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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2025-000520
Case No. 2024-CP-23-05956

Commissioners of Public Works of the City of Greenville, South Carolina .....Respondent,

v.

United States Pipe and Foundry Company, LLC, TEC Utilities Supply Inc., and Hayes Pipe Supply Inc.,..... Defendants,

of which

United States Pipe and Foundry Company, LLC, is the.....Appellant.

Appellant's Initial Reply Brief

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Greenville Water is bound by the Arbitration Agreement that broadly applies to "[a]ny controversy or claim arising out of or relating to the Agreement, or the breach thereof[.]" (Arbitration Mot., Ex. A, Terms at 5–6; R. __.) First, it is directly bound to the Arbitration Agreement as a downstream purchaser regardless of whether it signed an agreement. Second, Greenville Water should be compelled to arbitration as a non-signatory through direct benefits estoppel. Third, Greenville Water's issue preservation arguments are without merit and ignore the totality of the record before the Circuit Court.

Therefore, this Court should reverse and compel the parties to arbitration. Alternatively, this Court should reverse and remand to resolve any additional factual and legal disputes this Court determines have not been properly addressed by the Circuit Court.

I. Greenville Water fails to address U.S. Pipe's argument that the Arbitration Agreement flows through to it as a downstream purchaser under Section 36-2-318.

Greenville Water's claim that its non-signatory status ends the analysis is an overly narrow view of contract formation under the UCC. The UCC does not require a signed contract for enforcement. (Appellant's Br. at 11.) Greenville Water's own purchase orders with Distributors—the documents it claims govern the contractual relationships here, (Resp Br. at 6)—are also not signed, confirming that the Court should not credit this non-signatory argument, (Mem. in Opposition Exs. 1–2; R. at __). Because the UCC governs a contractual relationship between two sophisticated merchants here, a deeper analysis determines the terms binding the parties.

A. The Arbitration Agreement broadly applies to downstream purchasers who sue for breach of warranty absent a written or direct contractual relationship.

Greenville Water argues that no authority supports binding an indirect purchaser to an upstream manufacturer's arbitration provision. (Resp. Br. at 31.) The plain language of the Arbitration Agreement and the operation of Section 36-2-318 do not support that position.

Under the Arbitration Agreement, "[a]ny 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 . . ." (Arbitration Motion, Ex. A, Terms at 5–6; R. __.) Two parts of this quoted portion of the Arbitration Agreement stand out. *First*, using the words "any," "arising out of," and "relating to" evidence an intent that the Arbitration Agreement be interpreted broadly. *See Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs*., 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) ("The phrase 'arising out of' should be broadly construed in a clause of inclusion; it should mean more than causation."); *McPherson v. Michigan Mut. Ins. Co*., 310 S.C. 316, 426 S.E.2d 770 (1993) ("'[A]rising out of' broadly. . . connote[s] caus[al] relation to, incident to, flowing from, or having connection with." (internal quotation marks omitted)); *see also Upstate Shredding, LLC v. Carloss Well Supply Co.*, 84 F. Supp. 2d 357, 365–66 (N.D.N.Y. 2000) (citing *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 48 (2d Cir. 1993) and noting broad clauses that are not restrictively worded by referring to the immediate parties to the contract by name may bind non-signatories to arbitration when the agreement or contract is referenced by an incorporation clause). *Second*, the Arbitration Agreement's use of the passive voice means that it matters not who brings the "controversy or claim" so long as it arises out of or relates to the Terms. *Cf. Bartenwerfer v. Buckley*, 598 U.S. 69, 75 (2023) (explaining in a statutory construction case that the use of the "[p]assive voice pulls the actor off the stage," and shifts the focus to "an event that occurs without respect to a specific actor, and therefore without respect to any actor's

intent or culpability."); *see also* B. Garner, *Modern English Usage* 676 (4th ed. 2016) (the passive voice signifies that "the actor is unimportant" or "unknown"). Thus, the contractual claims Greenville Water brings easily fall under the broad Arbitration Agreement (although this arbitrability analysis is one for the arbitrator as set forth in Section III.A. below).

The introductory language defining "Seller" and "Buyer," and the limitations on third-party beneficiaries in the Terms do not mandate a different result. (Resp. Br. at 12.) This is where UCC Section 2-318 applies. S.C. Code Ann. § 36-2-318. Under this Section, if warranties flow to a downstream purchaser suing for their breach, then so do the contractual limitations on those warranties. *See Britt v. Sorin Grp. Deutschland GMBH*, 690 F. Supp. 3d 538 (D.S.C. 2023). It makes little sense to bind the original buyer to the contractual limitations on the warranties but not bind a later buyer asserting the same manufacturer's warranty to the contractual limitations on it. *See MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 140 (Tex. 2014). That is, the downstream purchaser cannot have more rights and more ways to assert those rights than the original purchaser. *Id.* ("[A] downstream purchaser cannot obtain a greater warranty than that given to the original purchaser, so if the manufacturer at the point of original sale makes a valid disclaimer of implied warranties, that disclaimer extends to subsequent purchasers.").

