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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2020-001449

Wanderlove Travel, LLC,

Respondent,

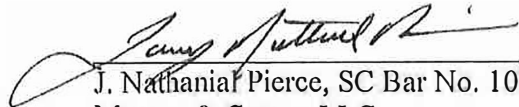
v.

Avanti Destinations, LLC,

Appellant.

RECORD ON APPEAL

April 7, 2021



J. Nathaniel Pierce, SC Bar No. 102803
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

Attorney for Appellant

Other Counsel of Record:

F. Craig Wilkerson, Jr., Esquire
1050 College Avenue Extension
Rock Hill, SC 29732

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Wanderlove Travel, LLC,

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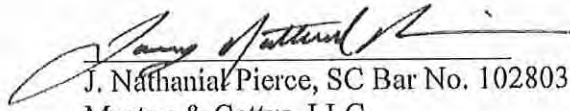
Avanti Destinations, LLC,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Designation of Matter complies with Rule 210(c), SCACR.

April 7, 2021


J. Nathaniel Pierce, SC Bar No. 102803
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

Attorney for Appellant

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4601212

Wanderlove Travel Llc
PLAINTIFF(S)

Avanti Destinations Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

After careful consideration:

Defendant's Motion to Dismiss is DENIED.

Defendant's Motion to Compel Arbitration is DENIED.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/28/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2020 Aug 28 10:34 AM - YORK - COMMON PLEAS - CASE#2020CP4601212

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2020 Aug 28 10:34 AM - YORK - COMMON PLEAS - CASE#2020CP4601212



York Common Pleas

Case Caption: Wanderlove Travel Llc VS Avanti Destinations Inc
Case Number: 2020CP4601212
Type: Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2020-08-28 10:31:56 page 3 of 3

ELECTRONICALLY FILED - 2020 Aug 28 10:34 AM - YORK - COMMON PLEAS - CASE#2020CP4601212

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4601212

Wanderlove Travel Llc
PLAINTIFF(S)

Avanti Destinations Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court;

After careful consideration, Defendant's Motion to Reconsider is DENIED.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/25/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2020 Sep 25 11:08 AM - YORK - COMMON PLEAS - CASE#2020CP4601212

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

ELECTRONICALLY FILED - 2020 Sep 25 11:08 AM - YORK - COMMON PLEAS - CASE#2020CP4601212



York Common Pleas

Case Caption: Wanderlove Travel Llc VS Avanti Destinations Inc
Case Number: 2020CP4601212
Type: Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2020-09-25 10:40:41 page 3 of 3

ELECTRONICALLY FILED - 2020 Sep 25 11:08 AM - YORK - COMMON PLEAS - CASE#2020CP4601212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	CASE NO. 20-46-CP-_____
Wanderlove Travel, LLC.,)	
Plaintiff(s),)	
vs.	)	SUMMONS
Avanti Destinations Inc.,)	
Defendant(s).	)	(Unfair Trade Practice)
	)	Jury Trial Requested

TO THE DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Summons and Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said Summons and Complaint on the subscribed at his office at 1050 College Avenue Extension, Rock Hill, SC 29732, within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to answer the Summons and Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/E. Craig Wilkerson, Jr.
 By: F. Craig Wilkerson, Jr.
 1050 College Avenue Extension
 Rock Hill, South Carolina 29732
 (803) 8324-7200
 ATTORNEY FOR PLAINTIFF
 SC Bar#: 64165
cwilkerson@fcwlaw.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	CASE NO.
Wanderlove Travel, LLC.,)	
Plaintiff(s),	)	COMPLAINT
vs.	)	(Jury Trial Requested)
Avanti Destinations Inc.,)	
Defendant(s).)	

NOW COMES the Plaintiff, above-named, complaining of the Defendant, above-named, and does allege and show unto this Honorable Court as follows:

1. That the Plaintiff is a citizen and resident of the County of York, State of South Carolina.
2. That the Defendant is, upon information and belief, a corporation incorporated under the laws of one of the States of the United States, licensed and doing business in the County of York, State of South Carolina.
3. That on or about early 2020, Plaintiff contracted with Defendant on behalf of at least 3 South Carolina residents for travel services.
4. That on or about March of 2020, a National Emergency was declared for Covid 19 and the Defendant cancelled the trips and/or accommodations the Plaintiff had booked with Defendant and wrongfully refused to refund the previously paid balances, although the hotels, etc. did refund the monies to the Defendant.
5. That Plaintiff has made due demand for the return of the funds paid the Defendant, but Defendant has refused.

6. That the Plaintiff's clients were able to recoup some of the money from a collateral source, travel insurance, but Defendant has the entire balance paid to it, and refused to return same. That the Defendant should not receive credit for collateral source payments. This makes a windfall for the Defendant and rewards self help by the Defendant and constitutes unjust enrichment.

7. That the Defendant has breached the contract by refusing to return monies that have been returned to the Defendant, profiting from the National Emergency, and has Plaintiff and/or Plaintiff's clients' funds and is trying to hold the cash while offering future potential travel credits which are not specified.

FOR A FIRST CAUSE OF ACTION

Breach of Contract/ Breach of Contract with Fraudulent Act

8. That the Plaintiff reiterates the allegations in Paragraphs 1 - 7 of Plaintiff's Complaint as fully as if repeated here verbatim.

9. That the Plaintiff was a recognized beneficiary of the contract between the Plaintiff and the Defendant.

10. That said contract was in force at all time relevant to this action.

11. That the Defendant materially breached the Contract by:

- a. Failing to return monies paid to it by Plaintiff.
- b. Failing to charge the Plaintiff the contract price for services rendered and/or return monies returned to the Defendant by third parties for the Plaintiff's benefit.
- c. Keeping unearned monies and exercising self help.

12. That the Defendant's material and willful breach of the contract justifies an award of punitive damages against the Defendant.

FOR A SECOND CAUSE OF ACTION

Unfair Trade Practices Act

13. That the Plaintiff reiterates the allegations in Paragraphs 1 - 12 of Plaintiff's Complaint as fully as if repeated herein verbatim.

14. Defendant is engaged in the business of providing travel services to the people of South Carolina and has done so to more than two such persons and is still engaged in such business.

15. The acts and practices of the Defendant, which are alleged in the foregoing causes of action, reflect a pattern of willful, unfair, and deceptive behavior which has either repeatedly and adversely affected the public interest of the people of South Carolina or which has the potential for so doing.

16. The actions of the Defendant violated S.C. Code Ann. 39-5-20 et seq. (1985) (The South Carolina Unfair Trade Practices Act, or the UTPA).

17. As a result of the actions of the Defendant, the Plaintiff has suffered economic loss, emotional distress and related costs, as detailed in the foregoing causes of action.

18. The Plaintiff is entitled to three times their actual damages and a reasonable award of attorneys fees under '39-5-140 or the UTPA.

WHEREFORE, the Plaintiff prays for a jury trial and for judgment against the Defendant in an amount of actual damages and for punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as this Court might deem just and proper, the combine total not to exceed \$74,999.99.

s/f. Craig Wilkerson, Jr.
By: F. Craig Wilkerson, Jr.
1050 College Avenue Extension
Rock Hill, South Carolina 29732
(803) 8324-7200
ATTORNEY FOR PLAINTIFF
SC Bar#: 64165
cwilkerson@fcwlaw.com

ELECTRONICALLY FILED - 2020 Apr 08 11:17 AM - YORK - COMMON PLEAS - CASE#2020CP4691212

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	CASE NO. 2020-46-CP-01212
Wanderlove Travel, LLC.,)	
Plaintiff(s),)	
vs.	)	AMENDED SUMMONS
Avanti Destinations Inc.,)	
Defendant(s).	)	(Unfair Trade Practice)
	)	Jury Trial Requested

TO THE DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Summons and Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said Summons and Complaint on the subscribed at his office at 1050 College Avenue Extension, Rock Hill, SC 29732, within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to answer the Summons and Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/F. Craig Wilkerson, Jr.
 By: F. Craig Wilkerson, Jr.
 1050 College Avenue Extension
 Rock Hill, South Carolina 29732
 (803) 8324-7200
 ATTORNEY FOR PLAINTIFF
 SC Bar#: 64165
cwilkerson@fcwlaw.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	CASE NO. 2020-CP-46-01212
Wanderlove Travel, LLC.,)	
Plaintiff(s),	)	AMENDED COMPLAINT
vs.	)	(Jury Trial Requested)
)	
Avanti Destinations Inc.,)	
Defendant(s).)	

NOW COMES the Plaintiff, above-named, complaining of the Defendant, above-named, and does allege and show unto this Honorable Court as follows:

1. That the Plaintiff is a citizen and resident of the County of York, State of South Carolina.
2. That the Defendant is, upon information and belief, a corporation incorporated under the laws of one of the States of the United States, licensed and doing business in the County of York, State of South Carolina.
3. That on or about early 2020, Plaintiff contracted with Defendant on behalf of at least 3 South Carolina residents for travel services.
4. That on or about March of 2020, a National Emergency was declared for Covid 19 and the Defendant cancelled the trips and/or accommodations the Plaintiff had booked with Defendant and wrongfully refused to refund the previously paid balances, although the hotels, etc. did refund the monies to the Defendant.
5. That Plaintiff has made due demand for the return of the funds paid the Defendant, but Defendant has refused.

6. That the Plaintiff's clients were able to recoup some of the money from a collateral source, travel insurance, but Defendant has the entire balance paid to it, and refused to return same. That the Defendant should not receive credit for collateral source payments. This makes a windfall for the Defendant and rewards self help by the Defendant and constitutes unjust enrichment.

7. That the Defendant has breached the contract by refusing to return monies that have been returned to the Defendant, profiting from the National Emergency, and has Plaintiff and/or Plaintiff's clients' funds and is trying to hold the cash while offering future potential travel credits which are not specified.

FOR A FIRST CAUSE OF ACTION

Breach of Contract/ Breach of Contract with Fraudulent Act

8. That the Plaintiff reiterates the allegations in Paragraphs 1 - 7 of Plaintiff's Complaint as fully as if repeated here verbatim.

9. That the Plaintiff was a recognized beneficiary of the contract between the Plaintiff and the Defendant.

10. That said contract was in force at all time relevant to this action.

11. That the Defendant materially breached the Contract by:

- a. Failing to return monies paid to it by Plaintiff.
- b. Failing to charge the Plaintiff the contract price for services rendered and/or return monies returned to the Defendant by third parties for the Plaintiff's benefit.
- c. Keeping unearned monies and exercising self help.

12. That the Defendant's material and willful breach of the contract justifies an award of punitive damages against the Defendant. Plaintiff seeks actual and punitive damages in an amount a jury may award.

FOR A SECOND CAUSE OF ACTION

Unfair Trade Practices Act

13. That the Plaintiff reiterates the allegations in Paragraphs 1 - 12 of Plaintiff's Complaint as fully as if repeated herein verbatim.

14. Defendant is engaged in the business of providing travel services to the people of South Carolina and has done so to more than two such persons and is still engaged in such business.

15. The acts and practices of the Defendant, which are alleged in the foregoing causes of action, reflect a pattern of willful, unfair, and deceptive behavior which has either repeatedly and adversely affected the public interest of the people of South Carolina or which has the potential for so doing.

16. The actions of the Defendant violated S.C. Code Ann. 39-5-20 et seq. (1985) (The South Carolina Unfair Trade Practices Act, or the UTPA).

17. As a result of the actions of the Defendant, the Plaintiff has suffered economic loss, emotional distress and related costs, as detailed in the foregoing causes of action.

18. The Plaintiff is entitled to three times their actual damages and a reasonable award of attorneys fees under '39-5-140 or the UTPA.

FOR A THIRD CAUSE OF ACTION

Unjust Enrichment

19. That the Plaintiff reiterates the allegations in Paragraphs 1-18 of Plaintiff's Complaint fully as if repeated verbatim here.

20. The Plaintiff has been informed that the money paid to Defendant Avanti for the reservation of trips was refunded by the hotels, airlines, and other providers to Avanti.

21. Defendant Avanti has been refunded the money paid by Wanderlove, but refuses to refund the money to Plaintiff and Plaintiff's clients nor account for same.

22. Defendant Avanti is being unjustly enriched by there refusal to refund the money. Avanti is withholding funds paid to them for the payment of other activities and services which Avanti has not earned. Avanti has refused to release those funds or have issued vouchers which are worth a fraction of the funds they are withholding from Plaintiff.

23. The failure of Defendant to repay the money to the Plaintiff and Plaintiff's clients is inequitable and gives rise to unjust enrichment of Defendant.

