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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

Case No. 2023-CP-10-4408

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Appellate Case No. 2024-002103

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Crescent Homes Realty, LLC, Appellant

v.

Brenda Kennedy, Respondent

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FINAL REPLY BRIEF OF APPELLANT

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## INTRODUCTION

The parties do not dispute the facts in this case. Despite an arbitration provision in the parties' contract, Crescent Homes Realty, LLC, with a pleading signed by a non-lawyer, filed a small claims debt collection action seeking only the repayment of draws it had advanced Ms. Kennedy that she did not repay when she quit. Crescent intentionally limited its damages to \$7500.00 to stay within the jurisdictional limits of the Small Claims Court. Ms. Kennedy filed counterclaims, asserting collective and class violations of the FLSA and SCPWA, and requested and obtained a transfer to the court of common pleas, based on alleged damages greater than \$7500.00. Crescent immediately moved to stay and compel arbitration with respect to those claims based on the broad arbitration agreement between the parties, claiming that it did not waive its right to arbitrate the counterclaims because they are separate and distinct from the collection action, both factually and legally.

At page three of her Brief, Ms. Kennedy lays out the alleged relationship between the debt collection action and her FLSA and SCPWA counterclaims: "Kennedy contends any draws she is alleged to owe are offset by the damages Crescent owes her for misclassifying her as an independent contractor and failing to pay her wages and overtime compensation." (Respondent's Brief at 3). Using her own description, whether she failed to repay the draws she owed is one factually and legally distinct issue. Whether Crescent misclassified her as an independent contractor rather than an employee and thus failed to pay her all the wages she is owed, thereby violating the FLSA and SCPWA, is another separate factually and legally distinct issue. While damages from her counterclaims might theoretically offset what she owes in the collection action, the two claims are not otherwise sufficiently related to each other to make the filing of the debt collection action a waiver of the arbitrability of the counterclaims. Because only prior litigation of

the same legal and factual issues can constitute waiver of a right to arbitrate, and because Respondent's counterclaims do not sufficiently involve the same legal and factual issues as the collection action, Appellant has not waived its right to arbitrate Respondent's FLSA and SCPWA counterclaims.<sup>1</sup> While Crescent believes the Brief of the Appellant adequately makes its argument, in this Reply Brief, it will try to briefly address specific issues raised by Respondent's Brief.

## ARGUMENT

### I. ***Morgan* did not change the maxim that litigation surrounding factually and legally distinct claims is not a waiver of the right to arbitrate unrelated claims.**

Respondent argues in the first section of her brief that Appellant waived its right to arbitrate Ms. Kennedy's federal FLSA and SCPWA counterclaims based on the Supreme Court's holding in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022). Appellant does not dispute that *Morgan* removed the prejudice requirement from arbitration waiver analysis. In fact, Appellant spends pages 13-16 of its initial Brief arguing that the holding in *Morgan* is applicable to claims of arbitration waiver in South Carolina state court. (Final Brief of Appellant at 13-16). Rather, Appellant argues separately that it did not waive the right to arbitrate these claims based on an entirely different legal maxim: A party does not waive its right to arbitrate claims that are distinct, factually and legally, from the claims that it previously litigated. (See Final Brief of Appellant at 16-28); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250-51 (4th Cir. 2001) ("Because these claims are distinct, both factually and legally, from Lauricia's discrimination claims, the litigation surrounding these claims cannot support a finding that MicroStrategy waived its right to arbitrate

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<sup>1</sup> Respondent now asserts that she will not pursue class or collective claims. Perhaps she considered the absurdity of claiming that class and collective FLSA claims are compulsory to an individual debt collection. Regardless, the demand for arbitration was filed in response to the putative collective and class action claims. Arbitrability is determined based on the claims at the time of the demand for arbitration. In either case, her FLSA and SCPWA counterclaims are legally and factually distinct from the issue of whether she breached a contractual provision to repay a loan from Crescent Homes Realty, LLC.

