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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTIONS

United States District Court for the District of South Carolina

Cameron McGowan Currie, Senior U.S. District Judge

Appellate Case No. 2026-000728

Latavia Allen*,* on behalf of herself and all other similarly situated,............................. Plaintiff,

v.

SRP Federal Credit Union..Defendant.

Norman Black*,* on behalf of himself and all other similarly situated,.......................... Plaintiff,

v.

SRP Federal Credit Union..Defendant.

Ge-Quoia Whitfield*,* on behalf of herself and all other similarly situated,................... Plaintiff,

v.

SRP Federal Credit Union..Defendant.

Rosemary Ortiz*,* on behalf of herself and all other similarly situated, ... Plaintiff,

v.

SRP Federal Credit Union..Defendant.

***Theresa McGrier**, on behalf of herself and all other similarly situated,*........................ Plaintiff,

v.

SRP Federal Credit Union..Defendant.

***Shannon Dunn**, o*n behalf of herself and all other similarly situated, ... Plaintiff,

v.

SRP Federal Credit Union..Defendant.

***Ricky Chase**,* on behalf of himself and all other similarly situated, ... Plaintiff,

v.

SRP Federal Credit Union..Defendant.

PLAINTIFFS' OPENING BRIEF

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Certified Question No. 1: Does a consumer who agreed to be bound by an agreement "as amended from time to time" when opening an account manifest assent to a proposed modification adding an arbitration provision by failing to opt out within the time provided and continuing to use the account?

Plaintiffs' Answer: No.

Certified Question No. 2: When a modification clause allows one party, "in its sole discretion," to change any contract term "at any time without notice except as expressly required by applicable law," does the implied covenant of good faith and fair dealing apply to limit the party's discretion and save the agreement from illusoriness?

Plaintiffs' Answer: No.

STATEMENT OF THE CASE

Before the Court are two questions that call for the same answer: "No." Because answering "yes" would change the "longstanding, black-letter" contract principles this Court preserved in *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 320, 914 S.E.2d 139, 147 (2025). The questions come from the District Court after it considered agreements between SRP Credit Union and its members, as SRP moved to compel arbitration under those agreements during litigation between the parties. Two issues arose from the agreements and SRP's conduct under them.

First, there was an issue with SRP's one-sided terms. SRP reserved for itself the ability to amend its membership agreements unilaterally and without notice: "[SRP], in its sole discretion, may change any term or condition of this Agreement… at any time without notice[.]" District Court Order ("D. Ct. Order") p. 32. As the District Court found, this meant the contracts "appear[ed] to be illusory" because the clause "impose[d] no express limit on SRP's discretion beyond what the law already require[d.]" *Id*. pp. 32–33. And second, SRP acted on that clause in a way South Carolina law prohibits under this Court's decision in *Lampo*, sending Plaintiffs so-called "opt out" offers that tried to add arbitration terms to the parties' agreements without Plaintiffs "manifesting" their assent to those terms in any way, as Plaintiffs responded only with silence and inaction. *Lampo,* 445 S.C. 320.

In other words, SRP reserved all rights and powers under its agreements to itself, allowing SRP to modify the contract whenever it wanted, however it wanted, with or without notice to Plaintiffs and no matter whether Plaintiffs manifested assent. Worse, SRP acted on that clause using "opt outs," devices this Court has rejected as a "new blight" "employed to circumvent the longstanding, black-letter principles of contract law." *Id*.

Even so, the District Court hesitated to reject SRP's contracts outright because they touched on contract principles it believed this Court has not settled. It questioned whether SRP's opt-outs might be allowed under South Carolina law because the underlying contract allowed SRP to amend it "from time to time." D. Ct. Order p. 32. And even if *Lampo* had rejected the opt out device, the District Court questioned whether the Court would vary its approach by contract type, as *Lampo* concerned an employment contract and this case concerns consumer contracts. *Id*. pp. 29–30. Last, the District Court wondered whether the contract might be "saved" from its illusoriness by the "covenant of good faith and fair dealing." *Id*. p. 32. In response, the Court certified those questions under Rule 244. And as Plaintiffs explain above and below, the answer to those questions is "No."

