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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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

v.

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

of which

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

Appellant's Final Brief

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Statement of Issues on Appeal

Under the Uniform Commercial Code, warranties provided by a manufacturer may be limited by clear disclaimers and other contract terms. By law, both the warranties *and* the limitations on those warranties apply to downstream purchasers, even when there is no contractual privity between the manufacturer and the end user.

The issues presented here are:

I. Whether a sophisticated-merchant and downstream buyer of goods asserting a breach of warranty against the manufacturer of those goods is bound by the limitations and conditions of that warranty, including its requirement to resolve disputes by binding arbitration, when the downstream buyer purchased the goods through distributors.

II. Whether direct benefits estoppel applies to require a sophisticated downstream buyer of goods suing in contract to arbitrate its claims when the manufacturer's standard terms contain an arbitration provision.

III. Whether the Circuit Court erred in deciding issues of contractual interpretation and enforcement delegated in the Arbitration Agreement to the arbitrator, and in ruling that the Arbitration Agreement was unconscionable.

IV. Whether the Circuit Court erred in resolving disputes of material fact central to the parties' contract formation or in failing to conduct the "battle of the forms" analysis to determine the terms applicable to the parties' contract.

Statement of the Case and Facts

This is a case arising out of South Carolina's UCC in which the Circuit Court denied a Motion to Dismiss or Stay Pending Arbitration filed by Defendant-Appellant United States Pipe and Foundry Company, LLC ("U.S. Pipe"). Although Plaintiff-Respondent Commissioners of Public Works of the City of Greenville, South Carolina ("Greenville Water") claims to have an implied contract with U.S. Pipe, (Compl. ¶¶ 115–23; R. at 47–48), it repudiates the arbitration obligation contained in the contract. Instead, Greenville Water, a sophisticated merchant in the industry, claims it has no arbitration obligation because it purchased goods manufactured by U.S. Pipe—ductile iron pipes with cement mortar lining for the city water system—through Defendant-Respondents TEC Utilities Supply Inc. and Hayes Pipe Supply Inc. (together "Distributors"), and not through U.S. Pipe directly.

U.S. Pipe appeals from the Circuit Court's order denying its motion seeking to compel arbitration and asks that this Court reverse and compel this case to arbitration. Alternatively, U.S. Pipe asks that this Court at minimum reverse and remand for the Circuit Court to resolve additional factual and legal disputes not properly addressed by the Circuit Court.

A. Greenville Water's Purchase of Ductile Iron Pipe

Greenville Water alleges that from "October 2022 through May 2023, [it] regularly purchased ductile iron pipe with cement-mortar lining from U.S. Pipe, through" Distributors. (Compl. ¶ 61; R. at 38.) Greenville Water characterizes this purchase as being made "indirectly," (Pl.'s PowerPoint Presentation at 2; R. at 289), but also alleges that it entered into separate contractual relationships with both U.S. Pipe and Distributors, (Compl. ¶¶ 70–71; R. at 39–40; PowerPoint at 18; R. at 305), and that both U.S. Pipe and Distributors "contracted to supply goods and manufacturer and/or distributed goods" to Greenville Water in South Carolina, (Compl. ¶ 13;

R. at 27). It also asserts that "US Pipe is not a party to any agreement between Greenville Water and TEC and/or Hayes." (Hr'g Tr. 15:8–9; R. at 249.) U.S. Pipe does not dispute that Distributors were involved in the transaction on behalf of Greenville Water, but it asserts that the U.S. Pipe Terms and Conditions of Sale (the "Terms") control the transaction. (Hr'g Tr. 6:19–20; R. at 240.)

This was not the first purchase of pipes from U.S. Pipe by Greenville Water. Ductile iron pipes with cement-mortar lining—specifically including pipes manufactured by U.S. Pipe—have been used in Greenville Water's systems for many years, having been installed by Greenville Water and other contractors before the purchase of the pipes at issue in this lawsuit. (Compl. ¶ 64; R. at 38.) Since October 2022, Greenville Water claims that over 100,000 feet of U.S. Pipe's products have been installed in the Water Distribution system. (Compl. ¶ 62; R. at 38.) Greenville Water alleges that most of the pipes were manufactured in Lynchburg, Virginia. (Compl. ¶¶ 1, 56; R. at 37; PowerPoint at 7; R. at 294.)

The parties dispute which terms govern each of the contractual relationships in this case. U.S. Pipe maintains that its Terms govern the relationship between the parties. (Arbitration Mot., Ex. A; R. at 147.) The Terms apply to "quotations and sales of goods and products" by U.S. Pipe and related entities to buyers and their related entities. (*Id*. at 1; R. at 147.) U.S. Pipe has also made the Terms available on its website, https://www.uspipe.com/about-us/#tab-f980d7d7e6543f9a7f0. (Arbitration Mot. at 3; R. at 134.) By contrast, Greenville Water argues that "The terms and conditions contained in Greenville Water's own purchase order control Greenville Water's contractual relationship with Hayes and TEC . . ." (Hr'g Tr. 15:2–4; R. at 249.) These terms are attached to its purchase orders. (Mem. in Opposition at 5; R. at 161; Mem. in Opposition, Exs. 2–3; R. at 177, 180; PowerPoint at 18; R. at 305.) In those purchase orders, Greenville Water lists itself as the "Buyer" and Distributors as the "Seller." (Mem. in Opposition,

Exs. 2–3; R. at 177, 180.) Greenville Water also includes in its purchase order terms a requirement that Distributors make their own warranties about the goods to Greenville Water. (*Id.*; R. at 178, 181; PowerPoint at 19, 23; R. at 306, 310.)

There are also, however, a third set of terms involved: Distributors' terms. Those terms contradict Greenville Water's terms and state that Distributors are not the manufacturers of the goods, so they provide no warranties for those goods:

- TEC's Terms: "TEC is a reseller of goods only, and as such does not provide any warranty for the goods it supplies hereunder. **SOLE AND EXCLUSIVE WARRANTY, IF ANY, ON GOODS SOLD BY TEC, IS THAT PROVIDED BY THE GOODS MANUFACTURER.**" (Reply to Arbitration Mot. at 3, Ex. C; R. at 231; PowerPoint at 27; R. at 314.)
- Hayes' Terms: "**ALL WARRANTIES ARE LIMITED TO THE WARRANTIES PROVIDED BY THE MANUFACTURER OF THE PRODUCTS.**" (Arbitration Mot. at 4–5; R. at 135–36; Reply to Arbitration Mot. at 3; R. at 218; PowerPoint at 29; R. at 316.)

Distributors' terms are referenced in their credit application and in various other documents, such as pick tickets issued after the purchase order on which Greenville Water relies. (Hr'g Tr. 6:24–25: R. 240; Reply to Arbitration Motion, Ex. A, TEC Quote at 1; R. at 226; *id*., Ex. B, TEC Pick Ticket at 1; R. at 228; *id*., Ex. C, Application for Credit at 1–2; R. at 231–32.)

Although U.S. Pipe's Terms include an arbitration provision (discussed below), neither Greenville Water nor Distributors' terms contain an express arbitration provision. (*Compare* Arbitration Mot., Ex. A; R. at 147; Mem. in Opposition, Exs. 2–3; R. at 177, 180; Reply to Arbitration Mot. at 3, Ex. C; R. at 218, 231; PowerPoint at 29; R. at 316.)

B. The Alleged Defective Pipes and Warranty

Nearly a year after it began purchasing the pipes at issue here, Greenville Water began to claim that the pipes were defective, which U.S. Pipe has continuously disputed. (Arbitration Mot. at 6; R. at 137.) Greenville Water alleges that "U.S. Pipe manufactured and sold the Defective Pipes to Greenville Water through" Distributors, (Compl. ¶ 16; R. at 28), which do not have cement mortar lining with a uniform thickness of 1/16-inch throughout the pipes, (Comp. ¶ 8; R. at 25). Greenville Water claims that certain pipes manufactured in Lynchburg, Virginia do not comply with warranties provided to Greenville Water, and that the pipes do not comply with the prevailing industry standard. (Compl. ¶ 9; R. at 25.)

Greenville Water alleges that it learned of the alleged defect in May 2023. (Compl. ¶ 53; R. at 36.) Thereafter, Greenville Water alleges it notified U.S. Pipe about the alleged defects. (Compl. ¶ 66; R. at 39.) While Greenville Water does not include the total amount paid for the pipes, it claims to have bought about $330,000 worth of uninstalled pipes and spent another unknown amount of pipes that have been installed. (Compl. ¶ 62; R. at 38.)

Greenville Water claims that the pipes do not comply with warranties U.S. Pipe made about the cement-mortar lining. (Compl. ¶¶ 6–7, 9, 47–48, 51, 70, 77; R. at 24, 25, 34, 35, 39, 41.) Greenville Water claims that U.S. Pipe's "marketing and promotional materials" represent that the pipes comply with a particular industry standard about cement lining. (Compl. ¶¶ 6–7; R. at 24–25.) Greenville Water also alleges that U.S. Pipe issued a Certificate of Product Compliance (the "Certificate") confirming that the pipes complied with that standard. (Compl. ¶¶ 6–7, 9, 47–48, 51, 70, 77; R. at 24, 25, 34, 35, 39, 41; Mem. in Opposition at 3; R. at 159; PowerPoint at 9, 42–43; R. at 296, 329–30.) This Certificate was allegedly provided in addition to the "marketing and promotional materials" from U.S. Pipe. (Compl. ¶¶ 49, 77; R. at 35, 41.) Greenville Water

purports to paste a screenshot of the Certificate, (Compl. ¶ 48; R. at 35), though this screenshot is cropped and does not show which employee issued it, who the product was manufactured for, what project it applies to, the specific pipes the certification applies to, or other typical qualifications on the Certificate, (*id.*; *see also* Pl.'s PowerPoint at 6; R. at 293; Hr'g Tr. 28:15–23; R. at 262).

