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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
William C. McMaster, III, Circuit Court Judge

Appellate Case No. 2025-002264
Case No. 2025-CP-23-01757
Case No. 2025-CP-23-01759

Kimberly Haag, Individually and as Personal Representative of the Estate of Raymond Zeigler,……. Respondent,

v.

Carlyle Senior Care of Fountain Inn, LLC; Carlyle Senior Care Management Company, Inc.; New Day Health Ventures, LLC; LARK of Fountain Inn, LLC; Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute; Providence Group, Inc.; Providence Administrative Consulting Services, Inc.; PACS Group, Inc.; PACS Holdings, LLC; and 501 Gulliver Property, LLC,…… Appellants.

INITIAL REPLY BRIEF

OF THE APPELLANTS:
FOUNTAIN INN HEALTHCARE, LLC D/B/A FOUNTAIN INN POST ACUTE; PROVIDENCE GROUP, INC.; PROVIDENCE ADMINISTRATIVE CONSULTING SERVICES, INC.; PACS GROUP, INC.; PACS HOLDINGS, LLC; AND 501 GULLIVER PROPERTY, LLC

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April 20, 2026
Charleston, South Carolina

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ARGUMENT IN REPLY

I. No Argument Raised by Respondent Challenges the Formation of the Delegation Clause Specifically or Exclusively.

"When one party challenges another party's right to invoke an arbitration provision, the gateway question sometimes becomes: Does the court or the arbitrator decide whether the dispute is arbitrable?" *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 383, 892 S.E.2d 112, 115 (2023). An "agreement to arbitrate a gateway issue" such as the issues here, including applicability and enforceability, by way of a delegation clause is "simply an additional, antecedent agreement," and "the FAA operates on this additional arbitration agreement just as it does any other." *Doe v. TCSC, LLC,* 430 S.C. 602, 610, 846 S.E.2d 874, 878 (Ct. App. 2020) (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70-72, 130 S. Ct. 2772, 2777-78 (2010)).

"Arbitration may not be compelled unless the court is satisfied 'the making of the agreement for arbitration ... is not in issue.'" *Simmons v. Benson Hyundai, LLC,* 438 S.C. 1, 5, 881 S.E.2d 646, 648 (Ct. App. 2022) (quoting 9 U.S.C § 4). Respondent agrees that "[t]he making or formation of—in the sense of the very existence of—the agreement to arbitrate is always a question for the court, not the arbitrator." *Id*.

However, "[i]n the FAA world, the issue of the formation of the arbitration agreement is quite different from the issue of the validity of a concluded agreement, i.e. whether an arbitration agreement that was formed is nevertheless invalid because of fraud, duress, unconscionability, or some other defense to the enforcement of a contract." *Id*. If the Court "concludes [the parties] did form an agreement to arbitrate, [the Court] would take the second step: deciding whether the concluded arbitration agreement survives [respondent's] validity challenge . . . [only when] the parties have not delegated that issue to the arbitrator." *Id*. at 6, 881 S.E.2d at 648.

Respondent does not challenge the FAA applies to the Arbitration Agreement, which contains a delegation clause. Respondent does not challenge the Facility's signature constituted an offer. Respondent does not challenge acceptance or argue Kimberly Haag did not have the requisite authority to bind Raymond Zeigler to the Arbitration Agreement at the time the parties executed it. Respondent does not challenge the mutual agreement to arbitrate is consideration. The Parties seemingly to agree a valid offer, acceptance, and consideration exist for the Arbitration Agreement's delegation clause, which is governed by the FAA. *See Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003) ("[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration"). Further, the delegation clause contained in the Arbitration Agreement is clear and unmistakable, and the Respondent does not oppose the agreement on that basis. *See Doe v. TCSC, LLC*, at 608, 846 S.E.2d at 877 ("[t]he parties may, of course, delegate these gateway issues to an arbitrator as long as there is "clear and unmistakable" evidence of such delegation.").

