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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

RECORD ON APPEAL

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INDEX

Order Transferring Case, Sept. 8, 2023.....	1
Order Denying Motion to Stay and Compel Arbitration, Nov. 25, 2024.....	3
Order Granting Extension of Time to File Initial Brief, April 29, 2025.....	7
Summons and Complaint.....	8
Exh. A- Independent Contractor Agreement.....	11
Exh. B- E-Mail with Invoices for Draws Owed.....	20
Answer and Counterclaims.....	26
Exh. A- Letter of Marybeth Mullaney to Small Claims Court, Aug. 18, 2023.....	38
Plaintiff's Motion to Stay Proceedings and Compel Arbitration.....	39
Exh. A- Independent Contractor Agreement.....	42
Exh. B- Letter of Allan Holmes to Marybeth Mullaney, Oct. 18, 2023.....	51
Plaintiff's Memorandum in Support of Motion to Stay and Compel Arbitration.....	52
Defendant's Memorandum in Opposition to Motion to Stay and Compel Arbitration.....	56
Exh. A- E-Mail of MaryBeth Mullaney to Ted Terry.....	60
Plaintiff's Reply Memorandum in Support of Motion to Stay and Compel Arbitration.....	61
Defendant's Reply Memorandum in Opposition to Motion to Stay and Compel Arbitration.....	66
Plaintiff's Surreply Memorandum in Support of Motion to Stay and Compel Arbitration.....	72
Notice of Appeal.....	74
Appellant's Motion for Extension of Time to File Initial Brief.....	80
Transcript of Oct. 16, 2024 Hearing.....	82
E-Mail of Court Reporter Melissa R. Singletary.....	98

2023-CP-10-4408

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE SMALL CLAIMS COURT
NORTH AREA

Crescent Homes Realty, LLC,
Plaintiff,

CASE NO: 2023 CV 1011501023

-VS-

TRANSFER ORDER

Brenda Kennedy.

Defendant.

FILED
2023 SEP -8 AM 11:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

IT APPEARING TO THIS COURT that the Defendant's claim exceeds the subject matter and damage limits jurisdictional limit of the Charleston County Small Claims Court; it is hereby

ORDERED, ADJUDGED, and DECREED that this matter above-captioned is transferred to the Charleston County Court of Common Pleas for all proceedings consistent with trying of matters filed in an original capacity with the Court of Common Pleas in the state of South Carolina; and ORDERED, ADJUDGED, and DECREED that any fees or cost required shall be paid by the Plaintiff but recoverable according to state statute or court rule at the conclusion of this matter.

AND IT IS SO ORDERED!

Sept 5th, 2023
North Charleston, SC 29405

M. T. Morrison
Martelle T. Morrison
Presiding Judge

Enclosure: File/Return
RECEIPT

RECEIPT OF THESE DOCUMENTS IS ACKNOWLEDGED BY:

(X) Clerk of Court Charleston County

() Magistrate _____

Date of Receipt: September, 9, 2023 By Whitney Lookadoo,
(Name and Title) Court Specialist II

FILED
2023 SEP -8 AM 11:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH CIRCUIT

CRESCENT HOMES REALTY, LLC

Plaintiff,

v.

BRENDA KENNEDY,

Defendant.

Civil Case No. 2023-CP-10-04408

**ORDER DENYING PLAINTIFF’S MOTION TO STAY PROCEEDINGS AND COMPEL
ARBITRATION**

This matter comes before the Court on Plaintiff’s Crescent Homes Realty, LLC (“Crescent” or “Plaintiff”) Motion to Stay Proceedings and Compel Arbitration against Defendant Brenda Kennedy. (“Kennedy” or “Defendant”). The parties filed briefs, and a hearing was held on October 16, 2024. The motion is ripe for ruling. For the reasons set forth below, the Court denies Plaintiff’s motion.

BACKGROUND

Plaintiff filed a complaint against Defendant in Charleston County Magistrate Small Claims Court on July 14, 2023, seeking a judgment for \$7500. The complaint which was signed under penalty of perjury by Plaintiff’s President Edward Terry (“Terry”) alleges that Defendant had a contractual obligation to repay draws. Plaintiff filed the “Independent Contractor Agreement” signed by Kennedy and Terry with the complaint. The first page of the 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.*

Thus, even though the agreement gave Plaintiff the right to arbitrate, Plaintiff chose to file an action in small claims court. Defendant filed an answer and counterclaim bringing class claims for unpaid wages and failure to pay overtime pursuant to Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, *et seq.* ("SCPWA"). On September 8, 2023, the Magistrate Court transferred the case to the Court of Commons Pleas because the Defendant's counterclaims exceeded the \$7500 limit for small claims court. On October 20, 2023, Plaintiff filed a motion seeking to enforce the arbitration agreement.

DISCUSSION

The Court finds that Plaintiff waived the right to compel arbitration under the test set forth in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022). The Supreme Court rejected the prejudice-focused arbitration waiver, unanimously ruling that the Federal Arbitration Act (FAA)'s "policy favoring arbitration" does not permit courts to condition a waiver of the right to arbitrate on a showing of prejudice to the opposing party. *Id* at 412. *Morgan* held that the test for waiver is whether the party seeking to enforce arbitration knew of an existing right to arbitrate and acted inconsistently with that right. *Id.* at 419. Here, Plaintiff knew they had a right to arbitrate because the agreement filed with their complaint clearly states they had the right to compel arbitration. By initiating this action rather than seeking to arbitrate, Plaintiff acted inconsistently with their right to arbitrate.

Plaintiff doesn't dispute that it had knowledge of the arbitration agreement; rather it argues that it did not act inconsistently with its right to arbitrate because Defendant's counter claims are not sufficiently related to the debt-collection action it filed in smalls claims court. Defendant argues the counterclaims are related because they are a defense to the debt-collection action.

Defendant asserts that she does not owe the draws because Plaintiff misclassified her as an independent contractor when she was an employee. (Answer ¶ 3) Defendant alleges Plaintiff exercised significant control over her by requiring her to work over forty (40) hours a week in the sales center, and to perform administrative and data-entry tasks that she was not paid for. (Answer ¶ 40, 57, 63). Defendant also alleges she could only sell homes built by Plaintiff, was subject to Plaintiff's supervision and was required to wear appropriately colored attire. (Answer ¶ 42, 49, 52, 54) Defendant argues because she was an employee rather than an independent contractor, the agreement violates the SCPWA and the FLSA and is not enforceable. Defendant also argues even if the agreement is enforceable the debt would be offset by what Plaintiff owes her under the SCPWA and FLSA.

The Court finds that Defendant's SCPWA and FLSA counter claims are sufficiently related to the debt-collection claim 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.

CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff's Motion to Compel Arbitration and stay this proceeding is DENIED.

The Honorable Dale E. Van Slambrook

Dated: _____
Charleston, South Carolina



Charleston Common Pleas

Case Caption: Crescent Homes Realty Llc VS Brenda Kennedy

Case Number: 2023CP1004408

Type: Order/Stay

And It Is So Ordered!

s/Dale E. Van Slambrook S.C. Circuit Court Judge
#2781

Electronically signed on 2024-11-25 15:45:44 page 4 of 4

The South Carolina Court of Appeals

Crescent Homes Realty, LLC, Appellant,

v.

Brenda Kennedy, Respondent.

Appellate Case No. 2024-002103

The Honorable Dale E. Van Slambrook
Charleston County
Trial Court Case No. 2023CP1004408

ORDER

The time for serving and filing the appellant's initial brief and designation of matter is hereby extended until May 14, 2025.

FOR THE COURT
BY Catherine Hannisai, deputy
CLERK

Columbia, South Carolina

FILED
Apr 29 2025

cc:

Allan R. Holmes, Sr., Esquire

Marybeth E. Mullaney, Esquire

STATE OF SOUTH CAROLINA)

2023CV1011501023
CIVIL CASE NUMBER

COUNTY OF CHARLESTON)

IN THE MAGISTRATE'S COURT

SUMMONS

Crescent Homes Realty, LLC
572 Savannah Highway
Charleston, SC 29407
(843) 573-9635

PLAINTIFF(S)

Vs

Brenda Kennedy
824 Rue Drive
Charleston, SC 29414
DEFENDANT(S)FILED
2023 SEP -8 AM 11:13
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO THE DEFENDANT(S) NAMED ABOVE:

YOU ARE SUMMONED and required to answer the allegations of the attached complaint and present any appropriate counterclaims/crossclaims to the attached Complaint within THIRTY days from the first day after receipt of this summons. Your Answer must be received by the:

Small Claims - North
4045 Bridge View Drive
P. O. Box 70235
North Charleston, SC 29405
Phone: (843) 202-6650
Fax: (843) 202-6652

If you fail to answer within the prescribed time, a judgment by default may be rendered against you for the amount or other remedy requested in the attached complaint, plus interest and costs. **If you desire a jury trial, you must request one in writing at least five (5) working days prior to the date set for trial.** If no jury trial is timely requested, the matter will be heard and decided by the Judge.

READ ATTACHED INSTRUCTIONS CAREFULLY

July 14, 2023

Case No: 2023 CV 1011501023

Filed: FILED IN CHARLESTON COUNTY

Served:

Default: JUL 14 2023

Hearing: North Area Small Claims Court

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE SMALL CLAIMS COURT

CRESCENT HOMES REALTY, LLC BRENDA KENNEDY

Plaintiff

Defendant

572 Savannah Highway

Street Address

824 Rue Drive

Street Address

Charleston, SC 29407

City

State

Zip

Charleston, SC 29414

City

State

Zip

(843) 573-9635

Phone

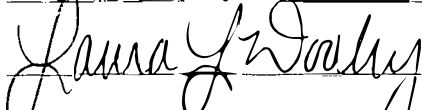
(843) 343-8223

Phone

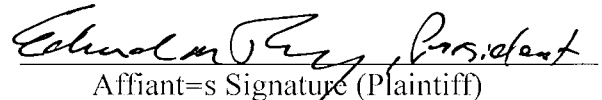
I, the plaintiff in this civil action, make the following claim against the defendant:

- 1.) I believe that the defendant is a resident of Charleston County.
- 2.) Check a, b, or c to indicate the type of suit and supply documents required:
 - a. () This is a suit on a note; Two (2) copies of note attached. Defendant has defaulted in payment of said note with balance of \$ _____ now due and payable.
 - b. (X) This is a suit on an account; Two (2) copies of statement attached. Sign as affiant swearing to statement and have your signature notarized.

SWORN and subscribed before me this

27th day of June 2023NOTARY PUBLIC, State of South Carolina
My Commission Expires: 10/10/2023

Attached to this complaint is a statement of account which I swear to be true and correct, with no part of the balance having been paid.


Affiant's Signature (Plaintiff)

- c. (X) OTHER. This is a claim based on the following facts: (Describe Complaint)

Defendant has a contractual obligation to repay DRAWS to Plaintiff and those specific DRAWS are attached.DRAW Repayment language in Section 3B, Paragraph 3, with additional supporting language in the Addendum.
(attach supplement if necessary)

-see attachment-

- 3.) I believe because of the following information, that I am entitled to, and request a judgment for

\$ 7,500 and/or other relief:court costs, legal fees, interest

(Include any costs resulting from this action. (Example: court costs, legal fees, interest))

I STATE UNDER PENALTY OF PERJURY THAT THE ABOVE IS CORRECT AND TRUTHFUL.

June 27, 2023

Date



Signature of Plaintiff or Attorney

FORM C32-5270



Small Claims Court

Defendant, Brenda Kennedy, was working for Plaintiff, Crescent Homes Realty, LLC, as a Sales Agent selling new homes for Defendant while earning commissions from each home sale. Defendant was contracted as an Independent Contractor (1099).

Defendant resigned from working with Plaintiff with no notice in December 2022. Plaintiff attempted on numerous occasions to inform and request that monies owed be repaid, emails attached.

Plaintiff prepared an invoice and provided that to Defendant in the US Mail and via email to demand the repayment of the outstanding DRAWS Plaintiff borrowed from Defendant. DRAWS are loans against future commissions and under normal circumstances be settled once a home sold.

Defendant separated from Plaintiff prior to those DRAWS being repaid. Based on the contractual obligation provided here within, Plaintiff believes Defendant owes \$8,991.92 but is only requesting repayment in the full amount of \$7,500 allowed by this Court.

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.*

CRESCENT HOMES REALTY, LLC

INDEPENDENT CONTRACTOR AGREEMENT

Sales Representative Procedure and Commission Policies

The following policies and procedures of Crescent Homes Realty, LLC, concerning licensing and commissions are effective for Brenda Kennedy ("Sales Representative") as of 7.14.2022, and shall remain in effect until modified or superseded at the sole discretion of Crescent Homes Realty, LLC as set forth herein. For purposes of this document, the only differentiation between Assistant Sales Representative and Sales Representative is the Compensation Structure and the Termination terms referenced below. Assistant Sales Representatives shall adhere to all other terms, duties, responsibilities, and requirements of the Sales Representative.

1. **Independent Contractor:** Sales Representative is an independent contractor. It is agreed and understood that Crescent Homes Realty, LLC, has no right to control the method or manner of the work to be performed by the independent contractor, Sales Representative. This agreement does not constitute a hiring by either party. The parties hereto are and shall remain independent contractors bound by the provisions hereof. As an Independent Contractor, the Sales Representative is not under the control of Crescent Homes Realty, LLC, as to the means by which the Sales Representative's work is accomplished. Crescent Homes Realty, LLC, and its Broker in Charge will such exercise such authority as is required to meet their obligation to comply with applicable laws and regulations governing real estate brokerage activities. This agreement shall not be construed as a partnership; neither party hereto shall be liable for any obligation incurred by the other except as provided elsewhere herein. Crescent Homes Realty, LLC, shall not withhold from Sales Representative's commission any amounts for taxes, State or Federal. Crescent Homes Realty, LLC, shall not make any premium payments or contributions for any workers compensation or unemployment compensation
2. **Licensing: SALES REPRESENTATIVES LICENSED BY CRESCENT HOMES REALTY, LLC, SHALL AT ALL TIMES PERFORM THEIR SERVICES PURSUANT TO AN "AT WILL" RELATIONSHIP. THIS RELATIONSHIP MAY BE TERMINATED BY CRESCENT HOMES REALTY, LLC, OR BY THE SALES REPRESENTATIVE AT ANY TIME FOR ANY REASON, WITH OR WITHOUT CAUSE AND WITH OR WITHOUT NOTICE.** The policies set forth herein shall not create a contract or be deemed to establish services for any fixed term, nor shall any action or inaction by Crescent Homes Realty, LLC, create an obligation of continuing or maintaining Sales Representative's license. Sales Representative is required by law to

maintain a valid South Carolina or Tennessee real estate sales license in good standing at all times while performing under this agreement.

3. Compensation:

A. Method and Terms of Payment:

- a) All Sales Representatives shall be compensated by commissions earned on closings of homes. No other compensation in the form of salary, hourly, or weekly wages shall be paid to any Sales Representative. Crescent Homes Realty, LLC will pay for business cards, all MLS dues and fees, and L.L.R. dues and fees. Sales Representatives are solely responsible for all other costs required for their performance of their sales activities. Commission checks will be paid the following Friday after closing (2nd Friday after closing).
- b) All Assistant Sales Representatives shall be compensated on an hourly basis at a rate agreed to by the parties for all hours worked as reflected in the appropriate time records. In addition, Assistant Sales Representatives shall earn commissions on closings of homes from the commission paid to the Sales Representatives, as set forth in the Addendum attached hereto and made part hereof by reference. Crescent Homes Realty, LLC, will pay for business cards, all MLS dues and fees, and LLR dues and fees required for their performance of their sales activities. Assistant Sales Representative will receive commission check on the following Friday (2nd Friday after closing).