The Court should not stray from the "longstanding, black-letter" contract principles it articulated and protected in *Lampo*, nor should it alter the prohibition against "illusory" contracts to "save" SRP's contract from itself. ***First***, the principles at issue in *Lampo* are at issue here, and there is no reason to vary those principles by contract type. Nothing suggests consumers should bear the "blight" opt outs create and employees should not. The requirements for acceptance and assent do not change by contract type and it would change the law to find they do. ***Second***, it would also change the law to find the "implied covenant of good faith and fair dealing" can "save" an illusory contract from itself. The implied covenant applies only to *existing* and formed contracts, and "illusory" contracts are non-existing, unformed illusions, not contracts. And ***third***, the Court should constrain its analysis to the questions it certified without delving into the merits. SRP has sought to introduce evidence before the Court that is not needed under Rule 244. The District Court has provided the record this Court needs to decide the issues and reconsidering its findings here would only confuse the issues.

STANDARD OF REVIEW

Rule 244 allows the Court to answer "questions of law certified to it by any federal court[,]" including the District Court. Rule 244(a). But Rule 244 constrains this analysis to "questions of law," stopping the Court from considering questions of fact. *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 346, 878 S.E.2d 896, 897 (2022) ("The rule on certification is designed for this Court to answer questions of South Carolina law"); *see also Butler v. Travelers Home & Marine Ins. Co.*, 433 S.C. 360, 366, 369, 858 S.E.2d 407, 410-12 (2021) (Rule 244 does not allow the Court to answer fact questions). Thus, Plaintiffs focus their arguments on the certified questions without delving into the facts, except as needed to illustrate their arguments and answer the questions.

ARGUMENT

I. Question No. 1: Does a consumer who agreed to be bound by an agreement "as amended from time to time" when opening an account manifest assent to a proposed modification adding an arbitration provision by failing to opt out within the time provided and continuing to use the account?

No. The Court answered this question in *Lampo v. Amedisys Holding, LLC*, without equivocating. 445 S.C. 305, 320, 914 S.E.2d 139, 147 (2025). It referred to "opt-out" contract offers as a "blight on the law of contracts" and declined to hold that offerees accept "opt-out" amendments when they respond with silence, even if the offeree acknowledges they received the opt-out offer. *Id*. Core to the Court's reasoning was its observation that the opt-out device is a "clever disguise employed to circumvent the longstanding, black-letter principles of contract law[.]" *Id*. Those principles include assent—"based on some action taken by the offeree"—and consideration, an "inseparable" element from acceptance. *Id*. at 319.

Opt-outs violate those principles by erasing them, assuming an offeree can somehow manifest assent by doing nothing, receiving no consideration, and never establishing they accept the "opt-out" offer. Nothing in *Lampo* suggests a modification allowing amendments "from time to time" can erase those principles any more than the opt-out offer in *Lampo* could. Nor does *Lampo* suggest these rules should differ from contract-type to contract-type, as if consumers should bear the "blight" opt-outs create but employees should not. Indeed, the Court should preserve the "longstanding, black-letter" principles it protected in *Lampo* here again.

a. The Court has rejected the "opt out" device under South Carolina law because it seeks to circumvent "longstanding, black-letter" contract principles

Starting with first principles: Arbitration agreements are treated like all other contracts and must be reviewed for formation and validity under state contract law. *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). Under South Carolina law, a contract requires (1) an offer, (2) acceptance of the offer, and (3) the mutual exchange of benefits called "consideration." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). There must be a "meeting of the minds" between the parties on all terms for the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E. (2d) 231 (1975). Amendments to the contract must satisfy the same requisites. *Bishop Realty & Rentals v. Perk, Inc.*, 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987) *cert. denied*, 293 S.C. 538, 362 S.E. (2d) 26 (1987). A party seeking to compel arbitration must show that these elements have been met, whether in the contract or a contract amendment. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019). And despite what parties sometimes say: "There is . . . no public policy—federal or state— 'favoring' arbitration." *Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). Indeed, the Court has reiterated this rule time and again. *Lampo*, 445 S.C. 317 ("We remind our litigants and lower courts that we dispensed with this incorrect notion almost four years ago").

