RECEIVED
Aug 28 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
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.

RESPONDENT'S FINAL BRIEF

Adam J. Levitt (*pro hac vice*)
DiCELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel.: 312-314-7900
alevitt@dicellolevitt.com

Adam C. Bach (S.C. Bar #74885)
TONNSEN BACH, LLC
1306 South Church Street
Greenville, South Carolina 29605
Tel.: 864-236-5013
abach@tonnsenbach.com

Justin J. Hawal (*pro hac vice*)
DiCELLO LEVITT LLP
8160 Norton Parkway, Third Floor
Mentor, Ohio 44060
Tel.: 440-953-8888
jhawal@dicellolevitt.com

Attorneys for Respondent Commissioners of Public Works of the City of Greenville, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

Under South Carolina law, an agreement to arbitrate must be proven by establishing all elements of valid contract formation with respect to arbitration. When a party sought to be bound by an arbitration provision is a non-signatory, there is a presumption against arbitration. And, in order to show that a non-signatory is nonetheless bound by an arbitration provision, it must be shown that the party resisting arbitration embraced the contract despite its non-signatory status but then, during litigation, attempted to repudiate the arbitration clause in the contract.

The issues presented by this appeal are:

1. Whether U.S. Pipe waived arguments that it failed to raise in the Circuit Court such that they are not properly preserved for appellate review.

2. Whether the Circuit Court erred in holding that U.S. Pipe failed to rebut the presumption against arbitration that applies to non-signatories, like Greenville Water, when it failed to present any evidence of valid contract formation with respect to arbitration.

3. Whether the Circuit Court erred in holding that direct benefits estoppel did not apply when Greenville Water asserts claims that do not arise out of U.S. Pipe's Terms and Conditions of Sale and U.S. Pipe fails to present any evidence that Greenville Water otherwise embraced the Terms and Conditions of Sale, or even knew of their existence.

4. Whether the Circuit Court erred in deciding the validity of the arbitration provision, including that it was unconscionable, where U.S. Pipe never raised the delegation clause in the arbitration provision before the Circuit Court and the delegation clause does not specifically reserve a decision on the validity of the arbitration provision for an arbitrator.

5. Whether the Circuit Court properly adjudicated the parties' arbitration dispute based upon the record before it without objection by U.S. Pipe.

STATEMENT OF THE CASE AND FACTS

This case arises out of Defendant-Appellant United States Pipe and Foundry Company, LLC's ("U.S. Pipe") manufacture of ductile iron pipe with defective cement-mortar-lining at its Lynchburg, Virginia facility (the "Lynchburg 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-Respondent Commissioners of Public Works of the City of Greenville, South Carolina ("Greenville Water"). (Compl., ¶ 1; R. at 23). Greenville Water alleges that the ductile iron pipes with defective cement-mortar-lining manufactured by U.S. Pipe (the "Defective Pipes") cause significant water quality problems as well as damage to its water distribution system, resulting in Greenville Water not receiving the benefit of its bargain and sustaining other consequential damages, including the cost of repair, lost revenue, and reputational harm. (Compl., ¶¶ 2, 10, 38-40, 44; R. at 24, 26, 32-33).

While U.S. Pipe claims that Greenville Water is bound by the arbitration provision contained in its Terms and Conditions of Sale—that it posted on its website without Greenville Water's knowledge—the *only* evidence in the record establishes that Greenville Water is not a party to U.S. Pipe's Terms and Conditions of Sale, did not otherwise agree to be bound by U.S. Pipe's Terms and Conditions of Sale, and does not seek to exploit any benefit from U.S. Pipe's Terms and Conditions of Sale. Consequently, Greenville Water cannot be compelled to arbitrate its claims against U.S. Pipe and the Greenville County Court of Common Pleas, Thirteenth Judicial Circuit ("Circuit Court") correctly denied U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration. For the reasons that follow, this Court should affirm.

I. U.S. Pipe Manufactured The Defective Pipes And They Were Sold To Greenville Water By TEC And Hayes.

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; R. at 24). Ductile iron pipe that does not have cement-mortar-lining results in myriad 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; R. at 26, 32-33). As a result, industry standards and South Carolina law require that all ductile iron pipes used for water service have cement-mortar-lining that is of a minimum uniform thickness. (*Id.* at ¶¶ 4, 27-36; R. at 24, 30-32).

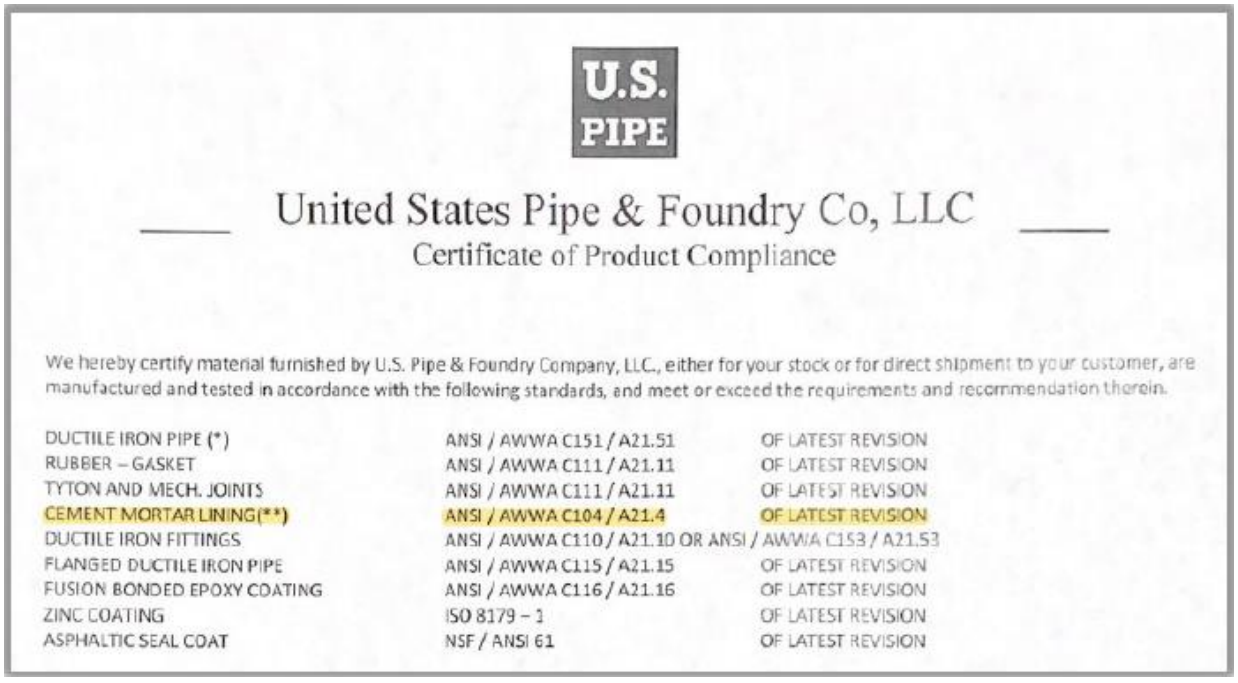
During a construction project, Greenville Water discovered that a substantial quantity of ductile iron pipe manufactured at U.S. Pipe's Lynchburg Facility (and purchased from TEC and Hayes) did not comply with industry standards, because the cement-mortar-lining was concentrated almost entirely on one side of the pipe, as pictured below:

(*Id.* at ¶¶ 8, 53-60; R. at 25, 36-37). Upon discovery of the defect, Greenville Water retained an outside engineering firm to test pipe from U.S. Pipe's Lynchburg Facility across numerous

deliveries and batches, which showed that more than 70% of the pipe tested failed to comply with industry standards. (*Id.* at ¶¶ 56-57; R. at 37).

II. U.S. Pipe Promised Greenville Water That Its Ductile Iron Pipe Met Industry Standards, Irrespective Of The Warranties Contained In The Terms And Conditions Of Sale.

Contrary to U.S. Pipe's assertion that Greenville Water's claims arise out of warranties contained in U.S. Pipe's Terms and Conditions of Sale (Appellant's Final Br. at 13-16), neither Greenville Water's implied contract nor its warranty claims arise out of U.S. Pipe's Terms and Conditions of Sale. Rather, U.S. Pipe certified to Greenville Water, via a Certificate of Product Compliance (pictured below), that all of the ductile iron pipe that it manufactured complied with applicable industry standards, including the specific industry standard governing minimum thickness of cement-mortar-lining (ANSI/AWWA Standard C104/A21.4). (Compl., ¶¶ 6, 45-52; R. at 24, 33-36).



U.S. PIPE

United States Pipe & Foundry Co, LLC

Certificate of Product Compliance

We hereby certify material furnished by U.S. Pipe & Foundry Company, LLC., either for your stock or for direct shipment to your customer, are manufactured and tested in accordance with the following standards, and meet or exceed the requirements and recommendation therein.

DUCTILE IRON PIPE (*)	ANSI / AWWA C151 / A21.51	OF LATEST REVISION
RUBBER – GASKET	ANSI / AWWA C111 / A21.11	OF LATEST REVISION
TYTON AND MECH. JOINTS	ANSI / AWWA C111 / A21.11	OF LATEST REVISION
CEMENT MORTAR LINING(**)	ANSI / AWWA C104 / A21.4	OF LATEST REVISION
DUCTILE IRON FITTINGS	ANSI / AWWA C110 / A21.10 OR ANSI / AWWA C153 / A21.53	
FLANGED DUCTILE IRON PIPE	ANSI / AWWA C115 / A21.15	OF LATEST REVISION
FUSION BONDED EPOXY COATING	ANSI / AWWA C116 / A21.16	OF LATEST REVISION
ZINC COATING	ISO 8179 – 1	OF LATEST REVISION
ASPHALTIC SEAL COAT	NSF / ANSI 61	OF LATEST REVISION

Further, Greenville Water relied upon U.S. Pipe's Certificate of Product Compliance and affirmative representations concerning its compliance with industry standards when deciding to

purchase pipe manufactured by U.S. Pipe because the pipe it purchased was manufactured with a black asphaltic seal paint coating that prevented Greenville Water from directly observing the quality of the cement-mortar-lining. (*Id.* at ¶¶ 50-51; R. at 35). Had Greenville Water known that the express warranty made to it in the Certificate of Product Compliance was false, Greenville Water would not have purchased the Defective Pipes and would not have permitted them to be installed in its water distribution system. (*Id.* at ¶ 52; R. at 36). The affirmative misrepresentations that U.S. Pipe made to Greenville Water in the Certificate of Product Compliance form the basis of Greenville Water's implied contract, warranty, and South Carolina Unfair Trade Practices Act claims; *not* U.S. Pipe's Terms and Conditions of Sale. (*Id.* at ¶¶ 45-52, 77-79, 91-92, 104-05, 117-21; R. at 33-36, 41, 43, 45, 47-48).