No argument raised by Respondent in opposition to the Arbitration Agreement otherwise discretely and directly challenges the delegation clause and instead, Respondent challenges the agreement as a whole. *See id*. (when there is a delegation clause, Court only "retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole.").

A. Respondent's Argument Challenging the Ability of Certain Non-Signatories to Bind Respondent to the Arbitration Agreement is a Question of Enforceability and Not Formation

Respondent's argument that some of the Appellants cannot bind her to arbitration because they were not signatories is a question of enforcement, which was delegated to an arbitrator.[1] Accordingly, whether "a nonsignatory can enforce [an] arbitration agreement *is a question of the enforceability* of the arbitration clause, as to that defendant." *De Angelis v. Icon Ent. Grp. Inc*., 364 F. Supp. 3d 787, 797 (S.D. Ohio 2019) (emphasis added). "The Supreme Court has concluded that when a litigant *specifically challenges* the enforceability of an arbitration agreement with *a delegation clause*, the challenge must be submitted to the arbitrator *unless* the plaintiff has lodged a specific objection to the delegation clause." *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286, 291 (4th Cir. 2020) (emphasis added); *see also Rent-A-Ctr., W., Inc.*, at 68, 130 S. Ct. at 2774 (2010) ("if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator."). Here, Respondent's argument that some of the Appellants were not signatories to the Arbitration Agreement raises a question of enforceability, which was delegated to the Arbitrator.

While Respondent cites to *RUAG Ammotec GmbH v. Arch on Firearms, Inc*., to support her argument to the contrary, *RUAG* actually invalidates Respondent's position. 139 Nev. 465, 474, 538 P.3d 428, 436 (2023). In *RUAG*, Nevada's state supreme court was faced with *two*

[1] Initially, despite arguing the contrary, Respondent's underlying memorandum in opposition to underlying motion to dismiss and compel arbitration appears to agree that this is a question of enforceability. (See Resp. Mem. Opp. Mot. Compel, p. 16 ("However, while the Arbitration Agreement is not *enforceable* in the first place, should the Court determine it is *enforceable*, the Court would have to determine which of these Defendants may *enforce* the Arbitration Agreement.") (emphasis added)).

motions to compel arbitration, each involving *different* arbitration agreements. *Id*. at 474, 538 P.3d at 436-37. Respondent argues this case stands for the proposition that a nonsignatory's enforcement of an arbitration agreement against a signatory is a question of formation without providing necessary context. (*See* Resp. Init. Br., p. 10 (quoting *RUAG*, at 470, 538 P.3d at 433 ("Where a nonsignatory is involved in a motion to compel arbitration under a contract, there is a question as to the very existence of an agreement involving the nonsignatory.")). First, that statement of law stands for the proposition an arbitration agreement, in which no party is a signatory, may inherently raise the separate question of whether there is a validly formed arbitration agreement.

However, the quote Respondent provides from *RUAG*, cites in part to *Schoenfeld v. Mercedes-Benz USA, LLC*, which provides the answer under facts analogous to the facts of this case. 532 F. Supp. 3d 506, 509 (S.D. Ohio 2021). *Schonfeld* acknowledges that "'[w]hether a nonsignatory can enforce [an] arbitration agreement is a question of the enforceability of the arbitration clause, as to that defendant' [when] . . . at least one of the defendants who moved to compel arbitration in that case [is] a signatory to the arbitration agreement." *Id*. (quoting *De Angelis,* at 787). In the present case, Respondent admits at least one of the Appellants is a signatory, which is the exact circumstance when the Court in *Schonfeld* would have determined that a nonsignatory's enforcement of an arbitration agreement presents the delegated question of enforceability.

