THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Civil Action No.: 2013-CP-03-00147
Honorable Perry M. Buckner

Appellate Case No.: 2015-001401

JOYCE MYERS.....Respondent,

-vs-

TITLEMAX OF SOUTH CAROLINA, INC. AND AFFORDABLE RECOVERY SOLUTIONS, A/K/A ARS.....Defendants,

Of which AFFORDABLE RECOVERY SOLUTIONS A/K/A ARS is.....Appellant.

REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES IN REPLY BRIEF

I. **Can Appellant, as a nonsignatory to the Arbitration Agreement, enforce the Arbitration Agreement and compel Respondent to arbitrate her claims?**

II. **Did Appellant waive its right to compel arbitration by serving its motion to compel arbitration six days after learning of the Arbitration Agreement's existence and engaging in very limited discovery prior to filing its motion to compel arbitration?**

STATEMENT OF THE CASE

Appellant refers the Court to the statement of the case contained within Appellant's Initial Brief.

STATEMENT OF THE FACTS[1]

Throughout the complaint, Respondent referred to Appellant and TitleMax as "Defendants." (Complaint pp. 2-5). Respondent made the following allegations against Appellant and TitleMax as "Defendants":

1. "Defendants' employees entered onto [Respondent's] premises . . . to repossess" the vehicle. (Complaint p. 2).
2. "The Defendants owed [Respondent] a duty . . . ." (Complaint p. 2).
3. "Defendants . . . were negligent, careless, reckless . . . ." (Complaint p. 2).
4. "As a direct and proximate result of the Defendants' negligence, [Respondent] suffered injuries to her hand" and finger. (Complaint p. 3).
5. "The Defendants' actions were reckless . . . ." (Complaint p. 3).
6. "As a direct and proximate result of the outrageous conduct of the Defendants, the [Respondent] has suffered . . . ." (Complaint p. 3).
7. "Defendants' conduct placed the [Respondent] in reasonable fear of bodily harm." (Complaint p. 4).
8. "Defendants' employees inflicted forcible contact on [Respondent]'s person." (Complaint p. 4).

[1] This fact section is meant only to supplement the fact section contained in Appellant's Initial Brief and recite facts relevant to the issues addressed in the Reply Brief.

9. "As a direct and proximate result of Defendants' batter, [Respondent] suffered . . . ." (Complaint p. 4).
10. "Defendants' employees voluntarily and intentionally entered" Respondent's property. (Complaint p. 4).
11. "Defendants thereby interfered" with Respondent's right to exclusive, peaceable possession of her property. (Complaint p. 4).
12. "As a direct and proximate result of Defendants' trespass," Respondent suffered. (Complaint p. 4).

(Complaint pp. 2-4).

Additionally, Respondent alleged that any employees referenced in the Complaint were the "agents, servants, and/or employees" of Appellant and TitleMax and were acting within the scope and course of their employment at all times. (Complaint pp. 1-2). Respondent further alleged TitleMax was liable under the theory of respondeat superior because Appellant "was an agent, servant[,] and/or employee" of TitleMax. (Complaint p. 2).

Although Respondent filed this action on August 16, 2013, Respondent did not serve Appellant until March 10, 2014. (Affidavit of Service on Appellant). At the time of service, the loan agreement and Arbitration Agreement were in TitleMax's control, and thus, Appellant was not aware of and did not have access to the Arbitration Agreement until TitleMax responded to basic discovery requests. On August 21, 2014, Appellant received documents from TitleMax, which included the Arbitration Agreement. (TitleMax Discovery Responses dated August 20, 2014). Appellant's motion to compel arbitration was served on

August 27, 2014, only six days after receiving the Arbitration Agreement. (Motion to Compel Arbitration).

Prior to Appellant filing its motion to compel arbitration and prior to Appellant becoming aware of the Arbitration Agreement, it served standard interrogatories and requests for production at the beginning of this action. (Appellant's Interrogatories and Requests for Production). Appellant also served two sets of supplemental interrogatories, which consisted of a total of eight additional interrogatories. (Appellant's Supplemental Interrogatories). Appellant further served four requests for admission. (Appellant's Requests for Admission).

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (emphasis removed). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Id. (brackets removed).

"In reviewing a circuit court's decision regarding a motion to stay an action pending arbitration, the determination of whether a party waived its right to arbitrate is a legal conclusion subject to de novo review."[2] Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 256, 743 S.E.2d 868, 872 (Ct. App. 2013) (emphasis removed).

