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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

Case No. 2023-CP-10-4408

Appellate Case No. 2024-002103

,Crescent Homes Realty, LLC, Appellant,

v.

Brenda Kennedy, Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……....iii

STATEMENT OF THE ISSUES ON APPEAL……1

STATEMENT OF THE CASE……..1

STATEMENT OF FACTS……3

STANDARD OF REVIEW……6

ARGUMENT……..7

THE TRIAL COURT ERRED BY FINDING THAT CRESCENT HOMES, LLC WAIVED ITS RIGHT TO COMPEL ARBITRATION OF AN FLSA COLLECTIVE ACTION AND A RULE 23 SCPWA CLASS ACTION BY FILING A PRO SE DEBT COLLECTION ACTION IN SMALL CLAIMS COURT, LIMITED TO $7500, SEEKING THE RETURN OF DRAWS IT HAD ADVANCED TO A FORMER INDEPENDENT CONTRACTOR.

I. A valid arbitration agreement exists between the parties; the FAA applies to this Arbitration Agreement; and while the claims at issue are subject to arbitration, the Arbitration Agreement requires that arbitrability be decided by the arbitrator……7

A. A valid Arbitration Agreement exists between the parties……8

B. The FAA applies to this Arbitration Agreement……9

C. The parties delegated the question of arbitrability to the arbitrator……9

D. Regardless, the claims at issue are subject to arbitration……11

II. The trial court erred by finding that Appellant waived its contractual right to arbitrate Respondent's class and collective FLSA and SCPWA claims when it filed a pro se debt collection action in Small Claims Court, seeking the return of draws it had advanced a former real estate agent………..12

A. After *Morgan v. Sundance*, South Carolina likely no longer requires a showing of prejudice to find waiver of arbitration……..13

B. Because Respondent's FLSA and SCPWA claims are distinct, both factually and legally, from the debt collection action, Crescent's filing that action did not waive its right to arbitrate the subsequent claims………16

1. Respondent's claims are not sufficiently related to the prior debt collection action to show waiver……..19

2. Respondent's reliance of *Roper v. Oliphant Financial* is misplaced because her claims did not arise "exclusively out of [Crescent Homes Realty]'s conduct" in the Small Claims Court proceeding……22

3. The trial court erred finding waiver because the subsequent claims arose prior to and independent of the collection case—the subsequent claims *could have been brought* regardless of whether the collection case was filed………24

CONCLUSION……28

TABLE OF AUTHORITIES

CASES

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995)……..7

Arco Nat'l Constr., LLC v. MCM Mgmt. Corp., No.: 1:20-cv-03783-JRR, 2024 U.S. Dist. LEXIS 158349, *20 (D. Md. Sept. 4, 2024)……18

Barnett v. Am. Express Nat'l Bank, No. 3:20-CV-623-HTW-LGI, 2024 U.S. Dist. LEXIS 118087 (S.D. Miss. July 4, 2024)…….18

Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd., No. 2:18-cv-00151-DCN, 2024 U.S. Dist. LEXIS 59484 (D.S.C. March 30, 2024)……10

Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd., 130 F.4th 396, 2025 U.S. App. LEXIS 5367 (4th Cir. 2025)……....10, 11

Blitz v. USAA Gen. Indem. Co., No. RDB-24-1070, 2024 U.S. Dist. LEXIS 208576 (D. Md. Nov. 18, 2024)……..17, 18

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012)…….6

Cain v. Midland Funding, 452 Md. 141, 156 A.3d 807 (Md. 2017)……..20

Carr v. Main Carr Dev., LLC, 337 S.W.3d 489 (Tex. App. 2011)……...7

Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc., 294 Md. 443, 450 A.2d 1304 (Md. 1982)……21

Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014)……..6, 12

Desarrolladora La Ribera, S. de R.L. de C.V. v. Anderson, 2024 U.S. Dist. LEXIS 231048 (S.D.N.Y. Dec. 20, 2024)……..18

Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996)…….7

Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997)……..18

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)……..7

Forby v. One Techs, L.P., 13 F.4th 460 (5th Cir. 2021)……..18

Ford v. UHG I LLC, Case No. 22-cv-00840-LKG, 2023 U.S. Dist. LEXIS 31069 (D. Md. Feb. 23, 2023)……19, 20, 22, 23, 25, 26, 27

Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc., 817 F.2d 250 (4th Cir. 1987)……...13

Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc., 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001)……..12

Granite Rock Co. v. Teamsters, 561 U.S. 287 (2010)……14

Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)……..6

Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019)……10

Hinson v. Jusco Co., 868 F.Supp. 145 (D.S.C. 1994)……11

Holloman v. Consumer Portfolio Services, C/A No. RDB-23-134, 2023 U.S. Dist. LEXIS 105075 (D. Md. June 15, 2023)……...20, 21, 22, 25, 26, 27

Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 788 S.E.2d 216 (2016)……12

Keystone, Inc. v. Triad Systems Corp., 1998 MT 326, 971 P.2d 1240, 292 Mont. 229 (Mont. 1998)……8

Lampo v. Amedisys Holding, LLC, 445 S.C. 305, 914 S.E.2d 139, 2025 S.C. LEXIS 31 (2025)……9, 14-15

Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999)……6

Meadows v. Cebridge Acquisition, LLC, 132 F.4th 716 (4th Cir. 2025)…….....17

MicroStrategy, Inc. v. Lauricia, 268 F.3d 244 (4th Cir. 2001)…….6, 12, 13, 16, 17, 18, 27

Morgan v. Sundance, Inc., 596 U.S. 411 (2022)……..13, 14, 15, 16, 19, 21

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)……8

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)……7, 9

Palmetto Constr. Grp. v. Restoration Specialists, LLC, 432 S.C. 633, 856 S.E.2d 150 (2021)……15

Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 791 S.E.2d 128 (2016)……..11

Perry v. Thomas, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987)…….....8

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)……7, 14

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63,130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)…….10

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)……12, 15

Roper v. Oliphant Fin., LLC, Civil No. 23-2112-BAH, 2024 U.S. Dist. LEXIS 164090 (D. Md. Sept. 12, 2024)……...22, 23, 24

S.C. Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 437 S.E.2d 22 (1993)……11

Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324 (5th Cir. 1999)……...17

SZY Holdings, LLC v. Garcia, Case No. 23-1305, 2024 U.S. App. LEXIS 21960 (4th Cir. Aug. 29, 2024)……...15-16

Wilson v. Willis, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019)……7

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001)…….11, 12

STATUTES

Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*……*passim*

Federal Arbitration Act, 9 U.S.C. § 1 et seq……..... *passim*

South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq*……..*passim*

OTHER

AAA Commercial Arbitration Rules…….10

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err in holding that a party waived its contractual right to compel arbitration of collective and class Fair Labor Standards Act (FLSA) and South Carolina Payment of Wages Act (SCPWA) claims when it filed a *pro se* debt collection action in Small Claims Court, limited to only $7500, seeking the return of draws it had advanced a former independent contractor?