the unrelated claims.”); *Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716, 733-34 (4th Cir. 2025) (“Litigation surrounding factually and legally distinct claims ‘cannot support a finding that [a party] waived its right to arbitrate . . . unrelated claims’ . . .”) (quoting *MicroStrategy*, 268 F.3d at 250); *Forby v. One Techs, L.P.*, 13 F.4th 460, 465 (5th Cir. 2021) (“For waiver purposes, a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate.”); *Desarrolladora La Ribera, S. de R.L. de C.V. v. Anderson*, 2024 U.S. Dist. LEXIS 231048 (S.D.N.Y. Dec. 20, 2024) (“[O]nly prior litigation of the *same legal and factual issues* as those the party now wants to arbitrate results in waiver of the right to arbitrate.”) (quoting *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 130-31 (2d Cir. 1997)). As these cases, and the others cited by Appellant here and in its initial Brief, show, this rule is still applied by courts, including the Fourth Circuit, even after the Supreme Court’s decision in *Morgan*. *See id.*

As Appellant illustrates in its initial Brief, district courts in the Fourth Circuit apply this holding within the *Morgan* framework. *See, e.g., Ford v. UHG I LLC*, Case No. 22-cv-00840-LKG, 2023 U.S. Dist. LEXIS 31069 (D. Md. Feb. 23, 2023); *Holloman v. Consumer Portfolio Services, C/A No. RDB-23-134*, 2023 U.S. Dist. LEXIS 105075 (D. Md. June 15, 2023). Applying *Morgan*, in order to find waiver, those courts require a party to “(1) know of an existing right to arbitration; and (2) act inconsistently with that right.” *Ford*, 2023 U.S. Dist. LEXIS 31069 at \*15; *Holloman*, 2023 U.S. Dist. LEXIS 105075 at \*23-24 (citing *Morgan*, 596 U.S. at 411). In determining whether a party has met the second requirement, “acted inconsistently with the right to arbitrate,” those courts have considered two factors: (1) whether a right to arbitrate the claims that were litigated in state court existed; and (2) whether the claims sought to be compelled to arbitration were “related” to the claims litigated in state court. *Id.*; *Holloman*, 2023 U.S. Dist. LEXIS 105075 at \*23-24. Thus, totally *within* the *Morgan* framework, these courts still hold that a party does not “act

inconsistently with the right to arbitrate” by arbitrating an unrelated issue or claim. *See id.* at \*17 (court “conclude[ed] that claims in the two cases [were] not sufficiently related to show Defendants waived their right to arbitration.”); *Holloman*, 2023 U.S. Dist. LEXIS 105075 at \*26 (“[T]his Court finds that the factual record indicates that Holloman's claims are insufficiently related to the prior collection case to show that Defendants waived their right to compel arbitration.”).

Respondent would have it so that any time any party to an arbitration agreement filed a lawsuit against the other party, the first party would forever waive its right to arbitrate any issue, regardless of its connection to the litigation. However, that is not the law. As Appellant argues at length, the law is that a party to an arbitration agreement does not waive its right to arbitrate other issues that are factually and legally distinct from that which he litigated. Because Respondent’s federal (alleged as class and collective) FLSA claims based on an alleged failure to pay overtime wages (and corresponding SCPWA claims) are factually and legally distinct—that is, not *related* under the *Holloman* and *Ford* analysis—to Appellant’s small claims collection action based on Respondent’s failure to repay a loan, Appellant did not waive its right to arbitrate these unrelated counterclaims pursuant to the arbitration agreement between the parties. *See Ford*, 2023 U.S. Dist. LEXIS 31069 at \*17; *Holloman*, 2023 U.S. Dist. LEXIS 105075 at \*26; *see also MicroStrategy*, 268 F.3d at 250-51 (“Because these claims are distinct, both factually and legally, from Lauricia's discrimination claims, the litigation surrounding these claims cannot support a finding that MicroStrategy waived its right to arbitrate the unrelated claims.”); *Meadows*, 132 F.4th at 733-34 (“Litigation surrounding factually and legally distinct claims ‘cannot support a finding that [a party] waived its right to arbitrate . . . unrelated claims’ . . .”) (quoting *MicroStrategy*, 268 F.3d at 250); *Forby*, 13 F.4th at 465 (“For waiver purposes, a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate.”); *Desarrolladora*, 2024

U.S. Dist. LEXIS 231048 (“[O]nly prior litigation of the *same legal and factual issues* as those the party now wants to arbitrate results in waiver of the right to arbitrate.”).