[2] In this case, the circuit court did not issue any rulings or findings regarding waiver.

ARGUMENT

I. APPELLANT, AS A NONSIGNATORY, IS ENTITLED TO ENFORCE THE ARBITRATION AGREEMENT.

A. Appellant, As A Nonsignatory, May Compel Respondent To Arbitrate Her Claims Pursuant To The Arbitration Agreement Because Respondent Raised Allegations Of Substantially Interdependent And Concerted Misconduct By Both Appellant And Titlemax Who Was A Signatory To The Arbitration Agreement.

Appellant, as a nonsignatory, may compel Respondent to arbitrate her claims pursuant to the Arbitration Agreement because Respondent raised allegations of substantially interdependent and concerted misconduct by both Appellant and TitleMax who was a signatory to the Arbitration Agreement. "Unless the parties have contracted to the contrary, the Federal Arbitration Act (FAA) applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce . . . ." Pearson v. Hilton Head Hosp., 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (brackets removed).

"State law determines questions concerning the validity, revocability, or enforceability of contracts generally," but the FAA[3] creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Id. at 289, 733 S.E.2d at 601. "These statutes constitute a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Id. "Because the determination of whether a nonsignatory is bound by a contract

[3] The FAA is found at 9 U.S.C. § 2 (1994).

presents no state law question or contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question."[4] Id. at 289-90, 733 S.E.2d at 601; see also Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 312 (D.S.C. 2005) (applying "federal substantive law of arbitrability" to determine whether a nonsignatory may enforce an arbitration clause against a signatory).

"[M]ost courts recognize that in certain circumstances, a nonparty to an arbitration agreement can enforce, or be bound by, an arbitration provision within a contract executed by other parties so long as it is the 'appropriate case,' or certain exceptions apply." Goer, 395 F. Supp. 2d at 312-13. "Courts have allowed a [nonsignatory] to an arbitration agreement to force one of the signatories to that agreement to arbitrate claims against it pursuant to a so-called 'intertwined claims' test." Id. at 313. "Under the intertwined claims test, the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." Id.

Generally, "[e]quitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000). There are multiple circumstances that warrant application of equitable estoppel in the context of nonsignatories enforcing arbitration agreements against signatories.

[4] Although in Arthur Anderson LLP v. Carlisle, 556 U.S. 624 (2009), the Supreme Court of the United States ruled state contract law governs the ability of nonsignatories to enforce arbitration provisions, our state law, as cited above, dictates that we look to federal substantive law when making this determination.

"[A]pplication of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."[5] Goer, 395 F. Supp. 2d at 314 n.9; see also PRM Energy Sys., Inc. v. Primenergy, L.L.C., 592 F.3d 830, 836 (8th Cir. 2010) (finding a nonsignatory to an arbitration agreement could compel a signatory to arbitrate based on the interdependent and concerted misconduct test).

"The linchpin for equitable estoppel is equity—fairness." Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524, 528 (5th Cir. 2000). Allowing a signatory to an arbitration agreement to avoid arbitration with a nonsignatory "would be especially *inequitable* where" a signatory defendant and a nonsignatory defendant are charged "with interdependent and concerted misconduct." Id. (emphasis added).

In this case, Respondent is estopped from avoiding arbitration based on Appellant's nonsignatory status because Respondent alleged interdependent and concerted misconduct by Appellant and TitleMax who is a signatory to the Arbitration Agreement. Throughout the complaint, Respondent refers to Appellant and TitleMax as "Defendants." (Complaint pp. 2-5). Respondent made the following allegations against Appellant and TitleMax as "Defendants":

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[5] This theory of equitable estoppel was cited with approval by this Court in Pearson. 400 S.C. at 395, 733 S.E.2d at 604. The United States Court of Appeals for the Fourth Circuit has also recognized this theory of equitable estoppel. Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005).