STATEMENT OF THE CASE

This case began on July 14, 2023, with the *pro se* commencement of an action in Small Claims Court by the Appellant, Crescent Homes Realty LLC, a real estate broker, against Brenda Kennedy, a real estate sales agent, who worked pursuant to a written Independent Contractor Agreement. (*See* Complaint of Crescent Homes Realty, LLC, filed July 14, 2023). The Small Claims action sought to collect draws which had been advanced to Ms. Kennedy but not repaid as required by the Agreement. *See id*. While the Complaint asserted that Ms. Kennedy owed $8,991.92, it stated that it was "only requesting repayment in the full amount of $7,500 allowed by this Court"—Crescent specifically lowered the damages it sought in order to stay within the jurisdictional amount allowed by the Small Claims Court. *Id*. at 2.

Respondent Kennedy filed her Answer and Counterclaims in the Small Claims Court on August 30, 2023. (*See* Answer of Brenda Kennedy, filed Aug. 30, 2023). Her counterclaims seek class and collective relief based upon alleged failures to pay overtime under the federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. (FLSA) and a corresponding alleged failure to pay those amounts as wages under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq*. (SCPWA); any relief due to her under those statutes relies on Crescent's alleged misclassification of her—and allegedly others like her—as an independent contractor rather than a nonexempt employee during the time she worked as a Crescent real estate agent. *See id*. With

her Answer and Counterclaims, Respondent included a letter to the Small Claims Court requesting that the case be removed to the Court of Common Pleas. (Answer and Counterclaims at 13). The Small Claims Court determined that the damages alleged by the counterclaims exceeded the $7500 jurisdictional limit of that Court and thus transferred the case to the Court of Common Pleas in Charleston County. (*See* Transfer Order, filed in the Court of Common Pleas on Sept. 8, 2023).

Before pursuing any additional litigation or otherwise responding to Kennedy's pleading, Crescent Homes Realty, LLC timely filed a Motion to Stay Proceedings and Compel Arbitration, pursuant to a contractual Arbitration Agreement between the parties. (*See* Plaintiff's Motion to Stay and Compel Arbitration, filed Oct. 20, 2023) (hereinafter "Arbitration Motion"). On October 9, 2024, Crescent filed its Memorandum in Support of its Motion to Stay and Compel Arbitration. (Plaintiff's Memorandum in Support of Motion to Stay and Compel Arbitration, filed Oct.9, 2024) (hereinafter "Arbitration Memo"). Respondent then filed her Memorandum in Opposition on October 10, 2024. (Defendant's Memorandum of Law in Opposition to Motion to Stay Proceedings and Compel Arbitration, filed Oct. 10, 2024) (hereinafter "Opposition Memo"). On October 14, 2024, Crescent filed its Reply Memorandum. (Plaintiff's Reply Memorandum, filed Oct. 14, 2024) (hereinafter "Reply Memo"). The night before the Hearing, Ms. Kennedy filed a Reply in Opposition to Crescent's Reply. (Defendant's Reply in Opposition, filed Oct. 15, 2024) (hereinafter "Opposition Reply"). Crescent filed a Surreply Memorandum in response on the day of the Hearing. (Plaintiff's Surreply Memorandum, filed Oct. 16, 2024) (hereinafter "Surreply").

The Honorable Dale E. Van Slambrook, heard oral arguments on October 16, 2024, in the Charleston County Court of Common Pleas. (*See* Transcript of Hearing, hereinafter "Transcript"). On November 25, 2024, Judge Van Slambrook issued an Order denying Crescent's Motion to Stay and Compel Arbitration. (Order of Nov. 25, 2024). Crescent timely filed its Notice of Appeal on

December 12, 2024. (Notice of Appeal, filed Dec. 12, 2024). Appellant received the Transcript of the Hearing on March 25, 2025. (*See* E-mail of Melissa R. Singletary, March 25, 2025); (Transcript). Within thirty days of its receipt, Appellant filed and was granted a Motion for an Extension of Time to file its Initial Brief. (Appellant's Motion for Extension of Time to File Initial Brief, filed April 22, 2025); (Order Granting Extension, filed Apil 29, 2025). Appellant's Initial Brief is timely filed. *See id.*

STATEMENT OF FACTS

The appellant, Crescent Homes Realty, LLC (hereinafter "Crescent"), a real estate broker, filed a *pro se* collection action in Small Claims Court against the Respondent, Brenda Kennedy (hereinafter "Kennedy"), its former real estate sales agent. (*See* Complaint). The Complaint alleges that Kennedy failed to repay draws that she had borrowed from Crescent Homes—and had a contractual obligation to repay pursuant to the Independent Contractor Agreement that governed the parties' relationship—when she resigned with no notice. (*Id*. at 1-2). Although Crescent alleges that Ms. Kennedy owes Crescent $8991.92, Crescent intentionally limited its damages to $7500.00 in order to stay within the jurisdiction of the Small Claims Court. (*Id.* at 2).

In response, Ms. Kennedy filed an Answer and Counterclaims, along with a request that the Small Claims Court transfer the action to the Court of Common Pleas because her alleged damages were greater than $7500. (*See* Answer at 13). Her counterclaims seek class and collective relief—she estimates a class size of over one hundred people—based on Crescent's alleged violations of the Fair Labor Standards Act (FLSA) and the South Carolina Payment of Wages Act (SCPWA) during the time she worked as a Crescent real estate agent. *Id*. at 3. The crux of her case is her claim Crescent violated the FLSA by misclassifying her as an independent contractor

rather than a non-exempt employee. *Id*. Due to this alleged misclassification, Kennedy claims that Crescent further violated the FLSA by failing to pay her overtime and by failing to pay her for all time she allegedly worked. *Id*. at 2-11. As a result, Ms. Kennedy additionally claims these amounts are due to her as wages under the SCPWA. *Id*. at 9-10. Per Respondent's request, the Small Claims Court transferred this case to the Charleston County Court of Common Pleas. (*See* Transfer Order).