**II. Ms. Kennedy’s FLSA and SCPWA counterclaims are not sufficiently “related” to Appellant’s small claims collection action for its litigation to constitute waiver.**

Appellant argues at great length in its initial Brief that the counterclaims are not sufficiently related, factually and legally, to Crescent’s small claims collection action for its filing to waive the arbitrability of these unrelated counterclaims. (*See* Final Brief of Appellant at 16-28). Rather than repeating that here, Appellant will respond to particular items raised in Respondent’s Brief.

**A. Respondent’s counterclaims do not “arise from the same agreement” as Appellant’s small claims collection action; regardless, that is not determinative of whether they are sufficiently “related.”**

Respondent argues that the claims are related because they “arise from the same agreement that Crescent is seeking to enforce.” (Respondent’s Brief at 7). However, Ms. Kennedy’s FLSA claims do not arise from the Independent Contractor Agreement. Regardless of the existence of this contract or the Small Claims Court proceeding, Ms. Kennedy would be entitled to allege claims for overtime under the FLSA based upon her contention that Crescent failed to comply with its statutory provisions. Crescent could not “contract” its way out of FLSA compliance or liability. Moreover, whatever Ms. Kennedy’s contract – or South Carolina common law – provides for determination of an independent contractor relationship, the FLSA standard is different from, and independent of, those tests. Thus, to the extent she seeks to challenge the validity of the contract, the FLSA is irrelevant to the contract’s validity or her employment status under state law. Even insofar as she claims her employment status might have some effect, is it her assertion that an employee would not have to repay its employer’s loans? This has no basis in fact or law.

Moreover, in both *Ford* and *Holloman*, the claims arose from the same contract as the debt collection action, but the courts nevertheless found they were not sufficiently related. As the *Holloman* court explained, “

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

*Holloman*, 2023 U.S. Dist. LEXIS 105075 at \*26 (emphasis added). Thus, even if Respondent was correct that both the debt collection claim and the counterclaims arose from the same Agreement, that still would not make them sufficiently related for the filing of the debt collection action to waive Crescent’s right to arbitrate Ms. Kennedy’s federal overtime claims under the FLSA. *See id.*

**B. Respondent’s claims are *not* compulsory counterclaims.**

At page 7 of her Brief, Respondent seems to assert that her counterclaims are compulsory to the debt collection action, and thus are “related” for purposes of waiver. While state case law on whether an employee’s FLSA claim is compulsory to an employer’s contract claim is fairly thin, federal courts almost universally reject the proposition that an employer’s state law contract claim is compulsory to an employee’s FLSA claim. *See Folta v. Norfolk Brewing Co.*, No. 21-03038, 2022 U.S. Dist. LEXIS 33715, 2022 WL 584302, at \*1-2 (W.D. Ark. Feb. 25, 2022) (in FLSA case, dismissing employer's breach-of-contract counterclaim for employee's failure to repay loan to buy a truck); *Rice v. C Island Home & Props., LLC*, No. 21-01835, 2022 U.S. Dist. LEXIS 21596, 2022 WL 356204, at \*2-4 (M.D. Fla. Feb. 7, 2022) (in case for FLSA violations over a ten-

year period, dismissing employer's unjust-enrichment counterclaim for employee's failure to repay money owed for rent and utilities at employer-provided housing); *Allbert v. Vickers Concrete Reinforcing*, No. 20-00015, 2021 U.S. Dist. LEXIS 82579, 2021 WL 1646768, at \*2-3 (E.D. Tenn. Feb. 11, 2021) (dismissing breach-of-contract counterclaim for employee's failure to pay back loan); *Bautista v. Disc. Warehouse, Inc.*, No. 15-24206, 2016 U.S. Dist. LEXIS 33232, 2016 WL 1028358, at \*1-2 (S.D. Fla. Mar. 15, 2016) (dismissing counterclaim for employee's breach of promissory note with employer's corporate officer); *Cruz v. Don Pancho Mkt., LLC*, 167 F.Supp.3d 902, 905-07 (W.D. Mich. 2016) (dismissing breach-of-contract counterclaim for employee's failure to pay back loan); *Johnson v. Ctr. Techs., Inc.*, No. 10-02180, 2010 WL 11652394, at \*2-3 (S.D. Tex. Sept. 29, 2010) (same); *Tedrow v. NVR, Inc.*, No. 4:24-cv-0227-JD, 2024 U.S. Dist. LEXIS 157133 (D.S.C. Aug. 7, 2024) (dismissing employer's breach of contract counterclaim for relocation expenses under employment contract as non-compulsory to employee's FLSA claims).