13. "Defendants' employees entered onto [Respondent's] premises . . . to repossess" the vehicle. (Complaint p. 2).
14. "The Defendants owed [Respondent] a duty . . . ." (Complaint p. 2).
15. "Defendants . . . were negligent, careless, reckless . . . ." (Complaint p. 2).
16. "As a direct and proximate result of the Defendants' negligence, [Respondent] suffered injuries to her hand" and finger. (Complaint p. 3).
17. "The Defendants' actions were reckless . . . ." (Complaint p. 3).
18. "As a direct and proximate result of the outrageous conduct of the Defendants, the [Respondent] has suffered . . . ." (Complaint p. 3).
19. "Defendants' conduct placed the [Respondent] in reasonable fear of bodily harm." (Complaint p. 4).
20. "Defendants' employees inflicted forcible contact on [Respondent]'s person." (Complaint p. 4).
21. "As a direct and proximate result of Defendants' batter, [Respondent] suffered . . . ." (Complaint p. 4).
22. "Defendants' employees voluntarily and intentionally entered" Respondent's property. (Complaint p. 4).
23. "Defendants thereby interfered" with Respondent's right to exclusive, peaceable possession of her property. (Complaint p. 4).
24. "As a direct and proximate result of Defendants' trespass," Respondent suffered. (Complaint p. 4).

(Complaint pp. 2-4).

Additionally, Respondent alleged that any employees referenced in the Complaint were the "agents, servants, and/or employees" of Appellant and TitleMax and were acting within the scope and course of their employment at all times. (Complaint pp. 1-2). Respondent further alleged TitleMax was liable under the theory of respondeat superior because Appellant "was an agent, servant[,] and/or employee" of TitleMax. (Complaint p. 2).

Respondent made no allegations against Appellant or TitleMax individually. Instead, every allegation made by Respondent was an allegation that Appellant was an employee and/or agent of TitleMax. Every allegation was an allegation that Appellant and TitleMax were working together as one to trespass, assault, and batter Respondent. It would be impossible to distinguish any claims or allegations as being against Appellant or TitleMax individually. Thus, Respondent alleged purely interdependent and concerted misconduct by Appellant, a nonsignatory, and TitleMax, a signatory.

Respondent claims she "did not allege TitleMax and [Appellant] jointly acted in concert to harm her" because she merely alleged "men" trespassed on her property and "struck her and shouted profanities and threats at her." (Resp. Br. p. 20). As is evident in the excerpts from the Complaint referenced above, Respondent never alleged "men" did anything to her. Respondent alleged only that "Defendants," defined as including Appellant and TitleMax, committed various acts and harmed her. (Complaint 2-4). Furthermore, as also noted above, Respondent alleged all of the "men" who entered her property were

employees of both Appellant and TitleMax. Accordingly, Respondent unquestionably alleged Appellant and TitleMax acted jointly and in concert.

Furthermore, allowing Appellant to avoid arbitration under these circumstances would be particularly inequitable, which is contrary to goal of equitable estoppel. See Grigson, 210 F.3d at 528 (explaining that the "linchpin for equitable estoppel is equity" and that allowing a signatory to an arbitration agreement to avoid arbitration with a nonsignatory "would be especially *inequitable* where" a signatory defendant and a nonsignatory defendant are charged "with interdependent and concerted misconduct." Id. (emphasis added)).

Respondent also asserts this Court should not employ equitable estoppel because estoppel requires a showing of detrimental reliance or prejudice. (Resp. Br. pp. 18-19). However, this Court has already applied equitable estoppel in the arbitration context without requiring, or in fact even mentioning, detrimental reliance. The Pearson court detailed and explained the status of equitable estoppel law in the arbitration context at length and did not mention detrimental reliance being a requirement. 400 S.C. at 288-96, 733 S.E.2d at 600-605. Concomitantly, the Pearson court also found the plaintiff was equitably estopped from avoiding arbitration against a nonsignatory without ever mentioning or requiring detrimental reliance. Id. at 296-97, 733 S.E.2d at 605. Thus, under South Carolina law as revealed by Pearson, detrimental reliance is not a requirement for equitable estoppel in the arbitration context.

Because Respondent alleged interdependent and concerted misconduct by Appellant and TitleMax and she voluntarily entered into the Arbitration Agreement with TitleMax, Respondent is estopped from asserting lack of privity to avoid arbitration with Appellant. See Goer, 395 F. Supp. 2d at 314 n.9 ("[A]pplication of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.").

B. Appellant, As A Nonsignatory, May Compel Respondent To Arbitrate Her Claims Pursuant To The Arbitration Agreement Because Respondent Is Estopped From Refusing To Comply With The Arbitration Agreement When She Received A Direct Benefit From The Loan Agreement, Which Contained The Arbitration Agreement, And Relies On The Loan Agreement When Advancing Other Arguments.

