

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COMMISSIONERS OF PUBLIC WORKS OF
THE CITY OF GREENVILLE, SOUTH
CAROLINA,

Plaintiff,

v.

UNITED STATES PIPE AND FOUNDRY
COMPANY LLC, TEC UTILITIES SUPPLY
INC., and HAYES PIPE SUPPLY INC.,

Defendants.

THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2024CP2305956

ORDER

RECEIVED
Mar 14 2025
SC Court of Appeals

This matter comes before the Court upon Defendant United States Pipe and Foundry Company LLC's ("U.S. Pipe") Motion to Dismiss or Stay Pending Arbitration.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter arises from U.S. Pipe's alleged manufacture of ductile iron pipe with defective cement-mortar lining at its Lynchburg, Virginia facility and its sale of the defective cement-mortar-lined pipes through its distributors, Defendants TEC Utilities Supply Inc. ("TEC") and Hayes Pipe Supply Inc. ("Hayes"), to Plaintiff Commissioners of Public Works of the City of Greenville, South Carolina ("Greenville Water"). Compl., ¶ 1. Greenville Water asserts claims against U.S. Pipe for declaratory relief and damages, including the following: (1) Declaratory Judgment against U.S. Pipe pursuant to South Carolina Code §§ 15-53-10, *et seq.*; (2) Breach of Express Warranty; (3) Breach of Implied Warranty of Merchantability; (4) Breach of Implied Warranty of Fitness for a Particular Purpose; (5) Breach of Implied Contract; (6) Violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-20, *et seq.*; and (7) in the alternative, Unjust Enrichment.

A. Greenville Water's Complaint

Greenville Water alleges that Cement-mortar-lined ductile iron pipe is industry standard in the waterworks industry because the cement-mortar-lining prevents water from reacting with the iron contained in the pipes. Compl., ¶ 2. Ductile iron pipe that does not have cement-mortar lining results in numerous problems, including deterioration of water quality, decreased functionality of and damage to water distribution systems, and decreased life expectancy of the pipe, resulting in lost revenue and reputational harm. *Id.* at ¶¶ 10, 37-44. As a result, industry standards and South Carolina law require all ductile iron pipes used for water service to have cement-mortar-lining that is of a minimum uniform thickness. *Id.* at ¶¶ 4, 27-36.

The American Water Works Association (“AWWA”) is a non-profit, scientific, and educational association, founded to improve water quality, that issues industry standards approved by the American National Standards Institute (“ANSI”). *Id.* at ¶ 4. The AWWA standard for cement-mortar-lined ductile iron pipe requires cement mortar lining to have a uniform thickness of 1/16-inch throughout the length of all 3-inch to 12-inch ductile iron pipe (“ANSI/AWWA Standard C104/A21.4”). *Id.* The purpose of this standard is to ensure water quality and safety. *Id.* Both the South Carolina Plumbing Code and Safe Drinking Water Act as well as Greenville Water’s design and construction specifications require all water service ductile iron pipes to be cement-mortar-lined in compliance with ANSI/AWWA Standard C104/A21.4. *Id.* at ¶ 5.

U.S. Pipe’s marketing and promotional materials tout that its ductile iron pipe fabrication “meets or exceeds” the latest revision of ANSI/AWWA Standard C104/A21.4. *Id.* at ¶ 6. U.S. Pipe also issued a Certificate of Product Compliance to Greenville Water that certified that the Defective Pipes complied with ANSI/AWWA C104/A21.4. *Id.* Despite U.S. Pipe’s marketing and promotional representations and Certificate of Product Compliance to Greenville Water,

Greenville Water alleges that the pipe U.S. Pipe manufactured does not meet ANSI/AWWA Standard C104/A21.4. *Id.*

During a construction project, Greenville Water discovered that a substantial quantity of ductile iron pipe manufactured at U.S. Pipe's Lynchburg, Virginia facility (and purchased indirectly through TEC and Hayes) did not comply with industry standards because the cement-mortar-lining was concentrated almost entirely on one side of the pipe. *Id.* at ¶¶ 8, 53-60. Upon discovery of the defect, Greenville retained an outside engineering firm to test pipe from U.S. Pipe's Lynchburg, Virginia facility across numerous deliveries and batches, which Greenville Water alleges showed that more than 70% of the pipe tested failed to comply with industry standards. *Id.* at ¶¶ 56-57.