As one court explained:

Defendant's argument that the claim for repayment of a loan between employee and employer is related to [an employee's] claim that the employer is in violation of state and federal labor standards, is meritless . . . [because] [t]he claim and counterclaim[s] will present entirely different legal, factual, and evidentiary questions. The primary concerns involved with the plaintiffs' complaint will be whether defendant has violated state and federal labor laws . . . The defendant's counterclaim, however, involves general factual issues of whether a loan was transacted and whether repayment is still owing.

The facts surrounding the loan have no logical relationship to the facts that need to be proven to demonstrate a violation of labor laws. In order to succeed on the counterclaim the defendant will need to demonstrate that the existence and terms of a contract. These facts have nothing, whatsoever, to do with plaintiffs' underlying claims . . . The only connection the claims have is that they occurred in the employment context.

*Wagner v. E. Coast Growers*, No. 91-03714, 1991 U.S. Dist. LEXIS 13992, 1991 WL 198557, at \*2 (E.D. Pa. Sept. 30, 1991) (dismissing employer's counterclaim seeking repayment of loan in FLSA case brought by employee).

In *Tedrow*, the employee asserted FLSA claims relating to unpaid overtime and other wage violations. 2024 U.S. Dist. LEXIS 157133 at \*1-3. The employer counterclaimed, alleging that under the employment agreement, the employee was required to repay his relocation expenses since he terminated his employment within twenty-four months of the date of his hire. *Id.* The employee moved to dismiss the counterclaim, asserting that it was unrelated to his FLSA claim, and not a compulsory counterclaim. *Id.* at \*4-5. Even though both claims arose from the employment relationship and the employer's claim was based on an employment contract, the court held that the counterclaim was not compulsory. In making the determination, the court considered four factors:

(1) Are the issues of fact and law raised in the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on the party's counterclaim, absent the compulsory counterclaim rule? (3) Will substantially the same evidence support or refute the claim as well as the counterclaim? And (4) Is there any logical relationship between the claim and counterclaim?

*Id.* at \*5. The Court answered each of those questions in the negative and thus found the counterclaim was not compulsory. *See id.*

Applying those factors to the present case, the issues of law and fact raised in the claim and counterclaim are not the same. The collection claim is based on breach of contract—the issue is whether respondent failed to repay loans as required by contract. Her federal FLSA claims regarding employee classification and payment of overtime hours under a federal statute raise completely different issues. Second, res judicata would not bar a subsequent suit on Ms. Kennedy's counterclaim. Third, the evidence required to support or refute the collection claim would be

entirely different from that needed to support or refute respondent's allegations of federal wage and hour violations. Finally, there is no logical relationship between the claims beyond that they both arise out the employment relationship between the parties. As the cases cited make clear, that is not enough. *See id.*; *Wagner*, 1991 U.S. Dist. LEXIS 13992, 1991 WL 198557, at \*2

In *Holden v. Bwell Healthcare Inc.*, No. SAG-19-760, 2020 U.S. Dist. LEXIS 46975 (D. Md. Mar. 18, 2020), the employer asserted that its breach of contract counterclaims were compulsory to the employee's FLSA claims because both addressed whether the workers were employees or independent contractors. Soundly rejecting the argument, the court stated:

