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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
R. Lawton McIntosh, Circuit Court Judge

Appellate Case Number 2023-001506

Skylar Blume, Virgil Dowis, Rhi Greer, Jonathan Hudson, Natalie Mann, Mya Ourada, Braden Terrill, and Aneil Tripathi,

Respondents,

v.

Starbucks Corporation and Melissa Morris,

Appellants.

FINAL BRIEF OF APPELLANT, MELISSA MORRIS

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INTRODUCTION AND STATEMENT OF THE CASE

On October 17, 2022, Respondents Skylar Blume, Virgil Dowis, Rhi Greer, Jonathan Hudson, Natalie Mann, Mya Ourada, Braden Terrill, and Aneil Tripathi ("Respondents") sued Appellants Starbucks Corporation ("Starbucks") and Melissa Morris ("Morris") in the Court of Common Pleas in Anderson County, South Carolina.[1] Starbucks employed Respondents, and Morris briefly managed the store wherein they worked in Anderson, South Carolina.

In December 2022, Starbucks and Morris timely moved to dismiss the case based on federal labor pre-emption under the National Labor Relations Act ("NLRA"). (Starbucks' Motion to Dismiss; R. 0417-0418) (Morris Motion to Dismiss; R. 04515-0416). The Trial Court denied both Motions on February 15, 2023. (Order Denying Motions to Dismiss; R. 0027-0029).

On December 22, 2022, Starbucks moved to transfer the case to the South Carolina Business Court's Pilot Program under the Program's "catch-all provision" given the complexity of the legal issues involved in this case, and Morris supported and joined in the motion. The Trial Court denied this Motion on March 15, 2023. (Motion to Transfer; R. 0419-0420) (Order Denying Motion to Transfer; R. 0025-0026).

On April 7 and June 2, 2023, Starbucks and Morris moved to compel arbitration of the case, as all of the Respondents signed broad arbitration agreements, which required them to arbitrate all workplace disputes, except in limited circumstances not herein applicable. (Motions to Compel Arbitration; R. 0252-0253, 0374-0375). On September 1, 2023, the Court denied the Motions to Compel Arbitration. (Order Denying Motions to Compel Arbitration; R. 0011-0018).

[1] Starbucks is the Appellant in a pending companion appeal on the same legal and factual issues that Morris raised in this appeal.

On September 8 and September 11, 2023, Starbucks and Morris timely moved for reconsideration of the Order denying the Motions to Compel Arbitration. (Motions For Reconsideration; R. 0172-0188).

On September 15, 2023, the Court denied the Motions for Reconsideration. (Order Denying Motions For Reconsideration; R. 0008-0010).

On September 22, 2023, Starbucks and Morris timely filed their respective Notices of Appeal, contesting the Trial Court's erroneous denial of the Motions to Compel Arbitration and for Reconsideration.

STATEMENT OF THE FACTS

I. Overview Of The Lawsuit's Allegations

Starbucks is an American chain of coffeehouses, with over 9,000 locations nationwide. (Braislin Decl., ¶ 3; R. 0269). Starbucks regularly conducts transactions across state lines and ships and sells its coffee-related merchandise across state lines. (Braislin Decl., ⁋⁋ 3-4; R. 0269-0270). Starbucks advertises employment opportunities nationally (and internationally) via the internet and recruits candidates from all 50 states. (Braislin Decl., ⁋ 4; R. 0270).

On August 1, 2022, Respondents and other unionized Starbucks employees approached Morris, encircled her, and demanded changes to the terms and conditions of their employment with Starbucks, including, among others, wage increases. (Compl., ¶ 20; R. 0065). Respondents and the others who confronted Morris video recorded this event. (Compl., ¶¶ 21-26; R. 0065-0066, 0068). Morris thereafter contacted the Anderson County Sheriff's Office and reported the events that occurred on August 1, 2022. (Compl., ¶ 27; R. 0066).

On August 8, 2022, Starbucks issued a statement, noting that Morris felt threatened and unsafe during the confrontation on August 1 and had contacted law enforcement about those

events. (Compl., ¶ 36; R. 0067-0068). After investigating the events that occurred on August 1, 2022, the Sherriff's Office declined to pursue charges against those individuals named in the police report. (Compl., ¶¶ 44-45; R. 0069).

On October 17, 2022, Respondents sued Starbucks and Morris, alleging claims for defamation and abuse of process. (Compl., ¶¶ 49-63; R. 0069-0070). Respondents specifically alleged that Morris defamed them by submitting a police report following the events that took place at the Anderson Starbucks location on August 1, 2022. (Compl., ¶¶ 27-30, 50-51; R. 0066, 0069).

Respondents further alleged that Starbucks published a false/defamatory statement on August 8, 2022, regarding the events that took place on August 1, 2022. (Compl., ¶¶ 31-38, 52; R. 0067-0069).

Finally, Respondents claimed that Starbucks and Morris abused the legal process by filing a police report and did so for the purpose of "preventing Plaintiffs from publicly protesting Starbucks." (Compl., ¶¶ 59-62; R. 0070).