Greenville Water alleges that the defective cement-mortar-lined ductile iron pipe will cause numerous problems—all leading to a loss of consumer confidence, reputational harm, and, ultimately, lost revenue—including, among others: increased corrosion causing deterioration of water quality; build-up of corrosive material causing water pressure problems; damage to infrastructure caused by cement-mortar breaking-off from the pipes and causing pipe clogs; and proliferation of numerous types of bacteria due to loose cement, which can be harmful to human health if allowed to reach unsafe levels. *Id.* at ¶ 10.

Greenville Water alleges that, from October 2022 through May 2023, Greenville Water regularly purchased ductile iron pipe with cement-mortar lining from U.S. Pipe, through distributors TEC and Hayes, much of which was manufactured at U.S. Pipe's Lynchburg, Virginia facility. *Id.* at ¶ 61. Since October 2022, Greenville Water has purchased approximately \$330,000.00 worth of uninstalled pipe presently being stored at its storage facility and more than 100,000 feet of cement-mortar-lined ductile iron pipe manufactured at U.S. Pipe's Lynchburg,

Virginia facility was installed in Greenville Water's water distribution system. *Id.* at ¶ 62. Additionally, prior to October 2022, a substantial amount of cement-mortar-lined ductile iron pipe manufactured at U.S. Pipe's Lynchburg, Virginia facility was purchased and installed in Greenville Water's distribution system by Greenville Water and contractors of Greenville Water. *Id.* at ¶ 64.

In addition to declaratory relief, Greenville Water seeks benefit of the bargain damages for the difference between what it paid in consideration for the defective pipes and what it actually received, consequential damages for the cost of removing and replacing the defective pipes presently installed in its water distribution system, and punitive damages for U.S. Pipe's deceptive and unfair trade practices. *Id.* at ¶ 67.

B. U.S. Pipe's Motion to Compel Arbitration.

U.S. Pipe asserts that its sale of ductile iron pipe is "expressly conditioned" on Greenville Water's acceptance of U.S. Pipe's Terms and Conditions of Sale, which it asserts are readily available on its website to anyone with access to the Internet. U.S. Pipe Motion at 3; *see also* Exhibit A to U.S. Pipe's Motion. U.S. Pipe's Terms and Conditions of Sale contain the following arbitration provision:

ARBITRATION; CONSENT TO VENUE. Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, including the arbitrability thereof, shall be settled by binding arbitration administered by the American Arbitration Association in accordance with the then-current Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. No dispute will be arbitrated as a class action, representative or general public action, collective action, private attorney-general action, or otherwise be joined with claims of any other person, and any arbitrator attempting such a proceeding shall be deemed to have exceeded the powers available under the Federal Arbitration Act. Claims shall be heard by a single arbitrator in Dallas County, Texas. In the event that this arbitration provision is deemed invalid or inapplicable for any reason, in whole or in part, the parties agree that the venue and jurisdiction for any proceedings arising out of or related to the Agreement shall lay exclusively in the state and federal courts of Dallas County, Texas to which jurisdiction each party irrevocably consents and waives any

objection or defense that it is not subject to personal jurisdiction in such venue or that the forum is inconvenient.

Mot. at 3.

U.S. Pipe asserts that, even though Greenville Water purchased ductile iron pipe through its distributors, TEC and Hayes, invoices and pick tickets used by TEC and Hayes “reference the terms & conditions applicable to the sale.” *Id.* at 3-4. U.S. Pipe also asserts that, as a sophisticated purchaser, Greenville Water had knowledge of the Terms and Conditions of Sale. *Id.* at 4. In support of its assertion that Greenville Water was placed on notice of U.S. Pipe’s Terms and Conditions of Sale through TEC and Hayes, U.S. Pipe points to: (1) unspecified terms contained in warranty provisions in TEC’s and Hayes’ respective terms and conditions that U.S. Pipe alleges are applicable to Greenville Water’s relationships with TEC and Hayes; (2) a reference to a manufacturer “cancellation fee” contained in an invoice TEC allegedly provided to Greenville Water; (3) a reference to TEC’s full terms and conditions contained in a pick ticket TEC allegedly provided to Greenville Water; and (4) and a provision contained in TEC’s terms and conditions that states “Sole and exclusive warranty, if any, on goods sold by TEC, is that provided by the goods manufacturer.” U.S. Pipe Reply Memorandum at 2-3; *see also* Exhibits A-C to U.S. Pipe’s Reply Memorandum.