Based on a broad arbitration clause contained in the Independent Contractor Agreement between Crescent and Kennedy, Appellant then moved to stay the litigation and compel arbitration pursuant to the Federal Arbitration Act ("FAA"). (*See* Motion to Stay and Compel Arbitration). The Arbitration Clause reads:

> 9. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be submitted to mandatory, confidential arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, in Charleston, South Carolina. The parties agree to bring any dispute in arbitration on an individual basis only, and not as a class, collective or private attorney general representative action basis. The arbitrator(s) shall not have the authority to address class or collective claims. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(Independent Contractor Agreement at 7, Exh. To Complaint). Additionally, the first page of the Independent Contractor Agreement states in bold capital letters:

> **THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S. C. CODE§ 15-48-10 et. seq., and the FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 et. seq.**

Id. at 1. In its Motion, Crescent asserted that:

> (a) A valid Arbitration Agreement exists between the parties;
>
> (b) The Arbitration Agreement is governed by the Federal Arbitration Act, as it evidences a transaction in interstate commerce, and pursuant to § 3 of that Act, the Court should stay any further proceedings beyond those seeking an order compelling arbitration and submit the matter to arbitration;

(c) All causes of action asserted are subject to arbitration under the broad language of the arbitration agreement, but a determination of their arbitrability is reserved exclusively to the Arbitrator; and

(d) Crescent has demanded arbitration in accordance with the arbitration agreement so as to resolve all claims.

(Motion to Stay and Compel Arbitration at 1-2).

Neither party has disputed that the arbitration clause is valid and enforceable. Neither party has disputed that the FAA applies to this Arbitration Agreement or that Crescent demanded arbitration in accordance with the agreement. Neither party has disputed that the Arbitration Agreement applies to the claims at issue. However, Kennedy opposed Crescent's Arbitration Motion because she claims that Crescent waived its right to arbitrate the FLSA and SCPWA collective and class claims by filing the debt collection action in Small Claims Court. (*See generally* Opposition Memo).

Kennedy asserts that Crescent knew of its right to arbitrate and acted inconsistently with that right, thereby waiving its right to arbitrate the other claims. (*Id.* at 1). She points out that Crescent filed a copy of the Independent Contractor Agreement, containing the Arbitration Agreement, with its Small Claims Complaint, evidencing that it knew of its right to arbitrate at that time. (*Id*. at 2); (Complaint at 3). Neither party disputes that the debt collection claim could have been subject to arbitration pursuant to the Arbitration Agreement had Appellant commenced it in arbitration. The question before this Court is whether Crescent, by filing that Small Claims debt collection action, waived its right to compel arbitration for the unrelated FLSA and SCPWA claims.

Relying on the great weight of legal authority, which holds that a party only waives the right to arbitrate if the prior litigation activities are related – both factually and legally – to the claims at issue, Appellant posited to the lower court that this question was easily answered, "No." *See,*

e.g., *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 250-251 (4th Cir. 2001); (Reply Memo at 2). Appellant asserted that the counterclaims are not sufficiently related to the original debt collection action for its filing to constitute waiver of the right to arbitrate those later claims. (Id. at 5); (Transcript at 6). Although Crescent may have known of its right to arbitrate at the time it filed the debt collection action, its filing that action was not acting inconsistently with its right to arbitrate the unrelated FLSA and SCPWA claims. However, the trial judge disagreed, holding that:

> Defendant's counter claims are sufficiently related to the debt collection action since Defendant filed the claims in defense of the action that Plaintiff initiated. Additionally, the SCPWA and FLSA claims are relevant to whether Defendant owes the debt. The Court further finds Plaintiff knew of its right to arbitrate but explicitly chose not to exercise that right by filing an action and Plaintiff waived its right to compel arbitration by acting inconsistently with the right to arbitrate by commencing this action.

(Order Denying Arbitration at 3). This is an Appeal of that Order.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Bradley v. Brentwood Homes, Inc*., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). "Whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway*, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014), *quoting*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

ARGUMENT

THE TRIAL COURT ERRED BY FINDING THAT CRESCENT HOMES REALTY, LLC WAIVED ITS RIGHT TO COMPEL ARBITRATION OF AN FLSA COLLECTIVE ACTION AND A RULE 23 SCPWA CLASS ACTION BY FILING A *PRO SE* DEBT COLLECTION ACTION IN SMALL CLAIMS COURT, LIMITED TO $7500, SEEKING THE RETURN OF DRAWS IT HAD ADVANCED TO A FORMER INDEPENDENT CONTRACTOR.

I. A valid Arbitration Agreement exists between the parties; the FAA applies to this Arbitration Agreement; and while the claims at issue are subject to Arbitration, the Arbitration Agreement requires that arbitrability be decided by the arbitrator.

Arbitration is a matter of contract between the parties and a way to resolve only those disputes that the parties have agreed to submit to arbitration. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995). The FAA applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise. *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). "A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement." *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) (citing *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494 (Tex. App. 2011)).

"General contract principles of state law apply to arbitration clauses governed by the FAA." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), *citing*, *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 130 L. Ed. 2d 753, 115 S.

Ct. 834 (1995); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); *see also Keystone, Inc. v. Triad Systems Corp*., 1998 MT 326, 971 P.2d 1240, 292 Mont. 229 (Mont. 1998) (applying general state law to arbitration clause governed by FAA). "State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally." *Id.* (citing *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987)). A written provision for arbitration in any contract involving interstate commerce "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.

A. <u>A valid Arbitration Agreement exists between the parties</u>.

Respondent has not disputed the validity of the Arbitration Agreement or that the FAA applies to it. There is no question but that the parties have a valid agreement under the terms of the Independent Contractor Agreement. Their Agreement is headed with the following notice and contains an arbitration clause:

> **THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S. C. CODE§ 15-48-10 *et. seq.*, and the FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 *et. seq*.**

(Independent Contractor Agreement at 1, attached to Complaint). The Arbitration Clause reads:

> 9. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be submitted to mandatory, confidential arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, in Charleston, South Carolina. The parties agree to bring any dispute in arbitration on an individual basis only, and not as a class, collective or private attorney general representative action basis. The arbitrator(s) shall not have the authority to address class or collective claims. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(Independent Contractor Agreement at 7, Exh. To Complaint).

Both parties reviewed and signed the Independent Contract Agreement, entering into a valid bilateral contract bound by mutual promises. By signing the Agreement, Kennedy manifested her assent to its terms, including the Arbitration Agreement. A valid Arbitration Agreement between the parties exists. *See, e.g., Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 914 S.E.2d 139, 2025 S.C. LEXIS 31 (2025) (arbitration agreement is a bilateral contract; the elements necessary for the formation of any contract are (1) an offer, (2) acceptance of the offer, and (3) the mutual exchange of benefits the law calls "consideration.")

B. <u>The FAA applies to this Arbitration Agreement.</u>

Further, Crescent Realty is engaged in the sale of real estate, and that real estate was marketed and sold in interstate commerce by Respondent Kennedy. Kennedy has not disputed that the FAA applies to the Arbitration Agreement. Indeed, in her Answer and Counterclaim, she specifically alleges that: "At all times pertinent to this Complaint, Crescent Entities were enterprises engaged in interstate commerce or in the production of interstate commerce as defined by the Act, 29 U.S.C.§ 203(r) and 203(s). Upon information and belief, the annual gross sales volume of the Crescent Entities was more than $500,000.00 per year at all times material hereto." (Answer and Counterclaim at para. 32). Consequently, because the Agreement involves interstate commerce, the FAA applies to this Agreement. *See, e.g., Munoz v. Green Tree Fin. Corp*., 343 S.C. at 538, 542 S.E.2d at 363 (2001) (FAA applies in state or federal court to any arbitration agreement involving interstate commerce).