II. Arbitration Agreement

Respondents each executed a valid and legally enforceable Arbitration Agreement ("Agreement"), as part of their employment with Starbucks. (Agreement; R. 0350-0373).

The Agreement specifically required Respondents to arbitrate all claims "brought under any statute, local ordinance, or common law relating to my employment . . ." (Agreement; R. 0280).

The Agreement further included and encompassed Respondents' claims against Morris, as it broadly included all claims between Respondents, Starbucks Corporation, and/or "any

current or former employee of Starbucks" (which necessarily included Morris who Starbucks formerly employed as Respondents' manager) (Agreement; R. 0280).

At all relevant times, Starbucks utilized an online Employee Onboarding Process on Starbucks' Taleo online application website. (Braislin Decl., ¶ 5; R. 0270). As one of the initial steps in the onboarding process, Starbucks required employees to complete the "E-Signature Consent" page ("E-Signature Consent"). (Braislin Decl., ¶ 7; R. 0270).

Respondents each executed the E-Signature Consent as part of the onboarding process. (Braislin Decl., ¶ 12; R. 0271) (Consent Forms; R. 0278-0279, 0285-0286, 0292-0293, 0299-0300, 0306-0307, 0313-0314, 0320-0321, 0327-0328).

The E-Signature Consent provided:

> By entering your signature in the text field below, you are agreeing to electronically access, receive, review, sign and authenticate certain documents, forms, and/or letters ('Materials') covered by the federal Electronic Signatures in Global and National Commerce Act ('E-SIGN')... including but not limited to an offer letter, I-9 form, wage statement; and any other employment-related documents.
>
> This E-Signature Consent applies to all Materials, both current and future, related to your employment with Starbucks Corporation.
>
> By entering your signature in the text field below, you are agreeing that your electronic signature is the equivalent of your handwritten (or wet) signature, with all the same legal and binding effect. In certain cases throughout your employment, you may be asked to click buttons labeled "I Agree," "I Acknowledge," or using similar words, or otherwise electronically to acknowledge, accept, or review Materials. This E-Signature Consent applies to those instances as well.

(Consent Form; R. 0278-0279).

The E-Signature Consent further provided that each employee understood that his/her signature evidenced his/her agreement "to electronically access, receive, review, sign and

authenticate Materials related in any way to [their] employee with Starbucks Corporation, in place of hard copy/paper documents and handwritten signatures." (Consent Form; R. 0279).

Similarly, the E-Signature Consent further provided that employees, by signing the consent, confirmed that they understood how to cancel the consent (if they decided to do so) and that they read, understood, and agreed to the terms of the E-Signature Consent, among other representations. (Consent Form; R. 0279). All Respondents executed an E-Signature Consent. (Consent Forms; R. 0279, 0286, 0293, 0300, 0307, 0314, 0321, 0328).

Starbucks also provided Respondents with the Starbucks Mutual Arbitration Agreement during the onboarding process. (Braislin Decl., ¶ 8; R. 0270). Like the E-Signature Consent, employees review the Arbitration Agreement electronically and execute the agreement with an electronic signature. (Braislin Decl., ¶ 8; R. 0270). The Agreement stated, in relevant part:

> Starbucks and I agree to use binding individual arbitration to resolve any "Covered Claims" that arise between me and Starbucks, its subsidiaries and related companies, and/or any current or former employee of Starbucks or a related company (collectively "Starbucks"). 'Covered Claims' are those brought under any statute, local ordinance, or common law relating to my employment, including those concerning any element of compensation, harassment, discrimination, retaliation, recovery of bonus or relocation benefits, leaves of absence, accommodations, or termination of employment.

(Braislin Decl., ¶¶ 8-10; R. 0270-0271) (Respondents' Executed Agreements; R. 0350-0373).

The Agreement further provides that "[**e]xcept as provided herein, I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Starbucks and I waive the right to a trial before a judge or jury in federal or state court**." (Agreement; R. 0350) (emphasis in original).

Additionally, the Agreement provided: (1) the arbitration is governed by the AAA rules; (2) Starbucks will pay all costs unique to arbitration; (3) the arbitrator will be mutually selected by the parties; (4) adequate discovery and arbitrator discretion to permit additional discovery; and (5) a requirement that the arbitrator issue a written ruling within 30 days after the conclusion of the hearing. (Agreement; R. 0351).

Moreover, the Agreement established that the arbitrator, not a court or agency, possesses the sole authority to resolve any disputes concerning "the formation, interpretation, applicability, enforceability, or implementation of this Agreement, including any claim that all of part of this Agreement is void or voidable." (Agreement; R. 0351).

Once an employee signed the Arbitration Agreement, his/her electronic signature was placed on the Arbitration Agreement along with the date that the Agreement was signed and the IP address from the device used to review/sign the Agreement. (Braislin Decl., ¶ 8; R. 0270). Each of the Respondents agreed to be bound by the Arbitration Agreement while employed by Starbucks. (Braislin Decl., ¶ 8; R. 0270).

Respondents do not dispute that they entered into a valid agreement to arbitrate with Starbucks nor do they contest any of the terms in the Arbitration Agreement itself. (Pl.'s Memo. in Opp. To Motion to Compel Arbitration; R. 0238-0251).