B. Respondent's Argument as to Compliance with the Code of Federal Regulations is a Question for an Arbitrator.

Second, Respondent's argument alleging the Arbitration Agreement is illegal and did not conform with 42 C.F.R. § 483.70(m) also raises a question that has been delegated to an arbitrator and is not properly before the Court. The United States Supreme Court has addressed this very

argument and disagrees with Respondent. "Held: Regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 440, 126 S. Ct. 1204, 1206 (2006). "[T]he *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." *Id*. at 449, 126 S. Ct. 1211 (whether "contract containing an arbitration provision was void for illegality was to be determined by arbitrator, not court" because it challenged the "validity of the contract as a whole.").

Here, the Court should find Respondent's argument as to the legality of the arbitration agreement according to certain C.F.R.'s is one for the arbitrator because it raises a question as to the validity or enforceability of the arbitration agreement as a whole and not the delegation clause specifically. Moreover, the Respondent's argument does not otherwise discretely challenge the clear and unmistakable delegation clause within the arbitration agreement. The only evidence before the trial court that could support Respondent's argument was Kimberly Haag's affidavit, which only mentions the Arbitration Agreement in its entirety and does not mention or discuss the delegation clause specifically or even acknowledge it. (*See* Aff. K. Haag, R.____.) Lastly, 42 C.F.R. § 483.70(m) is a regulation related to surveyors and the receipt of Medicare and Medicaid and lacks any precedential authority on contract formation. Therefore, the Court should find the delegation clause within the Arbitration Agreement requires an arbitrator to determine whether the Arbitration Agreement as a whole is void pursuant to *Prima Paint* and the clear and unmistakable delegation clause within the agreement.

C. The Question of Whether the Respondent's Wrongful Death Claim is Arbitrable was Delegated to the Arbitrator.

Courts have routinely delegated to an arbitrator the question of whether an arbitration agreement is applicable for a claim of wrongful death, which is the very question the Respondent raises here. *See Sw. Convenience Stores, LLC v. Iglesias on Behalf of Est. of Iglesias*, 656 S.W.3d 784, 790 (Tex. App. 2022) ("The authority to make the initial determination of whether the loss of consortium claim was derivative or not was unambiguously delegated to the arbitrator in the parties' Agreement, and therefore is not ripe for our review"). *BFS Grp. LLC v. De Leon*, --- S.W.3d ---, at *14 No. 14-24-00548-CV (Tex. App. 2025) (finding delegation clause mandated that arbitrator determine whether "the Arbitration Agreement requires arbitration of some or all of the [plaintiff's] claims" of wrongful death and survival") (intended to be but not yet published).

The Arbitration Agreement expressly delegates the question of whether the wrongful death and survival claims are arbitrable. The delegation clause requires any questions as to the "applicability" of the Arbitration Agreement to any of the Respondent's claims "be resolved by arbitration." (Def. Mot. Compel, Ex. A, p. 2; R. ___.) Here, the Court should find the Arbitration Agreement delegates the question of whether it applies to the Respondent's alleged claims or otherwise arises from the Parties relationship. Specifically, any argument the Arbitration Agreement does not apply to Respondent's claim of wrongful death is a gateway question delegated to the arbitrator.

II. Respondent's Initial Brief Ignores a Material Term as to her Meeting of the Minds Argument which is Premised on the Arbitrator Selection Provision.

Respondent's argument the Arbitration Agreement lacked a meeting of the minds to and on the basis that it lacked an integral or material term fails to acknowledge two distinguishing facts of this case from those cases she relies on. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 82-

83, 749 S.E.2d 139, 147 (Ct. App. 2013) ("[T]he lack of a specified arbiter is not an omission of a material term. While the *Grant* court held that a named arbitrator is a material term when one is specified within an agreement, and that FAA Section 5 does not apply when such a specification exists, these holdings are inapplicable when the contract does not specify a particular arbitrator, i.e., make the chosen arbitrator a material term. In fact, this is the exact situation to which Section 5 of the FAA applies."); 9 U.S.C.A. § 5 (providing a mechanism to select an arbiter when the agreement does not do so).