C. <u>The parties delegated the question of arbitrability to the Arbitrator.</u>

Moreover, while it is certain that the claims at issue are subject to arbitration under the broad scope of the Arbitration Agreement, it is also certain that the parties have agreed to submit that decision to the arbitrator. "Under the [FAA], arbitration is a matter of contract, and courts

must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019).

> In their contracts, "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Henry Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70.

Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd., 130 F.4th 396, 2025 U.S. App. LEXIS 5367 at *5-6 (4th Cir. 2025). "If the parties' contract delegates gateway arbitrability questions to an arbitrator, then a court must enforce that delegation." *Id*. at *6. "In those circumstances, a court possesses no power to decide the arbitrability issue." *Id.* (citing *Henry Schein*, 139 S. Ct. at 529).

In *Berkeley County School District*, the parties had entered into arbitration agreements that specifically incorporated the AAA Commercial Arbitration Rules; those Rules delegate questions regarding scope and validity of the Arbitration Agreement to the Arbitrator. As a result, the Fourth Circuit upheld the District Court's finding that, by incorporating the AAA Commercial Rules, the parties had delegated the question of arbitrability to the Arbitrator. *Berkeley County,* 2025 U.S. App. LEXIS 5367 at *9-10. As the Court stated, "the arbitration provisions incorporate the AAA commercial rules, which provide that the arbitrator "'shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.'" *Id.* at *9 (quoting *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd*., No. 2:18-cv-00151-DCN, 2024 U.S. Dist. LEXIS 59484 at *14 n.24 (D.S.C. March 30, 2024) (quoting AAA Commercial Arbitration Rules, R-7(a)

(amended Oct. 1, 2013)). Thus, the Court held that any questions regarding scope of the arbitration clause or the arbitrability of any claim were for the Arbitrator to decide. *Id*.

In this case, the parties have also specifically incorporated the AAA Commercial Arbitration Rules. (*See* Independent Contractor Agreement at 7, Exh. To Complaint) ("Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be submitted to mandatory, confidential arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, in Charleston, South Carolina.") Fourth Circuit precedent thus holds that this Arbitration Agreement delegates the arbitrability question to the Arbitrator. *See Berkeley County,* 2025 U.S. App. LEXIS 5367 at *9-10. As such, any questions regarding the scope of this Arbitration Agreement or the arbitrability of any claim are for the Arbitrator to decide. *See id*.

D. <u>Regardless, the claims at issue fall within the scope of the broad arbitration clause.</u>

Nevertheless, the broad Arbitration Agreement at issue in this case applies to "any controversy or claim arising out of or relating to [the Independent Contractor Agreement], or the breach thereof." (Independent Contractor Agreement at 7).

> To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118 (citing *Hinson v. Jusco Co*., 868 F.Supp. 145 (D.S.C. 1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993)). The heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Landers v. Fed. Deposit Ins*. *Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996) (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co*., 867 F.2d 809, 812 (4th Cir. 1989))).

Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 791 S.E.2d 128 (2016).

It is undisputed that Ms. Kennedy's FLSA and SCPWA claims arise out of or relate to her Agreement with Crescent Homes Realty. Respondent has not argued that her claims are beyond the scope of the Arbitration Agreement. Further, while the Court must treat the existence of an Arbitration Agreement like any other contract, questions of scope are to be decided in favor of arbitration. *See, e.g., Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). If the Court decides to determine the scope of this Arbitration Agreement, the claims at issue are unquestionably subject to arbitration. *See id.*

II. The trial court erred by finding that Appellant waived its contractual right to arbitrate Respondent's class and collective FLSA and SCPWA claims when it filed a *pro se* debt collection action in Small Claims Court, seeking the return of draws it had advanced its former real estate agent.

Parties may waive their right to enforce an arbitration clause. *Dean*, 408 S.C. at 387-88, 759 S.E.2d at 736 (citing *Rhodes v. Benson Chrysler-Plymouth, Inc*., 374 S.C. 122, 125, 647 S.E.2d 249, 251 (Ct. App. 2007). Historically in South Carolina, "[t]he party seeking to establish waiver [had] the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016) (quoting *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc*., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001)).

Likewise, until recently, the Fourth Circuit required a showing that a party had "so substantially utilized the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001). "[E]ven in cases where the party seeking arbitration invoked the 'litigation machinery' to some degree, the 'dispositive question was whether the party objecting to arbitration had suffered

actual prejudice.'" *Id*. (quoting *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987)).

A. After *Morgan v. Sundance*, South Carolina likely no longer requires a showing of prejudice to find waiver of arbitration.

However, in *Morgan v. Sundance, Inc*., the United States Supreme Court struck the prejudice requirement from the arbitration waiver inquiry. 596 U.S. 411 (2022). In that case, Petitioner, an hourly Taco Bell employee at a franchise owned by the Respondent, signed an arbitration agreement at the onset of her employment, requiring her to arbitrate any employment dispute. Notwithstanding her arbitration agreement, she filed a nationwide collective action against Sundance, alleging violations of the FLSA. *Id*. at 414. Despite full knowledge of the arbitration agreement, rather than move to compel arbitration, Sundance filed a motion to dismiss, which was heard and denied by the district court. It then filed an answer, asserting fourteen affirmative defenses, none of which mentioned the arbitration agreement. The parties next attempted mediation but did not settle, and then discussed scheduling the remainder of the litigation. *Id*. at 414-15. Approximately eight months after the filing of the suit, Sundance first moved to stay the litigation and compel arbitration under the FAA. Morgan argued Sundance had waived its right to arbitrate by litigating for so long. *Id*. at 415.

The lower courts applied then-Eighth Circuit precedent to determine waiver: "a party waives its contractual right to arbitrate if it knew of the right; acted inconsistently with that right; and—critical here—*prejudiced the other party by its inconsistent actions*." *Id*. (citation omitted) (emphasis added). The lower court found sufficient prejudice for waiver, but the Eighth Circuit reversed, sending the parties to arbitration. The Supreme Court decided that the lower courts were "wrong to condition waiver of the right to arbitrate on a showing of prejudice." *Id.* at 417. As the Court explained:

> Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. Waiver, we have said "is the intentional relinquishment of a known right." To decide whether a waiver has occurred, the court focuses on the actions of the person who held that right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to waiver of a contractual right, as of any other.

Morgan, 596 U.S. at 417.

The Supreme Court attributed the addition of the prejudice requirement to a decades-old misunderstanding of the FAA's "policy favoring arbitration."