24. That the failure of Defendant to refund the funds justifies an award of actual and punitive damages a jury may award.

WHEREFORE, the Plaintiff prays for a jury trial and for judgment against the Defendant in an amount of actual damages and for punitive damages in an appropriate amount, attorney fees, for the costs of this action, and for such other and further relief as this Court might deem just and proper, the combine total not to exceed \$74,999.99.

s/F. Craig Wilkerson, Jr.
By: F. Craig Wilkerson, Jr.
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ELECTRONICALLY FILED - 2020 Oct 19 1:17 PM - YORK - COMMON PLEAS - CASE#2020CP4601212

STATE OF SOUTH CAROLINA
COUNTY OF YORK
WANDERLOVE TRAVEL, LLC,
Plaintiff,
v.
AVANTI DESTINATIONS, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2020-CP-46-01212

MOTION TO DISMISS

Defendant Avanti Destinations, LLC (“Avanti”), responding to Plaintiff Wanderlove Travel, LLC’s (“Wanderlove”) Complaint, would show unto this Honorable Court the following:

FOR A FIRST DEFENSE
(Lack of Subject Matter Jurisdiction – SCRPC 12(b)(1))

1. The Court lacks subject matter jurisdiction over the claims asserted by Wanderlove and, therefore, Wanderlove’s claims must be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(1).

FOR A SECOND DEFENSE
(Lack of Personal Jurisdiction – SCRPC 12(b)(2))

2. The Court lacks personal jurisdiction over Avanti and, therefore, Wanderlove’s claims must be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(2).

FOR A THIRD DEFENSE
(Improper Venue – SCRPC 12(b)(3))

3. York County, South Carolina is not the proper venue for this action and, therefore, Wanderlove’s claims must be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(3).

FOR A FOURTH DEFENSE
(Failure to State a Claim – SCRCP 12(b)(6))

4. Wanderlove has failed to state a claim upon which relief can be granted and, therefore, Wanderlove’s claims must be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(3).

FOR A FIFTH DEFENSE
(Motion to Compel Arbitration)

5. An enforceable arbitration provision exists, and the Plaintiff has filed this action in contravention of that provision. This court must compel arbitration between the parties.

WHEREFORE, Avanti prays for dismissal of Wanderlove’s claims with prejudice, for the Court to award Challenger the costs of this action, for the court to compel arbitration between the parties, for the court to award reasonable attorneys’ fees, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/ Daniel J. Ballou

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J. Nathaniel Pierce, SC Bar No. 102803
Morton & Gettys, LLC
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June 24, 2020
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF YORK
WANDERLOVE TRAVEL, LLC,
Plaintiff,
v.
AVANTI DESTINATIONS, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2020-CP-46-01212

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Defendant Avanti Destinations, LLC ("Avanti"), in support of its Motion to Dismiss Plaintiff Wanderlove Travel, LLC's ("Wanderlove") Complaint, would show unto this Honorable Court the following:

FACTUAL BACKGROUND

Avanti is a travel package broker organized as a limited liability company under the laws of the State of Oregon, with its principle place of business situated in Portland, Oregon. Grundy Aff. ¶¶ 2-3. Avanti does not maintain offices in South Carolina, nor does it maintain employees in South Carolina. Grundy Aff. ¶¶ 4-5. Avanti does not assign employees to manage South Carolina business specifically. Rather, the State is part of a regional sales territory for a traveling Regional Sales Representative. Grundy Aff. ¶ 6. The percentage of Avanti's revenue deriving from the State of South Carolina is relatively small, constituting no more than 2.2% percent of Avanti's total gross revenue in 2019. Grundy Aff. ¶ 7. Avanti does not target ads directly to residents of the State of South Carolina. Grundy Aff. ¶ 8.

Avanti maintains a website located at www.avantidestinations.com. Grundy Aff. ¶ 9. The website provides travel offerings to potential customers navigating through a series of steps in order to review travel opportunities and to formulate custom vacation ideas. Grundy Aff. ¶ 10. The

customer's local travel agent would be the party to actually book travel services. Grundy Aff. ¶ 10. Each customer who uses Avanti's website or purchases services from Avanti affirmatively agrees to certain terms and conditions ("Terms and Conditions"), attached as Exhibit "A." Grundy Aff. ¶ 11. In the Terms and Conditions, Avanti expressly disclaims liability for acts of God beyond its control and provides a detailed process and standard for the issuance of refunds. Grundy Aff. ¶¶ 12-13. The Terms and Conditions provide Oregon law governs and the sole and exclusive jurisdiction for the resolution of disputes is the appropriate state or federal court sitting in Portland, Oregon. Grundy Aff. ¶ 14. Finally, the parties are required to resolve any dispute through arbitration under the prevailing American Arbitration Association rules. Grundy Aff. ¶ 15.

ON information and belief, Wanderlove is a limited liability company organized and existing under the laws of the State of South Carolina and based in York County, South Carolina. Grundy Aff. ¶ 16. Wanderlove is a travel agency that serves as a booking intermediary between its customers and Avanti's travel components. The Wanderlove travel agent, like any travel agent using Avanti's services, must proactively reach out on the customer's behalf to begin any business with Avanti. Avanti does not solicit the business from the customer but produces wholesale travel packages from which individual travel agents can select elements and then market or book at the retail level with their customer. Grundy Aff. ¶ 18. Avanti does not deal directly with any end-user customers but, rather, with travel agents such as Wanderlove. Grundy Aff. ¶ 19.

Wanderlove must log in to Avanti's website through a portal specifically designed for travel agents. Grundy Aff. ¶ 20. By logging in to Avanti's website, Wanderlove affirmatively agreed to the Terms and Conditions. Grundy Aff. ¶ 21. At no point has Avanti solicited Wanderlove's business in South Carolina. Rather, Wanderlove takes advantage of a service offered by Avanti from its principle place of business in Oregon. Grundy Aff. ¶ 22.

ARGUMENT

I. The Federal Arbitration Act applies and preempts South Carolina law, and the Court must compel arbitration between the parties.

Unless the parties have contracted otherwise, the Federal Arbitration Act (“FAA”) applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce. *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). Pursuant to the Federal Arbitration Act (“FAA”):

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, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2.

To fall within the scope of the FAA, the transaction must involve “interstate commerce.” *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843 (1995). To determine whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. *See Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). The FAA has been broadly interpreted to mean Congress intended to utilize its power to regulate interstate commerce to its fullest extent.” *Id.*

As set forth in the attached Affidavit, the agreement in this case contains an enforceable arbitration clause. Grundy Aff. ¶¶ 2-3. Further, the attached Affidavit sets forth this matter concerns interstate commerce between Avanti, an Oregon limited liability company, and Wanderlove, a South Carolina limited liability company. Grundy Aff. ¶ 17. The services Wanderlove procured on behalf of its customers included airline flights and hotel accommodations

abroad. The undisputed facts of this case dictate interest state commerce is involved, and the FAA controls.

Arbitration can be compelled by demonstrating (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal to the defendant to arbitrate the dispute.” *Poteat v. Rich Products Corp.*, 91 Fed.Appx. 832, 2004 WL 119363, *1 (4th Cir. 2004) (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002)). The FAA reflects a liberal federal policy favoring arbitration agreements. *Soil Remediation Co.*, 476 S.E.2d at 152 (citing *Moses H. Cone Mem’l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 124, 103 S. Ct. 927 (1983)). Due regard must be given to the federal policy strongly favoring arbitration, and ambiguities relating to the interpretation of an arbitration agreement must be resolved in favor of arbitration. *See Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 776 S.E.2d 91 (Ct. App. 2015).

The Terms and Conditions provide “[a]ny controversy or claim arising out of, or relating to, these Terms of Use or the breach thereof...shall be settled by arbitration in accordance with the then-current rules of the American Arbitration Association.... The location of arbitration shall be Portland, Oregon, USA.” Grundy Aff. ¶ 15, Exhibit A. The entirety of Plaintiff’s claim is encompassed by the arbitration provision in the Terms and Conditions. The gravamen of Plaintiff’s complaint is an alleged failure by Avanti to return sums paid by Wanderlove’s customers. The Terms and Conditions expressly address the issues of deposits and refunds. The Court must give the arbitration clause its plain meaning, construe ambiguities in favor of arbitration as the FAA requires, and grant Avanti’s motion to compel Plaintiff to arbitrate this matter in Portland, Oregon.

II. The Terms and Conditions contain an enforceable forum selection clause.

Whether this claim is resolved by arbitration or litigation, the proper forum for resolving it is in Oregon. Forum selection clauses will be enforced unless unreasonable or unjust. *Republic Leasing Co., Inc. v. Haywood*, 329 S.C. 562, 495 S.E.2d 804, 807 (Ct. App. 1998), *vacated on other grounds* (citing *Scott v. Guardsmark Security*, 874 F.Supp. 117, 120 (D.S.C. 1995)). In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 122, 1528 (1991), the United States Supreme Court upheld the enforceability of a forum selection clause in a passage contract ticket, noting the advantages of certain standard contracts due to their decreased transaction costs and increased certainty.

Here, the Terms and Conditions provide, in clear and unambiguous language, “[i]n the event of any unresolved claim or lawsuit, the parties agree to the sole and exclusive jurisdiction of the appropriate state or federal court sitting in Portland, Oregon, regardless of any conflicting law regarding venue or jurisdiction.” The Terms and Conditions go on to provide “[a]ny controversy or claim arising out of, or relating to, these Terms of Use or the breach thereof...shall be settled by arbitration in accordance with the then-current rules of the American Arbitration Association.... The location of arbitration shall be Portland, Oregon, USA.” Grundy Aff. ¶ 15, Exhibit A. Based on the clear and unambiguous language above, Wanderlove’s complaint must be dismissed for lack of subject matter jurisdiction pursuant to South Carolina Rules of Civil Procedure 12(b)(1).

III. The Court must dismiss Wanderlove’s claims because it lacks personal jurisdiction over Avanti.

When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012).

This Court lacks personal jurisdiction over Avanti and the claims against it must be dismissed. To exercise personal jurisdiction over a foreign corporation, the trial judge must determine (1) that the South Carolina long arm statute applies; and (2) that the corporation's contacts in South Carolina are sufficient to satisfy due process requirements. *Colite Industries, Inc. v. G.W. Murphy Const. Co., Inc.*, 377 S.E.2d 321, 297 S.C. 426 (1989) (citing *Atlantic Soft Drink Co. v. South Carolina National Bank*, 287 S.C. 228, 336 S.E.2d 921 (1974)). Here, the only likely application of the South Carolina long arm statute would be § 36-2-803(1)(g) – “entry into a contract to be performed in whole or in part by either party in South Carolina.”

It is well-settled that “a contract is executed when the last act necessary for its formation is done and at the place where the final act is done.” *Aviation Associates and Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 179, 303 S.C. 502 (1991) (finding the long arm statute did not apply where a South Carolina corporation sent a purported contract to an Oklahoma corporation and the Oklahoma corporation's agent signed the purported contract in Oklahoma, completing the act of contracting in Oklahoma). In *Fields v. INA Filtration Corp.*, 358 S.E.2d 160, 292 S.C. 614 (Ct. App.), the court found § 36-2-803(1)(g) applied where a German national was sued in South Carolina in a dispute over amounts owed under stock option agreement. The German national was the CEO of the company who issued the stock option agreement. *See id.* The Court relied on the facts the stock option agreement was actually signed in South Carolina, the stock option agreement contemplated the sale and transfer of stock in South Carolina, the stock was issued in South Carolina, the physical stock shares were kept in South Carolina, and the tender of repurchase as issue was made in South Carolina. *Id.*, 358 S.E.2d at 162.

In the present case, all actions necessary to form the contract at issue were directed towards or occurred in Oregon. Grundy Aff. ¶¶ 18, 19, 20. Wanderlove's complaint makes no allegations

Avanti made any targeted effort to solicit Wanderlove in South Carolina. Grundy Aff. ¶ 8. Avanti did not solicit Wanderlove's business in South Carolina. Rather, Wanderlove affirmatively sought Avanti's service through Avanti's website. Grundy Aff. ¶ 20. Wanderlove directed its actions to Oregon, where Avanti accepted Wanderlove's offer and agreed to provide services. Based on the above, the South Carolina long arm statute does not apply, and Wanderlove's claims must be dismissed for lack of personal jurisdiction.