Bwell asserts that the common question linking the counterclaims to the underlying suit, is "if the Plaintiffs are employees or independent contractors," suggesting that a document entitled "Independent Contractor Agreement" resolves the issue. ECF 44 at 6; see ECF 39-1 (Ex. A & B to Bwell's Counterclaims). However, **a worker's appropriate classification as an employee or independent contractor is not governed by any purported agreement between the parties.** *Hall v. DIRECTV, LLC*, 846 F.3d 757, 774 (4th Cir. 2017). Instead, the Court looks to the "economic realities" of the parties' relationship. *Id.* (quoting *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006)). Therefore, **even assuming that the "Independent Contractor Agreement" is a contract that the parties in this case agreed to, its existence does not resolve the question of the Defendants' liability under the FLSA, MWHL, or MWPC. Moreover, courts routinely reject "the notion that the employer-employee relationship single-handedly creates a common nucleus of operative fact between the FLSA claim and peripheral state law claims."** *Williams*, 558 F. Supp. 2d at 604 (citing cases and quoting *Wilhelm v. TLC Lawn Care, Inc.*, No. 07-2465, 2008 U.S. Dist. LEXIS 19911, 2008 WL 640733, at \*3 (D. Kan. Mar. 6, 2008))

*Id.* at \*8-9 (emphasis added). Likewise, in this case, the determination of Respondent's employment status does not create a common nucleus of operative fact between the FLSA and state law contract claim, so as to render the FLSA claim a compulsory counterclaim. *See id.* As such, Appellant's litigation of the contract claim is not sufficiently related to constitute a waiver of arbitration with respect to Respondent's legally and factually distinct counterclaims. *See id.*

**C. Respondent mischaracterizes the holding of *Ford v. UHG I LLC*.**

At pages 7-8, in seeking to distinguish its holding, Respondent claims the court in *Ford v. UHG I LLC*, Case No. 22-cv-00840-LKG, 2023 U.S. Dist. LEXIS 31069 (D. Md. Feb. 23, 2023), found no waiver “because the party seeking to enforce the arbitration agreement didn’t initiate the court proceedings.” (Respondent’s Brief at 7-8). “By contrast, Crescent affirmatively filed a lawsuit against Kennedy in magistrate court, invoking the judicial process and thus acting inconsistently with a right to arbitrate.” (*Id.*)

This contention has no legitimate basis at all. In fact, in *Ford*, like in this case, UHG first sued Ford in small claims court to collect a debt. Subsequently, Ford brought a putative class action claiming UHG had violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (FDCPA); the Maryland Consumer Debt Collection Act, Md. Code Ann. Com. L. § 14-201 et seq. (MCDCA); and the Maryland Consumer Protection Act, Md. Code Ann. Com. L. § 13-101 et seq. (MCPA), by engaging in certain illegal debt-collection activities, including hiring a third-party debt-collector that placed excessive calls and harassed Ford. *Id.* at \*1-2. When UHG moved to compel arbitration, like Ms. Kennedy, Ford contended that by prosecuting its small claims court collection action, UHG had waived arbitration. *Id.* at \*11-14. In analyzing the claim, the Court stated, “[T]hese claims do also involve Plaintiff’s Loan. But, the claims in this case do not arise from the previous debt-collection litigation brought by UHG. Rather, the claims in this case arise from alleged improper collection calls and letters that pre-date that litigation.” *Id.* at \*16. Ford “would have brought this action regardless of whether UHG filed the debt collection suit in state court.” *Id.* at \*17. Thus, the “claims in the two cases [were] not sufficiently related to show Defendants waived their right to arbitration.” *Id.* This decision was not based *at all* on whether UHG first initiated the court proceedings, as Respondent claims —although UHG did first initiate proceedings. *See id.*

**D. The Circuit Court made legal determinations, not factual findings.**

“Arbitrability determinations are subject to de novo review.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). “Whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

In its Order finding waiver, the lower court stated:

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

(Order Denying Arbitration at 3; R. p. 5).

