THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

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Appellate Case No. 2020-001150

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Joshua Hawkins…….....Appellant,

v.

American Airlines, The Qantas Group d/b/a Qantas Airlines, Expedia, and Travel Guard Insurance, Defendants,

Of Which American Airlines and Expedia are the…….....Respondents.

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# INTIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

1. WHETHER A CASE CAN BE DISMISSED WHERE A PLAINTIFF HAS STATED A CAUSED OF ACTION FOR WHICH RELIEF MAY BE GRANTED

2. WHETHER THE PURCHASE OF SERVICES BINDS A PURCHASER TO TERMS THAT ARE NOT MADE READILY AVAILABLE

## STATEMENT OF THE CASE

The appellant filed suit on March 3, 2020 and named Qantas Airlines, American Airlines, Expedia, and Travel Guard Insurance[1] as defendants. The appellant resolved claims against Travel Guard and Qantas[2]. American Airlines and Expedia filed motions to dismiss, which were heard on July 21, 2020. Both motions were granted. The appellant timely filed a Rule 59(e) motion, which was denied on August 7, 2020. The appellant timely filed a notice of appeal.

## STANDARD OF REVIEW

Whether a motion to dismiss should be granted is a question of law. Questions of law are decided de novo, meaning that "a review in court is free to decide questions of law with no particular deference to the trial court." *Personal Care, Inc. v. Theo,* 426 S.C. 78 S.E.2d 281 (Ct. App. 2019). In reviewing a South Carolina Rule of Civil Procedure, the Court applies the same rules of construction used in interpreting statutes. *Green v. Lewis Truck Lines, Inc*., 314 S.C. 303 (1994). "If the rules language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary, and the stated meaning should be enforced." *Maxwell v. Genez*, 356 S.C. 617 (2003).

[1] The plaintiff purchased travel insurance. After the occurrence of the events described in the complaint, the appellant made a claim with Travel Guard, which denied the claim. The plaintiff then filed suit and subsequently resolved the bad faith claim with Travel Guard prior to the hearing on American's and Expedia's motions to dismiss.

[2] Qantas went into default. An attorney for Qantas contacted the appellant before a damages hearing was held, and parties resolved the plaintiff's claims against Qantas.

## FACTUAL BACKGROUND

In 2019, the appellant purchased an airline ticket through Expedia to travel to New Zealand on flights operated by American Airlines and Qantas Airlines. When the appellant arrived at Greenville-Spartanburg International Airport for his first flight, he learned the flight was delayed because American Airlines did not have sufficient staff at the airport. After hours of delay, American got the appellant to Dallas, the site of his connecting Qantas flight. However, while the plaintiff made it to Dallas, his luggage did not. Additionally, American refused to perform under the contract related to the bonus points that the appellant earned with the airline. Every time the appellant inquired about the points during the delay at the airport and during telephone calls, American pointed the appellant somewhere else.

When the appellant finally arrived in Dallas, Qantas representatives told the appellant that he was unable to board his flight to New Zealand. Eventually, the appellant convinced Qantas to allow him to board the flight. While in the air, Qantas representatives announced the flight would land in an entirely different city (Brisbane) than its destination (Sydney). Upon landing, cards resembling debit cards were handed to passengers, including the appellant. The cards turned out to have no value. The appellant then learned the airlines had lost his luggage. Because of the disaster created by Expedia, Qantas, and American, and because the airlines issued a worthless card to the appellant – presumably for the purpose of appeasing passengers – the appellant was forced to purchase clothes and gear when he finally arrived in New Zealand. The appellant did not receive his luggage for several days.

The plaintiff filed suit on March 3, 2020, asserting claims for negligence, recklessness, unfair trade practices, insurance bad faith, and breach of contract accompanied by a fraudulent act. Expedia filed a motion to dismiss and compel arbitration. American Airlines filed a motion to

dismiss pursuant to the Montreal Convention. The circuit court granted both motions.

## ARGUMENTS

### I. South Carolina law requires denial of a motion to dismiss where a plaintiff has stated a cause of action for which relief can be granted.

In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely upon the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). A motion to dismiss may not be sustained if the facts alleged in the complaint and the inferences reasonably deducible therefrom would entitle the plaintiff to *any* relief on *any* theory of the case. *Id*. In reviewing the complaint, "the facts alleged and inferences reasonably deducible therefrom" must be "viewed in the light most favorable to the plaintiff." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014). The appellant's claims against Expedia and American should not have been dismissed by the Circuit Court because the complaint, when viewed in a light most favorable to the appellant, allows him to recover from a jury.