Nor does the exercise of personal jurisdiction over Avanti in South Carolina comport with due process. South Carolina treats its long-arm statute as coextensive with the due process clause of the Constitution, the sole question becomes "whether the exercise of personal jurisdiction would violate the strictures of due process." *Hirida, USA, Inc. v. Delo*, 415 S.C. 533, 541, 783 S.E.2d 839, 843 (Ct. App. 2016). Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174 (1985)). In South Carolina, the determination of whether the requirement of due process are satisfied involves a two-prong analysis: (1) the "power" prong, under which minimum contacts grant a court the "power" to adjudicate the action; and (2) the "fairness" prong, which requires the exercise of jurisdiction to be "reasonable" or "fair." *Id* (citing *S. Plastics Co. V. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)). In *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884-85 (Ct. App. 2004), the South Carolina Court of Appeals explained:

Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Without minimum contacts, the court does not have the "power" to adjudicate the action. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits

and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case. Under the fairness prong, we examine such factors as the burden on the defendant, the extent of the plaintiff's interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies.

Here, neither the power nor fairness prongs are satisfied. As to the power prong, all actions necessary to form the contract at issue were directed towards or occurred in Oregon. Grundy Aff. ¶¶ 18, 19, 20. Wanderlove's complaint makes no allegations Avanti made any targeted effort to solicit Wanderlove in South Carolina. To the contrary, the affidavit of Mark Grundy, CEO of Avanti, provides the exact opposite. Grundy Aff. ¶ 8. Avanti did not solicit Wanderlove's business in South Carolina. Rather, Wanderlove affirmatively sought Avanti's service through Avanti's website. Grundy Aff. ¶ 20. Wanderlove does not maintain offices or employees in South Carolina. Grundy Aff. ¶¶ 4, 5. As to the fairness prong, the vast majority of the pertinent witnesses and evidence are located in Oregon, creating a substantial burden on Avanti in defending the action in South Carolina. Further, South Carolina has little, if any, interest in adjudicating a dispute involving a corporation organized and headquartered in Oregon. Because neither the power nor fairness prongs are satisfied, this court must dismiss Wanderlove's claims for lack of personal jurisdiction.

WHEREFORE, Avanti prays for an order compelling arbitration of this matter, dismissal of Wanderlove's claims with prejudice, for an award of costs of this action, reasonable attorneys' fees, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/ Daniel J. Ballou

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June 24, 2020
Rock Hill, South Carolina

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EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2020-CP-46-01212

WANDERLOVE TRAVEL, LLC,

Plaintiff,

v.

AVANTI DESTINATIONS, LLC,

Defendants.

AFFIDAVIT OF MARK GRUNDY

Mark Grundy, Chief Operating Officer (COO) of Avanti Destinations, LLC, personally
~~appeared before me and made the following statement under oath:~~

1. I am over the age of eighteen and am competent to testify regarding the matters set forth in this affidavit. I am the COO of Avanti Destinations, LLC ("Avanti"). This affidavit is based upon my personal knowledge.
2. Avanti is a corporation organized and existing under the laws of the State of Oregon.
3. Avanti's principle place of business is situated in Portland, Oregon.
4. Avanti does not maintain offices in South Carolina.
5. Avanti does not maintain employees in South Carolina.
6. Avanti does not assign employees to manage South Carolina business specifically; the state is part of a regional sales territory for a traveling Regional Sales Representative.
7. The percentage of Avanti's revenue deriving from the State of South Carolina is relatively small, constituting no more than 2.2% percent of Avanti's total gross revenue in 2019.
8. Avanti does not target ads directly to residents of the State of South Carolina.
9. Avanti maintains a website located at www.avantidestinations.com.

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10. Avanti's website provides travel offerings with potential customers navigating through a series of steps in order to review travel opportunities and to formulate custom vacation ideas. The customer's local travel agent would be the only registered agent to actually book travel services
11. Each customer who uses Avanti's website or purchases services from Avanti affirmatively agrees to certain terms and conditions ("Terms and Conditions"), attached as Exhibit "A."
12. In the Terms and Conditions, Avanti expressly disclaims liability for acts of God beyond its control.
13. The Terms and Conditions also provide a detailed process and standard for the issuance of refunds.
14. The Terms and Conditions provide Oregon law governs and the sole and exclusive jurisdiction for the resolution of disputes is the appropriate state or federal court sitting in Portland, Oregon.
15. The Terms and Conditions require the parties to resolve any dispute through arbitration under the prevailing American Arbitration Association rules.
16. Wanderlove Travel, LLC is, upon information and belief, a travel agency organized as a limited liability company under the laws of the State of South Carolina.
17. Wanderlove has occasionally used Avanti's services over the internet to book travel packages. The travel agent must proactively reach out on the customer's behalf to begin any business with Avanti. Avanti does not solicit the business from the customer but only brings together wholesale travel packages from which local travel agents select elements and then market/book at the retail level with their customer.

- 18. Avanti does not have any contractual relationship with any end-user customers but, rather, only with travel agents such as Wanderlove.
- 19. When a travel agent such as Wanderlove seeks to procure services through Avanti, the agent must log in to Avanti's website through a dedicated portal specifically designed for travel agents.
- 20. When it logged in to Avanti's website, Wanderlove affirmatively agreed to the Terms and Conditions contained on the website.
- 21. At no point has Avanti solicited Wanderlove's business in South Carolina. Rather, Wanderlove takes advantage of a service offered by Avanti from its principle place of business in Oregon.

FURTHER AFFIANT SAYETH NOT.

Mark Grundy, COO of Avanti Destinations, LLC

SWORN to and subscribed before me
This 25th day of June 2020.

Notary Public for: MULTNOMAH COUNTY, OREGON
My Commission Expires: 12/19/2020



STATE OF SOUTH CAROLINA	)	IN THE Court OF COMMON PLEAS
COUNTY OF YORK	)	CASE NO.: 2020-CP-46-01212
Wanderlove Travel, LLC.,)	
Plaintiff(s),)	
vs.	)	PLAINTIFF'S MEMORANDUM
	)	IN SUPPORT OF OPPOSITION
Avanti Destinations Inc.,	)	TO DEFENDANT'S MOTION
Defendant(s).	)	TO DISMISS

Plaintiff Wanderlove Travel, LLC ("Wanderlove"), responding to Defendant Avanti Destinations, LLC("Avanti") Motion to Dismiss, will show the following:

Factual Background

Wanderlove is a limited liability company under the laws of South Carolina, with its principal place of business in Rock Hill, South Carolina. Avanti is a limited liability company under the laws of Oregon, with its principal place of business in Portland, Oregon. Avanti maintains a regional sales manger over the State of South Carolina and actively encourages sales in South Carolina. Their website targets all states and they derive a proportionate amount of business from the state of South Carolina.

Avanti's website (www.avantidestinations.com) is set up to target the entire United States and requires travel agents to make bookings for their clients. Avanti uses a browsewrap agreement which treats the use of the website as consent to the terms and conditions of the website. When the agent accesses the website for the first time there is no way to view the terms and conditions. The agent must then create an account through the website to be able to use the features and book trips for her

clients. At no point is the agent notified that use of the website constitutes acceptance of the terms and conditions or given access to view the terms and conditions. Once the agent has created an account and logged into their portal, they can access the terms and conditions under a tab labeled "Legal". Then the agent may review the terms and conditions if they so choose but are never prompted to review them or required to review them before using the website.

Argument

- 1. The Arbitration Clause and Forum Selection Clause are not enforceable because the contract in which they are found was not a valid contract between the parties.**

In South Carolina, the formation of a contract is governed by well-settled principles. Quite simply, a contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. There must be an offer and an acceptance accompanied by valuable consideration for formation of a contract. (*Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co.*, 313 S.C. 215, 216 (S.C. Ct. App. August 2, 1993). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. The meeting of minds required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. (*Player v. Chandler*, 299 S.C. 101, 103 (S.C. July 31, 1989). Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. A typical contract contains

mutual promises and is created by an acceptance constituting a return promise by the offeree. A bilateral contract exists when both parties exchange mutual promises. Moreover, a contract only arises when there is an actual agreement by the parties in which the parties demonstrate a mutual intent to be bound. (Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 365 (S.C. Ct. App. February 2, 2004).

Under South Carolina law for parties to enter into a contract there must be an offer, acceptance, consideration, and a meeting of the minds as to the terms of the agreement. Here, Avanti's terms and conditions may rise to the level of an offer, however, it was never communicated to Wanderlove. Since Wanderlove was never made aware of the offer it can not agree to an offer which it had no knowledge of. Wanderlove never made any promise to perform and was not made aware of the terms and conditions until she had already made use of the website. Even after she had created an account and logged in to the agent portal she was never made aware of the terms and conditions or that use of the website constituted assent to the terms. Here, Wanderlove could never have agreed to the terms of the offer since she was never made aware of them. She also never expressly assented to the terms. Simple use of the website is not enough to symbolize an unconditional manifestation of assent to the terms of the agreement. However, even if the Courts found that Wanderlove's use of the website was an acceptance of the terms of the agreement the contract would still fail for a lack of the meeting of the minds. A meeting of the minds between the two parties cannot occur when one party is not aware of the terms and conditions of the contract. If the party is unaware of terms, they cannot be deemed to have assented to

the terms of the agreement and no contract can be found to have existed. Therefore, the contract is invalid for both a lack of acceptance and meeting of the minds in regards to the terms of the contract.

2. The Court has Subject Matter and Personal Jurisdiction over the claims and is the Proper Venue for the Claim to be filed in.

The claims at issue are not arising from a federal question or meet the jurisdictional requirements for diversity jurisdiction by federal Courts. State Courts are granted plenary jurisdiction over all claims not reserved for federal Courts. This is a breach of contract claim arising under state law and not meeting the requirements to be removed or filed in federal Court. Therefore, South Carolina Courts do have proper subject matter jurisdiction to hear this case.

South Carolina Courts have personal jurisdiction over the parties in the suit. The long arm statute of South Carolina must also be considered when seeing if the parties are subject to the Court's personal jurisdiction. Avanti is subject to South Carolina's law arm statute under section 36-2-8031(a). Avanti is transacting business with a person or entity located in South Carolina. By their own admission 2.2% of their business is derived from South Carolina so they must be doing business with South Carolina businesses or people. Here, Wanderlove is a South Carolina limited liability company and they have entered into a business transaction with them. Thereby, meeting the requirements for the long arm statute. Avanti is subject to specific personal jurisdiction in South Carolina because of their purposeful availment and minimum contacts with the state. To be subject to a state's personal jurisdiction the party must have contact with the state, the claims must arise from that contact, and it must be fair to that party to be

hailed into Court in that state. Avanti contacted South Carolina by doing business with people and companies located within the state. It has a regional manager who was hired to promote the business and generate sales in the state. Avanti also did business with these people and entities thereby availing themselves of the benefits of South Carolina and establishing a minimum contact with the state. The cause of action at issue here arose out of the business transaction that Avanti had established with a South Carolina company. It is a breach of contract action that arises from the proposed contract entered into between the parties. Since Avanti was doing business with people and entities located in South Carolina it is not unfair for them to be required to litigate this case in South Carolina. They purposefully targeted companies and people in South Carolina to do business with so they should be required to come to South Carolina to litigate the issue.

Subjecting Avanti to the personal jurisdiction of South Carolina must also meet the due process requirements set out by the US Constitution. In *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884-85 (Ct. App. 2004), the South Carolina Court of Appeals explained:

Under the power prong, a minimum contacts analysis requires a Court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Without minimum contacts, the Court does not have the "power" to adjudicate the action. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be hailed into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case. Under the fairness prong, we examine such

factors as the burden on the defendant, the extent of the plaintiff's interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies. Here both prongs are satisfied by Avanti's conduct with businesses in the state of South Carolina. As discussed above Avanti has met the requirements for showing purposeful availment and minimum contacts within the state. Under the fairness prong of the analysis, Avanti is again subject to South Carolina's personal jurisdiction. They have targeted South Carolina to do business within the state so the burden on them to come here for a cause of action arising out of those transactions cannot be a surprise or unfair to the defendant. South Carolina has a great interest in the litigation because it affects South Carolina businesses entering into business transactions with foreign companies. Looking at Avanti's conduct on the whole, they easily satisfy the requirements under the power and fairness prong for due process and will be subject to South Carolina's personal jurisdiction.

Avanti argues that South Carolina is an improper venue, Venue is proper where any defendant is located or where a substantial portion of the cause of action arose. Here, Wanderlove is located in South Carolina. The alleged contract that formed the basis for the breach of contract action was formed when Wanderlove made use of Avanti's website. That use was done in South Carolina. Therefore, a substantial portion of the cause in action arose in South Carolina and South Carolina is a proper venue for the case.