III. U.S. Pipe's Terms And Conditions Of Sale Do Not Purport To Bind Indirect Purchasers, Like Greenville Water.

U.S. Pipe's own Terms and Conditions of Sale do not purport to bind indirect purchasers that purchase goods through U.S. Pipe's distributors, like TEC and Hayes. The term "Seller" is defined as referring to U.S. Pipe, Griffin Pipe Products Co., LLC, and U.S. Pipe Fabrication, LLC only—not distributors of U.S. Pipe. (Mot., Ex. A at 1; R. at 147). Additionally, the term "Buyer" is defined as an entity and its parents, subsidiaries, affiliates, or business units that purchased goods from "Seller." (*Id.*). It does not include entities that purchase goods manufactured by U.S. Pipe indirectly from distributors of U.S. Pipe, like TEC and Hayes. (*Id.*) The arbitration provision expressly applies only to "[a]ny controversy or claim arising out of or relating to the Agreement, or the breach thereof. . . ." (*Id.* at 5; R. at 151). The term "Agreement" means the Agreement between "Seller" and "Buyer." (*Id.* at 1; R. at 147). The Terms and Conditions further provide that there are no third-party beneficiaries to the "Agreement." (*Id.* at 6; R. at 152).

IV. Greenville Water Is Not A Direct Purchaser And, Therefore, Is Not A "Buyer" Under U.S. Pipe's Terms And Conditions Of Sale.

Greenville Water has never purchased ductile iron pipe directly from U.S. Pipe. (Compl., ¶¶ 1, 16, 61; R. at 23, 28, 38; Mem. in Opp., Ex. 1, Schmidt Aff. at ¶¶ 5-6; R. at 174). Rather, Greenville Water has always purchased ductile iron pipe manufactured by U.S. Pipe through distributors TEC and Hayes. (*Id.*) Greenville Water's contractual relationship with TEC and Hayes are governed by the terms and conditions set forth in Greenville Water's purchase orders with TEC and Hayes. (Mem. in Opp., Exs. 2-3; R. at 177-81). The purchase orders that Greenville Water entered into with TEC and Hayes do not subject Greenville Water to arbitration, nor do they reference or incorporate U.S. Pipe's Terms and Conditions of Sale in any way. (*Id.*) Greenville Water is, therefore, not a "Buyer," as that term is defined and used in U.S. Pipe's own Terms and Conditions of Sale, because it did not purchase any goods from "Seller" (U.S. Pipe, Griffin Pipe Products Co., LLC, or U.S. Pipe Fabrication, LLC). (Mot., Ex. A at 1; R. at 147). Therefore, Greenville Water is not a party to the "Agreement," which is expressly defined as between "Buyer" and "Seller." (*Id.*)

V. Greenville Water Has Never Been Put On Notice Of—Nor Agreed To—U.S. Pipe's Terms And Conditions Of Sale.

Since Greenville Water has never purchased ductile iron pipe directly from U.S. Pipe, Greenville Water has never been notified of nor agreed to U.S. Pipe's Terms and Conditions of Sale. (Mem. in Opp., Ex. 1, Schmidt Aff. at ¶¶ 8-9; R. at 174). Nor has Greenville Water ever used U.S. Pipe's website in connection with its purchase of ductile iron pipe. (*Id.* at ¶ 6; R. at 174). Additionally, as set forth above, Greenville Water's contractual relationships with TEC and Hayes are governed by the terms and conditions contained in Greenville Water's purchase orders with TEC and Hayes. (Mem. in Opp., Exs. 2-3; R. at 177-81; Mem. in Opp., Ex. 1, Schmidt Aff. at ¶ 9;

R. at 174). Even assuming TEC and Hayes had separate terms and conditions that became part of the contract with Greenville Water, as asserted by U.S. Pipe, it is undisputed that those terms and conditions do not contain an arbitration provision, reference arbitration, nor specifically incorporate U.S. Pipe's Terms and Conditions of Sale. (Mot. at 3-5; R. at 134-36; Reply Br., Exs. A-C; R. at 225-32).

VI. The Circuit Court Correctly Denied U.S. Pipe's Motion To Compel Arbitration.

On November 12, 2024, U.S. Pipe filed its Motion to Dismiss or Stay Pending Arbitration, claiming that Greenville Water is subject to an arbitration provision contained in U.S. Pipe's Terms and Conditions of Sale that it posted on its website. (Mot.; R. at 132-53). On January 16, 2025, Greenville Water filed its Memorandum in Opposition to U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration, asserting that it was never notified of the existence of U.S. Pipe's Terms and Conditions of Sale and did not agree to arbitrate any claims with U.S. Pipe. (Mem. in Opp; R. at 154-81). On February 6, 2025, U.S. Pipe filed its Reply Memorandum in Further Support of its Motion to Dismiss or Stay Pending Arbitration. (Reply Br.; R. at 216-32). On February 10, 2025, the Circuit Court held a full evidentiary hearing on U.S. Pipe's motion to compel arbitration. (*See generally* Hr'g Tr.; R. at 235-87).

On February 25, 2025, the Circuit Court issued an Order, properly denying U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration. (Order Denying Arbitration; R. at 1-17). In addressing each of the arguments raised by the parties in the Circuit Court, the Circuit Court correctly held that: (1) Greenville Water is a non-signatory to U.S. Pipe's Terms and Conditions of Sale and a presumption against arbitration, therefore, applies (*Id.* at 8-9; R. at 8-9); (2) U.S. Pipe failed to otherwise establish a valid agreement to arbitrate (*Id.* at 9-11; R. at 9-11); (3) Greenville Water cannot be forced to arbitrate under an estoppel theory (*Id.* at 11-14; R. at 11-14); (4) the

arbitration agreement is an unconscionable adhesion contract as to Greenville Water (*Id.* at 14-16; R. at 14-16); and (5) the Federal Arbitration Act ("FAA") does not apply and the Circuit Court is the proper forum. (*Id.* at 16; R. at 16). On March 14, 2025, U.S. Pipe filed its Notice of Appeal. (Not. of Appeal; R. 344-45).

STANDARD OF REVIEW

Whether an arbitration agreement can be enforced against a non-signatory to the agreement, like Greenville Water, "is a matter subject to de novo review by an appellate court." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.*; *see also Aiken*, 373 S.C. at 148, 644 S.E.2d at 707; *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

ARGUMENT

This Court should affirm the Circuit Court's Order denying U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration for four primary reasons.

First, U.S. Pipe has provided no evidence of valid contract formation between itself and Greenville Water with respect to arbitration to rebut the presumption against arbitration that applies to non-signatories, like Greenville Water. The only evidence in the record establishes that the express terms of U.S. Pipe's Terms and Conditions of Sale do not apply to indirect purchasers, like Greenville Water, and that Greenville Water was not aware of U.S. Pipe's Terms and Conditions of Sale prior to this litigation. Further, since U.S. Pipe did not raise incorporation by reference or

agency as a means to bind Greenville Water to the arbitration provision as a non-signatory in the Circuit Court, it waived appellate review of those issues. And, in any event, neither theory applies to bind Greenville Water to U.S. Pipe's arbitration provision.

Second, direct benefits estoppel does not apply to force Greenville Water to arbitrate, because U.S. Pipe points to nothing more than a contractual relationship between U.S. Pipe and Greenville Water. Direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen but-for a contractual relationship. Rather, direct benefits estoppel only applies when a non-signatory exploits (and thereby assumes) the contract containing the arbitration provision itself. There is no evidence in the record that Greenville Water embraced U.S. Pipe's Terms and Conditions of Sale despite its non-signatory status but then, during litigation, attempted to repudiate the arbitration clause in the contract.

Third, the Circuit Court correctly held, in the alternative, that the arbitration provision was unconscionable and unenforceable as to Greenville Water. Not only did U.S. Pipe fail raise the purported delegation clause contained in the arbitration provision in the Circuit Court, but it affirmatively raised and asked the Circuit Court to decide the issue of unconscionability in its motion to compel arbitration. U.S. Pipe, therefore, waived enforcement of the delegation clause. And, even if it did not waive enforcement of the delegation clause (which it did), the plain language of the delegation clause only empowers an arbitrator to resolve the arbitrability of the "controversy or claim" and does not delegate the decision of whether the arbitration provision was valid and enforceable to an arbitrator. Further, the arbitration provision is a one-sided contract of adhesion that unfairly requires Greenville Water to forego its fundamental right to a judicial remedy without any meaningful choice.

Fourth, the Circuit Court did not err in adjudicating the arbitration dispute on the record before it. The FAA's procedural rules, including those requiring a summary trial of disputed facts, do not apply in state court proceedings, like those before the Circuit Court. Further, there are no genuine issues of material fact with respect to whether Greenville Water entered into a valid agreement to arbitrate and, even if there were, the Circuit Court correctly adjudicated the dispute after conducting a hearing on the motion papers and evidence submitted without objection by U.S. Pipe.

For these reasons and the reasons that follow, the Court should affirm the Circuit Court's Order denying U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration.

I. The Circuit Court Correctly Held That U.S. Pipe Failed To Establish A Valid Arbitration Agreement Between The Parties.

The Circuit Court correctly held that U.S. Pipe failed to carry *its* burden to establish a valid arbitration agreement exists between U.S. Pipe and Greenville Water. 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). Where, as 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, 644 S.E.2d 663, 667 (2007)). If no agreement exists, "the court *must* deny any application to arbitrate." *Id.* (emphasis added).

"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, 827 S.E.2d 167, 173 (2019); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("[A] party cannot be required to submit to arbitration any

dispute which he has not agreed to submit."). "[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, 827 S.E.2d at 173 (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.*

A. The Circuit Court correctly held that Greenville Water is a non-signatory to U.S. Pipe's Terms and Conditions of Sale and, therefore, a presumption against arbitration applies.

The Circuit Court correctly held that Greenville Water is a non-signatory to any alleged arbitration agreement. 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).

U.S. Pipe does not meaningfully dispute (nor can it) that Greenville Water is a non-signatory to the Terms and Conditions of Sale, including the arbitration provision, that it unilaterally placed on its website. Indeed, the arbitration provision does not apply to Greenville Water under the Terms and Conditions of Sale's own express terms. U.S. Pipe's Terms and Conditions of Sale expressly apply only to purchasers of goods and products from the "Seller" of those goods and products. (Mot., Ex. A at 1; R. at 147). The term "Seller" is defined as "United States Pipe and Foundry Company, LLC, Griffin Pipe Products Co., LLC, and U.S. Pipe Fabrication, LLC." (*Id.*) It does not include resale distributors of goods and products manufactured

by U.S. Pipe, like TEC and Hayes. (*Id.*) And the term "Buyer" is defined as a person or entity, including "its parents, subsidiaries, affiliates, or business units," that purchases goods and products from "Seller." (*Id.*)

The *only* evidence in the record establishes that Greenville Water never purchased goods or products directly from any entity defined as a "Seller" under the Terms and Conditions of Sale, including U.S. Pipe, Griffin Pipe Products Co., LLC, or U.S. Pipe Fabrication, LLC. (Mem. in Opp., Ex. 1, Schmidt Aff. at ¶ 6; R. at 174). Rather, Greenville Water purchased all ductile iron pipe that was manufactured by U.S. Pipe from U.S. Pipe's distributors, TEC and Hayes. (*Id.*) Greenville Water, therefore, does not meet the definition of the term "Buyer" in U.S. Pipe's Terms and Conditions of Sale. (Mot., Ex. A at 1; R. at 147). And Greenville Water cannot be considered a third-party beneficiary to the contract because the Terms and Conditions of Sale expressly state that "Buyer and Seller are the only intended beneficiaries of this document, and there are no third party beneficiaries." (*Id.* at 6; R. at 152). The Circuit Court, therefore, not only correctly held that Greenville Water is a non-signatory to U.S. Pipe's Terms and Conditions of Sale such that a presumption *against* arbitration applies, *Wilson*, 426 S.C. at 337-38, but Greenville Water is a non-party to the agreement containing the arbitration provision under its own express terms.