> But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. Our frequent use of that phrase connotes something different. "The policy," we have explained, "is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements on the same footing as other contracts. *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010). Or in another formulation: the policy is to make arbitration agreements "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404 n.12 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would any other kind. But a court may not devise novel rules to favor arbitration over litigation.

Id. at 418.

Because the ordinary federal rules that apply to contractual waiver do not include a prejudice requirement, the Supreme Court struck it from the arbitration waiver analysis. *Morgan* held that the relevant waiver inquiry is whether the party requesting arbitration "knowingly relinquished the right to arbitrate by acting inconsistently with that right." *Id*. at 419.

South Carolina appellate courts have not yet had occasion to address the effect of the *Morgan* decision on arbitration waiver analysis. However, the South Carolina Supreme Court has affirmatively cited *Morgan* for the proposition that "an arbitration contract is like any other contract: if it exists, it will be enforced according to its terms." *Lampo v. Amedisys Holding, LLC*,

445 S.C. 305, 914 S.E.2d 139, available at 2025 S.C. LEXIS 31, at *16 (2025) (citing *Morgan v. Sundance, Inc*., 596 U.S. 411, 417-19, 142 S. Ct. 1708, 1712-14, 212 L. Ed. 2d 753, 759-60 (2022) (parenthetical omitted). In fact, a year before *Morgan* was decided, the South Carolina Supreme Court had already stated unequivocally that neither federal nor state public policy favored arbitration and had undertaken a similar analysis as the United States Supreme Court in *Morgan*. *See Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is . . . no public policy—federal or state— 'favoring' arbitration.'"). Thus, it is likely that South Carolina no longer requires a showing of prejudice to find that a party has waived the right to arbitrate—particularly when applying the FAA, like in this case.[1]

The United States Court of Appeals for the Fourth Circuit has addressed this issue since *Morgan*:

> Until recently, a party in this circuit waived its arbitration right "by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985)....
>
> In *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022), however, the Supreme Court struck down the prejudice requirement. 596 U.S. at 419. The Court clarified that waiver in the arbitration context, like waiver generally, is simply "the intentional relinquishment or abandonment of a known right." *Id*. at 417 (citation & internal quotation marks omitted). The relevant question, then, is whether the party requesting arbitration "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right." *Id.* at 419.

[1] If a showing of prejudice is still required, there has undoubtedly been no waiver. Respondent cannot show she suffered actual prejudice in this case. Although Respondent claims she was prejudiced (a) because she had to hire an attorney, and (b) because that attorney was unable to acquire an extension of time to file the Answer when she initially emailed the President of Crescent Home Realty after 6:00 PM the night before it was due to request one, neither of those are proper grounds to show prejudice under the old standard. *See, e.g., Rhodes v. Benson Chrysler-Plymouth, Inc*., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007) ("To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'") Appellant moved to compel arbitration at the earliest possible time after learning of her claims. Both parties have only submitted initial pleadings. Appellant has not even answered the Counterclaims. There has been no prejudice. *See id*.

SZY Holdings, LLC v. Garcia, Case No. 23-1305, 2024 U.S. App. LEXIS 21960, at *5-6 (4th Cir. Aug. 29, 2024).

Consequently, after *Morgan*, the question before this Court is whether Crescent Homes Realty, upon its filing of a *pro se* $7,500 collection suit in small claims court, knowingly relinquished its right to arbitrate Ms. Kennedy's federal FLSA claims for collective and class action relief—claims which are unrelated to the collection action and beyond the authority of the small claims court to entertain or adjudicate—by acting inconsistently with that right. Under the facts of this case, this question is easily answered. No waiver occurred.

B. Because Respondent's FLSA and SCPWA claims are distinct, both factually and legally, from the debt collection action, Crescent's filing that action did not waive its right to arbitrate the subsequent claims.

Prior to *Morgan*, a controlling Fourth Circuit case on waiver of arbitration was *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001)—itself a case in which the party demanding arbitration, MicroStrategy, had previously prosecuted suits in court against Lauricia, the party opposing arbitration. There, the Court first held that to establish waiver, the party opposing arbitration must show that it suffered actual prejudice—after *Morgan*, that holding is no longer applicable. *See id.* at 249-50; *Morgan*, 596 U.S. at 419.

However, the *MicroStrategy* court *also* held that the party opposing arbitration must show that that the prior litigation activities were related – both factually and legally – to the claims at issue in the present litigation. That holding remains intact and it controls the dispute between Crescent Homes Realty and Ms. Kennedy:

> When concluding that Lauricia was prejudiced by MicroStrategy's litigation activities, the district court took into account all of MicroStrategy's activities in the prior actions. Most of MicroStrategy's conduct in the prior actions, however, was

> in connection with its state-law claims which sought to prevent Lauricia from disclosing trade secrets or other confidential information. Because these claims are distinct, both factually and legally, from Lauricia's discrimination claims, the litigation surrounding these claims cannot support a finding that MicroStrategy waived its right to arbitrate the unrelated claims. *See Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999) ("[A] party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate."); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997) ("Only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate."). Although MicroStrategy's declaratory relief claims asserted in the prior actions involve the same legal and factual issues underlying Lauricia's claims against MicroStrategy, we cannot conclude, as did the district court, that the mere inclusion of these claims permits us to factor into the waiver analysis MicroStrategy's actions in connection with the distinct state-law claims. As noted above, the bulk of the activity in the prior actions was directed toward the state-law claims, and no decision on the merits of the declaratory relief claims was ever made in any of the actions. Under these circumstances, we believe it was error for the district court to rely on the litigation of the trade secret claims to support its waiver finding.
>
> To be sure, the litigation of the prior actions did involve many motions, responses, and other procedural maneuvers (more than 50, according to Lauricia), including a later-dismissed appeal by MicroStrategy of the district court's dismissal of *MicroStrategy I*. And there is no doubt that the litigation involved the expenditure of substantial sums of money by all involved. In fact, because the state court in *MicroStrategy II* refused to dismiss Lauricia's attorney as a defendant, Lauricia was forced to hire another attorney to represent her in that action. But because the prior actions were primarily directed to claims unrelated to those asserted by Lauricia, the expense and effort associated with those claims cannot be used in support of the argument that MicroStrategy waived its right to arbitrate the discrimination claims.

MicroStrategy, 268 F.3d at 250-251.