U.S. Pipe asserts there is a policy in South Carolina to favor arbitration of disputes where an agreement to arbitrate exists and that Greenville Water is subject to U.S. Pipe’s Terms and Conditions of Sale. U.S. Pipe’s Motion at 7-8. U.S. Pipe further asserts that the arbitration provision contained in its Terms and Conditions of Sale is not unconscionable and is enforceable against Greenville Water. *Id.* at 10. Finally, U.S. Pipe asserts that, even if Greenville Water is not a party to U.S. Pipe’s Terms and Conditions of Sale, Greenville Water should be estopped from

repudiating the arbitration provision because Greenville Water derives a direct benefit from the warranty contained in U.S. Pipe's Terms and Conditions of Sale. *Id.* at 9-10.

Greenville Water asserts that it is a non-party to U.S. Pipe's Terms and Conditions of Sale because it never purchased ductile iron pipe directly from U.S. Pipe and did not otherwise agree to be bound by U.S. Terms and Conditions of Sale because it had no knowledge of the terms, including the arbitration provision, prior to this litigation. Greenville Water's Memorandum in Opposition at 7-9. Specifically, Greenville Water asserts that it does not meet the definition of the term "Buyer," as that term is expressly defined by the Terms and Conditions of Sale, and, therefore, Greenville Water is not a party to the "Agreement," as that term is expressly defined by the Terms and Conditions of Sale. *Id.* Greenville Water further asserts that it cannot be a third-party beneficiary to U.S. Pipe's Terms and Conditions of Sale because the terms expressly provide that "Buyer and Seller are the only intended beneficiaries of this document, and there are no third party beneficiaries." *Id.* at 8. Greenville Water asserts that it cannot be subjected to arbitration under a direct benefits estoppel theory because it has not and does not seek to derive any benefit from the Terms and Conditions of Sale, of which it was not aware prior to this litigation. *Id.* at 9-12. Lastly, Greenville Water asserts that, even if it were a party to U.S. Pipe's Terms and Conditions of Sale, the arbitration provision cannot be enforced against Greenville Water because the provision is an unconscionable adhesion contract. *Id.* at 12-14.

C. The Evidence Submitted

In support of its motion to compel arbitration, U.S. Pipe submits a copy of its Terms and Conditions of Sale containing the arbitration provision at issue. *See* Exhibit A to U.S. Pipe's Motion. In its Reply Memorandum, U.S. Pipe also submits invoices and pick tickets allegedly

provided to Greenville Water by TEC that contain alleged references to U.S. Pipe's Terms and Conditions of Sale, as identified above. *See* Exhibits A-C to U.S. Pipe's Reply Memorandum.

In opposition to U.S. Pipe's motion to compel arbitration, Greenville Water submits the affidavit of its Chief Administrative Officer, Robert Schmidt. *See* Exhibit 1 to Greenville Water's Memorandum in Opposition. Among other averments, Mr. Schmidt avers that Greenville Water has never purchased ductile iron pipe directly from U.S. Pipe, Greenville Water has never looked at or otherwise been notified of U.S. Pipe's Terms and Conditions of Sale, and Greenville Water did not agree to arbitrate any disputes with U.S. Pipe. *Id.* Greenville Water also submits its purchase orders with TEC and Hayes that it alleges contain the terms and conditions (which include no warranty limitations or arbitration provision) applicable to its relationships with TEC and Hayes. *See* Exhibits 2-3 to Greenville Water's Memorandum in Opposition.