U.S. Pipe asserts that the South Carolina Supreme Court's holding in *Wilson v. Willis* that there is a presumption against arbitration when the resisting party is a non-signatory "cannot be squared with the United States Supreme Court's more recent opinion in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022)." (Appellant's Final Br. at 26-27). U.S. Pipe is incorrect.[1] In *Morgan*,

[1] Additionally, U.S. Pipe did not raise this argument in the Circuit Court and, consequently, the Circuit Court did not rule upon whether the presumption against arbitration for non-signatories conflicts with federal law concerning the FAA (and, therefore, could not have erred). U.S. Pipe has, therefore, waived this issue for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue cannot be raised for the first time on appeal, but

the United States Supreme Court decided the "single issue" of whether courts "may create arbitration-specific variants of *federal procedural rules*, like those concerning waiver, based on the FAA's 'policy favoring arbitration.'" 596 U.S. 411, 416-17, 142 S. Ct. 1708, 1712 (2022) (emphasis added) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927 (1983)). The Court held that "a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." *Id.* at 418. Rather, "[i]f an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it." *Id.*

The South Carolina Supreme Court has consistently held, however, that "the FAA does not preempt state ***procedural*** law," like the presumption to be applied to non-signatories, relating to arbitration. *See Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013) (emphasis in original); *see also Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003) ("There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate."); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 n.6, 109 S. Ct. 1248, 1259 (1989) (noting, while the Supreme Court has held certain substantive provisions of the FAA were applicable in state and federal courts, it has never held that procedural provision of the FAA are applicable in state courts). And, consistent with these principles, this Court has continued to reiterate that a presumption against arbitration applies to non-signatories, like Greenville Water, after the United States

---

must have been raised to and ruled upon by the trial judge to be preserved for appellate review); *see also Aiken v. World Fin. Corp. of South Carolina*, 367 S.C. 176, 179, 623 S.E.2d 873, 875 (Ct. App. 2005).

Supreme Court's decision in *Morgan*. *See, e.g.*, *Dixon v. Pattee*, 442 S.C. 233, 256, 898 S.E.2d 158, 170 (Ct. App. 2023); *Nanney by and through Nanney v. THI of South Carolina at Spartanburg, LLC*, No. 2020-000500, 2023 WL 5426594, at *3 (Ct. App. Aug. 23, 2023); *Blackwell v. Mary Black Health Sys., LLC*, 445 S.C. 62, 73, 911 S.E.2d 147, 152-53 (Ct. App. 2024). As such, the Circuit Court did not err in applying South Carolina's presumption against arbitration for non-signatories to a contract containing an arbitration provision.

B. The Circuit Court correctly held that U.S. Pipe failed to rebut the presumption against arbitration.

Despite Greenville Water's non-signatory status and the inapplicability of U.S. Pipe's Terms and Conditions of Sale to Greenville Water under its own express terms, U.S. Pipe has submitted *no evidence* of a valid agreement to arbitrate, let alone to rebut the presumption against arbitration that applies here. 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. 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, 877 S.E.2d 486, 489 (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*.

U.S. Pipe asserts that Greenville Water is bound by the arbitration provision in its Terms and Conditions of Sale solely by virtue of U.S. Pipe posting the Terms and Conditions of Sale on its website. No authority exists (and U.S. Pipe has identified none), however, that would allow a manufacturer to bind all downstream purchasers of a product to arbitration by simply posting one-sided terms and conditions on its 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."); *see also Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 319, 914 S.E.2d 139, 147 (2025) ("Technology has changed the manner in which people interact, but it has not changed the bedrock principles of contract law."). To the contrary, 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, unlike here, 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). And the fact that Greenville Water may be a sophisticated purchaser does not alter the analysis because there was no arms-length, commercial negotiation between the parties since Greenville Water did not purchase the Defective Pipes from U.S. Pipe. *See South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp.*, 826 F. Supp. 1549, 1554 (D.S.C. 1993). U.S. Pipe must, therefore, provide evidence of valid contract formation with respect to arbitration beyond the terms being merely posted to its website.

U.S. Pipe, however, has submitted *no evidence* of valid contract formation with respect to arbitration (because none exists). The *only* evidence in the record establishes that the Greenville Water was entirely unaware of U.S. Pipe's Terms and Conditions of Sale on its website at any point prior to the filing of U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration. (*See* Mem. in Opp., Ex. 1, Schmidt Aff. at ¶¶ 8-9; R. at 174); *see also Lampo*, 437 S.C. at 242, 877 S.E.2d at 242

("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.") (citing Restatement (Second) of Contracts § 53 cmt. c (1981)). There is no evidence that Greenville Water ever purchased ductile iron pipe directly from U.S. Pipe (it did not), much less used U.S. Pipe's website to do so. (*See* Mem. in Opp., Ex. 1, Schmidt Aff. at ¶ 6; R. at 174). Nor does U.S. Pipe provide evidence that Greenville Water was otherwise put on notice of the Terms and Conditions of Sale. There is no evidence that TEC or Hayes informed Greenville Water of U.S. Pipe's Terms and Conditions of Sale or specifically incorporated U.S. Pipe's Terms and Conditions of Sale into any agreement with Greenville Water. (*Id.* at ¶ 9; R. at 174). Indeed, it is undisputed that none of the documents that were allegedly provided to Greenville Water by TEC and Hayes reference arbitration, much less incorporate U.S. Pipe's arbitration provision into the agreements between Greenville Water and TEC and Hayes. (Reply Br., Exs. A-C; R. at 225-32). The Circuit Court thus correctly held that U.S. Pipe failed to carry its burden to rebut the presumption against arbitration by proving the existence of a valid arbitration agreement by competent evidence. (Order Denying Arbitration at 9-11; R. at 9-11).

To divert attention from the lack of evidence demonstrating a valid arbitration agreement, U.S. Pipe relies upon a hodgepodge of inapplicable cases (most of which are nonbinding) for the proposition that courts routinely compel arbitration against non-signatories. (*See* Appellant's Final Br. at 11-17). But, aside from being nonbinding, the cases upon which U.S. Pipe relies are also readily distinguishable because, unlike here, they involve circumstances in which the party seeking to compel arbitration submitted evidence to establish a valid arbitration agreement, including reasonable notice, acceptance, and mutual assent.

First, U.S. Pipe relies upon a string of cases in which courts have compelled arbitration against non-signatories where the party resisting arbitration was on notice of the arbitration provision, took action manifesting assent, and did not object to arbitration. *See Boerstler v. UHS of Delaware, Inc.*, No. 1:21-CV-2334-JMC-SVH, 2021 WL 6841644, at *4-5 (D.S.C. Sept. 30, 2021) (finding the defendants presented unrebutted evidence that the plaintiff received the arbitration agreement and failed to opt out of it, despite its terms requiring an opt out form to be submitted within 30 days); *Laidlaw Envtl. Servs. (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1409 (D.S.C. 1996) (finding that the plaintiff manifested its assent by signing and returning the contract after lengthy negotiations over its terms and then conducted itself as though the negotiated contract controlled the parties' obligations); *Hudson-Swoope v. MRO Corp.*, No. 1:24-CV-01183, 2025 WL 904456, at *9 (N.D. Ohio Mar. 25, 2025) (finding that the defendant provided the plaintiff's attorney an invoice containing an arbitration provision and the attorney paid the invoice without objecting to arbitration); *Braxton v. O'Charley's Rest. Props., LLC*, 1 F. Supp. 3d 722, 726 (W.D. Ky. 2014) (finding the defendant submitted evidence that the plaintiffs were informed of the arbitration agreement, were allowed an opportunity to review it, and were informed that they must agree to its terms as a condition of their employment). Here, however, U.S. Pipe has submitted no such evidence that Greenville Water was on notice of the arbitration provision or that it manifested its assent to arbitration.

Second, U.S. Pipe relies upon a series of cases for the proposition that "[c]ourts routinely compel arbitration agreements in form contracts made binding under the UCC even if they have not been signed." (Appellant's Final Br. at 12). But these cases are also distinguishable because there is no evidence that Greenville Water and U.S. Pipe exchanged form contracts at all, let alone form contracts containing an arbitration provision. And, unlike the cases upon which U.S. Pipe

relies, U.S. Pipe submitted no evidence that arbitration was a "usage of trade" in the industry. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 279-80 (4th Cir. 2007) (finding the defendant submitted evidence in the form of "Yarn Rules" that established that arbitration was a "usage of trade" in the textile industry and that documents exchanged by the parties contemplated arbitration); *ETC Intrastate Procurement Co., LLC v. JSW Steel (USA), Inc.*, 620 S.W.3d 168, 178-79 (Tex. App. 2021) (finding terms and conditions containing arbitration provision were part of the offer and were accepted when the party accepted the offer by sending a purchase order); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 102 (2d Cir. 2002) (finding the party resisting arbitration accepted form contracts containing an arbitration provision and failed to rebut evidence that arbitration was custom in the industry); *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 514 Fed. App'x 365, (4th Cir. 2013) (finding contract between the parties incorporated an arbitration provision by reference).

The only South Carolina appellate case upon which U.S. Pipe relies is *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). But the Circuit Court properly held that *One Belle Hall* is distinguishable from the present case. (Order Denying Arbitration at 12; R. at 12). In *One Belle Hall*, unlike here, a warranty claim was initiated under the agreement containing the arbitration provision by a developer hired by the plaintiff for the plaintiff's benefit prior to the commencement of litigation. *See One Belle Hall*, 418 S.C. at 58, 791 S.E.2d at 289. Further, in *One Belle Hall*, the arbitration clause was contained in a sales agreement that was entered into by the parties prior to the purchase and delivery of the product. *See In re Petersen v. DCTCL, L.P.*, No. 2021-CP-10-01973, 2022 WL 21747908, at *2 (Ct. Com. Pl. Jun. 9, 2022) (distinguishing *One Belle Hall* where, like here, the plaintiff "was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the

[product], nor did she attempt to avail herself of the express warranty contained therein"). Here, Greenville Water has *never* made a warranty claim arising out of U.S. Pipe's Terms and Conditions of Sale nor was Greenville Water given the opportunity to consent to the terms of the arbitration clause prior to purchasing the Defective Pipes. *One Belle Hall*, therefore, does not control.[2]

U.S. Pipe also relies upon the Fourth Circuit's decision in *Buettner v. R.W, Martin & Sons, Inc.*, 47 F.3d 116 (4th Cir. 1995). But *Buettner* did not involve the issue of arbitrability at all. Rather, in *Buettner*, an employee of the purchaser of a flatwork ironer was injured in the scope of her employment by the product. *Buettner*, 47 F.3d at 117-18. The employer purchased the flatwork ironer "as is" and, relying on Virginia's anti-privity provision of the UCC, the court held that the employee was bound by the warranty disclaimer made to her employer. *Id.* at 118-19. The court reasoned that in such situations the "employer-purchasers, who bear the major portion of costs of employee injuries and are in the best position to evaluate risks to employees who will be using the goods, are given appropriate incentives to negotiate warranties with vendors." *Id.* at 119. Here, there is no such relationship between Greenville Water and U.S. Pipe's distributors, TEC and Hayes, nor does South Carolina's UCC contain any such provision with respect to arbitration. Rather, South Carolina courts unequivocally require evidence of an agreement to arbitrate because "[e]ven the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. The warranty disclaimer cases upon which U.S. Pipe relies are thus inapplicable to whether

[2] Additionally, the only issue decided by this Court in *One Belle Hall* was whether the arbitration clause was unconscionable. *See One Belle Hall*, 418 S.C. at 60-65, 791 S.E.2d at 291-94.