Greenville Water ignores the cases U.S. Pipe cites applying Section 36-2-318. Indeed, Greenville Water does not cite to the UCC in its brief at all. The closest it comes to addressing U.S. Pipe's arguments under the UCC is to say that *Buettner v. R.W. Martin & Sons*, which dealt with the application of a contractual limitation to a downstream buyer asserting warranty claims, does not a apply to arbitration. (Resp. Br. at 19.) Greenville Water also mistakenly argues that there is no provision in South Carolina similar to the Virginia code section at issue in *Buettner* that specifically applies to arbitration. (Resp. Br. at 19.) But UCC principles and provisions should

not be ignored because they do not specifically mention arbitration; an arbitration clause passes through to a downstream purchaser under UCC Section 2-318 no differently than another type of contractual limitation. The United States Supreme Court has "made it clear that states may not treat arbitration clauses differently from other contract provisions." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.").[1] That is, if a non-arbitration contractual limitation would pass through from a manufacturer to an indirect, downstream purchaser—and they do under *Buettner* and the other cases U.S. Pipe cites in its brief, (Appellant's Br. at 14–15)—then an arbitration provision must also pass through to the same indirect, downstream purchaser.

Courts have extended non-warranty related contract provisions to downstream buyers. In *Bruckner Truck Sales, Inc. v. Hoist Liftruck Mfg., LLC*, the court held that a dealership's customers were bound by a forum-selection clause in the dealership's agreement with the vendor, even though the customers were not signatories. 501 F.Supp.3d 409, 426 (N.D. Tex. 2020). The court reasoned that the clause encompassed claims which were related to the agreement, including those asserted by non-signatories. It found that when a non-signatory is closely related to the dispute "it does not defy the non-signatory's reasonable expectations that it would be bound by the clause, just as the signatory parties are." *Id*. at 425 (internal citations omitted). This is because under

[1] Here, the Federal Arbitration Act requires treating arbitration the same as other contractual limitations under the circumstances. The Court is bound to apply the FAA in this case. Greenville Water does not challenge the interstate nature of the transaction. *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 633, 889 S.E.2d 564, 569 (2023) (referring to "involving commerce" as "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.").

those circumstances a non-signatory impliedly consents to the forum selection clause via its connections with the dispute, the parties, and the contract or contracts at issue. *Id*. at 426.

Jury trial waivers have also been found to bind downstream non-signatories. For example, in *In re Titanium Dioxide Antitrust Litigation*, the court determined that if "forum selection clauses, jury waivers, and class action waivers" can be enforced by non-signatories, then the same equitable consideration runs the opposite way to allow enforcement of those clauses against a non-signatory. 962 F.Supp.2d 840, 852 (D. Md. 2013). "To rule otherwise would in essence allow [the parties] to have their cake and eat it too—in other words, to 'rely on the contract when it works' to their advantage, while 'repudiating it' when it works to their disadvantage." *Id*.

Arbitration clauses should be treated no differently than these other types of contractual limitations. Thus, the Court should reject Greenville Water's challenges to the enforcement of the arbitration provision against it as a downstream purchaser.

B. Greenville Water conflates UCC Section 2-318 with the "battle of the forms."

Greenville Water tries to undermine U.S. Pipe's application of Section 36-2-318 by claiming there is no evidence that the two parties exchanged form contracts. (Resp. Br. at 17.) This misstates U.S. Pipe's argument. Section 2-318 applies by operation of law, not because of a negotiated exchange of forms between U.S. Pipe and Greenville Water. It extends warranty protections—and accompanying limitations—to foreseeable downstream purchasers, regardless of whether a direct exchange of forms ever occurred. The section governs who may benefit from, or be bound by, a warranty and, by extension, the limitations that travel with that warranty. This occurs regardless of whether those terms arise from agreements exchanged between those parties.

The "battle of the forms" analysis, by contrast, is concerned with resolving differences in terms between competing forms exchanged between direct contracting parties. S.C. Code Ann.

§ 36-2-207. In its Section 2-318 argument, U.S. Pipe is not simply claiming its Terms became part of a contract by exchanging documents with Greenville Water. Instead, it asserts that Greenville Water, as a downstream purchaser, accepted the benefits of U.S. Pipe's goods by suing under a warranty related to those goods. Therefore, Greenville Water must also accept the Terms, including the Arbitration Agreement, which define and limit the warranties on those goods. Greenville Water's attempt to shoehorn this dispute into a "battle of the forms" analysis between it and U.S. Pipe is inapposite and avoids the actual legal framework that governs downstream warranty claims and their corresponding limitations.

C. Greenville Water ignores the numerous instances in the record where it was placed on inquiry notice of U.S. Pipe's Terms.

Just as Greenville Water conflates Section 36-2-318 and the battle of the forms, it conflates U.S. Pipe's arguments about inquiry notice with incorporation by reference. (Resp. Br. 47–48.) U.S. Pipe takes issue with Greenville Water's assertion that there "is *no evidence* that TEC or Hayes informed Greenville Water of U.S. Pipe's Terms . . ." (Resp Br. at 16 (emphasis added).) This simply isn't true. At a minimum, the record shows three instances in which Distributors provided documents to Greenville Water, putting it on inquiry notice of U.S. Pipe's separate contractual terms as the manufacturer of the pipes Greenville Water asked Distributors to supply:

- Distributors' terms state that the products sold are covered only by the manufacturer's warranties, not any warranties from Distributors themselves. (*See* Hayes Ans., Ex. A; R. at __; Reply to Arbitration Mot., Ex. C; R. at __.) This language places Greenville Water on notice that any warranties or claims would be governed by the manufacturer's terms—*i.e.*, U.S. Pipe's Terms.

- TEC's invoice says that "the manufacture[r] has in *its terms*" that there is a cancellation fee, making clear that TEC passed U.S. Pipe's contractual terms through to Greenville Water. (Reply to Arbitration Mot., Ex. A (emphasis added); R. at __.)

- A Pick ticket signed by "MBS," for a delivery of more than $216,000 worth of pipes to Greenville Water's jobsite referenced the applicability of TEC's terms

> and conditions, which in turn referenced U.S. Pipe's warranty. (Reply to Arbitration Mot., Ex. B; R. at __.)