B. Commissions: A commission shall be earned for each new home sale that is closed. The amount of commission shall be as follows unless and until changed by Crescent Homes Realty, LLC as stated herein:

2% of total price minus incentives and design center options if applicable to lead agent. Lead Agent begins earning commissions on sales after start date of assigned community. Some communities may have more than one lead agent. In this instance the lead agents will equally split the total commission due. Certain communities and/or homes may be paid at a lower commission percentage per the discretion of Crescent Homes Realty, LLC.

Crescent Homes Realty, LLC may pay a draw for contracts that are ratified for up to 50% of the commission amount. The total outstanding draws will be capped at \$8,000 per the discretion of Crescent Homes Realty, LLC. In order for the draw to be paid, the buyer has to be well qualified with an approval, and all contingencies must be satisfied. Should sales agent resign or be terminated, all draws received will be paid back to Crescent Homes. Draw requests against commissions will not be provided for Assistant Sales Representatives.

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Crescent Homes Realty, LLC shall not change the amounts of commission on less than 30 days notice. All sales based on contract accepted by Crescent Homes Realty, LLC before the effective date of a commission change shall be governed by the commission rates in effect before such change.

- C. When Commissions Have Been Earned: Commissions shall be earned only on sales which actually close and the loan, if any, has been funded. No commission shall be earned on any sale that does not close for any reason whatsoever, including cancellation by Crescent Homes Realty, LLC.
- D. Partial Commissions Under Special Circumstances: The management shall establish a schedule of commission rates or percentages for sales under the following circumstances.

Transfers:

- a) Sales Agents that transfer to another Community shall fully service their own contracts that close within 60 days of the transfer and shall receive full commission on these closings with no servicing fee's to be paid out to new Sales Agent. Sales that close beyond 60 days after the transfer takes place shall be handled as follows: For those sales which were under contract prior to the new agent, servicing will be handled by the new agent that transferred to the Community. The procuring Sales Agent(s) will pay the new agent a servicing fee of \$500 or \$250 each, for agents with partnerships. The service fee is \$500 total regardless of stage of construction. Assistant pay will be deducted from procuring Sales agent's commission per the In-house Commission sheet. It is the responsibility of Sales Agent(s) to revise the In-house commission sheet to receive proper compensation.
- b) Sales Agents that transfer to a community where a Sales Agent left the company or is terminated, will be paid a servicing fee of \$500 from Crescent Homes Realty, LLC regardless of stage of construction. Crescent Homes Realty, LLC will also pay the Sales Assistant \$500 upon closing of home (if applicable). New Sales Agent will be responsible for updating the In-house commission sheet in order to receive proper compensation.

Departure of Sales Assistant:

Should a Sales Assistant leave the company or be terminated, Sales Agent will need to revise the In-House Commission sheet removing the Sales Assistant from the paperwork to receive proper compensation.

Sales Agent – Partner:

Should a partner leave the company or is terminated, the commission due to remaining Sales Agent will be 1% per the In-house Commission sheet submitted at time of contract. Remaining sales agent will still pay \$250 to Sales Assistant (if applicable) and Crescent Homes Realty, LLC will pay the other \$250 to the Sales Assistant. It is the responsibility of the Sales Agent to revise In-house Commission Sheet to receive proper compensation.

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E. Payment of Commission to Assistant Sales Representatives: In order to maintain commercially acceptable production standards for sales office coverage in accordance with paragraph 5 of this Agreement, Crescent Homes Realty, LLC may assign an Assistant Sales Representative or a Sale Agent in Training to a Sales Representative. In this case, \$500 will be deducted from Sales Representative's commission and paid to Assistant Sales Representative for each home closed in community. Communities with two lead Agents will equally split the Assistant servicing fee. Crescent Homes Realty, LLC reserves the right to determine, in its sole discretion, which agent/agents contributes to Assistant Sales Representatives and Sales Agent in Training upon transfers and terminations. Assistant Sales Representatives are only eligible to earn commissions on contracts written/closed starting from the date of assignment to said Community. For example, Assistant Sales Representatives will not be eligible for commissions for sales that were written prior to their servicing that community unless expressly approved in writing.

F. Special Promotions and Bonuses: The Broker – In – Charge may establish special incentives, sales promotions, or bonuses for sales of particular units or on a company wide basis. The amounts, conditions, terms and details of such incentives or bonuses shall be determined by the management at its sole discretion. Sales Representatives are therefore no entitled to nor should they have any expectation of receipt of said discretionary bonuses.

Bonus Pay: Agents are eligible to receive an extra .25% commission for meeting monthly goals and an extra .25% commission for meeting quarterly goals. Crescent Homes does NOT pay a bonus for goals of 1 per month.

Bonus Goals will NOT be set or apply toward monthly or quarterly commission bonus for the first 30 days of a new community or newly assigned phase releases. Crescent Homes Realty, LLC does NOT pay a bonus for goals of 1 sale per month.

G. Policies Subject to Change: Crescent Homes Realty, LLC shall have the right to change any or all of the foregoing policies at any time. Except as to commissions which are governed by paragraph B, above, changes adopted by Crescent Homes Realty, LLC shall become effective immediately after notification to the Sales Representative.

H. Reimbursement for Unauthorized Acts: If any Sales Representative enters into any agreement that violates the sales policies established by Crescent Homes Realty, LLC or intentionally or through error or omission, commits any act which obligates Crescent Homes Realty, LLC to modify plans, reduce prices, compensate buyers, or incur any unauthorized expenses, Crescent Homes Realty, LLC shall have the right to recover such expenses by withholding the amount of

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such expenses from compensation earned. For example, if a Sales Representative promises an unauthorized price reduction, the amount of the price reduction in excess of any authorized discount shall be charged against the Sales Representative. If a Sales Representative promises an unauthorized mortgage financing program, the cost of obtaining such financing in excess of the company's normal cost will be charged against the Sales Representative. If a Sales Representative promises unauthorized options, any expenses incurred by the company to accommodate such options shall be charged against the Sales Representative. The foregoing examples are for illustration only, and shall not be deemed to limit the company's right to recover unauthorized expenses for any Sales Representative. The Sales Representative acknowledges the rights herein reserved to Crescent Homes Realty, LLC to charge the Sales Representative for the unauthorized expenses.

4. Benefits, Holidays, Vacation, and Sick Policy:

- A. As an independent contractor, the Sales Representative is not provided any "employee" benefits. The task which the Sales Representative has been contracted is the selling and marketing of real estate which Crescent Homes Realty, LLC, has available for listing and sale. Sales Representative is expected to be available and to be actively marketing to potential purchasers of real estate at all commercially reasonable times.
- B. Benefits: Crescent Homes Realty, LLC, may provide Sales Representative with Health Insurance in the manner and in accordance with terms and conditions determined by Crescent Homes Realty, LLC.
- C. Periods During Which Sales Representative Will Be Unavailable for Marketing and Sales Activities: Sales Representative should notify Broker – In – Charge in writing at least 30 days in advance of any period during which the Sales Representative will not be actively engaged in marketing and sales activities for properties made available for listing and sale by Crescent Homes Realty, LLC. The Company will attempt in good faith to accommodate the Sales Representative in efforts to locate other qualified Sales Representatives to undertake marketing and sales activities in the absence of the Sales Representative. Should emergency conditions arise which render the Sales Representative unavailable for marketing and sales activities, the Sales Representative should notify the Broker-In-Charge at the earliest possible time.
- D. Holidays: Crescent Homes Realty, LLC, does not seek to have properties marketed and sold on Christmas Day, New Year's Day, Memorial Day, 4th of July, Labor Day, Thanksgiving, and Easter Sunday.
- E. Policies Subject to Change: Crescent Homes Realty, LLC shall have the right to change any or all of the foregoing policies at any time. Except as to commissions which are governed by paragraph B, above, changes adopted by Crescent Homes

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Realty, LLC shall become effective immediately after notification to the Sales Representative.

5. Production Standards: The Broker-In-Charge may issue a policy and procedure manual setting forth commercially acceptable production standards for the task undertaken by the Sales Representative --- the marketing and selling properties made available for listing and sale by Crescent Homes Realty, LLC. These standards include marketing and sales at all commercially reasonable times --- including, but not limited to, the hours during which Crescent Homes Realty, LLC, sales offices are available and open for business; Tuesday through Friday 11:00 a.m. to 6 p.m., Saturday 10 a.m. to 6 p.m., and Sundays and Mondays 1:00 p.m. to 6 p.m. Sales Representatives who are allowed to access and utilize sales offices owned by Crescent Homes Realty, LLC, are required to remain at, or in close proximity to, these offices during these hours so as to secure these properties and confirm to the public the widely advertised availability of these office and associated on-site sales and marketing services. Crescent Homes Realty, LLC has the right to change the foregoing policies and hours of operation at any time. Changes by Crescent Homes Realty, LLC will become effective immediately after notification to the Sales Representatives.

6. Termination of this Independent Contractor Agreement:

As all Sales Representatives are to perform services as independent contractors pursuant to an at-will relationship with Crescent Homes Realty, they may be terminated at any time for any reason, with or without cause and with or without notice. If a Sales Representative is terminated, or if he/she voluntarily resigns with no notice or insufficient notice, no commissions related to homes unclosed on the date of termination or resignation shall be paid.

A. If a Sales Representative voluntarily resigns with at least thirty (30) days notice and is in good standing as judged solely by management, management may, in its sole discretion, determine to pay him/her a commission of no more than fifty percent (50%) of the total of commissions relating to homes that close within thirty (30) days of the Sales Representative's resignation.

B. If an Assistant Sales Representative is terminated, or he/she voluntarily resigns with or without notice, no commissions related of homes unclosed on the date of termination or resignation shall be paid.

Re-Written Contracts: No commission shall be payable on any sales resulting from any contract written after the date of resignation or termination.

7. Ethical Standards: No Sales Representative shall accept any kickback, payment, or gift from any real estate agent, broker, or other persons involved in any transaction with Crescent Homes Realty, LLC. No Sales Representative shall engage in any independent real estate activities other than the representation of Crescent Homes Realty, LLC, without the prior written approval of the Broker in Charge for Crescent Homes Realty,

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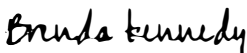
LLC. No Sales Representative shall own investment property which competes with Crescent Homes Realty, LLC. in location and price without the written approval of the Broker in Charge for Crescent Homes Realty, LLC which consent shall not be unreasonably denied. No Sales Representative shall knowingly or intentionally misrepresent any condition of the property, or any term or condition of the sales contract, warranty, homeowner association documents, financing or other terms, conditions, or other documents or the rights or obligations of Crescent Homes Realty, LLC. Sales Representative acknowledges receipt of Crescent Homes Realty, LLC. Policy Manual, agrees to be bound thereby and acknowledges that any breach thereof may subject Sales Representative to termination for cause.

8. Policy Changes: Crescent Homes Realty, LLC shall have the right at any time to change any or all of the foregoing policies subject to any notice commitments set forth herein.
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 on 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.
10. Non-Reliance by Sales Representative: Sales Representative hereby represents to Broker-In-Charge that Sales Representative has not relied and is not relying upon any promises, guarantees, or representations made by Broker-In-Charge or anyone else acting or claiming to act on behalf of Crescent Homes Realty, LLC with respect to terms or other matters set forth herein unless specifically reduced to writing and made a part of this document.
11. Acknowledgement: The undersigned Sales Representative hereby acknowledges receipt of a copy of these policies and agrees that he/she as a Sales Representative is an independent contractor and shall be governed hereby.
12. Non-Disparagement. At no time during this Agreement, or after the termination of this Agreement, shall the Sales Representative disparage Crescent Homes Realty, LLC, its owners, or managers.
13. Confidentiality. Sales Representative will perform work that may require Crescent Homes Realty, LLC, to disclose confidential and proprietary information ("Confidential Information") to Sales Representative. Confidential Information is information and data of any kind concerning any matters affecting or relating to Crescent Homes Realty, LLC, the business or operations of Crescent Homes Realty, LLC, and/or the products, plans, processes, or other data of Crescent Homes Realty, LLC, not generally known or available outside of the company. Accordingly, to protect the Confidential Information that will be disclosed during employment, the Sales Representative agrees as follows:



- A. Sales Representative will hold the Confidential Information received from Crescent Homes Realty, LLC, in strict confidence and will exercise a reasonable degree of care to prevent disclosure to others.
 - B. Sales Representative will not disclose or divulge either directly or indirectly the Confidential Information to others unless first authorized to do so in writing by Crescent Homes Realty, LLC, management.
 - C. Sales Representative will not reproduce the Confidential Information nor use this information commercially or for any purpose other than the performance of his/her duties for Crescent Homes Realty, LLC.
 - D. Sales Representative will, upon request or upon termination of his/her relationship with Crescent Homes Realty, LLC, deliver to Crescent Homes Realty, LLC, any Confidential Information originating from, or received from Crescent Homes Realty, LLC.
14. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of South Carolina applicable to contracts which are wholly executed and performed in South Carolina. If a court or arbitrator of competent jurisdiction should determine that any of the language contained in this Agreement is vague or ambiguous, such language shall not be presumptively construed against either party but shall instead be construed to give effect to the true intentions of the parties.
15. Merger. This Agreement constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes and replaces any oral or written communications and any undertakings previously made between the Parties relating to the subject matter.

Signature Required:

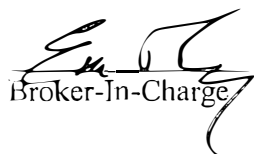
DocuSigned by:

049784C167E0433...

Sales Representative

7/14/2022

Date

Crescent Homes Realty, LLC


Broker-In-Charge

7/14/2022
Date

Addendum to Crescent Homes Realty, LLC Independent Contractor Agreement

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.*

This Agreement is an Addendum to the Independent Contractor Agreement of Brenda Kennedy (Sales Representative).

Draw on Commissions: The agreement shall be effective as of June 29, 2022.

Opportunity to request increased commission draw:

Any amount requested exceeding \$8,000 per the Independent Contractor Agreement may be evaluated and decided upon at the discretion of Crescent Homes Realty, LLC. In order for the draw to be paid, the buyer(s) must be well qualified with an approval, full deposit paid, and contingencies must be satisfied. Should request be granted, Sales Representative may only take 1% draw per lot. Should Sales Representative be in a partnership, agent can only take .5% draw per lot.

Should Sales Representative resign and/or be terminated from Crescent Homes, all draws taken must be paid back in full at time of resignation and/or termination.

Acknowledgement: Brenda Kennedy hereby acknowledges receipt of a copy of this Addendum and agrees that this is a Binding Agreement, and all parties acknowledge that they are independent contractors.

DocuSigned by:
Brenda Kennedy 6/29/2022
040784C1A7E8433
Brenda Kennedy Date
DocuSigned by:
Brian Wagner 6/29/2022
7AE1562268A74DE... Date

Crescent Homes Realty, LLC
Ethelene Key 6/29/22
Broker-in-Charge Date

Laura Dooley

From: Laura Dooley
Sent: Wednesday, January 18, 2023 10:09 AM
To: Brenda Kennedy
Subject: FW: Final Invoice attached - Crescent Homes
Attachments: Invoice_B Kennedy. 12 -2022.docx

Good morning, Brenda –

The company has sent this invoice to you via email and by mail. Please advise if you intend to pay the amount due.

We will have to pursue other options if there is no response from you this week.