WHEREFORE, Wanderlove prays that the Court dismiss Defendant's motion for dismissal and allow the Plaintiff's claims to continue. Plaintiff also prays that the Court not compel arbitration and allow the claims to continue. The Plaintiff also prays for the

Court to award reasonable attorney's fees and other such relief as the Court may deem just and proper.

s/F. Craig Wilkerson, Jr.
F. Craig Wilkerson, Jr.
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STATE OF SOUTH CAROLINA
COUNTY OF YORK
WANDERLOVE TRAVEL, LLC,
Plaintiff,
v.
AVANTI DESTINATIONS, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2020-CP-46-01212

**MOTION TO ALTER OR AMEND
JUDGMENT**

The Petitioner, pursuant to South Carolina Rule of Civil Procedure 59(e), moves the court to alter or amend the order denying Defendant's Motion to Dismiss dated August 28, 2020.

I. There is an enforceable arbitration agreement, and the court must amend its judgment and grant Defendant's Motion to Compel Arbitration.

- a. Unless the parties have contracted otherwise, the Federal Arbitration Act ("FAA") applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce. *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)).
- b. Pursuant to the Federal Arbitration Act ("FAA"): 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, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2.

- c. To fall within the scope of the FAA, the transaction must involve “interstate commerce.” *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843 (1995).
- d. To determine whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. *See Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). The FAA has been broadly interpreted to mean Congress intended to utilize its power to regulate interstate commerce to its fullest extent.” *Id.*
- e. As set forth in Grundy’s Affidavit, the agreement in this case contains an enforceable arbitration clause. Grundy Aff. ¶¶ 2-3. Further, Grundy’s Affidavit sets forth this matter concerns interstate commerce between Avanti, an Oregon limited liability company, and Wanderlove, a South Carolina limited liability company. Grundy Aff. ¶ 17. The services Wanderlove procured on behalf of its customers included airline flights and hotel accommodations abroad. The undisputed facts of this case dictate interest state commerce is involved, and the FAA controls.
- f. Arbitration can be compelled by demonstrating (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal to the defendant to arbitrate the dispute.” *Poteat v. Rich Products Corp.*, 91 Fed.Appx. 832, 2004 WL

119363, *1 (4th Cir. 2004) (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002)).

- g. The FAA reflects a liberal federal policy favoring arbitration agreements. *Soil Remediation Co.*, 476 S.E.2d at 152 (citing *Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 124, 103 S. Ct. 927 (1983)).
- h. Due regard must be given to the federal policy strongly favoring arbitration, and ambiguities relating to the interpretation of an arbitration agreement must be resolved in favor of arbitration. *See Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 776 S.E.2d 91 (Ct. App. 2015).
- i. The Terms and Conditions provide “[a]ny controversy or claim arising out of, or relating to, these Terms of Use or the breach thereof...shall be settled by arbitration in accordance with the then-current rules of the American Arbitration Association.... The location of arbitration shall be Portland, Oregon, USA.” Grundy Aff. ¶ 15, Exhibit A.
- j. The entirety of Plaintiff’s claim is encompassed by the arbitration provision in the Terms and Conditions. The gravamen of Plaintiff’s complaint is an alleged failure by Avanti to return sums paid by Wanderlove’s customers. The Terms and Conditions expressly address the issues of deposits and refunds.
- k. The Court must give the arbitration clause its plain meaning, construe ambiguities in favor of arbitration as the FAA requires, and grant Avanti’s motion to compel Plaintiff to arbitrate this matter in Portland, Oregon.

2. Whether this claim is resolved by arbitration or litigation, the proper forum for resolving it is in Oregon, and this Court must amend its judgment and grant Defendant's Motion to Dismiss for improper venue.

- a. Forum selection clauses will be enforced unless unreasonable or unjust. *Republic Leasing Co., Inc. v. Haywood*, 329 S.C. 562, 495 S.E.2d 804, 807 (Ct. App. 1998), *vacated on other grounds* (citing *Scott v. Guardsmark Security*, 874 F.Supp. 117, 120 (D.S.C. 1995)).
- b. Here, the Terms and Conditions provide, in clear and unambiguous language, "[i]n the event of any unresolved claim or lawsuit, the parties agree to the sole and exclusive jurisdiction of the appropriate state or federal court sitting in Portland, Oregon, regardless of any conflicting law regarding venue or jurisdiction."
- c. The Terms and Conditions go on to provide "[a]ny controversy or claim arising out of, or relating to, these Terms of Use or the breach thereof...shall be settled by arbitration in accordance with the then-current rules of the American Arbitration Association.... The location of arbitration shall be Portland, Oregon, USA." Grundy Aff. ¶ 15, Exhibit A.
- d. Based on the clear and unambiguous language above, Wanderlove's complaint must be dismissed for lack of subject matter jurisdiction pursuant to South Carolina Rules of Civil Procedure 12(b)(1).

3. This Court does not have personal jurisdiction over the Defendant, and the Court must amend its judgment and grant Defendant's Motion to Dismiss.

- a. To exercise personal jurisdiction over a foreign corporation, the trial judge must determine (1) that the South Carolina long arm statute applies; and (2) that the corporation's contacts in South Carolina are sufficient to satisfy due process requirements. *Colite Industries, Inc. v. G.W. Murphy Const. Co., Inc.*, 377 S.E.2d 321, 297 S.C. 426 (1989) (citing *Atlantic Soft Drink Co. v. South Carolina National Bank*, 287 S.C. 228, 336 S.E.2d 921 (1974)).
- b. Here, the only likely application of the South Carolina long arm statute would be § 36-2-803(1)(g) – “entry into a contract to be performed in whole or in part by either party in South Carolina.”
- c. It is well-settled that “a contract is executed when the last act necessary for its formation is done and at the place where the final act is done.” *Aviation Associates and Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 179, 303 S.C. 502 (1991) (finding the long arm statute did not apply where a South Carolina corporation sent a purported contract to an Oklahoma corporation and the Oklahoma corporation's agent signed the purported contract in Oklahoma, completing the act of contracting in Oklahoma).
- d. In *Fields v. INA Filtration Corp.*, 358 S.E.2d 160, 292 S.C. 614 (Ct. App.), the court found § 36-2-803(1)(g) applied where a German national was sued in South Carolina in a dispute over amounts owed under stock option agreement. The German national was the CEO of the company who issued the stock option agreement. *See id.* The Court relied on the facts the stock option agreement was

- actually signed in South Carolina, the stock option agreement contemplated the sale and transfer of stock in South Carolina, the stock was issued in South Carolina, the physical stock shares were kept in South Carolina, and the tender of repurchase as issue was made in South Carolina. *Id.*, 358 S.E.2d at 162.
- e. In the present case, all actions necessary to form the contract at issue were directed towards or occurred in Oregon. *Grundy Aff.* ¶¶ 18, 19, 20. Wanderlove's complaint makes no allegations Avanti made any targeted effort to solicit Wanderlove in South Carolina. *Grundy Aff.* ¶ 8. Avanti did not solicit Wanderlove's business in South Carolina. Rather, Wanderlove affirmatively sought Avanti's service through Avanti's website. *Grundy Aff.* ¶ 20. Wanderlove directed its actions to Oregon, where Avanti accepted Wanderlove's offer and agreed to provide services. Based on the above, the South Carolina long arm statute does not apply, and Wanderlove's claims must be dismissed for lack of personal jurisdiction.
- f. Nor does the exercise of personal jurisdiction over Avanti in South Carolina comport with due process.
- g. South Carolina treats its long-arm statute as coextensive with the due process clause of the Constitution, the sole question becomes "whether the exercise of personal jurisdiction would violate the strictures of due process." *Hirida, USA, Inc. v. Delo*, 415 S.C. 533, 541, 783 S.E.2d 839, 843 (Ct. App. 2016).
- h. Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional

- notions of fair play and substantial justice. *Id* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174 (1985)).
- i. In South Carolina, the determination of whether the requirement of due process are satisfied involves a two-prong analysis: (1) the “power” prong, under which minimum contacts grant a court the “power” to adjudicate the action; and (2) the “fairness” prong, which requires the exercise of jurisdiction to be “reasonable” or “fair.” *Id* (citing *S. Plastics Co. V. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)). In *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884-85 (Ct. App. 2004), the South Carolina Court of Appeals explained:
 - j. Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities.
 - k. Under the fairness prong, we examine such factors as the burden on the defendant, the extent of the plaintiff's interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies.
 - l. All actions necessary to form the contract at issue were directed towards or occurred in Oregon. *Grundy Aff.* ¶¶ 18, 19, 20.
 - m. Wanderlove's complaint makes no allegations Avanti made any targeted effort to solicit Wanderlove in South Carolina. To the contrary, the affidavit of Mark Grundy, CEO of Avanti, provides the exact opposite. *Grundy Aff.* ¶ 8. Avanti did not solicit Wanderlove's business in South Carolina. Rather, Wanderlove

affirmatively sought Avanti's service through Avanti's website. Grundy Aff. ¶

20. Wanderlove does not maintain offices or employees in South Carolina.

Grundy Aff. ¶¶ 4, 5.

- n. The vast majority of the pertinent witnesses and evidence are located in Oregon, creating a substantial burden on Avanti in defending the action in South Carolina. Further, South Carolina has little, if any, interest in adjudicating a dispute involving a corporation organized and headquartered in Oregon.
- o. Because neither the power nor fairness prongs are satisfied, this court must dismiss Wanderlove's claims for lack of personal jurisdiction.

WHEREFORE, because the applicable statute envisions partition under the facts presented in the case at bar, and because the balance of equities favor partition, Petitioner moves this court to alter its judgment of June 24, 2020 and deny Respondents' motion to dismiss.

Respectfully submitted,

s/ J. Nathaniel Pierce
Morton & Gettys, LLC
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September 7, 2020
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
York County Civil Action Number 2020-CP-46-01212

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate No. _____

Wanderlove Travel, LLC Respondent,

v.

Avanti Destinations, LLC, Appellant.

NOTICE OF INTENT TO APPEAL

Appellant appeals the Order of Judgment of the Honorable Daniel D. Hall, dated September 25, 2020. Appellant received an electronic copy of the Form-4 Order on Friday, September 25, 2020, making Monday, October 26, 2020 the last day for filing the Notice of Intent to Appeal.

Respectfully Submitted,

By: s/J. Nathaniel Pierce
Morton & Gettys, LLC
J. Nathaniel Pierce, S.C. Bar No. 102803
Attorney for Appellant
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nate.pierce@mortongettys.com

October 20, 2020
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK	)	CASE NO.: 2020-CP-46-01212
)	
Wanderlove Travel, LLC.,)	
)	
Plaintiff(s),	)	Affidavit of Rachelle Settle
)	
)	
Avanti Destinations Inc.,)	
)	
Defendant(s).)	
_____)	

PERSONALLY APPEARED BEFORE ME, Rachelle Settle, who first being duly sworn deposes and says:

- 1) My name is Rachelle Settle. I am a licensed travel agent in South Carolina and use multiple travel sites to book trips for my clients.
- 2) The cause of this action is for the failure of Avanti Destinations, LLC to refund the travel money paid by 7 of my clients after Avanti Destinations, LLC cancelled the trips due to the widespread pandemic caused by COVID-19. My understanding is the other vendors have refunded the money to Avanti Destinations, LLC, and Avanti is refusing to refund the money to Wanderlove nor the clients but instead is keeping it.
- 3) I made multiple attempts to contact Avanti Destinations to resolve this problem without the need for a lawsuit. At no point could myself or my attorneys get any response from Avanti Destinations.
- 4) Avanti refused to cooperate or respond to any demands to return the money until a lawsuit was filed against. At that point in time, I was made aware of the terms and conditions,
- 5) Until Avanti responded to the lawsuit, I was unaware that I may be liable for any attorney's fees incurred by Avanti in the defense of this suit. I filed suit simply to get a response in an effort to have my client's money refunded to them.
- 5) The Avanti website does not display the terms and conditions or direct users to a page that shows them when first viewing the website.
- 6) The travel agent must create an account to use the features of the website and to be able to book trips for their clients. The website will direct the user to

create or log in to an account before being able to make use of the website's features.