Greenville Water includes no allegations about when U.S. Pipe allegedly issued this Certificate. When Greenville Water bought the pipes in October 2022, U.S. Pipe had issued no certificate of product compliance to Greenville Water in more than a decade. (Hr'g Tr. 28:15–23; R. at 262.) Despite that, Greenville Water claims it relied on U.S. Pipe's "affirmative representations of compliance" with the industry standard via the Certificate. (Compl. ¶ 51; R. at 35.) Again, however, Greenville Water (1) does not allege it relied on the Certificate to buy the pipes, (Compl. ¶¶ 6–7, 9, 47–48, 51, 70, 77; R. at 24, 25, 34, 35, 39, 41); and (2) does not allege *when* it relied on the Certificate, whether before or after the purchase of the pipes, (*id.*; Compl. ¶ 128(e); R. at 49).

C. The Complaint and the Parties' Motions Practice

Greenville Water filed its Complaint against U.S. Pipe and Distributors in October 2024. (Compl.; R. at 21.) In its ten-count Complaint, Greenville Water sued U.S. Pipe for declaratory judgment, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of implied contract, violation of the South Carolina Unfair Trade Practices Act, and unjust enrichment. (Compl. ¶¶ 68–74, 75–81, 89–94, 102–07, 115–23, 124–41, 142–48; R. at 39–40, 40–41, 43–44, 45–46, 47–48, 48–51, 52.) Greenville Water seeks declaratory relief, "benefit of the bargain damages," consequential damages, punitive damages, interest, and attorneys' fees. (Compl. ¶ 67; R. at 39; *id.* at 33; R. at 53.)

In response, U.S. Pipe filed its Motion to Dismiss or Stay Pending Arbitration (the "Arbitration Motion") under the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ("FAA"). (Arbitration Mot. at 1; R. at 132.) U.S. Pipe's Terms applicable to the sale of pipes to Greenville Water include the following Arbitration Agreement, reading in part:

> **ARBITRATION; CONSENT TO VENUE.** Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, including the arbitrability thereof, shall be settled by binding arbitration administered by the American Arbitration Association in accordance with the then-current Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(*See* Arbitration Motion, Ex. A, Terms at 5–6 [hereinafter the "Arbitration Agreement"]; R. at 151–52.) Greenville Water claims to have never received a copy of the Terms before suing. (Mem. in Opposition, Ex. 1, Schmidt Aff. ¶ 8; R. at 174; PowerPoint at 10; R. at 297.)

The Court held a hearing on the Arbitration Motion on February 10, 2025. At the hearing, Greenville Water presented the full Certificate of Compliance to the Circuit Court in a PowerPoint presentation not previously served on the parties or filed in the record. (Hr'g Tr. 28:15–23; R. at 262; PowerPoint at 6; R. at 293.)[1] Contrary to its allegations in the Complaint, Greenville Water in its presentation alleged for the first time that the "affirmative misrepresentations . . . in the Certificate . . . form the basis of Greenville Water's implied contract, warranty, and South Carolina Unfair Trade Practice Act claims." (PowerPoint at 9; R. at 296.)

[1] As noted by U.S. Pipe, the company had provided no certificates of compliance to Greenville Water in more than a decade. (Hr'g Tr. 28:15–23; R. at 262.) It was not until after the hearing that U.S. Pipe learned that the Certificate of Compliance presented to the Circuit Court 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. (Compl. ¶ 48; R. at 35; Hr'g Tr. 28:15–23; R. at 262.)

D. The Circuit Court's Order Denying Arbitration

On February 25, 2025, the Circuit Court issued an order denying U.S. Pipe's arbitration motion. (Order Denying Arbitration; R. at 1.) The Circuit Court concluded that Greenville Water was a nonsignatory to the Terms, that U.S. Pipe had failed to establish a valid arbitration agreement, and that direct benefits estoppel did not apply. (*Id*. at 8–9, 11–12; R. at 8–9, 11–12.) It also ruled that, had an agreement been established, it would have been unconscionable contract of adhesion. (*Id.* at 14–15; R. at 14–15.) It did not resolve which terms were applicable to the separate contractual relationship between Greenville Water and Distributors. (*Id*. at 10 n.1; R. at 10.)

On March 14, 2025, U.S. Pipe timely filed and served its Notice of Appeal of the order denying its motion to compel arbitration. (Not. of Appeal; R. at 344.) Shortly thereafter, the Court granted Greenville Water's Motion to Expedite, which U.S. Pipe had consented to in its Return. (Order, April 9, 2025; R. at 19.)

Standard of Review

Each of the legal issues on appeal are subject to de novo review. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007) (appeal from denial of a motion to compel arbitration); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016) (appeal of arbitrability determination); *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (application of direct benefits estoppel); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 13, 742 S.E.2d 37, 39 (Ct. App. 2013) (determining agreement is unconscionable).

Argument

The Court should reverse and compel the dispute between these sophisticated entities to arbitration for three reasons. Alternatively, this Court should at minimum reverse and remand to resolve additional factual and legal disputes not properly addressed by the Circuit Court.

First, this dispute is covered by a valid arbitration agreement. U.S. Pipe's Terms included a limited warranty subject to other contractual limitations and conditions, including the Arbitration Agreement. (*See* Arbitration Mot., Ex. A, Terms at 5–6; R. at 151–52.) The limitations on U.S. Pipe's warranty, which includes the obligation to arbitrate claims for breach of warranty, are just as binding on downstream buyers as they are direct buyers under UCC Section 2-318. Greenville Water's claim that it was not relying on the Terms but was instead relying on the Certificate fails because that Certificate cannot form a contract between the parties like the Terms do. Regardless, Greenville Water is bound to arbitrate its claims because its agents—Distributors—had notice of, and assented to, the Terms when they engaged in these interstate transactions on Greenville Water's behalf.

Second, although Greenville Water did not sign the Terms containing the Arbitration Agreement—and no party signed any contract here because the transaction was governed by the UCC—direct benefits estoppel applies. Greenville Water relies on the contract containing the Arbitration Agreement to assert its contractual claims against U.S. Pipe. Also, Greenville Water directly benefitted from the same contract containing the Arbitration Agreement. *Wilson v. Willis*, relied upon by the Circuit Court to refuse to apply direct benefits estoppel, is distinguishable because here, unlike in *Wilson*, Greenville Water expressly pleads a contractual relationship between the parties, asserts five contract-based claims against U.S. Pipe, and seeks contractual damages.

Third, the Circuit Court erred by concluding the Arbitration Agreement was unconscionable because that issue is one of arbitrability properly delegated to the arbitrator. In any event, the Arbitration Agreement is aimed at arriving at an unbiased resolution by a neutral decision-maker (the American Arbitration Association), so it is not unconscionable. This is especially true given the sophisticated entities involved here.

Alternatively, remand is appropriate because the Circuit Court erred in resolving factual disputes central to the parties' contract-formation arguments. The Circuit Court also erred in failing to determine the terms applicable to the parties' contract through the "battle of the forms" analysis. Lastly, transcription errors caused by a non-functioning microphone at counsel table warrant remand.

Therefore, the Court should reverse and compel this matter to arbitration or, alternatively, reverse and remand.

I. The Circuit Court erred in denying U.S. Pipe's motion to compel arbitration because a valid arbitration agreement exists.

Here, the Circuit Court erred when denying U.S. Pipe's Arbitration Motion because it ignored the commercial and economic realities associated with contracts for goods governed by the UCC. Under traditional UCC principles, there is a valid Arbitration Agreement in the Terms that binds Greenville Water. This Court should reverse as Greenville Water's claims are subject that Arbitration Agreement.

A. The Arbitration Agreement binds Greenville Water as a downstream buyer and the FAA governs that interstate contract.

Greenville Water makes much of the fact that it did not expressly sign a contract with U.S. Pipe. This argument contradicts the eight different allegations in the Complaint in which Greenville Water directly alleges a contractual relationship with U.S. Pipe. (Compl. ¶¶ 13, 70–71,

74, 116, 118, 121, 143; R. at 27, 39–40, 47, 48, 52.) This argument by Greenville Water also ignores South Carolina law under the UCC.

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. To determine whether the parties formed an arbitration agreement, courts first look to state law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).