Sincerely,

LAURA DOOLEY
Director, HR
Crescent Homes
Cell: (843) 718-5361
Office (843) 573-9635 ext.5131

From: Laura Dooley
Sent: Tuesday, January 3, 2023 9:38 AM
To: Brenda Kennedy <brenda33317@gmail.com>
Subject: FW: Final Invoice attached - Crescent Homes

Good morning, Brenda –

Sending you this reminder for the attached invoice we have listed as due tomorrow, January 4.

Please let me know if you have any questions.

Kind regards,

LAURA DOOLEY
Director, HR
Crescent Homes
Cell: (843) 718-5361
Office (843) 573-9635 ext.5131

From: Laura Dooley
Sent: Wednesday, December 21, 2022 3:36 PM
To: Brenda Kennedy <brenda33317@gmail.com>
Subject: Final Invoice attached - Crescent Homes

Hello Brenda,

Please find attached the final invoice for your account with Crescent Homes.

We have mailed a copy to your home address on record as well.

I'm available if you'd like to discuss and thank you for delivering the laptop last Friday.

Sincerely,



LAURA DOOLEY

Director of Human Resources

O: (843) 573-9635 ext.5131 | Celi (843) 718-5361 | laura.dooley@crescenthomes.net |
572 Savannah Hwy, Charleston SC 29407 | www.crescenthomes.net



This message and any attachments are strictly confidential and protected from disclosure. If you are not the intended recipient, you are prohibited from reading, distributing, copying or altering this email in any way. Any views or opinions expressed in this email are those of the author and not those of Crescent Homes. If you have received this message in error, please notify us immediately. Although precautions have been taken to prevent viruses from being present in this email, the company does not accept responsibility for any loss or damage that arise from the use of this email or its attachments.

Crescent Homes, LLC
 572 Savannah Hwy
 Charleston, SC 29407
 (843)-573-9635

Invoice

Date	Invoice #
12/21/2022	12212

Bill To:

Brenda Kennedy
 824 Rue Drive
 Charleston, SC 29414-7929

Date	Service	Description	Amount
08/10/2022	DRAW	KRP 79	\$2,500
08/10/2022	DRAW	KRP 80	\$2,500
08/10/2022	DRAW	KRP 88	\$3,000
05/02/2022	DRAW	KRP 13	\$2,500
12/21/2022	CREDIT	Expense Reimbursement	\$(1,508.08)
Payment due January 4, 2023			Total Amount Due \$8,991.92

CHECK REQUEST

Pay To: Brenda Kennedy8.10.22
DATEAddress: 824 Rue DriveCity / State / Zip Code: Charleston, SC 29414Company to be Charged: Crescent Homes SC, LLC

Account or Description	Accounts to be Charged	Amount
Draw on Lot 79 KRP Lot 79		\$2,500
Draw on lot 80 KRP Lot 80		\$2,500
3		
4 Draw on 88 KRP Lot 88		\$3,000.00
6		
7		
8		
9.		
10.		
	Less: Advances	()
	TOTAL:	\$8,000.00

Explanation or Notes:

DocuSigned by: Brian Wagner Date: 8/11/2022

Approved By: _____ Date: _____

Approved By: _____ Date: _____

Approved By: _____ Date: _____

CHECK REQUEST

Pay To: Brenda Kennedy

5/2/2022

DATE _____

Address: 824 Rue Drive

City / State / Zip Code: Charleston, SC 29414

Company to be Charged: Crescent Homes SC, LLC

[illegible]

Explanation or Notes:

Approved By: Brian Wagner

Date:

Approved By: *Melissa Strickland*

Date:

Approved By: _____

Date: _____

Small Claims - North

4045 Bridge View Drive
North Charleston, SC 29405
Phone:(843) 202-6650 Fax:(843) 202-6652

Received From: Crescent Homes Realty, Llc
572 Savannah Highway
Charleston, SC 29407

Date: 7/14/2023
Receipt #: 500724
Clerk: SUMARK

Paying for: Crescent Homes Realty, Llc,
Transaction Type: Civil Payment

Payment Type: Credit Card \$80.00
SC.gov Portal Fee \$2.36

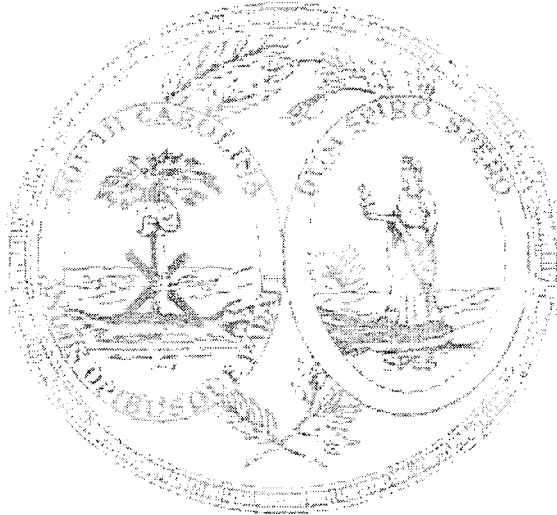
Reference #:
Comment:
Non-Refundable

Total Paid: \$82.36

You may check the status of your Charleston case at:

<http://www.sccourts.org/caseSearch/>

Case #	Caption	Previous Balance	Amount Paid	Balance Due
2023CV1011501023	Crescent Homes Realty, Llc VS Brenda Kennedy	\$80.00	\$80.00	\$0.00



L. H. Woolley
Total Cases: 1

\$80.00	\$80.00	\$0.00
SC.gov Portal Fee:	\$2.36	
Total Paid:	\$82.36	

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CRESCENT HOMES REALTY, LLC

Plaintiff,

v.

BRENDA KENNEDY,

Defendant.

2023-CP-10-4408
IN THE MAGISTRATE'S COURT

Civil Case No. 2023CV1011501023

ANSWER AND COUNTERCLAIM
(Jury Trial Requested)

FILED IN CHARLESTON COUNTY

AUG 30 2023

North Area Small Claims Court

2023 SEP -8 AM 11:18

FILED

Defendant Brenda Kennedy, answering the Plaintiff's Complaint (the "Complaint"), would respectfully show the Court as follows:

1. Defendant Kennedy admits that she worked for Crescent Homes Realty, LLC as a sales agent selling new homes. Kennedy alleges she was jointly employed by Crescent Homes SC, LLC, Crescent Homes CHS, LLC and Crescent Homes Realty, LLC. ("Crescent Entities")
2. Defendant Kennedy admits that she was paid commissions for each home sales.
3. Although Defendant Kennedy admits that she signed an agreement with Crescent Homes Realty, LLC which stated she was independent contractor, Kennedy denies that she was an independent contractor.
4. Defendant Kennedy admits that she resigned with no notice in December of 2022.
5. Defendant Kennedy admits that Crescent Entities contacted her several times claiming that she owed them monies stemming from her employment.
6. Defendant Kennedy denies that she owed the Crescent Entities any monies.

7. Defendant Kennedy admits that the Crescent Entities prepared an invoice and provided it to her in the US Mail claiming she owed them outstanding Draws.

8. Defendant Kennedy denies that she owes Crescent Entities any draws.

9. Defendant Kennedy denies that she owes Crescent Entities \$8991.92.

KENNEDY'S DEFENSES

10. Crescent Entities failed to state a claim upon which relief can be granted.

11. Crescent Entities is barred from recovery pursuant to the doctrine of unclean hands.

12. Crescent Entities is barred from recovery pursuant to the doctrine of misrepresentation.

13. Crescent Entities violated South Carolina Payment of Wages Act.

14. Crescent Entities is Kennedy's "Employer" under SC Code § 41-1-10(1).

15. Crescent Entities breached their agreement with Kennedy.

16. Kennedy was employee not an independent contractor.

17. Crescent Entities violated Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.,

18. Crescent Entities violated South Carolina Unfair Trade Practices Act.

19. Crescent Entities prohibited Defendant from making sales from February 2022 until she resigned.

COUNTERCLAIMS

Plaintiff Brenda Kennedy, individually and on behalf of herself and all others similarly situated employees, by undersigned counsel, alleges the following claims against the Plaintiffs Crescent Homes SC, LLC; Crescent Homes CHS, LLC; and Crescent Homes Realty, LLC. ("Crescent Entities")

NATURE OF COUNTERCLAIMS

20. Defendant Kennedy and similarly situated employees alleges Crescent Entities violated the Fair Labor Standards Act, 29 U.S.C. §201, et seq, (“FLSA”)by misclassifying her as independent contractor and by failing to pay her overtime wage when she worked in excess of 40 hours a week. Defendant Kennedy brings this action as a collective action pursuant to 29 U.S.C. §216(b), individually and on behalf of other similarly situated employees who suffered damages.

21. Kennedy also bring this action individually and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure for unpaid wages, treble damages, and other relief under the South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, et seq.(“SCPWA”)

CLASS CLAIMS

22. Upon information and belief, the members of each of the Classes are so numerous that joinder of all members is impracticable. While the exact number of the members of these Classes is unknown to Defendant Kennedy and similarly situated employees at this time, and can only be ascertained through appropriate discovery, she believes there are over one hundred individuals in each of the Classes.

23. Common questions of law and fact exist as to the Classes that predominate over any questions only affecting them individually and include, but are not limited to, the following:

- a. Whether Defendant Kennedy and members of the Class were improperly classified as independent contractors by Crescent Entities.
- b. Whether Defendant Kennedy and members of the Class were paid pursuant to their employment agreement with Crescent Entities.

- c. Whether Defendant Kennedy and members of the Class are owed commissions or unpaid wages do to Crescent Entities failure to pay them for working when they prohibited them from selling homes;

24. Defendant Kennedy will fairly and adequately protect the interests of the Classes as her interests are aligned with those of the members of the Classes. Defendant Kennedy has no interests adverse to the Classes she seeks to represent, and she has retained competent and experienced counsel.

25. The class action/collective action mechanism is superior to other available methods for a fair and efficient adjudication of this controversy. The damages suffered by individual members of the Classes may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the Classes to individually seek redress for the wrongs done to them by Defendant.

26. Defendant Kennedy and the Classes she seeks to represent have suffered and will continue to suffer irreparable damage from Defendant's illegal pay practices.

27. Crescent Entities has acted willfully and has engaged in a continuing violation of the FLSA and SCPWA.

PARTIES, JURISDICTION AND VENUE

28. Defendant is a resident of Charleston County, South Carolina.

29. Plaintiff Crescent Homes Reality, LLC, is a corporation, headquartered in Charleston, South Carolina and is registered with the South Carolina Secretary of State.

30. Crescent Homes SC, LLC is corporation, based in Charleston South Carolina and is registered with the South Carolina Secretary of State.

31. Crescent Homes, CHS LLC, is a corporation, headquartered in Charleston, South Carolina and is registered with the South Carolina Secretary of State.

32. 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.

FACTUAL ALLEGATIONS

33. Defendant and other similarly situated employees were jointly employed by Crescent Homes SC, LLC, Crescent Homes Reality, LLC. Crescent Homes CHS, LLC. (“Crescent Entities”)

34. Crescent Entities build and sell new homes throughout South Carolina.

35. Crescent Entities headquarters is 572 Savannah Hwy, Charleston, South Carolina, 29407.

36. Defendant and other similarly situated employees primary job duties were to sell new homes built by the Crescent Entities.

37. Defendant and other similarly situated employees were non-exempt for the purposes of FLSA.

38. Defendant and other similarly situated employees were not exempt from overtime pursuant to the outside sales exemption because they were required to makes sales at the employers’ places of business.

39. Defendant and other similarly situated employees were paid 100% commission for the homes they sold.

40. Defendant and other similarly situated employees were required to work scheduled hours at the sales centers in the various neighborhoods that Crescent Entities were building and developing.

41. The Crescent Entities had the authority to hire and fire Defendant Kennedy as well as similarly situated employees.

42. Crescent Entities supervised Defendant Kennedy as well as similarly situated employees.

43. The Crescent Entities had the authority to discipline Defendant Kennedy as well as similarly situated employees.

44. The Crescent Entities provided Defendant Kennedy as well as similarly situated employees, equipment such as computers and other office equipment.

45. The Crescent Entities were responsible for maintaining Defendant's as well as well as similarly situated employees', payroll, insurance, and taxes documents.

46. Crescent Entities intended to enter an employment relationship with Defendant well as similarly situated employees.

47. Crescent Entities provided Defendant well as similarly situated employees mandatory training.

48. Crescent Entities required Defendant well as similarly situated employees to complete all the items on checklist that was provided to them when they sold a home.

49. Defendant and similarly situated employees were only allowed to sell property that was owned by the Crescent Entities.

50. Crescent Entities required Defendant to work at the sales center which was located at the model home from 11 AM to 6 PM.

51. In addition to the scheduled hours at the sales center, Crescent Entities required Defendant and similarly situated employees to work from 8 AM to 5 PM.

52. Defendant and similarly situated employees were not allowed to sell homes for any other entity other than Crescent Entities.

53. Defendant and similarly situated employees were expected to take calls and handle work related matters even on their scheduled days off.

54. Crescent Entities wrote up employees for various things, including not wearing appropriately colored attire.

55. Defendant's and similarly situated employees are advertised as employees on the website of Crescent Entities.

56. Defendant and similarly situated employees regularly worked in excess of 40 hours a week and were not paid time and half of their regular hourly wages.

57. Defendant regularly worked between 45 to 55 hours a week.

58. Crescent Entities were aware that Defendant and similarly situated employees regularly worked in excess of 40 hours, because they aware of their scheduled hours and were aware of the phone calls and emails Defendant and similarly situated employees performed outside of their scheduled hours.

59. Defendant and similarly situated employees were expected to handle communications surrounding the sales of properties owned by Crescent Entities, twenty-four hours a day, seven days a week, including nights, weekends, and requested days off.

60. In February of 2022, Crescent Entities decided to pull all their listings from Multiple Listing Services (MLS) and ceased all sales company-wide. Defendant and similarly situated employees were unable to make any sales for approximately five months.

61. Even though Defendant and similarly situated employees could not make any sales during this time period, Crescent Entities required Defendant and similarly situated employees to report to work at the sales center on their regularly scheduled hours. Notwithstanding that Defendant and similarly situated employees were not being paid nor could they earn commissions.

62. Crescent Entities even returned deposits to clients who had already began the home-buying process thus Defendant and similarly situated employees were not paid any wages/commission for these sales as per their employment agreement.

63. During this five (5) month period, Defendant and similarly situated employees were required to perform administrative tasks, such as data-entry and they were not compensated for these hours.

64. Defendant and similarly situated employees lost on commissions for sales that they had already made and potential sales that could have been made due to the actions of the Crescent Entities.

65. Defendant and similarly situated employees entered a valid contract with Crescent Entities for wages/commissions for any home sold.

FOR A FIRST COUNTERCLAIM
(Fair Labor Standards Act–Failure to Pay Overtime Wages as to all Crescent Entities)

66. Defendant and similarly situated employees realleges and incorporates by reference all preceding paragraphs as if specifically set forth herein.

67. Defendant and similarly situated employees were employees of Crescent Entities for purposes of the Fair Labor Standards Act during times relevant to this matter.

68. Crescent Entities was Defendant's and similarly situated employees, employer pursuant to the FLSA.

69. Crescent Entities failed to pay Defendant and similarly situated employees at the rate of one-and-a-half times his normal rate of pay for all hours worked in excess of forty (40) hours per work week as required by section 7(a) of the FLSA, 29 U.S.C. § 207(a).

70. Defendant and similarly situated employees are entitled to back wages at the rate of one-and-a-half times their regular rate of pay for all overtime hours worked in excess of forty (40) hours per week, pursuant to section 16(b) of the FLSA, 29 U.S.C. § 216(b).