7) The website will require the travel agent to enter all the information required to create an account. Once the information is entered and the account created, the website sends an automated email to the account holder. (Exhibit 1). At no point in this process, is a user, nor was I, directed to the legal page that Avanti has attached to their motion. Prior to that page being provided to my lawyers, I had never seen that page before not any of the terms included therein. A copy of that page is attached hereto as Exhibit 3.

8) When the user logs into their account for the first time they are not directed to the legal tab to view the terms and conditions. The website never makes the user aware of the existence of the terms of the conditions. It never directs the user to view the terms and conditions or require the user to view them before utilizing the website. (Exhibit 2)

9) I never saw, was directed to, or was made aware of the existence of the Terms and Conditions during the course of the 4 years I have used Avanti Destinations. The first time I became aware of it was when Avanti's lawyer provided it to my lawyer.


10) The terms could not be a clickwrap agreement because I was never instructed to or required to click to agree to any contract for the use of the website.

11) At no point was I made aware that the use of the website constituted an acceptance of the Terms and Conditions.

12) If I had been made aware of the Terms and Conditions I would not have continued to use Avanti Destinations to book travel for my clients. I would not have agreed to the Terms and Conditions if I had been given the opportunity to read them. I have never intentionally agreed to these terms because I have never known of them.

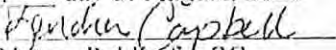
13) In the email confirmation itinerary that Avanti used in all of my dealings with them, Avanti never addressed the terms and conditions included in Exhibit 3. I have used the website for at least 4 years at this point and was never made aware of the terms and conditions for the use of the website.

FURTHER AFFIANT SAITH NOT


Rachelle Settle

SWORN BEFORE ME THIS

19th day of August, 2020


Notary Public for SC

My Commission Expires: 2/10/30

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND
CORRECT.

ELECTRONICALLY FILED - 2020 Aug 19 4:24 PM - YORK - COMMON PLEAS - CASE#2020CP4601212

Exhibit 1



Thanks for registering and joining the Avanti team!

Our Agent Portal has been designed to specifically help you and your clients. Once you have [logged in](#), you may plan and book complete vacations as well as manage all your bookings, access agent resources and more. We have several tutorials that give you an overview of the site listed on our home screen, and if you would like a more in-depth walk through of the portal, you can request individual web training help. You can also chat with our A&A team from 8:00am - 6:00pm PT by using the Live Chat icon on the bottom right corner. If you need help navigating the site, or have general questions regarding our policies or procedures.

The Avanti Destinations A&A Team

Avanti Destinations

111 SW Columbia St., Suite 1000 | Portland, OR 97201

T: 503.298.1000 F: 503.432.9815

agents@avanti.com

www.avantivacations.com

[LinkedIn](#) [Twitter](#) [Facebook](#)

Be Social on [Facebook](#) Follow us on [Instagram](#)

Exhibit 2



- New Guide (Guided Mode)
- New Guide (Agent Mode)
- Recommended Locations
- Local Attractions
- Virtual Walking Tours
- Hotels & Local MTE
- Submit a Guide (New & Existing Agents)



- List My Bookings
- Display A Booking
- Apply Payment
- To Travel Issues
- Post Travel Claims
- Request A Change
- Submit A Special Mobility Form



- Country Codes
- State & Territories
- Travel Documents
- Destination Requirements & Documents
- Special Mobility Issues Form
- DMT Visa
- Request Travel Documents
- FMS FAQs
- Webinars & Tools
- Travel



- My Profile
- My Profile
- Change Password
- Manage Agents (Manager only)
- ACH Request Form (MS Agent only)



- Agency Profile
- My Profile
- Change Password
- Manage Agents (Manager only)
- ACH Request Form (MS Agent only)



- Client Management Plan
- Terms and Conditions
- Privacy Policy

Exhibit 1



Thanks for registering and joining the Avanti team!

Our Agent Portal has been designed to specifically help you and your clients. Once you have logged in, you may plan and book complete vacations as well as manage all your bookings, access agent resources and more. We have several tour and guide previews of the site listed on our home screen, and if you would like a more in-depth walk through of the portal, you can request individual web training here. You can also chat with our help team from 9:00am-4:00pm ET by using the live chat icon in the bottom right corner. If you need help navigating the site, or have general questions regarding our policies or procedures.

The Avanti Destinations App Team

Avanti Destinations

1000 Columbia St., Suite 1000 | Portland, OR 97201

Toll-free 1-800-432-6500

agent@avantiexcursions.com

www.avantiexcursions.com

Follow us on Facebook

Be Social on Facebook Follow us on Instagram

Exhibit 2



- New Destinations Menu
- New Destinations Expert Module
- New Recommended Locations
- Local Attractions
- Local History & Events
- Local Area Attractions
- Local Area Attractions



- List My Bookings
- Display A Booking
- Apply Payment
- Travel Itinerary
- Post-travel Items
- Request A Change
- Submit A Special Mobility Form



- Country Sheets
- City by City Itineraries
- Travel Documents
- Transportation and Safety Information
- Special Mobility Request Form
- Gift Ideas
- Frequency Asked Questions
- FAQs
- Web Resources
- Training



- Local Attractions



- Agency Profile
- Your Profile
- Change Password
- Manage Account Information
- Account Request Form (Management)



- City Management Tools
- Terms and Conditions
- Privacy Policy

TERMS AND CONDITIONS OF SALES

The following Terms and Conditions of Sales apply to all transactions, the traveler agrees to be bound by such Terms, and Conditions of Sales when traveler accepts the arrangements provided to traveler by payment of the booking deposit.

1. GENERAL TERMS AND CONDITIONS

1.1 Traveler Information

A traveler's full passport name, date of birth, and gender are required to create a quote, as well as to hold airline space. Failure to provide correct passport names may result in the loss of airline space, and any penalties associated with incorrect names are not the responsibility of Avanti Destinations or the airlines.

Name corrections may not be possible on some carriers and, if possible, may require a fee or a complete cancellation and rebooking.

Avanti Destinations urges travelers to provide a mobile telephone number that may be used in case of emergency during travel.

Please see Section 5 for important information regarding travelers with Special Mobility Needs.

1.2 Passport Information

Passport number, expiration date, and date of birth may be required to confirm services.

1.3 Passport/Visa/Health

It is the traveler's responsibility to obtain a valid passport and any necessary visa and health documentation required by the country/countries they wish to enter or transfer through. Passports must be valid for six (6) months after the U.S. departure date. Avanti Destinations accepts no responsibility for cancellations due to the lack of proper travel documentation, passport validity, or immunizations.

1.4 Discrepancies

It is the responsibility of the traveler to ensure all arrangements are booked as requested and that the itinerary contains no errors. Avanti Destinations accepts no responsibility for discrepancies between oral quotes/information and written quotes/information. After deposit has been made, Avanti Destinations consider all information contained on the itinerary to be correct. All fees are the responsibility of the travel agent or traveler. Fees will apply up to the full amount paid.

1.5 Exceptions

Any exception/waiver to these Terms and Conditions is not valid unless given in writing by Avanti Destinations.

1.6 Responsibility

Avanti Destinations is the tour operator. Avanti Destinations, its agents, and representatives act as agents only for purchasers of these packages in making and securing all arrangements for transportation, sightseeing, hotel accommodations, and other services related to the program based solely on information provided to Avanti Destinations at the time of package purchase. Avanti Destinations is not responsible for errors and omissions contained in its brochures, on-site conditions or actions of the package providers, health conditions or events of the traveler(s), nor is it liable for acts of God, fires, acts of government and other authorities, wars, civil disturbances, riots, terrorist acts, strikes, thefts, incidents at sea, land or air travel, and other similar acts or incidents beyond its ability to control.

2. PAYMENT POLICY AND DEPOSIT INFORMATION

2.1 Fares and Rates

Exhibit 3

All prices expressed on this website are in U.S. dollars and are subject to change without notice. Rates are guaranteed once full payment is received. All rates are subject to change until paid in full.

2.2 Reservations

Reservations should be made as early as possible to assure confirmation of selected travel components. Reservations for travel components (air, hotels, car rentals, tours, rail, etc.) are subject to availability. Should circumstances beyond our control make changes necessary, we reserve the right to vary itineraries and/or inclusions or to substitute hotels of similar standard. Avanti Destinations accepts no responsibility for any increased cost incurred by such substitutions once accepted by the Travel Agent.

2.3 Deposits

For bookings made more than 74 days prior to departure, a mandatory land deposit of \$250.00 per person is due within 7 days after the booking date to activate the booking and to avoid cancellation. Additional deposits may be required for certain products and will be indicated on the initial quote. By providing the deposit, you are agreeing to these Terms and Conditions. Avanti Destinations reserves the right to treat any booking as cancelled by you if the balance is not paid by the option period specified on the booking invoice.

2.4 Final Payment

Full payment is due 45 days prior to the U.S. departure date, unless otherwise indicated. Avanti Destinations reserves the right to cancel a booking if full payment is not received on time.

Bookings made less than 45 days prior to departure require full payment to activate the booking. Please note, any payment constitutes acceptance of the itinerary and our Terms and Conditions.

A special handling fee of \$35.00 will be assessed to any booking made 21 days or less from the U.S. departure date in addition to the \$45.00 Design, Document, and Delivery Fee. Reservations must be made at least 7 days prior to U.S. departure.

Please note there are no Saturday or Sunday deliveries of physical documents.

2.5 Refund Applications

Subject to Section 1.6, application for a refund of purchased travel components must be requested in writing to Avanti Destinations' Customer Relations department within 30 days of the traveler's return to the U.S. Supporting documentation may be requested to process post-travel claims. For more information, please visit the [claims](#) section of our website to submit your client's refund request.

3. CANCELLATION AND REFUND POLICY

3.1 Changes and Cancellations

Avanti defines Changes and Cancellations as the following:

Change

When a land service changes dates or when the number of travelers booked on that service changes, this constitutes a Change. If land services are changed after the initial deposit is received, a revision fee of \$50.00 per booking will be charged, in addition to any other noted penalties. Any confirmed services that are completely removed from the booking are subject to the penalties below. Further, the substitution of travelers on bookings that are under payment shall be charged a non-refundable \$250.00 per-person deposit.

Cancellation

When a traveler is completely removed from a reservation or when the booking is cancelled in full, this constitutes a Cancellation. Cancellation fees are based on the U.S. departure date and the type of service, not the date of service. Each service may have its own additional fees.

Requests to remove travelers from a booking, or to cancel bookings in full, must be received in writing by Avanti Destinations' Cancel Requests department at cancelrequests@avantidestinatons.com before action will be taken. This written notice must be received by 4:30 p.m. Pacific Time (Monday - Friday) in order to be recorded as cancelled for that date. You will receive an acknowledgement of the cancellation request via email by the end of the next business day.

Land Service Penalties

<u>Days from Departure</u>	<u>Fee Per Person</u>	<u>Fee Per Service</u>
Prior to full payment	Full deposit	Plus restrictions below
60 to 11 days prior to departure	Full deposit	30% of gross land total plus restrictions below
10 to 1 day(s) prior to departure	Full deposit	100% non-refundable
Day of departure, No Shows, and during travel	Full deposit	100% non-refundable

3.1.2 Air Cancellations

Upon receipt of full air payment, airline tickets are issued, and penalties apply for any change or cancellation. Total air fees are dependent upon the type of fare purchased. All air tickets are non-refundable/non-changeable within 24 hours of departure.

Name changes/corrections are considered full cancellations and will be subject to the same cancellation penalties. Any penalties associated with incorrect names are the full responsibility of the traveler and are not the responsibility of Avanti Destinations. In limited cases where a name correction is feasible, a \$100.00 fee per name-correction will be assessed.

Air Penalties

<u>Fare Type</u>	<u>Fee Per Ticket</u>
Contract Economy/Premium Economy	\$400
Contract Business/First	\$1,000
Published (All Cabins)	Non-refundable

3.1.3 Cruise Cancellations

Cancellation policies for cruises vary by cruise line and may be more stringent than those imposed by Avanti Destinations. You will be advised of the cancellation penalties at the time of booking. Please note most cruises are non-refundable.

3.1.4 Rail Cancellations

Upon receipt of full rail payment, rail passes and any tickets and seat reservations that are currently loaded, ready for confirmation by the various national rail agencies, are confirmed and issued. Rail products can only be ticketed when loaded for international issue by the appropriate rail agency for that country. Once payment is made for the rail, and it is available to ticket, if the price of the ticket increases, Avanti will contact the Travel Agent for approval to charge the new price and issue the tickets. All rail pricing is subject to change until ticketed, and all rail is non-refundable once issued.