First, no party to the agreement wrote in or otherwise indicated a specific arbitrator to arbitrate an underlying dispute, such as this one. The blank space following "We select Option ___" was left empty. (Def. Mot. Compel, Ex. A, pp. 3-4; R. ___.) This was an optional, antecedent agreement, which the Parties opted to forego based on the fact that neither of them chose one of the two options or wrote in an arbitrator of their choice. Moreover, the Arbitration Agreement does not indicate or suggest in any way that a specific arbitrator is required for any underlying dispute. (*See id.*; R. ___.) Since no party to the Arbitration Agreement specifically chose or designated an arbitrator or arbitral forum, it cannot be said to constitute an integral term of the agreement. Accordingly, the failure of the parties to agree to any proposed arbitrator cannot constitute the lack of an integral term.

The Court's decision in *Dean* undermines the Respondent's meeting of the mind's argument. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 385, 759 S.E.2d 727, 734 (2014) ("had the parties truly intended that the AAA serve as the exclusive arbitral forum, they could have easily said so"). "Respondent has not offered any evidence that the 'exclusive' designation of [an arbitral forum] was an important consideration to either herself or Appellants when the parties entered the Agreement." *Id*. Rather, by choosing not to specify any of the

proposed arbitrators and at the same time, foregoing their right to choose an alternative arbitrator, the Arbitration Agreement expresses the Parties intent to forego agreeing to a specific arbitrator to administer any claim. Instead, the Parties are free to consent to an arbitrator at their election, or in the alternative, follow the default procedure provided by the FAA, 9 U.S.C. § 5.

Additionally, like the arbitration agreement in *Dean*, the Arbitration Agreement governing the present dispute contains a severability clause. *Id*. at 387, 759 S.E.2d at 735 (internal citations omitted). The Court in *Dean* provided that a severability provision indicates the parties' intention was not to make a selection of procedure or forum for arbitration integral but instead to generally have a dispute resolution process through arbitration. *Id*. In the present case, the Arbitration Agreement contains the following severability provision:

> **(i) Severability.** In the event any provision of this Agreement is determined to be invalid, illegal, or unenforceable, the offending provision shall be severed from the Agreement, and the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby. This provision reflects the Parties intent to arbitrate all claims.

(Def. Mot. Compel, Ex. A, p. 5; R. ___.) Even assuming the Parties had agreed to a specific arbitral forum, which they did not, the severability provision within the agreement demonstrates the Parties' intention the Arbitration Agreement remain valid and enforceable. Therefore, the Court should find that the Arbitration Agreement was executed as a validly formed contract and expresses a meeting of the minds.

III. Without Waiver to the Foregoing, Respondent's Arguments in Opposition to Arbitration are Otherwise without Merit.

A. Both Nonsignatory and Signatory Appellants are Permitted to Compel Respondent to Arbitration.

At the outset, Respondent argues that certain non-signatory appellants are precluded from enforcing the Arbitration Agreement against her on the basis that the Admission Agreement and Arbitration Agreement merged and should be construed as one. (Resp. Init. Br., p. 14-17.) However, it does not appear Respondent raised this argument before the trial court and therefore, it is not properly before this Court. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.")); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (it is "axiomatic that an issue cannot be raised for the first time on appeal.").

B. The Arbitration Agreement Expressly Provides All Appellants May Bind Respondent to its Terms.

Without waiving delegation of this issue, the present appeal, in part, concerns whether those Appellants who later acquired the Facility may enforce the Arbitration Agreement as assignees of the Arbitration Agreement albeit nonsignatories. The Facility is a signatory to the Arbitration Agreement, which expressly defines Facility as "the Facility identified above [Carlyle Senior Care] and includes the Facility's employees, agents, subcontractors, and parent and affiliated companies . . . and their employees and agents." Additionally, the Arbitration Agreement specifically states that "[t]his Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective heirs, personal representatives, *successors, purchasers, and assigns*." (Def. Mot. Compel, Ex. A, p. 5; R. ___.) (emphasis added).