This second holding remains good law, and *MicroStrategy* has been cited for this holding numerous times by courts since the *Morgan* decision, including by the Fourth Circuit itself. *See, e.g., Meadows v. Cebridge Acquisition, LLC,* 132 F.4th 716, 733-34 (4th Cir. 2025) ("Litigation surrounding factually and legally distinct claims 'cannot support a finding that [a party] waived its right to arbitrate . . . unrelated claims' . . .") (quoting *MicroStrategy*, 268 F.3d at 250); *Blitz v.*

USAA Gen. Indem. Co., No. RDB-24-1070, 2024 U.S. Dist. LEXIS 208576 (D. Md. Nov. 18, 2024) ("Specifically, the Fourth Circuit evaluates whether a party's conduct in substantially participating in litigation amounts to waiver.") (citing *MicroStrategy*, 268 F.3d at 249); *Arco Nat'l Constr., LLC v. MCM Mgmt. Corp*., No.: 1:20-cv-03783-JRR, 2024 U.S. Dist. LEXIS 158349, *20 (D. Md. Sept. 4, 2024) ("The Fourth Circuit in *MicroStrategy, Inc. v. Lauricia* similarly concluded that a finding of waiver was not supported where the claims in previous actions were distinct—one related to the disclosure of trade secrets or other confidential information, and the other to discrimination.").

It is the law in other jurisdictions as well. *See, e.g., Forby v. One Techs, L.P.*, 13 F.4th 460, 465 (5th Cir. 2021) ("For waiver purposes, a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate."); *Barnett v. Am. Express Nat'l Bank*, No. 3:20-CV-623-HTW-LGI, 2024 U.S. Dist. LEXIS 118087, *13 (S.D. Miss. July 4, 2024) ("For waiver purposes, a party only invokes the judicial process to the extent it litigates a *specific claim* it subsequently seeks to arbitrate." (emphasis in original)). "'[O]nly prior litigation of the *same legal and factual issues* as those the party now wants to arbitrate results in waiver of the right to arbitrate.'" *Desarrolladora La Ribera, S. de R.L. de C.V. v. Anderson*, 2024 U.S. Dist. LEXIS 231048 (S.D.N.Y. Dec. 20, 2024) (while there was considerable factual overlap between plaintiff's original defamation claims and defendant's fraud counterclaims, they were not "identical," either legally or factually, and thus plaintiff seeking to litigate its own claims did not constitute a waiver of its right to arbitrate the counterclaims), *quoting*, *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 130-31 (2d Cir. 1997)).

1. **Respondent's claims are not sufficiently related to the prior debt collection action to show waiver.**

Since the decision in *Morgan*, this second holding of *MicroStrategy* has been applied by a district court in the Fourth Circuit to reject a waiver of arbitration claim under facts which are indistinguishable from those presented by the dispute between Crescent Homes Realty and Ms. Kennedy. *See Ford v. UHG I LLC*, Case No. 22-cv-00840-LKG, 2023 U.S. Dist. LEXIS 31069 (D. Md. Feb. 23, 2023). In *Ford,* a debt collector, UHG, sued Ford in small claims court to collect a debt. Subsequently, Ford brought a putative class action claiming UHG had violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (FDCPA); the Maryland Consumer Debt Collection Act, Md. Code Ann. Com. L. § 14-201 et seq. (MCDCA); and the Maryland Consumer Protection Act, Md. Code Ann. Com. L. § 13-101 et seq. (MCPA), by engaging in certain illegal debt-collection activities, including hiring a third-party debt-collector that placed excessive calls and harassed Ford. *Id.* at *1-2. UHG moved to compel arbitration. *Id.* at *5. The district court found that there was a valid, applicable arbitration agreement, but Ford contended that by prosecuting its small claims court collection action, UHG had waived arbitration. *Id.,* at *11-14. This contention was soundly rejected.

Citing *Morgan*, the court noted that to waive the right to arbitrate, Defendant must: (1) know of an existing right to arbitrate; and (2) act inconsistently with that right. *Id*. at *14 (citing *Morgan*, 142 S.Ct. 1708 (2022)). It was undisputed that UHG had previously commenced a debt collection action regarding the Loan at issue; thus, the Court agreed with the Plaintiff that UHG must have known of its right to arbitration under the agreement, thereby satisfying the first factor in the waiver analysis. *Id.* at *14-15.

However, the Court did not agree that UHG acted inconsistently with its right to compel arbitration by commencing its debt-collection action:

> Under Maryland law, a waiver of a right to arbitrate may result from either an express agreement or be inferred from other circumstances. *Cain v. Midland Funding*, 452 Md. 141, 156 A.3d 807, 815 (Md. 2017). To make such a waiver without an express agreement, the party must act inconsistently with an intent to insist upon enforcing the arbitration agreement. *Id*. And so, to determine whether UHG acted inconsistently with its right to arbitrate here, the Court considers: (1) whether a right to arbitrate the claims that were litigated in state court existed; and (2) whether the claims sought to be compelled to arbitration in this case are "related" to the claims litigated in state court. *Id*. at 815-17.

Ford, 2023 U.S. Dist. LEXIS 31069 at *15.

While UHG had the right to arbitrate its debt collection claims, the FDCA, MCDCA, and MCPA claims were not sufficiently related to the debt collection claims to constitute waiver of the right compel arbitration. As the Court explained:

> In this case, Plaintiff alleges that Defendants violated the FDCPA, MCDCA and MCPA by engaging in certain illegal debt collection activities, including hiring a third-party debt-collector that placed excessive calls and harassed Plaintiff. (citation omitted). To be clear, these claims do also involve Plaintiff's Loan. But, the claims in this case do not arise from the previous debt-collection litigation brought by UHG.
>
> Rather, the claims in this case arise from alleged improper collection calls and letters that pre-date that litigation.

Id. at *16. The Court agreed with UHG that Plaintiff "would have brought this action regardless of whether UHG filed the debt collection suit in state court." *Id*. at *17. Thus, it "conclude[ed] that claims in the two cases [were] not sufficiently related to show Defendants waived their right to arbitration." *Id*.

Similarly, in *Holloman v. Consumer Portfolio Services*, Consumer Portfolio Services ("CPS") filed a debt collection action against Ms. Holloman in small claims court; she then filed class claims against CPS in state court, alleging it violated the MCDCA, MCPA, and FDCPA by

engaging in illegal debt-collection activities with respect to the same debt. C/A No. RDB-23-134, 2023 U.S. Dist. LEXIS 105075 (D. Md. June 15, 2023). CPS removed the case to federal court and then moved to compel arbitration. Holloman argued that CPS had waived the right to arbitrate by filing the prior debt collection action related to the same debt. *Id*. at *7.

In its waiver analysis, the Court first addressed the holding of *Morgan v. Sundance*, explaining that now, in order to waive the right to arbitration, a party must "(1) know of an existing right to arbitration; and (2) act inconsistently with that right." *Id*. at *23-24 (citing *Morgan*, 596 U.S. at 411). The Court found that CPS must have known about its right to arbitration when it filed the collection action, but it nevertheless found that CPS had not acted inconsistently with that right. *Id*. at *24-25. To make that determination, the court considered: (1) whether a right to arbitrate the claims that were litigated in state court existed; and (2) whether the claims sought to be compelled to arbitration were "related" to the claims litigated in state court. *Id.*

The Court determined soundly that Holloman's claims were not sufficiently related to the collection case to establish waiver. Although some of her claims were based partially on the collection case, Plaintiff's other claims arose from alleged improper collection activities that pre-dated that collection case; thus, they were insufficiently related. *Id.* at *25-26.