These documents collectively show a consistent pattern of putting Greenville Water on notice that U.S. Pipe's Terms were involved in the transaction, demonstrating that Greenville Water knew that more than just its purchase order's terms applied. Greenville Water concedes it is a sophisticated purchaser, so it should have known that U.S. Pipe's Terms and warranties were involved. If it willfully declined to learn what those were, such willful ignorance cannot preclude the application of those terms. *Suntrust Mortg., Inc. v. AIG United Guar.*, No. 3:09CV529, 2011 WL 1225989, at *22 (E.D. Va. Mar. 29, 2011) (treating willful blindness in a civil case as "an alternate, co-equal, state of mind to 'actual knowledge'"), a*ff'd*, 508 F. App'x 243 (4th Cir. 2013).

The presence of industry-standard disclaimers and references to other terms on purchase orders or pick tickets is not novel. This is certainly not the first time that a sophisticated buyer of construction materials like Greenville Water has received terms on the back side of pre-printed forms or on invoices and pick tickets. At a minimum, a factual issue lingers here—a reasonable fact finder could conclude that Greenville Water was aware of U.S. Pipe's Terms given these three references to them. *Wheeler v. Corley*, 106 S.C. 319, 322, 91 S.E. 307, 308 (1917) (explaining that notice "largely a question of fact, dependent upon all the circumstances").

D. Greenville Water fails to meaningfully distinguish *One Belle Hall*.

In its Response Brief, Greenville Water fails to detail how this case is distinguishable from *One Belle Hall*, which involved the analogous circumstances of a downstream user of a product challenging an arbitration clause that originated from the manufacturer. 418 S.C. 51, 58–59, 791 S.E.2d 286, 290 (Ct. App. 2016). Ultimately this Court held the arbitration provision was enforceable and flowed downstream to bind the HOA as the end user of the product. *Id*. at 65, 791

S.E.2d at 294. Like *One Belle Hall*, this case involves a downstream purchaser challenging the enforceability of an arbitration provision in an upstream manufacturer's contract.

Greenville Water argues that *One Belle Hall* is limited to unconscionability. (Resp. Br. at 19 n.2.) This is just not the case. Both before the trial court and this Court, the HOA there argued that no contract between it and the manufacturer containing an arbitration agreement had been formed. *See* Resp.'s Final Br. at 17–18, Case No. 2014-002115 (S.C. Ct. App. May 28, 2019). This Court even referenced the issue before focusing on whether the arbitration agreement was unconscionable. *One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293. The only reasonable conclusion is that that subsidiary question of contract formation was addressed by the Court, which would not have reached the unconscionability issue had no contract been formed.

Greenville Water also tries to distinguish *One Belle Hall* by claiming that the contractor there was hired for the plaintiff's benefit. (Resp. Br. at 18.) This argument reinforces U.S. Pipe's point. Like the contractor in *One Belle Hall*, Distributors were directly involved in supplying U.S. Pipe's product for Greenville Water. (Compl. ¶¶ 71, 110–11; R. at __.) Greenville Water's procurement of pipe was facilitated through Distributors, and it does not dispute that U.S. Pipe's product was the object of the transaction. If anything, the facts here more directly support application of the arbitration clause, because unlike in *One Belle Hall*—where the plaintiff was one step further removed—Greenville Water admits that it intentionally purchased U.S. Pipe's goods. The relationship here falls squarely under *One Belle Hall*.

Failing to meaningfully distinguish *One Belle Hall*, Greenville Water points to the alleged presumption against arbitration that it asserts exists in non-signatory cases. (Resp. Br. at 14.) It squares this presumption with the FAA by arguing that it is merely a procedural device. (Resp. Br. at 45–46.) Not so. Shifting the burden of persuasion or applying legal presumptions are

substantive when they define the legal rights or obligations of the parties. *See Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (concluding that evidentiary presumption is the implementation of substantive law); *Chesapeake & Ohio Ry. Co. v. A.F. Thompson Mfg. Co.*, 270 U.S. 416, 421–22 (1926) (discussing operation of "so-called presumption," as really being a rule of substantive law). The presumption against arbitration for non-signatories, which affects whether a party can enforce a contract right to arbitrate, is substantive. This presumption cannot withstand the long history of Supreme Court cases explaining that the FAA requires placing arbitration agreements on equal footing. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).[2] This equal-footing principle requires displacing traditional state law that would single out arbitration agreements or have a disparate impact on them. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011) (explaining that the FAA may preempt generally applicable contract defenses that "would have a disproportionate impact on arbitration"); *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 581 U.S. 246, 251–52 (2017) (stating that the FAA "also displaces any rule that covertly accomplishes the same objective [discriminating on its face against arbitration] by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.").

II. Direct benefits estoppel applies to Greenville Water's contractual claims.

Greenville Water's own pleadings and briefing establish that it seeks to enforce obligations that allegedly arose from U.S. Pipe's promises about its product quality and standards. These

[2] The litigants in the post-*Morgan* cases applying the anti-arbitration presumption cited by Greenville Water did not raise any challenges to the presumption. (Resp. Br. at 13–14.) Additionally, Greenville Water fails to note that one of the cases is unpublished and not binding, *Nanney by & through Nanney v. THI of S.C. at Spartanburg, LLC*, No. 2020-000500, 2023 WL 5426594, at *3 (S.C. Ct. App. Aug. 23, 2023) (unpublished), and another is on certiorari to our Supreme Court, *Blackwell v. Mary Black Health Sys., LLC*, 445 S.C. 62, 73, 911 S.E.2d 147, 152 (Ct. App. 2024), *cert. granted* (June 25, 2025).

obligations originate in, or are defined by, U.S. Pipe's Terms. Greenville Water argues its reliance on marketing materials, technical specifications, and most notably, the Certificate, form the basis of its contractual and warranty rights. (Resp. Br. at 21.) But these representations cannot be divorced from the underlying contractual framework through which U.S. Pipe provides its product, which is governed by its Terms. Accordingly, Greenville Water cannot seek to benefit from the contract while simultaneously disclaiming its obligation to arbitrate under that same contract.