II. LEGAL STANDARD

The threshold issue in determining arbitrability is "whether a valid, binding arbitration agreement exists in the first place." *BVW Holding AG v. Hoowaki, LLC*, No. 2021-001168, 2024 WL 112281, at *2 (S.C. Ct. App. Jan. 10, 2024). "[W]here one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place." *Id.* (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22 (2007)). If no agreement exists, "the court must deny any application to arbitrate." *Id.*

"Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426 S.C. 326, 337 (2019); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596 (2001). "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or the identity of the parties who may be bound to*

such an agreement.” *Wilson*, 426 S.C. at 337 (quoting *Carr v. Main Carr Development, LLC*, 337 S.W.3d 489, 496 (Tex. Ct. App. 2011) (emphasis in *Wilson*)). “Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so.” *Id.*

III. FINDINGS OF FACT AND LEGAL ANALYSIS

A. Greenville Water is a Nonsignatory to U.S. Pipe’s Terms and Conditions of Sale

U.S. Pipe asserts that Greenville Water is a party to its Terms and Conditions of Sale and is, therefore, subject to the arbitration provision contained therein. The party seeking arbitration has “the burden of proving the existence of a valid agreement to arbitrate.” *BVW Holding AG*, 2024 WL 112281, at *2. Arbitration, while favored, exists solely by agreement of the parties, and a party “cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000). Therefore, “a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.” *Wilson*, 426 S.C. at 337-38 (emphasis in original).

After fully reviewing the evidence submitted and arguments made by the parties, the Court finds that Greenville Water is a nonsignatory to U.S. Pipe’s Terms and Conditions of Sale and, therefore, a “presumption *against* arbitration” applies. *Wilson*, 426 S.C. at 337-38 (emphasis in original). U.S. Pipe’s Terms and Conditions of Sale expressly provide that the “Agreement” applies only to a “Buyer” that purchases products from “Seller,” which is defined as “U.S. Pipe and Foundry Company, LLC, Griffin Pipe Products Co., and U.S. Pipe Fabrication, LLC.” *See* Exhibit A to U.S. Pipe’s Motion at 1. Greenville Water has submitted evidence, namely the affidavit of Mr. Schmidt, that establishes that Greenville Water has never purchased ductile pipe

from any of these entities. *See* Exhibit 1 to Greenville Water’s Memorandum in Opposition at ¶¶ 5-6. U.S. Pipe has failed to submit any contrary evidence, showing that Greenville Water has purchased ductile iron pipe directly from U.S. Pipe, Griffin Pipe Products Co., or U.S. Pipe Fabrication, LLC. Based on the record before the Court, Greenville Water is, therefore, not a “Buyer” under the express terms of U.S. Pipe’s Terms and Conditions of Sale.

Further, under U.S. Pipe’s Terms and Conditions of Sale, the term “Agreement” means the agreement between “Buyer” and “Seller.” *See* Exhibit A to U.S. Pipe’s Motion at 1. The arbitration provision expressly provides that it applies only to claims arising out of or relating to the “Agreement.” *Id.* at 6-7. But, because Greenville Water is not a “Buyer,” its claims do not arise out of or relate to any “Agreement” with “Seller.” And under the express terms of U.S. Pipe’s Terms and Conditions of Sale, Greenville Water cannot be a third-party beneficiary and cannot be subject to arbitration on that basis. *See Id.* at 7. Accordingly, the Court finds that, under the express terms of U.S. Pipe’s Terms and Conditions of Sale, Greenville Water is a nonsignatory to the contract and a “presumption *against* arbitration” applies. *Wilson*, 426 S.C. at 337-38 (emphasis in original).

