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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Daniel Coble, Circuit Court Judge

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Appellate Case No. 2025-001658

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Linda Plaag and Robert Plaag, ..... Respondents,

v.

Charles Oliver, Leanna Oliver, Davis Oliver, Devin Patel, Foundations Investment Advisors, LLC, Strategic Equity Energy a Series of V360 Holdings LLC, Strategic Equity Path, LP, Strategic Equity Path, GP, Strategic Equity Technology a Series of V360 Holdings LLC, Strategic Equity Technology LLC, Strategic Equity Technology Management LLC, Hidden Wealth Management LLC, Alternative Wealth Solutions, LLC, The Institute of Financial Enrichment, LLC, Strategic Retirement Solutions, LLC, American Equity Investment Advisors, LLC, Innovative Medical Enterprises, LLC, CDO Enterprises, Inc., Event Labels LLC, Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners, LLC, Moving Future, LLC, Incredible Concepts, LLC, Upside Solutions, LLC, Oliver Avery and Bryant LLC, ERP LLC, GITW, LLC, Legacy of Faith LP, Legacy of Faith Trust, and John Doe Corporate Entities,..... Defendants.

Of which Charles Oliver, Leanna Oliver, Davis Oliver, Strategic Equity Energy a Series of V360 Holdings LLC, Strategic Equity Path, LP, Strategic Equity Path, GP, Strategic Equity Technology a Series of V360 Holdings LLC, Strategic Equity Technology LLC, Strategic Equity Technology Management LLC, Hidden Wealth Management LLC, Alternative Wealth Solutions, LLC, The Institute of Financial Enrichment, LLC, Strategic Retirement Solutions, LLC, American Equity Investment Advisors, LLC, Innovative Medical Enterprises, LLC, CDO Enterprises, Inc., Event Labels LLC, Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners, LLC, Moving Future, LLC, Incredible Concepts, LLC, Upside Solutions, LLC, Oliver Avery and Bryant LLC, ERP LLC, GITW, LLC, Legacy of Faith LP, and Legacy of Faith Trust are the Appellants.

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**FINAL BRIEF OF APPELLANTS**

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June 12, 2026

Charleston, South Carolina

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### **STATEMENT OF ISSUES ON APPEAL**

1. Whether the circuit court erred in finding that Appellants, as non-signatories, could not compel arbitration even though the circuit court found that Respondents entered into a valid and enforceable arbitration agreement that covers the exact same claims asserted by Respondents against other defendants.
2. Whether the trial court erred by failing to determine that Appellants did not waive their right to compel arbitration.



## **STATEMENT OF THE CASE**

This appeal arises from the circuit court’s Order denying the Appellants’ motion to compel arbitration. The Appellants are Charles Oliver, Leanna Oliver, Davis Oliver, Strategic Equity Energy a Series of V360 Holdings LLC, Strategic Equity Path, LP, Strategic Equity Path, GP, Strategic Equity Technology a Series of V360 Holdings LLC, Strategic Equity Technology LLC, Strategic Equity Technology Management LLC, Hidden Wealth Management LLC, Alternative Wealth Solutions, LLC, The Institute of Financial Enrichment, LLC, Strategic Retirement Solutions, LLC, American Equity Investment Advisors, LLC, Innovative Medical Enterprises, LLC, CDO Enterprises, Inc., Event Labels LLC, Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners, LLC, Moving Future, LLC, Incredible Concepts, LLC, Upside Solutions, LLC, Oliver Avery and Bryant LLC, ERP LLC, GITW, LLC, Legacy of Faith LP, and Legacy of Faith Trust (collectively, “Appellants”). The court denied the motion (1) despite finding a valid and enforceable arbitration agreement exists which requires Respondents to arbitrate their claims against defendants Foundations Investment Advisors, LLC and Devin Patel, (2) despite the agreement delegating gateway issues, including arbitrability, to the arbitrator, and (3) despite the arbitration provision plainly encompassing the claims asserted against Appellants. The court refused to compel arbitration of the claims against Appellants on the ground that they did not offer “admissible evidence” of a separate agreement between them and Respondents. This appeal follows.

## **STANDARD OF REVIEW**

An appeal from the denial of a motion to compel is subject to de novo review. *See Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 383, 892 S.E.2d 112, 115 (2023) (citing *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005)). Whether litigation conduct amounts to waiver of the right to arbitrate is also a legal conclusion

reviewed de novo. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999).

### **STATEMENT OF FACTS**

This appeal concerns Appellants' ability to compel arbitration of Respondents' claims against them, where the trial court already compelled arbitration of the same exact claims against other defendants and where Respondents' expressly allege that all defendants, acting together, caused Respondents' to suffer damages. The arbitration provision itself and the law require that the arbitrator determine whether Appellants are entitled to arbitration of Respondents' claims. Regardless, even if this Court addresses the arbitrability of Respondents' claims, the result is the same. Even as non-signatories to the agreement containing the arbitration provision, Appellants are clearly entitled to compel arbitration under the facts of this case. The circuit court's ruling, which would result in piecemeal litigation of the exact same claims was error. As detailed below, this Court should find that Appellants are entitled to compel arbitration.

#### **I. RESPONDENTS' ALLEGATIONS**

The Respondents, Linda Plaag and Robert Plaag ("Respondents"), filed this action against Foundations Investment Advisors, LLC ("FIA"), Devin Patel, and Appellants, alleging that FIA and certain defendants played various roles in encouraging Respondents to place their assets in "investments which were either highly risky, unprofitable, improper, and/or plainly fraudulent." (Compl. ¶ 66; R. p. 36). The Complaint alleges Charles "Chuck" Oliver founded The Hidden Wealth Solution, which provides advisory services through The Institute of Financial Enrichment, LLC and Hidden Wealth Management, LLC, and that The Hidden Wealth Solution operates as an affiliate of FIA within FIA's "network of affiliated offices." (Compl. ¶¶ 1, 7, 15 and 26; R. pp. 21, 23, 24, and 26). To that point, the Complaint states that FIA provides financial advisory services through "a network of affiliated offices[,] including The Hidden Wealth Solution." (*Id.* ¶

15; R. p. 24). Respondents further allege Devin Patel is a licensed investment advisor with FIA and a “pass-through” advisor for The Hidden Wealth Solution. (Compl. ¶ 15; R. p. 24). Central to Respondents’ theory, the Complaint pleads:

At all times relevant to this case, Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel were agents, representatives, and/or employees of The Hidden Wealth Solution and/or [FIA]. All their actions, inactions, omissions, and wrongdoing were performed for and on behalf of The Hidden Wealth Solution or [FIA] in the course and scope of their agency and/or employment. Therefore, in addition to Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel’s personal liability for their own actions, inactions, and omissions, The Hidden Wealth Solution and [FIA] are individually, jointly, severally, and totally liable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel under agency law and common law principles of *respondeat superior*.