When under state law an agreement need not be physically signed for it to be valid, courts may enforce unsigned arbitration agreements. *See, e.g.*, *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 55–56, 791 S.E.2d 286, 289 (Ct. App. 2016) (compelling arbitration of contract for goods absent signed agreement between the parties). Federal courts applying South Carolina law agree. *Boerstler v. UHS of Delaware, Inc.*, No. 1:21-cv-2334-JMC-SVH, 2021 WL 6841644, at *4 (D.S.C. Sept. 30, 2021) (holding the plaintiff's signature was not required for her to be bound by agreement despite the plaintiff's argument that her failure to sign the agreement or indicate her consent to its terms, including arbitration) (citing *Laidlaw Envtl. Servs. (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1409 (D.S.C. 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997) ("Pursuant to South Carolina law, conduct manifesting assent constitutes acceptance of the offered terms. Thus, compliance with the proffered terms and conditions constitutes acceptance of an offer, and assent need not be express, but may be inferred from the parties' conduct.")). Such is the case in other states as well. *Hudson-Swoope v. MRO Corp.*, No. 1:24-cv-01183, 2025 WL 904456, at *9 (N.D. Ohio Mar. 25, 2025) ("arbitration agreements do not require a signature to bind the parties and be enforceable."); *Braxton v. O'Charley's Rest. Props.*, LLC, 1 F. Supp. 3d 722, 726 (W.D. Ky. 2014) ("Kentucky courts will

also enforce unsigned arbitration agreements where the parties have indicated acceptance of the contract through their actions" because "under Kentucky law, a party can be bound to a contract, even in the absence of a signature, when her actions indicate acceptance of the contract's terms.").

In the context of the sale of goods—such as ductile iron pipes—courts analyzing the validity of contracts look to the UCC. *See Plantation Shutter Co. v. Ezell*, 328 S.C. 475, 492 S.E.2d 404 (Ct. App. 1997). While the UCC generally requires a signed writing for an enforceable contract, S.C. Code Ann. § 36-2-201(1), exceptions exist when a contract is admitted in a pleading, S.C. Code Ann. § 36-2-201(3)(b), or when the goods are paid for and accepted, S.C. Code Ann. § 36-2-201(3)(c), § 36-2-606. Courts routinely compel arbitration agreements in form contracts made binding under the UCC even if they have not been signed. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 279–80 (4th Cir. 2007) (applying North Carolina law to enforce arbitration agreement applicable under the battle of the forms); *ETC Intrastate Procurement Co., LLC v. JSW Steel (USA), Inc*., 620 S.W.3d 168, 174 (Tex. App. 2021) (concluding in dispute over oil and gas pipe that arbitration agreement need not be incorporated into the terms when battle of the forms analysis confirmed the arbitration agreement was a part of the contract); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 99–100 (2d Cir. 2002); *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 514 F. App'x 365, 366 (4th Cir. 2013).

Indeed, within the last decade, this Court has done so. *One Belle Hall*, 418 S.C. at 55–56, 791 S.E.2d at 289. There, a downstream buyer of roofing shingles sued the shingles manufacturer despite there being no direct contractual relationship between the manufacturer and the end user. *Id*. The manufacturer had sold the shingles to a subcontractor hired by the developer even before the property had been conveyed to the HOA. *Id*. at 56, 791 S.E.2d at 289. After the HOA took title to the property, those shingles began to fail, and the HOA sued the manufacturer and others

for negligence, breach of warranty, and strict liability. *Id*. The manufacturer moved to compel arbitration, and the HOA opposed it. *Id.*, 418 S.C. at 58–59, 791 S.E.2d at 290 ("[The HOA and plaintiffs] filed a memorandum in opposition to [the manufacturer's] motion, contending neither the Association nor the property owners ever agreed to arbitrate, and the arbitration clause was unconscionable and unenforceable."). Ultimately, this Court determined that the arbitration provision was enforceable over the HOA's objections and reversed the trial court's ruling that the provision was unconscionable. *Id*. at 65, 791 S.E.2d at 294.

This Court's opinion in *One Belle Hall*, however, does not stand alone. Other Courts have addressed contract-formation issues under the UCC and concluded that certain contractual terms apply to downstream purchasers despite there being no direct contractual relationship or signed agreement. For example, the Fourth Circuit has held that contractual limitations on a manufacturer's warranty were enforceable against a downstream purchaser injured by the manufacturer's goods. *Buettner v. R.W. Martin & Sons, Inc*., 47 F.3d 116, 118 (1995). In so doing, the court rejected the downstream purchaser's argument that the manufacturer had not negotiated directly with her, so the contractual limitation could not be enforced against her. *Id*. at 119 ("We likewise reject [the downstream purchaser's] suggestion that a seller must negotiate a warranty disclaimer with an individual foreseeable user despite the inclusion of an otherwise valid disclaimer in the contract of sale. Were we to hold otherwise, a seller would be virtually incapable of disclaiming any implied warranties as to all foreseeable users, contrary to the clear intent of § 8.2-316.").

To reach this conclusion, the Fourth Circuit relied on the official comments to UCC Section 2-318: "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative

against beneficiaries of warranties under this section." *Id.* (quoting UCC § 2-318, Official Cmt. 1). The Fourth Circuit reasoned that the plaintiff, and any downstream purchaser, "can enjoy no more contractual rights than are enjoyed by the purchaser" under the UCC. *Id*. at 119. As a result, the Fourth Circuit upheld the application of other contractual limitations against the downstream purchaser even though that purchaser had never directly agreed to those contractual provisions. *Id*. at 119–20.

South Carolina has a similar provision in its UCC. *Compare* Va. Code Ann. § 8.2-318 ("Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller *might reasonably have expected to use, consume, or be affected by the goods*") (emphasis added), *with* S.C. Code Ann. § 36-2-318 ("A seller's warranty whether express or implied extends to any natural person who *may be expected to use, consume or be affected by the goods* and whose person or property is damaged by breach of the warranty.") (emphasis added). Further, South Carolina's federal courts have similarly enforced a manufacturer's limiting contract terms against downstream purchasers even where no direct express contractual relationship between the manufacturer and the downstream buyer existed. *See Britt v. Sorin Grp. Deutschland GMBH*, 690 F. Supp. 3d 538, 546 (D.S.C. 2023) (granting summary judgment on hospital patient's claims against manufacturer because of warranty limitations in the manufacturer's contract with hospital under UCC § 2-318); *Brooks v. GAF Materials Corp*., 284 F.R.D. 352, 359 (D.S.C. 2012) ("Accordingly, to the extent that a plaintiff seeks the protections of an express warranty as a third-party beneficiary, the plaintiff is also bound by the warranty limitations and disclaimers."), *clarified on denial of reconsideration*,

No. 8:11-cv-00983-JMC, 2013 WL 461468 (D.S.C. Feb. 6, 2013); *Godawa v. Dixie Camper Sales of S.C., Inc.*, No. 6:16-cv-1101-HMH, 2016 WL 3125459, at *3 (D.S.C. June 2, 2016); *Hinkle v. Cont'l Motors, Inc.*, No. 9:16-cv-3707-RMG, 2017 WL 4776992, at *4 (D.S.C. Oct. 20, 2017). Other courts from around the country agree. *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 140 (Tex. 2014) ("[A] downstream purchaser cannot obtain a greater warranty than that given to the original purchaser, so if the manufacturer at the point of original sale makes a valid disclaimer of implied warranties, that disclaimer extends to subsequent purchasers."); *AIG Eur., Ltd. v. Caterpillar, Inc.*, 831 F. App'x 111, 117 (5th Cir. 2020) ("Because Caterpillar made a valid disclaimer as to Dragon, that disclaimer extends to BHI, a downstream purchaser."); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 741, 729 N.E.2d 1113, 1118 (2000) (holding plaintiff could not possess greater warranty rights from manufacturer than the original purchaser); *Transport Corp. of Am. v. International Business Machs., Inc*., 30 F.3d 953, 959 (8th Cir. 1994) (holding disclaimers of implied warranties are extended to subsequent purchasers). Some courts say the downstream purchaser steps into the shoes of the original buyer. *Boston Helicopter Charter, Inc. v. Agusta Aviation Corp.*, 767 F. Supp. 363, 376 (D. Mass. 1991).

In each of the above-cited instances, the downstream purchaser had no direct express contractual relationship with the manufacturer, yet the purchaser sued the manufacturer for breach of warranty and other contractual claims. And in each of those instances, the courts held that the downstream purchaser could sue on the warranty but had to take with it the other contractual limitations related to the purchase of the goods. Assuming that Greenville Water may sue on the warranty, it must also be subject to the other contractual limitations on that warranty.[2] In addition

[2] The viability of Greenville Water's claims is not properly before the Court. The merits of those claims are reserved for the arbitrator.

to suing for breach of implied contract, (Compl. ¶¶ 115–23; R. at 47–48), Greenville Water sues for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose, (Compl. ¶¶ 12, 75–81, 89–94, 102–07; R. at 26, 40–41, 43–44, 45–46). These warranty claims are contractual claims. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co*., 843 F. Supp. 1027, 1035 (D.S.C. 1993) ("Stripped to its essentials, therefore, this a contract action executed in a commercial setting between two merchants that bargained for a particular product.").