Respondent mistakenly refers to these as factual findings, asserting they should not be disturbed on appeal. (Respondent’s Brief at 8). However, the lower court’s determinations of whether the counterclaims are “sufficiently related” to the debt collection action to constitute waiver and whether those counterclaims are “relevant” to that claim are legal conclusions, specifically connected to its finding of waiver. Whether claims are “sufficiently related” to support a finding of waiver, both factually and legally, as discussed in cases like *MicroStrategy, Ford*, and *Holloman*, is clearly a legal conclusion subject to de novo review. *See MicroStrategy*, 268 F.3d at 250-51; *Ford*, 2023 U.S. Dist. LEXIS 31069 at \*17; *Holloman*, 2023 U.S. Dist. LEXIS 105075 at \*26. Similarly, a determination of whether those claims are “relevant” to the debt collection claim is also a legal determination. *See id.*

There is no dispute over the underlying facts in this case. The dispute is over whether those facts constitute a waiver of Appellant's right to arbitrate the FLSA and SCPWA counterclaims. Contrary to Respondent's assertion, the literal holding of the lower court's Order, the basis for this appeal, is not a factual finding. Under the undisputed facts of this case, Appellant posits that the lower court incorrectly determined that the counterclaims were sufficiently related and thus incorrectly found a waiver of the right to arbitrate.

**E. *Liberty Builders is inapposite.***

Respondent claims "the facts on this case closely parallel" those in *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). However, that case is highly distinguishable. As Respondent even notes in her Brief, in that case, "The parties pursued [that] litigation for two and one-half years before Liberty Builders moved to stay the action in favor of arbitration." (Respondent's Brief at 9). The Court further described the parties' conduct:

The Hortons were forced to answer Liberty's complaint and respond to discovery in the circuit court, most of which would not have been necessary or available if Liberty had pursued arbitration. The circuit judge found "on approximately forty occasions, the parties over the years have sought assistance from the Court including but not limited to motions to amend, compel, dismiss, add parties and to restore under SCRCF 40(j)." The delays in resolving these issues and the attorney fees incurred by the Hortons during this lengthy litigation were sufficient to support the circuit judge's finding of prejudice. Liberty's delay in demanding arbitration until the litigation was nearly complete not only prejudiced the Hortons but enabled Liberty to "test the water before taking the swim."

*Id.* at 665-66, 521 S.E.2d at 753.

In this case, Appellant moved to compel arbitration as soon as Respondent filed her FLSA and SCPWA claims. Appellant has not even filed an Answer to the Counterclaims, has engaged in no discovery, and has not pursued litigation of these claims at all, much less for two and a half years. The facts of our case are *nothing like* that case. *See id.* Moreover, as Respondent states in

her brief, that case was decided under the old standard, which she claims is not even applicable. *Liberty Builders* provides no support for Respondent’s argument. *See id.*

**III. Appellant does not rely on *MicroStrategy* for its prejudice analysis; rather, a party does not waive its right to arbitrate by litigating an unrelated matter.**

Respondent apparently takes the position that because *MicroStrategy* was decided before *Morgan*, then its second holding, unrelated to prejudice, is also no longer good law. (*See* Respondent’s Brief at 9-10). As already explained, Appellant cites *MicroStrategy* for the rule that when claims are distinct, both factually and legally, the litigation surrounding one claim cannot support a finding that a party waived its right to arbitrate an unrelated claim. *See MicroStrategy, Inc. v. Lauricia*, 268 F.3d at 250-51. This holding is unquestionably still good law. *MicroStrategy* has been cited for this holding numerous times by courts since the *Morgan* decision, including by the Fourth Circuit itself. *See, e.g., Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716, 733-34 (4th Cir. 2025) (“Litigation surrounding factually and legally distinct claims ‘cannot support a finding that [a party] waived its right to arbitrate . . . unrelated claims’ . . .”) (quoting *MicroStrategy*, 268 F.3d at 250); *Blitz v. USAA Gen. Indem. Co.*, No. RDB-24-1070, 2024 U.S. Dist. LEXIS 208576 (D. Md. Nov. 18, 2024) (“Specifically, the Fourth Circuit evaluates whether a party’s conduct in substantially participating in litigation amounts to waiver.”) (citing *MicroStrategy*, 268 F.3d at 249); *Arco Nat’l Constr., LLC v. MCM Mgmt. Corp.*, No.: 1:20-cv-03783-JRR, 2024 U.S. Dist. LEXIS 158349, \*20 (D. Md. Sept. 4, 2024) (“The Fourth Circuit in *MicroStrategy, Inc. v. Lauricia* similarly concluded that a finding of waiver was not supported where the claims in previous actions were distinct—one related to the disclosure of trade secrets or other confidential information, and the other to discrimination.”). It is the law in other jurisdictions as well. *See, e.g., Forby v. One Techs, L.P.*, 13 F.4th 460, 465 (5th Cir. 2021) (“For waiver purposes, a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to