3.1.5 Additional Cancellation Fees

Some of the properties and services offered by Avanti Destinations have their own cancellation fees. These fees are in addition to any cancellation fees imposed by Avanti Destinations and may not always be disclosed by the property or service provider until the time of cancellation. Any pre-determined fees of which Avanti Destinations is advised in advance will be noted with that property or service on your invoice. All cancellation fees are the sole responsibility of the traveler.

3.1.6 Deposits

All deposits are non-refundable and non-transferable.

3.1.7 Date of Departure

The date of departure is defined as the date on which the traveler is originally scheduled to leave from North America on their trip.

3.2 Refunds

No refund claim will be considered or pursued and no action will be taken by Avanti Destinations unless notice of claim is received in writing to Avanti Destinations' Customer Relations department within 30 days of the traveler's return to the U.S. Supporting documentation may be requested to evaluate any post-travel claims subject to Section 1.6 (the use of traceable mail is strongly recommended). For more information, please visit the [claims](#) section of our website to submit your client's refund request.

No refunds will be granted for unused land arrangements once the trip has commenced. Refund decisions are determined by Avanti Destinations per the signed contract existing between Avanti Destinations and the supplier(s). No refund determination can be made by anyone other than Avanti Destinations. Refunds can only be made to the same form of payment originally used, and only up to the amount originally charged. Refunds for payments made by one person cannot be made to another person.

4. ACCOMMODATIONS

*Note traveler responsibility under Sec. 1.4 and Sec 1.6 to review and confirm all arrangements.

4.1 Hotels

Hotel rates found on this website include (unless otherwise stated): accommodations with private bath or shower, continental breakfast, hotel taxes, and general service charges. Local municipal city taxes may be additional in some cities/resorts and must be paid locally by the traveler.

Hotel rates do not include any expenses of a personal nature or any incidental charges. Room assignments are at the discretion of the hotel management, and specific requests cannot be guaranteed. Avanti Destinations guarantees room types that have appropriate bedding for the number of guests requested per room. We do not guarantee a specific bed type.

4.2 Check-In

Check-in cannot be guaranteed prior to 4:00 p.m. Departure is normally required by 10:00 a.m.

4.3 Air Conditioning

Avanti Destinations is not responsible for air-conditioning standards or availability, as these factors can vary greatly between properties and countries. Please note hotels in Europe typically do not offer the type of air conditioning to which we in the U.S. are accustomed. Rather, they have a "climate control" system that keeps temperatures within a comfortable range. Therefore, the indoor environment may not be as cool as guests prefer, especially during periods of high outdoor temperatures.

5. SPECIAL MOBILITY NEEDS

Requests for special accommodations and services to meet specific physical requirements - such as wheelchair-accessible rooms, tours, or transfers - must be made at the time of booking (prior to the payment of deposit) and require the submission of a completed [Special Mobility Needs Form](#) detailing the limits of mobility and a description of any mobility-assistance devices. Failure to correctly submit this information may result in a disruption of service and/or increased cost to the traveler. Please note accommodation- and service requests are subject to availability and cannot be guaranteed. Further, Avanti Destinations

4

cannot accept responsibility for the standards of the facilities requested, as they can vary between properties.

6. TRANSPORTATION

6.1 Airline Tickets

Tickets purchased from Avanti Destinations carry restrictions and penalties for any change, however slight. Not all fares allow mileage upgrades or mileage credit. Airline tickets are non-endorsable, non-transferable. An Itinerary is sent immediately from Avanti Destinations so that all information can be checked before payment is made and tickets are issued. Prior to payment and issuance, all airfares are subject to change without notification, and any increase in cost is the responsibility of the traveler. Once payment is made, Avanti Destinations considers the information contained on the itinerary to be correct, and any fees associated with changes or cancellation are the responsibility of the travel agent or traveler.

6.2 Airline Schedule/Equipment/Seat Assignment Changes

Airlines reserve the right to change schedules, equipment, or routings at any time. Avanti Destinations will automatically pre-assign seats where possible at the time of initial booking. However, advanced seat assignments may not be available on certain flights, can be changed or cancelled by the airline at any time, and never can be guaranteed by Avanti Destinations. It is the traveler's responsibility to contact the airline 72 hours prior to departure and on the day of departure to reconfirm their flights. Any traveler who misses their flight due to a schedule change will not be reimbursed by Avanti Destinations for expenses resulting from a missed flight. Schedule changes may result in lost seat assignments, including upgraded seats and cabins.

Avanti Destinations reserves the right to accept on the travel agent or traveler's behalf any change of schedule within 15 minutes of the originally quoted departure time. Schedule changes greater than 15 minutes will be deferred to the agent and must be accepted before tickets are issued/reissued.

6.3 Airline Baggage Allowance

The number of pieces and the weight of each piece of baggage, whether checked or personally carried onto the plane, varies depending on the airline and the cabin booked. It is the traveler's responsibility to contact the airline directly to inquire about their specific baggage allowance.

6.4 Air Fares

Fares and schedules are based on regular scheduled carrier service. All applicable airline rules apply, and schedules are subject to change. Basic airfares do not include fuel surcharges, airport departure taxes, passenger facility charges (PFCs), Customs or immigration fees, and excess baggage charges. Contract air fares require a land minimum of \$250 for economy/economy plus or \$1,000 for business/first class in conjunction with the airline ticket. This land minimum is total for the reservation and travel protection does not qualify towards the land minimum requirement. For mileage accrual information, please contact the carrier directly for details.

6.5 Transfers and Baggage

Porterage and baggage handling are not included with transfers unless specifically stated on the transfer voucher. Baggage allowance is limited and varies by country and vehicle type. In general, one (1) medium-sized suitcase and one (1) personal item per person are allowed, and the personal item should fit on the traveler's lap. A larger vehicle must be booked in advance for oversized bags and additional baggage. Failure to do so may result in additional local charges or the cancellation of service with no refund.

6.6 Car Rental

Drivers must be at least 25 years of age; a maximum age may apply, subject to car rental company rules. Basic car rental rates include unlimited mileage and VAT (value added tax).

5

Rates do not include tolls, gasoline, additional driver surcharge, overtime charges, or VAT on additional items that are paid, agreed to, and/or accepted locally. Specific car models cannot be guaranteed. Airport surcharges and one-way drop-off fees may apply when picking up a vehicle in one location and returning it to another.

6.7 Rail Tickets and Passes

Avanti Destinations reserves the right to accept on the travel agent or traveler's behalf any change of schedule within 15 minutes of the originally quoted departure time. Schedule changes greater than 15 minutes will be deferred to the agent and must be accepted before tickets are issued.

Avanti Destinations is not responsible for rail passes, train tickets, or vouchers which are lost, stolen, mutilated or destroyed. Refunds cannot be authorized in such cases. To protect yourself against such losses, please refer to the optional Rail Protection Plan.

7. TRAVEL DOCUMENTS

Travel documents are sent approximately 4 weeks prior to departure if full payment has been submitted and processed. Avanti Destinations is not responsible for lost or stolen documents; therefore, any re-issuance of documents may be assessed at their full face value and may include an increase in cost.

Expedited delivery requests will be accepted until 2:00 p.m. Pacific Time, Monday - Friday. Saturday and Sunday deliveries are not currently possible.

Travel documents are mailed to the agency of record's street address. Avanti Destinations must be notified 60 days in advance of the travel date if travel documents should be mailed to a different street address, such as the agent's home office or directly to the traveler.

7.1 Traveler Information and Passport/Visa

The traveler's full passport name, passport number, date of birth, and gender are required to hold airline space. Failure to provide correct passport names may result in the loss of airline space, and any penalties associated with incorrect names are not the responsibility of Avanti Destinations or the airlines. The traveler assumes complete and full responsibility for, and hereby releases Avanti Destinations from, any duty of checking and verifying any and all passport, visa, vaccination, or other entry requirements for each destination. Passport number, expiration date, gender, mobile phone number, and date of birth may be required to confirm services. Please note most countries require at least six (6) months remaining passport validity at the time of travel.

To facilitate communication during travel, Avanti Destinations urges our clients to provide the traveler's mobile telephone number that may be used during travel in case of emergency.

8. TRAVEL PROTECTION

Avanti Destinations is not responsible for missed or unused services for reasons including, but not limited to, flight delays, weather, traveler injuries or illness, strikes, or other unforeseen circumstances. Avanti Destinations strongly encourages all travelers to purchase travel protection or other qualified travel insurance. If you have purchased travel protection, please refer to your plan information for all plan details.

9. RESPONSIBILITY

Avanti Destinations and its directors, officers, employees, independent contractors, agents, and suppliers act only as agents for the traveler in making arrangements for hotels,

transportation, sightseeing, restaurants, or any other service described in this website. The individual traveler and/or purchaser, by acceptance of the travel documents, agrees that Avanti Destinations and its directors, officers, employees, independent contractors, agents, or suppliers shall not be liable for any injury, damage, loss, accident, delay or irregularity, liability, or expense to person or property due to any act or default of any hotel, carrier, restaurant, company, or person providing or rendering any of the services included in the itinerary. The tickets, coupons, tariffs, rules, or contracts currently in use by any carrier, hotel, restaurant, or any other contractor providing service shall constitute the sole contract between such contractor and the traveler. Avanti Destinations and its directors, officers, employees, independent contractors, agents, and suppliers accept no responsibility for any damage, delay or irregularity, expense, or liability arising from sickness, pilferage, labor dispute, machinery breakdown, quarantine, government restraints, war, act of terrorism, weather conditions, defect in any vehicle of transportation, or for any misadventure or causality or any other cause beyond their control. Any and all losses and expenses will be borne by the traveler, the tour rates being only for the time period and places specified. All accommodations, services, and facilities are subject to the laws of the countries in which these accommodations, services, and facilities are provided. Avanti Destinations reserves the right to cancel or change itineraries and substitute services without notice and to decline to accept or retain any traveler at any time.

10. USTOA \$1 MILLION TRAVELERS ASSISTANCE PROGRAM

Avanti Destinations' coverage available under the USTOA \$1 Million Travelers Assistance Program, as an Active Member of the USTOA, is required to post \$1 million with USTOA to be used to reimburse, in accordance with the terms and conditions of the USTOA \$1 Million Travelers Assistance Program, the advance payments of Avanti Destinations' clients in the unlikely event of Avanti Destinations' bankruptcy, insolvency, or cessation of business. The \$1 million posted by Avanti Destinations may be sufficient to provide only a partial recovery of the advance payments received by Avanti Destinations. More details of the USTOA Travelers Assistance Program and a list of affiliates may be obtained by writing to USTOA at 345 Seventh Avenue, Suite 1801, New York, New York 10001, emailing information@ustoa.com, or by visiting www.USTOA.com.

11. WEBSITE TERMS OF USE

The following Terms of Use should be read carefully before using this website, as use of this website signifies agreement to these Terms of Use. Do not use this website if you do not agree with the Terms of Use. Avanti Destinations reserves the right, at its discretion, to change, modify, update, add, or remove all or any portion of these Terms of Use at any time and without notice. Your continued use of this website signifies agreement to those changes.

11.1 Restrictions on Use of this Website

This website is owned and operated by Avanti Destinations. Materials on this website are protected by copyrights owned by AvantiDestinations.com or other parties who have consented to their use by Avanti Destinations. The materials on this website may not be copied, reproduced, republished, uploaded, posted, or transmitted in any way, except that one (1) copy of the materials may be downloaded on any single computer for your personal, noncommercial use only. Use of these materials, including their modification for any other purpose, may constitute a violation of patent, copyright, trademark, and/or other intellectual property laws.

11.2 Responsibility of the User

By using this website, you agree to be financially responsible for all transactions made using your login information, and you represent that you are of legal age to make such legally binding obligations.

11.3 Disclaimer

Avanti Destinations and its providers and distributors provide this website and materials on an "as is" basis and specifically disclaim all warranties of title, merchantability, fitness for a particular purpose, and non-infringement. Avanti Destinations makes no representation or warranty that such information is complete or accurate or that the services provided by Avanti Destinations will be timely, secure, error-free, or uninterrupted. Avanti Destinations will not be liable for any damages or injury resulting from the user's reliance on any information provided in this website.

11.4 Indemnity

By using this website, you agree to indemnify Avanti Destinations and its officers, directors, employees, independent contractors, agents, and suppliers from and against any liability, damage, costs, or expenses, including reasonable attorney fees that Avanti Destinations may incur as a result of your use of this website or the user's breach of these Terms of Use.