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION

A. Standard Of Review

"An order denying a motion to compel arbitration . . . is immediately appealable." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1 (Ct. App.

2008) (citing S.C. Code § 15-48-200(a)(2) ("An appeal may be taken from an order denying an application to compel arbitration.")).

"'The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.'" *Estate of Mary Solesbee v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144, 147 (2023) (citation omitted).

"An 'appeal from the denial of a motion to compel arbitration is subject to de novo review.'" *Id.*

"'[W]hether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court.'" *Id.*, at 147-148.

"Under this standard of review, 'a trial court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings.'" *Id.*, at 148.

B. The Arbitration Clause Must Be Enforced Under The Federal Arbitration Act.

The Federal Arbitration Act ("FAA") provides, in relevant part, that "[a] written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable...." 9 U.S.C. § 2.

When an action subject to arbitration is brought in court, the court "***shall*** make an order directing the parties to proceed to arbitration." 9 U.S.C. §§ 3–4 (emphasis added).

Although the FAA provides that a court "shall ... stay the trial of the action" when it compels arbitration, *see* 9 U.S.C. § 3, the Fourth Circuit Court of Appeals has recognized that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709– 10 (4th Cir. 2001).

Importantly, the FAA "leaves no place for the exercise of discretion by the district court, but instead mandates that . . . courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241 (1985); *Adkins v. Labor Ready, Inc*., 303 F.3d 496, 500 (4th Cir. 2002) (courts have "no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview.").

The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (S.C. 2001) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255 (1989)).

In determining whether the FAA applies, the "proper inquiry is whether the economic activity at issue, in the aggregate, is a general practice subject to federal control." *Dean witter v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 2040 (2003)); *see also Marzulli v. Tenet S.C., Inc*., No. 2015-002363, 2018 WL 1531507, at *2 (S.C. Ct. App. Mar. 28, 2018).

Courts interpret the phrase "involving commerce" the same as "affecting commerce," which has been very broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995).[2]

[2] South Carolina Courts have recognized that this may include three areas: (1) use of channels of interstate commerce; (2) use of the instrumentalities, persons or things of interstate commerce; or (3) activities that are substantially related to interstate commerce. *See Cape Romain Contractors, Inc., v. Wando E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (S.C. 2013) (citations omitted).

At all relevant times, Starbucks was engaged in interstate commerce, as it owns and operates thousands of retail coffee shops throughout the United States where it sells coffee and related products to its customers. These shops involve the channels of interstate commerce. In addition, Starbucks purchases goods from multiple states and transports goods across state lines for ultimate sale to its customers through its retail locations.

These activities undoubtedly utilize the instrumentalities of interstate commerce and/or people or things of interstate commerce as well as the channels of understatement commerce. *See Cape Romain Contractors, Inc.*, 405 S.C. at 122, 747 S.E.2d at 464.

In fact, the Complaint provided that Starbucks "is engaged in the retail operation of restaurants throughout the United States" and further confirms that Starbucks operates nationwide. (Compl., ¶¶ 3, 16; R. 0063-0066). Accordingly, Starbucks was engaged in commerce for the purposes of the FAA, and the FAA therefore applies to the Arbitration Agreement.

As such, the applicable law required the Trial Court to dismiss this case in favor of arbitration given that a valid agreement to arbitrate existed.

C. A Valid And Enforceable Arbitration Clause Covered Respondents' Claims.

There exists a strong South Carolina and federal policy favoring arbitration, and arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc.*, 405 S.C. at 125, 747 S.E.2d at 466. Accordingly, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 91, 123 S.Ct. 513, 522 (2000). The question of validity of an arbitration agreement is based upon state contract law. *See S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 562, 437 S.E.2d 22, 24 (S.C. 1993).

To determine whether a particular matter is bound to arbitration, the court is tasked with determining two "gateway" issues: (1) whether there is a valid agreement to arbitrate; and (2) whether the agreement covers the dispute. *Howsam v. Dean Witter Reynolds,* 537 U.S. 79, 84, 123 S.Ct. 588, 592 (S.C. 2002).

1. The Arbitration Agreement Is Valid And Enforceable.

The Agreement is valid and enforceable, as it provided that the parties agreed to arbitrate "Covered Claims" and to waive their respective rights to a jury trial.

These terms were reasonable as they contained mutual promises to arbitrate disputes covered by the Agreement, as well as a mutual release of other rights.

Under South Carolina law, a mutual promise to arbitrate constitutes sufficient consideration to underpin an arbitration agreement. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 298, 468 S.E.2d 292, 300 (S.C. 1996)).

"Because no consideration is required above and beyond the agreement to be bound by the arbitration process," Starbucks' promise to arbitrate its own claims "is *a fortiori* adequate consideration for this agreement." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) (internal citations omitted); *see also Patterson v. Asbury SC Lex, LLC*, No. 6:16-1666-MGL, 2016 WL 7474377, at *3 (D.S.C. Dec. 29, 2016) (finding adequate consideration because both plaintiff and defendant agreed to be bound by the arbitration process for any claims).