B. U.S. Pipe has Failed to Otherwise Establish a Valid Agreement to Arbitrate.

U.S. Pipe asserts that Greenville Water has agreed to arbitrate its claims with U.S. Pipe by virtue of certain terms contained in documents provided to Greenville Water by TEC and Hayes. Whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law. *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 241-43 (Ct. App. 2022). Under South Carolina law, there must be competent record evidence of reasonable notice, acceptance, and mutual assent to establish a valid arbitration agreement. *Id.*

The Court finds that Greenville Water was not placed on reasonable notice of U.S. Pipe’s arbitration provision and U.S. Pipe has failed to present evidence that Greenville Water otherwise

knew of and assented to the arbitration provision. Even assuming that the terms and conditions of TEC and Hayes are applicable to their contractual relationship with Greenville Water (which Greenville Water disputes),¹ it is undisputed that those terms and conditions do not contain or reference an arbitration provision. Further, the documents submitted by U.S. Pipe in support of its argument do not contain a link to U.S. Pipe’s Terms and Conditions of Sale, do not otherwise provide the Terms and Conditions of Sale, do not incorporate the Terms and Conditions of Sale, and do not reference arbitration in any way. The Court finds that vague references in documents from TEC and Hayes to manufacturer warranties and cancellation fees are not sufficient to place Greenville Water on reasonable notice of the arbitration provision contained in U.S. Pipe’s Terms and Conditions of Sale. U.S. Pipe provides no authority to the contrary.

Greenville Water further presented evidence, through the affidavit of Mr. Schmidt, that establishes that Greenville Water has never purchased ductile iron pipe directly from U.S. Pipe, using its website or otherwise. *See* Exhibit 1 to Greenville Water’s Memorandum in Opposition at ¶¶ 5-6. Mr. Schmidt further avers that Greenville Water has never looked at or otherwise been notified—by U.S. Pipe, TEC, or Hayes—of U.S. Pipe’s Terms and Conditions of Sale, including, but not limited to, the warranty, arbitration, or venue provisions contained therein. *Id.* at ¶ 8; *see also Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 241-43 (Ct. App. 2022) (“A party cannot assent to something he does not know about, so the law in general requires that for an offer to be effective, the responding party must have reasonable notice of the offer’s terms.”). U.S. Pipe provides no evidence to the contrary that demonstrates the elements required for valid contract

¹ Because the Court finds that U.S. Pipe failed to place Greenville Water on reasonable notice of the arbitration provision and has not presented sufficient evidence of an agreement to arbitrate, the Court does not decide at this juncture the terms and conditions that are applicable to the contractual relationship between Greenville Water and TEC and Hayes.

formation under South Carolina law for purposes of establishing a valid arbitration provision. The Court thus finds that U.S. Pipe has failed to rebut the presumption against arbitration that is applied when a party is a nonsignatory to a contract containing an arbitration provision. *See Wilson*, 426 S.C. at 337-38.

C. Greenville Water Cannot be Forced to Arbitrate Under an Estoppel Theory.

U.S. Pipe asserts that, even if Greenville Water is a nonsignatory to its Terms and Conditions of Sale, Greenville Water can be compelled to arbitrate its claims under a direct benefits estoppel theory. Whether an arbitration agreement may be enforced against non-signatories, and under what circumstances, is an issue controlled by state law. *Wilson*, 426 S.C. at 338. South Carolina recognizes that non-signatories to arbitration agreements can potentially be bound in limited circumstances under an estoppel theory. *Id.* (citing *Malloy v. Thompson*, 409 S.C. 557, 561-62 (2014)). Equitable estoppel, however, “should be used sparingly” and only when necessary to prevent injustice. *Id.* at 345.

Under direct benefits estoppel, “[a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* at 340 (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290 (2012)). “A benefit is direct if it flows directly from the agreement.” *Blackwell v. Mary Black Health System, LLC*, No. 2020-001613, 2024 WL 4234719, at *4 (S.C. Ct. App. Sept. 18, 2024). “In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.” *Id.* Generally, cases in which estoppel is applied involve “non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *Id.* In other words, “[u]nder the direct

benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory ‘knowingly exploits’ the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement. . . .” *Wilson*, 426 S.C. at 340-41 (quoting *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1134 (2013)).

In support of its estoppel argument, U.S. Pipe relies primarily upon *One Belle Hall Prop. Owners Ass’n v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). The Court finds that *One Belle Hall* is distinguishable from the present case. In *One Belle Hall*, unlike the present case, a warranty claim was initiated under the agreement containing the arbitration provision by a developer hired by the plaintiff for the plaintiff’s benefit. Further, the plaintiff in *One Belle Hall* did not dispute that the arbitration provision applied to its claims. It only asserted that the contract containing the provision was unconscionable. As a result, the *One Belle Hall* court did not address the issue of direct benefits estoppel at all. The court held only that the trial court erred in finding that the contract was unconscionable.