A. U.S. Pipe does not argue that Greenville Water's contractual relationship is all that requires applying direct benefits estoppel here.

Greenville Water suggests that U.S. Pipe's direct benefits estoppel argument is solely based on the existence of a contractual relationship, so *Wilson v. Willis* controls. (Resp. Br. at 20.) This misunderstands U.S. Pipe's argument. Unlike the plaintiff in *Wilson*, Greenville Water alleges that it has a direct contractual relationship with U.S. Pipe, (Compl. ¶ 70; R. at __), and asserts contractual claims, (Compl. ¶¶ 115–23). Greenville Water refers to its claims as "contract claims." (Resp. Br. at 21 n.4.) This direct contractual relationship, *plus* the assertion of direct contractual claims, is sufficient to apply direct benefits estoppel. *Wilson* says that a "but for" contractual relationship alone is not enough—U.S. Pipe does not quarrel with that conclusion. *Wilson v. Willis*, 426 S.C. 326, 343–44, 827 S.E.2d 167, 177 (2019). However, here there is a direct contractual relationship plus an assertion of rights and entitlement to remedies based on the contract, making this case controlled by *Pearson*, not *Wilson*. *See Pearson*, 400 S.C. 281, 296–97, 733 S.E.2d 597, 605 (Ct. App. 2012) (noting that doctor "received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work," and that if "not for that contract, he would have had to make separate arrangements with the Hospital in order to work there.").

To try to avoid arbitration, Greenville Water improperly parses the Supreme Court's opinion in *Wilson*. Contrary to Greenville Water's arguments, *Wilson* does not require suit on a specific provision of the Terms. It just requires that the lawsuit seek to exploit a direct contractual benefit, and that the suit is not independent of the Terms. *Wilson*, 426 S.C. at 342–43, 827 S.E.2d at 176. The line between indirect and direct benefits is a thin one. *Id*. at 344, 827 S.E.2d at 177. "Whether a claim seeks a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading." *Hays v. HCA Holdings, Inc*., 838 F.3d 605, 609 (5th Cir. 2016) (quoting *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 527 (Tex. 2015)). Here, despite Greenville Water's artful pleading, the suit is *for* breach of contract and seeks contract damages. (Compl. ¶¶ 11, 12, 67, 70; R. at __.) As stated, Greenville Water even refers to its claims as "contract claims." (Resp. Br. at 21 n.4.) As a result, Greenville Water, who chose to bring this lawsuit and is thus seeking to exploit the contract, should be estopped from ignoring the Arbitration Agreement governing disputes in that same contract.

Greenville Water's argument would lead to the absurd conclusion that a real "buyer" could simply substitute a shell company as the "buyer" with U.S. Pipe and thereby avoid all the terms and conditions. Further, Greenville Water's arguments would lead similarly in such a scenario to the "real buyer" saying only the shell company "knew" about the terms and conditions and thus the "real buyer" cannot be bound by them. This just cannot be the case. This type of form over substance is a reason why the law recognizes that downstream purchasers are bound.

B. Greenville Water's contract claims are not, and cannot, be based merely on the Certificate.

Greenville Water tries to argue its contract claims are based entirely on its receipt of the Certificate. It fails to point to any record showing when it received the Certificate or what consideration was provided for the Certificate. The portion of the Certificate it copied and pasted

in the Complaint is not addressed to Greenville Water and could have been directed to anyone, including Distributors. (Compl. ¶ 48; R. at __; Pl.'s PowerPoint at 6; R. at __.) The Certificate in particular states: "We hereby certify material furnished by U.S. Pipe & Foundry Company, LLC., either for your stock or for direct shipment to your customer . . . ." For the Certificate to apply, Greenville Water would have to hold pipes for "stock" or directly ship pipes to its customers using the water system, despite alleging that it bought pipe through Distributors and not directly from U.S. Pipe. (Compl. ¶ 61; R. at __.)

While Greenville Water's Complaint mentions the Certificate within its breach of express warranty claim, it does not specifically identify the Certificate as the source of contract formation or even as the source of the warranty: "U.S. Pipe issued a Certificate of Product Compliance *and* represented in its promotional and marketing materials that its cement-mortar-lined ductile iron pipe meets or exceeds the [standard]." (Compl. ¶ 77 (emphasis added); R. at __.) Greenville Water is referencing both the Certificate and other "materials" which are not identified. Greenville Water's "the Certificate is the contract" argument appears manufactured after the fact, advanced solely to avoid the contractual limitations and the arbitration provision in U.S. Pipe's Terms.

In its implied contract claim, Greenville Water omits any mention of the Certificate. (Compl. ¶¶ 115–23; R. at __.) Greenville Water also does not mention the Certificate in the affidavit it filed in opposition to the Motion to compel arbitration. (Mem. in Opposition, Ex. 1; R. at __.) The first time Greenville Water stated the Certificate formed the basis of its contractual claims—a representation belied by the record—was in its Memorandum in Opposition to U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration. (*See* Mem. in Opposition at 4; R. ___.) But this argument is not evidence. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590

S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."). And this argument is also not based on the Complaint or admissible evidence presented at the hearing.