Appellant, as a nonsignatory, may compel Respondent to arbitrate her claims pursuant to the Arbitration Agreement because Respondent is estopped from refusing to comply with the Arbitration Agreement when she received a direct benefit from the loan agreement, which contained the Arbitration Agreement, and relies on the loan agreement when advancing other arguments.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity. Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012).

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause *when*

> *he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*

Id. (quoting Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000). "To allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [Federal] Arbitration Act." Id. (brackets removed). "A party is estopped from denying its obligation to arbitrate when it receives a direct benefit from a contract containing an arbitration clause." Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999).[6]

In this case, this Court should find Respondent is estopped from denying the Arbitration Agreement because Respondent received a direct benefit from the loan agreement, which contained the Arbitration Agreement. Under the loan agreement, Respondent received a cash loan in exchange for a security interest on the vehicle formerly owned by Respondent. (2012 Loan Agreement). Respondent sought out this loan and agreed to the loan agreement, which contained the Arbitration Agreement. Respondent admitted she read and understood the loan agreement and the Arbitration Agreement. (Respondent Deposition pp. 21-22). The cash loan Respondent received from the loan agreement was a direct benefit from the loan agreement.

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[6] This Court has cited American Bureau approvingly. Pearson, 400 S.C. at 290, 733 S.E.2d at 601. Also, the United States Court of Appeals for the Fourth Circuit cited American Bureau approvingly. Int'l Paper, 206 F.3d at 418.

Because Respondent received a direct benefit from the loan agreement, Respondent is estopped from refusing to comply with the Arbitration Agreement. See Pearson, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [Federal] Arbitration Act." (brackets removed)). Furthermore, because Respondent received a direct benefit from the loan agreement, it would be inequitable to allow Respondent to disclaim the Arbitration Agreement merely because Appellant was a nonsignatory. See Am. Bureau, 170 F.3d at 353 ("A party is estopped from denying its obligation to arbitrate when it receives a direct benefit from a contract containing an arbitration clause."). Thus, Respondent should be estopped from avoiding arbitration.

Additionally, Respondent cited the loan agreement as evidence for her argument that she could not have foreseen the acts alleged in her complaint. Respondent claims in her brief the loan agreement promised her that any repossession would be performed pursuant to section 37-5-112 of the South Carolina Code (2015). (Resp. Br. p. 13). Respondent's claims regarding the loan agreement constitute a second direct benefit to Respondent. It would be inequitable to allow Respondent to rely on one section of the loan agreement when arguing foreseeability and then repudiate the loan agreement with regard to the Arbitration Agreement. See Pearson, 400 S.C. at 295, 733 S.E.2d at 604 ("A party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage." (internal quotation marks omitted)

(brackets removed)). Respondent is estopped from denying the Arbitration Agreement, which is contained within the loan agreement, because she is attempting to rely on the loan agreement to show she could not have foreseen the alleged acts.

Furthermore, Respondent has consistently relied on the Repossession Agreement between Appellant and TitleMax when arguing foreseeability of the alleged acts even though she was not a party to the Repossession Agreement. Respondent cited the Repossession Agreement in her brief for the proposition that Appellant made certain promises to TitleMax. (Resp. Br. 13). Respondent made the same argument during the first hearing in the circuit court. (First Hearing Transcript p. 20). Also, Respondent promoted this argument in her proposed order denying arbitration. (Respondent's Proposed Order p. 2). Thus, Respondent is attempting to rely on an agreement between TitleMax and Appellant to advance her claims but then she asserts Appellant cannot enforce the Arbitration Agreement between her and TitleMax. Such a result would be inequitable, and this Court should find Respondent is estopped from denying the Arbitration Agreement under these circumstances. See Int'l Paper, 206 F.3d at 417-18 ("Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." (internal quotation marks omitted); Pearson, 400 S.C. at 295, 733 S.E.2d at 604 ("A party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage." (internal quotation marks omitted) (brackets removed)).

Based on the foregoing, Respondent is estopped from refusing to comply with the Arbitration Agreement when she received a direct benefit from the loan agreement, which contained the Arbitration Agreement, and relies on the loan agreement and Repossession Agreement when advancing other arguments. It would be particularly inequitable to allow Respondent to avoid arbitration when all three of these conditions are present. Accordingly, Appellant may enforce the Arbitration Agreement against Respondent.