Greenville Water can be compelled to arbitrate its claims against U.S. Pipe.[3] (*See* Appellant's Final Br. at 14-15).

With no evidence in the record to establish a valid agreement to arbitrate, U.S. Pipe is left to assert (falsely) that Greenville Water's contractual claims arise out of warranties contained in its Terms and Conditions of Sale and, therefore, Greenville Water must be bound by the arbitration provision contained in the Terms and Conditions of Sale. (*See* Appellant's Final Br. at 16). In doing so, however, U.S. Pipe effectively concedes that Greenville Water is not a party to the Terms and Conditions of Sale but is subject to arbitration by virtue of its purported availment of benefits under the contract containing the arbitration provision, *i.e.*, under a direct benefits estoppel theory. But, as set forth more fully below, "direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence[.]" *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176. Rather, "where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself[,]" the benefit is indirect and direct benefits estoppel does not apply. *Id.* at 343-44.

As set forth above, Greenville Water could not and did not exploit U.S. Pipe's Terms and Conditions of Sale because it was never notified of them prior to the filing of U.S. Pipe's motion to compel arbitration and, therefore, has never asserted claims arising out of the warranties contained in U.S. Pipe's Terms and Conditions of Sale. Rather, Greenville Water's claims against U.S. Pipe arise out of the promises and affirmative misrepresentations that U.S. Pipe made to Greenville Water in the Certificate of Product Compliance that its products complied with the

[3] Indeed, whether the disclaimers contained in U.S. Pipe's Terms and Conditions of Sale can be applied to Greenville Water's warranty claims arising out of the promises made in the Certificate of Product Compliance is, at most, a merits defense to Greenville Water's claims that is not material to the issue of arbitrability.

specific industry standard governing minimum thickness of cement-mortar-lining (ANSI/AWWA Standard C104/A21.4)—and *not* the general warranty provisions contained in U.S. Pipe's Terms and Conditions of Sale.[4] (*See* Compl., ¶¶ 77-79, 91-92, 104-05, 117-21; R. at 41, 43, 45, 47-48). And, because U.S. Pipe has failed to prove a valid agreement to arbitrate, the FAA does not apply. *See Wilson*, 426 S.C. at 336 (holding a party seeking to compel arbitration under the FAA must establish that there is a valid arbitration agreement).

C. Whether Greenville Water can plausibly allege claims arising out of promises made in the Certificate of Product Compliance is a merits issue that is not properly before this Court.

U.S. Pipe asserts, for the first time on this appeal, that the Certificate of Product Compliance cannot form the basis of Greenville Water's contractual claims as a matter of law. But "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp.*, 330 S.C. at 733, 497 S.E.2d at 76 (citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)); *see also Aiken v. World Fin. Corp. of South Carolina*, 367 S.C. 176, 179, 623 S.E.2d 873, 875 (Ct. App. 2005). Since U.S. Pipe did not raise this argument

[4] U.S. Pipe falsely claims that Greenville Water asserted that its contract claims arose out of the Certificate of Product Compliance for the first time in its presentation at the February 10, 2024 hearing. (Appellant's Final Br. at 7). But both Greenville Water's Complaint and its briefing expressly made this point clear. (Compl., ¶¶ 45-52; R. at 33-36; *see also* Memo in Opp. at 4; R. at 160 ("The affirmative misrepresentations that U.S. Pipe made to Greenville Water in the Certificate of Product Compliance form the basis of Greenville Water's implied contract, warranty, and South Carolina Unfair Trade Practice Act claims; not U.S. Pipe's Terms and Conditions of Sale." (citing Compl., ¶¶ 77-79, 91-92, 104-05, 117-21; R. at 41, 43, 45, 47-48)). Greenville Water also asserts, without *any* evidentiary support in the record, that the Certificate of Product Compliance "was apparently not even created until May 2023, months after Greenville Water began buying the pipes and notified U.S. Pipe about potential issues with the lining." (Appellant's Final Br. at 7 n.1). If U.S. Pipe had any evidence to support this claim, it was obligated (and had the opportunity) to submit such evidence to the Court with its reply brief or at the hearing. It cannot now raise this issue for the first time on appeal after failing to do so below. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *see also Aiken*, 367 S.C. at 179, 623 S.E.2d at 875.

in the Circuit Court, the Circuit Court did not decide this issue and it has not been preserved for appellate review. For that reason alone, this Court should refrain from addressing whether the affirmations made by U.S. Pipe in the Certificate of Product Compliance can form the basis of valid contractual claims as a matter of law.

Even assuming, however, that this issue has been properly preserved for appellate review (which it has not), the issue goes toward the merits of Greenville Water's claims and has no bearing on whether U.S. Pipe has carried its burden to establish a valid agreement to arbitrate between the parties. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."); *see also AT & T Techs., Inc. v. Commc'ns Workers of America*, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419 (1986) (holding courts have "no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim" when deciding arbitrability). Here, Greenville Water has asserted contractual claims arising out of promises and misrepresentations made in the Certificate of Product Compliance and the only issue is whether U.S. Pipe has established an agreement to arbitrate those claims. While U.S. Pipe attempts to rewrite Greenville Water's Complaint by contradicting the well-pled allegations therein to assert that its claims actually arise under U.S. Pipe's Terms and Conditions of Sale, "[i]t is a fundamental principle of law that the plaintiff is the master of his own complaint. . . ." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 615, 879 S.E.2d 746, 757 (2022). And it is undisputed that Greenville Water's Complaint neither references nor asserts claims based upon U.S. Pipe's Terms and Conditions of Sale, of which it was unaware at the time it filed its Complaint.

Further, even if Greenville Water were required to demonstrate viable claims at this juncture (which it is not), Greenville Water sufficiently alleges contractual claims arising out of the Certificate of Product Compliance and the conduct of the parties. For example, a breach of express warranty occurs when goods do not conform to a promise or affirmation of fact made by the seller. *See Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002)). Courts have held that even advertisements that make affirmations of fact can give rise to an express warranty. *See Triple E, Inc. v. Hendrix and Dail, Inc.*, 344 S.C. 186, 190-91, 543 S.E.2d 245, 247 (Ct. App. 2001) (citing *Odom v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956)). Here, Greenville Water sufficiently alleges that U.S. Pipe made an affirmation of fact in the Certificate of Product Compliance as well as in promotional and marketing materials that its pipe meets or exceeds ANSI/AWWA Standard C104/A21.4. (Compl., ¶¶ 6-7, 45-52 77-79; R. at 24-25, 33-36, 41). And Greenville Water alleges U.S. Pipe breached the express warranty set forth in the Certificate of Product Compliance because the Defective Pipes do not meet or exceed the requirements of ANSI/AWWA Standard C104/A21.4, as promised. (*Id.*).

Additionally, U.S. Pipe's claim that the Terms and Conditions of Sale must necessarily be the basis for Greenville Water's contract claims, is belied by the fact that Greenville Water's other contractual claim is a breach of an *implied* contract, which can only apply in the absence of an express agreement. *See Thomerson v. DeVito*, 430 S.C. 246, 257 n.10, 844 S.E.2d 378, 385 n.10 (2020) ("A contract implied in fact arises when the assent of the parties is manifested by conduct, not words.") (internal citations and quotations omitted). Indeed, Greenville Water alleges that both its implied warranty and implied contract claims arise out of U.S. Pipe's conduct in providing the Certificate of Product Compliance. (*See* Compl., ¶¶ 45-52, 77-79, 92, 105, 117-21; R. at 33-36, 41, 43, 45, 47-48). That is, an implied contract and implied warranties were created when U.S.

Pipe promised that its pipe would meet the standards set forth in ANSI/AWWA Standard C104/A21.4 (thereby complying with South Carolina law) and, based on that promise, Greenville Water decided to purchase pipe manufactured by U.S. Pipe from TEC and Hayes. (*Id.*) Nothing about these claims are dependent upon U.S. Pipe's Terms and Conditions of Sale in any way. And whether they are ultimately proven has no bearing on whether a valid agreement to arbitrate was reached between the parties.

Next, U.S. Pipe asserts that Greenville Water's Complaint alleges that "other" documents form the basis of Greenville Water's contractual claims against U.S. Pipe. (Appellant's Final Br. at 19-20). U.S. Pipe is incorrect.[5] The Complaint expressly alleges that each of Greenville Water's contractual claims against U.S. Pipe arises out of U.S. Pipe's promise that the Defective Pipes meet or exceed ANSI/AWWA Standard C104/A21.4, as set forth in the Certificate of Product Compliance. (*See* Compl., ¶¶ 45-52, 77-79, 92, 105, 117-21; R. at 33-36, 41, 43, 45, 47-48). While U.S. Pipe points to documents that were allegedly provided to Greenville Water by TEC as the basis of Greenville Water's contractual claims, none of those documents purport to create a contract between Greenville Water *and U.S. Pipe* nor do they reference arbitration or purport to incorporate U.S. Pipe's Terms and Conditions of Sale.[6]

[5] In support of its reframing of Greenville Water's Complaint, U.S. Pipe relies solely on an allegation contained in Greenville Water's declaratory judgment claim that, "among other written documents and communications, U.S. Pipe provided Greenville Water with a written certificate of compliance with ANSI/AWWA Standard C104/A21.4." (Compl., ¶ 70; R. at 39).

[6] What U.S. Pipe is actually asserting is that its arbitration provision was incorporated by reference in these documents. As set forth fully in Section IV, *infra* (p. 42-44), however, the distinct legal doctrine of incorporation by reference is not properly before this Court because U.S. Pipe failed to meaningfully develop any argument under such a theory in the Circuit Court and, even if it was properly before the Court, incorporation by reference cannot apply to bind Greenville Water to the arbitration provision because the documents to do not clearly and specifically incorporate U.S. Pipe's Terms and Conditions of Sale.

For example, U.S. Pipe asserts that a price quotation provided by TEC incorporates U.S. Pipe's Terms and Conditions of Sale. But, in actuality, the price quote references nothing more than a 5% cancellation fee that TEC reserved the right to pass on to Greenville Water, if U.S. Pipe chose to exercise the cancellation fee for unused pipe *against TEC*. (Reply Br., Ex. A at 1; R. at 226). U.S. Pipe also asserts that a "pick ticket" provided by TEC placed Greenville Water on notice of U.S. Pipe's Terms and Conditions of Sale. But the "pick ticket" does not reference U.S. Pipe's Terms and Conditions of Sale at all. Rather, it references TEC's Terms and Conditions, which indisputably do not contain an arbitration provision. (Reply Br., Ex. B at 2; R. at 229). Finally, U.S. Pipe asserts that an unexecuted application for credit allegedly provided to Greenville Water by TEC placed Greenville Water on notice of U.S. Pipe's Terms and Conditions of Sale. The application for credit, however, does not specifically reference or incorporate U.S. Pipe's Terms and Conditions of Sale. Nor does it contain any reference to arbitration. Rather, it states generically that the "sole and exclusive warranty, if any, on goods sold by TEC, is that provided by the goods manufacturer." (Reply Br., Ex. C at 2; R. at 232). In sum, none of these documents form a contract between Greenville Water and U.S. Pipe, reference arbitration in any way, nor incorporate U.S. Pipe's Terms and Conditions of Sale into any contract between Greenville Water and U.S. Pipe. And, because there was no arms-length, commercial negotiation between Greenville Water and U.S. Pipe, the fact that Greenville Water may be a sophisticated purchaser does not alter the analysis. *See South Carolina Elec. & Gas Co.*, 826 F. Supp. at 1554.