(*Id.* ¶ 45; R. p. 29). The Complaint also alleges that “neither [Chuck Oliver], [Devin] Patel, nor [FIA], drew any line between which activities were conducted under [FIA] and which were under The Hidden Wealth Solution only.” (*Id.* ¶ 63; R. p. 35).

Respondents’ Complaint refers to the remaining defendants as the “Fund Defendants”<sup>1</sup> and the “Oliver Family Asset Defendants.”<sup>2</sup> (*Id.* ¶¶ 23 and 44; R. pp. 25 and 29). As to the Fund Defendants, the Complaint states: “At all times relevant to this case, Charles Oliver, Leanna Oliver, and Davis Oliver were agents, representatives, and/or employees of the Fund Defendants. All their actions, inactions, omissions, and wrongdoing were performed for and on behalf of the Fund Defendants in the course and scope of their agency and/or employment.” (*Id.* ¶ 46; R. p. 30).

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<sup>1</sup> The Complaint refers to Alternative Wealth Solutions, LLC, Strategic Equity Technology Management LLC, Strategic Equity Energy a Series of V360 Holdings LLC, Strategic Equity Technology LLC, Strategic Equity Technology a Series of V360 Holdings LLC, Strategic Equity Path, LP, Strategic Equity Path, GP as the “Fund Defendants.” (*Id.* ¶ 23; R. p. 25).

<sup>2</sup> Oliver Avery and Bryant LLC, ERP LLC, Strategic Retirement Solutions, LLC, Moving Future, LLC, Incredible Concepts, LLC, Upside Solutions, LLC, GITW, LLC, American Equity Investment Advisors, LLC, CDO Enterprises, Inc., Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners, LLC, Legacy of Faith LP, and Legacy of Faith Trust are referred to as the Oliver Family Asset Defendants. (*Id.* ¶ 44; R. p. 29).

As to the Oliver Family Asset Defendants, the Complaint claims that the Oliver Family Asset Defendants “along with the Fund Defendants and The Hidden Wealth Solution, operate indistinguishably from one another under the complete and absolute control of Chuck, Leanna, and Davis Oliver.” (*Id.* ¶ 44; R. p. 29). Plaintiffs claim, “the Oliver Family Asset Defendants serve no legal purpose and exist only to shield the Oliver Family’s assets from creditors, including defrauded investors like [Respondents].” (*Id.* ¶ 2; R. p. 22).

Respondents’ Complaint asserts claims for (1) breach of fiduciary duty; (2) aiding and abetting breach of fiduciary duty; (3) violation of the South Carolina Uniform Securities Act of 2005; (4) violation of the South Carolina Unfair Trade Practices Act; (5) fraud in the inducement, actual fraud, and constructive fraud; (6) fraudulent concealment; (7) negligent misrepresentation; (8) civil conspiracy; (9) breach of contract; (10) breach of contract accompanied by a fraudulent act; (11) quantum meruit/unjust enrichment; and (12) single business enterprise/alter ego/piercing the corporate veil/joint venture. (*Id.* ¶¶ 83 – 163; R. pp. 40 – 55). Underlying these causes of action, Respondents allege that all “Defendants” engaged in a common scheme to defraud Respondents. By way of example, the Complaint claims, “Defendants combined and agreed for the purpose of committing the acts and omissions described in the Causes of Action set forth in this complaint” and “Defendants took overt acts in furtherance of this conspiracy as also described in [the] complaint.” (*Id.* ¶¶ 137 – 138; R. p. 50).

## **II. PROCEDURAL HISTORY**

Respondents filed this action on November 27, 2024. Appellants accepted service of the Complaint on January 17, 2025. On February 14, 2025, Defendants Charles Oliver, Patel, and The Institute of Financial Enrichment, LLC filed an Answer. The remaining Appellants moved to dismiss Respondents’ Complaint for lack of personal jurisdiction and failure to state a claim. On February 26, 2025, FIA moved to compel arbitration based upon the IAR Investment Advisory

Agreement between FIA and Respondents (“FIA Agreement”). (FIA’s Motion to Dismiss or Stay, Including Discovery, and to Compel Arbitration; R. p. 80). Thereafter, on April 7, 2025, Appellants and Patel filed their Motion to Compel Arbitration, joining FIA’s motion and also seeking to compel arbitration pursuant to the arbitration provision within the FIA Agreement. (Appellants and Patel’s Motion to Compel Arbitration; R. p. 105).

The circuit court heard the motions to compel arbitration on July 8, 2025. In an Order entered on July 29, 2025, the circuit court granted the motion as to FIA and Patel only—finding “there is a valid and enforceable arbitration agreement between [FIA] and [Respondents] which covers this dispute” and “that the arbitration agreement covers claims against [Patel].” (Order at \*3 – 4; R. pp. 8 – 9). The circuit court also ruled that the arbitrator would decide any dispute over the applicable rules of arbitration. (*Id.*). As to Appellants, the circuit court denied the motion to compel arbitration, finding:

there is no agreement between [Appellants] and [Respondents]. [Appellants] instead argue that they fall within [FIA’s] arbitration agreement, which extends to [FIA’s] ‘representatives, directors, officers, employees, and agents.’ But [Appellants] offer no evidence that they are representatives, directors, officers, employees, or agents of [FIA]. They simply point to allegations in [Respondents’] complaint to that effect.

(Order at \*5; R. p. 10). The circuit court noted that the denial as to Appellants was “without prejudice as discovery may alter [the circuit court’s] ruling.” (*Id.* at \*6; R. p. 11).<sup>3</sup> On August 8, 2025, Appellants timely filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. (Appellants’ Motion to Alter or Amend; R. p. 350). That motion was denied by a Form 4 Order on August 13, 2025. (Form 4 Order on Appellants’ Motion to Alter or Amend; R. p. 16). Appellants timely filed this appeal on August 18, 2025. (Appellants’ Notice of Appeal; R. p. 436).