C. Appellant, As A Nonsignatory, May Compel Respondent To Arbitrate Her Claims Pursuant To The Arbitration Agreement Because Respondent Is Incorporated By Reference Into The Arbitration Agreement And Is A Third-Party Beneficiary.

Appellant, as a nonsignatory, may compel Respondent to arbitrate her claims pursuant to the Arbitration Agreement because Respondent is incorporated by reference into the Arbitration Agreement and is a third-party beneficiary. "Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Pearson v. Hilton Head Hosp., 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). This Court recognized five theories that "could provide a basis for binding nonsignatories to arbitration agreements: (1) incorporation by references; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel." Id. at 289, 733 S.E.2d at 601. Furthermore, "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person."

Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 492-93 (Ct. App. 2007).

Here Appellant is incorporated by reference into the Arbitration Agreement. See Pearson, 400 S.C. at 289, 733 S.E.2d at 601 (noting a basis for binding nonsignatories to arbitration agreements is incorporation by reference). For the purposes of the Arbitration Agreement, Appellant was acting as TitleMax's agent or employee when it repossessed Respondent's automobile. Respondent alleged in her complaint that "[Appellant] was an agent, servant and/or employee of Defendant TitleMax." (Complaint p. 2). The Arbitration Agreement explicitly provides that the agreements cover "all claims by [Respondent] against [TitleMax] and/or any of our employees [or] agents." (2012 Loan Agreement p. 2). Thus, the Arbitration Agreement specifically incorporates all of TitleMax's employees and agents into the agreement. Furthermore, Appellant is a third-party beneficiary because the language in the Arbitration Agreement is clearly intended to benefit TitleMax's employees and agents. Because, as Respondent alleged, Appellant was acting as TitleMax's agent or employee when it repossessed Respondent's automobile and the Arbitration Agreements incorporates TitleMax's agents and employees into the agreement, Appellant is entitled to compel arbitration for Respondent's claims to the same extent as TitleMax.

With regard to Respondent's assertion that Appellant claimed in its answer that it was an independent contractor for TitleMax, rather than an agent, and thus, Appellant was not incorporated by reference, Respondent is incorrect. As

noted above, the complaint alleged TitleMax and Appellant were one in the same. Throughout the Complaint, Respondent refers to Appellants and TitleMax as "Defendants." (Complaint pp. 2-5). Respondent alleged that any employees referenced in the Complaint were the "agents, servants, and/or employees" of Appellant and TitleMax and were acting within the scope and course of their employment at all times. (Complaint pp. 1-2). Respondent further alleged TitleMax was liable under the theory of respondeat superior because Appellant "was an agent, servant[,] and/or employee" of TitleMax. (Complaint p. 2).

Respondent made no allegations against Appellant or TitleMax individually. Instead, every allegation made by Respondent was an allegation that Appellant was an employee and/or agent of TitleMax. Every allegation was an allegation that Appellant and TitleMax were working together as one to trespass, assault, and batter Respondent. It would be impossible to distinguish any claims or allegations as being against Appellant or TitleMax individually.

Appellant, of course, denied these allegations in its answer because it lacked the knowledge and information to form a proper belief as to these issues at such an early stage in the litigation. Appellant's denial of these allegations should not form the basis for a judicial finding that Appellant was an independent contractor, rather than an agent. Respondent alleged at length that Appellant was an agent and employee of TitleMax, and those allegations should control the decision of whether Appellant was incorporated by reference for purposes of determining whether to refer this case to arbitration.

Furthermore, to the extent Respondent cites an affidavit from Adam Yount as evidence that Appellant was an independent contractor, Mr. Yount's affidavit, which was issued on behalf of TitleMax, was executed only after Respondent and TitleMax reached a settlement to extinguish TitleMax's liability. (TitleMax Settlement; First Hearing Transcript pp. 3-4). It was not until after the settlement between TitleMax and Respondent that Respondent began alleging Appellant was merely an independent contractor.

Additionally, whether Appellant ultimately was an agent or independent contractor is unclear because such a determination is typically an issue for the finder of fact. Thus, the Arbitration Agreement is susceptible to a reasonable interpretation that would cover Respondent's allegations. Because there could be doubt regarding whether Appellant was an independent contractor or agent, the Court should grant arbitration. See Pearson, 400 S.C. at 287, 733 S.E.2d at 600 ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. A motion to compel arbitration . . . should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." (citation and internal quotation marks omitted)).