Moreover, the Agreement was fair, as it required Starbucks, not Respondents, to pay all of the costs of arbitration. The Agreement further stated that the parties must mutually agree upon an arbitrator, meaning that Respondents have the opportunity to meaningfully participate in the selection the arbiter of their claims. Finally, the arbitration process is governed by the widely

recognized rules of the American Arbitration Association (AAA), as well as the Federal Rules of Civil Procedure, and offers a fair, commonly used procedure to conduct any arbitration subject to this agreement.

To prove that an arbitration provision is invalid, a party must show that (1) he/she lacked a meaningful choice as to whether to arbitrate because the arbitration provisions are one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them. *See Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (S.C. 2007).

Respondents cannot establish either of these elements. As noted above, the Agreement was mutual and not one-sided. In addition, the terms of the Agreement were not oppressive, as they provided a fair opportunity for Respondents to litigate their disputes in a neutral forum, with widely respected rules of procedure, in a manner paid for by Starbucks. Thus, no evidence showed, or even suggested, that the Agreement was invalid.

Moreover, other courts presented with this same Starbucks' Arbitration Agreement regularly have held that the Agreement is valid and enforceable under the FAA and state contract law principles. *See Walters v. Starbucks Corp.*, No. 22CV1907 (DLC), 2022 WL 3684901, at *3 (S.D.N.Y. Aug. 25, 2022) (holding that Starbucks' arbitration agreement is valid and enforceable and "the FAA requires the enforcement of the Arbitration Agreement"); *Wilson v. Starbucks Corp.*, 385 F. Supp. 3d 557, 565 (E.D. Ky. 2019); (granting motion to compel arbitration and dismissing complaint because Starbucks' arbitration agreement is valid and enforceable under state contract law); *Armstead v. Starbucks Corp*., No. 17-CV-1163 (PKC), 2017 WL 5593519, at *3 (S.D.N.Y. Nov. 17, 2017) (holding that Starbucks' arbitration agreement is valid and enforceable under the FAA and expressly finding that an employee's electronic signature on the

agreement was sufficient to bind the employee to the terms of the agreement); *Horne v. Starbucks Corp.*, No. 216CV02727MCECKD, 2017 WL 2813170, at *3 (E.D. Cal. June 29, 2017) (noting that Starbucks' arbitration agreement is valid and enforceable). At least one court, in response to a challenge to the procedural rules established by the Arbitration Agreement, held that those rules and the arbitration procedures in the Arbitration Agreement are manifestly fair and reasonable. *Horne*, 2017 WL 2813170, at *3 (court denying employee's challenge to the fairness of the discovery rules in Starbucks' arbitration agreement and holding that the procedural process in that agreement allows employees to fairly litigate their claims).

Further, to the extent that Respondents contend that the Agreement is not enforceable because it fails to comply with the requirements of S.C. codeSection 15-48-10(a), that argument fails as a matter of law because the FAA preempts state laws that invalidate otherwise valid agreements to arbitrate. *See Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 538 n.2, 542 S.E.2d 360, 365 (S.C. 2001) ("The FAA preempts state laws that invalidate the parties' agreement to arbitrate"); *Blanton v. Stathos*, 351 S.C. 534, 539, 570 S.E.2d 565, 568 (S.C. Ct. App. 2002) (holding that an arbitration clause was enforceable under the FAA even though it did not contain the terms or text as required by S.C. Code § 15-48-10(a)).

Therefore, the Arbitration Agreement was enforceable, and the Trial Court erred in not dismissing the Complaint and compelling the parties to binding arbitration.

2. The Agreement Covered Respondents' Claims.

Respondents' claims involved activities and events relating to their employment with Starbucks. As such, those claims fell within the scope of the Agreement and were therefore subject to the terms of that Agreement.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

"A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Id*. at 598, 553 S.E.2d at 119.

"[U]nless the Court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (S.C. 2004).

Here, the Agreement provided that it applies to "Covered Claims" and defined "Covered Claims" as claims "brought under any statute local ordinance, or common law relating to [an employee's] employment [with Starbucks]." Accordingly, Respondents' claims in the Complaint related to their employment with Starbucks and were therefore subject to the Agreement.

More specifically, Respondents described their actions on August 1, 2022, as efforts to "alter the terms and conditions of their employment." Moreover, the allegedly defamatory statements related to Respondents' actions on August 1, 2022, which occurred in their place of employment and within the scope of their employment with Starbucks.

Indeed, the Starbucks' statement relied upon in the Complaint to support the defamation claim referenced company policies concerning employees, its investigation into workplace incidents, and the company's desire that all employees "work in a warm, welcoming, inclusive

environment." Thus, Respondents' defamation claim related to their employment with Starbucks.

Likewise, statements attributed to Morris also related to Respondents' employment with Starbucks, as they concerned actions that Respondents took ***as employees*** of Starbucks. In fact, Respondents themselves deemed these efforts to alter the "terms and conditions of their employment" with Starbucks which is a phrase used to define protected activity under the NLRA.

Thus, by their own allegations, Respondents essentially admitted that their purported conduct, which was the cornerstone of Morris' statements to the police, related to their employment with Starbucks.