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<sup>3</sup> The circuit court also denied the Rule 12(b)(2) motion to dismiss filed by Leanna Oliver, Davis Oliver, Hidden Wealth Management, American Equity Advisory Group, the Fund Defendants, and the Oliver Family Asset Defendants. (Order, at \*7 – 8; R. pp. 12 – 13). That denial is not at issue in this appeal.

## **ARGUMENT**

Despite the circuit court finding the FIA Agreement's arbitration provision is valid and enforceable and finding that it covers the claims asserted by Respondents against FIA and Patel, the circuit court denied Appellants' motion to compel arbitration. The circuit court's ruling as to Appellants was in error. First, the language of the arbitration provision and its incorporation of the American Arbitration Association ("AAA Rules") requires that an arbitrator, not the court, decide "gateway issues", including whether Respondents' claims against Appellants are subject to arbitration. Regardless, even if this Court addresses issues of arbitrability, Respondents' claims against Appellants are subject to arbitration. Finally, Defendants have not waived the right to arbitration. For these reasons, as more fully set forth below, Appellants respectfully request that this Court reverse the circuit court's Order and direct that the matter proceed to arbitration.

### **I. APPELLANTS ARE ENTITLED TO COMPEL ARBITRATION OF ALL DISPUTES IN THIS MATTER, INCLUDING GATEWAY ISSUES OF ARBITRABILITY.**

#### ***A. The Circuit Court Correctly Found a Valid and Enforceable Arbitration Provision, Which Covers This Dispute Exists.***

The FIA Agreement's arbitration provision requires Respondents to arbitrate:

*all claims or controversies, and any related issues, which may arise at any time between the Parties (including FIA's representatives, directors, officers, employees, and agents) concerning any investment or planning advice, recommendation, or exercise of limited discretionary authority with respect to any subject matter, any transaction or order, the conduct of FIA or its representatives, directors, officers, employees, and agents [,] the construction, performance, or breach of this or any other agreement between the Parties, whether entered into prior to, on, or subsequent to the date of this Agreement the breach of any common law or statutory duty or the violation of any federal or state law of any nature shall be resolved by binding arbitration rather than by a lawsuit in a court of law or equity.*

(FIA Agreement ¶ 15.b.; R. p. 101). Significantly, the arbitration provision also expressly states, "[a]ny arbitration pursuant to this Agreement shall be in accordance with, and governed by, the Code of Commercial Arbitration of the [AAA Rules]." (See FIA Agreement ¶ 15.c.; R. p. 101).

The circuit court correctly held this provision is enforceable and that it covers the claims asserted by Respondents.<sup>4</sup> To that point, the circuit court’s Order plainly states that “there is a valid and enforceable arbitration agreement between [FIA] and [Respondents] which covers this dispute.” (Order at \* 3; R. p. 8). Thus, unlike other arbitration cases, this case presents “no...risk of sending a party to arbitration when that party *never* agreed to arbitration.” *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 391, 892 S.E.2d 112, 119 (2023) (emphasis in original). Here, it is undisputed that Respondents agreed to arbitrate the types of claims asserted in the lawsuit.

***B. The FIA Agreement Delegates Questions of Arbitrability, Including the Question of Whether Appellants Can Enforce the Arbitration Provision Against Respondents, to the Arbitrator.***

The fundamental question at the outset of this case is whether Appellants, as non-signatories to the FIA Agreement, can also compel Respondents’ claims to arbitration. However, “[w]hen one party challenges another party’s right to invoke an arbitration provision, the gateway question sometimes becomes: Does the court or the arbitrator decide whether the dispute is arbitrable?” *Id.* 440 S.C. at 383-84, 892 S.E.2d at 115 (citing *Peabody Holding Co. v. United Mine Workers of Am., Int’l Union*, 665 F.3d 96, 101 (4th Cir. 2012)). That question presents itself in

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<sup>4</sup> The application of the Federal Arbitration Act (“FAA”) in this matter cannot be disputed. “[T]he FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The FIA Agreement and relationship between Respondents, FIA, and Appellants clearly involve and affect interstate commerce. First, as is clearly stated in the FIA Agreement (and the Complaint), FIA is an Arizona limited liability company. (FIA Agreement preamble; R. p. 99; *see also* Compl. ¶ 15; R. p. 24). Plaintiffs are “citizens and residents of Richland County, South Carolina.” (Compl. ¶ 4; R. p. 22). Defendant Devin Patel, who executed the FIA Agreement on behalf of FIA, is alleged to be “a citizen and resident of Lake County, Florida.” (Compl. ¶ 12; R. p. 100). Appellants Chuck Oliver, Leanna Oliver, and Davis Oliver are alleged to be “citizen[s] and resident[s] of Mecklenburg County, North Carolina.” (Compl. ¶¶ 5, 8, 10 and 45; R. pp. 22, 23, and 29). The business dealings among the parties crossed state lines, and therefore, involved interstate commerce. Appellants cannot reasonably argue that its dealing with entities and individuals from three states outside of South Carolina does not affect interstate commerce. *See Am. Home Assurance Co. v. Vecco Concrete Constr. Co.*, 629 F.2d 961, 963 (4th Cir. 1980) (holding that a contract between a Delaware corporation and Virginia corporation established a sufficient interstate nexus to satisfy the FAA).



this case. Here, the arbitrator, as opposed to the court, should decide whether Respondents' claims against Appellants are subject to arbitration. The circuit court erred in reaching and purporting to decide this issue.

“[A]rbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.” *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. 63, 67, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019). “[A]n ‘agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” *Id.* at 68, 139 S. Ct. 524 (quoting *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 70, 130 S. Ct. 2772 (2010)). “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). “The parties may, of course, delegate these gateway issues to the arbitrator as long as there is ‘clear and unmistakable’ evidence of such delegation.” *Id.* “[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Henry Schein, Inc.*, 586 U.S. at 69, 139 S. Ct. 524. “Where, as here, a contract that is subject to the FAA contains a delegation clause, federal law governs whether the clause provides ‘clear and unmistakable’ evidence that the parties agreed to delegate questions of arbitrability. *See Blanton v. Domino's Pizza Franchising, LLC*, 962 F.3d 842, 846-47(6th Cir. 2020).