Even if the Certificate were a part of bargain, other parts of the bargain remain, including U.S. Pipe Terms. U.S. Pipe's Terms expressly state: "All sales to Buyer are subject to these Terms, which shall prevail over any inconsistent terms of Buyer's purchase order or other documents. . . . This Agreement supersedes all prior or contemporaneous understandings, agreements, negotiations, representations, and warranties, and communications, whether written or oral. The foregoing shall apply to all documents heretofore or hereafter submitted by Buyer, whether executed by Seller or not." (Arbitration Mot., Ex. A, Terms at 1; R. __.) This language demonstrates the Terms are intended to apply prospectively to bind downstream purchasers by indicating the Terms apply to all later documents submitted by the Buyer with relation to the goods purchased, whether executed by U.S. Pipe or not. (*Id*.)

Greenville Water incorrectly claims that U.S. Pipe failed to argue there was no reasonable reliance on the Certificate before the Circuit Court. (Resp. Br. 21–22.) The record proves otherwise. In its Reply cited below, U.S. Pipe noted that "Greenville Water attempts to distance itself from the terms of its agreement with TEC and Hayes by claiming the only agreement it had with U.S. Pipe is a screen shot of a 'certificate of compliance.' There is no allegation regarding the date the certificate was issued, who requested the certificate, or a complete copy of the certificate." (Reply to Arbitration Motion at 3; R. at __.) Greenville Water did not present the complete copy of the Certificate until showing its PowerPoint during the hearing. (Pl.'s PowerPoint at 6; R. at __.) Furthermore, at the hearing on U.S. Pipe's motion, counsel for U.S. Pipe directly questioned Greenville Water's purported reliance on the Certificate with the Circuit Court: "So, they're pulling a document that they found somewhere on the Internet and saying, this

is our contract. But our contract isn't for the purchase of the pipe. It's just this term that you're going to comply with the certification of it. It doesn't make any sense." (Hr'g Tr. 28:15–23; R. at __.) U.S. Pipe can hardly be said to have failed to question the validity or applicability of the Certificate as a sufficient basis for Greenville Water's contract claims.

Greenville Water tries to divorce the Certificate from the context in which it was allegedly issued. The Certificate is not a freestanding contract—it exists only in connection with the sale of goods governed by U.S. Pipe's Terms. Greenville Water's claims still arise from the purchase of those goods. As a result, Greenville Water's contract claims depend on the *contract*, including the Terms, and cannot be based purely on the Certificate.

III. U.S. Pipe's arguments are preserved for review by this Court and should the Court not outright reverse, disputed factual issues should be resolved on remand.

Although the hearing transcript contains obvious transcription errors, a point Greenville Water concedes, (Resp. Br. at 50), the balance of the record confirms that the issues raised were presented below. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp*., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (noting issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict). Appellate courts should not apply preservation rules "in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." *Cone v. State*, 443 S.C. 487, 494, 905 S.E.2d 368, 372 (2024) (quoting *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023)). The arguments briefed by U.S. Pipe were preserved for appellate review.

A. U.S. Pipe's delegation argument is preserved, and the arbitrator should decide gateway questions, including unconscionability.

Greenville Water's argument that the delegation of the unconscionability and related enforcement issues are unpreserved is the type of technical application our Supreme Court cautioned against. *Cone*, 443 S.C. at 494, 905 S.E.2d at 372.[3] U.S. Pipe presented the argument to the Circuit Court by raising these points in its Arbitration Motion and at the hearing. In its motion, U.S. Pipe cites the arbitration provision in full, which explicitly delegates resolution of "[a]ny claim or controversy arising out of or relating to the Agreement, . . . including the arbitrability thereof," to the arbitrator and incorporates the AAA Commercial Rules, which delegate issues of arbitrability—including enforceability—to the arbitrator. (Arbitration Mot. at 3; R. at __.) Despite having transcription errors, the hearing transcript still shows that counsel for U.S. Pipe discussed the arbitration provision, which includes the delegation clause, and issues related to unconscionability. (Hr'g Tr. 6:10–7:1-6; R. at __.) While U.S. Pipe may not have expounded upon the delegation argument or used any "magic words" to parse out the arbitrability issues, this reliance on the Arbitration Agreement was sufficient to preserve the delegation argument for appellate review. *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Thus, Greenville Water's preservation argument as to delegation fails.

Greenville Water's argument on the merits of the delegation issue fails as well. Greenville Water first argues 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-

[3] Greenville Water presents this as a "waiver" of this issue, rather than an issue preservation problem. U.S. Pipe did not waive or fail to preserve the delegation issue by merely including the unconscionability argument in its Arbitration Motion in anticipation of Greenville Water's counterarguments.

001168, 2024 WL 112281, at *2 (S.C. Ct. App. Jan. 10, 2024)." (Resp. Br. at 10.)[4] U.S. Pipe agrees with this first step. There obviously is an Arbitration Agreement involved here; it is just that Greenville Water desires the agreement not be enforced against it. That said, Greenville Water then tries to argue that "validity" in *BVW Holding* encompasses the unconscionability issue the Circuit Court wrongly decided. (Resp. Br. 41–42.) This argument conflates formation with validity. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded."). While courts must first decide whether a contract was formed, the questions that follow all fall under the "arbitrability" analysis, which may be delegated to an arbitrator. *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 381, 892 S.E.2d 112, 114 (2023) (referring to "whether the arbitration provision is enforceable" as "the gateway arbitrability question"); *id.* at 384, 892 S.E.2d at 115 (referring to "gateway questions of arbitrability such as whether an arbitration provision is enforceable and whether the provision applies to a particular dispute."). *Ensambles Hyson, S.A. de C.V. v. Sanchez*, 736 F. Supp. 3d 871, 885 (S.D. Cal. 2024) ("Arbitrability is a deceptively broad term; it encompasses such issues as "whether the agreement covers a particular controversy or whether the arbitration provision is enforceable at all.'") (quoting *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1029 (9th Cir. 2022)). Thus, the Arbitration Agreement's delegation of questions of arbitrability clearly and unmistakably delegates questions of enforceability and validity, contrary to Greenville Water's claims otherwise.