In addition, Respondents based their abuse of process claim on similar allegations. As noted above, the report to the police centered upon Respondents' activities related to their employment with Starbucks and efforts to alter the terms and condition of their employment with the Company.

Respondents alleged that Starbucks and Morris made "false statements . . . not . . . for a proper purpose . . . but instead for the illegitimate collateral purpose of preventing [Respondents] from publicly protesting Starbucks." Those allegations related to Respondents' rights under the NLRA, including, among others, their right to protest their employer—all of which arose from Respondents' employment with Starbucks. Thus, the foundation of Respondents' abuse of process claim was their employment with Starbucks.

Based on the allegations in the Complaint, Respondents' claims related to their employment with Starbucks and the rights that they possessed as union-affiliated Starbucks employees. Their claims were "Covered Claims" as defined by the Arbitration Agreement.

Therefore, Respondents' claims were subject to the Arbitration Agreement. Moreover, because all of Respondents' claims fell within the Agreement, the Trial Court was required to dismiss the Complaint and compel the dispute to arbitration. *See Choice Hotels Int'l, Inc.*, 252 F.3d at 709–10 ("when all of the issues presented in a lawsuit are arbitrable," dismissal of a complaint is warranted).

D. The Agreement's Delegation Clause Required The Trial Court To Refer The Case To The Arbitrator.

The Trial Court erroneously resolved "gateway issues," which the parties delegated to the arbitrator. The appropriate remedy, given the language in the Agreement and issues before the Trial Court, was to compel this dispute to arbitration and defer the resolution of any and all such issues to the arbitrator.

"[A] court may not override the contract" to arbitrate and decide issues when "the parties' [arbitration] agreement delegate[]" authority to the arbitrator to resolve such issues. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 700, 869 S.E.2d 859, 864 (Ct. App. 2022) (holding a delegation clause was valid and enforceable and required the court to abstain from ruling on issues concerning the scope, enforceability, and potential exceptions to enforcement of the agreement).

South Carolina courts recognize that the parties to an arbitration agreement must delegate authority to an arbitrator to resolve "gateway issues" concerning the enforceability, scope, and interpretation of the agreement. *Id.*; *see also DOE v. TSCS, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (same) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S.Ct. 1920 (1995)).

Importantly, a court may only pass judgment on gateway issues if the "party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the

delegation clause ***specifically***." *TSCS*, 430 S.C. at 608, 846 S.E.2d at 877 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 130 S.Ct. 2772 (2010)) (emphasis added).

However, Respondents proffered no challenge to the delegation clause or to the validity of the Agreement. In fact, Respondents effectively conceded that the Agreement was valid and enforceable, including the delegation clause, and that they were bound by that Agreement.

By failing to challenge the delegation clause (or the Agreement itself), Respondents now cannot contend that the delegation clause did not apply. Respondents' failure to do so effectively handcuffed the Trial Court such that it had to enforce the Arbitration Agreement as written.

Given Respondents' failure to make such a challenge, the Trial Court was not authorized to pass judgment on any "gateway issues" pertaining to the Arbitration Agreement. *See TSCS*, 430 S.C. at 608, 846 S.E.2d at 877. Instead, the Trial Court simply was required to enforce the Agreement and was bound by the delegation clause because Respondents failed to challenge (whether directly or indirectly) the validity and enforceability of the delegation clause.

As a result, the Trial Court improperly addressed issues concerning the enforceability (i.e., waiver) and scope of the Arbitration Agreement (i.e., whether Respondents' claims were subject to the Arbitration Agreement).

Each of those issues must be resolved by the arbitrator and not the Trial Court, as the Agreement provided that:

> Except as provided below, Starbucks and I agree that the Arbitrator - and not a court or agency - shall have exclusive authority to resolve any dispute regarding the formation, interpretation, applicability, enforceability, or implementation of this Agreement, including any claim that all or part of this Agreement is void or voidable.

(Agreement; R. 0280).

Based on the plain language of the Agreement, the issues resolved in the Order concerned issues "regarding the formation, interpretation, applicability, enforceability, or implementation" of the Agreement. The parties agreed to delegate those issues exclusively to the arbitrator. Thus, the Trial Court erroneously considered and ruled upon those issues that the parties unmistakably delegated to the arbitrator. *See Ludy*, 435 S.C. at 700, 869 S.E.2d at 864. Accordingly, an arbitrator must resolve those issues, and the Trial Court erred in doing so.

E. The Order Contained Errors Of Law Regarding The Timing And Adequacy Of Starbucks' And Morris' Arguments On The Delegation Clause.

Equally incorrect were the Order's conclusions concerning the timing of Starbucks' and Morris' arguments concerning the delegation clause. The authority which the Order relied upon, to support its finding that Starbucks waived this argument "[b]y raising this argument for the first time on reply," ***only*** applies in the context of appeals. (Order, p. 2; R. 0013-0014) (citing *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E. 2d 475, 577 (Ct. App. 1989)).