Pursuant to the FIA Agreement, Plaintiffs “waiv[ed] their right to seek remedies in court” and agreed that “all claims or controversies, **and any related issues...** shall be resolved by binding arbitration rather than by a lawsuit in a court of law or equity.” (FIA Agreement ¶ 15.b.; R. p.

101). In addition, the FIA Agreement states that “claims or controversies ... concerning the...**construction**, performance, or breach of [the FIA Agreement]...” would be decided by the arbitrator, not the court. (*Id.* (emphasis added)). The language of the FIA Agreement delegating gateway issues is clear and unmistakable.

Regardless, when like here, parties incorporate the AAA Rules, courts have found it to be clear and unmistakable evidence of the parties’ intent to arbitrate arbitrability that parties intended to delegate arbitrability issues to an arbitrator. *See 315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 530, 908 S.E.2d 892, 896 (Ct. App. 2024) (recognizing reference to AAA Commercial Arbitration Rules delegates gateway issues of arbitrability to the arbitrator); *NLM Servs., LLC v. K1 Speed Franchising, Inc.*, No. 9:23-CV-1777-RMG, 2023 WL 11887252, at \*3 (D.S.C. June 27, 2023) (holding incorporation of the AAA Rules “clearly and unmistakably delegates the arbitrability question to an arbitrator.”). The AAA Commercial Rules,<sup>5</sup> which Respondents expressly agreed would govern any disputes, unquestionably give the arbitrator authority to decide the “gateway questions” relevant in this case. Rule 7(a) of the AAA Commercial Rules provides: “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.” Rule 7(b) of the AAA Commercial Rules states: “The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part.”

“[C]ourts frequently and consistently find that when the arbitration provision incorporates arbitration rules, including the commercial rules of the American Arbitration Association..., there

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<sup>5</sup> The AAA Commercial Rules are available at <https://adr.org/industries/commercial/>.

is clear and unmistakable evidence that the parties intended to arbitrate arbitrability.” *In re Oaktree Med. Ctr., P.C.*, 640 B.R. 649, 660 (Bankr. D.S.C. 2022). This Court has previously recognized that incorporation of the AAA Rules delegates gateway issues of arbitrability to the arbitrator unless the arbitration provision is challenged on grounds of unconscionability. *See 315 Corley CW LLC*, 444 S.C. at 530, 908 S.E.2d at 896. This Court’s recognition is consistent with other courts that have addressed this issue. *See JPay, Inc. v. Kobel*, 904 F.3d 923, 936-38 (11th Cir. 2018) (“[by] expressly incorporating ... AAA rules,” an arbitration clause “clearly and unmistakably give[s] the arbitrator power to rule on his own jurisdiction, thus delegating questions of arbitrability to the arbitrator”); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017) (collecting cases from multiple circuits); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-64 (3d Cir. 2016) (“It appears that virtually every circuit to have considered the issue has determined that incorporation of the [AAA] rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” (citations omitted)); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (“[W]e hold that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.”); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (“We agree with most of our sister circuits that the express adoption of [the AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” (citations omitted)); *Cayenne Med., Inc. v. MedShape, Inc.*, No. 2:14-CV-0451-HRH, 2015 WL 5363717, at \*4 (D. Ariz. Sept. 15, 2015) (“Incorporation of the AAA Rules effectively delegates jurisdictional questions, including arbitrability and validity, to the arbitrator.”) (quoting *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968 (N.D. Cal. 2015)).

Because the FIA Agreement delegates gateway issues to the arbitrator, either by its express terms or by virtue of its incorporation of the AAA rules, the arbitrator, not this Court, must decide whether Appellants, as non-signatories, can enforce the FIA Agreement’s arbitration provision. Respondents’ attempt to cast this question as one that goes to the existence of an agreement to arbitrate is without merit. Notably, courts have “treated the non-signatory question differently when the non-signatory *opposes* arbitration.” *Blanton*, 962 F.3d at 848. In that situation, the question goes to the “very existence of a valid arbitration agreement.” *Id.* (internal quotations omitted). However, when, like here,

a plaintiff has signed a contract with an arbitration provision and a delegation clause and where a non-party to the contract seeks to compel the plaintiff to arbitrate claims that bear some relation to the contract—the question is *not* whether the plaintiff specifically intended that the non-party could enforce the delegation clause. Rather, the sole question is whether the delegation clause clearly and unmistakably delegates questions of arbitrability to the arbitrator.

*Cunningham v. Ford Motor Co.*, No. 21-CV-10781, 2022 WL 2819115, at \*6 (E.D. Mich. July 19, 2022) (emphasis in original) (citing *Swiger v. Rosette*, 989 F.3d 501, 507 (6th Cir. 2021)). Here, the circuit court already found that Respondents entered into a valid and enforceable arbitration agreement which requires them to arbitrate the claims asserted in this matter. (Order at \*3 – 4; R. pp. 8 – 9). The existence or formation of an agreement to arbitrate is not at issue.<sup>6</sup>

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<sup>6</sup> The Circuit Court’s reliance on *Raymond James Financial Services, Inc. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013), for the proposition that “whether a person can enforce an arbitration agreement goes to the agreement’s existence” is misplaced. *Cary* involved arbitration under the FINRA Code, in which “customer status” is itself an element of the arbitration agreement: Rule 1220 creates the obligation to arbitrate only if the plaintiff is a “customer.” Thus, in *Cary*, determining whether a party was a “customer” was determining whether an arbitration agreement existed at all. *Id.* at 386 (“whether appellants are customers thus relates to the existence of a contract to arbitrate, not the scope of that potential agreement”). That logic has no application here. Respondents’ arbitration obligation stems from the FIA Agreement they signed, not from an external rule whose applicability depends on status.