As above, the Court applied these principles in *Lampo* just last year, holding: "[w]ithout some manifestation of assent to the new terms" of a proposed arbitration agreement, "there can be no acceptance." *Lampo,* 445 S.C. 316. There, the Court considered whether a plaintiff who began work one month earlier agreed to arbitrate her claims when her employer notified her about its arbitration program with an option to "opt out." *Id*. The plaintiff clicked that she "acknowledged" the notice, could view the "agreement," and chose not to "opt out." *Id.* at 309. Indeed, she did nothing, responding to the opt-out with silence and inaction. *Id*. After some consternation with how a person can "accept" a contract amendment by doing nothing, the Court of Appeals upheld the opt-out and enforced it against plaintiff. *Id*. at 316 ("the court of appeals appeared to recognize the difficulty in finding a 'manifestation of assent' in Lampo's silence and inaction in simply not opting out of the arbitration program").

But this Court reversed. It held "Lampo's decision to continue working and not opt out does not in any way indicate her willingness and desire to enter and be bound by the Dispute Resolution Agreement." *Id*. This is because she was working under her agreed terms before the arbitration proposition, and there was "simply nothing to indicate she did anything different that could be considered a manifestation of assent to the [arbitration] offer." *Id*. She "simply continued to perform the job duties for which she was already under contract to be paid. Without some manifestation of assent to the new terms of employment set forth in the Dispute Resolution Agreement—the mutual promises of arbitration—there can be no acceptance." *Id*. (*citing Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (Ct. App. 2004)).

In other words, the Court rejected that "[s]ilence and inaction" can constitute acceptance when "the offeree does not intend to do so." *Id*. at 315 (*citing* and *quoting* 1 Timothy

Murray, Corbin on Contracts § 3.19, at 497 ("It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so"); s*ee also Electro-Lab of Aiken, Inc.*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (acceptance requires "manifestation of assent to the terms thereof."). The Court then gave three examples from the Restatement (Second) of Contracts in which an offeree *can* intend to accept terms with silence and inaction under the circumstances: (i) if the offeree takes the "benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;" (ii) if the offeror gives the offeree reason to know silence and action will constitute acceptance *and* the offeree intends to accept; and (iii) where "because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept." *Id*. But the Court held no exception applied in *Lampo* because each call for *some* manifestation from plaintiff under the circumstances—and none existed in that case. *Id*. at 320.[1]

So too here. Nothing suggests a contract that may be "amended from time to time" would change the analysis. Indeed, *any* contract may be "amended from time to time" on agreement between the parties no matter what the contract's modification clause states. But an agreement to amend a contract, like all agreements, must meet the elements for a contract. *Sauner*, 354 S.C. 405. Indeed, in *Sauner*, the Court held contract amendments should be scrutinized the same way as contracts: "It is well established that '[a] written contract may be modified by a subsequent

[1] Courts across the country join this reasoning. *See, e.g., Marshall v. Georgetown Mem'l Hosp.*, No. 2:21-cv-02733-RMG-JDA, 2022 WL 5434226, at *6 (D.S.C. July 7, 2022) (affirmed in Case No. 22-2010, 4th Cir. Aug. 13, 2024) (failing to respond to a form notice is not acceptance); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 86-87 (2013) (same); *Brown v. Ryan's Family Steak Houses, Inc.*, No. 2:03–2582, slip op. at 10–11 (D.S.C. Feb. 27, 2004) (same). *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 660(2022) (same).

agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.'" *Id*. at 405–406 (*citing* and *quoting Florence City-County Airport Com. v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)). To repeat the elements, that includes "offer, acceptance, and valuable consideration." *Id*. Thus, proposing an amendment as a "valid offer" requires "bargained for exchange and creates a *power of acceptance in the offeree*." *Id* (emphasis added); *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993).

In other words, a contract that may be "amended from time to time" is like any other contract and the analysis does not change just because an amendment is proposed through an "opt out." It still must fulfill the same elements, including that the offeror must acquire the offeree's acceptance to bind the offeree. And thus, the analysis ends up in the same spot under the same "longstanding, black letter" principles articulated in *Lampo*: an opt out "amendment" proposal cannot bind the offeree unless they manifested *some* intent that they accepted the amendment. *Lampo,* 445 S.C. 314–315. Put another way, the offeree must signal they *want* to amend the contract, and they cannot do so with silence, inaction, or even continuing to do business under the contract. Because silence and inaction are not acceptance.