As noted above, *Bouchette* does not apply in this context. In *Bouchette*, the South Carolina Court of Appeals held that "[a]n ***appellant*** may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief." *Id.*

This authority was inapplicable here and does not stand for the conclusion for which the Order cited it. Thus, the Order's reliance on *Bouchette* to effectively bar Starbucks and Morris from arguing an issue raised in their respective Motions and/or supporting briefs timely submitted before oral argument to the trial court was incorrect and improper.

Similarly, the Order incorrectly applied an exception from the Agreement in holding that the Agreement did not "clear[ly] and unmistakabl[y]" delegate questions of arbitrability" to the arbitrator because it "excludes '(c) actions to enforce this Agreement, compel arbitration, [or] compel arbitration.'" (Order, p. 3; R. 0014).

The Trial Court's conclusion was erroneous, as the Agreement did "clear[ly] and unmistakabl[y]" delegate questions of arbitrability" to the arbitrator. Likewise, this case – which Respondents' initiated – is not one to enforce the Agreement. Rather, this is an action seeking civil relief from events which took place as part of Respondents' employment with Starbucks and their efforts to alter (and negotiate changes) to the terms and conditions of their employment with Starbucks. Thus, the Trial Court improperly concluded that the exception in the Agreement, which applied to actions ***solely*** seeking to enforce that agreement or to compel arbitration, was applicable here.

Nevertheless, Starbucks raised the issue of the delegation clause in its memorandum in support of its Motion to Compel Arbitration, as it expressly cited to that clause, and further addressed that clause in its reply brief and at oral argument.[3] (Starbucks' Memo in Support and Reply Brief; R. 0091, 0192-0194, 0257). Thus, the Agreement's delegation clause barred the Trial Court from addressing the issue of waiver (or other "gateway issues") as the parties delegated all such issues to the arbitrator.

Moreover, the delegation clause governed "formation, interpretation, applicability, enforceability, or implementation" of the Agreement, and the arbitrator, not the Trial Court, was the only individual authorized to address any "gateway issues," including challenges to the scope of the Agreement and/or claims of waiver.

F. Starbucks And Morris Did Not Waive Their Right To Compel Arbitration.

The Trial Court's erroneous conclusions concerning waiver and its application to the facts of this case directly contradicted applicable South Carolina precedent. While the Trial

[3] Likewise, by explicit reference thereto, Morris adopted and incorporated all of Starbucks' legal positions and arguments on all of the issues related to their respective Motions to Compel Arbitration.

Court lacked authority to address the issue of waiver, no basis existed for the Court to find that Morris and Starbucks waived their right to compel arbitration.

In South Carolina "a party ***may*** waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (emphasis added). Beside the passage of time, another key factor in this analysis is whether the party seeking to compel arbitration initiated discovery and the extent of the discovery exchanged between the parties prior to the moving party's request to compel arbitration, namely whether the parties engaged in "extensive discovery." *Id*.; *see also Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75–76 (Ct. App. 2003) (finding party had waived right to compel arbitration by engaging in substantial written discovery and conducting multiple depositions); *Samuel v. Schumacher Homes of S.C.*, No. 2019-001972, 2022 WL 854380, at *1 (S.C. Ct. App. Mar. 23, 2022) (holding party waived right to compel arbitration where the (1) case was pending for two years prior to motion to compel arbitration, (2) parties engaged in discovery in preparation for trial, including several depositions, and (3) parties mediated the case prior to the filing of a motion to compel arbitration).

Generally, the passage of mere months is insufficient as a matter of law to constitute waiver of a right to compel arbitration. *Rhodes*, 374 S.C. at 128, 647 S.E.2d at 252; *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (S.C. 2003) (a fifteenth (15) month delay in seeking to compel arbitration was insufficient to constitute waiver); *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (thirteen (13) month delay where "limited discovery was conducted," including a single deposition, was

insufficient to constitute waiver of a right to compel arbitration); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (less than eight (8) month delay was insufficient to constitute waiver).

Rather, for a period of time to constitute a "substantial length of time" it must constitute multiple years of delay in seeking to compel arbitration. *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (more than five-year delay in seeking to compel arbitration was sufficient to constitute waiver of right to compel arbitration); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 666, 521 S.E.2d 749, 753-54 (Ct. App. 1999) (more than two year delay in seeking to compel arbitration was enough to constitute a waiver of the right to do so).

Under South Carolina law, the Trial Court's rationale for finding waiver was incorrect. The Trial Court's Order provided that, "Defendants have waived the right to compel arbitration. Defendants waited several months to seek to arbitrate Plaintiffs' claims." (Order, p. 3; R. 0012-0013).

However, the passage of mere months is insufficient to constitute a "substantial length of time" to establish the defense of waiver. *See Gen. Equip.*, 344 S.C. at 556, 544 S.E.2d at 645; *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585; *Rich*, 357 S.C. at 67, 590 S.E.2d at 507.

This is certainly true here as less than six (6) months passed between when Respondents filed the Complaint and when Starbucks filed its Motion.

Similarly, in its Answer timely filed in December 2022, only two (2) months after Respondents initiated this action, Starbucks raised the issue of arbitration and argued "Plaintiffs' claims ***should be dismissed because those claims are subject to and governed by a binding agreement to arbitrate*** and, as such, this Court lacks jurisdiction over this dispute and/or is the

improper venue for this action." (Starbucks' Answer, ¶ 75; R. 0038) (emphasis added). Thus, contrary to the Order's erroneous conclusions, Respondents were on notice from the outset of Starbucks' appearance in this case that arbitration, not this Court, was the only proper forum for this dispute.