Courts addressing this precise issue have consistently held that whether a non-signatory can enforce an arbitration provision is a question of arbitrability, not, as Respondents argue, a question concerning the existence of an agreement. *See Swiger*, 989 F.3d at 507 (“[W]hether [defendant] can enforce the arbitration agreement against [plaintiff] presents a question of arbitrability that [the] arbitration agreement delegated to an arbitrator.”); *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) (holding a contract’s incorporation of the AAA rules required the arbitrator, not the court, to determine whether a non-signatory could compel a signatory to arbitrate); *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017) (“[A] signatory and two nonsignatories—are attempting to enforce the arbitration provision against [a] signatory... Although the [agreement] does not explicitly state that it binds nonsignatories..., it does explicitly bind [the signatory]. Therefore,...the language of the agreement clearly and unmistakably delegates arbitrability.”); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (“[A]s a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, [the signatory] cannot now disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability.”); *Apollo Computer v. Berg*, 886 F.2d 469 (1st Cir. 1989) (affirming district court order allowing arbitration between signatory plaintiff and a non-signatory); *Fisher v. FCA US LLC*, 769 F. Supp. 3d 587, 604 (E.D. Mich. 2025) (“[T]he question of whether Ford, as a non-signatory to the Sales Contracts, may compel Tri-State and Weiss to arbitrate under the Arbitration Provisions of those contracts is a question of ‘arbitrability’ that has been delegated to the arbitrator under the Delegation Clause.”); *DeAngelis v. Icon Entertainment Grp.*, 364 F. Supp. 3d 787, 797 (S.D. Ohio 2019) (“Whether a nonsignatory can enforce the arbitration agreement is a question of the enforceability of the arbitration clause, as to that

defendant.”); *Riversa v. L-3 Communications Corp.*, Case No. 8:09-cv-02447, 2010 WL 11629016, at \*2 (M.D. Fla. May 24, 2010) (concluding that whether non-signatory affiliates “are ultimately entitled to enforce the arbitration clause is a matter of the agreement’s continued existence, validity, and scope which must be decided by the arbitrator”). For these reasons, the circuit court erred in addressing the issue of whether Appellants can enforce the FIA Agreement’s arbitration provision. This issue should be left for the arbitrator to decide.

***C. Even If This Court Decides Arbitrability, It Should Still Compel Arbitration of Respondents’ Claims Against Appellants.***

Even if this Court decides arbitrability, Respondents’ claims against Appellants should all be compelled to arbitration. The FIA Agreement’s arbitration provision undeniably encompasses Respondents’ claims against Appellants, and Appellants are entitled to enforce the arbitration provision despite not being signatories to the FIA Agreement.

***i. The Plain Language of the FIA Arbitration Provision Requires That Respondents Arbitrate Their Claims Against Appellants.***

“To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (citing cases). “[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *Id.* (citing *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)). Stated another way, “[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.” *Id.* “A clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract [containing the arbitration clause] is construed broadly.” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100,

109, 739 S.E.2d 209, 213 (2013) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S. Ct. 1801 (1967)). “Thus, the scope of the clause does ‘not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship to the contract.’” *Id.* (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988)).

The circuit court already found that Respondents are bound by “a valid and enforceable arbitration agreement between [FIA] and Respondents ***which covers this dispute***,” and compelled arbitration as to the claims against FIA and Patel. (Order at \*3 – 4; R. pp. 8 – 9 (emphasis added)). The factual allegations of the Complaint likewise require that the claims against Appellants be compelled to arbitration. Again, Respondents agreed to arbitrate:

***all claims or controversies, and any related issues, which may arise at any time between the Parties (including FIA’s representatives, directors, officers, employees, and agents) concerning any investment or planning advice, recommendation, or exercise of limited discretionary authority with respect to any subject matter, any transaction or order, the conduct of FIA or its representatives, directors, officers, employees, and agents, [and] the construction, performance, or breach of this or any other agreement between the Parties ... shall be resolved by binding arbitration ... and shall be in accordance with the [AAA] Commercial Rules.***

(See FIA Agreement ¶ 15; R. p. 101 (emphasis added)).

“[T]he factual allegations underlying [Respondents’] claim[s] are within the scope of the broad arbitration clause.” *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. First, all of Respondents’ claims relate to or arise out of allegedly improper investments that they claim resulted in the loss of their retirement savings. (See generally Compl.; see also Compl. ¶¶ 84, 85, 94; R. pp. 40, 41, and 44). Respondents’ claims undoubtedly relate to “investment or planning advice,” and therefore, fall within the scope of the FIA Agreement’s broad arbitration provision.

***ii. Appellants, as Non-Signatories, are Entitled to Enforce the FIA Agreement’s Arbitration Provision.***

The fact that Appellants did not execute the FIA Agreement does not preclude their ability to enforce its arbitration provision. The law expressly permits non-signatories, like Appellants, to compel arbitration against signatories to an agreement to arbitrate, like Respondents. Indeed, in *Great Western Coal (Kentucky), Inc.*, the South Carolina Supreme Court rejected a plaintiff's argument that a defendant was not subject to arbitration because he was not personally a party to the contract with an arbitration provision:

[Defendant] also argues the trial judge erred in ruling [he] is not entitled to demand arbitration because he did not sign the contract in his individual capacity. We agree. *In Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990), the court held that ***a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration. The court further held when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated. Id.*** [Defendant] is the party seeking arbitration. Therefore, we hold the trial judge erred in denying [his] motion to compel arbitration because he did not sign the contract.

*S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 563 437 S.E.2d 22, 24-25 (1993) (emphasis added); *see also Giove v. Design to Build, Inc.*, No. 2008CP1001377, 2008 WL 9749842, at \*3 (S.C.Com.Pl. Nov. 12, 2008) (“Under the rule pronounced in *Great Western [Coal (Kentucky), Inc.]*, the [Plaintiffs] should not be allowed to avoid an arbitration agreement by naming non-signatory parties in their complaint, or by naming signatory parties in their individual capacity, because it would nullify the rule requiring arbitration. The individually named Defendants are willing to submit to arbitration, and the case must be arbitrated.”). That principle squarely applies in this case. Respondents sued FIA along with Patel and Appellants, who are plainly alleged to be agents, representatives of FIA. The circuit court correctly held Respondents’ claims against FIA and Patel must be arbitrated. The same reasoning requires that Respondents’ claims against Appellants likewise be compelled to arbitration. The circuit court’s reasoning—that “there is no agreement between [Appellants] and [Respondents]”—ignores clear South Carolina law allowing



non-signatories to enforce arbitration provisions against signatories. (Order at \*5; R. p. 10). Allowing Respondents to engage in piecemeal litigation and avoid arbitration as to Appellants would “nullify the rule requiring arbitration.” *Great Western Coal (Kentucky), Inc.*, 437 S.E.2d at 24-25.