11.5 Limitation of Liability

Avanti Destinations will not be liable for any damages to your computer nor for viruses or other data-corruption problems that may affect your computer equipment or other property on account of access to, or use of, this website or the downloading of any materials, data, text, images, video, or audio from this website. In no event will Avanti Destinations be liable for any injury, loss, claim, damage, or any special, punitive, indirect, incidental, or consequential damages of any kind, whether based on contract, tort, strict liability, or otherwise, that result from the use of, or the inability to use, the materials on this website, even if Avanti Destinations has been advised of the possibility of such damages. In no event will Avanti Destinations, if found liable for damage or loss in any way related to the aforementioned uses of this website and/or its content, be liable for any amount that exceeds the amount, if any, that has been paid by you to access the website.

11.6 Privacy

By accepting these Terms of Use, you expressly consent to certain disclosures of your personally identifiable and other personal information and to use of your information by Avanti Destinations and third parties, as explained in Avanti Destinations' then-current Privacy Policy, which is incorporated herein by reference. Avanti Destinations' current Privacy Policy is available by clicking [here](#).

11.7 Links

This website contains links to other websites. Avanti Destinations is not responsible for the content of any other website and makes no representation or warranty regarding any other website, nor does its linkage constitute an endorsement by Avanti Destinations. Please be aware that access to these websites is at your own risk.

11.8 Entire Agreement

These Terms of Use constitute the entire agreement between you, the user, and Avanti Destinations with respect to this website and supersede any and all prior agreements, in any form, between you and Avanti Destinations.

11.9 Assignment

You may not sell, transfer, assign, license, or convey in any way your rights or obligations under these Terms of Use.

11.10 Severability

If any section or provision of these Terms of Use is found to be unlawful or unenforceable for any reason, the rest of these Terms of Use will not be affected and will remain valid.

11.11 Applicable Law

The law of the State of Oregon shall govern these Terms and Conditions and any travel packages or arrangements provided by Avanti Destinations to the traveler. In the event of any unresolved claim or lawsuit, the parties agree to the sole and exclusive jurisdiction of

the appropriate state or federal court sitting in Portland, Oregon, regardless of any conflicting law regarding venue or jurisdiction. The prevailing party in any such claim or lawsuit shall be entitled to receive all costs and reasonable attorneys' fees, including on any appeals.

11.12 Arbitration

Any controversy or claim arising out of, or relating to, these Terms of Use or the breach thereof, with the exception of injunctive relief sought by Avanti Destinations for any violation of Avanti Destinations' proprietary rights, shall be settled by arbitration in accordance with the then-current rules of the American Arbitration Association. Before entering into arbitration, the parties shall each appoint an arbitrator, and these two arbitrators shall select a third arbitrator to be a member of the panel. Should the two arbitrators not be able to agree on a choice of the third, then the American Arbitration Association shall make the appointment of a person who is neutral to the parties. None of the arbitrators shall be officers or employees of the parties to these Terms of Use. Such arbitrators shall be experts in the computer/information technology field. The cost of arbitration, including fees per arbitrator, shall be borne equally by the parties. The location of arbitration shall be Portland, Oregon, USA.

11.13 Additional Terms

You may be subject to additional terms and conditions based upon reservations and purchases of goods or services and agree to be bound by such other terms and conditions.

11.14 Copyright and Trademark Notices

All content on this website is: ©Avanti Destinations 2017. All rights reserved.

If you are a copyright owner who believes that certain content available on Avanti Destinations' website infringes your copyright, please see our Copyright Dispute Resolution Mechanism by clicking [here](#). Avanti Destinations.com is a trademark of Avanti Destinations, Inc. Other product and company names mentioned herein may be the trademarks of Avanti Destinations, Inc., or their respective owners.

11.15 Further Information

This website is owned and operated by:

Avanti Destinations
111 SW Columbia St.
Suite 1200
Portland, OR 97201.

For further information about Avanti Destinations, please click [here](#), or call (503) 295-1100.

12. STATE OF CALIFORNIA SELLER OF TRAVEL

Avanti Destinations California Seller of Travel number: CST: 2005018.

13. COPYRIGHT DISPUTE RESOLUTION MECHANISM

Pursuant to the Digital Millennium Copyright Act, Title 17, United States Code, Section 512(c)(2), copyright owners or their authorized agents may submit a complaint of alleged copyright infringement to Avanti Destinations if they have a good-faith belief that their protected works are being infringed. Avanti Destinations will respond to all such notifications that are sent to:

Legal Department
Avanti Destinations
111 SW Columbia St.
Suite 1200
Portland, OR 97201
(503) 295-1100 phone

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To be effective, the notification must be a written communication that includes: A physical or electronic signature of a person authorized to act on behalf of the owner of a right that is allegedly infringed; Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single website are covered by a single notification, a representative list of such works at that website; Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted; A statement that the complaining party has a good-faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. Upon receipt of such notification, Avanti Destinations shall promptly investigate the matter, and, if appropriate, remove or disable access to the allegedly infringing material.

After Avanti Destinations removes or disables access to such material, Avanti Destinations will notify the party that posted the material of its action. Such party may then provide Avanti Destinations' designated agent proper "counter-notification" stating his, her or its authority to post the allegedly infringing material, which Avanti Destinations will forward to the alleged copyright owner. Avanti Destinations will inform the alleged copyright owner that Avanti Destinations will repost the removed material or cease disabling access to it in ten to fourteen business days unless the alleged copyright owner sends a second notification to Avanti Destinations' designated agent stating that it has filed suit against the alleged infringer. An effective counter-notification must be sent to Avanti Destinations' designated agent, whose name and address are listed above. The notice must include the following information: The counter-notifying party's physical or electronic signature; Identification of the material that has been removed or disabled and the location where the material was before its removal or disablement; A statement, under penalty of perjury, that the party has a good faith belief that the material was removed or disabled as a result of mistake or misidentification; and The counter-notifying party's name, address, phone number, and a statement that the party consents to the jurisdiction of the federal court in its district, or if the subscriber is foreign, it consents to any jurisdiction where EuroVacations.com is subject to jurisdiction, and that the subscriber will accept service of process from the person who provided Avanti Destinations with notification or an agent of such a person.

14. Date of Last Revision: January 24, 2020

10

STATE OF SOUTH CAROLINA	)	IN THE Court OF COMMON PLEAS
COUNTY OF YORK	)	CASE NO.: 2020-CP-46-01212
Wanderlove Travel, LLC.,)	
Plaintiff(s),	)	Affidavit of
vs.	)	Rachelle Settle
Avanti Destinations Inc.,)	
Defendant(s).)	

PERSONALLY APPEARED BEFORE ME, Rachelle Settle, who first being duly sworn deposes and says:

- 1) My name is Rachelle Settle. I am a licensed travel agent in South Carolina and use multiple travel sites to book trips for my clients.
- 2) Avanti claims to have not solicited my business in South Carolina and that I alone reached out to them.
- 3) Avanti has reached out to me for my business on a weekly basis via email for years to solicit new business from myself and clients in South Carolina.
- 4) I have received at least 2 solicitations a month from Avanti over the last 4 years.
- 5) The following exhibit shows several of the emails over the course of June through August.
- 6) I still continue to receive at least weekly emailed attempts to obtain new business from Avanti at my South Carolina location.
- 7) My business and office are located in Fort Mill, South Carolina.

FURTHER AFFIANT SAITH NOT

Rachel Settle

Rachelle Settle

SWORN BEFORE ME THIS

19 day of September, 2020

[Signature]

Exhibit I

Notary Public S.C. Expires - Oct 8, 2029



ELECTRONICALLY FILED - 2020 Sep 18 4:22 PM - YORK - COMMON PLEAS - CASE#2020CP4601212

1 that Oregon law governs and is the sole and exclusive
2 jurisdiction for any dispute amongst the parties. And
3 it provides that the appropriate state or federal
4 Court sitting in Portland Oregon would be were all
5 disputes would be adjudicated.

6 Further, Your Honor, under the terms and
7 conditions the parties are required to resolve any
8 disputes through arbitration under the prevailing
9 American Arbitration Association Rules.

10 Now, turning to the plaintiff, Wanderlove is a
11 limited liability company that's organized and exists
12 under the laws of the State of South Carolina and we
13 believe it's based in York County, South Carolina.
14 Wanderlove is a travel agency and it serves as a
15 booking intermediary between Avanti and Wanderlove's
16 customers. Wanderlove travel agent like any travel
17 agent who is using Avanti services would have to
18 proactively reach out to Avanti on their clients
19 behalf in order to do business with Avanti. Avanti
20 does not solicit business from the customer, but
21 again, it simply produces wholesale packages from
22 which individual travel agencies can choose on behalf
23 of the travel agents customer. Avanti does not deal
24 directly with any end-user customer but rather with
25 travel agents like Wanderlove.

1 to be performed in Oregon where all the witnesses --
2 excuse me -- the majority of witnesses, evidence and
3 data are located in Oregon. So because the long-arm
4 statute does not apply because there are no minimum
5 contacts and because it would be fundamentally unfair
6 to require Avanti to defend this matter in South
7 Carolina the court must dismiss Wanderlove's claims
8 for lack of personal jurisdiction.

9 Now, Your Honor, turning to the motion to compel
10 arbitration plead in the alternative. The defendant
11 would argue the federal arbitration act applies. It
12 preempts South Carolina law and the court must compel
13 arbitration between the parties to the extent personal
14 jurisdiction is found. Which again, we do not
15 concede.

16 Unless the parties have contracted otherwise the
17 Federal Arbitration Act or the FAA would apply in
18 Federal or State court to any arbitration agreement
19 regarding a transaction that involves interstate
20 commerce.

21 South Carolina courts have held that South
22 Carolina courts must give due regard to the federal
23 policy strongly favored arbitration and any
24 ambiguities relating to the interpretation of
25 arbitration agreement must be resolved in favor of

1 arbitrated. The FAA specifically provides -- and this
2 is a truncated quote, Your Honor. It's fully quoted
3 in our memorandum. "A written provision in any
4 contract evidencing a transaction involving interstate
5 commerce to settle by arbitration a controversy
6 thereafter arising out of such contract shall be
7 valid, irrevocable, and enforceable, save upon such
8 grounds as exist at law or in equity in favor of the
9 revocation of any contract."

10 That is to say, Your Honor, to fall within the
11 scope of the FAA there must be a arbitration agreement
12 that must involve interstate commerce. The court will
13 look to the facts surrounding the case as to whether
14 on not interstate commerce is involved.

15 As set forth in the attached affidavit of Mark
16 Grundy, Your Honor, the terms and conditions which
17 would constitute the agreement between the parties
18 contain an enforceable arbitration clause. Further,
19 the attached affidavit sets forth this matter concerns
20 interstate commerce. Not only because Avanti is an
21 Oregon limited liability company, and Wanderlove is a
22 South Carolina limited liability company therefore
23 showing interstate commerce is involved, but also
24 because the services that Wanderlove procured on
25 behalf of its clients included airline flights and

1 hotel accommodations abroad. So the undisputed facts
2 of this matter I believe would show that interstate
3 commerce is involved and the Federal Arbitration Act
4 would apply in South Carolina law. Upon showing that
5 an enforceable arbitration provision exists
6 arbitration can be compelled by demonstrating first,
7 the existence of a dispute between the parties; next,
8 a written agreement that includes an arbitration
9 provision which covers the dispute; third, the
10 relationship of the transaction evidenced by the
11 agreement and includes interstate or foreign commerce,
12 and then fourth, the failure or neglect or refusal of
13 the defendant to arbitrate the dispute. So applying
14 the facts in this matter there's clearly a dispute
15 between the parties as a suit has been filed. Next
16 the terms and conditions which would constitute the
17 agreement between the parties clearly covers the
18 dispute. The terms and conditions provide that any
19 controversy or claim arising out of, or relating to
20 these terms of use of the breach thereof shall be
21 settled by arbitration in accordance with the
22 then-current rules of American Arbitration Association
23 and the location of the arbitration shall be Portland,
24 Oregon, USA.

25 So the entirety of the plaintiff's claim is

1 encompassed by the arbitration clause in the terms and
2 conditions. The gravamen of plaintiff's complaint is
3 the failure -- or the alleged failure to return
4 amounts due under cancellation.