71. Defendant and similarly situated employees are also entitled to an award of back pay at their regular hourly rate or his overtime rate, as appropriate, as appropriate compensation for all time spent in working for the Crescent Entities.

72. Defendant and similarly situated employees are also entitled to liquidated damages equal to the amount of overtime compensation and unpaid compensation due to them under the FLSA, pursuant to section 16(b) of the FLSA, 29 U.S.C. § 216(b).

73. The work and pay records of Defendant and similarly situated employees are in the possession, custody, and/or control of Crescent Entities are under a duty pursuant to section 11(c) of the FLSA, 29 U.S.C. § 211(c). Pursuant to the regulations of the United States Department of Labor to maintain and preserve such payroll and other employment records from which the amount of Crescent Entities liability can be ascertained.

74. Defendant and similarly situated employees requests an order requiring Crescent Entities to preserve such records during the pendency of this action.

75. Defendant and similarly situated employees are also entitled to an award of reasonable attorney's fees and costs incurred in prosecuting this action, pursuant to 29 U.S.C. § 216(b).

FOR A SECOND COUNTERCLAIM
(South Carolina Payment of Wages Act - all Crescent Entities)

76. Defendant reallege and incorporates by reference all preceding paragraphs as if they were set forth herein verbatim.

77. Crescent Entities are “employers” as defined by S.C. Code Ann. § 41-10-10(1).

78. Crescent Entities employed the Defendant and similarly situated employees within the State of South Carolina.

79. S.C. Code Ann § 41-10-10(2) defines wages to mean “all amounts at which labor rendered is recompensed . . . and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract.”

80. Crescent Entities owe Defendant and similarly situated employees “wages” as defined in Section 41-10-10(2) of the Act, to compensate them for labor rendered to Crescent Entities, as promised to Defendant and the members of the Defendants’ class and as required by law.

81. Crescent Entities failed to pay Defendant and the members of the Defendant’s class all wages due, as required by Sections 41-10-40 and -50 of the Act.

82. Crescent Entities failed to pay Defendant and the members of the Defendant’s class per their employment agreement.

83. Crescent Entities failure to pay Defendant and the members of the Defendant’s class all wages due is willful, without justification, and in violation of the duty of good faith and fair dealing.

84. Pursuant to Section 41-10-80(C) of SCPWA, Defendant and the members of the Defendant’s class are entitled to recover an amount equal to three times the full amount of his unpaid wages, or his wrongfully deducted wages, plus costs and reasonable attorney’s fees.

85. Defendant reallege and incorporates by reference all preceding paragraphs as if they were set forth herein verbatim.

PRAYER FOR RELIEF

WHEREFORE, Defendant Kennedy individually and on behalf of herself and all others similarly situated who join this action demand prays that the Court grant the following relief:

- A. Designation of this action as a collective action on behalf of the FLSA collective class pursuant to 29 U.S.C. § 216 (b);
- B. Designation of the action as a class action under Fed. R. Civ. P. 23 on behalf of the SC Class;
- C. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and the SCPWA;
- D. An Award against Crescent Entities in the amount of unpaid overtime;
- E. Judgment against Crescent Entities that their violations of the FLSA and its implementing regulations were willful;
- F. An award of liquidated damages in an amount equivalent to the overtime damages, owed to Defendant and similarly situated employees;
- G. An award against Crescent Entities in the amount the unpaid wages/commissions. owed to Defendant Kennedy and similarly situated employees.
- H. An award of treble damages to Plaintiff and members of the Classes to the extent permitted by S.C. Code Ann. § 41-10-80(C);
- I. An award of costs and expenses of this action together with reasonable attorneys' and expert fees to Defendant and members of the Classes; and
- J. Such other and further relief as this Court deems just and proper.

JURY DEMAND

Defendant Kennedy demands a trial by jury on all questions of fact raised by this Complaint.

Respectfully submitted,

/s/ Marybeth Mullaney
Marybeth Mullaney, Esq.
Mullaney Law, LLC
652 Rutledge Ave Ste A
Charleston, South Carolina 29403
(843) 588-5587
marybeth@mullancylaw.net

ATTORNEY FOR DEFENDANT

FILED IN CHARLESTON COUNTY

AUG 30 2023

North Area Small Claims Court



MARYBETH MULLANEY

ATTORNEY AT LAW

652 Rutledge Ave. Suite A / Charleston, SC 29403

P: 843.588-5587 / marybeth@mullaneylaw.net

August 18, 2023

VIA U.S. MAIL

Small Claims – North
4045 Bridge View Drive
P.O. Box 70235
North Charleston, SC 29405

RE: 2023CV1011501023; *Crescent Homes Reality, LLC v. Brenda Kennedy*

Dear Sir/Madame:

Please find enclosed a copy of the Answer Counterclaims and Third-Party Complaint of Defendant Brenda Kennedy. Please be advised that I will be representing Ms. Kennedy in this matter. Defendant also requests that this matter be removed to the Court of Common Pleas as the damages alleged by Defendant exceeds \$7,500.00. If you have any questions or concerns, please contact my office at (843) 588-5587 or email me at marybeth@mullaneylaw.net.

Sincerely,

Marybeth Mullaney

FILED IN CHARLESTON COUNTY
AUG 30 2023
North Area Small Claims Court

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Crescent Homes Realty, LLC,

C/A No.: 2023-CP-10-04408

Plaintiff,

CRESCENT HOMES REALTY, LLC
MOTION TO STAY PROCEEDINGS AND
TO COMPEL ARBITRATION

v.

Brenda Kennedy,

Defendant.

The Plaintiff, Crescent Homes Realty, LLC, by its undersigned counsel, hereby moves this court for an Order staying this proceeding and compelling arbitration, pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, and such other authority as this Court may deem applicable, including but not limited to, South Carolina's Uniform Arbitration Act, the public policy favoring the avoidance of duplicitous results, and the relevant case law thereto.

The grounds for this motion are as follows:

- a. An arbitration agreement exists between the parties, which requires the arbitration of all disputes. A copy of this Agreements is attached hereto as Exhibit A.
- 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, this 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;
- d. The Plaintiff has demanded arbitration in accordance with the arbitration agreement so as to resolve all claims. A copy of its demand is attached hereto as Exhibit B.
- e. The relevant portions of the Arbitration and Dispute Resolution provisions of the applicable Agreement is as follows:

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.

Para. 9, Exhibit A

For the foregoing reason, Plaintiff hereby requests that this Court stay the proceedings in this case and compel the parties to enter into arbitration as required by the parties' arbitration agreement. Defendants rely upon the arguments and authorities cited to in the Memorandum which will be filed in Support of their Motion to Stay Proceedings and Compel Arbitration prior to a hearing on the Motion.

All of which is respectfully submitted.

GIBBS & HOLMES

/S/Allan R. Holmes, Sr.
Allan R. Holmes, Sr.
Cheryl H. Ledbetter
171 Church Street, Suite 110
Charleston, SC 29401
Telephone: 843-722-0033
Facsimile: 843-722-0114

ATTORNEYS FOR PLAINTIFF

October 20, 2023

EXHIBIT A

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.*

CRESCENT HOMES REALTY, LLC

INDEPENDENT CONTRACTOR AGREEMENT

Sales Representative Procedure and Commission Policies

The following policies and procedures of Crescent Homes Realty, LLC, concerning licensing and commissions are effective for Brenda Kennedy ("Sales Representative") as of 7.14.2022, and shall remain in effect until modified or superseded at the sole discretion of Crescent Homes Realty, LLC as set forth herein. For purposes of this document, the only differentiation between Assistant Sales Representative and Sales Representative is the Compensation Structure and the Termination terms referenced below. Assistant Sales Representatives shall adhere to all other terms, duties, responsibilities, and requirements of the Sales Representative.

1. **Independent Contractor:** Sales Representative is an independent contractor. It is agreed and understood that Crescent Homes Realty, LLC, has no right to control the method or manner of the work to be performed by the independent contractor, Sales Representative. This agreement does not constitute a hiring by either party. The parties hereto are and shall remain independent contractors bound by the provisions hereof. As an Independent Contractor, the Sales Representative is not under the control of Crescent Homes Realty, LLC, as to the means by which the Sales Representative's work is accomplished. Crescent Homes Realty, LLC, and its Broker in Charge will such exercise such authority as is required to meet their obligation to comply with applicable laws and regulations governing real estate brokerage activities. This agreement shall not be construed as a partnership; neither party hereto shall be liable for any obligation incurred by the other except as provided elsewhere herein. Crescent Homes Realty, LLC, shall not withhold from Sales Representative's commission any amounts for taxes, State or Federal. Crescent Homes Realty, LLC, shall not make any premium payments or contributions for any workers compensation or unemployment compensation
2. **Licensing:** SALES REPRESENTATIVES LICENSED BY CRESCENT HOMES REALTY, LLC, SHALL AT ALL TIMES PERFORM THEIR SERVICES PURSUANT TO AN "AT WILL" RELATIONSHIP. THIS RELATIONSHIP MAY BE TERMINATED BY CRESCENT HOMES REALTY, LLC, OR BY THE SALES REPRESENTATIVE AT ANY TIME FOR ANY REASON, WITH OR WITHOUT CAUSE AND WITH OR WITHOUT NOTICE. The policies set forth herein shall not create a contract or be deemed to establish services for any fixed term, nor shall any action or inaction by Crescent Homes Realty, LLC, create an obligation of continuing or maintaining Sales Representative's license. Sales Representative is required by law to

maintain a valid South Carolina or Tennessee real estate sales license in good standing at all times while performing under this agreement.

3. Compensation:

A. Method and Terms of Payment:

- a) All Sales Representatives shall be compensated by commissions earned on closings of homes. No other compensation in the form of salary, hourly, or weekly wages shall be paid to any Sales Representative. Crescent Homes Realty, LLC will pay for business cards, all MLS dues and fees, and L.L.R. dues and fees. Sales Representatives are solely responsible for all other costs required for their performance of their sales activities. Commission checks will be paid the following Friday after closing (2nd Friday after closing).
- b) All Assistant Sales Representatives shall be compensated on an hourly basis at a rate agreed to by the parties for all hours worked as reflected in the appropriate time records. In addition, Assistant Sales Representatives shall earn commissions on closings of homes from the commission paid to the Sales Representatives, as set forth in the Addendum attached hereto and made part hereof by reference. Crescent Homes Realty, LLC, will pay for business cards, all MLS dues and fees, and LLR dues and fees required for their performance of their sales activities. Assistant Sales Representative will receive commission check on the following Friday (2nd Friday after closing).

B. Commissions: A commission shall be earned for each new home sale that is closed. The amount of commission shall be as follows unless and until changed by Crescent Homes Realty, LLC as stated herein:

2% of total price minus incentives and design center options if applicable to lead agent. Lead Agent begins earning commissions on sales after start date of assigned community. Some communities may have more than one lead agent. In this instance the lead agents will equally split the total commission due. Certain communities and/or homes may be paid at a lower commission percentage per the discretion of Crescent Homes Realty, LLC.

Crescent Homes Realty, LLC may pay a draw for contracts that are ratified for up to 50% of the commission amount. The total outstanding draws will be capped at \$8,000 per the discretion of Crescent Homes Realty, LLC. In order for the draw to be paid, the buyer has to be well qualified with an approval, and all contingencies must be satisfied. Should sales agent resign or be terminated, all draws received will be paid back to Crescent Homes. Draw requests against commissions will not be provided for Assistant Sales Representatives.

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Crescent Homes Realty, LLC shall not change the amounts of commission on less than 30 days notice. All sales based on contract accepted by Crescent Homes Realty, LLC before the effective date of a commission change shall be governed by the commission rates in effect before such change.

- C. When Commissions Have Been Earned: Commissions shall be earned only on sales which actually close and the loan, if any, has been funded. No commission shall be earned on any sale that does not close for any reason whatsoever, including cancellation by Crescent Homes Realty, LLC.
- D. Partial Commissions Under Special Circumstances: The management shall establish a schedule of commission rates or percentages for sales under the following circumstances.

Transfers:

- a) Sales Agents that transfer to another Community shall fully service their own contracts that close within 60 days of the transfer and shall receive full commission on these closings with no servicing fee's to be paid out to new Sales Agent. Sales that close beyond 60 days after the transfer takes place shall be handled as follows: For those sales which were under contract prior to the new agent, servicing will be handled by the new agent that transferred to the Community. The procuring Sales Agent(s) will pay the new agent a servicing fee of \$500 or \$250 each, for agents with partnerships. The service fee is \$500 total regardless of stage of construction. Assistant pay will be deducted from procuring Sales agent's commission per the In-house Commission sheet. It is the responsibility of Sales Agent(s) to revise the In-house commission sheet to receive proper compensation.
- b) Sales Agents that transfer to a community where a Sales Agent left the company or is terminated, will be paid a servicing fee of \$500 from Crescent Homes Realty, LLC regardless of stage of construction. Crescent Homes Realty, LLC will also pay the Sales Assistant \$500 upon closing of home (if applicable). New Sales Agent will be responsible for updating the In-house commission sheet in order to receive proper compensation.

Departure of Sales Assistant:

Should a Sales Assistant leave the company or be terminated, Sales Agent will need to revise the In-House Commission sheet removing the Sales Assistant from the paperwork to receive proper compensation.

Sales Agent – Partner:

Should a partner leave the company or is terminated, the commission due to remaining Sales Agent will be 1% per the In-house Commission sheet submitted at time of contract. Remaining sales agent will still pay \$250 to Sales Assistant (if applicable) and Crescent Homes Realty, LLC will pay the other \$250 to the Sales Assistant. It is the responsibility of the Sales Agent to revise In-house Commission Sheet to receive proper compensation.

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E. Payment of Commission to Assistant Sales Representatives: In order to maintain commercially acceptable production standards for sales office coverage in accordance with paragraph 5 of this Agreement, Crescent Homes Realty, LLC may assign an Assistant Sales Representative or a Sale Agent in Training to a Sales Representative. In this case, \$500 will be deducted from Sales Representative's commission and paid to Assistant Sales Representative for each home closed in community. Communities with two lead Agents will equally split the Assistant servicing fee. Crescent Homes Realty, LLC reserves the right to determine, in its sole discretion, which agent/agents contributes to Assistant Sales Representatives and Sales Agent in Training upon transfers and terminations. Assistant Sales Representatives are only eligible to earn commissions on contracts written/closed starting from the date of assignment to said Community. For example, Assistant Sales Representatives will not be eligible for commissions for sales that were written prior to their servicing that community unless expressly approved in writing.

F. Special Promotions and Bonuses: The Broker – In – Charge may establish special incentives, sales promotions, or bonuses for sales of particular units or on a company wide basis. The amounts, conditions, terms and details of such incentives or bonuses shall be determined by the management at its sole discretion. Sales Representatives are therefore no entitled to nor should they have any expectation of receipt of said discretionary bonuses.

Bonus Pay: Agents are eligible to receive an extra .25% commission for meeting monthly goals and an extra .25% commission for meeting quarterly goals. Crescent Homes does NOT pay a bonus for goals of 1 per month.

Bonus Goals will NOT be set or apply toward monthly or quarterly commission bonus for the first 30 days of a new community or newly assigned phase releases. Crescent Homes Realty, LLC does NOT pay a bonus for goals of 1 sale per month.

G. Policies Subject to Change: Crescent Homes Realty, LLC shall have the right to change any or all of the foregoing policies at any time. Except as to commissions which are governed by paragraph B, above, changes adopted by Crescent Homes Realty, LLC shall become effective immediately after notification to the Sales Representative.