This Court has recognized that “[w]ell-established common law principles dictate that in an appropriate case ***a nonsignatory can enforce***, or be bound by, ***an arbitration provision within a contract executed by other parties.***” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). Relying on numerous cases from a variety of jurisdictions, this Court noted “five theories ‘arising out of common law principles of contract and agency law’ could provide a basis ‘for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.’” *Id.* at 289, 733 S.E.2d at 601 (citing cases); *see also Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (same).<sup>7</sup> Three of these theories—agency, veil piercing/alter ego, and estoppel—require that Respondent’s claims against Appellants be compelled to arbitration.<sup>8</sup>

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<sup>7</sup> The FIA Agreement contains an Arizona choice of law provision. (FIA Agreement ¶ 19. e.; R. p. 103). The circuit court’s Order primarily relies on South Carolina law. To the extent this Court applies Arizona law, Appellants’ ability to enforce the arbitration provision is equally clear. *See Duenas v. Life Care Centers of Am., Inc.*, 236 Ariz. 130, 139, 336 P.3d 763, 772 (Ct. App. 2014) (“Theories for binding a non-signatory to an arbitration agreement include incorporation by reference, assumption, agency, veil-piercing or alter ego, equitable estoppel, and third-party beneficiary.”)

<sup>8</sup> The fact that Respondents agreed to arbitration is once again relevant. “Most courts...have distinguished between non-signatories seeking to compel arbitration by signatories to an agreement with an arbitration clause and signatories attempting to compel non-signatories to arbitrate. *Sun Valley Ranch 308 Ltd. P’ship ex rel. Englewood Props., Inc. v. Robson*, 231 Ariz. 287, 296, 294 P.3d 125, 134 (Ct. App. 2012); *see also CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir.2005) (“The test for determining whether a nonsignatory can force a signatory into arbitration is different from the test for determining whether a signatory can force a nonsignatory into arbitration....”).

***1. Agency and Veil Piercing/Alter Ego.***

“[A] plaintiff’s allegations of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even when the agents are not parties to the agreement.” *Yadegari v. Ford Motor Company*, No. CV 23-07438-MWF (RAOX), 2023 WL 11067049, at \*3 (C.D. Cal. Dec. 20, 2023) (citing *Thomas v. Westlake*, 204 Cal. App. 4th 605, 614–15, 139 Cal. Rptr. 3d 114 (2012)); *see also Pearson* at 289, 733 S.E.2d at 601 (recognizing agency principles allow non-signatories to enforce arbitration provisions). Similarly, when parties are alleged to be alter egos of other parties entitled to arbitration, the court should compel arbitration of claims against all of the parties. *See Pearson* at 289, 733 S.E.2d at 601 (recognizing veil piercing/alter ego principles allow non-signatories to enforce arbitration provisions); *see also Soar.Earth Ltd. v. Mahaffie*, No. 1:24-CV-02757-DDD-NRN, 2025 WL 2253697, at \*4 (D. Colo. Apr. 24, 2025) (“By alleging that the defendant entities are alter egos of each other in its complaint, Plaintiff has conceded [the non-signatory parties are entitled to enforce the arbitration agreement], despite its best efforts to backtrack in response to Defendants’ motion to compel arbitration.”). *Formostar LLC v. Florentius*, No. 2:11-CV-01166-GMN-CW, 2012 WL 2873928, at \*3 (D. Nev. July 13, 2012) (finding “[n]on signatory alleged alter egos are entitled to compel arbitration”) (citing *Prograph Intern., Inc. v. Barhydt*, 928 F. Supp. 983, 991 (N.D.Cal.1996)); *Sun Valley Ranch 308 Ltd. P’ship ex rel. Englewood Props., Inc.*, 231 Ariz. at 296, 294 P.3d at 134 (“When a plaintiff sues an individual under an alter ego theory, that defendant may demand arbitration to the same extent the corporate entities could do so.”).

Here, Respondents plainly make agency and alter ego allegations which require that their claims against Appellants be decided by arbitration. The Complaint makes the following allegations: “At all times relevant to this case, Charles Oliver, Leanna Oliver, Davis Oliver, and

Devin Patel were ***agents, representatives***, and/or employees of The Hidden Wealth Solution and/or Foundations Investment Advisors.” (See Compl. ¶ 45; R. p. 29 (emphasis added)). Respondents also allege that The Institute of Financial Enrichment, LLC and Hidden Wealth Management, LLC are affiliates of FIA providing services on FIA’s behalf and that FIA operates through “a network of affiliated offices, including The Hidden Wealth Solution.” (*Id.* ¶¶ 15 and 26; R. pp. 24 and 26). The Complaint even alleges that “The Hidden Wealth Solution and Foundations are individually, jointly, severally, and totally liable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel ***under agency law and common law principles of respondeat superior***.” (*Id.* ¶ 45; R. pp. 29 – 30 (emphasis added)). Similarly, Respondents claim “Charles Oliver, Leanna Oliver, and Davis Oliver were ***agents, representatives***, and/or employees of the Fund Defendants,” and “the Fund Defendants are individually, jointly, severally, and totally liable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Charles Oliver, Leanna Oliver, and Davis Oliver ***under agency law and common law principles of respondeat superior***.” (*Id.* ¶ 46; R. p. 30 (emphasis added)). As to the Oliver Family Asset Defendants, the Fund Defendants, and The Hidden Wealth Solution, Respondents claim they “operate indistinguishably from one another under the complete and absolute control of Chuck [Oliver], Leanna [Oliver], and Davis Oliver.” (*Id.* ¶ 44; R. p. 29). Respondents’ Complaint also alleges: “The Oliver Family dominates and controls the Fund Defendants [and] the Oliver Family Asset Defendants ..., controlling their business decisions and actions to such an extent that they manifest no separate corporate interests and function solely to achieve the purposes of the Oliver Family. With regard to these entities, there has been such an amalgamation of corporate interests, entities, funds, and activities so as to blur the distinction

between them and their activities.” (Compl. ¶ 161; R. p. 55). These agency and alter ego allegations require that Respondents’ claims against Appellants also be compelled to arbitration.

## **2. Equitable Estoppel.**

The doctrine of equitable estoppel provides another basis to compel arbitration of Respondents’ claims against Appellants. In *Pearson*, this Court recognized:

Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. ***First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.*** When each of a signatory’s claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory’s claims arise out of and relate directly to the written agreement, and arbitration is appropriate. ***Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.***

*Pearson*, at 295, 733 S.E.2d at 604 (emphasis in original) (quoting *Goer v. Jasco Indus., Inc.*, 395 F. Supp. 2d 308, 314 n. 9 (D.S.C. 2005)). Both circumstances are present here.