> Courts have explained that "waiver does not extend to any unrelated issues arising under the contract" and that waiver only extends to other disputes when "*all* of the parts of the dispute [are] deemed to be interrelated." *Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc.*, 294 Md. 443, 450 A.2d 1304, 1307-09 (Md. 1982) (emphasis added); *see also Cain*, 156 A.3d at 816-18. Claims are related when "*[t]he claim is in actuality part of one basic issue*." *Charles J. Frank, Inc.*, 450 A.2d at 1309 (emphasis in original). **Because Plaintiff *could* have brought this lawsuit regardless of whether the Collection Case was filed, this Court finds that the factual record indicates that Holloman's claims are insufficiently related to the prior collection case to show that Defendants waived their right to compel arbitration**.

Holloman, 2023 U.S. Dist. LEXIS 105075 at *26 (emphasis added).[2]

It is a long-standing principle that the right to require arbitration of a matter is not waived by litigation concerning an unrelated matter. Crescent Homes Realty's suit to recover a debt in small claims court is completely unrelated to Ms. Kennedy's collective, class action claims under the Federal Fair Labor Standards Act (FLSA) and South Carolina Payments of Wages Act (SCPWA).[3] Any alleged violations of the FLSA (or the SCPWA) would have occurred prior to the litigation in small claims court, and Ms. Kennedy's claims cannot even be prosecuted within the jurisdiction of the small claims court. Moreover, Ms. Kennedy could have brought her claims regardless of whether the small claims case was filed. As such, they are insufficiently related to the prior debt collection action, and the appellant did not waive its right to compel arbitration. *See Ford v. UHG I LLC*, 2023 U.S. Dist. LEXIS 31069 at *16-17; *Holloman*, 2023 U.S. Dist. LEXIS 105075 at *26.

2. Respondent's reliance on *Roper v. Oliphant Financial* is misplaced because her claims do not arise "exclusively out of [Crescent Homes Realty's] conduct" in the small claims court proceeding.

Respondent relies on *Roper v. Oliphant Financial, LLC*, to support her contention that her counterclaim under the FLSA is sufficiently related to the Plaintiff Crescent Homes Realty's collection action to show that Crescent Homes Realty waived its right to compel arbitration. *Roper v. Oliphant Fin., LLC*, Civil No. 23-2112-BAH, 2024 U.S. Dist. LEXIS 164090 (D. Md. Sept. 12, 2024). In that case, the Plaintiff, Ms. Roper, defaulted on a personal loan, and Oliphant Financial

[2] The arbitration agreement in Holloman also expressly provided that neither party waived the right to arbitrate "by filing an action . . . to recover a deficiency balance," but this provision did not affect the Court's holding that the actions were insufficiently related. As the Court stated, "Even if this express reservation of Consumer Portfolio Services' right to enforce arbitration was inconsequential, Holloman's claims in this action are not sufficiently related to the Collection Case." *Holloman,* 2023 U.S. Dist. LEXIS 105075 at *25.

[3] Ms. Kennedy's SCPWA claim is wholly reliant on the success of her FLSA claim—that is, her contention is that if she was misclassified as an independent contractor rather than a nonexempt employee and did not receive proper overtime pay and pay for all hours worked under the FLSA, she is also owed those same amounts as wages under the SCPWA.

filed a debt collection action against her outside of the applicable statute of limitations. *Id.* at *3. Ms. Roper filed a motion to dismiss based on Oliphant's filing outside the statute of limitations. The parties then litigated, resulting in the court granting her motion to dismiss. *Id*. Ms. Roper subsequently filed class claims against Oliphant under the FDCPA, MCDCA, and MCPA, alleging unfair debt collection practices—based specifically on Oliphant's filing its debt collection action outside of the statute of limitations. *Id.* Oliphant moved to compel arbitration, but Roper contended that Oliphant had waived its right to arbitrate by filing and litigating the prior debt collection action.

The Court agreed, finding that Oliphant had "waived the right to compel arbitration by previously commencing a debt collection lawsuit against Plaintiff in state court and litigating the central issue in this case to conclusion." *Id.* at *15-16. Oliphant argued that the case was similar to *Ford*, 2023 U.S. Dist. LEXIS 31069, which should control the outcome, but the Court distinguished that case:

> Plaintiff correctly observes that the instant lawsuit involves "claims exclusively based on the conduct of the defendants in the state court collection action." ECF 18, at 6. ***Specifically, the basis for the instant lawsuit stems from Oliphant's commencement of the underlying debt-collection action outside the statute of limitations. See ECF 4, at 1-2 ¶ 1-12 (alleging that filing a consumer debt collection action beyond the statute of limitations is expressly prohibited by Maryland consumer protection laws)***. Defendants point to *Ford v. UHG I, LLC* in support of their argument that the "prior debt collection action claim, though it involves the same debt Plaintiff refers to in her Complaint, does not relate to this action such that the Plaintiff's action arises out of the Defendant's collection action claim." ECF 17-1, at 10 (*citing Ford*, 2023 U.S. Dist. LEXIS 31069 , 2023 WL 2185751, at *7). ***However, unlike Ford***, where the Plaintiffs would have brought the action regardless of the underlying debt-collection suit because it involved matters that pre-dated the lawsuit, *Ford*, 2023 U.S. Dist. LEXIS 31069, 2023 WL 2185751, at *7, ***the instant case arises exclusively out of defendants' conduct in the prior litigation.*** Defendants initiated and fully participated in litigation surrounding the debt collection claim and suffered an adverse judgment. When the propriety of that litigation was challenged in this Court, Defendants, for the first time, invoked the arbitration provision as a defense even though the instant claim grows directly out of the adverse judgment in the previous suit. ***Put differently, had***

> ***Oliphant not initiated the debt collection lawsuit after the statute of limitations had run, there would be no basis for the instant lawsuit. Thus, the claims are clearly sufficiently related, and Ford is inapposite.***

Roper, 2024 U.S. Dist. LEXIS 16409 at *19-20 (emphasis added).

Unlike the situation in *Roper*, Ms. Kennedy's FLSA claim does not arise "exclusively out of [Crescent Homes Realty's] conduct" in the small claims court proceeding. Rather, her FLSA claim is alleged to rest entirely upon a pre-existing failure of Crescent Homes Realty to have complied with the FLSA during the time she worked there. Respondent argues her claims against Crescent are "related" to the collection action because they are defenses to that action and "had Crescent not initiated its action against Kennedy, she would not have filed her Answer and Counterclaim." (Defendant's Reply at 6). Her contention misses the point entirely. The *Roper* court only held that the prior litigation was "related" because that prior litigation itself served as the *entire* basis for her subsequent claims. Had Oliphant not filed its prior collection action outside of the statute of limitations, Roper would have had no basis for her claims—the filing of the collection action outside the statute of limitations *was itself* the alleged violation of the relevant statutes upon which she brought her subsequent claims. As such, the current situation is completely inapposite. *See id*.