This case is more akin to the South Carolina Supreme Court’s decision in *Wilson v. Willis*, 426 S.C. 326, 337 (2019), which is binding upon this Court. In *Wilson*, the defendant sought to enforce an arbitration provision against the plaintiffs, who were non-signatories to the contract containing the arbitration provision. *See Wilson*, 426 S.C. at 338. In holding that the non-signatories were not bound to the arbitration agreement under an estoppel theory, the South Carolina Supreme Court emphasized that the plaintiffs were “never aware of the existence of the contract” until they initiated litigation and that general principles of South Carolina law formed the basis of most of the plaintiffs’ claims. *Id.* at 342. The Supreme Court further emphasized that “direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence[.]” *Id.* at 343. The court went on to distinguish between direct

benefits and indirect benefits and explained that a benefit is indirect “where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.” *Id.* at 343-44. Ultimately, the court held that the plaintiffs could not be bound by the arbitration provision because they did not “knowingly exploit[] and receive[] a direct benefit” from the contract containing the arbitration agreement. *Id.* at 344.

In the present case, like in *Wilson*, Greenville Water submits un rebutted evidence that it was unaware of U.S. Pipe’s Terms and Conditions of Sale prior to this litigation and, therefore, could not have sought to derive a benefit from the Terms and Conditions of Sale at the time its claims arose. Further, Greenville Water’s Complaint does not reference U.S. Pipe’s Terms and Conditions of Sale and none of Greenville Water’s claims arise from the Terms and Conditions of Sale.² Rather, the Complaint alleges Greenville Water’s warranty and implied contract claims arise out of affirmative representations made by U.S. Pipe in the Certificate of Product Compliance U.S. Pipe provided to Greenville Water. In other words, like in *Wilson*, general principles of South Carolina law form the basis of Greenville Water’s claims. And, contrary to U.S. Pipe’s assertions, Greenville Water’s implied contract claim against U.S. Pipe does not automatically subject Greenville Water to arbitration because Greenville Water “does not exploit (and thereby assume)” the Terms and Conditions of Sale. *Wilson*, 426 S.C. at 343-44. This is not a situation where Greenville Water seeks to derive a benefit from U.S. Pipe’s Terms and Conditions of Sale while, at the same time, attempting to repudiate the arbitration provision, which is the circumstance in

² For that reason, the other two cases upon which U.S. Pipe relies are distinguishable. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 297 (Ct. App. 2012) (holding the plaintiff accepted a benefit under the contract and sought to use the contract containing the arbitration provision to hold the defendant liable); *see also International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (holding the contract containing the arbitration provision formed the factual foundation for every claim asserted by the plaintiff and that the plaintiff’s “entire case . . . hinge[d] on its asserted rights under the . . . contract”).

which direct benefits estoppel applies. *See Blackwell*, 2024 WL 4234719, at *4 (“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.”). Accordingly, the Court finds that considerations of equity and justice do not warrant estopping Greenville Water from asserting its nonsignatory status to U.S. Pipe’s Terms and Conditions of Sale. Greenville Water is, therefore, not subject to arbitration under an estoppel theory.

D. The Arbitration Agreement is an Unconscionable Adhesion Contract as to Greenville Water.

Greenville Water asserts that, even if it is subject to U.S. Pipe’s Terms and Conditions of Sale, the arbitration provision cannot be enforced because it is an unconscionable adhesion contract. Courts may invalidate arbitration agreements on general state law “contract defenses, such as fraud, duress, and unconscionability.” *Zabinski*, 346 S.C. at 593. In South Carolina, unconscionability is defined as “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson*, 373 S.C. at 24-25. “In analyzing claims of unconscionability of arbitration agreements, the [U.S. Court of Appeals for the] Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decisionmaker.” *Id.* at 25. While adhesion contracts are not per se unconscionable, courts look upon them with “considerable skepticism” because they raise “considerable doubt that any true agreement ever existed to submit disputes to arbitration.” *Id.* at 26-27.