The Respondent's reliance on the Transfer Agreement and the Admission Agreements in interpreting the Arbitration Agreement provisions are misguided. The merger of the Arbitration

Agreement with the Admission Agreement was not presented as an argument to the trial court. The very terms of the Arbitration Agreement do not prohibit assignment, and instead expressly contemplate the possibility it may in fact be assigned. (*See* Def. Mot. Compel, Ex. A, p. 5; R. ___.) Accordingly, the only relevancy the Transfer Agreement has to this argument is to show that certain Appellants later acquired the Facility where Mr. Zeigler was a resident, and those Appellants fall within the category of "successors, purchasers, and assigns." It does operate to modify the Arbitration Agreement itself.

The Respondent's underlying Complaint acknowledges those Appellants "*purchased*" and "became *successors* in interest of the Facility." (Pl. SA Compl. ¶ 11; Pl. WD Compl. ¶ 11; R. ___.) (emphasis added). The plain language of the Arbitration Agreement provides they have the right to enforce the Arbitration Agreement. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) ("courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes.") (emphasis added). Based on the language of the Arbitration Agreement and the Transfer Agreement, Appellants are entitled to compel Respondent to arbitration.

C. Even Assuming, *in Arguendo*, no Delegation Clause were to Exist, Respondent would Nevertheless be Bound to Arbitrate Her Wrongful Death Claim.

If the decedent could not bring the action in circuit court, neither can her wrongful death beneficiaries. South Carolina courts have interpreted this language to mean that the right of a decedent's statutory beneficiaries to recover in wrongful death is entirely contingent upon and equivalent to the decedent's right to recover for the same wrongful act. *See Est. of Stokes ex rel. Spell v. Pee Dee Fam. Physicians*, L.L.P., 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010) (holding that a wrongful death action lies only in "those cases in which the party injured would have been entitled to recover if death had not ensued"). This Court recently described the principle:

"Although a wrongful death claim is for the benefit of the decedent's family, South Carolina treats this claim as derivative of the decedent's own personal claim during his lifetime*." Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 667, 869 S.E.2d 819, 851 (Ct. App. 2021), *aff'd sub nom. Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024) (emphasis added).

Long before the current wrongful death statute was adopted, the South Carolina Supreme Court's exposition of the derivative principle yielded similar results. *See Price v. Richmond & D. R. Co.*, 33 S.C. 556, 560, 12 S.E. 413, 414 (1890) (holding that if the decedent would have been "debarred" from maintaining an action due to some defense, then "it follows necessarily that his administrator is likewise barred"). In short, "if the deceased never had a cause of action, none accrues under the wrongful death statute." *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E.2d 324, 326 (1948); s*ee also Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988).

Respondent neglects to acknowledge the key distinction to be made in the context of wrongful death claims set forth in *Jolly*, which is that a wrongful death claim is derivative until the death of the decedent and only then does it become possible for a wrongful death claim to accrue and stand independently. *See Jolly*, at 668, 869 S.E.2d at 852. In determining whether settlement proceeds barred should have been allocated to a plaintiff's wrongful death claim, the Court in *Jolly* focused on whether the settlement was executed during the plaintiff's lifetime or after the plaintiff's death. *Id.* In doing so, the Court provided that "South Carolina treats [a wrongful death] claim as derivative of the decedent's own personal claim *during his lifetime*." *Id.* (emphasis added).

Being derivative of his personal claim, the acts a decedent may take during his lifetime that limit his personal claim are binding not only to a post-death survival claim but also a post-death

wrongful death claim. The Court in *Jolly* acknowledged that "[i]f the decedent settled, or prosecuted to judgment, his personal injury claims against a certain defendant during his lifetime, his heirs or beneficiaries are precluded from bringing a wrongful death claim against that defendant after the decedent's death." *Id.* (citing, *inter alia*, *Restatement (Second) of Judgments* § 46 cmt. b (1982) ("The claim for wrongful death that arises in favor of the decedent's family, dependents, or representative can be characterized as either 'derivative' from the injured person's own claim or 'independent' of it. If the claim for wrongful death is treated as wholly 'derivative,' the beneficiaries of the death action can sue only if the decedent would still be in a position to sue . . .").