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

It is a long-standing principle that the right to require arbitration of a matter is not waived by litigation concerning an unrelated matter. Crescent Homes Realty’s suit to recover a debt in small claims court is completely unrelated to Ms. Kennedy’s collective, class action claims under the Federal Fair Labor Standards Act (FLSA) and South Carolina Payments of Wages Act (SCPWA)—the claims she asserted at the time Appellant moved to stay and compel arbitration. Consequently, Crescent did not waive its right to arbitrate Ms. Kennedy’s counterclaims by filing its debt collection action. See *MicroStrategy*, 268 F.3d at 250-51.

#### **IV. Roper v. Oliphant is not similar to this case.**

Respondent claims the facts in this case are similar to *Roper v. Oliphant Financial, LLC*, Civil No. 23-2112-BAH, 2024 U.S. Dist. LEXIS 164090 (D. Md. Sept. 12, 2024). In that case, the Plaintiff, Ms. Roper, defaulted on a personal loan, and Oliphant Financial filed a debt collection action against her outside of the applicable statute of limitations. *Id.* at \*3. Ms. Roper filed a motion to dismiss based on Oliphant’s filing outside the statute of limitations. The parties then litigated,

resulting in the court granting her motion to dismiss. *Id.* Ms. Roper subsequently filed class claims against Oliphant under the FDCPA, MCDCA, and MCPA, alleging unfair debt collection practices—based specifically on Oliphant’s filing its debt collection action outside of the statute of limitations. *Id.* Oliphant moved to compel arbitration, but Roper contended that Oliphant had waived its right to arbitrate by filing and litigating the prior debt collection action. The Court agreed, finding that Oliphant had “waived the right to compel arbitration by previously commencing a debt collection lawsuit against Plaintiff in state court *and litigating the central issue in this case to conclusion.*” *Id.* at \*15-16 (emphasis added).

As Respondent acknowledges in her Brief, “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.**” (Respondent’s Brief at 11) (emphasis added). Or, as the Court stated:

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

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

Unlike the situation in *Roper*, Ms. Kennedy’s FLSA claim does not arise “exclusively out of [Crescent Homes Realty’s] conduct” in the small claims court proceeding. Rather, her FLSA claim is alleged to rest entirely upon a pre-existing failure of Crescent Homes Realty to have complied with the FLSA during the time she worked there. Respondent argues her claims against Crescent are “related” to the collection action because they are defenses to that action and “had Crescent not initiated its action against Kennedy, she would not have filed her Answer and Counterclaim.” The *Roper* court only held that the prior litigation was “related” because that prior litigation itself served as the *entire* basis for her subsequent claims. *See id.* Had Oliphant not filed its prior collection action outside of the statute of limitations, Roper would have had no basis for

her claims—the filing of the collection action outside the statute of limitations *was itself* the alleged violation of the relevant statutes upon which she brought her subsequent claims. *Roper* is inapplicable to the present case, and Respondent’s argument to the contrary is disingenuous. *See id.*

### **CONCLUSION**

Appellant’s Small Claims debt collection action is insufficiently related to Respondent’s collective and class claims under the FLSA and SCPWA for its filing to constitute a waiver of the contractual right to arbitrate those unrelated claims. For all the reasons herein and in Appellant’s initial Brief, Appellant respectfully requests that this Court:

- (A) Grant Appellant’s current appeal;
- (B) Reverse the decision of the lower court;
- (C) Remand this case to the trial court with instructions to stay the proceeding and compel arbitration in accordance with the Arbitration Agreement; and
- (D) Award such other relief as this Court deems just and equitable.

All of which is respectfully submitted.

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