The Court finds that, even assuming the arbitration provision applied to Greenville Water, it is not enforceable against Greenville Water because it is an unconscionable contract of adhesion.

By simply placing terms and conditions, including an arbitration provision, on its website and not providing any reasonable notice to indirect purchasers of its products (and non-users of the website), like Greenville Water, U.S. Pipe has failed to afford Greenville Water any meaningful choice in its ability to negotiate the arbitration provision in U.S. Pipe's Terms and Conditions of Sale. *See Simpson*, 373 S.C. at 24-25; *see also Lampo*, 437 S.C. at 241-43 ("A party cannot assent to something he does not know about, so the law in general requires that for an offer to be effective, the responding party must have reasonable notice of the offer's terms."). Courts across the United States have found that terms placed on a website without reasonable notice to those intended to be bound do not bind a party to those terms, even when the party used the website to conduct the transactions at issue. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178-79 (9th Cir. 2014) (holding browsewrap terms of use were not enforceable because users of website were not provided reasonable notice of the terms); *Walker v. Nautilus, Inc.*, 541 F. Supp. 3d 836, 841 (S.D. Ohio 2021) ("Courts have refused to enforce browsewrap terms of use where the website's users were required to scroll down the webpage to discover the terms."); *Marshall v. Georgetown Memorial Hosp.*, No. 2:21-cv-02733, 2022 WL 5434226, at *6-7 (D.S.C. July 7 2022) (holding no agreement to arbitrate arose where website did not make clear user was agreeing to arbitrate).

U.S. Pipe's attempt to enforce the Terms and Conditions of Sale contained on its website against Greenville Water here is even more one-sided because Greenville Water never transacted directly with U.S. Pipe, much less used U.S. Pipe's website to conduct the transactions at issue. *See Schmidt Aff.* at ¶¶ 5-6. U.S. Pipe identifies no authority that allows a manufacturer to bind all downstream purchasers of a product to arbitration by simply posting one-sided terms and conditions on a website. *See Zajac, LLC v. Walker Industrial and Truck, Inc.*, No. 2:15-cv-00507-GZS, 2016 WL 9021492, at *1 (D. Me. Mar. 21, 2016) ("It cannot be the case that a manufacturer

can simply post warranty terms on its website and bind any and all downstream purchasers of its products.”). The fact that Greenville Water may be a sophisticated purchaser does not alter the Court’s analysis because there is no evidence of an arms-length, commercial negotiation between the parties since Greenville Water did not purchase the pipe at issue from U.S. Pipe. *See South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp.*, 826 F. Supp. 1549, 1554 (D.S.C. 1993). The Court, therefore, finds that the arbitration provision in U.S. Pipe’s Terms and Conditions of Sale cannot be enforced against Greenville Water because it is unconscionable under South Carolina law.

E. The Federal Arbitration Act Does Not Apply and this Court is the Proper Forum.

“The purpose of the FAA is ‘to make arbitration agreements as enforceable as other contracts, but not more so.’ *Wilson*, 426 S.C. at 336 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)) (emphasis added). “A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement.”

Because the Court finds that there is no valid agreement to arbitrate between U.S. Pipe and Greenville Water, the FAA does not apply. For the same reason, the venue and jurisdiction provision contained within the arbitration provision of U.S. Pipe’s Terms and Conditions of Sale also does not apply. The Court thus finds that it has jurisdiction over Greenville Water’s claims against U.S. Pipe and that this Court is the proper venue to hear those claims.

IV. CONCLUSION

The Court finds that there is no basis to enforce the arbitration provision contained in U.S. Pipe’s Terms and Conditions of Sale against Greenville Water. U.S. Pipe’s Motion to Dismiss or Stay Pending Arbitration is denied.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration is DENIED in its entirety.

IT IS SO ORDERED.

E-signature of Judge Gravely to follow



Greenville Common Pleas

Case Caption: Commissioners Of Public Works Of The City Of Greenville Sou vs. United States Pipe And Foundry Company LLC , defendant, et al
Case Number: 2024CP2305956
Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755