3. The trial court erred finding waiver because the subsequent claims arose prior to and independent of the collection case—the subsequent claims *could have been brought* regardless of whether the collection cases were filed.

Nevertheless, the lower court held that Ms. Kennedy's FLSA and SCPWA counterclaims were sufficiently related to the debt collection claim (a) because she filed the claims in defense of the action Plaintiff initiated; and (b) because the claims are relevant to whether Defendant owes the debt. (Order Denying Arbitration at 3). Following the lower court's Order to its logical conclusion, literally any counterclaim filed in any action would be sufficiently related to constitute

waiver, as long as it was filed "in defense of the action Plaintiff initiated"—i.e., if it was a counterclaim. This circular logic would always result in the finding of waiver, no matter how unrelated the claims might be.

Hypothetically, imagine a plaintiff business who, despite the existence of a broad arbitration agreement, brings a Small Claims debt collection action, limited to $7500.00, against a customer who owes it a few thousand dollars—after all, the cost of the arbitrator might be more than the total debt owed. The customer then counterclaims, asserting egregious violations of the Americans with Disabilities Act ("ADA"), seeking hundreds of thousands of dollars in damages. Remembering the arbitration agreement, the small claims Plaintiff then moves to compel arbitration. Under the logic of the lower court's order, the plaintiff has waived the right to arbitrate this seemingly unrelated claim. After all, the ADA claim is made in defense of the small claims collection action, and that debt could be offset by what the defendant claims she is owed under the ADA—it must be related!

As outlandish as that sounds, it is essentially what the lower court's order says, and it is in direct conflict with all the relevant case law. In both *Ford* and *Holloman*, rather than filing independent lawsuits, those plaintiffs could have brought their claims as defenses and counterclaims to their respective debt collection actions. *See Ford*, 2023 U.S. Dist. LEXIS 31069; *Holloman*, 2023 U.S. Dist. LEXIS 105075. According to the lower court's order in this case, if those debt collectors had *then* moved to compel arbitration, the outcomes would have been different—they would both have waived the right to arbitrate. *See id*.; (Order Denying Arbitration) at 3).

The lower court's order completely misses the mark. The holdings in those cases were not controlled by whether the claims were brought in defense of the original action or whether the debt

could be offset by the subsequent claims; that had nothing to do with it. The controlling issue was whether the subsequent claims arose prior to and independent of the original claims—whether the subsequent claims *could have been brought* regardless of whether the collection cases were filed. *See Holloman*, 2023 U.S. Dist. LEXIS 105075 at *26 ("Because Plaintiff *could* have brought this lawsuit regardless of whether the Collection Case was filed, this Court finds that the factual record indicates that Holloman's claims are insufficiently related to the prior collection case to show that Defendants waived their right to compel arbitration."); *Ford*, 2023 U.S. Dist. LEXIS 31069 at *16-17 ("[T]he claims in this case arise from alleged improper collection calls and letters that pre-date that litigation . . . [Plaintiff] Plaintiff would have brought this action regardless of whether UHG filed the debt collection suit in state court."). The MCDCA, MCPA, and FDCPA claims in those cases, if proven, surely would be relevant to whether Ford and Holloman owed the debt—they were related to the same loans and the same contracts—but they arose prior to and independent of the filing of the collection actions. Therefore, they were not sufficiently related, such that the filing of the small claims debt collection actions constituted a waiver of the right to arbitrate those other claims. *See id.*

In this case, Appellant filed a *pro se* debt collection action in Small Claims Court, intentionally limiting its damages to $7500 to stay within that court's jurisdiction. Crescent sought the return of advances it had lent to the Respondent that she had not repaid when she left. Respondent counterclaimed, bringing FLSA and SCPWA class and collective claims, based entirely on allegations that occurred before and independent of Appellant's debt collection action—claims which were unrelated to that action and beyond the jurisdiction of the Small Claims Court, both subject matter wise and monetarily. Respondent's counsel included a letter to the Small Claims Court, specifically requesting that it transfer jurisdiction to the Court of Common

Pleas because she recognized that the Small Claims Court did not have jurisdiction to hear the claims.

Whether Crescent misclassified Ms. Kennedy as an independent contractor under the Federal Fair Labor Standards Act is distinct—legally and factually—from whether she failed to repay draws advanced to her by Crescent Homes Realty, LLC when she quit. Of course there is some factual overlap. Both issues arise from her time spent working as a Crescent real estate agent, and as the lower court recognized, the success of her FLSA claims could affect whether and how much debt she owes. However, according to all relevant caselaw, they are not sufficiently related to constitute waiver. *See Microstrategy*, 268 F.3d at 250 ("Because these claims are distinct, both factually and legally . . . the litigation surrounding these claims cannot support a finding that MicroStrategy waived its right to arbitrate the unrelated claims ."); *Holloman*, 2023 U.S. Dist. LEXIS 105075 at *26 ("Because Plaintiff *could* have brought this lawsuit regardless of whether the Collection Case was filed, this Court finds that the factual record indicates that Holloman's claims are insufficiently related to the prior collection case to show that Defendants waived their right to compel arbitration."); *Ford*, 2023 U.S. Dist. LEXIS 31069 at *16-17 ("[T]he claims in this case arise from alleged improper collection calls and letters that pre-date that litigation . . . [Plaintiff] Plaintiff would have brought this action regardless of whether UHG filed the debt collection suit in state court."). By filing a Small Claims debt collection action against Ms. Kennedy, Crescent Homes Realty was not acting inconsistently with its right to compel arbitration of her unrelated FLSA and SCPWA collective and class claims. Accordingly, Appellant did not waive its right to arbitrate those claims. *See id*.

CONCLUSION

The lower court erred when it denied Appellants' Motion to Stay Proceedings and Compel Arbitration. Courts universally hold that litigation surrounding factually and legally distinct claims cannot support a finding that a party waived its right to arbitrate unrelated claims—a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate. Appellant's Small Claims debt collection action is insufficiently related to Respondent's collective and class claims under the FLSA and SCPWA for its filing to constitute a waiver of the contractual right to arbitrate those unrelated claims. Consequently, for all the reasons stated herein, Appellant respectfully requests that this Court:

(A) Grant Appellant's current appeal;

(B) Reverse the decision of the lower court;

(C) Remand this case to the trial court with instructions to stay the proceeding and compel arbitration in accordance with the Arbitration Agreement; and

(D) Award such other relief as this Court deems just and equitable.

All of which is respectfully submitted.

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