Each of Greenville Water's claims—including the breach of implied contract claim—incorporates the same set of underlying factual allegations. (Compl. ¶¶ 75, 89, 102, 115; R. at 40, 43, 45, 47.) Greenville Water further seeks monetary damages allegedly flowing from the purchase of the goods, such as "benefit of the bargain" damages, (Compl. ¶¶ 67, 80, 93, 106, 122; R. at 39, 41, 43, 45–46, 48), and consequential damages stemming from the cost of repair, lost revenue, and reputational harm, (Mem. in Opposition at 2; R. at 158). These are classic contract-based damages, *see S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990) (contract damages give a party the benefit of their bargain); *Petty v. Weyerhaeuser Co*., 288 S.C. 349, 356–57, 342 S.E.2d 611, 616 (Ct. App. 1986) (affirming damages for loss of profits and injury to reputation), some of which have roots in the UCC, *see Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 621 S.E.2d 38 (2005) (citing S.C. Code Ann. §§ 36-2-714, 36-2-715). Greenville Water cannot pursue warranty and other contractual claims seeking contractual damages while simultaneously ignoring the contractual limitations placed on those warranties by the parties' contract and State law.

Therefore, a valid arbitration agreement between Greenville Water and U.S. Pipe exists. That agreement is governed by the FAA, which applies to any arbitration agreement executed in

connection with a transaction involving interstate commerce. *See* 9 U.S.C. § 2; *see also Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 281 (1995) (explaining that FAA applies to arbitration agreements involving transactions in interstate commerce, even if parties do not contemplate an interstate commerce connection). The FAA defines "commerce" as "commerce among the several states." 9 U.S.C. § 1. In section 2 of the FAA, the "word 'involving' . . . signals an intent to exercise Congress's commerce power to the full," and the phrase "evidencing a transaction" means that the transaction has "involved interstate commerce." *Allied-Bruce*, 513 U.S. at 273–74; *Hicks Unlimited, Inc. v. UniFirst Corp*., 439 S.C. 623, 633, 889 S.E.2d 564, 569 (2023) (referring to "involving commerce" as "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.").

The involvement of multiple parties from different states in that agreement is alone enough to meet the low "involving" commerce threshold set by the FAA. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 208 n.2, 731 S.E.2d 324, 326 n.2 (Ct. App. 2012) ("There is no dispute the transaction here . . . involved interstate commerce as Mary is a South Carolina resident, Harrelson is a North Carolina corporation, the vehicle was manufactured in Tennessee, and financing was provided by Nissan-Infiniti LT of California"). Additionally, the pleadings and record confirm that the transaction actually involved both goods and funds crossing state lines as a part of the transaction. (Pl.'s Memo. in Opposition, Ex. 1, Schmidt Aff. ¶ 3; R. at 173.) Thus, the Circuit Court erred in holding the FAA did not apply to this interstate transaction.

Because a valid arbitration agreement exists, the Court must compel the matter to arbitration. The FAA "leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218

(1985); *Cox v. Assisted Living Concepts, Inc.*, No. 6:13-cv-00747, 2014 WL 1094394, at *10 (D.S.C. Mar. 18, 2014) ("[A] court . . . has no choice but to grant a motion to compel arbitration where a valid agreement exists and the issues in a case fall within its purview." (quoting *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 50 (4th Cir. 2002))).[3]

B. Greenville Water cannot base its contract claims on the alleged receipt of a Certificate of Product Compliance because that document forms no contract between the parties.

In an effort to escape the application of the UCC, Greenville Water argues that it does not rely on U.S. Pipe's warranty in the Terms to establish its claims. (Mem. in Opposition at 1; R. at 157.) Instead, it claims it relied only on the Certificate to establish its contract with, and warranty from, U.S. Pipe. (*Id.* at 4, 12; R. at 160, 168; PowerPoint at 9; R. at 296.) This argument fails for three reasons.

First, the Certificate does not create a contract with U.S. Pipe. *See McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 331, 350 S.E.2d 208, 211 (1986) ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty."). There is also no consideration given for the Certificate. *Armstrong v. Collins*, 366 S.C. 204, 223, 621

[3] The parties' agreement in the Terms requires the arbitration of "[a]ny controversy or claim arising out of or relating to the Agreement, or breach thereof," with the AAA. (Arbitration Motion, Ex. A, Terms and Conditions of Sale at 5; R. at 151.) Whether the scope of this Arbitration Agreement covers Greenville Water's claims is a question for the arbitrator for the reasons set forth in Section III.A. below. That said, this Court has previously held that use of language like "any" or "arising out of or relating to" is broad. *See Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723, 728–29 (4th Cir. 1997) (interpreting "arising out of employment" term in arbitration agreement broadly to require arbitration of any claims that "involve significant aspects of the employment relationship, including but not limited to explicit contractual terms."); *Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) ("The phrase 'arising out of' should be broadly construed in a clause of inclusion; it should mean more than causation. *See McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993) ('arising out of' in clause of inclusion connotes 'incident to,' 'flowing from,' or 'having connection with' as well as 'causal relation to.')."").

S.E.2d 368, 377 (Ct. App. 2005) ("Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."). Merely agreeing again to perform what you have already agreed to perform does not consideration make. *See Atl. Joint Stock Land Bank of Raleigh v. Latta*, 164 S.C. 56, 162 S.E. 68, 69 (1932) (a party's promise to carry out pre-existing contractual duties is "clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit.").

Second, the record is replete with examples of other documents and communications that form the agreement between the parties. For example, the Complaint alleges that U.S. Pipe provided "other written documents and communications" to Greenville Water in connection with the purchase of these pipes. (*Id.* ¶ 70; R. at 39.) Greenville Water alleges these "other" documents form the basis of its separate contracts with U.S. Pipe and Distributors. (Compl. ¶¶ 70–71; R. at 39–40.) Several of those "other" documents refer to the Terms or portions thereof. (Reply to Arbitration Motion, Ex. A, TEC Quote at 1; R. at 226; *id*., Ex. B, TEC Pick Ticket at 1; R. at 228; *id*., Ex. C, TEC's Application for Credit at 1–2; R. at 231–32.) These references placed Greenville Water on notice of the Terms, especially because Greenville Water is a sophisticated buyer of ductile iron pipes and a merchant under the UCC. *See* S.C. Code Ann. § 36-2-104(1) ("'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."); (*see also* Compl. ¶ 91 (calling U.S. Pipe a merchant); R. at 43). The UCC imposes a duty on Greenville Water to inquire into those references to ascertain the full terms of its agreement with U.S. Pipe.

See Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 n.10 (3d Cir. 2003) ("But the goal of commercial contract law is to efficiently facilitate business transactions between seasoned merchants. It is appropriate to require a merchant to exercise a level of diligence that might not be appropriate to expect of a non-merchant."). Those references alone are sufficient for the Terms to control the transaction even if Greenville Water never chose to seek an actual copy of the Terms. *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 514 F. App'x 365, 368 (4th Cir. 2013) ("Although it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms, the party challenging incorporation need not have actually received the incorporated terms in order to be bound by them, especially when both parties are sophisticated business entities.") (citations omitted). Greenville Water's choice to ignore the clear indications of other terms is fatal to its argument that no arbitration agreement between the parties exists. This is true even in the face of the Certificate issued after the fact that Greenville Water now claims influenced its purchase of the pipes, as Greenville Water itself pleads that the Certificate is not the only document supporting its agreement with U.S. Pipe. (Compl. ¶¶ 6–7, 49, 77; R. at 24–25, 35, 41.)[4]

[4] References to U.S. Pipe's Terms in Distributors' terms, quote, and pick tickets are especially sufficient when, as here, the parties have a pattern of transactions instead of an isolated relationship, and industry custom confirms that arbitration of disputes between sophisticated parties is a standard term. S.C. Code Ann. § 36-1-201(b)(3) (defining "agreement" to include both course of dealing and usage of trade); *See, e.g., In re Cotton Yarn Antitrust Litig*., 505 F.3d 274, 279 (4th Cir. 2007); *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg*., 189 F.3d 289, 296–97 (2d Cir. 1999) (applying usage of trade to require arbitration even though pre-printed contract's arbitration provision was "illegible and unintelligible"); *Standard Bent Glass*, 333 F.3d at 448 (holding arbitration is usage of trade in fabricating industry); *Aceros Prefabricados*, 282 F.3d at 102 (same; steel industry). The record reflects that Greenville Water and U.S. Pipe have been operating and engaged in the commercial pipe industry for years and Greenville Water has long used U.S. Pipe's goods. (*See* Compl. ¶¶ 15–16, 64; R. at 27–28, 38.) The complex and specialized nature of the industry means "arbitration is especially appropriate in situations involving issues that are unique to certain industries and which require specialized knowledge for their resolution." *Lake Plumbing, Inc. v. Seabreeze Const.*, 493 So. 2d 1100, 1102 (Fla. Dist. Ct. App. 1986).