Finally, U.S. Pipe asserts that Greenville Water "presents no evidence that it timely relied on the Certificate to purchase the pipes" and attacks the allegations in the Complaint as insufficient to state a claim. (Appellant's Final Br. at 20-22). Again, these are merits issues that are not properly before the Court because they have no bearing on arbitrability nor did U.S. Pipe challenge the

sufficiency of the pleadings in the Circuit Court. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. U.S. Pipe also asserts that Greenville Water failed to submit a full copy of the Certificate of Product Compliance in the record. But it is not Greenville Water's burden to prove the allegations in the Complaint at the pleading stage. Rather, if U.S. Pipe had evidence to rebut the allegations in the Complaint, it was U.S. Pipe's burden to submit such evidence to establish valid contract formation with respect to arbitration between the parties. *BVW Holding AG*, 2024 WL 112281, at *2 (The party seeking arbitration has "the burden of proving the existence of a valid agreement to arbitrate."). And it cannot do so by merely misconstruing and attacking the sufficiency of the allegations in Greenville Water's Complaint.

D. TEC and Hayes are not agents that can bind Greenville Water to an arbitration provision it did not agree to and, regardless, any such argument is waived.

Apparently dissatisfied with the arguments it chose to raise in the Circuit Court, U.S. Pipe improperly asserts, for the first time in this appeal, that TEC and Hayes can bind Greenville Water to arbitrate its claims without Greenville Water's knowledge because TEC and Hayes were acting as Greenville Water's apparent agents. (Appellant's Final Br. at 22-26). While South Carolina law recognizes that there are several theories that could bind non-signatories to arbitration agreements, including an agency theory, in the Circuit Court U.S. Pipe asserted only that Greenville Water was subject to arbitration as a non-signatory under a direct benefits estoppel theory. *See Wilson*, 426 S.C. at 339, 827 S.E.2d at 174; *see also* (Mot. at 8-9; R. at 139-40; Reply Br. at 6-7; R. at 221-22). Thus, since U.S. Pipe did not raise this argument in the Circuit Court, the Circuit Court did not decide this issue and it has not been preserved for appellate review. *See Wilder Corp.*, 330 S.C. at 733, 497 S.E.2d at 76 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *see also Aiken*, 367 S.C. at 179, 623 S.E.2d at 875. U.S. Pipe's argument that Greenville

Water is bound to the arbitration provision as a non-signatory under an agency theory has, therefore, been waived.

Even if this issue were properly before this Court (which it is not), however, U.S. Pipe's argument is meritless. "The test to determine agency is whether or not the purported principal has the *right to control* the conduct of the alleged agent." *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982) (emphasis in original). "An agency relationship may be established by evidence of actual or apparent authority." *Charleston, S.C. Registry for Golf Tourism, Inc. v. Young Clement Rivers Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). "The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Fernander*, 278 S.C. at 143, 293 S.E.2d at 426. In South Carolina, "agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority *with the knowledge of the alleged principal*." *Id.* (citing *Fochtman v. Clanton's Auto Auction Sales*, 233 S.C. 581, 106 S.E.2d 272 (1958)) (emphasis added). "The elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 62, 409 S.E.2d 769, 771 (1991).

Here, there is simply no evidence in the record to support that TEC and Hayes were acting as Greenville Water's apparent agents. For starters, other than the sample of U.S. Pipe's Terms and Conditions of Sale (Mot., Ex. A; R. at 146-53), there is no evidence in the record establishing the

terms of the contract that was entered into between U.S. Pipe and TEC and Hayes, how or when it was entered, or the course of dealings surrounding the contract. Indeed, there is no actual evidence in the record establishing that TEC and Hayes entered into a contract with U.S. Pipe that contains an arbitration provision at all. Rather, U.S. Pipe urges this Court to assume that its Terms and Conditions of Sale apply to TEC and Hayes. Thus, even if TEC and Hayes were acting as Greenville Water's apparent agents (which they were not), U.S. Pipe fails to present evidence that TEC and Hayes agreed to an arbitration provision that they, in turn, could bind Greenville Water to.

Even assuming that such a contract was entered into, however, U.S. Pipe claims that Greenville Water is subject to arbitration on an agency theory based solely upon the fact that it purchased pipe manufactured by U.S. Pipe through TEC and Hayes, which is insufficient to establish apparent agency. (Appellant's Final Br. at 25-26). U.S. Pipe presents no evidence that Greenville Water had the right to control TEC and Hayes—two legally independent entities that Greenville Water contracted with at arm's length and which contracts do not purport to provide Greenville Water any such control. It presents no evidence that Greenville Water consciously or impliedly represented to U.S. Pipe that TEC and Hayes were Greenville Water's agents. It presents no evidence that TEC and Hayes exhibited a pretense of authority to U.S. Pipe with the knowledge of Greenville Water. It presents no evidence that U.S. Pipe relied upon any such representation or pretense of authority. And it presents no evidence that U.S. Pipe changed its position to its detriment in reliance upon a purported agency relationship. In sum, U.S. Pipe fails to establish any of the elements of apparent agency under South Carolina law.

In support of its apparent agency argument (which has been waived), U.S. Pipe relies solely upon nonbinding authority from other jurisdictions applying the law of other states and that involve

circumstances where a person purchases a revocable license to attend a sporting event or stay at a rental property on behalf of himself and close friends. But, aside from being nonbinding, these cases are readily distinguishable from the present case. For example, in *Naimoli v. Pro-Football, Inc.*, a non-party purchased football tickets through an online, electronic ticketing platform for himself and several friends. 120 F.4th 380, 383-84 (4th Cir. 2024). Unlike here, the defendant presented evidence that the purchaser of the tickets entered into a binding arbitration agreement that expressly provided that "[t]he *person seeking entry* pursuant to such license, and any accompanying minors ("Holder"), agrees that such license is subject to these terms ("Terms") and by purchase, acceptance *and/or use of such license*, Holder is deemed to have read the Terms and has agreed to be bound by them." *Id.* at 385 (emphasis added). Upon entry to the stadium, the purchaser of the tickets used his iPhone to provide entry into the game for himself and the plaintiffs while the plaintiffs stood nearby waiting to be admitted entry. *Id.* at 382. The plaintiffs, however, argued that, because they never saw or possessed the tickets, they could not be bound by the arbitration provision. *Id.* at 384.

The Fourth Circuit found, under the specific circumstances presented, that the defendant's reliance on the purchaser's apparent authority was reasonable. *Id.* at 387. Specifically, the purchaser agreed that if he were to refuse to consent to the terms of the contract he would have to "leave or not enter the stadium" and that the tickets were given to the other users with this express limitation. *Id.* Further, it was reasonable for the defendant to believe (and, in fact, it was expressly contemplated by the language in the agreement) that purchasers of tickets often purchase them for themselves and others. *Id.* The users of the tickets also manifested actual acceptance that the ticket purchaser was acting on their behalf in purchasing the tickets and presenting them on his iPhone at the game while they waited to enter the stadium. *Id.* at 387-88. Finally, the defendant not only

relied on the ticket purchaser's apparent agency in allowing the plaintiffs to enter the stadium, but its reasonable belief was directly traceable to the plaintiff's manifestation of assent in entering the stadium after the ticket purchaser presented the tickets to the defendant's employee on his iPhone. *Id.* at 388. The other ticketed event cases relied upon by U.S. Pipe follow the same rationale. *See Jackson v. World Wrestling Entertainment, Inc.*, 95 F.4th 390, 393 (5th Cir. 2024) (holding the purchase terms made clear that the use of the ticket constituted acceptance and that ticket purchaser acted as the plaintiff's agent when the plaintiff allowed him to present the ticket on his behalf for admittance to the stadium); *Miami Dolphins, Ltd. v. Engwiller*, No. 3D24-0605, 2025 WL 1064381, at *4 (Fla. Ct. App. Apr. 9, 2025) (holding the ticket purchaser acted as the plaintiff's apparent agent once the plaintiff allowed her to present the ticket on her behalf to enter the stadium and the defendant altered its position in reliance on the ticket purchaser's apparent agency because it would not have allowed the plaintiff to enter the stadium otherwise).

Similarly, in *Durham v. Airbnb, Inc.*, No. SAG-24-02523, 2025 WL 675319, at *1-2 (D. Md. Mar. 3, 2025), another case upon which U.S. Pipe erroneously relies, the renter of an Airbnb booked a rental property for herself and several other friends. There, the plaintiff acknowledged that he was an intended third-party beneficiary to the rental contract, which bound him to the arbitration agreement in the contract. *Id.* at *3. Further, Airbnb relied upon the renter's apparent authority to act on behalf of her rental party, otherwise it would not have allowed the other occupants to stay at the rental property. *Id.* The other occupants manifested their assent to the renter's apparent authority by arriving and staying at the property. *Id.* And Airbnb's reliance was reasonable because "it is routine for a single member of a larger party to enter a contract to rent a vacation home on behalf of a larger number of occupants/intended beneficiaries." *Id.*

The holdings in these cases are exceedingly narrow and apply only to situations, unlike here, where it was both customary and foreseeable that the purchaser/renter would act as an apparent agent to purchase a revocable license for a close friend and the defendant reasonably relied upon the purchaser's/renter's apparent agency in permitting the other users to enter the premises. Tellingly, U.S. Pipe provides *no* authority (because none exists) where an independent third-party distributor of goods has been found to act as an apparent agent for purposes of binding an indirect purchaser to a manufacturer's arbitration provision. And for good reason: such a rule of law would drastically alter South Carolina law to bind all downstream indirect purchasers to any contracts entered into by a distributor with a manufacturer, regardless of whether there is evidence demonstrating that the downstream purchaser assented to be bound.

U.S. Pipe nonetheless claims that "putting U.S. Pipe's goods in the ground is akin to allowing the family friend to present the football tickets for entry into the stadium." (Appellant's Final Br. at 25-26). To the contrary, unlike in the cases relied upon by U.S. Pipe, U.S. Pipe's Terms and Conditions of Sale do not purport to apply to all users of its products and, in fact, the express terms do not apply to indirect purchasers, like Greenville Water, at all. *See* p. 5, *supra.* And there is no evidence of a fiduciary relationship[7] nor conduct by Greenville Water manifesting assent to the distributors' apparent agency to act on its behalf. *See Fernander*, 278 S.C. at 143, 293 S.E.2d at 426. Rather, unlike the revocable licenses at issue in the cases upon which U.S. Pipe relies, once TEC and Hayes purchased the pipe from U.S. Pipe they became the owners of the pipe and once Greenville Water purchased the pipe from the distributors, it became the owner of the pipe and was free to do with the pipe whatever it pleased (including, for example, not installing the

[7] If anything, there is a closer relationship between U.S. Pipe and the distributors it approves to sell its products than there is between those distributors and indirect purchasers, like Greenville Water.