Accordingly, Appellant, as a nonsignatory, may compel Respondent to arbitrate her claims pursuant to the Arbitration Agreement because Respondent is incorporated by reference into the Arbitration Agreement, is a third-party beneficiary, and any doubt on this issue should be resolved in favor of compelling arbitration.

II. APPELLANT DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION BECAUSE IT SERVED ITS MOTION TO COMPEL ARBITRATION ONLY SIX DAYS AFTER LEARNING OF THE ARBITRATION AGREEMENT'S EXISTENCE AND RESPONDENT DID NOT SUFFER ANY PREJUDICE OR UNDUE BURDEN FROM THE DELAY IN DEMANDING ARBITRATION.

Appellant did not waive its right to compel arbitration because it served its motion to compel arbitration only six days after learning of the Arbitration Agreement's existence and Respondent did not suffer any prejudice or undue burden from the delay in demanding arbitration. "South Carolina favors arbitration," but the right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). However, any doubts concerning the scope of arbitrable issues must 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." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 387, 759 S.E.2d 727, 736 (2014). "Thus, there is a presumption against finding a party has waived its right to compel arbitration, and a party seeking to prove a waiver of a right to arbitrate carries a heavy burden." Id. at 388, 759 S.E.2d at 736 (citation and internal quotation marks omitted).

"In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Rhodes, 374 S.C. at 126, 647 S.E.2d at 251. "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id.

> Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time

> transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Id. "What is 'a substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." Id.

"To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" Id. at 127, 647 S.E.2d at 251. "To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took advantage of the judicial system by engaging in discovery." Id.

In this case, Appellant did not waive its right to compel arbitration. First, although Respondent filed this action on August 16, 2013, Respondent did not serve Appellant until March 10, 2014. (Affidavit of Service on Appellant). At the time of service, the loan agreement and Arbitration Agreement were in TitleMax's control, and thus, Appellant was not aware of and did not have access to the Arbitration Agreement until TitleMax responded to basic discovery requests. On August 21, 2014, Appellant received documents from TitleMax, which included the Arbitration Agreement. (TitleMax Discovery Responses dated August 20, 2014). Appellant's motion to compel arbitration was served on August 27, 2014, only six days after receiving the Arbitration Agreement. (Motion to Compel Arbitration). Thus, Appellant did not delay in demanding arbitration. Because

there was no delay in Appellant's demand of arbitration, Respondent cannot show prejudice or waiver. See Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013) ("In order to establish waiver, a party must show prejudice through an undue burden caused by *delay in demanding arbitration*." (emphasis added)). Appellant could not have waived its right to arbitration when it filed its motion to compel arbitration only six days after discovering it was entitled to arbitrate Respondent's claims.

Second, even if Appellant had known about the Arbitration Agreement when Respondent served it in March 2014 and failed to file its motion to compel arbitration until August 2014, Respondent still cannot carry her heavy burden of proving waiver. See Dean, 408 S.C. at 388, 759 S.E.2d at 736 ("[T]here is a presumption against finding a party has waived its right to compel arbitration, and a party seeking to prove a waiver of a right to arbitrate carries a heavy burden." (citation and internal quotation marks omitted)). Respondent was not prejudiced through an undue burden because Appellant engaged in only limited discovery between the times Respondent served Appellant and when Appellant moved to compel arbitration.[7]

[7] The appropriate inquiry when determining waiver is the extent to which the party moving for arbitration participated in discovery prior to filing its motion to compel arbitration. See Rhodes, 374 S.C. at 126, 647 S.E.2d at 251 (explaining a factor when deciding waiver is "whether the party requesting arbitration engaged in extensive discovery *before* moving to compel arbitration"). During the hearing before the circuit court, Respondent argued Appellant waived its right to arbitration based on many things that occurred well after Appellant filed its motion to compel arbitration. (First Hearing Transcript pp. 23-25). To the extent Respondent continues to rely on events that occurred after Appellant filed its motion to compel arbitration when arguing waiver to this Court, this Court should disregard those arguments. For example, Respondent asserts Appellant "waited

Prior to Appellant filing its motion to compel arbitration and prior to Appellant becoming aware of the Arbitration Agreement, it served standard interrogatories and requests for production at the beginning of this action. (Appellant's Interrogatories and Requests for Production). Appellant also served two sets of supplemental interrogatories, which consisted of a total of eight additional interrogatories. (Appellant's Supplemental Interrogatories). Appellant further served four requests for admission. (Appellant's Requests for Admission). These discovery requests constitute the extent of all discovery undertaken by Appellant with regard to Respondent prior to Appellant filing its motion to compel arbitration. Appellant recognizes it filed two motions to compel answers to the discovery requests against Respondent. However, the motions to compel would not have been necessary but for Respondent's consistent refusal to comply with our civil procedure rules regarding timely responses to discovery.