Accordingly, the wrongful death statute, S.C. Code Ann. § 15-51-10, creates a cause of action for certain beneficiaries *to the extent that the decedent could have maintained an action for the injuries had he or she lived*. Wrongful death claimants have no greater rights than the decedent from whom they ground their claim. Only once a wrongful death claim actually arises, after the decedent passes away, does it operate independently of other claims that may be personal to the decedent, such as survival. *See Jolly*, at 668, 869 S.E.2d at 852. Decedent's agreement to arbitrate is just as binding on the wrongful death claim as it is on the survival claim. The trial court cannot have it both ways: it cannot accept Decedent's Arbitration Agreement governs the survival action, which it did, compelling arbitration there, while simultaneously declining to apply that same Agreement to the wrongful death action. Both claims arise from the same alleged wrongful acts, which the Respondent alleges to involve the same breaches of underlying rights and duties. There is no question if Decedent alive and suing for the same injuries or violation of rights, the Agreement would bar him from bringing that action in civil court.

The Appellants' argument to this end is not one which is out-of-the-ordinary or one-of-a-kind. Instead, many states compel to arbitration a plaintiff's wrongful death claim no differently than they would the same plaintiff's survival claim. *Laizure v. Avante at Leesburg, Inc*., 109 So. 3d 752, 762 (Fla. 2013) ("[T]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent's estate and heirs are bound by the decedent's agreement to arbitrate. The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases."); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009) (explaining that Texas's statutory wrongful-death claim is "an entirely derivative cause of action" that depends on "the decedent's right to maintain suit for his injuries"); *Cleveland v. Mann*, 942 So. 2d 108, 119 (Miss. 2006) ("Because [the decedent] agreed to arbitrate, he could not have brought this claim for medical malpractice even if death had not ensued. He would have been required to submit his claim to arbitration. Therefore, since [the decedent] could not have brought this claim, neither can plaintiffs."); *Ballard v. Sw. Detroit Hosp*., 119 Mich.App. 814, 327 N.W.2d 370, 371–72 (1982) (explaining that Michigan's wrongful-death "cause of action is expressly made derivative of the decedent's rights" and that the personal representative therefore is "bound by the arbitration agreement to the same extent the decedent would have been bound had she survived"). *Kline v. Eyrich*, 69 S.W.3d 197, 206 (Tenn. 2002) ("[T]he statutes permitting an action for the wrongful death of another create 'no right of action exist[ing] independently of that which the deceased would have had, had [he or she] survived'").

D. Respondent Fails to Acknowledge Limited Discovery is Permitted by the FAA, and the Trial Court's Order Granting Limited Discovery, But However Denying the Appellants' Motion to Compel Arbitration is Ripe for Review

a. The Issue of the Trial Court's Contemporaneously Allowing Limited Discovery into the Issue of the Arbitration Agreement is Properly Before the Court

Respondent challenges the trial court's ruling as to jurisdictional discovery on the basis that it is not immediately appealable and is otherwise interlocutory. The Court "may review an interlocutory order when, as now, it contains other appealable issues." *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct.App.1998); *see also Hite v. Thomas & Howard Co*., 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) ("[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation.") (emphasis added), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). Here, the trial court's denial of the Appellants' motion to compel arbitration is immediately appealable pursuant to 9 U.S.C. § 16(a)(1)(A-B).