“A party may not ‘rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.’” *Id.* at 295, 733 S.E.2d at 604. Here, Respondents’ Complaint asserts claims for breach of contract and breach of contract accompanied by a fraudulent act against Chuck Oliver, Leanna Oliver, Davis Oliver, The Hidden Wealth Solution, Patel, FIA and the Fund Defendants. (See Compl. ¶¶ 142 – 155; R. pp. 51 – 54). In support, the Complaint alleges that “[d]efendants entered into express and implied contracts with [Respondents] in connection with soliciting, investing, and managing [Respondents’] investments. These contracts included account agreements, subscription agreements, and others.” (See *id.* ¶¶ 143 and 151; R. pp. 51 and 53). The Complaint specifically alleges contracts between themselves and “Chuck Oliver, Leanna Oliver, Davis Oliver, The Hidden Wealth Solution, Devin Patel and [FIA]” and claims breaches of those

alleged agreements. (*See id.* ¶¶ 142 – 155; R. pp. 51 – 54). Under South Carolina law, Plaintiffs cannot seek to enforce the FIA Agreement in support of their breach of contract claims while simultaneously ignoring the clear agreement to arbitrate. *Pearson*, 400 S.C. at 290–91, 733 S.E.2d at 601–02 (noting signatories have been compelled to arbitrate with non-signatories based on “the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory’s obligations and duties in the contract and the fact that the claims were intimately founded in and intertwined with the underlying contract obligations.”) (*quoting Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 n. 6 (4th Cir.2000)).

Additionally, the Complaint clearly and unambiguously alleges that all defendants were involved in a common scheme to defraud Respondents. Again, “application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.” *Pearson*, 400 S.C. at 295, 733 S.E.2d at 604; *see also Sun Valley Ranch 308 Ltd. P’ship ex rel. Englewood Props., Inc.*, 231 Ariz. at 296, 294 P.3d at 134 (“non-signatory may compel arbitration based on ‘close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory’s obligations and duties in the contract and the fact that the claims were intimately founded in and intertwined with the underlying contract obligations’”) (*quoting Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F.Supp.2d 825, 830–31 (N.D.Cal.2007)). Here, the alleged misconduct by FIA and Patel is inseparable from the alleged misconduct by Appellants.

Plaintiffs’ Complaint makes the following allegations:

[Charles Oliver, Leanna Oliver, Davis Oliver, and Patel’s] actions, inactions, omissions, and wrongdoing were performed for and on behalf of The Hidden Wealth Solution or [FIA] in the course and scope of their agency and/or employment. Therefore, in addition to Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel’s personal liability for their own actions, inactions, and

omissions, The Hidden Wealth Solution and [FIA] are individually, jointly, severally, and totally liable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel under agency law and common law principles of *respondeat superior*.

(Compl. ¶ 44; R. p. 29).

[FIA] was a knowing and eager participant in the Oliver Family's schemes. The Hidden Wealth Solution is one of [FIA's] top 25 producers, which incentivized [FIA] to sponsor the Oliver Family's fraudulent investment strategies. [FIA] was aware of the Oliver Family's activities, advertising, and investments, and it knowingly permitted, sanctioned, and enabled those actions to continue so that [FIA] could collect substantial fees and revenue from the Oliver Family's defrauded clients.

(*Id.* ¶ 58; R. p. 34).

[Patel] would maintain assets under management for Chuck [Oliver's] clients through [FIA]. Meanwhile, [Chuck] Oliver hid the ruse from clients like [Respondents] by blurring the lines between himself, his business, his family, and his employed investment advisors, like [Patel]. Indeed, many sections of the Oliver Family's website link directly to [FIA], employees share email domains with both The Hidden Wealth Solution and [FIA], and they even refer to [FIA] as "our firm."

(*Id.* ¶ 61; R. p. 35).

To clients like [Respondents], The Hidden Wealth Solution seemed to be merely the platform through which Chuck and Devin provided services for Foundations. For example, on October 21, 2021, Chuck [Oliver] and [Patel] required [Respondents] to complete a "Risk Tolerance and Time Horizon Assessment." This assessment is proprietary to [FIA]. Neither Chuck [Oliver], [Patel], nor [FIA] drew any line between which activities were conducted under [FIA] and which were under The Hidden Wealth Solution only.

(*Id.* ¶ 63; R. p. 35).

Despite the [Respondents'] expressly stated highly conservative risk tolerance, the Oliver Family, [Patel] and [FIA] invested over \$1 million of the [Respondents'] assets in investments which were either highly risky, unprofitable, improper, and/or plainly fraudulent. [Respondents] lost a tremendous amount of money as a result and Bob Plaag, now 73, no longer expects to retire as a result. The Defendants, on the other hand, have profited handsomely.

(*Id.* ¶ 66; R. p. 36). These allegations unquestionably "raise[] allegations of substantially interdependent and concerted misconduct by both the non-signator[ies] and one or more of the

signatories to the contract.” *Pearson*, 400 S.C. at 295, 733 S.E.2d at 604. Thus, Respondents are estopped from trying to avoid arbitration as to Appellants.

**iii. *The Answer Filed by Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment Does Not Preclude Any Appellant from Compelling Arbitration of Respondents’ Claims Against Them.***

Respondents are bound by the allegations in the Complaint and cannot refute them for the purpose of avoiding arbitration. The circuit court’s Order found that the Answer filed by Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment—only 3 of the 28 Appellants—justified denying Appellants’ motion to compel arbitration.<sup>9</sup> As to certain allegations in Respondents’ Complaint, including many of the allegations alleging agency or alter ego relationships, Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment answered that “[t]he allegations...are legal conclusions, which require no response from [Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment]. To the extent a response is required, [Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment] deny the allegations...” (*See e.g.*, Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment Answer ¶¶ 45, 46; R. 66, 67). “No rule of pleading is better established than that facts must be alleged, and not legal conclusions.” *Four Cnty. Agr. Credit Corp. v. Matthews*, 199 S.C. 71, 18 S.E.2d 602, 604 (1942). Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment’s response to the legal conclusions alleged by Respondents was appropriate.