5 Third, Your Honor, the transaction concerns
6 interstate on foreign commerce. I don't believe that
7 would be any reasonable grounds to dispute that. And
8 fourth, by failing to submit this claim to arbitration
9 rather than filing suit the plaintiff has failed to
10 arbitrate. Given the South Carolina law, Your Honor,
11 the existence of an enforceable arbitration clause and
12 the clear failure of the plaintiff to abide by the
13 arbitration clause. To extent this court does not
14 grant the motion to dismiss for lack of personal
15 jurisdiction or the motion to dismiss under the other
16 grounds we would ask this court to compel arbitration
17 between the parties and compel that arbitration occur
18 in Portland, Oregon.

19 Next, Your Honor, we've filed a motion to dismiss
20 for lack of subject matter jurisdiction. That would
21 fall under the same argument regarding the motion to
22 compel arbitration. Because there is a valid and
23 enforceable agreement between the parties that this
24 case will be resolved by arbitration this court would
25 not have the authority to adjudicate a matter on this

1 brief.

2 Your Honor, I think the adage that someone is
3 trying to have their cake and eat it to is appropriate
4 here because Wanderlove has asserted in its complaint
5 that there's a breach of contract. They have not
6 alleged there's an oral contract. So ostensibly there
7 must be written contract. But the claim is it's not
8 this contract because this contract doesn't allow to
9 them to litigate here. So there's some ethereal
10 written contract somewhere. It's not the one
11 contained on the website. So I believe that there's a
12 little bit of have your cake and eat it to in
13 Wanderlove's camp.

14 Now, Your Honor, again, breaking this down to the
15 arguments we've heard from plaintiff's counsel I
16 believe fall in to whether or a contract exists and
17 then whether or not personal jurisdiction is
18 appropriate here. Again, there's allegation of a
19 breach of contract but there's no allegation that this
20 is not the contract that was breached, begs the
21 question of what contract was breached. If there's no
22 contract there's no lawsuit.

23 The basis, again, one of the basis that the
24 contract, the terms and conditions aren't applicable
25 is that it's browser app agreement and not a clickwrap

1 agreement. And Your Honor, that's not something I
2 thought I would have to think about after the first
3 year of civil procedure. I don't want to age Craig
4 but I'm not sure if the internet was around when he
5 was taking the first year of civil procedure. But
6 there is a distinction in federal courts as to whether
7 or not the clickwrap or browser app -- there's a
8 distinction between the two, but there's no case in
9 South Carolina or elsewhere that holds browser app
10 agreements are per se unenforceable to the extent that
11 -- and we certainly don't concede that this is purely
12 a browser app contract. But assuming for a moment
13 that this is a browser app contract, the courts that
14 examined these types of agreements through a website
15 will look to all the facts and circumstances as to
16 whether or not there was actual or constructive notice
17 of the terms and conditions for using the website.
18 While of course the plaintiff claims today that there
19 was no actual knowledge you don't have to look any
20 further than the affidavit of Rachelle Settle to show
21 that is there more than enough evidence to show there
22 was constructive knowledge of the terms and
23 conditions.

24 If you look at page two of the memorandum in
25 opposition that was filed by the plaintiff in this

1 matter, it provides plain language. Once the agent
2 has created an account and logged into their portal,
3 and that would be the Avanti portal -- they can access
4 the terms and conditions under a tab labeled legal.
5 Then the agent may review the terms and conditions if
6 they choose.

7 Now, I think it's axiomatic in South Carolina,
8 Your Honor, you can not be willfully ignorant of the
9 terms of contract. You can not bury your head in the
10 sand to avoid responsibility or be held accountable
11 for the terms of the contract.

12 Going to plaintiff's exhibit number two, there are
13 six headings on the portal and one of them is legal.
14 It's right there on the home page. And there are
15 three hyperlinks under the legal tab. The middle
16 being terms and conditions. This is not hidden on
17 some random page. This is not buried in some legalese
18 on a-third party website. It's right here on the
19 portal that Miss Settle claims to have been using for
20 four years. Ostensibly, if she was operating on
21 behalf of her clients, if her allegations now that for
22 four years she's been booking on behalf of third
23 parties without availing herself of the knowledge of
24 what she was signing those people up for I think we
25 might have a bigger issue then breach of contract.

1 Now, Miss Settle had clear access to the terms
2 and conditions for four years. The assertion now that
3 she never had the opportunity to view them strains
4 congruity in allowing there to be argument that you
5 can willfully ignore a contract for four years with
6 regards to arbitration and forum but you can enforce
7 the other terms of the contract you want to file a
8 breach of contract action would be in opposite of
9 pursuit of justice.

10 Now, going to personal jurisdiction, Your Honor, I
11 think we might have discussed this earlier but to be
12 clear, the plaintiff in this matter bears the
13 responsibility for proving personal jurisdiction is
14 this; the defendant does not have the burden of
15 proving that. The plaintiff has failed to put forth
16 any credible allegations supporting personal
17 jurisdiction over Avanti. The plaintiff has relied on
18 two facts from Mr. Grundy's affidavit. The first is
19 that Avanti derives some profits from the State of
20 South Carolina. And the second is that Wanderlove is
21 a South Carolina company. The argument being that by
22 doing business with a South Carolina company somehow
23 Avanti is automatically doing business in the State of
24 South Carolina.

25 As to profits, that alone is insufficient to

1 part of the motion to dismiss, there is a form selection
2 clause in the terms and conditions that Avanti asserts
3 constitute the grounds for the motion to compel arbitration.
4 And in South Carolina form selection clauses will be
5 enforced unless they're unreasonable or unjust. Here, the
6 terms and conditions at issue are very clear that to the
7 extent that there is any causes of action that arise from
8 the relationship between Avanti and whoever's on the other
9 side, the exclusive jurisdiction is going to be the
10 appropriate state or federal court in Portland, Oregon.
11 Because it's a clear and -- it's very clear language.
12 There's no ambiguity as to where the form is supposed to sit
13 or where -- which court is supposed to sit in judgment of
14 this case. And because there's been no allegation that the
15 terms and conditions are unreasonable or unjust or the form
16 selection clause they're in are unreasonable or unjust, we
17 believe that the Court should reconsider its ruling on the
18 motion to dismiss, as far as Rule 12 (b)(1) goes.

19 And, finally, Your Honor, as to the motion to
20 compel arbitration, which again, is pled in the alternative
21 to the motion to dismiss, unless the parties have contracted
22 otherwise, the FAA is going to -- the Federal Arbitration
23 Act or the FAA is going to apply to any contract that
24 involves interstate commerce. And under the FAA and the
25 intended case law, a contract evidencing interstate commerce

1 that contains an arbitration clause is enforceable, unless
2 there is a valid ground for the contract to be revoked. And
3 South Carolina courts give due regard to the federal policy
4 underpinning the FAA that strongly favors arbitration.

5 Now, to prevail on a motion to compel arbitration,
6 the party seeking to compel must show four things to the
7 Court. In this case, we believe three of those are very
8 clear. The first is that a dispute must exist between the
9 parties. And as a lawsuit has been filed, it's clear that a
10 dispute exists. Second, the transaction must involve
11 interstate or foreign commerce, which again is clear here.
12 Wanderlove is a South Carolina company. Avanti is an Oregon
13 company. And the services at issue were hotel and flight
14 accommodations for a trip abroad. Third, there must be a
15 failure or neglect by the defendant -- or excuse me -- a
16 failure of neglect by one of the parties to arbitrate the
17 dispute. And because we're here, fighting about the motion
18 to compel arbitration, I believe that also would be clear.

19 Now, the one point that I believe was contested at
20 the motion to dismiss hearing was whether there is a written
21 agreement that includes an arbitration provision which
22 purports to cover the dispute. And that is the fourth
23 requirement for a party seeking to compel arbitration. And
24 that appears to be the only argument -- the substantive
25 argument raised by Wanderlove at the motion to dismiss

1 hearing. Now, I think from the outset, I don't think it has
2 or can be argued that to the extent the terms and conditions
3 constitute an agreement that they would not cover this
4 dispute. The entirety of plaintiff's claim regards a refund
5 for services that were not performed or allegedly not
6 performed. And paragraph 3 of the terms and conditions lays
7 out Avanti's return policy. So to the extent that this
8 written agreement is recognized as valid by this Court, I
9 don't think there's any argument that it would apply to this
10 situation.

11 Wanderlove's specific argument appears to be -- or
12 is that there was no meeting of the minds and therefore no
13 contract exists because Rachel [phonetic] Settle or
14 Rachelle Settle did not in the course of four years of using
15 Avanti's website click on the link to the terms and
16 conditions. And in her affidavit, Ms. Settle draws a
17 distinction between clickwrap and browsewrap agreements and
18 alleges that because this is a brows wrap agreement and not
19 a clickwrap agreement that there can be no enforceable
20 agreement between the parties. And even assuming that this
21 is a browsewrap agreement, which is not something that
22 Avanti concedes, but even assuming momentarily that this is
23 true, plaintiff's argument is a misstatement of the law
24 regarding these types of agreements. And I'm not sure that
25 we were clear on this at the motion to dismiss hearing, but

1 a clickwrap agreement requires that when using an Internet
2 site that a party is required to affirmatively click on a
3 button that says, "I agree to these terms and conditions,"
4 et cetera, at some point in the furtherance of using
5 their -- using the website.

6 A browsewrap agreement, on the other hand, the
7 terms and conditions of that agreement are contained in a
8 link that is available to the party using the website. And,
9 again, Ms. Settle seems to argue that because this is
10 allegedly a browsewrap agreement and not a clickwrap
11 agreement in that she was not required to specifically click
12 "I agree," with regards to the terms and conditions, that
13 there is no enforceable agreement. And while the case law
14 on this matter within the Fourth Circuit is not voluminous,
15 courts have addressed this. And in *Craft Real Estate*
16 *Investments, LLC, versus HomeAway.com, Inc.*, which cites --
17 I apologize, Your Honor -- another case out of the
18 Eastern District of Virginia. Courts that are analyzing the
19 enforceability of terms and conditions of browsewrap
20 contracts focus on whether the user had actual or
21 constructive knowledge of the terms and conditions.

22 Mr. Wilkerson, I provided you a copy of these.

23 May I approach, Your Honor, to hand you a copy of
24 these two cases.

25 (Counsel handed document to opposing counsel and to the

1 Court.)

2 And while Ms. Settle has unsurprisingly alleged
3 that she has not read the terms and conditions and therefore
4 is not bound by them, that is not the end of the Court's
5 inquiry when you're dealing with an alleged browsewrap
6 agreement. The Court will look for actual or constructive
7 knowledge. And Ms. Settle has attempted to set up and
8 argument regarding actual knowledge, but Ms. Settle also
9 makes several arguments in her sworn affidavit that
10 establish constructive knowledge.

11 In paragraph 6, Ms. Settle testifies that she was
12 required to affirmatively create an account to be able to
13 access Avanti's site to book services, and she did so for
14 four years. In paragraph 9 and 13, she testifies that she's
15 been using this site for four years. And Exhibit 2 to the
16 affidavit shows the portal by which or with which Ms. Settle
17 conducted her business. And under a large, conspicuous
18 heading titled "Legal," there are only three links, one of
19 which is a link to the terms and conditions. So for
20 four years, Ms. Settle had access to the terms and
21 conditions and free reign to access them. The terms and
22 conditions are not buried at the bottom of a page. They're
23 not buried on some hidden page in a pile of other links,
24 they are under a large icon titled "Legal." And it's also
25 important to note, Your Honor, that based on Exhibit 2, the

1 link to the terms and conditions is not different in size or
2 color or general location than any of the other links that
3 Ms. Settle would have been required to click on to do
4 business through this portal. The terms and condition link
5 is the same size and color as the links for New Quote,
6 View Our Products, Request A Quote, List My Bookings,
7 Display A Booking, Request A Change, Manage Agents, Change
8 Your Password, et cetera. So to say that the terms and
9 conditions link is somehow more difficult to locate and
10 access than any of these other links that she would have had
11 to use over the course of four years booking for her
12 clients, I think that strains credulity so it's all here in
13 Settle's affidavit. At the very least, she had constructive
14 knowledge of the terms and conditions, which means the terms
15 and conditions are enforceable. And the fourth of the four
16 elements required to be shown under a motion to compel
17 arbitration have been proved.

18 So, Your Honor, we would ask the Court to
19 reconsider its ruling on both the motion to dismiss for lack
20 of personal jurisdiction and the alternate motion to compel
21 arbitration, for the reasons stated in oral argument, as
22 well as raised in writing in the motions.

23 THE COURT: All right. Let me ask you something.
24 I'm having a little bit of confusion. Maybe you can help
25 me, educate me. Our long-arm statute and the way it was