This amount of discovery constitutes only very limited discovery and does not prejudice Respondent. There were no depositions prior to Appellant filing its motion to compel arbitration. Because Appellant engaged only in very limited discovery with Respondent prior to filing its motion to compel arbitration, Respondent did not suffer any prejudice. See Toler's Cove Homeowners Ass'n,

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until the day the case was scheduled for trial before having its motion heard." (Resp. Br. pp. 21-22). This type of assertion is irrelevant because, even if true, it occurred after Appellant filed its motion to compel arbitration. Further, Appellant filed its motion to compel arbitration in August 2014, and the circuit court heard the motion on April 20, 2015. (Motion to Compel Arbitration; First Hearing Transcript p. 1). The delay between Appellant filing the motion and the circuit court hearing the motion is outside the control of Appellant. Appellant cannot be held responsible or to have waived its rights because the circuit court waited eight months to place its motion on the motion roster. This eight month delay was not the result of any action or inaction on Appellant's behalf.

Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding there was no waiver where the parties engaged in only limited discovery, which included written discovery); Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 555, 557, 544 S.E.2d 643, 644-46 (Ct. App. 2001) (finding there was no prejudice or waiver even though the parties engaged in limited discovery, which included standard interrogatories and requests for production and two occasions of seeking the circuit court's assistance). Also, Respondent did not suffer any prejudice because she was aware of the Arbitration Agreement, and she failed to raise any objection to engaging in discovery. Respondent responded to discovery requests and propounded her own discovery requests as well. Respondent never raised any concerns about engaging in discovery despite being fully aware of the Arbitration Agreement.

Furthermore, the length of the delay[8] was significantly less than previous cases in which this Court and our Supreme Court found there was no waiver. See Toler's Cove, 355 S.C. at 612, 586 S.E.2d at 585 (finding a thirteen month period did not demonstrate waiver); Carlson, 404 S.C. at 257, 743 S.E.2d at 872 (finding a delay of over two years was not prejudicial); Rich v. Walsh, 357 S.C. 64, 72, 590 S.E.2d 506, 507 (Ct. App. 2003) (finding a thirteen month period did not demonstrate waiver); Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645-46 (finding a motion to compel arbitration filed within eight months was filed "within a

[8] At worst, Appellant's delay was five months because Respondent served Appellant in March 2014, and Appellant served its motion to compel arbitration in August 2014. However, as discussed above, Appellant contends its true "delay" was six days.

reasonable time"). Thus, the length of any delay by Appellant was not prejudicial to Respondent.

Accordingly, Appellant did not waive its right to compel arbitration. Appellant served its motion to compel arbitration six days after receiving notice of the Arbitration Agreement. Also, Respondent suffered no prejudice because Appellant engaged in only very limited discovery with Respondent prior to filing its motion to compel arbitration.

CONCLUSION

Based on the foregoing, Appellant is entitled to enforce the Arbitration Agreement even though it was a nonsignatory to the loan agreement. Additionally, Appellant did not waive its right to compel arbitration. Appellant respectfully requests this Court reverse the circuit court's order and remand this action to the circuit court with instructions to enter an order compelling arbitration of all of Respondent's claims.

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December 23, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Civil Action No.: 2013-CP-03-00147
Honorable Perry M. Buckner

Appellate Case No.: 2015-001401

JOYCE MYERS.....Respondent,

-vs-

TITLEMAX OF SOUTH CAROLINA, INC. AND AFFORDABLE RECOVERY SOLUTIONS, A/K/A ARS.....Defendants,

Of which AFFORDABLE RECOVERY SOLUTIONS A/K/A ARS is.....Appellant.

CERTIFICATE OF SERVICE FOR REPLY BRIEF

The undersigned counsel hereby certifies that he has served the foregoing Reply Brief of Appellant upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 23rd day of December, 2015 addressed to the following:

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