Based upon South Carolina precedent, Starbucks and Morris did not waive their right to compel arbitration. Accordingly, the Order incorrectly concluded that the passage of time between Respondents' filing of the Complaint and Starbucks' filing of its Motion was sufficient to find waiver under these circumstances.

Further, no evidence showed, or even suggested, that Starbucks or Morris engaged in any conduct that would otherwise allow the Trial Court to conclude that they waived their right to compel arbitration. Neither Starbucks nor Morris initiated or participated in any pre-trial discovery or mediation.[4] No depositions have been conducted (or even scheduled) in this case, and neither Morris nor Starbucks served any discovery on Respondents. According to South Carolina law, no waiver occurs where the parties have refrained from engaging in substantive discovery. *See Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251; *Evans*, 352 S.C. at 548, 575 S.E.2d at 75–76. This is certainly true where the party seeking to compel arbitration did not initiate or serve any discovery.

The Order also incorrectly concluded that Starbucks' filing of a procedural motion[5] and administrative request, given the passage of time and lack of discovery conducted, was sufficient

[4] Respondents, not Starbucks or Morris, initiated discovery in this case by serving discovery requests. In accordance with its position that arbitration is the only proper forum for this dispute, Starbucks responded to those requests by objecting that they had been served in the improper forum because Respondents' claims were subject to mandatory arbitration and expressly denied that this Court was the proper forum for this dispute. Morris did not respond to Respondents discovery requests at all, as she considered them improper unless and until served during arbitration, pursuant to the rules applicable therein.

[5] As previously explained, Starbucks and Morris based their respective motions to dismiss on

to constitute waiver. (Order, p. 3; R. 0012-0013). To the contrary, engaging a court for procedural matters, jurisdictional motions, or administrative requests does not waive a party's right to compel arbitration. *See Gen. Equip,* 344 S.C. at 557, 544 S.E.2d at 645 (engaging in administrative matters are insufficient to establish waiver even after an eight-month delay before seeking to compel arbitration); *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585 (filing motions concerning procedural/jurisdictional issues and third-party practice did not constitute waiver of right to compel arbitration).

Thus, the Order contained an error of law in its conclusion that Starbucks' motion to dismiss for lack of subject matter jurisdiction and request to transfer this case to the Business Court Pilot Program were sufficient to constitute a waiver of Starbucks' and Morris' respective rights to compel arbitration.

As noted above, the Trial Court cannot address "gateway issues" as those were delegated solely to the arbitrator.[6] However, even if the Trial Court were authorized to do so, the facts of

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their proper contention that the NLRA pre-empted Respondents' claims and that those claims were subject to the exclusive jurisdiction of the National Labor Relations Board. In other words, neither this Court nor an arbitrator has jurisdiction over claims subject to the NLRA.

[6] The Order further erroneously relied upon *Morgan v. Sundance,* 596 U.S. 411, 142 S.Ct. 1708 (2022). In *Morgan*, the United States Supreme Court simply held that district courts (or others) cannot create procedural rules favoring or disfavoring arbitration. *Id.* at 1712. The South Carolina Court of Appeals has noted that the Court's holding from *Morgan* simply requires that "a court must hold a party to its arbitration contract just as the Court would to any other kind." *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 489 (Ct. App. 2022) (quoting *Morgan*, 142 S.Ct. at 1713)). Contrary to the Trial Court's Order, the *Morgan* opinion does not provide that "courts must apply to arbitration agreements the same test that applies to waiver of other contractual rights or defenses," and reaching this erroneous conclusion was inconsistent with the Supreme Court's holding in *Morgan.*

Morgan merely held that the "usual **federal** rule of waiver does not include a prejudice requirement," while not precluding state courts from continuing to include prejudice as a factor when analyzing waiver of arbitration under state law as some state courts continue to do post-*Morgan.* (emphasis added). *See Alarcon Constr. Group v. Santoyo,* No. 05-21-00885-CV, 2022 WL 4923461, *5, fn. 3 (Tex. Ct. App., Oct. 4, 2022) (citing *Morgan* while continuing to apply prejudice as a factor in analyzing waiver of arbitration under Texas state law). South Carolina's appellate courts have not yet addressed or adopted *Morgan's* ruling on prejudice, thereby

this case did not support the conclusion that Starbucks or Morris waived their right to compel arbitration. Rather, pursuant to applicable South Carolina law, neither Starbucks nor Morris waived their right to compel arbitration.

G. Respondents' Claims Are Within the Scope Of The Arbitration Agreement.

While the arbitrator, not the Trial Court, was the proper individual to address issues concerning the scope of the Agreement, Respondents' claims fell within the scope of the Agreement. Thus, the Trial Court incorrectly concluded that Respondents' claims were not within the scope of the Agreement.[7]

South Carolina courts look to the "***factual allegations underlying [a] claim***" and not the elements of the claims themselves to determine whether a claim is within the scope of an arbitration agreement. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (emphasis added).