Defective Pipes and holding them in its yard). (*See* Compl., ¶ 62; R. at 38). Accordingly, even if the issue of apparent agency was properly before the Court for appellate review (which it is not), neither the law nor the evidence supports a finding that TEC and Hayes had the apparent authority to bind Greenville Water to the arbitration provision.

II. The Circuit Court Correctly Held That Greenville Water Cannot Be Forced To Arbitrate Under An Estoppel Theory.

The Circuit Court correctly held that Greenville Water is not required to arbitrate under an estoppel theory because it did not knowingly exploit nor derive a direct benefit from U.S. Pipe's Terms and Conditions of Sale. 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, 827 S.E.2d at 173-74. "South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Id.* (citing *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014)). The only theory that is properly at issue for purposes of this appeal is estoppel.[8]

A. Greenville Water did not knowingly exploit U.S. Pipe's Terms and Conditions of Sale during the life of the contract.

The Circuit Court correctly held that Greenville Water did not knowingly exploit U.S. Pipe's Terms and Conditions of Sale to receive a direct benefit during the life of the contract. While South Carolina recognizes that non-signatories to arbitration agreements can potentially be bound

[8] As set forth above, the only theory upon which U.S. Pipe relied in the Circuit Court to bind Greenville Water to the arbitration provision as a non-signatory is estoppel. (*See* Mot. at 9-10; R. at 140-41; Reply Br. at 5-9; R. at 220-24). As such, U.S. Pipe's assertion of new theories that could bind Greenville Water as a non-signatory, including incorporation by reference and agency, were not preserved for appellate review. *See Aiken*, 367 S.C. at 179, 623 S.E.2d at 875; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

in limited circumstances under an estoppel theory, equitable estoppel "should be used sparingly" and only when necessary to prevent injustice. *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. 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*, 445 S.C. at 74, 911 S.E.2d at 153.

U.S. Pipe asserts that Greenville Water is subject to direct benefits estoppel because it is "seeking to gain a benefit from the *contractual relationship* between the parties" and Greenville Water's claims "arise[] solely from the *contractual relationship* that Greenville Water alleges to have with U.S. Pipe, and its claims must be determined by reference to that *contractual relationship*." (Appellant's Final Br. at 28 (emphasis added)). U.S. Pipe is incorrect. "[A]ny 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." *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (emphasis added); *Blackwell*, 445 S.C. at 74, 911 S.E.2d at 153. And "when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled." *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176. That Greenville Water alleges a contractual relationship with U.S. Pipe is, therefore, insufficient in and of itself to establish direct benefits estoppel.

Instead, U.S. Pipe must show that Greenville Water "knowingly exploit[ed] the benefits" of the Terms and Conditions of Sale and "receive[d] benefits flowing directly from" the Terms and Conditions of Sale. *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)); *see also Blackwell*, 445 S.C. at 74, 911 S.E.2d at 153. Conspicuously lacking, however, is any explanation of what benefits Greenville Water has knowingly exploited from the Terms and Conditions of Sale itself. Rather,

U.S. Pipe claims that Greenville Water derived a general benefit of receiving pipe indirectly from U.S. Pipe that Greenville Water purchased from TEC and Hayes. (Appellant's Final Br. at 29). But that benefit flows directly from Greenville Water's contracts with TEC and Hayes—not the Terms and Conditions of Sale.

Indeed, U.S. Pipe does not identify any provision of its Terms and Conditions of Sale that Greenville Water exploited at any point. It is undisputed that Greenville Water's Complaint does not reference U.S. Pipe's Terms in Conditions of Sale in any way, and Greenville Water has never made a warranty claim for the Defective Pipes under the Terms and Conditions of Sale. Nor has it ever invoked any other provision of the Terms and Conditions of Sale. Rather, the only evidence in the record establishes that Greenville Water was entirely unaware of U.S. Pipe's Terms and Conditions of Sale prior to U.S. Pipe's filing of its motion to compel arbitration. (Mem. in Opp., Ex. 1, Schmidt Aff. at ¶¶ 8-9; R. at 174); *see also Wilson*, 426 S.C. at 342 (emphasizing that the plaintiffs, like here, were "never aware of the existence of the contract" until they initiated litigation). The Circuit Court thus correctly held that none of Greenville Water's claims arise out of the general warranties contained in U.S. Pipe's Terms and Conditions of Sale; they arise under general principles of South Carolina law through express and implied promises that U.S. Pipe made specifically to Greenville Water in its Certificate of Product Compliance that ductile iron pipe it manufactured complied with a specific industry standard, ANSI/AWWA Standard C104/A21.4. (Order Denying Arbitration at 13; R. at 13; *see also* Compl., ¶¶ 6-7, 47-52, 70, 77-79, 92, 105; R. at 24-25, 34-36, 39, 41, 43, 45); *Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 (holding direct benefits estoppel does not apply where "[g]eneral principles of South Carolina law form the basis for most of Petitioners' claims).

U.S. Pipe does not provide *any* South Carolina authority establishing that Greenville Water is subject to direct benefits estoppel by simply purchasing and accepting the Defective Pipes from U.S. Pipe's distributors. Instead, U.S. Pipe relies upon two non-binding federal district court decisions that did not apply South Carolina law. (*See* Appellant's Final Br. at 29). And both are readily distinguishable. *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 272 (E.D.N.Y. 2019) (holding users of an internet account are bound by the terms and conditions that govern the account because it "could not possibly be the rule" that "[a]ny individual could avoid the terms of a website by simply logging on to a friend's or relative's account instead of creating their own"); *In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 292-93 (5th Cir. 2015) (finding the plaintiff knew of the contract and actively participated in ensuring that the parts of the contract benefiting it were performed during the life of the contract); *cf. id.* ("If a nonsignatory receives a copy of a heretofore-unknown contract for the first time when it sues a signatory, that mid-litigation revelation likely is not enough for knowing exploitation of the contract under this version of direct-benefits estoppel."). Here, Greenville Water neither knew of U.S. Pipe's Terms and Conditions of Sale prior to this litigation (and, therefore, could not have knowingly exploited them) nor did it ever purchase pipe from U.S. Pipe using U.S. Pipe's website such that it could be bound by the Terms and Conditions of Sale posted on U.S. Pipe's website. (Mem. in Opp., Ex. 1, Schmidt Aff. at ¶¶ 6, 8-9; R. at 174).

In sum, there is simply no evidence that Greenville Water knew of U.S. Pipe's Terms and Conditions of Sale prior to this litigation, let alone "embraced the contract despite [its] non-signatory status but then, during litigation, attempt[ed] to repudiate the arbitration clause in the contract." *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176; *Blackwell*, 445 S.C. at 74, 911 S.E.2d at 153. The Circuit Court, therefore, correctly held that Greenville Water cannot be forced to arbitrate its claims against U.S. Pipe under a direct benefits estoppel theory.

B. The Circuit Court correctly held that *Wilson v. Willis* is controlling.

U.S. Pipe asserts that *Wilson v. Willis* is distinguishable because Greenville Water alleges a contractual relationship with U.S. Pipe and the plaintiffs in *Wilson* did not. (Appellant's Final Br. at 29-30). But, as set forth above, a mere contractual relationship in and of itself is not enough to establish direct benefits estoppel. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 ("[D]irect benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence[.]"). Nor did the South Carolina Supreme Court's decision in *Wilson* hinge on the fact that the plaintiffs did not allege contractual claims. Rather, the Supreme Court's analysis focused on the fact that the plaintiffs were "never aware of the existence of the contract," that the contract, by its express terms, was inapplicable to other parties, and that the plaintiffs never sought "to procure any direct benefit from the [contract] itself while attempting to avoid its arbitration provision." *See id.* at 342, 344-45. The same is true here.

The Circuit Court also properly distinguished *Pearson v. Hilton Head Hosp.* (*see* Order Denying Arbitration at 13 n.2; R. at 13), which is the only case upon which U.S. Pipe relies for its assertion that direct benefits estoppel applies. (Appellant's Final Br. at 30-31). In *Pearson*, a hospital contracted with an online medical professional placement company for the placement of temporary physicians at the hospital to work as independent contractors. *Pearson*, 400 S.C. at 285, 733 S.E.2d at 599. The contract between the placement corporation and hospital contained an arbitration provision. *Id.* at 286. The plaintiff subsequently contracted with the placement company to temporarily place him at the hospital as an anesthesiologist. *Id.* at 285-86. The contract between the plaintiff and the placement company also contained the same arbitration provision. *Id.* at 286. Following complications that occurred during a medical procedure, the hospital and the placement corporation fired the plaintiff. *Id.* The plaintiff sued both the hospital and the placement company

for wrongful discharge, alleging violations of the South Carolina Payment of Wages Act, retaliatory discharge, defamation, and breach of contract. *Id.* The hospital filed a motion to compel arbitration under the contract that it had with the placement corporation. *Id.*

In holding that the plaintiff was subject to arbitration under an estoppel theory, the *Pearson* Court found that the plaintiff's breach of contract claims sought damages under both the contract between the hospital and the placement company and the contract between the plaintiff and the placement company. *Id.* at 297. The court further emphasized that the plaintiff's complaint made no distinction between the hospital and the placement company and sought to hold both defendants liable under both contracts. *Id.* And, since both contracts contained the same arbitration provision, the court found "[the plaintiff] should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions." *Id.*

Here, unlike in *Pearson*, Greenville Water does not seek to hold U.S. Pipe liable for contract damages under the Terms and Conditions of Sale. Indeed, Greenville Water's Complaint does not invoke the Terms and Conditions of Sale in any way, because Greenville Water was entirely unaware of the Terms and Conditions of Sale at the time it filed its Complaint. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 (distinguishing *Pearson* where the plaintiff was unaware of the existence of the contract containing the arbitration provision and general principles of South Carolina law formed the basis of the plaintiff's claims); *Blackwell*, 445 S.C. at 75, 911 S.E.2d at 154 (distinguishing *Pearson* where the plaintiff was unaware of the existence of the contract containing the arbitration provision and the complaint did not allege any causes of action arising out of the contract); *see also Browne v. Larlee Constr., LLC*, No. 1:19-02862-MGL, 2022 WL875842, at *6 (D.S.C. Mar. 24, 2022) (declining to apply direct benefits estoppel where there was no evidence in the record that the party resisting arbitration had knowledge of the contract

containing the arbitration clause). Rather, Greenville Water asserts claims independent of U.S. Pipe's Terms and Conditions of Sale arising out of specific promises and misrepresentations it made in its Certificate of Product Compliance that the Defective Pipes complied with ANSI/AWWA Standard C104/A21.4, upon which it relied in deciding to purchase the Defective Pipes from TEC and Hayes. *Cf. Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 ("When a claim depends on the contract's existence and cannot stand independently . . . equity prevents a person from avoiding the arbitration clause that was part of that agreement.") (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)). The Supreme Court's decision in *Wilson*, therefore, controls and direct benefits estoppel does not apply.

C. It would be inequitable to force Greenville Water to arbitrate its claims pursuant to an agreement it was never notified of nor agreed to.

Generally, arbitration must be "predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. "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.* That is why equitable estoppel "should be used sparingly" to compel arbitration against a non-signatory and only in exceptional circumstances where it is necessary to prevent injustice. *Id.* at 345 (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (emphasizing equitable estoppel should be used sparingly to compel arbitration and it "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"); *see also* 28 Am. Jr. 2d, *Estoppel and Waiver* § 29 (2011) (stating equitable estoppel should be used with restrain and only in exceptional circumstances).