This Court's opinion in *Doe v. TCSC, LLC*, which Greenville Water relies heavily on in its brief, (Resp. Br. at 40–41), is distinguishable. There, this Court analyzed an arbitration provision that did not incorporate the AAA Commercial Rules, but only delegated questions of "the

[4] Greenville Water does not mention this case is unpublished and non-binding.

interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute." *Doe*, 430 S.C. at 609, 846 S.E.2d at 877. The AAA Commercial Rules, which Greenville Water does not address, make the difference here. In addition to the Arbitration Agreement's delegation of questions of "arbitrability," the Commercial Rules delegate questions of the arbitrator's "own jurisdiction," "the existence, scope, or validity" of the Arbitration Agreement, and the "arbitrability of any claim" to the arbitrator. Am. Arbitration Assoc. Comm. Rules, Rule 7(a) (Sep. 1, 2022). Absent any reference in the arbitration provision in *Doe* to anything but "interpretation," "scope," and "validity," the Court refused to permit the delegation of the gateway questions. *Id*. at 609, 846 S.E.2d at 877. Ultimately, this Court still sent the matter to arbitration for the arbitrator to address several threshold issues. *Id*. at 616, 846 S.E.2d at 881.

Greenville Water concedes the Arbitration Agreement's incorporation of the AAA Commercial Rules equates to clear and unmistakable delegation. (Resp. Br. at 41 ("Here, unlike in *Rent-A-Center*, it is clear and unmistakable that the delegation clause committed disputes over the 'arbitrability' of '[a]ny claim or controversy arising out of or relating to the Agreement" to the arbitrator.'").) Greenville Water does not challenge the cases U.S. Pipe cited on this point. *In re StockX Customer Data Sec. Breach Litig*., 19 F.4th 873, 879 n.2 (6th Cir. 2021) ("This court, and each of the ten other circuits to address the issue, has held that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." (quotation omitted)); *accord Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017) (same; applying JAMS Rules). This concession ends the analysis because, as set forth above, "arbitrability" encompasses "validity and enforceability issues," such as unconscionability. *See Sanders*, 440 S.C. at 381, 892 S.E.2d at 114; *Schneider*, 688 F.3d at 71; *Ensambles Hyson*, 736 F. Supp. 3d at 885.

In any event, the Arbitration Agreement—and more specifically, the delegation clause—is not unconscionable. In its Response Brief, (Resp. Br. at 42), Greenville Water generally agrees with U.S. Pipe that the unconscionability test is "focus[ed] generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007) (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). So too does Greenville Water agree that the mere adhesive nature of a contract is not enough to establish unconscionability. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022) ("The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed*."). That said, Greenville Water fails to identify any substantive provision of the Arbitration Agreement that is unconscionable. That the parties chose arbitration as the forum for resolving disputes is not enough to establish unconscionability. *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 401, 498 S.E.2d 898, 905 (Ct. App. 1998) ("We conclude that a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration.").

Greenville Water continues to solely focus on its argument that the Terms containing the Arbitration Agreement are an adhesion contract. (Resp. Br. at 9, 42–43.) This argument, and the Circuit Court's adoption of it, (Order at 14–15; R. at __), fails on two fronts. *First*, the contract-of-adhesion argument relates to the contract as a whole—Greenville Water takes the position that the Terms itself were adhesive, so the Arbitration Agreement is therefore adhesive by association. (Resp. Br. at 43.) "That is precisely the sort of argument that . . . must be deferred for arbitration." *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 595 n.4 (4th Cir. 2023). *Second*, this argument

ignores the second prong of the analysis (unfairness in the contract's provisions) and fails to meet the high bar for unconscionability under South Carolina law. *Hosey v. Quicken Loans, Inc.*, No. 1:17-cv-02060, 2018 WL 1471891 (D.S.C. Mar. 26, 2018) (explaining that unconscionability traditionally "requires a showing of both substantive unconscionability, or unfairness in the contract itself, and procedural unconscionability, or unfairness in the bargaining process."). Greenville Water points to no provision of the Arbitration Agreement that would be unfair. The straightforward Arbitration Agreement here differs from the unconscionable agreement, for example, in *Damico*, which had an exception allowing the proponent of the arbitration clause to separately bring judicial actions for repossession, meaning that the provision really only applied to a plaintiff's claims. *Damico*, 437 S.C. at 615, 879 S.E.2d at 757 (holding unconscionable an arbitration provision giving the proponent the sole ability to determine the parties to be joined as co-defendants in the arbitration proceeding).