Third, Greenville Water presents no evidence that it timely relied on the Certificate to purchase the pipes. It is not enough to merely allege, subsequent to the purchase, that "had Greenville Water known that the Defective Pipes did not meet the requirements of ANSI/AWWA Standard C104/A21.4 it would not have purchased the Defective Pipes." (Compl. ¶ 78; R. at 41.) Greenville Water must establish that it had received the Certificate before or at the same time as it bought the goods from U.S. Pipe for any representations in that Certificate to form the basis of its bargain. *See Stevenson v. B. B. Kirkland Seed Co.*, 176 S.C. 345, 352–53, 180 S.E. 197, 200 (1935) (explaining that plaintiff must rely on the warranty made at the time of purchase, not after the fact); *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575, 582 (8th Cir. 1980) (rejecting attempts to read warranty into agreement months after purchase). Greenville Water makes no such allegation. Although Greenville Water claims that buyers usually rely on certificates of product compliance, (Compl. ¶ 47; R. at 34), this allegation stops short of establishing that Greenville Water relied on the Certificate. Moreover, the introduction to the Complaint states that Greenville Water "makes the following allegations upon personal knowledge as to its own acts, *upon information and belief and its attorneys' investigation as to all other matters*," (Compl. at 1 (emphasis added); R. at 23), so this general statement on "information and belief" is not entitled to any deference from the Court, *Career Counseling, Inc. v. Amerifactors Fin. Grp.*, No. 3:16-cv-03013-JMC, 2017 WL 4269458, at *5 (D.S.C. Sept. 26, 2017) (finding use of "upon information and belief" was an inadequate substitute for providing detail that should be squarely within the plaintiff's control). The closest Greenville Water comes to a reliance allegation is that, "[c]onsequently, Greenville Water relied upon U.S. Pipe's Certificate of Product Compliance," (Compl. ¶ 51; R. at 35), but the balance of that allegation is that the reliance was for the purpose of ensuring compliance. Greenville Water does *not* allege that it relied on the Certificate to buy the pipes. It does not even

allege when it received, or how it relied on, the Certificate. (*Id.*) The claim that it relied on the Certificate is also not included in the Schmidt Affidavit Greenville Water submitted to the Circuit Court. (Mem. in Opposition, Ex. A, Schmidt Aff.; R. at 173.) Indeed, Schmidt does not even reference the Certificate and no authenticated copy of the Certificate is in the record.[5] So no facts in the record support a finding that Greenville Water relied on the Certificate when it bought the pipes such that it could form the basis of its claims. (Order at 13; R. at 13.)

Instead of the Certificate, the Terms establish the contract between the parties. Although Greenville Water claims it has "never . . . been notified—by U.S. Pipe, [Distributors], or any private developer—of U.S. Pipe's Terms," (Schmidt Aff. ¶ 8; R. at 174), the record confirms that Greenville Water received several different communications and transaction documents referencing different terms of sale involving U.S. Pipe, (Arbitration Mot. Reply Br., Exs. A–C; R. at 226, 228, 231).[6] Greenville Water even alleges that documents apart from the Certificate established the representations on which it now claims to rely. (Compl. ¶¶ 2, 70, 71; R. at 24, 39, 40.) For the reasons set forth above, those Terms—and not the Certificate of Product Compliance—form the basis of the parties' contract. The Court should thus reverse and compel this matter to arbitration.

[5] Greenville Water did not submit a full copy of the Certificate until the PowerPoint at the hearing, which it did not serve on U.S. Pipe beforehand. Only a portion of the Certificate is included in the Complaint. (Compl. ¶ 48; R. at 35.)

[6] At the least, this contradiction creates an issue of material fact as discussed in Section IV, below.

C. Greenville Water is bound to the contract entered into by Distributors, which were acting as its agents.

Greenville Water's argument that it did not know about the Terms because it never contracted directly with U.S. Pipe also ignores the agency relationship between Greenville Water and Distributors.

For contracts, an entity can be bound by an acceptance made by another if there is an agency relationship between the two. *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd*., 944 F.3d 225, 236 (4th Cir. 2019) (citing *Sampson & Wyatt v. Singer Mfg. Co*., 5 S.C. 465, 467 (1875)). "An agent contracting with the authority of his principal binds him to the same extent as if the principal personally made the contract." *S.C. Ins. Co. v. James C. Greene & Co*., 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986). And within the agency relationship, the agent's knowledge of contractual terms or facts material to the transaction equates to knowledge of the principal. *Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority."). Therefore, "under the rule of imputation the principal is chargeable with the knowledge the agent has acquired, whether the agent communicates it or not." *Martin Marietta Corp. v. Gould, Inc*., 70 F.3d 768, 773 (4th Cir. 1995). This is because agency "is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013). Such agency can be established through apparent authority, which provides that the principal is bound by acts of his agent "when he has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom, is led to believe the agent has certain authority and in turn deals with

the agent based on that assumption." *Frasier v. Palmetto Homes of Florence, Inc*., 323 S.C. 240, 244, 473 S.E.2d 865, 867–68 (Ct. App. 1996). Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf. *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997).

Binding a principal to an arbitration agreement is no different. The authority to contract inherent in an agency relationship "can encompass an agreement to arbitrate made between an agent on behalf of his principal, on the one hand, and a third party on the other." *Berkeley Cnty.*, 944 F.3d at 237 (citing *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167, 174 (2019)) (cleaned up). Recently, the Fourth Circuit upheld enforcement of an arbitration provision in a contract adopted by an agent with apparent authority. *Naimoli v. Pro-Football, Inc.*, 120 F.4th 380, 390 (4th Cir. 2024). There, four plaintiffs sued after they were injured while attending a football game. *Id.* at 383. The defendants moved to compel arbitration based on the arbitration clause in the terms governing the use of the football tickets. *Id*. A non-party friend of the plaintiffs had bought the tickets online and then displayed the electronic tickets on his iPhone to provide entry into the game for himself, the plaintiffs, and four others. *Id.* at 382. The plaintiffs alleged they had never even seen the tickets, so they did not know about the Arbitration Agreement in the terms. *Id*. at 384.

On appeal, the Fourth Circuit held that the defendants reasonably relied on the non-party's apparent authority to enter into a contract on the plaintiffs' behalf: "Even though [the family friend] was the purchaser of the tickets, it was reasonable for the Washington Football Team to assume that in purchasing nine tickets, [he] did so both for himself and for the plaintiffs, as indicated by the purchase of multiple tickets and the plaintiffs' entry into the stadium by means of those tickets." *Id.* at 387. "Thus, not only was the Washington Football Team's reliance on [the family friend's] agency reasonable, its belief was traceable to the plaintiffs' manifestations—their

use of the tickets to enter the stadium." *Id.* at 388. Ultimately, the court determined that actual awareness was not a condition for apparent authority and held that the plaintiffs were bound to the non-party's contract with the defendants. *Id.*; *see also Jackson v. World Wrestling Ent., Inc.*, 95 F.4th 390, 392 (5th Cir. 2024) (holding that an "individual who permits a third party to present a ticket for admittance to an event on his behalf is bound by the terms and conditions governing the use of that ticket."); *Durham v. Airbnb, Inc.*, No. 24-cv-02523-SAG, 2025 WL 675319, at *3 (D. Md. Mar. 3, 2025) (holding Airbnb reasonably relied on the apparent authority of an individual to act on behalf of her rental party, and when the nine-person rental party stayed at the premises, they manifested their acceptance to the contract terms).

Here, Greenville Water sought to purchase a large quantity of goods manufactured by U.S. Pipe. (Compl. ¶¶ 61, 62, 64; R. at 38.) It did so just as it had done for years before: through its agents, never contracting directly with U.S. Pipe. (Compl. ¶¶ 61, 64.; R. at 38.) Greenville Water placed orders for the pipes through Distributors, (Compl. ¶¶ 1, 61; R. at 23, 38), which then purchased the pipes from U.S. Pipe for Greenville Water, (Compl. ¶¶ 16–19; R. at 28.) Greenville Water alleges separate contractual relationships existed between it and U.S. Pipe, and then between it and Distributors: "Greenville Water entered into a contractual relationship with U.S. Pipe," and "Greenville Water *also* entered into contractual relationships with" Distributors. (Compl. ¶ 70, 71; R. at 39–40; *see also* Compl. ¶ 74 (referring to "Defendant**s**' contract**s** with Greenville Water") (emphasis added); R. at 40.) It also alleges that Distributors bought pipes from U.S. Pipe at Greenville Water's direction and for Greenville Water's benefit. (Compl. ¶¶ 110–11; R. at 46.) The Complaint even alleges that U.S. Pipe "knew or should have known that Greenville Water was purchasing" the pipes for use its water system, even though Greenville Water bought the pipe through Distributors. (Compl. ¶ 104; R. at 45.)

Therefore, U.S. Pipe reasonably relied on Distributors' apparent authority to act on behalf of Greenville Water when the entities entered into a contract to buy the pipes. In so doing, Distributors agreed to the Terms issued by U.S. Pipe for the sale of its products on Greenville Water's behalf. Then, when Greenville Water used the pipes in its construction projects, (Compl. ¶¶ 61–62; R. at 38), it manifested acceptance of the contract terms entered by Distributors when acting as Greenville Water's agents. That is, 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. *See Naimoli*, 120 F.4th at 387–88 (the plaintiffs manifested their acceptance that friend was acting on their behalf in presenting and using the tickets to enter the game). Thus, Greenville Water's own allegations and actions establishes its knowledge of the Terms, which includes knowledge of the Arbitration Agreement accepted by Distributors on Greenville Water's behalf. *Miami Dolphins, Ltd. v. Engwiller*, No. 3D24-0605, 2025 WL 1064381, at *4 (Fla. Dist. Ct. App. Apr. 9, 2025) (arbitration provision in terms of football ticket purchased by the plaintiff's mother required the plaintiff to arbitrate her claims because the mother had acted as the plaintiff's agent when purchasing and presenting the ticket on the plaintiff's behalf to attend the game). As *Naimoli* instructs, it is immaterial whether Greenville Water had actual knowledge of the Arbitration Agreement given the knowledge of its agents. *Naimoli*, 120 F.4th at 388. This agency relationship confirms that Greenville Water knew about, and is bound by, the Arbitration Agreement. The Court should also reverse on this basis.