H. Reimbursement for Unauthorized Acts: If any Sales Representative enters into any agreement that violates the sales policies established by Crescent Homes Realty, LLC or intentionally or through error or omission, commits any act which obligates Crescent Homes Realty, LLC to modify plans, reduce prices, compensate buyers, or incur any unauthorized expenses, Crescent Homes Realty, LLC shall have the right to recover such expenses by withholding the amount of

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such expenses from compensation earned. For example, if a Sales Representative promises an unauthorized price reduction, the amount of the price reduction in excess of any authorized discount shall be charged against the Sales Representative. If a Sales Representative promises an unauthorized mortgage financing program, the cost of obtaining such financing in excess of the company's normal cost will be charged against the Sales Representative. If a Sales Representative promises unauthorized options, any expenses incurred by the company to accommodate such options shall be charged against the Sales Representative. The foregoing examples are for illustration only, and shall not be deemed to limit the company's right to recover unauthorized expenses for any Sales Representative. The Sales Representative acknowledges the rights herein reserved to Crescent Homes Realty, LLC to charge the Sales Representative for the unauthorized expenses.

4. Benefits, Holidays, Vacation, and Sick Policy:

- A. As an independent contractor, the Sales Representative is not provided any "employee" benefits. The task which the Sales Representative has been contracted is the selling and marketing of real estate which Crescent Homes Realty, LLC, has available for listing and sale. Sales Representative is expected to be available and to be actively marketing to potential purchasers of real estate at all commercially reasonable times.
- B. Benefits: Crescent Homes Realty, LLC, may provide Sales Representative with Health Insurance in the manner and in accordance with terms and conditions determined by Crescent Homes Realty, LLC.
- C. Periods During Which Sales Representative Will Be Unavailable for Marketing and Sales Activities: Sales Representative should notify Broker – In – Charge in writing at least 30 days in advance of any period during which the Sales Representative will not be actively engaged in marketing and sales activities for properties made available for listing and sale by Crescent Homes Realty, LLC. The Company will attempt in good faith to accommodate the Sales Representative in efforts to locate other qualified Sales Representatives to undertake marketing and sales activities in the absence of the Sales Representative. Should emergency conditions arise which render the Sales Representative unavailable for marketing and sales activities, the Sales Representative should notify the Broker-In-Charge at the earliest possible time.
- D. Holidays: Crescent Homes Realty, LLC, does not seek to have properties marketed and sold on Christmas Day, New Year's Day, Memorial Day, 4th of July, Labor Day, Thanksgiving, and Easter Sunday.
- E. Policies Subject to Change: Crescent Homes Realty, LLC shall have the right to change any or all of the foregoing policies at any time. Except as to commissions which are governed by paragraph B, above, changes adopted by Crescent Homes

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Realty, LLC shall become effective immediately after notification to the Sales Representative.

5. Production Standards: The Broker-In-Charge may issue a policy and procedure manual setting forth commercially acceptable production standards for the task undertaken by the Sales Representative --- the marketing and selling properties made available for listing and sale by Crescent Homes Realty, LLC. These standards include marketing and sales at all commercially reasonable times --- including, but not limited to, the hours during which Crescent Homes Realty, LLC, sales offices are available and open for business; Tuesday through Friday 11:00 a.m. to 6 p.m., Saturday 10 a.m. to 6 p.m., and Sundays and Mondays 1:00 p.m. to 6 p.m. Sales Representatives who are allowed to access and utilize sales offices owned by Crescent Homes Realty, LLC, are required to remain at, or in close proximity to, these offices during these hours so as to secure these properties and confirm to the public the widely advertised availability of these office and associated on-site sales and marketing services. Crescent Homes Realty, LLC has the right to change the foregoing policies and hours of operation at any time. Changes by Crescent Homes Realty, LLC will become effective immediately after notification to the Sales Representatives.

6. Termination of this Independent Contractor Agreement:

As all Sales Representatives are to perform services as independent contractors pursuant to an at-will relationship with Crescent Homes Realty, they may be terminated at any time for any reason, with or without cause and with or without notice. If a Sales Representative is terminated, or if he/she voluntarily resigns with no notice or insufficient notice, no commissions related to homes unclosed on the date of termination or resignation shall be paid.

- A. If a Sales Representative voluntarily resigns with at least thirty (30) days notice and is in good standing as judged solely by management, management may, in its sole discretion, determine to pay him/her a commission of no more than fifty percent (50%) of the total of commissions relating to homes that close within thirty (30) days of the Sales Representative's resignation.
- B. If an Assistant Sales Representative is terminated, or he/she voluntarily resigns with or without notice, no commissions related of homes unclosed on the date of termination or resignation shall be paid.

Re-Written Contracts: No commission shall be payable on any sales resulting from any contract written after the date of resignation or termination.

7. Ethical Standards: No Sales Representative shall accept any kickback, payment, or gift from any real estate agent, broker, or other persons involved in any transaction with Crescent Homes Realty, LLC. No Sales Representative shall engage in any independent real estate activities other than the representation of Crescent Homes Realty, LLC, without the prior written approval of the Broker in Charge for Crescent Homes Realty,

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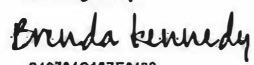
LLC. No Sales Representative shall own investment property which competes with Crescent Homes Realty, LLC. in location and price without the written approval of the Broker in Charge for Crescent Homes Realty, LLC which consent shall not be unreasonably denied. No Sales Representative shall knowingly or intentionally misrepresent any condition of the property, or any term or condition of the sales contract, warranty, homeowner association documents, financing or other terms, conditions, or other documents or the rights or obligations of Crescent Homes Realty, LLC. Sales Representative acknowledges receipt of Crescent Homes Realty, LLC. Policy Manual, agrees to be bound thereby and acknowledges that any breach thereof may subject Sales Representative to termination for cause.

8. Policy Changes: Crescent Homes Realty, LLC shall have the right at any time to change any or all of the foregoing policies subject to any notice commitments set forth herein.
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 on 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.
10. Non-Reliance by Sales Representative: Sales Representative hereby represents to Broker-In-Charge that Sales Representative has not relied and is not relying upon any promises, guarantees, or representations made by Broker-In-Charge or anyone else acting or claiming to act on behalf of Crescent Homes Realty, LLC with respect to terms or other matters set forth herein unless specifically reduced to writing and made a part of this document.
11. Acknowledgement: The undersigned Sales Representative hereby acknowledges receipt of a copy of these policies and agrees that he/she as a Sales Representative is an independent contractor and shall be governed hereby.
12. Non-Disparagement. At no time during this Agreement, or after the termination of this Agreement, shall the Sales Representative disparage Crescent Homes Realty, LLC, its owners, or managers.
13. Confidentiality. Sales Representative will perform work that may require Crescent Homes Realty, LLC, to disclose confidential and proprietary information ("Confidential Information") to Sales Representative. Confidential Information is information and data of any kind concerning any matters affecting or relating to Crescent Homes Realty, LLC, the business or operations of Crescent Homes Realty, LLC, and/or the products, plans, processes, or other data of Crescent Homes Realty, LLC, not generally known or available outside of the company. Accordingly, to protect the Confidential Information that will be disclosed during employment, the Sales Representative agrees as follows:

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- A. Sales Representative will hold the Confidential Information received from Crescent Homes Realty, LLC, in strict confidence and will exercise a reasonable degree of care to prevent disclosure to others.
 - B. Sales Representative will not disclose or divulge either directly or indirectly the Confidential Information to others unless first authorized to do so in writing by Crescent Homes Realty, LLC, management.
 - C. Sales Representative will not reproduce the Confidential Information nor use this information commercially or for any purpose other than the performance of his/her duties for Crescent Homes Realty, LLC.
 - D. Sales Representative will, upon request or upon termination of his/her relationship with Crescent Homes Realty, LLC, deliver to Crescent Homes Realty, LLC, any Confidential Information originating from, or received from Crescent Homes Realty, LLC.
14. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of South Carolina applicable to contracts which are wholly executed and performed in South Carolina. If a court or arbitrator of competent jurisdiction should determine that any of the language contained in this Agreement is vague or ambiguous, such language shall not be presumptively construed against either party but shall instead be construed to give effect to the true intentions of the parties.
15. Merger. This Agreement constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes and replaces any oral or written communications and any undertakings previously made between the Parties relating to the subject matter.

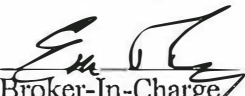
Signature Required:

DocuSigned by:

 049764C167E6433...
 Sales Representative

7/14/2022

Date

Crescent Homes Realty, LLC


 Broker-In-Charge

7/14/2022
 Date

Addendum to Crescent Homes Realty, LLC Independent Contractor Agreement

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.*

This Agreement is an Addendum to the Independent Contractor Agreement of Brenda Kennedy (Sales Representative).

Draw on Commissions: The agreement shall be effective as of June 29, 2022.

Opportunity to request increased commission draw:

Any amount requested exceeding \$8,000 per the Independent Contractor Agreement may be evaluated and decided upon at the discretion of Crescent Homes Realty, LLC. In order for the draw to be paid, the buyer(s) must be well qualified with an approval, full deposit paid, and contingencies must be satisfied. Should request be granted, Sales Representative may only take 1% draw per lot. Should Sales Representative be in a partnership, agent can only take .5% draw per lot.

Should Sales Representative resign and/or be terminated from Crescent Homes, all draws taken must be paid back in full at time of resignation and/or termination.

Acknowledgement: Brenda Kennedy hereby acknowledges receipt of a copy of this Addendum and agrees that this is a Binding Agreement, and all parties acknowledge that they are independent contractors.

DocuSigned by:
Brenda Kennedy 6/29/2022
 049784C167E8433...
 Brenda Kennedy Date
 DocuSigned by:
Brian Wagner 6/29/2022
 7AE1582268A74DE...
 Date

Crescent Homes Realty, LLC
Edward M. King 6/29/22
 Broker-in-Charge Date

EXHIBIT B

LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
POST OFFICE BOX 938
CHARLESTON, SOUTH CAROLINA 29402-0938

ALLAN R. HOLMES
PARTNER
CERTIFIED SPECIALIST IN LABOR
AND EMPLOYMENT LAW

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
aholmes@gibbs-holmes.com

October 18, 2023

VIA EMAIL AND REGULAR MAIL

Marybeth Mullaney, Esq.
Attorney at Law
652 Rutledge Ave. Ste A
Charleston, SC 29403

Crescent Homes Realty, LLC v. Brenda Kennedy
C/A No.: 2023-CP-10-4408, Court of Common Pleas, Ninth Judicial Circuit, Charleston County

Dear Marybeth:

Per our conversation of earlier today, this is a demand for arbitration of all claims and the entry of a stay in the above-referenced action. The demand is based upon the arbitration agreement found in the parties' Independent Contractor Agreement. My understanding from our conversation is that your client does not consent to this relief so we will be filing a motion on behalf of Crescent Homes Realty, LLC, shortly.

Thank you for discussing the matter with me, and I look forward to working with you to resolve the matter.

With kind regards, I am

Very truly yours,



Allan R. Holmes

ELECTRONICALLY FILED - 2023 Oct 20 5:11 PM - CHARLESTON - COMMON PLEAS - CASE#2023CP1004408

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Crescent Homes Realty, LLC,

Plaintiff,

v.

Brenda Kennedy,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C/A No.: 2023-CP-10-4408

CRESCENT HOMES REALTY, LLC
MEMORANDUM IN SUPPORT OF
ITS MOTION TO STAY AND
TO COMPEL ARBITRATION

History of the Litigation

This case began with the *pro se* commencement of an action in Small Claims Court by the Plaintiff Crescent Realty LLC, a real estate broker, against Brenda Kennedy, a real estate sales agent, who worked pursuant to a written Independent Contractor Agreement. The Small Claims action sought to collect draws which had been advanced to Ms. Kennedy but not repaid. The collection is specifically authorized by the parties' Independent Contractor Agreement, Exhibit A to the Summons and Complaint (hereinafter "Agreement"). The Plaintiff Crescent Realty limited its claims to \$7500 to stay within the jurisdictional requirements of the Small Claims Court.

Defendant Kennedy filed her Answer and Counterclaim in the Small Claims Court on August 30, 2023. Her counterclaim seeks class and collective relief based upon alleged failures to pay overtime under the federal Fair Labor Standards Act (FLSA). The Small Claims Court determined that the counterclaim exceeded the jurisdictional limit of that Court and transferred the case to the Court of Common Pleas. *See* Order filed in the Court of Common Pleas on September

8, 2023. Crescent Realty timely filed its Motion to Stay and Compel Arbitration on October 20, 2023¹.

An Order Should Be Entered Staying the Proceedings and Compelling Arbitration.

The Defendant Kennedy contends that because Crescent Realty commenced a suit in Small Claims Court, arbitration has been waived. This contention is contrary to controlling law.

First, 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 clause²:

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.*

The Federal Arbitration Act (FAA) applies to the Agreement. Crescent Realty is engaged in the sale of real estate, and that real estate was marketed and sold in interstate commerce by Defendant Kennedy³.

Second, the controlling precedents reject any contention that Crescent Realty has waived arbitration by the filing of its Small Claims Court suit. The governing law is explicated by *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001), itself a case in which the party demanding arbitration had previously prosecuted suits in court against the party opposing arbitration.

¹ On November 1, 2023, the Small Claims Court again transmitted the Defendant's Answer and Counterclaim to the Court of Common Pleas which, on November 6, filed it again.

² In addition, paragraph 9 of the Agreement contains its arbitration provision.

³ Indeed, in her Answer and Counterclaim, Defendant Kennedy 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, par. 32.

“Under the Federal Arbitration Act, a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right.” *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985); see 9 U.S.C.A. § 3 (West 1999). “Although this principle of 'default' is akin to waiver, the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred.” *Maxum*, 779 F.2d at 981; see also *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996) (“Because of the strong federal policy favoring arbitration, . . . we will not lightly infer the circumstances constituting waiver.”). “Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

A party may waive its right to insist on arbitration if the party “so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” *Maxum*, 779 F.2d at 981. But even in cases where the party seeking arbitration has invoked the “litigation machinery” to some degree, “the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*.” *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) (emphasis added). “Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration . . .” *Id.* (citation omitted).

MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001).

Defendant Kennedy can show zero actual prejudice. Crescent Realty has done nothing more than file pleadings, and there is no showing of any material delay. Per *MicroStrategy*, there is no basis for claiming waiver⁴. *Id.*

Besides, Crescent Realty’s litigation activities have consisted entirely of the filing of a Small Claims Court Collection action. Defendant Kennedy’s counterclaim is based upon the federal Fair Labor Standards Act. Because Crescent Realty’s collection claim is distinct, both factually and legally, from Ms. Kennedy’s FLSA claims, Crescent Realty’s litigation activities cannot support a finding that Crescent Realty waived its right to arbitrate the unrelated claims. *Id.* at 250-251 and cases cited therein.

⁴ *MicroStrategy* and its holding have been cited with approval and relied upon by our South Carolina Court of Appeals. *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003).

Conclusion

Crescent Realty and Ms. Kennedy are parties to a valid arbitration agreement. Application of the governing law eliminates the claim of waiver. It is respectfully submitted that this Court should stay⁵ this action and enter an Order referring the matter to arbitration.

All of which is respectfully submitted.

GIBBS & HOLMES

/S/Allan R. Holmes, Sr. #2576
Allan R. Holmes, Sr.
Cheryl H. Ledbetter
171 Church Street, Suite 110
Charleston, SC 29401
Telephone: 843-722-0033
Facsimile: 843-722-0114

ATTORNEYS FOR PLAINTIFF

October 9, 2024

⁵ A stay rather than a dismissal appears to be required. *See Smith v. Spizzirri*, 601 U.S. 472, 476, 144 S. Ct. 1173, 218 L. Ed. 2d 494 (2024), and *Bennett v. ACS Primary Care Physicians-Southeast P.C.*, No. 6089, 2024 S.C. App. LEXIS 77, *18-19, 2024 WL 4234720 (Ct. App. Sept. 18, 2024).