"Unconscionability is a narrow doctrine whereby the challenged contract must be one which no reasonable person would enter into, and the inequality must be so gross as to shock the conscience." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (internal quotation omitted). Although courts may refuse to enforce a contract on unconscionability grounds, this authority is limited. *Maybank v. BB&T Corp.*, 416 S.C. 541, 573, 787 S.E.2d 498, 514 (2016) ("[O]nly in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability."). This is especially true in the commercial context involving sophisticated parties. *Whirlpool Corp. v. Grigoleit Co.*, 2011 WL 3879486 (W.D. Mich. 2011), *aff'd in part, rev'd in part and remanded*, 713 F.3d 316 (6th Cir. 2013) (unconscionability rarely found in commercial settings); *Hagrpota for Trading & Distrib. v. Oakley Fertilizer*, 2010 WL 2594286, at *6 (S.D.N.Y. June 18, 2010) ("[A]rbitration clauses are not normally considered 'material'

terms in transactions between merchants, and so are routinely enforced even if one party professes unawareness of the presence of an arbitration clause in the agreement."). Indeed, in other contexts, courts have concluded that the inclusion of an arbitration clause in a commercial agreement cannot amount to unfair surprise sufficient to warrant excusing the provision. *See Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 708 (2d Cir. 2007) ("To carry the burden of showing surprise, a party must establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term."); *Wilson Fertilizer & Grain, Inc. v. ADM Mill. Co.*, 654 N.E.2d 848, 854 (Ind. Ct. App. 1995) (merchant failed to produce evidence proving surprise or hardship warranted excluding arbitration provision).

Greenville Water's unconscionability argument collapses under the weight of the commercial context. Greenville Water is not a powerless consumer. It is a sophisticated public body with procurement procedures, legal counsel, and years of industry experience. In the purchase orders it placed in the record, it was buying nearly $660,000.00 worth of pipe, a considerable sum that it no doubt carefully considered before spending taxpayer's money. (Mem. in Opposition, Exs. 2–3; R. at ___.) Courts are loath to find unconscionability in arm's length commercial transactions between experienced entities like the ones involved here.

What's more, the Arbitration Agreement at issue here is aimed at providing a fair process before a neutral decisionmaker (the American Arbitration Association). Although Greenville Water couches the stay of this action for arbitration as depriving it of a "constitutional right to a judicial remedy," (Resp. Br. at 38–39), the reality is that Greenville Water will still get its "day in court," except that day will be before an arbitrator. The arbitrator may rule for Greenville Water or even decide it will not enforce the Terms or its Arbitration Agreement for a host of reasons. That said, the Court must give the arbitrator a first shot at doing so under the delegation clause.

B. The agency relationship between Greenville Water and Distributors is apparent from the record.

Greenville Water contends that the agency relationship between it and Distributors was not presented to the Circuit Court. (Resp. Br. at 26.) Greenville Water's own pleadings, however, demonstrates that agency relationship existed and was presented to the Circuit Court. (Compl. ¶¶ 61, 71, 110-11; R. at __.) In fact, Greenville Water's own Purchase Orders, which it filed and argued to the Circuit Court, (Mem. in Opposition Exs. 2–3; R. at __), required Distributors to deliver to job-specific addresses designated by Greenville Water, dictated delivery timelines, and referenced Greenville Water's own specifications. These terms show not just transactional control, but operational direction over how and when pipe was to be delivered—strong evidence of Greenville Water exercising control typical of an agency relationship.

Even under Hayes' Terms and Conditions of Sale, Greenville Water retained the final say over the mechanisms for substantive aspects of the contractual relationship, including that "[m]aterials shipped are per Seller's interpretation of the purchase order or the plans and specifications provided by Buyer," that "[q]uotations are offered to Buyer as a service and it is Buyer's responsibility to carefully check all items and provide Seller with a correct and comprehensive purchase order." (Hayes' Ans., Ex. A; R. at __.) TEC's Terms similarly show that Greenville Water was expected to provide direction and instruction with respect to its role in purchasing the pipes, and that certain changes could not be made without the written agreement of Greenville Water. (Reply to Arbitration Mot., Ex. C.)

These examples, all presented to the Circuit Court, show that Distributors were acting as agents for a known principal when supplying pipes pursuant to Greenville Water's direction and specifications. As a result of that agency, Greenville Water is bound to arbitrate under the Terms.

IV. Alternatively, issues of material fact remain undecided.

Greenville Water doubles down on its claim that there "is no evidence that TEC or Hayes informed Greenville Water of U.S. Pipe's" Terms. (Resp Br. at 16.) Yet the record confirms that Greenville Water received several documents referencing different terms involving U.S. Pipe. (Arbitration Mot. Reply Br., Exs. A–C; R. at __.) These are the types of "other written documents and communications" referenced *throughout* Greenville Water's Complaint, (Compl. ¶¶ 6, 49, 70–71, 77, 84, 97, 110; R. at __), not just in its declaratory judgment claim as it argues. (Resp. Br. at 24 n.5.) If the Court considers Greenville Water's arguments that its own purchase orders control the contractual relationship, while simultaneously involving the express terms incorporated in Distributors' documents that also reference U.S. Pipe's Terms, then, at minimum, factual questions exist as to which terms govern. Should the Court decline to outright reverse in favor of U.S. Pipe, a disagreement over the terms in contract formation should be resolved through an evidentiary hearing under South Carolina precedent, as these conflicting points bear on the question of contract formation and leave a genuine dispute of material fact.