#### a. The Montreal Convention does not trump the United States Constitution.[3]

American has argued that the Montreal Convention prevents the appellant from exercising his right to a trial by jury. This argument contradicts the plain language of the Seventh Amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall by preserved…" The South Carolina Constitution is even more

[3] Dismissal of Expedia and American violates the appellant's federal and state constitutional rights. The appellant has preserved for review constitutional issues related to the dismissal of both parties, including equal protection violations and Seventh Amendment violations.

emphatic about the fundamental American right, requiring "…that the right of a trial by jury…be 'preserved **inviolate**.'" *Lester v. Dawson,* 491 S.E.2d 240 (S.C. 1997) (Emphasis added).

A second problem with American's argument is that the appellant asserted claims that are not encompassed in the meaning of "international carriage" as defined by the Montreal Convention. For example, part of the appellant's claims are related to American's failure to keep sufficient staff at the airport, which causes delays and missed flights, as well as its promise to give people bonus points to buy other flights and then refusing to do so after passengers have made requisite purchases.

**b. The doctrine of preemption does not shield American from suit.**

"The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is 'without effect.' *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). American's reliance upon the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b)(1) is misplaced. American has argued that this statute nullifies the appellant's claim by the doctrine of preemption. However, the issue in this case is not a South Carolina statute aimed at airlines, but rather general concepts of the law, which are generally applicable to defendants in lawsuits. This, taken with the fact that "…courts should begin with a presumption against preemption," leads to the logical conclusion that a motion to dismiss based on preemption should not have been granted in this case. *See Wyeth v. Levine,* 555 U.S. 555, 129 S.Ct. 1187, 1195, 173 L.Ed.2d 51 (2009).

## II. Terms of an arbitration clause cannot be agreed to if they are not made readily available[4].

[4] Arbitration is unconstitutional, and the appellant has preserved the issue for review.

"Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.,* 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App.2005). In its order granting Expedia's motion to dismiss, the Circuit Court relied upon the affidavit of Sibel Abreu, which states that Expedia's customers must agree to Expedia's terms in order to purchase tickets. The Court acknowledged at the hearing that the appellant "denied he was required to agree to the Terms of Use." Taking the allegations of the complaint as true, together with this denial and the requirement to resolve every inference in the appellant's favor, the Circuit Court should have denied Expedia's motion to dismiss.

Expedia would have the Court rule that the appellant does not have a constitutional right to a jury trial simply because Expedia claims that its terms include an arbitration agreement. Of course, arbitration agreements are not always enforceable. See S*impson v. MSA of Myrtle Beach, Inc*., 644 S.E. 2d 663 (Sup. Ct. 2007). Even if Expedia actually had required review and agreement of an arbitration clause, the clause would still be unenforceable. In *Simpson,* our Supreme Court ruled that an arbitration clause was invalid where it was inconspicuous and buried in other terms. Upon visiting Expedia's site, there are no terms that even appear on the screen. Rather, a customer enters a destination and dates, choses a travel option[5], and is presented with a screen where the purchaser enters credit card information. On a mobile phone, the "Policies" tab is not even visible unless the user continues to scroll down unnecessarily. That usually does not happen because at that point, the "Check out" button has already immediately appeared. If the price is acceptable and the "Check out" button is used to take the customer to the payment screen, the customer is 1) never put on notice that extra terms may hurt them or invalidate fundamental constitutional rights, or 2)

[5] On this screen there is a small, inconspicuous tab labeled "policies," but the purchaser is not required to click the button to continue.

that the terms can only be viewed by first clicking on the inconspicuous (and not visible on a mobile phone) "Policy" tab, then taking further action to click on the small print words, which read "Terms of Use." If a customer takes each of these steps – none of which is required to purchase a ticket – the customer is then presented with a screen that again contains no mention of arbitration. It is only after taking each of these steps and scrolling down far enough that the customer is even able to see the word "arbitration."

The fact that Expedia's arbitration terms are hidden and only visible after clicking on words in very small font is important. In ruling the arbitration clause in *Simpson* was not enforceable, the Court noted that, "while certain phrases within other provisions of the additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page." *Id*. at 28. Expedia requires multiple extra steps to even see its hidden terms, and one of those steps involves clicking on words in smaller font than nearly everything else.

The terms of Expedia's arbitration clause are also oppressive and one-sided. In *Simpson*, an arbitration clause was found to be unenforceable because it deprived a customer of remedies available at law including, "punitive, exemplary, double, or treble damages." *Id*. at 29. One of Expedia's hidden and vague terms states that, in the alternative to arbitration, a customer may bring an action in "small claims court," which has a jurisdictional maximum. Like the unenforceable clause in *Simpson*, this limits the customer's ability to recover under the law, as well as robs the customer of the right to have a jury determine damages.

## CONCLUSION

For the foregoing reasons, the appellant respectfully requests the Court reverse the Circuit Court's dismissal of the appellant's claims against American Airlines and Expedia.

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that I have served a copy of the Appellant's Initial Brief and Designation of Matter, electronically to the Court of Appeals, and to the following attorneys of record for the Respondents to the following electronic addresses, on this date October 19, 2020.

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