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH CIRCUIT

CRESCENT HOMES REALTY, LLC

Civil Case No. 2023-CP-04408

Plaintiff,

v.

BRENDA KENNEDY,

Defendant.

**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**

Defendant Brenda Kennedy (“Defendant” or “Kennedy”), through her undersigned counsel, files this motion in opposition to Plaintiff Crescent Homes Realty LLC (“Plaintiff” or “Crescent”) Motion to Stay Proceedings and Compel Arbitration. Kennedy’s former employer, Crescent, filed this action against her in Charleston County Magistrate Court. After Kennedy filed her Answer and Counterclaim (“Answer”), Crescent filed a Motion to Stay the Proceedings and Compel Arbitration. Because Crescent knew of their right to arbitrate this dispute and acted inconsistently with that right by filing this lawsuit, the Court should deny Plaintiff’s motion.

PROCEDURAL HISTORY

Kennedy resigned in December of 2022. Crescent filed a Complaint against Kennedy in Charleston County Magistrate’s Court on June 23, 2023, seeking a judgment for \$7500 in draws that they had paid her on ratified contracts before she resigned. Crescent’s handwritten complaint states:

Defendant has a Contractual obligation to repay DRAWS to Plaintiff, and those specific DRAWS are attached.

DRAW Repayment language in Section 3B, Paragraph 3, with additional supporting language in the Addendum

Crescent filed a copy of the contract signed by Kennedy with their complaint. Although the contract contained an agreement to arbitrate, Crescent did not reference arbitration in the relief requested. Instead, the Defendant requested “a judgment for \$7500 as well as Court costs, legal fees, and interest.” Rather than arbitrate their claims under the contract, Crescent filed a lawsuit against Kennedy for breach of contract. Crescent acted inconsistently with its right to arbitrate by choosing to use the power of the judicial system.

After being served with the complaint, Kennedy hired counsel. Her counsel emailed Crescent’s CEO President, Ted Terry (“Terry”), on August 17, 2023, explaining that she had been recently retained and asking him for an extension to file an Answer to his Complaint. (Ex1 Email to President) Terry never responded to Counsel’s request for an extension, so Kennedy’s Counsel had one day to draft the Answer and Counterclaim. Kennedy mailed her Answer and Counterclaim to the Court on August 18, 2023. On September 8, 2023, the Magistrate Court transferred the case to the Court of Commons Pleas because the Defendant’s Counterclaims exceeded the \$7500 limit for small claim court. On October 20, 2023, Crescent filed a motion seeking to enforce the arbitration agreement.

FACTUAL ALLEGATIONS

Kennedy was employed by Crescent from June 2018 until December 2022 as a Sales Representative. She was paid 100% commission. (Answer ¶ 4, 33, 73) Kennedy’s primary duties were to sell homes and perform administrative tasks for Crescent. (Answer ¶ 36, 49, 50) Crescent misclassified Kennedy as an independent contractor. (Answer ¶ 3) Crescent exercised significant

control over her. For instance, Kennedy had to wear certain attire, was required to work set hours, and could only sell homes built by Crescent. (Answer ¶ 50, 52) Kennedy regularly worked approximately 45 to 55 hours a week and was not paid overtime compensation. (Answer ¶ 39, 50, 51, 57) In February of 2022, Crescent Entities pulled all their listings from Multiple Listing Services (MLS) and ceased all sales company-wide. Defendant and similarly situated Sales Representatives could not make any sales for approximately five months. Kennedy was not paid any wages during this time, even though she was required to report to the Sales Center and perform data entry and other administrative tasks. (Answer ¶ 60, 63)

Kennedy filed counterclaims against Crescent on behalf of herself and other similarly situated Sales Representatives alleging that Crescent violated the Fair Labor Standards Act, 29 U.S.C. §201, et seq, (“FLSA”) by misclassifying them as independent contractors and by failing to pay them overtime wage when they worked in excess of forty (40) hours a week. Kennedy also brought individual, and class claims for unpaid wages, treble damages, and other relief under the South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, et seq.(“SCPWA”)

ARGUMENT

Plaintiff waived its right to arbitrate based on the test set forth in the United States Supreme Court’s Decision in *Morgan v. Sundance, Inc.*

In *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022), the Supreme Court rejected the prejudice-focused arbitration waiver inquiry followed by nine of the Courts of Appeals, including the Fourth Circuit. Instead, the Court held that the focus must be on the conduct of the party seeking to enforce the arbitration agreement. *Id.* *Morgan* unanimously ruled that the Federal Arbitration Act (FAA)’s “policy favoring arbitration” does not permit courts to condition a waiver of the right to arbitrate on a showing of prejudice to the opposing party. *Id.* *Morgan* holds that when deciding whether a waiver has occurred, courts should focus on the

actions of the party who held the right, not on prejudice to the opposing party, and consider the circumstances and context of each case. *Id.* *Morgan* held that the test for waiver is whether the party knew of an existing right to arbitrate and acted inconsistently with that right. *Id.* at 412.

Here, Crescent knew they had a right to arbitrate because they drafted the agreement to arbitrate. Moreover, they filed the contract containing the right to arbitrate as an exhibit with their lawsuit. Therefore, Crescent was clearly aware that they could arbitrate this dispute. The second part of the *Morgan* analysis looks to whether Crescent acted inconsistently with that right. By filing a lawsuit rather than seeking to arbitrate, Crescent acted inconsistently with that right. The very definition of acting inconsistent with arbitration is filing a lawsuit. The Court should follow the test set forth in *Morgan* and deny the Plaintiff's motion. Even though, under *Morgan*, Kennedy is no longer required to show prejudice, she has demonstrated that she was prejudiced because she incurred legal expenses due to the Crescent actions.

CONCLUSION

For the reasons set forth above, the Court should deny the Plaintiff's motion.

Respectfully submitted,

/s/ Marybeth Mullaney
Marybeth Mullaney, Esq.
Mullaney Law, LLC
4900 O'Hear Ave Ste 100 & 200
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Crescent Homes v. Kennedy 2023CV1011501023

1 message

Marybeth Mullaney <marybeth@mullaneylaw.net>

Thu, Aug 17, 2023 at 6:35 PM

To: T.terry@crescenthomes.net

Cc: Michael Close <michael@mullaneylaw.net>, Callie Seals <callie@mullaneylaw.net>

Ted,

I was recently retained in the above captioned case to represent Brenda Kennedy in the case you filed against her in Charleston County Magistrate Court. It is my understanding that the answer is due tomorrow. Would you grant me a 14 day extension to file an answer? I would greatly appreciate it.

Kind Regards,
Marybeth

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ELECTRONICALLY FILED - 2024 Oct 10 3:18 AM - CHARLESTON - COMMON PLEAS - CASE#2023CP1004408

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Crescent Homes Realty, LLC,

Plaintiff,

v.

Brenda Kennedy,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C/A No.: 2023-CP-10-4408

REPLY MEMORANDUM OF
CRESCENT HOMES REALTY, LLC
IN SUPPORT OF ITS MOTION TO
STAY AND COMPEL ARBITRATION

Counsel for the Plaintiff apologizes for failing to cite and address *Morgan v. Sundance, Inc.*, 596 U.S. 411(2022), and the effect of its holding on the requirements for waiver of FAA arbitration. Subsequent to *Morgan*, the United States Court of Appeals for the Fourth Circuit addressed this issue.

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.

SZY Holdings, LLC v. Garcia, Case No. 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 claim for collective and class action relief – a claim which is unrelated to the collection action and beyond the authority of the small claims court to entertain or adjudicate. Under the facts of this case, this question is easily answered. No waiver occurred.

In its prior memorandum, Crescent Homes Realty cited *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001)¹, itself a case in which the party demanding arbitration, MicroStrategy, had previously prosecuted suits in court against Lauricia, the party opposing arbitration. Crescent Homes Realty cited *MicroStrategy* for two separate holdings, each addressed the effect of litigation activities on waiver: To establish waiver, 1) the party opposing arbitration must show that it suffered prejudice, or 2) the party opposing arbitration must show that that the litigation activities were related – both factually and legally – to the claims at issue in litigation. After *Morgan*, a showing of prejudice is no longer required. However, the second *MicroStrategy* 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

¹ Sadly for the undersigned counsel, the application of Shepards to *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001), led neither to *SZY Holdings, LLC v. Garcia* nor to *Morgan v. Sundance, Inc.* Counsel has little doubt that he must have read *Morgan* at one time or another, but he did not recall it when drafting the memo in support of Crescent Homes Realty's Motion to Compel Arbitration.

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.”). ... 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, Inc., 268 F.3d at 250-251.

Since the decision in *Morgan*, this second holding of *MicroStrategy* has been applied 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 I, sued Ford in small claims court to collect a debt. Subsequently, Ford, brought a putative class action claiming UHG I 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 I 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 I had waived arbitration. *Id.*, at 11-14. This contention was soundly rejected.

... Plaintiff also has not shown that Defendants waived the right to compel arbitration by previously commencing a debt-collection lawsuit against Plaintiff in state court. ... To waive the right to arbitration, Defendants must: (1) know of an existing right to arbitration; and (2) act inconsistently with that right. *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 212 L. Ed. 2d 753 (2022). In this case, it is undisputed that UHG previously commenced a debt-collection action against Plaintiff regarding the Loan in the District Court of Maryland ... Given this, the Court agrees with Plaintiff that UHG, as a subsequent holder of the Loan, must have known of its right to arbitration under the Borrower Agreement....

The Court does not, however, agree with Plaintiff 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.

As discussed above, UHG had the right to arbitrate its debt-collection claims against Plaintiff under the broad arbitration provision in the Borrower Agreement. ... But the FDCPA, MCDCA and MCPA claims in this action are not sufficiently related to the claims in the prior debt-collection to show that UGH waived the right to compel arbitration.

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. ... 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.

... And so, the Court concludes that claims in the two cases are not sufficiently related to show Defendants waived their right to compel arbitration.

Ford v. UHG I LLC, No. 22-cv-00840-LKG, 2023 U.S. Dist. LEXIS 31069, *14-17 (D. Md. Feb. 23, 2023)(Griggsby, J.)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 claim under the Federal Fair Labor Standards Act (FLSA). Any alleged violations of the FLSA 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. It is respectfully submitted that Crescent Homes Realty's Motion to Stay and Compel arbitration should be granted.

All of which is respectfully submitted.

GIBBS & HOLMES

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ATTORNEYS FOR PLAINTIFF

October 14, 2024

² More recently, another district court opinion has rejected an arbitration waiver claim on the same ground relied upon by *MicroStrategy* and *Ford*. *Arco Nat'l Constr., LLC v. MCM Mgmt. Corp.*, Case No.: 1:20-cv-03783-JRR, 2024 U.S. Dist. LEXIS 158349, *15-25 (D. Md. Sept. 4, 2024) (Rubin, J.)(litigation of unrelated issues does not waive right to arbitration).

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH CIRCUIT

CRESCENT HOMES REALTY, LLC

Plaintiff,

v.

BRENDA KENNEDY,

Defendant.

Civil Case No. 2023-CP-04408

**DEFENDANT’S REPLY IN OPPOSITION TO
PLAINTIFF’S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**

Defendant Brenda Kennedy (“Defendant” or “Kennedy”), through her undersigned counsel, files this Reply in response to Plaintiff Crescent Homes Realty LLC (“Plaintiff” or “Crescent”) Reply in Support of its Motion to Stay the Proceedings and Compel Arbitration. Plaintiff argues the Court should grant its motion based on the decisions in *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001) and *Ford v. UHG I LLC*, Case No. 22-cv-00840-LKG 2023, U.S. Dist. LEXIS 31069 (D. Md. Feb. 23, 2023). Notwithstanding that, neither of those cases applies. First, *MicroStrategy Inc. v. Lauricia* doesn’t apply because it predates the United States Supreme Court’s decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708 (2022). Secondly, *Ford v. UHG I LLC* is distinguishable because the claims that Crescent seeks to arbitrate are related to the lawsuit they initiated against Kennedy. Additionally, the Court should deny Crescent’s motion because they waived the right to compel arbitration under the test set forth in *Morgan v. Sundance, Inc.*

PROCEDURAL HISTORY

Crescent initiated a lawsuit against Kennedy, a former employee, in Charleston County Magistrate Court on June 23, 2023, seeking a judgment against her for \$7500 in commissions. On August 18, 2023, Kennedy filed an Answer and Counterclaims denying that she owed \$7500 because Crescent misclassified her as an independent contractor and failed to pay her wages in violation of the Fair Labor Standards Act, 29 U.S.C. §201, et seq. (“FLSA”) and the South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, et seq. (“SCPWA”).

On September 8, 2023, the Magistrate Court transferred the case to this Court because Kennedy’s Counterclaims exceeded the \$7500 limit. On October 20, 2023, Crescent filed a motion seeking to enforce the arbitration agreement. Plaintiff’s motion is scheduled for a hearing before this Court on Wednesday, October 16, 2024. Last week, both parties filed Memorandums of Law. Plaintiff filed a Reply on October 14, 2024. Accordingly, Defendant files a Reply addressing the cases cited in Plaintiff’s Reply.

ARGUMENT

- 1. *MicroStrategy, Inc. v. Lauricia* predates the Supreme Court’s decision in *Morgan v. Sundance, Inc.*, which overturned the widespread practice of requiring a party to establish prejudice when arguing waiver.**

In their Reply, the Crescent incorrectly argues that the Fourth Circuit’s decision in *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001) controls the dispute between Crescent and Kennedy. Plaintiff is mistaken because the holding in *MicroStrategy, Inc. v. Lauricia* is not in line with the holding in *Morgan v. Sundance*. In *Morgan v. Sundance*, the Supreme Court held that the party arguing in favor of a waiver is not required to show prejudice. *Morgan*, 596 U.S. at 417. This opinion eliminated an over-50-year-old rule followed by nine courts of appeals,

including the Fourth Circuit. The Supreme Court articulated a test for determining when a party waives arbitration. It stated that a party waives its right to compel arbitration if it knowingly relinquishes the right to arbitrate and acts inconsistently with that right. *Id* at 419.

The *MicroStrategy, Inc. v. Lauricia* decision predates *Morgan v. Sundance*, and it requires the party arguing for waiver must show that it has “suffered actual prejudice.” *MicroStrategy*, 268 F.3d at 249 (citing “*Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987)”) In *Morgan v. Sundance* the Supreme Court stated in no uncertain terms that courts are “wrong to condition a waiver of the right to arbitrate on a showing of prejudice.” *Morgan*, 596 U.S. at. 417. Plaintiff’s reliance on *MicroStrategy, Inc v. Lauricia* is misplaced considering the Supreme Court’s decision in *Morgan v. Sundance* because the decisions are irreconcilable.

2. *Ford v. UHG I LLC* decision is not applicable here because Kennedy’s counterclaims are related to Crescent’s lawsuit, and Kennedy only filed her counterclaims in defense of Crescent’s lawsuit against her.