II. Direct benefits estoppel applies to prevent Greenville Water from avoiding the obligation to arbitrate while simultaneously suing in contract.

The Circuit Court mistakenly allowed Greenville Water to escape its arbitration obligations by applying an overly restrictive view of direct benefits estoppel. A plaintiff asserting a contractual relationship with a defendant who sues that defendant for contract-based claims and contract-based

damages must be exploiting the contractual relationship to do so. Thus, that plaintiff is estopped to deny an applicable arbitration provision.

A. The Circuit Court erred in applying a presumption against arbitration.

As an initial matter, the Circuit Court erred in ruling that a presumption against arbitration exists. (Order at 9; R. at 9.) While our Supreme Court has previously suggested 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, 827 S.E.2d at 173, that presumption cannot be squared with the United State Supreme Court's more recent opinion in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). There, the Court rejected an arbitration-specific test to determine whether litigation conduct amounted to waiver. *Id.* at 419. The Court explained that the federal arbitration policy under the FAA requires that "a court must hold a party to its arbitration contract just as the court would to any other kind. . . . The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 412. If equality is the FAA's policy, then it would contradict the FAA for a court to treat a nonsignatory challenging arbitration any different than it would for a court to treat a nonsignatory to a warranty limitation or other third-party beneficiary status. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (explaining FAA's policy of placing arbitration agreements on "upon the same footing as other contracts, where it belongs"); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("The FAA preempts state law to the extent it treats arbitration agreements differently than other contracts."). Moreover, our Supreme Court more recently clarified that no presumption in favor of arbitration exists. *See Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023). Thus, it would violate the FAA to hold the opposite is true. *See Morgan*, 596 U.S. at 418.

B. Greenville Water is knowingly exploiting the Terms.

Even if the Circuit Court were correct that Greenville Water did not agree to the Terms, Greenville Water still must arbitrate its claims. South Carolina law estops a non-signatory from avoiding an arbitration clause when the plaintiff receives a direct benefit from the contract containing the clause. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012); *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177 ("[A] party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him."). The estoppel test focuses on the benefit the non-signatory receives from the contract in the dispute. *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. That direct benefit can be shown by the plaintiff "consistently maintaining other provisions of contract should be enforced" or when the plaintiff "knowingly exploits the benefits of an agreement" containing the arbitration clause. *Id*. at 340, 827 S.E.2d at 175.

The circuit court misapplied the direct benefits estoppel test in denying the Arbitration Motion. (Order at 5, 11–13; R. at 5, 11–13.) Direct benefits estoppel applies here because Greenville Water is seeking to gain a benefit from the contractual relationship between the parties, which necessarily requires reliance on some contractual terms between it and U.S. Pipe. The Circuit Court incorrectly concluded that Greenville Water has not sued under the Terms and only brings claims based on an implied contract or the Certificate. (*Id.* at 13; R. at 13.) Although Greenville Water does plead one statutory claim, the substance of its claims—that U.S. Pipe warranted certain characteristics of the pipes—arises 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. *See 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—that is, the alleged liability 'arises solely from the contract or must be determined by reference to it'—equity prevents a person from avoiding the arbitration clause that was part of that agreement.") (citation omitted). Indeed, this is why Greenville Water incorporates by reference the same factual allegations into each of its claims. (Compl. ¶¶ 75, 89, 102, 115; R. at 40, 43, 45, 47.)

Even if the Circuit Court somehow determined the goods manufactured by U.S. Pipe were defective and did not fully comply with Greenville Water's specifications, Greenville Water concedes that it bought and paid for the pipes, Distributors supplied those goods, and Greenville Water put the pipes in the ground. (Compl. ¶¶ 52–62; R. at 36–38.) This performance was still a direct benefit to Greenville Water, even if it tries to classify that performance as partial by alleging it did not receive the full benefit of its bargain. *See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 275 (E.D.N.Y. 2019) (binding plaintiff to arbitration after his use of spouse's Amazon account to order product and later suing under federal consumer law about marketing that product), *aff'd*, 815 F. App'x 612 (2d Cir. 2020); *see also In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 292–93 (5th Cir. 2015) (granting mandamus of tort and fraud claims on direct benefits estoppel theory, reasoning that "if we assume that [the defendant's] performance was deficient, however, that partial performance was still a direct benefit to [the plaintiff]."). Indeed, that performance—the goods were sold but did not live up to the alleged specifications—forms the crux of Greenville Water's breach of contract and breach of warranty claims. (Compl. ¶¶ 79, 92, 105, 121; R. at 41, 43, 45, 48.) The assertion of those contractual claims also establishes sufficient reliance on the Terms to warrant application of the direct benefits estoppel doctrine here.

C. *Wilson v. Willis* is distinguishable because Greenville Water asserts contractual, and not tort, claims.

The Circuit Court erred in its focus on *Wilson v. Willis* to reject U.S. Pipe's direct benefits estoppel argument. The plaintiff in *Wilson* raised only tort and statutory claims—no claims for breach of contract or related causes of action. *Id*. at 331, 827 S.E.2d at 170. The key theme across the twelve lawsuits at issue in *Wilson* was the fraud committed by the insurance agent that was the sole connection between the plaintiffs and the insurance companies who moved to compel arbitration. *Id*. at 332, 827 S.E.2d at 170. The plaintiffs in *Wilson* had no relationship, contractual or otherwise, with the insurers who sought to assert their arbitration rights.

By contrast here, Greenville Water not only asserts contractual claims, but expressly alleges that a contractual relationship exists between the parties. In at least eight places in the Complaint, Greenville Water expressly or impliedly asserts a contract between it and U.S. Pipe, (Compl. ¶¶ 13, 70–71, 74, 116, 118, 121, 143; R. at 27, 39–40, 47, 48, 52), including allegations that:

- "Greenville Water entered into a contractual relationship with U.S. Pipe and, among *other* written documents and communications, U.S. Pipe provided Greenville Water with a written certificate . . ." (Compl. ¶ 70; R. at 39) (emphasis added).
- "Greenville Water seeks a declaration that the . . . pipe . . fails to comply with [the standard], in violation of Defendant**s**' contract**s** with Greenville Water . . ." (Compl. ¶ 71; R. at 40) (emphasis added).
- "Greenville Water entered into an implied contract with U.S. Pipe . . ." (Compl. ¶ 116 R. at 47).

- "*Alternatively*, to the extent a valid contract was not formed between Greenville Water and Defendant**s** . . ." (Compl. ¶ 143; R. at 52) (emphasis added).

U.S. Pipe recognizes that merely arguing that the claim could not have arisen without that contract being in place is not enough. *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176. But these facts move the case well past some sort of "but for" analysis into the realm of a direct contractual benefit being conferred on Greenville Water by U.S. Pipe, which makes *Wilson* inapplicable here.

This case is more akin to *Pearson*, in which this Court applied direct benefits estoppel to claims for retaliatory discharge, defamation, and breach of contract. *Pearson*, 400 S.C. at 286, 733 S.E.2d at 599. There, a doctor was equitably estopped from asserting that he was not bound by an arbitration clause in a contract between a hospital and a placement company. *Id*. at 296–97, 733 S.E.2d at 605. This Court concluded the doctor received a benefit from the hospital's contract with the placement company. *Id*. The contract containing the arbitration clause allowed the doctor to work at the hospital and receive payment for that work and, if not for the contract, he would have had to make separate arrangements directly with the hospital for that work. *Id*. Important to this Court in *Pearson*, the doctor raised a claim for *breach of contract* against both the placement company and the hospital. *Id*. at 297, 733 S.E.2d at 605. As a result, this Court reasoned that the doctor was "seeking either to receive damages under [the placement company] and the Hospital's contract, or to hold the Hospital accountable under his" contract with the placement company. *Id*.

Unlike *Wilson*, Greenville Water alleges a contractual relationship with U.S. Pipe. This was one of the tipping points in *Pearson* leading to the application of direct benefits estoppel. Greenville Water, however, goes a step further, suing for contractual claims and seeking contractual damages from U.S. Pipe. The Court should reverse to correct the Circuit Court's misapplication of *Wilson*.

D. Estoppel is intended to prevent injustice, which is occurring here.

As the Circuit Court correctly points out, courts generally apply estoppel doctrines only "to prevent injustice." (Order at 11; R. at 11.) Greenville Water's actions confirm that is going on here in multiple respects, so the Court should reverse and apply direct benefits estoppel.

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. Accepting Greenville Water's arguments could lead to limitless and ever-expanding liability for manufacturers to downstream purchasers. If downstream purchasers having no privity with the manufacturer can freely ignore contractual limitations placed on warranties, then the Court would be inviting suits of all types regardless of the allocation of risk inherent in those contractual limitations. Hence, arbitration should be ordered here.

III. The Circuit Court erred in deciding issues of enforcement delegated to the arbitrator, and in ruling the Arbitration Agreement was unconscionable.