Here, however, U.S. Pipe is attempting to use equitable estoppel as a sword to compel arbitration, rather than as a shield to prevent Greenville Water from seeking to hold it liable under

the Terms and Conditions of Sale, while repudiating the arbitration provision therein. It would be fundamentally unfair to require Greenville Water to waive its constitutional right to a judicial remedy based upon terms and conditions of which it was neither aware nor attempts to hold U.S. Pipe liable under.

U.S. Pipe nonetheless claims that direct benefits estoppel is "necessary to prevent other downstream purchasers from ignoring their arbitral responsibilities, and to give U.S. Pipe the benefit of its own bargain." (Appellant's Final Br. at 31). But there is and was a very simple solution that is entirely within U.S. Pipe's control: it could have easily drafted its Terms and Conditions of Sale so that the express language applies to downstream purchasers. And it could have directly notified downstream purchasers of its Terms and Conditions of Sale, including the arbitration provision, either itself or via its distributors by any number of means. U.S. Pipe chose to do neither and, instead, unilaterally placed its Terms and Conditions of Sale that apply only to direct purchasers on its website without notice to downstream purchasers. In other words, U.S. Pipe has no one to blame for the purported "injustice" but itself.

III. The Circuit Court Correctly Held That The Arbitration Agreement Is An Unconscionable And Unenforceable Adhesion Contract As To Greenville Water.

U.S. Pipe asserts that the Circuit Court erred by: (1) adjudicating the validity of the arbitration provision, despite the presence of a delegation clause; and (2) holding the arbitration provision was an unconscionable contract of adhesion as to Greenville Water. (Appellant's Final Br. at 32-39). As set forth fully below, U.S. Pipe is incorrect on both points.

A. The Circuit Court did not err in deciding the issue of unconscionability.

Dissatisfied with the Circuit Court's decision concerning unconscionability, U.S. Pipe now changes course and asserts, for the first time, that the District Court did not have authority to decide whether the arbitration agreement was unconscionable. (Appellant's Final Br. at 32-37). Not only

did U.S. Pipe fail to raise this issue in the Circuit Court by invoking the purported delegation clause, but U.S. Pipe *affirmatively raised* the issue of unconscionability with the Circuit Court in its motion to compel arbitration. (*See* Mot. at 10-13; R. at 141-44). It cannot now assert that the Circuit Court erred in ruling upon an issue it invited the court to decide, just because it does not like the outcome. As such, the issue has been waived for purposes of appellate review. *See Aiken*, 367 S.C. at 179, 623 S.E.2d at 875 (holding appellants' argument that the circuit court's authority was strictly limited to determining whether parties entered into an arbitration agreement was not properly before the appellate court where the appellants did not raise the issue in their motion to compel arbitration or at the hearing); *see also Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

Further, even if this Court were, nonetheless, inclined to decide the issue, U.S. Pipe waived its ability to enforce the delegation clause by failing to invoke the clause at any point in the Circuit Court and, instead, inviting the Circuit Court to decide the unconscionability issue. *See In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1298 (11th Cir. 2014) ("Quite simply, [the defendant] waived its delegation clause argument when it waited to raise the issue until after it had asked the district court to decide arbitrability—and lost."); *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320, 1325 (11th Cir. 2016) (holding the defendants waived enforcement of a delegation clause where they argued the merits of the arbitration agreement's enforceability, without mentioning that the issue should be committed to the arbitrator); *Smith v. HOVENSA, LLC*, No. SX-2020-CV-00229, 2021 WL 308947, at *4 (D.V.I. Jan. 28, 2021) (collecting cases).

Finally, assuming, for the sake of argument, that U.S. Pipe did not waive its ability to enforce the delegation clause (which it did), the Circuit Court properly ruled upon the validity of the agreement, including the unconscionability issue, based upon the plain language of the

delegation clause.[9] "The FAA presumes parties intend that the court, rather than an arbitrator, will decide 'gateway' issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute." *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020). While the parties may delegate these gateway issues to an arbitrator, there must be "clear and unmistakable" evidence of such delegation. *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920 (1995)). When, as here, the delegation clause only empowers an arbitrator to resolve the arbitrability of the "controversy or claim" (*see* Mot., Ex. A, at 5-6; R. at 151-52), "[t]he parties did not delegate the decision of whether the Agreement was valid and enforceable" because "one cannot 'interpret' an invalid contract." *Id.* at 608-609.

While U.S. Pipe asserts that the United States Supreme Court's decision in *Rent-A-Center* controls, "[t]his omission removes the Agreement from the reach of *Rent-A-Center*, which addressed a delegation clause giving the arbitrator the exclusive authority to resolve any dispute relating to the 'enforceability' of the agreement 'including . . . any claim that all or any part of this [a]greement is void or voidable.'" *Id.* at 609 (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72, 130 S. Ct. 2772 (2010)). 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. (Mot., Ex. A at 5-6; R. at 151-52). As such, because U.S. Pipe's delegation clause does not "mention who decides the gateway validity and enforceability issues, [the Court] must honor the parties choice to leave these to the court"

[9] "The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded[.]'" *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 88 n.2, 130 S. Ct. 2772 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204 (2006)).

because "[w]ithout an express delegation of these issues to the arbitrator, there is no delegation of them that § 2 requires the court to carry out." *Id.* "Instead, it remains for the court to decide whether the Agreement is valid," including whether it is unconscionable. *Id.* U.S. Pipe's argument that an arbitration agreement containing any type of delegation clause invariably means the issue of the validity of the arbitration agreement is exclusively for the arbitrator to decide "mocks not only §§ 2 and 4, but the choice of [U.S. Pipe] to *not* refer that gateway decision to an arbitrator." *Id.* at 610. The Circuit Court, therefore, correctly decided the issue of unconscionability, both because U.S. Pipe asked it to and because the delegation clause's plain language does not expressly reserve the determination of the validity of the agreement to an arbitrator.

B. The Circuit Court correctly held that the arbitration agreement was unconscionable.

Even if a valid arbitration agreement existed (which it does not), the Circuit Court correctly held that the arbitration clause in U.S. Pipe's Terms and Conditions of Sale is an unconscionable adhesion contract. (Order at 14-16; R. at 14-16). Courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and unconscionability." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116. 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, 644 S.E.2d at 668. "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.

U.S. Pipe's arbitration provision is an adhesion contract that cannot be enforced both because the terms were not agreed to by Greenville Water and it is unconscionable. 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 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, 644 S.E.2d at 668. 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*, 763 F.3d at1178-79; *Walker*, 541 F. Supp. 3d at 841; *Marshall*, 2022 WL 5434226, at *6-7. 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. Mem. in Opp., Ex. 1, Schmidt Aff. at ¶ 6; R. at 174). Further, no authority exists that allows a manufacturer to bind all downstream purchasers of a product to arbitration by simply posting one-sided terms and conditions on its website. *See Zajac, LLC*, 2016 WL 9021492, at *1 ("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."); *see also Lampo*, 445 S.C. at 319, 914 S.E.2d at 147 ("Technology has changed the manner in which people interact, but it has not changed the bedrock principles of contract law."). And, because there was no arms-length, commercial negotiation between the parties since Greenville Water did not purchase the Defective Pipes from U.S. Pipe, Greenville

Water's alleged status as a sophisticated purchaser is of no moment. *See South Carolina Elec. & Gas Co.*, 826 F. Supp. at 1554 (stating even when, unlike here, a contract is negotiated at arms-length in a commercial setting, it is "not dispositive on the issue of unconscionability).

Further, in light of its adhesive nature, the Circuit Court did not err in rejecting U.S. Pipe's argument that the arbitration provision was nonetheless commercially reasonable. *See Simpson*, 373 S.C. at 27, 644 S.E.2d at 669-70 (noting a finding of an adhesion contract justifies viewing the contract with "considerable skepticism"). While an adhesion contract in and of itself is not necessarily unconscionable, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." 17A Am. Jur. 2d *Contracts* § 272 (2016); *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022) ("The touchstone of the analysis begins with the presence or absence of meaningful choice."). Here, given that Greenville Water was not even aware of the arbitration provision's existence, requiring Greenville Water to forego its fundamental right to a judicial remedy in its chosen forum is oppressively one-sided. The Circuit Court thus correctly held 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.

IV. The Circuit Court Did Not Err By Resolving The Arbitration Dispute On The Record Before It.

The Circuit Court properly resolved U.S. Pipe's motion based upon the record before it and did not limit U.S. Pipe's ability to present evidence in any way. U.S. Pipe provides no applicable South Carolina precedent that establishes that the Circuit Court erred by adjudicating the existence of an agreement to arbitrate based upon the evidence submitted to it, which U.S. Pipe never objected to. To the contrary, South Carolina courts routinely adjudicate motions to compel

arbitration after hearing argument on the motion papers and evidence submitted. *See, e.g.*, *Wilson*, 426 S.C. at 331-34, 827 S.E.2d at 170-71 (holding the circuit court "properly denied the motion to compel arbitration" when it found a valid agreement to arbitrate was not established)[10]; *Aiken*, 367 S.C. at 178, 623 S.E.2d at 874 (affirming circuit court's denial of a motion to compel arbitration when the circuit court adjudicated the motion "[a]fter a hearing").

And, as set forth above (*see* p. 10-11, *supra*), the FAA "does not preempt state ***procedural*** law relating to arbitration." *Henderson*, 405 S.C. at 448, 748 S.E.2d at 225 (emphasis in original). That is because "[t]here is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate." *Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. at 611, 586 S.E.2d at 584. Indeed, while the United States Supreme Court has held that "the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court, [it has] never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court." *Volt Info. Sciences, Inc.*, 489 U.S. at 477 n.6, 109 S. Ct. at 1259 n.6 (internal citations omitted). U.S. Pipe is, therefore, incorrect that the Circuit Court erred in not holding a summary trial under § 4 of the FAA, which applies only in federal court. (Appellant's Final Br. at 40).

Further, *Berkeley Cnty. School Dist. v. Hub Int'l Ltd.* is both procedurally and factually inapposite. In *Berkeley*, the Fourth Circuit held that the district court failed to resolve factual disputes that were material to the arbitration agreement in the proper manner because, unlike here, § 4 of the FAA required such disputes to be resolved in trial proceedings. 944 F.3d 225, 228 (4th

[10] The circuit court in *Wilson* followed the same procedure as the Circuit Court here, which was upheld by the South Carolina Supreme Court. *Wilson v. Willis*, 416 S.C. 395, 407, 786 S.E.2d 571, 577 (Ct. App. 2016) (noting the circuit court denied motion to compel arbitration after hearing arguments on the motion papers).

Cir. 2019). Further, in *Berkeley*, the arbitration provisions were contained in multiple agreements that were allegedly provided directly to the plaintiff and, while the plaintiff denied ever agreeing to arbitrate, the plaintiff paid numerous invoices for large sums of money pursuant to the agreements it allegedly received, suggesting that the plaintiff did in fact receive the agreements and accepted the arbitration provisions therein by performance. *Id.* at 232. The Fourth Circuit found that this evidence raised a factual dispute with respect to the plaintiff's knowledge of the arbitration clauses. *Id.* at 239.