Greenville Water incorrectly argues that the Court can ignore these disputed issues of material fact by claiming that the trial provision of the FAA does not apply in state court. (Resp. Br. at 46.) This makes little sense. The question is how those factual issues are addressed. In *Berkeley County*, the Fourth Circuit concluded that the FAA required the Court to summarily address the issue, which it did by holding a bench trial. *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 130 F.4th 396, 400 (4th Cir. 2025). Whether this Court applies the FAA's trial provision or some corollary state law, the issues of material fact require the Circuit Court to hold an evidentiary hearing at which testimony is presented by affidavit or otherwise, and make detailed factual determinations about the disputed material facts. *See* S.C. Code Ann. § 15-48-20(a); *Bennett v.*

ACS Primary Care Physicians-Se. P.C., 444 S.C. 458, 479, 908 S.E.2d 110, 121 (Ct. App. 2024) (referring to Section 15-48-20 as being "a comparable provision" to the FAA § 4); *see also Hackworth v. Bayview Manor, LLC*, No. 2019-001536, 2023 WL 2519244, at *3 (S.C. Ct. App. Mar. 15, 2023) (unpublished, cited only as an example of persuasive reasoning) (analyzing federal and state trial provisions to determine factual disputes on motion to compel arbitration).[5]

Greenville Water would have the Court ignore the competing factual issues in favor of merely applying the single-page set of terms on the reverse of its purchase orders with Distributors. (Mem. in Opp., Exs. 2–3; R. at __.) But these purchase orders show on their face why they cannot be the sole contractual terms between the parties. For example, Greenville Water's purchase order to TEC requested 22,012 feet of 6" pipe at a unit price of $24.81 and 1,467 feet of 8" pipe at a unit price of $32.68. (Mem. in Opposition Ex. 3; R. at __.) The "deliver to" address in the purchase order for TEC is not a physical location, but TEC's accounts receivable department. (*Id.*) Comparatively, TEC's invoiced quote to Greenville Water shows a different delivery address and the order notes state Greenville Water is receiving a lower price of $23.40 per unit for the 6" pipe and $30.82 for the 8" pipe. (Reply to Arbitration Mot., Ex. A; R. at __.) It also references a different shipping address. (*Id.*) The invoice and pick ticket associated with the delivery then reference different shipping addresses and amounts of pipe being delivered. (Reply to Arbitration Mot., Ex. B; R. at __.) These differences confirm that, contrary to Greenville Water's claims, its

[5] On remand, the Circuit Court may decide that some limited discovery focused on the contract-formation issue is warranted to develop the record. *See Guidotti v. Legal Helpers Debt Resol.*, 716 F.3d 764, 780 (3d Cir. 2013) ("Thus, the District Court should not have denied the Appellants' motion to compel arbitration without first allowing limited discovery and then entertaining their motion under a summary judgment standard."); *id*. at 775 n.5 ("In addition, [limited discovery] has commonly been allowed to determine whether an agreement to arbitrate has been formed."). Discovery on the merits, however, is reserved for an arbitrator. *See Sanders*, 440 S.C. at 392, 892 S.E.2d at 119. This was U.S. Pipe's point in objecting to the extensive discovery served, not that all discovery on any issue was inappropriate, as Greenville Water suggests. (Resp. Br. at 49 n.15.)

purchase orders cannot be read in isolation as the only documents governing the transaction. Instead, the Court would look to the other documents to determine the extent of the contractual terms, including the specific references to the manufacturer's warranty in Distributors' terms. (Arbitration Mot. at 4–5; R. at __; Pl.'s PowerPoint Presentation at 27, 29; R. at __.)

Moreover, Greenville Water's own pleadings confirm that other documents and communications form the basis of its contractual relationships in this case. According to Greenville Water, those "other written documents and communications" include the Certificate and U.S. Pipe's promotional materials, (Compl. ¶¶ 6–7, 49, 77; R. at __), but under the battle of the forms, those "other documents" should include Distributors' terms as well. Contrary to Greenville Water's claims, these terms are in the record. U.S. Pipe included language from both sets of terms in its Arbitration Motion, without objection. (Arbitration Mot. at 4–5; R. at __.) It then attached TEC's terms to its Reply. (Reply, Ex. C; R. at __.) Hayes filed its terms with its answer before Greenville Water even responded to U.S. Pipe's Arbitration Motion. (Hayes' Ans., Ex. A; R. at __.) Greenville Water even presented Distributors' terms to the Circuit Court in the hearing. (Pl.'s PowerPoint Presentation at 27, 29; R. at __.) Yet the Circuit Court conducted no "battle of the forms" analysis. In any event, the record also reflects that Greenville Water was on inquiry notice of U.S. Pipe's Terms in light of the specific references to its warranty in Distributors' terms. (Pl.'s PowerPoint Presentation at 27, 29; R. at __.)

Therefore, if the Court agrees with Greenville Water that U.S. Pipe's Terms do not directly control under the Section 36-2-318 analysis or through direct benefits estoppel, then the proper remedy is remand. This is especially true when, as here, that Greenville Water concedes there are serious issues with the accuracy of the transcript. (Resp. Br. at 50 n.16.)

Conclusion

In light of the existence of a valid and enforceable Arbitration Agreement covering Plaintiff's claims against U.S. Pipe, this Court should reverse the Circuit Court and remand the matter for entry of an order compelling Greenville Water to submit its claims to arbitration and staying these proceedings. Failing that, this Court should remand for further proceedings to address the disputed material facts raised in opposition to U.S. Pipe's arbitration motion.

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July 30, 2025

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2025-000520
Case No. 2024-CP-23-05956

Commissioners of Public Works of the City of Greenville, South Carolina .....Respondent,

v.

United States Pipe and Foundry Company, LLC, TEC Utilities Supply Inc., and Hayes Pipe Supply Inc.,..... Defendants,

of which

United States Pipe and Foundry Company, LLC, is the.....Appellant.

Proof of Service

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant United States Pipe and Foundry Company, LLC, do certify that I have served all counsel of record in this action with a copy of the document(s) set forth below under Supreme Court Order dated April 24, 2024:

Document(s): **Appellant's Initial Reply Brief**

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