Because the parties properly delegated "arbitrability" issues to an arbitrator, the Circuit Court erred in ruling the Arbitration Agreement was unconscionable. Even if the Circuit Court could have properly considered this issue, it erred in determining the Arbitration Agreement was unconscionable merely because it was in a contract of adhesion. Thus, this Court should reverse.

A. An arbitrator, and not the court, should decide questions of arbitrability.

The United States Supreme Court has explained that parties may have different types of disputes within the arbitration context. *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148–49 (2024). "A contest over the merits of the dispute is a first-order disagreement, the resolution of which depends on the applicable law and relevant facts. The parties may also have a second-order dispute—

whether they agreed to arbitrate the merits—as well as a third-order dispute—who should have the primary power to decide the second matter." *Id*. (cleaned up).

A third-order dispute, "who should have the primary power to decide," is implicated here. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). "As long as the parties' agreement delegates the arbitrability question to an arbitrator 'by clear and unmistakable evidence,' a court may not override the contract and decide the arbitrability question." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 700, 869 S.E.2d 859, 864 (Ct. App. 2022) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. 63, 69 (2019)). In part, this is because the "FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (citations omitted).

In *Rent-A-Center*, the "'controversy' between the parties [was] whether the [Arbitration] Agreement is unconscionable." 561 U.S. at 68. That arbitration agreement contained a delegation clause in which the parties agreed that the "Arbitrator shall have exclusive authority to resolve any dispute relating to the enforceability of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id*. (alterations omitted). The Supreme Court explained that a delegation clause was just "an agreement to arbitrate threshold issues concerning the arbitration agreement," *id.*, which the Court construed to include "gateway questions of arbitrability," *id*. at 68–69. Ultimately, the Court held that whether the contract was unconscionable was one properly delegated to the arbitrator by applying the Court's separability

doctrine. *Id*. at 70 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 403–404 (1967)); *see also Palmetto Wildlife*, 435 S.C. at 699–700, 869 S.E.2d at 864 (discussing *Rent-A-Ctr.*, 561 U.S. at 68–69).

Relevant here, the Arbitration Agreement states that "[a]ny controversy or claim . . . including the arbitrability thereof, shall be settled by binding arbitration administered by the American Arbitration Association in accordance with the then-current Commercial Arbitration Rules." (Arbitration Mot., Ex. A, Terms at 5; R. at 151.) Yet the Circuit Court concluded that the agreement was not enforceable because it was unconscionable. (Order at 14–16; R. at 14–16.) The Circuit Court erred in deciding this question. Just as in *Rent-A-Center*, an arbitrator should decide Greenville Water's gateway claims of unconscionability in the first instance. This is so for two reasons. First, the Terms here have a delegation clause: "Any controversy . . . including the *arbitrability* thereof, shall be settled by binding arbitration . . ." (*See* Arbitration Motion, Ex. A, Terms at 5–6; R. at 151–52.) This statement shows a clear intention that the parties wanted an arbitrator to decide unconscionability. Put another way, the parties' "third-order dispute—who should have the primary power to decide"—is resolved by the clear language delegating questions of arbitrability to the arbitrator. *Coinbase*, 602 U.S. at 148–49. The Circuit Court, therefore, was powerless to "override the contract and decide the arbitrability question." *Palmetto Wildlife Extractors*, 435 S.C. at 700, 869 S.E.2d at 864.

Second, the Arbitration Agreement delegates the resolution of the unconscionability issue by its express invocation of the American Arbitration Association's Commercial Arbitration Rules. (*See* Arbitration Mot., Ex. A, Terms and Conditions of Sale at 5–6; R. at 151–52.) The AAA's Commercial Rules state that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the

arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court." Am. Arbitration Assoc. Commercial Rules, Rule 7(a) (Sep. 1, 2022).

Other federal circuit courts of appeal have determined that incorporating the AAA Rules equates to delegation of arbitrability questions. *In re StockX Customer Data Sec. Breach Litig*., 19 F.4th 873, 879 n.2 (6th Cir. 2021) ("This court, and each of the ten other circuits to address the issue, has held that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." (quotation omitted)). State courts agree. *See, e.g.*, *Uber Techs., Inc. v. Royz*, 517 P.3d 905, 910 (Nev. 2022) ("[A]s many courts have found, incorporating the AAA's rules, even without more, constitutes clear and unmistakable evidence of intent to submit the question of arbitrability to the arbitrator."); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("As a matter of policy, we adopt the majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator."). Although the Fourth Circuit has not yet done so with the AAA rules, it has previously held that, "in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as 'clear and unmistakable' evidence of the parties' intent to arbitrate arbitrability." *Simply Wireless, Inc v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017). Given the sophisticated nature of these parties and the clear invocation of the AAA Rules, the Circuit Court should have deferred the unconscionability question to the arbitrator.

U.S. Pipe recognizes, however, that just because "agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue," it is the court which must decide the issue even in the face of a valid delegation clause. *Rent-A-Ctr*., 561 U.S. at 71. But that is not the allegation made by

Greenville Water here. The actual argument Greenville Water raised attacked the validity of the contract as a whole: "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 Opposition at 14; R. at 170.) Such an argument is nothing more than one that "challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Rent-A-Ctr.*, 561 U.S. at 70. Put another way, it is Greenville Water's claim that it cannot be bound by any agreement placed on U.S. Pipe's website because that form of contracting is, by definition, unconscionable. (Mem. in Opposition at 13–14; R. at 169–70.)

It is this type of challenge to the contract as a whole that must be decided in the first instance by an arbitrator. *Rent-A-Ctr.*, 561 U.S. at 70; *Wu v. Uber Techs., Inc.*, 78 Misc. 3d 551, 576, 186 N.Y.S.3d 500, 522 (N.Y. Sup. Ct. 2022) ("Furthermore, even where such a challenge [on unconscionability grounds] is directed specifically at the arbitration provision, if the contract also contains a delegation provision delegating resolution of that challenge to an arbitrator and that delegation provision is not itself directly challenged, the *Prima Paint* severability doctrine, as extended by Rent-A-Center, operates to foreclose judicial review."), *aff'd*, 219 A.D.3d 1208, 197 N.Y.S.3d 1 (2023), *aff'd*, No. 90, 2024 WL 4874383 (N.Y. Nov. 25, 2024). Indeed, the AAA Commercial Rules contemplate a scenario in which a party attacks the validity of the contract containing the arbitration agreement, but with the arbitrator still being empowered to decide arbitrability issues: "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. . . . A decision by the arbitrator that the

contract is null and void shall not for that reason alone render invalid the arbitration clause." Am. Arbitration Assoc. Commercial Rules, Rule 7(b).

Precedent from our appellate courts does not require a different result. The primary case on which the Circuit Court relied, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), analyzed unconscionability under the South Carolina Uniform Arbitration Agreement, not the FAA. In so doing, our Supreme Court analyzed the question without the benefit of the United States Supreme Court's application of the arbitrability analysis to unconscionability claims in *Rent-A-Center*. Without that guidance, our Supreme Court mistakenly concluded that the SCUAA "and FAA provisions that apply to the issues are nearly identical," so "the analysis under state law is ultimately the same as the analysis under federal law." *Id*. at 22 n.1, 644 S.E.2d at 667 n.1. For similar reasons, this Court's opinion in *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, does not apply here. 444 S.C. 521, 530 n.3, 908 S.E.2d 892, 897 n.3 (Ct. App. 2024), *cert. granted*, No. 2024-002098 (S.C. Sup. Ct. June 25, 2025).[7] The opinion only applies the SCUAA and it fails to analyze our Supreme Court's most recent precedent on delegation in *Sanders v. Savannah Highway Auto. Co.*, which discussed the difference between contract formation and contract validity. 440 S.C. 377, 391, 892 S.E.2d 112, 119 (2023).

The Circuit Court's alternative conclusion that the agreement was unconscionable despite this clear and unmistakable delegation provision ignores binding United States Supreme Court precedent confirming that an arbitrator must decide that question. *Rent-A-Ctr.*, 561 U.S. at 68.

[7] This Court must reconcile our Supreme Court's decision in *Simpson* with *Rent-A-Center*, which this Court must follow under the Supremacy Clause of the United States Constitution even in the face of binding precedent from the South Carolina Supreme Court. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) ("Lower court judges are certainly free to note their disagreement with a decision of this Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." (internal quotation marks omitted)).

Therefore, the Circuit Court committed legal error in failing to compel the action to arbitration and in failing to leave the issue of whether the Terms were unconscionable to the arbitrator.

B. The Circuit Court erred in its unconscionability analysis because Greenville Water did not even allege procedural or substantive unconscionability.

Determining whether an arbitration agreement is tainted by an absence of meaningful choice is both fact-specific and context-specific. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611, 879 S.E.2d 746, 755 (2022) ("A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case."). In deciding whether an absence of meaningful choice taints a contract term, courts must consider all the facts and circumstances, including "the parties' relative sophistication." *Id*. at 613, 879 S.E.2d at 775.