To hold otherwise here would be to allow a "blight" that corrupts contract law and leads to "seemingly-ridiculous scenarios" in which offerors can bind offerees to terms even when the offeree does nothing to accept them. *Id*. at 320. Indeed, it encourages gamesmanship, as shown in the Court's posed hypotheticals in *Lampo*, questioning whether the party opposing an opt out could use their own opt out to change the terms in *their* favor. *Id*. Employing that hypothetical here, it would be as if SRP's members could send SRP their own opt outs changing the parties' terms and canceling their debts with the credit union. *Id*. at 317. If SRP would not want that tactic used against it, it should not be allowed to use it. Indeed, the Court should regard that kind of gamesmanship now as it did in *Lampo*: “This we will not accept.” *Id*.

b. The Court should decline to adopt the “Restatement of Consumer Contracts” into South Carolina law because doing so would violate the “longstanding, black-letter” contract principles articulated in *Lampo*

The Court knew it was bucking a trend with *Lampo*, as “opt outs” had been rejected in some courts but accepted in others: “As to those cases which are on point and which approve of the ‘opt-out’ device, we respectfully disagree with the reasoning of those courts.” *Lampo,* 445 S.C. 320. Again, this is because the Court “sees the ‘opt-out’ image as a clever disguise employed to circumvent the longstanding, black-letter principles of contract law… by cloaking an offeree’s decision not to accept an offer with an attractive—but inapplicable—legal term to give silence and inaction the appearance of acceptance.” *Id*. And the Court did not equivocate when it drew a line against adopting the opt-out device in South Carolina: “Today, we ‘opt out’ of this new blight on the law of contracts so that the metaphorical ‘old chestnuts’ of American contract law may yet stand guard over the sanctity of contract in South Carolina.” *Id*. In other words, the Court understood opt outs corrupt contract law because they change what it means to “manifest assent” and accept contract terms. Allowing opt outs to change those elements would change what it means to enter a contract.

Without advocating that the Court adopt it, the District Court mentioned the “recently adopted Restatement of Consumer Contracts” “departs from the Second Restatement’s rule that a party’s silence ordinarily does not operate as acceptance.” D. Ct. Order p. 29. And the District Court suggested that because this Court had referred to the Restatement (Second) for Contracts in part in *Lampo*, perhaps it would adopt the RCC in the consumer context. D. Ct. Order p. 30 (“Of course, it is not for this court to extend South Carolina law beyond its current boundaries” and adopt the RCC). In so doing, it outlined the RCC's four factors for allowing an opt out, including that: (i) the consumer receive it with "reasonable notice;" (ii) the consumer have a chance to reject it; (iii) the consumer know the contract would be changed if they did not reject it; and (iv) the consumer either accept or fail to reject it. *Id*. pp. 29–30. In other words, the RCC proposes that opt outs like the one in *Lampo* be allowed in the consumer context. But as elaborated below, the Court should decline to adopt it here because, like in *Lampo*, doing so would change what it means to enter a contract under South Carolina law.

The Court should reject adopting the RCC into South Carolina law for two reasons. First, *Lampo* did not suggest that consumers rather than employees should bear the "blight" the opt out represents. The Court held without equivocating it was rejecting the opt out to "preserve the sanctity of contract in South Carolina" for *all* contracts. *Lampo,* 445 S.C. 320. Plaintiffs will not rehash the line *Lampo* draws again, except to say the Court's rationale did *not* turn on the Restatement Second of Contracts alone, such that the RCC should provide the opposite result here. It relied on the Restatement to reiterate the "longstanding, black-letter" principles at play in contract law—principles the RCC seeks to supplant. *Id*. And just as there were jurisdictions that "approve of the 'opt out' device," they did not sway the Court's reasoning any more than the RCC should. *Id*. Indeed, the Court would be breaking its own rule to adopt it.

Second, Plaintiffs stress the RCC was born in controversy considering the very concerns the Court articulated in *Lampo*. Unlike Restatements on the law on other topics, the RCC took over a decade to adopt amid objections across stakeholder interest groups. This is because the RCC is not, in fact, a "restatement" of the law, but a proposal to develop *new* rules between businesses and consumers. As business interest groups from entities across the country put it when urging the ALI to reject the RCC: "Instead of restating an established area of law, these proposed rules advance a particular policy agenda: to subject agreements between businesses and consumers to heightened judicial scrutiny with respect to terms supplied by the business." Ex. A. (Industry and Trade Group Letter to the ALI).[2] And that "agenda's" premise, according to industry and trade interest groups, was that a "different set of legal rules should govern contracts between a business and a consumer." *Id*. This is why 23 attorneys general also opposed adopting the RCC: "weakening the requirement of mutual assent is not only contrary to fundamental principles of contract law but will encourage a veritable race to the bottom, as market forces will drive businesses – which will know they can bind consumers to all but the most odious terms – to draft standard form contracts with egregiously self-serving terms."[3] Ex. B (State Attorneys' General Letter to the ALI.)