In its Reply, Crescent argued that the Court should grant its motion based upon the Maryland District Court opinion in *Ford v. UHG I LLC*, Case No. 22-cv-00840-LKG 2023, U.S. Dist. LEXIS 31069 (D. Md. Feb. 23, 2023), however, the circumstances here are different. The plaintiff, Keith Ford, obtained a personal loan (the “Loan”) in the amount of \$15,000 via a website operated by Lending Club Corporation. Defendant UHG acquired the Loan. Ford defaulted on the loan. UHG brought a debt-collection action against Ford in the District Court of Maryland. Ford subsequently filed an action against UHG in the Circuit Court for Anne Arundel County for violating 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 for placing excessive calls and harassing him. UHG filed a motion to compel arbitration. Ford argued that UHG waived the right to compel arbitration by filing a lawsuit to collect the debt.

The *Ford* court applied the test set forth *Morgan v. Sundance*. While the court found that UHG had knowledge of the arbitration agreement, it held that UHG did not act inconsistently with its right to arbitration by filing a debt-collection action because Ford's claims were not sufficiently related to the debt-collection to show that UGH waived the right to compel arbitration. *Id* at *16. The court also held that Ford's claims did not arise from the previous debt-collection litigation brought by UHG. Rather, Ford's claims arose from improper collection calls and letters that predated that UHG's lawsuit to collect the debt. *Id*. Lastly, the court found that Ford would have filed a lawsuit regardless of whether UHG filed the debt-collection suit.

That is not the situation here. Defendant only filed her Answer and Counterclaims because Plaintiff sued her, claiming that she owed commissions. Defendant denies that she owes commission because Plaintiff misclassified her as an independent contractor when she was really an employee. (Answer ¶ 3) And because Plaintiff required her to perform data entry work and administrative jobs for approximately five months without paying her any wages. (Answer ¶ 63) She also alleges that she doesn't owe the commissions because Plaintiff did not pay her overtime when she worked over forty (40) hours a week. (Answer ¶ 70) The claims that Crescent is seeking to arbitrate are directly related to the lawsuit they initiated against Kennedy. Kennedy brings her claims in defense of Crescent's action against her. Also, unlike the plaintiff in *Ford*, Kennedy only brought this action as a defense to the lawsuit Crescent filed against her. This Court should deny Crescent's motion because *Ford v. UHG I LLC*, is not applicable here.

3. This case is similar to *Roper v. Oliphant Fin., LLC*, where the court found Defendant Oliphant Fin. LLC waived its right to compel arbitration.

The facts in this case are similar to the facts in *Roper v. Oliphant Fin., LLC*, No. 23-2112-BAH, 2024 U.S. Dist. LEXIS 164090, at *19 (D. Md. Sep. 12, 2024) *17 (D. Md. Feb. 23, 2023). Plaintiff Thelma Roper (“Roper”) obtained a personal loan (the “Loan”) in the amount of \$16,900 through a website operated by Lending Club Corporation. (“LendingClub”) *Id.* at *2. Roper’s Loan was sold and assigned to Oliphant; Roper defaulted on the loan. *Id.* Oliphant brought a debt-collection action against Roper in the District Court of Maryland. *Id.* Roper filed a motion to dismiss, arguing that the claim was barred by the statute of limitations. *Id.* at *3. The court granted the motion to dismiss. *Id.* Roper subsequently filed a putative class action alleging violations of 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”) *Id.* at *2. Oliphant filed a motion to compel. *Id.* at *3.

Roper argued that Oliphant waived the right to compel arbitration by filing a debt-collection lawsuit against her. *Id.* at *7. The court agreed, holding Oliphant had the right to arbitrate its debt-collection claims against Roper, but explicitly chose not to do so by filing a lawsuit to collect the debt. *Id.* at *18 Moreover, the court held that the FDCPA, MCDCA, and MCPA claims were sufficiently related to the claims in the prior debt-collection to show that the defendant waived the right to compel arbitration. *Id.* The court distinguished its ruling from the *Ford v. UHG I LLC* decision, stating that, unlike *Ford*, where the plaintiffs would have brought the action regardless of the underlying debt-collection suit because it involved matters that predated the lawsuit, Roper’s case arose exclusively out of defendants’ conduct in the prior litigation. *Id.* at *19. The court pointed out that the defendants initiated and fully participated in litigation, and when the propriety of that litigation was challenged, the defendants, for the first

time, invoked the arbitration provision as a defense even though the claims grew directly out of the adverse judgment in the previous suit. Id. at *19-20.

This case is like *Roper v. Oliphant* and not in *Ford v. UHG I LLC* because Kennedy's claims against Crescent are related to the lawsuit that Crescent initiated against her. Moreover, had Crescent not initiated its action against Kennedy, she would not have filed her Answer and Counterclaim. Accordingly, the Court should find that Crescent waived its right to compel arbitration by initiating this action against Kennedy.

CONCLUSION

For the reasons set forth above, the Court should deny the Plaintiff's motion.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT

October 15, 2024

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Crescent Homes Realty, LLC,

Plaintiff,

v.

Brenda Kennedy,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C/A No.: 2023-CP-10-4408

**SURREPLY MEMORANDUM OF
CRESCENT HOMES REALTY, LLC
IN SUPPORT OF ITS MOTION TO
STAY AND COMPEL ARBITRATION**

Fully accepting the need to avoid unnecessarily continuing argument beyond the opportunities that are ordinarily permitted, the Plaintiff Crescent Homes Realty, LLC, offers this brief Surreply memorandum in support of its Motion to Stay and Compel Arbitration in the above-referenced matter. The basis for filing this memorandum is that Defendant Brenda Kennedy filed and served her Reply Memorandum by email on 11:55 p.m., Monday, October 16, 2024, for the hearing held Tuesday, October 16, 2024, at 9:30 a.m. Given this late-night filing, Plaintiff's counsel was completely unaware of the memorandum until after the hearing and could not address the case of *Roper v. Oliphant Fin., LLC*, 2024 U.S. Dist. LEXIS 164090 (D. Md. 2024) – first cited in Defendant's Reply Memorandum.

Defendant Kennedy cites *Roper* in support of the 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's pursuit of it waived its right to compel arbitration. This position ignores the specific reasoning *Roper* uses to distinguish itself from *Ford v. UHG I, LLC*.

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 v. Oliphant Fin., LLC, 2024 U.S. Dist. LEXIS 16409 *Id.* 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.

All of which is respectfully submitted.

GIBBS & HOLMES

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October 16, 2024

ATTORNEYS FOR PLAINTIFF

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. 2023CP1004408

Brenda Kennedy,

Respondent,

v.

Crescent Homes Realty, LLC,

Appellant.

NOTICE OF APPEAL

Crescent Homes Realty, LLC, appeals the Order of the Honorable Dale E. Van Slambrook dated November 25, 2024. Appellant received written notice of entry of this Order on November 25, 2024, by Notice of Electronic Filing. A copy of this Order is appended with a Certificate of Service.

December 12, 2024

s/ Allan R. Holmes, Sr.
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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH CIRCUIT

CRESCENT HOMES REALTY, LLC

Plaintiff,

v.

BRENDA KENNEDY,

Defendant.

Civil Case No. 2023-CP-10-04408

**ORDER DENYING PLAINTIFF’S MOTION TO STAY PROCEEDINGS AND COMPEL
ARBITRATION**

This matter comes before the Court on Plaintiff’s Crescent Homes Realty, LLC (“Crescent” or “Plaintiff”) Motion to Stay Proceedings and Compel Arbitration against Defendant Brenda Kennedy. (“Kennedy” or “Defendant”). The parties filed briefs, and a hearing was held on October 16, 2024. The motion is ripe for ruling. For the reasons set forth below, the Court denies Plaintiff’s motion.

BACKGROUND

Plaintiff filed a complaint against Defendant in Charleston County Magistrate Small Claims Court on July 14, 2023, seeking a judgment for \$7500. The complaint which was signed under penalty of perjury by Plaintiff’s President Edward Terry (“Terry”) alleges that Defendant had a contractual obligation to repay draws. Plaintiff filed the “Independent Contractor Agreement” signed by Kennedy and Terry with the complaint. The first page of the 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.*

Thus, even though the agreement gave Plaintiff the right to arbitrate, Plaintiff chose to file an action in small claims court. Defendant filed an answer and counterclaim bringing class claims for unpaid wages and failure to pay overtime pursuant to Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, *et seq.* ("SCPWA"). On September 8, 2023, the Magistrate Court transferred the case to the Court of Commons Pleas because the Defendant's counterclaims exceeded the \$7500 limit for small claims court. On October 20, 2023, Plaintiff filed a motion seeking to enforce the arbitration agreement.

DISCUSSION

The Court finds that Plaintiff waived the right to compel arbitration under the test set forth in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022). The Supreme Court rejected the prejudice-focused arbitration waiver, unanimously ruling that the Federal Arbitration Act (FAA)'s "policy favoring arbitration" does not permit courts to condition a waiver of the right to arbitrate on a showing of prejudice to the opposing party. *Id* at 412. *Morgan* held that the test for waiver is whether the party seeking to enforce arbitration knew of an existing right to arbitrate and acted inconsistently with that right. *Id.* at 419. Here, Plaintiff knew they had a right to arbitrate because the agreement filed with their complaint clearly states they had the right to compel arbitration. By initiating this action rather than seeking to arbitrate, Plaintiff acted inconsistently with their right to arbitrate.

Plaintiff doesn't dispute that it had knowledge of the arbitration agreement; rather it argues that it did not act inconsistently with its right to arbitrate because Defendant's counter claims are not sufficiently related to the debt-collection action it filed in smalls claims court. Defendant argues the counterclaims are related because they are a defense to the debt-collection action.

Defendant asserts that she does not owe the draws because Plaintiff misclassified her as an independent contractor when she was an employee. (Answer ¶ 3) Defendant alleges Plaintiff exercised significant control over her by requiring her to work over forty (40) hours a week in the sales center, and to perform administrative and data-entry tasks that she was not paid for. (Answer ¶ 40, 57, 63). Defendant also alleges she could only sell homes built by Plaintiff, was subject to Plaintiff's supervision and was required to wear appropriately colored attire. (Answer ¶ 42, 49, 52, 54) Defendant argues because she was an employee rather than an independent contractor, the agreement violates the SCPWA and the FLSA and is not enforceable. Defendant also argues even if the agreement is enforceable the debt would be offset by what Plaintiff owes her under the SCPWA and FLSA.

The Court finds that Defendant's SCPWA and FLSA counter claims are sufficiently related to the debt-collection claim 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.

CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff's Motion to Compel Arbitration and stay this proceeding is DENIED.

The Honorable Dale E. Van Slambrook

Dated: _____
 Charleston, South Carolina



Charleston Common Pleas

Case Caption: Crescent Homes Realty Llc VS Brenda Kennedy

Case Number: 2023CP1004408

Type: Order/Stay

And It Is So Ordered!

s/Dale E. Van Slambrook S.C. Circuit Court Judge
#2781

Electronically signed on 2024-11-25 15:45:44 page 4 of 4

CERTIFICATE OF SERVICE

I hereby certify that I have served the Respondent Brenda Kennedy with this Notice of Appeal by serving it electronically upon her attorney, Marybeth Mullaney, Esq. This service was accomplished by filing it electronically with both the Court of Common Pleas for the Ninth Judicial Circuit, and the South Carolina Court of Appeals and by emailing a copy of the Notice of Appeal to Ms. Mullaney's email address: marybeth@mullaneylaw.com

Done this 12th day of December, 2024.

S/Allan R. Holmes, Sr.

RECEIVED

Apr 22 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Dale E. Van Slambrook, Circuit Court Judge

Appellate Case No. 2024-002103

Brenda Kennedy, ... Respondent

v.

Crescent Homes Realty, LLC, ... Appellant

MOTION FOR EXTENSION OF TIME FOR APPELLANT
TO SERVE AND FILE INITIAL BRIEF AND DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Pursuant to Rule 240, SCACR, appellant Crescent Homes Realty, LLC, moves for an extension of time in which to serve and file appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal ("Designation of Matter"). Appellant requests an extension of twenty days to file the Initial Brief and Designation of Matter which are currently due April 24, 2025. This is the first request for an extension filed.

The grounds for this motion are that other impending professional matters and obligations have created a need for additional time to prepare the Initial Brief and Designation of Matter. A twenty-day delay will not prejudice the rights of any of the parties. We have notified counsel for the Respondent below of our intent to file this motion. She has no objection.

Granting this motion would require the Initial Brief and Designation of Matter to be filed with the Court no later than May 14, 2025.

For these reasons, Crescent Homes Realty, LLC, requests an extension of the deadline for filing and serving the Initial Brief and Designation of Matter until May 14, 2025.

Respectfully submitted.

April 22, 2025

s/ Allan R. Holmes, Sr. #2585
Allan R. Holmes, Sr.
Gibbs & Holmes
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(843) 722-0033
Attorney for Appellant

Other Counsel of Record:

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Attorney for Respondent

State of South Carolina	)	
	)	In the Circuit Court
County of Charleston	)	
	)	
Crescent Homes Realty, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case #: 2023-CP-10-2024
	)	
Brenda Kennedy,	)	
	)	
Defendant.	)	
_____	)	

Charleston County Courthouse
October 16, 2024

TRANSCRIPT OF HEARING

B E F O R E

The Honorable Dale Van Slambrook

A P P E A R A N C E S:

Allan R. Holmes, Esquire
Attorney for Crescent Homes Realty LLC

Marybeth E. Mullaney, Esquire
Attorney for Brenda Kennedy

FOR COPIES CONTACT: Melissa R. Singletary
Certified Verbatim Court Reporter
msingletary@sccourts.org

I N D E X**WITNESS (ES)****PAGE**

Certificate of Service

16

E X H I B I T S

(There were no exhibits marked during this hearing)

1 The Court: We are here on 2023-CP-10-04408. Crescent
2 Homes Realty vs. Brenda Kennedy. This is a motion to stay
3 proceedings and compel arbitration. So whose motion is
4 this?

5 Mr. Holmes: It's mine, Your Honor. Allan Holmes.

6 The Court: All right. I will be happy to hear from
7 you.

8 Mr. Holmes: Thank you, Your Honor. We both have
9 written briefs and memoranda so I will try to make this as
10 brief as possible. Crescent Homes Realty LLC is the
11 plaintiff and the defendant is Brenda Kennedy. The
12 defendant, Ms. Kennedy, worked as a salesperson for
13 Crescent Homes Realty. Crest Homes Realty is a brokerage
14 firm. Ms Kennedy worked pursuant to an independent
15 contractor agreement, which is of record in the proceeding,
16 it has an arbitration clause. In any case, at the end of
17 the relationship between Crescent Holmes Realty and Ms.
18 Kennedy, Ms Kennedy, under the terms of the agreement, was
19 required to pay back some advances that had been provided
20 to her, she was commission sales and she got overpaid. So,
21 I guess, in order to avoid paying their employment lawyer,
22 that's me, Crescent Homes Realty went down to the small
23 claims court and filed a small claims proceeding. They
24 knocked the money down to \$7500 to keep it within the small
25 claims court and filed suit against Ms. Kennedy for that

1 amount. Ms Kennedy retained Ms. Mullaney. Ms Mullaney
2 filed a counterclaim under the Fair Labor Standards Act
3 claiming a punitive class action, punitive collective
4 action in small claims court. The whole matter got
5 transferred over to the circuit court and my client found
6 me at that point and we filed a motion to stay the
7 proceeding and refer it to arbitration. The real question
8 in the case is whether or not the filing of the affirmative
9 action and contract in small claims court is a waiver of
10 the right to demand arbitration of the Fair Labor Standards
11 Act collective action claim and the answer to that, we
12 respectfully submit to the court, it is not a waiver. The
13 law is provided by a number of cases. In the Fourth
14 Circuit, we cite the MicroStrategy case in which the court
15 holds that in order for there to have been a waiver the
16 claims have to be, excuse me, in order to avoid a waiver
17 the claims are both factually and legally distinct one from
18 the other. So if the counterclaim or the claim that Ms.
19 Mullaney's client is making is legally and factually
20 distinct from the small claims contract claim then there's
21 no waiver. We cite MicroStrategy, the Fourth Circuit case,
22 and we failed to note, and we've apologized in our
23 memorandum, we failed to note a case from the United States
24 Supreme Court called Morgan versus Sundance, which does not
25 address that holding of MicroStrategy, but it does address

1 prior holdings in which a person seeking to avoid, excuse
2 me, a person claiming waiver had to show prejudice in
3 addition to waiver, of course, and we missed that case, but
4 it has no real importance because the case is controlled by
5 MicroStrategy, which says you can't waive unless they're
6 the same issues. That case, MicroStrategy, has been cited
7 with approval and followed after the Morgan case that I
8 talked about where the prejudice has been eliminated,
9 that's a requirement for waiver, and we cite that case, and
10 it's almost identical to the case. And there's a case
11 called ...