Here, unlike in *Berkeley*, § 4 of the FAA and its accompanying procedural rules do not apply in this state court proceeding. Moreover, there is no evidence in the record that Greenville Water has ever been provided any documents that contain or reference an arbitration provision by any party. Nor is there any evidence that Greenville Water has ever paid U.S. Pipe any money pursuant to a written agreement with U.S. Pipe, let alone one containing an arbitration provision. Rather, Greenville Water purchased the Defective Pipes from TEC and Hayes pursuant to its purchase orders with TEC and Hayes, none of which contain an arbitration provision. And, while U.S. Pipe claims that the Circuit Court erred in not determining the disputed terms that applied between Greenville Water and TEC and Hayes, those disputed terms are immaterial to the issue of arbitration because it is undisputed that none of the terms have an arbitration provision.[11] (Reply Br., Exs. A-C; R. at 225-32).

The closest any of the documents submitted by U.S. Pipe come to even alluding to U.S. Pipe's Terms and Conditions of Sale is a reference to a cancellation fee that U.S. Pipe could

[11] U.S. Pipe never asserted or otherwise took the position that it was necessary for the Circuit Court to decide what disputed terms between Greenville Water and TEC and Hayes applied to the parties to adjudicate whether there was a valid agreement to arbitrate, which is why the Circuit Court did not decide the issue. Thus, the issue was not preserved for appellate review. *See Aiken*, 367 S.C. at 179, 623 S.E.2d at 875; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

potentially charge *its distributors* and that TEC stated it could potentially pass along to Greenville Water. (Reply Br., Ex. A; R. at 225-26). Another document merely states generically that "sole and exclusive warranty, if any, on goods sold by TEC, is that provided by the goods manufacturer." (Reply Br., Ex. C at 2; R. at 230-32). And the third document only references *TEC's* Terms and Conditions of Sale "included with the Application for Credit." (Reply Br., Ex. B at 2; R. at 229). None of these vague and generic statements are sufficient to establish incorporation by reference of an arbitration provision as a matter of law.[12]

While there appears to be little, if any, precedent under South Carolina law concerning incorporation by reference, federal precedent establishes that incorporation by reference in the context of arbitration applies only where a "party has entered into a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause." *Chubb Capital I Ltd. v. New Orleans City*, 732 F. Supp. 3d 558, 568 (E.D. La. 2024); *see also Bank of America, N.A. v. UMB Fin. Servs., Inc.*, No. 4:09-CV-00574-DGK, 2009 WL 10672301, at *3 (D. Mo. Dec. 23, 2009) (explaining incorporation by reference applies "when the signatory has entered into a separate contract with the nonsignatory which incorporates an existing arbitration clause"). Here, U.S. Pipe provides no evidence of a separate contract *between Greenville Water and U.S.*

[12] While U.S. Pipe argued generally that these documents placed Greenville Water on notice of its Terms and Conditions of Sale, it never meaningfully developed (and does not here) an incorporation by reference argument, which is a distinct legal doctrine. *See Int'l Corrugated and Packing Supplies, Inc. v. Lear Corp. and Lear Mexican Seating Corp.*, No. EP-15-CV-00405-DCG, 2016 WL 7410771, at *6 (W.D. Tex. Dec. 21, 2016) ("The lack of analysis by Defendants leaves the Court assuming how and when the underlying contracts were formed and, based on that decision, whether the doctrine of incorporation by reference establishes the existence of an agreement to arbitrate."). Consequently, the Circuit Court did not explicitly rule on incorporation by reference and this issue has not been properly preserved for appellate review. *See Aiken*, 367 S.C. at 179, 623 S.E.2d at 875; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

Pipe that incorporates by reference the arbitration provision or the Terms and Conditions of Sale (because none exists) and, for that reason alone, incorporation by reference does not apply.

But, even if documents allegedly exchanged between Greenville Water and TEC[13] could, as a matter of law, incorporate U.S. Pipe's Terms and Conditions of Sale (which they cannot), incorporation by reference is only proper "where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." *Logan v. Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 514 Fed. App'x 365, 367-68 (4th Cir. 2013).[14] And, while a sophisticated business entity need not actually have received the incorporated terms for incorporation by reference to apply, a distinct set of terms must still be clearly identified. *See, e.g.*, *Forge Underwriting Ltd. v. AmTrust Fin. Servs., Inc.*, No. 1:23-cv-06201 (JLR), 2023 WL 6890844, at *5 (S.D.N.Y. Oct. 19, 2023) (holding vague references to terms or documents not specifically identified do not suffice and collecting cases); *Aurum Asset Managers, LLC v. Banco Do Estado Do Rio Grande Do Sul*, No. 08-102, 2010 WL 4027382, at *6 (E.D. Pa. Oct. 13, 2010) ("Arbitration provisions are generally enforced through incorporation by reference in cases, unlike this one, where the non-signatory is expressly referenced in the contract containing the arbitration clause or the contract containing the clause is clearly adopted by another document."); *Industrial*

[13] U.S. Pipe did not submit any documents between Greenville Water and Hayes that it alleges reference U.S. Pipe's Terms and Conditions of Sale.

[14] While *Logan* ultimately decided that the arbitration provision was incorporated by reference, it is distinguishable. In *Logan*, unlike here, a contract *between the parties* clearly identified two separate sets of specific terms and conditions that both included an arbitration provision. *See Logan*, 514 Fed. App'x at 369. Here, no contractual document entered between Greenville Water and U.S. Pipe specifically identify U.S. Pipe's Terms and Conditions of Sale. And, even if a contractual document between Greenville Water and TEC could incorporate by reference U.S. Pipe's Terms and Conditions of Sale, none of the documents allegedly exchanged by U.S. Pipe and TEC clearly identify U.S. Pipe's Terms and Conditions of Sale. (*See* Reply Br., Exs. A-C; R. at 225-32).

Window Corp. v. Federal Ins. Co., 609 F. Supp. 2d 329, 337 (S.D.N.Y. 2009); *Total Environmental Concepts, Inc. v. Fed. Ins. Co.*, No. 2:20-cv-3992, 2023 WL 2776847, at *3 (S.D. Ohio Apr. 4, 2023).

Finally, U.S. Pipe claims that the Circuit Court "erred in making factual findings about Greenville Water's reliance on the Certificate." (Appellant's Final Br. at 42). U.S. Pipe further asserts that Greenville Water did not submit any evidence about the timing of the Certificate of Product Compliance and whether Greenville Water reasonably relied upon the Certificate of Product Compliance "creates an issue of fact." (*Id.*) But Greenville Water clearly alleges that it relied on the Certificate of Product Compliance and that it would not have purchased the Defective Pipes had it known the representations therein were false. (Compl., ¶¶ 45-52; R. at 33-36). To the extent that U.S. Pipe believed that this was material to whether a valid arbitration agreement exists (it is not and U.S. Pipe never asserted that it was in the Circuit Court), it was U.S. Pipe's obligation to submit actual evidence that Greenville Water did not reasonably rely upon the Certificate of Product Compliance, as the party seeking to compel arbitration. *See BVW Holding AG*, 2024 WL 112281, at *2. Without competing evidence, the Circuit Court properly concluded that there was no agreement to arbitrate based on the record before it.

In sum, the Circuit Court properly decided that there was no valid agreement to arbitrate between Greenville Water and U.S. Pipe based upon the record before it. Further, the Circuit Court did not limit U.S. Pipe's ability to present evidence in any way nor did it prevent U.S. Pipe from seeking discovery concerning any disputed issues relating to arbitration (if it had chosen to do so, which it did not).[15] Rather, it was U.S. Pipe's decision to submit the matter for adjudication based

[15] Indeed, Greenville Water served discovery on U.S. Pipe during the pendency of its Motion to Dismiss or Stay Pending Arbitration and U.S. Pipe took the position that discovery was improper while its motion was pending. (Mem. in Opp. to Mot. to Compel; R. at 233-34).

upon the record before the Circuit Court. And U.S. Pipe's belated attempt to object to the Circuit Court's procedure for deciding its motion for the first time on this appeal is improper.[16] *See Aiken*, 367 S.C. at 179, 623 S.E.2d at 875; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

CONCLUSION

For the reasons stated above, the Circuit Court's Order denying U.S. Pipe's Motion to Dismiss or Stay Pending Arbitration should be affirmed in its entirety.

Dated: August 28, 2025

Respectfully submitted,

/s/ Adam C. Bach

Adam C. Bach (S.C. Bar #74885)
TONNSEN BACH, LLC
1306 South Church Street
Greenville, South Carolina 29605
Tel.: 864-236-5013
abach@tonnsenbach.com

Adam J. Levitt (*pro hac vice*)
DiCELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel.: 312-314-7900
alevitt@dicellolevitt.com

Justin J. Hawal (*pro hac vice*)
DiCELLO LEVITT LLP
8160 Norton Parkway, Third Floor
Mentor, Ohio 44060
Tel.: 440-953-8888
jhawal@dicellolevitt.com

Counsel for Plaintiff Commissioners of Public Works of the City of Greenville, South Carolina

[16] U.S. Pipe provides *no* authority for its assertion that an alleged transcription error requires this Court to remand for further proceedings because none exists. Further, U.S. Pipe chose not to present any additional evidence at the hearing nor did it raise any arguments that were not raised in its briefing. Thus, the record before this Court, even without a fully accurate hearing transcript, is more than sufficient for the Court to affirm the Circuit Court's decision.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

The undersigned certifies that a copy of Respondent's Final Brief was served upon counsel of record in the above-entitled action by electronic mail on August 28, 2025, as follows:

Served: Via Email:

C. Mitchell Brown
Matthew A. Abee
Yasmeen Ebbini
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street, 17th Floor; P.O. Box 11070 (29211-1070)
Columbia, South Carolina 29201
mitch.brown@nelsonmullins.com
matt.abee@nelsonmullins.com
yasmeen.ebbini@nelsonmullions.com

Beattie B. Ashmore
BEATTIE B. ASHMORE, P.A.
650 East Washington Street
Greenville, SC 29601
beattie@beattieashmore.com

Paul G. Joyce (*pro hac vice*)
COLUCCI & GALLAHER P.C.
350 Main Street, Suite 800
Buffalo, New York 14202
pjoyce@cgbuffalo.com

Counsel for Appellant United States Pipe and Foundry Company, LLC

River S. Stilwell
David C. Dill
Claire K. Atwood
MAYNARD NEXSEN PC
104 S. Main Street, Suite 900
Grenville, South Carolina 29601
rstilwell@maynardnexsen.com
ddill@maynardnexsen.com
catwood@maynardnexsen.com

Counsel for Defendant TEC Utilities Supply Inc.

Gregory L. Shelton
SHELTON LAW CAROLINAS
101 S. Tryon Street, Suite 2700
Charlotte, North Carolina 28280
greg@sheltonlawcarolinas.com

Counsel for Defendant Hayes Pipe Supply, Inc.

Dated: August 28, 2025

Respectfully submitted,

/s/ Adam C. Bach

Adam C. Bach (S.C. Bar #74885)
TONNSEN BACH, LLC
1306 South Church Street
Greenville, South Carolina 29605
Tel.: 864-236-5013
abach@tonnsenbach.com

Adam J. Levitt (*pro hac vice*)
DiCELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel.: 312-314-7900
alevitt@dicellolevitt.com

Justin J. Hawal (*pro hac vice*)
DiCELLO LEVITT LLP
8160 Norton Parkway, Third Floor
Mentor, Ohio 44060
Tel.: 440-953-8888
jhawal@dicellolevitt.com

Counsel for Respondent Commissioners of Public Works of the City of Greenville, South Carolina