In other words, the "chestnut" the Court protected in *Lampo* is one the RCC seeks to destroy in the consumer context, proposing this Court vary its contract rules for businesses in their relations with consumers. But there is no reason to: the RCC is not "restating" South Carolina's contract principles, it is proposing its own principles to shift the power balance against consumers in a way this Court has rejected. As a result, the Court should not vary its principles by contract type and decline to adopt the RCC.

II. Question No. 2: When a modification clause allows one party, "in its sole discretion," to change any contract term "at any time without notice except as expressly required by applicable law," does the implied covenant of good faith and fair dealing apply to limit the party's discretion and save the agreement from illusoriness?

No. The "implied covenant of good faith and fair dealing" cannot "save" an illusory contract from itself because the covenant applies only to contracts—and "illusory contracts" are

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[2] The letter can also be found here: https://www.aba.com/-/media/documents/letters-to-congress-and-regulators/ltrarbitration2022jan19.pdf?rev=7b5103ee4e3f44d4bcf29c3a75359bad (last visited June 19, 2026).

[3] The letter can also be found here: https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf (last visited June 19, 2026).

not contracts. They are unformed contracts—what caselaw calls "illusions." The implied covenant does not apply to illusions, it applies to contracts *after* they have been formed, arising when a party fails to perform a contract term in "good faith." *Rd., LLC v. Beaufort Cty.*, 443 S.C. 11, 24, 902 S.E.2d 366, 372 (2024). Thus, the covenant cannot "save" illusory contracts because it cannot make "an otherwise unformed contract formed." *Kiser v. Truist Fin. Corp.*, 796 F. Supp. 3d 207, 240 (E.D. Va. 2025). In fact, it would be "antithetical" to the covenant's purpose, which is to govern "already-existing" contracts, not form contracts itself. *Id*; *Beaufort*, 443 S.C. 11, 24.

Indeed, allowing the covenant to "save" contracts from their illusoriness would destroy illusoriness as a concept, as every illusory contract would be "saved" by the covenant—when this Court has constrained the covenant's applicability to enforcing existing contract terms. *Beaufort*, 443 S.C. 11, 24 ("The implied covenant of good faith and fair dealing cannot create new contractual duties not already expressed or implied in the contract"). Nothing in South Carolina law supports expanding the covenant's scope to include contract formation or to "save" illusory contracts from themselves, and it would pollute the law to allow it.

a. "Illusory contracts" are not contracts

A contract is "illusory" when the parties' promises are not promises at all. An illusory promise is a "promise which by [its] terms make[s] performance entirely optional with the 'promisor.'" Restatement (Second) of Contracts § 77 cmt. a; *see also* 17A Am. Jur. 2d Contracts ss 125 ("[A] promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance."). Promises like that are not promises at all because they "impose no obligation" and "cannot serve as consideration." 3 Williston on Contracts § 7:7 (4th ed. 2025). This is not to mention it is "rudimentary contract law that an agreement lacks consideration, and is therefore never formed, when it consists entirely of illusory promises." *Johnson v. Cont'l Fin.*

Co., LLC, 131 F.4th 169, 178 (4th Cir. 2025). When one side can avoid all its obligations, the contract "lacks the kind of basic reciprocity that is necessary to form a binding contract." *Id*. And key to the Court's analysis here, illusoriness thus goes to a contract's formation, not its validity. *Johnson*, 131 F.4th at 176 ("Any new law student learns the distinction between contract formation and validity").

In other words, if a contract allows a party an escape hatch to change or avoid their obligations without limiting that power, it is not a contract, it is an illusion. As an example, the District Court found SRP's Membership Agreement "would seem to fit this mold" because it allowed SRP "in its sole discretion," to "change any term or condition of [the] Agreement… at any time without notice as expressly required by applicable law." D. Ct. Order p. 33. As the District Court found, this modification clause imposes "no express limit on SRP's discretion beyond what the law already requires," meaning "all of SRP's promises would appear to be illusory[.]" *Id*. pp. 33–34.