12 The Court: So how does that mesh with the Rhodes vs.
13 Benson, I think it's a state court case.

14 Mr. Holmes: I don't think. I'm not --- I'm not
15 familiar with the holding in that case. This is Ford vs.
16 Oleck(sp), is the one I'm citing. It's true that when you
17 file a case that you have acknowledged that that case and
18 that issue is not --- is you waive arbitration on that
19 particular issue in that case, but you've not waived claims
20 that are based on litigation that's based on other issues.
21 That's as I understand it, it's pretty much a holding
22 throughout everywhere. In Oleck, the case we cite is one in
23 which the plaintiff, Oleck was a collection firm. They
24 filed a collection suit in small claims court, and the
25 defendant filed an action claiming that Oleck had violated
26 various statutes that protect debtors from collection

1 activity. However, all that activity occurred prior to the
2 lawsuit involving collection for debt. And so the court
3 said, well, they're not legally and factually the same
4 thing. And in our case, whatever claims there are under
5 the Fair Labor Standards Act are totally unrelated to the
6 small claims contract claim that we brought in small claims
7 court. Indeed, there's not even --- there's no jurisdiction
8 of the claim of the Fair Labor Standards Act in small
9 claims it had to be referred over here, so from my
10 perspective, but again, I apologize if there's a case in
11 South Carolina that is controlling I couldn't find it. I
12 spent a lot of time looking, but I'm not aware of one that
13 would change the rules ...

14 THE COURT: Yes, there's certainly a lot of federal
15 involvement in the arbitration, and that was the only one
16 that I saw was a state court case but didn't do an
17 extensive look at it. So, okay.

18 MR. HOLMES: Thank you.

19 The Court: Thank you. Ms. Mullaney.

20 Ms. Mullaney: Yes, Your Honor. Thank you. My name is
21 Marybeth Mullaney. I represent Ms. Kennedy, and I'm asking
22 the court to find that Crescent Realty waived their right
23 to arbitrate this matter under the Supreme Court case
24 Morgan vs. Sundance. And, Your Honor, mentioned I believe
25 Rhode vs. Benson, which is a South Carolina State case, and

1 in Rhodes the court felt that the delay, the defendant's
2 delay in conducting discovery, they waived arbitration. And
3 so that case that, Your Honor, asked Mr. Holmes about the
4 Rhodes vs. Benson case that actually predates the Supreme
5 Court case in Morgan vs. Sundance and I believe in Rhodes
6 vs. Benson, they applied the standard that was overruled in
7 Morgan.

8 THE COURT: That required the prejudice?

9 MS. MULLANEY: Yes, Your Honor, that required
10 prejudice. And prejudice is no longer required. It's no
11 longer a requirement. So I think that that bolsters our
12 argument, makes my argument stronger. You know, the --- we
13 dispute, Mr. Holmes says that we dispute that my client was
14 overpaid. Essentially, Crescent filed a breach of contract
15 action against my client claiming that she breached their
16 employment contract. I filed an answer and counter claim
17 it's our position that she didn't breach it, that that
18 contract was illegal and that it violated the Fair Labor
19 Standards Act, and so that is my defense to the breach of
20 contract action. So the cases are related, and since you
21 know, Crescent Realty filed this action, started this
22 lawsuit, they've got the train on the tracks and now that I
23 filed an answer and a counterclaim, you know, they don't --
24 - they don't want to proceed in court anymore, and now they
25 want to go to arbitration. It's our position that they

1 waive that right when they initiated this lawsuit. In all
2 the other cases if you know the cases that I cite, even the
3 Rhodes vs. Benson case, in those cases it's the defendant
4 that's, you know, saying we didn't waive arbitration and
5 seeking arbitration. Here, you know this case, it's the
6 plaintiff, you know that's saying, we want to arbitrate. I
7 mean, they started this, they initiated it, they filed this
8 lawsuit, and now that I've brought an answer and a counter
9 claim, and based upon my defense, now that they realize
10 that the contract that they sued under may be illegal and
11 may violated the Fair Labor Standards Act and rather than
12 my client owing them money, they may actually owe my client
13 money now they want to arbitrate. And I believe that, you
14 know, that the case law is clear under Morgan vs. Sundance
15 that they have met the test, which is they knew about the
16 arbitration agreement, because they drafted it, and they
17 acted inconsistently with the arbitration agreement by
18 filing this lawsuit. They could have brought this case
19 against my client through arbitration, but they chose not
20 to do that and now they want to arbitrate because, you
21 know, they're not happy with the defense, and realize that
22 they have some exposure here. So I would ask, Your Honor,
23 to find that they've waived that.

24 THE COURT: So the counterclaim, the action to
25 recover, I guess, what they would say was wrongfully paid

1 commissions the defense to that was, explain that to me
2 again, how are they interrelated?

3 Ms. Mullaney: Sure. Essentially, what happened here
4 is my client is, they alleged in the contract that they had
5 my client sign, they said that she's an independent
6 contractor, and she's paid 100% commission. It's our
7 position that, no, she's not an independent contractor. She
8 is an employee. She had set hours that she is required to
9 work. She worked between 40 to 50 hours a week. She had to
10 wear a certain attire when she worked. She worked on their
11 premises, in their model home. She could only sell their
12 houses. They had the authority to discipline her if they
13 wanted to. So it's our position that she's not an
14 independent contractor, that she is an employee and that
15 they are claiming that she owes commission to them, because
16 under the agreement once she got a ratified contract she
17 was able to take 50% of her commission before the house
18 closed. So that's really what this is about. She took part
19 of her commission, and part of the reason she took the
20 commission is because she wasn't getting paid wages at that
21 time. You know, one of the other issues in the case is that
22 Crescent Realty stopped selling homes and pulled all their
23 homes off the MLS for five months, so my client couldn't
24 sell homes but they still required her to come in and to
25 work and to do data entry work and administrative work. So

1 we're claiming that that's a violation, that she was not an
2 independent contractor, and that she should have been paid
3 wages, and that the agreement, the contract, was illegal
4 that they had her sign and the way that they were paying
5 her was an illegal contract. And I filed it as a
6 collective, Your Honor, because I believe that they have
7 been doing the same thing to other agents, and that they
8 have been filing claims from other agents seeking money
9 from others. And so I filed it in case another --- somebody
10 else ...

11 The Court: Those other actions, were they filed in
12 small claims court?

13 Ms. Mullaney: I don't know, because we haven't
14 conducted discovery. According to my client, you know, she
15 believes that there have been, but I don't know that at
16 this point. Thank you.

17 The Court: Thank you.

18 Mr. Holmes: If I might speak briefly in reply.

19 The Court: Yes, please.

20 Mr. Holmes: First, I would say that on the issue of
21 Morgan vs. Sundance, which I'm painfully aware of since I
22 did cite it in my memorandum. Morgan vs. Sundance simply
23 eliminates the prejudice requirement for showing waiver. It
24 does not determine what constitutes waiver without
25 prejudice. And as I cited both in the MicroStrategy and the

1 other case, I'll read just a sentence. A party only
2 invokes the judicial process to the extent it litigates a
3 specific claim, it subsequently seeks to arbitrate. And we
4 cite a lot of that in our memorandum, an action on the
5 contract against whether this person is or is not an
6 independent contractor, she acknowledges in the contract
7 she is. An action to collect under a contract certainly
8 doesn't prompt a compulsory counter claim under the Fair
9 Labor Standards Act. This lady's client is perfectly ---
10 she could have brought this suit at any time. Her
11 employment ended, and this case is post her employment,
12 whatever claims she has relate not to the contract but to
13 the terms of her employment under the Fair Labor Standards
14 Act. No different, frankly, than if she had a OSHA
15 situation where there was a --- or in the cases we cite
16 here, one is a discrimination case, that's a MicroStrategy.
17 The Oleck case is a violation of the laws that govern
18 collecting activities, collection activities. And those
19 issues occurred prior to the lawsuit. And in both cases,
20 both cases, the plaintiff or the person who engaged in
21 litigation activity was the person who's seeking
22 arbitration later on. So that's not the --- I'll
23 respectively submit that's not the turning point on the
24 issue of waivers. The question, really ...

25 The Court: I guess, the posture that the case is in
26 now the suit by the plaintiff of the recovery of the

1 commissions that, I guess, what they're saying is the
2 defense, well, we don't owe you the money, because I guess
3 I've earned it, and y'all are not doing the right thing or
4 improperly paying me or not paying me according to the
5 National Standards. So that appears to be the defense and
6 that certainly appears interrelated and is that not a or
7 wouldn't that be a mandatory counter playing?

8 Mr. Holmes: No I don't think so. And the reason I'm
9 don't is because, for example, in the Oleck case, that
10 would be exactly the same situation. They're collecting a
11 debt, and so the response would be from the defendant in
12 that case in small claims court, well, wait a minute, you
13 violated these collection laws therefore we're entitled to
14 bring those as a mandatory counterclaim, but it's not. It's
15 not a mandatory claim. It's a counter claim that they
16 brought that's permissive counterclaim, just like she
17 could, she could bring a permissive counterclaim if we ran
18 into her with a car, but it doesn't arise our claim and her
19 claim don't arise out of the same legal issues. The basis
20 for the waiver is knowing relinquishment of the right to
21 arbitrate, and then they acted inconsistently with that.
22 They attached to their summons and complaints small claims
23 Court, the document that said the agreement is subject to
24 the arbitration on it. It's a it's all over. I mean, the
25 documents that are attached to the plaintiff's complaint

1 ...

2 Mr. Holmes: Yes, sir.

3 The Court: How is that not a waiver?

4 Mr. Holmes: Because we didn't litigate the specific
5 claim we are now seeking to arbitrate.

6 The Court: Okay, you're back to the distinction in
7 the ...

8 Mr. Holmes: Yes, sir.

9 The Court: Okay. I understand your argument better
10 now. Thank you.

11 Mr. Holmes: Thank you.

12 The Court: Ms. Mullaney anything further.

13 Ms. Mullaney: Yes, I could just address quickly.

14 Mr. Holmes is right she could have brought the Fair Labor
15 Standards Act earlier, but she didn't. She left their
16 employment in December of 2022, if she was going to bring a
17 Fair Labor Standards Act claim she would have brought it
18 then. She didn't bring it until August and she brought it
19 as the defense when they sued her and sought a judgment.
20 And she's raising it as a defense to their action against
21 her claim for commission. And even though, Your Honor, I
22 don't have to show prejudice, my client has been
23 prejudiced, like she got fired they sued her in small
24 claims court. She had a small amount of time to file an
25 answer or have a judgment against her. She had to hire a

1 lawyer. I came into the case, even asked them for an
2 extension to respond, they didn't return my emails. I had
3 one day to file an answer and a counter claim so that my
4 client didn't go in default in small claims court and
5 something tells me, had I not filed it, or had my client
6 gone in default in small claims court they would have been
7 arguing to hold her in default in small claims court. You
8 know, it's just because I filed an answer and a counter
9 claim, now they don't want to litigate the case in this
10 court when they initiated this action, brought this action,
11 they have the right to arbitrate, they knew they could
12 arbitrate, they just chose not to. They decided they wanted
13 to use the power of the judicial system, and now they don't
14 want to do that anymore, and I believe that's the very
15 definition of a waiver.

16 Mr. Holmes: Thank you, Your Honor. Just one thing.
17 They ... She wrote an email to the CEO of Crescent Realty.
18 I've never denied anybody an extension of time to answer.

19 Ms. Mullaney: I'm not saying Mr. Holmes did. I'm
20 sure he would have. I didn't mean to imply that.

21 Mr. Holmes: On the issue of having to spend fees and
22 all that again, that's addressed in MicroStrategy, they
23 sued in that case three times that people seeking
24 arbitration, they brought three, they spent a huge amount
25 of time and money in the litigation before they interposed

1 arbitration on a separate issue so ... Thank you for your
2 time.

3 The Court: No thank you all appreciate the documents
4 and the memorandum. I do need to look at it, because I
5 want to make sure I appreciate the argument and understand
6 the distinction between the matters and make sure I apply
7 the proper standard as well. So I will reach out to y'all
8 and let y'all know what we're going to do. Okay, thank you.

9 Mr. Holmes: Thank you, Judge.

10 Ms. Mullaney: Thank you very much, Your Honor.

STATE OF SOUTH CAROLINA)

) CERTIFICATE

COUNTY OF CHARLESTON)

Be it known that I, the undersigned Melissa R. Singletary, Certified Verbatim Reporter, for the State of South Carolina, do hereby certify that the foregoing transcript represents a true, accurate and complete transcript of record of the testimony and evidence introduced in during this testimony of the captioned case, before the Circuit Court for Charleston County, South Carolina, so given on October 16, 2024, to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

IN WITNESS WHEREOF I have here unto set my hand this 25th day of March, 2025.

Melissa R. Singletary

Melissa R. Singletary, CVR
Certified Verbatim Reporter

From: [Allan Holmes](#)
To: [Singletary, Melissa R.](#)
Cc: [Riley Holmes](#)
Subject: RE: 2023CP1004408; Crescent Homes Realty, LLC v. Brenda Kennedy; D/H: October 16, 2024
Date: Wednesday, March 26, 2025 4:31:00 PM
Attachments: [image001.png](#)
[image002.png](#)

Thank you. Will send payment immediately.

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From: Singletary, Melissa R. <msingletary@sccourts.org>
Sent: Tuesday, March 25, 2025 6:32 PM
To: Allan Holmes <aholmes@gibbs-holmes.com>
Subject: Re: 2023CP1004408; Crescent Homes Realty, LLC v. Brenda Kennedy; D/H: October 16, 2024

Good afternoon,

Attached please find the transcript of the hearing in the above case along with my invoice. Mr. Holmes, if I have the case you cite incorrectly, please let me know and I will correct and resend transcript. I have looked at different cases but really unsure if i am hearing the name correctly. The Ford case.

Thank you.

From: Allan Holmes <aholmes@gibbs-holmes.com>

Sent: Monday, January 6, 2025 11:43 AM

To: Singletary, Melissa R. <msingletary@sccourts.org>

Subject: RE: 2023CP1004408; Crescent Homes Realty, LLC v. Brenda Kennedy; D/H: October 16, 2024

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Thank you. Allan

Allan R. Holmes

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From: Singletary, Melissa R. <msingletary@sccourts.org>

Sent: Monday, January 6, 2025 10:52 AM

To: Allan Holmes <aholmes@gibbs-holmes.com>

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This will confirm that I have received your Transcript Request and will pull my records and prepare same for you. Upon completion I will forward the transcript to you along with my invoice.

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s/ A. Riley Holmes, Jr.

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*Attorneys for Appellant*

September 10, 2025