South Carolina courts routinely have held that tort claims brought by employees against their employer fall within (and are subject to) arbitration agreements even though the claims are not "traditional employment-law claims." *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 110, 739 S.E.2d 209, 214 (2013) (claims for defamation and intentional infliction of emotional distress were subject to the arbitration agreement between an employer and its employee); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41-42, 524 S.E.2d 839, 846-847 (Ct. App. 1999) (employee's tort claims, including, defamation, conspiracy, negligent supervision, and reckless or intentional infliction of emotional distress were subject to the arbitration agreement

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requiring the Court to apply South Carolina precedent, which mandates analyzing prejudice as a factor in determining whether a party waived arbitration.

[7] As set forth herein, the issue of the scope of the Agreement is one left for the arbitrator, not the Trial Court. Starbucks and Morris did not waive their right to address the scope of the Arbitration by responding to the Order's incorrect conclusions concerning the same.

between employee and employer where the arbitration agreement included "all other tort or contract theories" in addition to typical employment law claims); *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 244-45, 877 S.E.2d 486, 491 (S.C. Ct. App. 2022) (arbitration agreement between employer and employee applied to employee's tort claims for defamation and interference with prospective contractual relations).

The Order incorrectly concluded that Respondents' defamation claim was outside the scope of the Agreement. (Order, p. 3; R. 0013-0014). However, as noted above, an employee's defamation claim against its employer routinely falls within the scope of arbitration agreements between those parties. *See Landers*, 402 S.C. at 110, 739 S.E.2d at 214; *Lampo*, 437 S.C. at 244-45, 877 S.E.2d at 491; *Towles*, 338 S.C. at 41-42, 524 S.E.2d at 846-847. Thus, the Order's conclusion concerning Respondents' defamation claim was erroneous.

Moreover, Respondents' common law claims inextricably related to their employment with Starbucks and were premised entirely upon Starbucks' and Morris' response to an incident that occurred in the workplace.

In fact, Respondents linked their abuse of process claim, as well as their defamation claim, to their employment and have alleged those claims to describe activity which was only potentially legally protected ***because*** Respondents were/are Starbucks employees. Stated differently, Respondents' claims do not exist except for their employment with Starbucks. Accordingly, the Order incorrectly concluded that Respondents' claims did not fall within the scope of the Agreement, as their claims undoubtedly fell within the scope of the parties' agreement.

Also incorrect was the Order's reliance upon *Aiken v. World Finance Corporation of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007), which was inapplicable under

these circumstances. In *Aiken*, the Court never considered the employee's claims under the terms of an arbitration agreement. *Id*. at 149, 644 S.E.2d at 708. Further, unlike the former employee in *Aiken*, Respondents themselves have inextricably bound their claims to the employment context by claiming that Starbucks' and Morris' actions spawned from an incident in the workplace where Respondents were protesting the terms and conditions of their employment and that Starbucks and Morris were motivated by a desire to prevent Respondents from engaging in such activities in the workplace.[8] (Compl., ¶¶ 20, 62; R. 0065-0070). Thus, this case is decidedly different from *Aiken*, and that opinion and its rationale were inapplicable here.

H. The Arbitration Agreement Covered Morris.

The Agreement specifically encompassed Respondents' claims against Morris, as it broadly included all claims between Respondents, Starbucks, and/or "any current or former employee of Starbucks" (which necessarily includes Ms. Morris who Starbucks formerly employed as Respondents' manager). *See Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 877 S.E.2d 486, 491 (Ct. App. 2022) ("Lampo agreed to arbitrate her claim against Neasbitt. While the agreement did not name Neasbitt, it did state that, as used in the agreement, the term 'Amedysys' included reference to and was synonymous with its employees and agents. Because Neasbitt is an employee and agent of Amedisys, the arbitration agreement is directly enforceable by Neasbitt against Lampo.") (R. 0092-0093).

[8] South Carolina courts consistently have held that such tort claims, including defamation, fall within the scope of a broad arbitration clause between an employer and employees. *See Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (S.C. 2013) (finding Landers' defamation claim arbitrable because the alleged defamatory statements "directly related to Landers' ability to perform his duties with Bank"); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) (finding Pearson's tort claims, including defamation, arbitrable because the arbitration clause was broad and Pearson's tort claims resulted from his employment); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 42, 524 S.E.2d 839, 846 (finding Towles' defamation claim arbitrable because the agreement's plain language covered all tort and contract theories).

Starbucks and Morris share the same legal defenses on all of the legal issues that Starbucks raised in its Motion for Reconsideration and its pending appeal on these same issues.

CONCLUSION

The Trial Court erroneously denied Appellant's Motions to Compel Arbitration and for Reconsideration by incorrectly considering and/or ruling upon the merits of Respondents' arguments and by failing to refer this dispute to arbitration in accordance with the plain language of the Arbitration Agreement.

Accordingly, the Court should reverse the Trial Court's erroneous Orders and compel arbitration of this lawsuit.

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April 30, 2024

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Appellant's Brief complies with Rule 211(b), SCACR

April 30, 2024

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