However, the Court should exercise its discretion to review the trial court's contemporaneous order permitting limited jurisdictional discovery as to arbitration. Moreover, doing so would provide the Court the opportunity to acknowledge the existence of federal statutory and precedential authority permitting such discovery in the context of FAA governed arbitration agreements as set forth in the Appellants' briefs.

b. Limited Discovery is Necessary When the Trial Court Determines that a Genuine Issue Exists as to the Making of the Arbitration Agreement

Respondents mislead the Court into believing Appellants could have participated in discovery prior to the hearings without acknowledging the law that participation in discovery and reliance on the South Carolina Rules of Civil Procedure may be construed as waiver. (*See* Resp. Init. Br., pp. 34-36.) "It is generally held that the right to enforce an arbitration clause may be

waived." *Gen. Equip. & Supply Co. v. Keller Rigging & Const., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). Without a trial court's order permitting a party to engage in limited jurisdictional discovery, the non-moving party risks losing her right to arbitration on the basis of waiver. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case."); *see also, e.g., Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 381, 892 S.E.2d 112, 114 (2023) ("The circuit court ordered . . .[Defendant] would waive its right to arbitration by responding to discovery."); *see also Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) ("a party may waive its right to compel arbitration if a substantial length of time transpires [and] . . . [w]hat is 'a substantial length of time' varies from one case to the next . . ."). As a result, Appellants would have risked waiving their right to compel arbitration if Appellants had engaged in discovery prior to requesting authorization from the trial court.

c. Respondent Otherwise Neglects to Acknowledge the Trial Court's Decision to Grant Jurisdictional Discovery was Procedurally Flawed

The Fourth Circuit has explained that, when the party resisting arbitration challenges "the existence of an agreement to arbitrate," the court should initially apply a standard "akin to . . . summary judgment." *Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.,* 807 F.3d 553, 564 (4th Cir. 2015). However, the Fourth Circuit has also provided that, when a motion to compel arbitration "presents unresolved questions of material fact, the FAA 'call[s] for an expeditious and summary hearing' to resolve those questions." *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015) (internal citations omitted) (alteration in original).

The Third Circuit Court of Appeals has succinctly set forth a general guideline for compelling arbitration under the FAA:

> [I]f the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] question. After limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard. In the event that summary judgment is not warranted because the party opposing arbitration can demonstrate, by means of citations to the record, that there is a genuine dispute as to the enforceability of the arbitration clause, the court may then proceed summarily to a trial regarding 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same,' as Section 4 of the FAA envisions." *Id*. (quoting 9 U.S.C. § 4) (remaining internal citations omitted).

Guidotti v. Legal Helpers Debt Resol., L.L.C., 716 F.3d 764, 776 (3d Cir. 2013). Here, the Respondent neglects to acknowledge the erroneousness of granting jurisdictional discovery into the issue of arbitration *after* denying the pending motions to compel arbitration is in conflict with the express language of the FAA and simple logic. The lower court's ruling seemingly issues a final ruling on jurisdictional while simultaneously ordering discovery on jurisdiction. *See Dillon*, 787 F.3d at 713 ("the one thing the district court may never do is find a material dispute of fact does exist" and then deny the motion without holding "any trial to resolve that dispute of fact."). The trial court's ruling to grant jurisdictional discovery is inherently based on the fact there is a genuine dispute of fact or Appellants had not had the opportunity to make a "full inquiry" into the Respondent's arguments opposing arbitration. Simply put, denying arbitration and ordering jurisdictional discovery are inconsistent rulings that cannot coexist. Appellants respectfully request the Court reverse the trial court's order on the basis the trial court's decision to grant or

deny the underlying motions to compel arbitration should have been continued or stayed until after the close of jurisdictional discovery.[2]

CONCLUSION

For these reasons, Appellants respectfully request the decision of the circuit court be reversed, and an order be entered compelling arbitration of all Respondent's claims in the underlying actions in accordance with the valid delegation clause contained in the Arbitration Agreement and the FAA. In the alternative, Appellants respectfully request the decision of the circuit court be reversed, and that an order be entered requiring the trial court to proceed to a trial as to the issue of arbitration pursuant to 9 U.S.C. § 4.

Respectfully submitted this 20th day of April, 2026.

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[2] Pursuant to Rule 208(b)(6) SCACR, ***all*** named Appellants collectively incorporate the arguments within their briefing to the extent they are not in conflict or inconsistent with one another.