Courts across the country have confronted clauses like SRP's in the arbitration context and reached the same conclusion: "Most federal courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate [or change] the arbitration agreement, it is illusory and unenforceable, especially where there is no obligation to receive consent from, or even notify, the other parties to the contract." *In re Zappos, Inc.*, 893 F. Supp. 2d 1058, 1065 (D. Nev. 2012) (collecting cases); *See Grosvenor v. Quest Corp.*, 854 F. Supp. 2d 1021 (D. Colo. 2012) (same). Their reasoning derives in part from Fourth Circuit precedent interpreting South Carolina law, holding a contract is "illusory" when it allows one party to modify terms without limitation or notice. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999). And when a modification clause requires notice only as "required by law," courts decline to find that constitutes a "limitation." *Johnson* 131 F.4th 180 ("The plain language of the clause merely commits Continental to do what it is already required to do by law. That cannot furnish consideration").

The principle emerging from these cases is that parties can include "unilateral" modification clauses in their contracts so long as the clauses come with limitations. But without limitations, the contracts are not contracts, they are "illusory." As explained below, that prevents the implied covenant from altering or applying to them, as the covenant applies only to formed contracts.

b. The implied covenant applies only to formed contracts, and cannot be used to form otherwise unformed and illusory contracts

Because an illusory contract is not a contract, the "implied covenant of good faith and fair dealing" cannot "save" it. As this Court held, the covenant applies only to "already-existing" contracts: "the implied covenant of good faith and fair dealing applies only to the manner in which a party may enforce its contractual rights and must carry out its already-existing contractual duties." *Beaufort*, 443 S.C. 24, (emphases added). In *Beaufort*, the Court constrained the covenant's scope, explaining it can never create terms to a contract, meaning it plays no role in contract formation. *Id*. ("The covenant may not be relied on to create new contractual duties not expressly stated or fairly implied in the contract itself"). And for good reason, a "duty of good faith must relate to performance of an express term of the contract and is not an abstract and independent term of a contract[.]" 17A Am. Jur. 2d Contracts § 362 (2016) (emphasis added). These principles consist with the covenant's purpose in litigation as grounds for a contract breach claim. *Hall v. UBS Fin. Servs.*, 435 S.C. 75, 86, 866 S.E.2d 337, 342 (2021) ("if a party to a contract believes another party to the contract has breached the implied covenant of good faith and fair dealing, the cause of action is simply one for breach of contract"). In other words, the covenant applies to "existing" contract terms after the parties have formed the contract and cannot be used to create contracts or terms.

Nor can the covenant be used to reform "express" contract terms. In *Hall v. UBS*, the Court reiterated there is "no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Hall*, 435 S.C. 87. The upshot is the covenant cannot be used to reform or modify one-sided modification terms: "if [defendant] unilaterally modifies the account agreement without providing notice—which the agreement permits—there can be no implied breach because doing so is an activity governed by express contractual terms[.]" *Kiser*, 796 F. Supp. 3d 240. In other words, the implied covenant cannot revise or reform an "illusory" contract term to save it from itself under any circumstances.

This mirrors the logic articulated in cases across the country—including those that hold the covenant cannot save an illusory contract from its illusoriness. In *Moua v. Optum Servs.*, the court held just that: "the covenant of good faith and fair dealing cannot apply to save the [illusory] Policy from being unenforceable." 320 F. Supp. 3d 1109, 1114 (C.D. Cal. 2018). The reasoning underlying these decisions is drawn from the distinction described above. "Saving" an "illusory" contract is another way to describe forming an unformed contract, something the covenant cannot do. Because "the duty of good faith and fair dealing only applies to a party's performance of an existing contract, and does not extend to issues of contract formation." *Barton v. Hewlett-Packard Co.*, 635 F. App'x 46, 48 (3d Cir. 2015) (emphasis added) (citations and quotations omitted); *See also* Restatement (Second) of Contracts § 205 & cmt. c (rule imposing duty of good faith and fair dealing in performance and enforcement of contracts "does not deal with good faith in the formation of a contract"). That reasoning cuts across jurisdictions as a core contract principle. *See Hegel v. Brunswick Corp.*, No. 09-C-882, 2010 U.S. Dist. LX 110248, at *5-6 (E.D. Wis. Oct. 15,

2010) ("The implied duty of good faith and fair dealing is only appropriately used—where there is a contract in the first place").