Contrary to the case-by-case determination required by *Damico*, the Circuit Court simply applied the general proposition that a contract of adhesion must be viewed with skepticism, ending its analysis there. (Order at 14–15; R. at 14–15.) The balance of its ruling on the unconscionability issue is singularly focused on Greenville Water's argument that it had no part in specifically negotiating the Terms. (*Id.*) As this Court has explained, however, commercial transactions in the modern age differ from the traditional face-to-face negotiation and drafting of contracts for services. *Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus., Inc*., 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991) ("The rise of mass produced goods, the growth of markets, and the advance of communications technology have brought changes from former methods of making commercial contracts. Many such contracts are no longer concluded on a face to face basis nor are they individually drafted."). The Circuit Court's mere reliance on the Terms being a contract of adhesion "fails to accommodate the realities of much modern commercial practice." *Id*. Moreover, the "distinction between a contract of adhesion and unconscionability is worth

emphasizing: *adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed*." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756.

The Circuit Court then compounded this error by rejecting U.S. Pipe's argument that the Arbitration Agreement was commercially reasonable under the second prong of the unconscionability analysis. That the Circuit Court was confronted with what it deemed a contract of adhesion was not sufficient standing alone. "Rather, to constitute unconscionability, the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755 (citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996)). The Circuit Court correctly noted that this prong requires courts to "focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decisionmaker." (Order at 14; R. at 14.) But the Circuit Court incorrectly limited its analysis to the adhesive-nature of the contract, thereby conflating the two prongs.

The Circuit Court erred in this regard. The Arbitration Agreement can hardly be said to be geared towards some sort of biased decision by a partisan decisionmaker. *Damico*, 437 S.C. at 612, 879 S.E.2d at 755 (citing *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668, and *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). After all, both Greenville Water *and* U.S. Pipe must arbitrate any claims—the Arbitration Agreement contains no carve-out for particular types of claims, whether they be offensive or defensive. *One Belle Hall*, 418 S.C. at 65, 791 S.E.2d at 294 (analyzing mutuality of arbitration obligation). What's more, the Arbitration Agreement does not limit any rights or remedies that Greenville Water may have, except that it prohibits class or representative actions. This limitation, however, is regularly upheld under the FAA. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91–94, 749 S.E.2d 139, 151–53 (Ct. App. 2013)

(upholding a class action waiver in an arbitration agreement under the FAA); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 517 (2018) (collecting cases upholding class action waivers in the arbitration context). Thus, the Circuit Court erred in concluding that the Arbitration Agreement could not be enforced against Greenville Water merely because it was not specifically negotiated by the parties.

IV. Alternatively, the Circuit Court erred by resolving disputes of material fact and by not determining the full terms applicable to the parties' agreement.

Failing outright reversal and compelling arbitration, at minimum this Court should remand because the Circuit Court erred in resolving disputes of material fact and in failing to conduct the full "battle of the forms" analysis to determine the terms of all of the parties' contracts. Remand is also appropriate in light of the transcription issues due to no fault of U.S. Pipe.

First, the Circuit Court erred in resolving factual disputes without holding a summary trial under the FAA. Section 4 of the FAA provides that "[i]f the making of [an] arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. Under applicable federal law, courts must conduct a trial when a party unequivocally denies that an arbitration agreement exists and shows sufficient facts supporting their claim. *Berkeley Cnty. Sch. Dist.*, 944 F.3d at 234. To decide whether "sufficient facts" support a party's denial of an agreement to arbitrate, the court must employ a standard such as the summary judgment test. *See Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015). In applying that standard, a court is entitled to consider materials other than the complaint and its exhibits. *See Galloway v. Santander Consumer USA, Inc*., 819 F.3d 79, 86 (4th Cir. 2016) (evaluating materials outside of complaint in assessing motion to compel arbitration).

The Circuit Court's mistaken resolution of factual disputes is similar to the district court's resolution of a disagreement over agency in *Berkeley County School District*. Applying South Carolina law in the context of an arbitrability dispute, the Fourth Circuit reversed and remanded,

finding that a genuine dispute of material fact existed regarding whether Berkeley Schools agreed to arbitrate the claims alleged. *Berkeley Cnty. Sch. Dist.*, 944 F.3d at 239 ("On the other hand, the Appellants rely on the fact that Berkeley Schools made payments of large sums of money to Knauff Insurance for purported brokerage services from 2005 through 2012. A reasonable factfinder could thus infer Berkeley Schools' knowledge of, and acquiescence to, the Agreements, which contained provisions relating to brokerage services.").

In a similar vein, Greenville Water argues a contractual relationship based on the Certificate and "other written documents and communications" with U.S. Pipe. (Compl. ¶ 70; R. at 39.) It also claims that U.S. Pipe made representations about the pipes in other "marketing and promotional materials." (Compl. ¶¶ 6–7, 49, 77; R. at 24–25, 35, 41.) Despite these repeated claims, Greenville Water does not specify what the "other written documents and communications" are, but claims it knew nothing of U.S. Pipe's Terms. (Mem. in Opposition, Ex. 1, ¶ 8; R. at 174.) Its Chief Administrative Officer's testimony that it "has never . . . been notified . . . of U.S. Pipe's Terms" is directly contradicted by the express references to the manufactures' warranties in Distributors' terms, as well as the other references to U.S. Pipe's terms in the pick tickets. (Mem. in Opposition, Ex. 1, Schmidt Aff. ¶ 8; Arbitration Mot. Reply Br., Exs. A–C; R. at 174, 226, 228, 231.) In the face of these contradictions, Greenville Water still claims to have entered into a contract, received goods from U.S. Pipe, and even paid more than $330,000.00 for the pipes. (Compl. ¶ 70; R. at 39.) Greenville Water's position is internally inconsistent because it received at least four documents from Distributors referencing at least *some* additional terms from U.S. Pipe. A reasonable factfinder could conclude that Greenville Water would not have actually paid for the pipes over a seven-month period were it not for the existence of the Terms. *Berkeley Cnty. Sch. Dist*., 944 F.3d at 239. So too could a reasonable factfinder conclude that

Greenville Water should have known about the Terms given their references elsewhere in light of its nature as a sophisticated purchaser of pipe and other construction materials.[8]

The Circuit Court also erred in making factual findings about Greenville Water's reliance on the Certificate. The record has no evidence about the timing of that Certificate in relation to the contract formation and the competing factual allegations made by Greenville Water itself. (Compl. ¶¶ 6–7, 9, 47–48, 51, 70, 77; R. at 24–25, 34–35, 39, 41.) These examples establish that whether Greenville Water reasonably relied on the Certificate create issues of material fact. *Simmons v. Ciba-Geigy Corp*., 279 S.C. 26, 28, 302 S.E.2d 17, 18 (1983) (holding that reliance on information provided about goods was a question of fact); *cf. Bell v. Harrington Mfg. Co*., 265 S.C. 468, 471, 219 S.E.2d 906, 907 (1975) (holding that whether salesman's statements created express or implied warranties was a question for the jury). The Circuit Court erred in deciding that question on this record.

Second, the Circuit Court erred in not deciding the terms of the parties' agreement. *Aceros Prefabricados, S.A. v. TradeArbed, Inc*., 282 F.3d 92, 99 (2d Cir. 2002) (conducting battle of the forms analysis to determine whether arbitration provision bound the parties). When considering which terms apply to a contract between merchants, "courts have held that addition of an arbitration clause is not a material alteration if the party had reason to know that such a clause would be included in a confirmation." *Schulze & Burch Biscuit Co. v. Tree Top, Inc*., 831 F.2d 709, 713 (7th Cir. 1987). This supports "the sound premise that because a usage of trade gives a party notice that a confirmation is likely to contain an arbitration clause, the confirmation's

[8] U.S. Pipe's position is that Greenville Water is charged with knowledge of U.S. Pipe's Terms as a matter of both law and fact—it was told by Distributors of the existence of "manufacturer's terms" and also the contractual limitations apply to Grenville Water as a downstream purchaser. (Arbitration Mot. Reply Br., Exs. A–C; R. at 226, 228, 231.) If this Court declines to agree, at minimum there is a fact dispute here that would need to be addressed on remand.

inclusion of the clause is not an unreasonable surprise." *Id.* As outlined above, Greenville Water is a sophisticated business entity and highly experienced in the water systems industry. This gives rise to material factual dispute as U.S. Pipe argues that Greenville Water knew, or should have known, about the Arbitration Agreement. At the very least, the Circuit Court should have analyzed the various agreements to better define the terms of the contracts here.

Finally, in addition to the above, remand is appropriate because of the transcription errors that speak for themselves in the transcript.[9] Despite calling the transcript problems to the attention of the court reporting service, a second run at improving upon the transcription errors did little to fix the apparent problems.

For all of these reasons, and failing outright reversal and the compelling of arbitration, there should at minimum be a remand for a summary trial and appropriate fact finding.

Conclusion

In light of the existence of a valid and enforceable Arbitration Agreement covering Greenville Water's claims against U.S. Pipe, this Court should reverse the Circuit Court and remand the matter for entry of an order compelling Greenville Water to submit its claims to arbitration and staying these proceedings.

[Signature on following page.]

[9] The undersigned's understanding is that the errors resulted from a microphone at counsel table not being activated.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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

v.

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

of which

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

Certificate of Counsel

The undersigned certifies that Appellant United States Pipe and Foundry Company, LLC's Final Brief complies with Rule 211(b), SCACR.

[Signature on following page.]

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