Moreover, it is the allegations in the complaint that control whether claims are subject to arbitration. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (2001) (“To decide whether an arbitration agreement encompasses a dispute, a court must determine whether *the factual allegations underlying the claim* are within the scope of the broad arbitration clause, regardless

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<sup>9</sup> The circuit court’s Order provides no explanation of how the Answer filed by only Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment impacts the remaining Appellants.

of the label assigned to the claim.”) (emphasis added); *see also Beazer Homes Corp. v. Am. Residential Servs., LLC*, No. CIVA 4:09-1327TLWTER, 2010 WL 1254949, at \*2 (D.S.C. Feb. 18, 2010), *report and recommendation adopted*, No. CIVA 4:09-1327TLWTER, 2010 WL 1254948 (D.S.C. Mar. 23, 2010) (“In determining the scope of an arbitration provision, ***the court must look to the factual allegations of the complaint*** in order to ascertain whether the claims alleged touch a concern or matter covered by the arbitration provision.”) (emphasis added) (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988)); *Soar.Earth Ltd.*, No. 2025 WL 2253697, at \*4 (refusing to allow a plaintiff to “backtrack” on alter ego allegations in response to defendants’ motion to compel arbitration); *Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 768 (N.D. Ill. 2005) (holding that in assessing whether the plaintiff is advancing allegations that implicate doctrines concerning agency and concerted misconduct, cases have looked to the allegations of the plaintiff’s complaint and have not asked whether the non-signatory defendant concedes it is an agent.); *Kahn v. Peak*, No. 91 C 7148, 1992 WL 142297, at \*3 (N.D. Ill. June 18, 1992) (holding where a plaintiff alleges a defendant is an agent for purposes of liability, the plaintiff cannot disclaim that allegation in an attempt to defeat enforcement of an arbitration provision).

This case should not be litigated in piecemeal fashion with FIA and Patel defending Respondents’ claims in arbitration and Appellants forced to defend them in another forum. The FIA Agreement’s arbitration provision clearly encompasses this dispute, and Appellants are entitled to enforce it just like FIA. Thus, Respondents’ claims against Appellants must likewise be compelled to arbitration. The circuit court’s ruling to the contrary was in error.

## **II. APPELLANTS DID NOT WAIVE THEIR RIGHT TO COMPEL ARBITRATION.**

Although Patel initially filed an Answer to Plaintiffs’ Complaint, the circuit court correctly held that he had not waived his right to arbitration. However, as to Appellants, the Order states



“the Court need not reach [Plaintiffs’] argument that Chuck Oliver and The Institute of Financial Enrichment waived arbitration by answering the complaint and the other Oliver Defendants waived it by moving to dismiss.”<sup>10</sup> (See Order at \*6 n.6.) As an initial matter, based on the court’s ruling as to Patel, it would be wholly inconsistent to find that Appellants waived their right to arbitration. The facts and circumstances that led the circuit court to find that Patel maintained the right to arbitration are the exact same for Appellants. More importantly, the facts and circumstances show that there has not been a waiver of the right to arbitration.

When considering the issue of waiver, courts in South Carolina have historically considered (1) whether a substantial length of time passed between the commencement of the underlying action and the filing of the motion to compel arbitration, (2) whether the party seeking to compel arbitration engaged in extensive discovery before moving to compel arbitration, and (3) whether the nonmoving party was prejudiced by the delay in seeking to compel arbitration. See e.g., *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). Waiver “is an affirmative defense and the burden of proof is upon the party who asserts it.” *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994).

Long delays paired with extensive discovery support finding waiver of the right to arbitration. Simply responding to a complaint, without more, has not. Compare *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding

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<sup>10</sup> Although the circuit court declined to rule on this issue, it is preserved for appeal because Appellants raised it in their Rule 59(e), SCRPC motion. (See Appellant’s Motion to Alter or Amend at \*13–14; R. pp. 362 – 363 ). “When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.” *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009); see also *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (stating the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

waiver following a five-year delay during which significant discovery was conducted) and *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 666, 521 S.E.2d 749, 753-54 (Ct. App. 1999) (more than two years, multiple merits motions), with *Gen. Equip. & Supply Co. v. Keller Rigging & Const., SC, Inc.*, 344 S.C. 553, 556-57, 544 S.E.2d 643, 645-46 (Ct. App. 2001) (less than eight months; limited activity; no waiver) and *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (thirteen months with minimal discovery; no waiver).

Although the continued application of the prejudice element is unclear after the Supreme Court's decision in *Morgan v. Sundance, Inc.*, the Court's instruction is clear: courts may not craft "custom-made rules to tilt the playing field in favor of (or against) arbitration," and waiver turns on the voluntary relinquishment of a known right as shown by the holder's conduct. 142 S. Ct. 1708, 1712–14 (2022). That comports with the general rule that courts cannot apply arbitration-specific hurdles to avoid enforcing valid agreements. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992).

Respondents argued below that Appellants simply filing an answer or motion to dismiss resulted in them waiving the right to arbitration even though the motion to compel arbitration was filed approximately two and one-half months after Appellants accepted service of the Complaint. Our courts have repeatedly held that the passage of mere months is insufficient to constitute a "substantial length of time." *Rhodes*, 374 S.C. at 128, 647 S.E.2d at 252; *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (same); *Gen. Equip.*, 344 S.C. at 556, 544 S.E.2d at 645 (less than eight (8) month delay was insufficient to constitute waiver). When Appellants' motion was filed, no hearings had been held, and no discovery had been conducted. Under the undisputed facts, there has been no waiver of Appellants' right to arbitration in this case. The

circuit court declined to rule on this issue. Furthermore, because the circuit court has already determined that Patel did not waive his right to arbitration by filing an Answer—a ruling which is now the law of the case—it would be wholly inconsistent to find that Appellants waived their right to arbitration. This Court should find that Appellants did not waive their right to arbitration by simply responding to the Complaint.

### **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that this Court reverse circuit court's Order denying Appellants' motion to compel arbitration. Respectfully, the gateway issue of whether Appellants are entitled to arbitration under the FIA Agreement is an issue for the arbitrator. However, if this Court finds it should address that question, under these circumstances and based on Respondents' allegations, the law expressly allows Appellants to enforce the arbitration provision even though they are not signatories to the FIA Agreement. Finally, the undisputed facts demonstrate that the right to arbitration has not been waived, and any contrary finding would be inconsistent with both the court's treatment of similarly situated parties and the governing legal standards. Accordingly, all claims asserted against Appellants should be compelled to arbitration, and this matter should proceed in accordance with the terms of the FIA Agreement.

Respectfully Submitted,

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