The District Court identified some cases suggesting the covenant can save a "illusory" contract, though its analysis glossed over their reasoning. In two cases the District Court identified, the contract had some limitation on the modification clause at issue, meaning the contracts were not, in fact, "illusory." In *Canteen v. Charlotte Metro Credit Union*, the court found the modification provision "explicitly limited its scope" when it limited changes to those that complied with "applicable law." 386 N.C. 18, 27, 900 S.E.2d 890, 897 (2024). Thus, the court declined to find the provision was "illusory" because "applicable law" incorporated the implied covenant. *Id*. So too in *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 107 (E.D.N.Y. 2015). There the court found there were "sufficient limitations on the exercise of" the "power to modify" the contract at issue, including by requiring notice. *Id*. Put another way, the contracts in these cases were not "illusory" because there were limits on the parties' discretion. Thus, the implied covenant could apply.

But for illusory contracts like SRP's, it is "antithetical that the implied covenant of good faith and fair dealing would render an otherwise unformed contract formed." *Kiser*, 796 F. Supp. 3d 240. That principle should apply here with the same force. The Court's decision in *Beaufort* explained the implied covenant cannot create contract duties but rather applies only to "already-existing" contract terms. *Beaufort*, 443 S.C. 24. Applying that same logic, the Court should decline to hold the covenant can "save" illusory contracts from themselves because illusory contracts are not contracts.

Last, if the implied covenant can save illusory contracts from their illusoriness, then illusoriness as a concept ceases to exist. The exception the Court would create to save illusory contracts from themselves would end up swallowing the rule against them. Any illusory promise could be reformed by the covenant, rewritten to create consideration and form a contract when there was none. But as the Fourt Circuit explained, "[a]ny new law student learns the distinction between contract formation and validity." *Johnson*, 131 F.4th at 176. That boundary sets the boundary here. Illusoriness concerns formation while the covenant applies *after* formation, to the contract's validity and enforcement. And "[t]here is nothing to enforce if a contract never existed." *Id*. In other words, the two concepts were never meant to intertwine, and allowing them to would erase the distinction between them.

III. The Court should avoid delving into the facts and merits in the underlying case

Plaintiffs avoid analysis of the facts here because a Rule 244 case considers only the certified legal questions before the Court. *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 346, 878 S.E.2d 896, 897 (2022) ("The rule on certification is designed for this Court to answer questions of South Carolina law"). For good reason: it is the District Court's job in this instance to decide the underlying facts. *See Butler v. Travelers Home & Marine Ins. Co.*, 433 S.C. 360, 366, 369, 858 S.E.2d 407, 410-12 (2021) (Rule 244 does not allow the Court to answer fact questions). And candidly, the facts here are a chain of interlocking contracts and opt-outs between SRP and Plaintiffs spanning decades, with SRP failing to produce all links in the chain, as recognized by the District Court, resulting in a somewhat tangled web of documents and facts. To decide SRP's motion to dismiss, the District Court resolved some fact questions in its order and certified the two questions above based on its findings. Implied in those questions were findings on what the contracts stated and that SRP's modification provision was "illusory." But the District Court's questions do not require this Court to reevaluate the facts or merits, nor are the facts intertwined in a way that would require it to. Indeed, doing so would require the Court to untangle a tangled web.

Even so, on June 19, 2026—the Friday before Plaintiffs' June 22, 2026, filing deadline—SRP requested that the Court consider exhibits and facts in the record at the District Court. Plaintiffs suggest that the Court to decline that request or, at minimum, avoid diving into the facts and merits here. It is not needed when the District Court provided the Court all facts the Court may need to answer the questions before it. Delving into the record anyway would introduce evidence disputes this Court cannot resolve under Rule 244.

As a result, Plaintiffs avoid the merits and facts here and focus on the questions. But if SRP dives into them anyway, as it may do based on its request, Plaintiffs will do so on reply.

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Respectfully submitted,

By: *<u>/s/ Paul J. Doolittle</u>*

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