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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, *on 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.

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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
ARGUMENT	5
I. The Court should apply the “longstanding, black-letter” contract principles it articulated in Lampo without exception	5
a. <i>Lampo</i> controls.....	6
b. Adopting the RCC would change South Carolina law	9
c. The “consumer protection statutes” SRP cites do not apply.....	10
II. The “implied covenant of good faith and fair dealing” cannot “save” an “illusory” contract from itself.....	11
a. <i>Prima Paint</i> does not apply.....	12
b. Whether SRP’s contract is “illusory” is not before the Court, but the contract is “illusory” in any event	14
c. The implied covenant cannot save an illusory contract from itself	17

TABLE OF AUTHORITIES

Cases

<i>Bank One, N.A. v. Coates</i> , 125 F. Supp. 2d 819 (S.D. Miss. 2001)	9
<i>Beneficial Nat’l Bank v. Payton</i> , 214 F. Supp. 2d 679 (S.D. Miss. 2001)	9
<i>Bishop Realty & Rentals v. Perk, Inc.</i> , 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987), cert. denied, 293 S.C. 538, 362 S.E.2d 26 (1987)	6
<i>Cornell v. Desert Fin. Credit Union</i> , 524 P.3d 1133 (Ariz. 2023)	10
<i>Denson v. Nat’l Cas. Co.</i> , 439 S.C. 142, 886 S.E.2d 228 (2023)	13, 14
<i>Gillam v. Branch Banking & Tr. Co. of Va.</i> , No. 3:17-cv-722, 2018 U.S. Dist. LEXIS 133255 (E.D. Va. Aug. 7, 2018)	9
<i>Granite Rock Co. v. Int’l Bhd. of Teamsters</i> , 561 U.S. 287 (2010)	14
<i>Grosvenor v. Quest Corp.</i> , 854 F. Supp. 2d 1021 (D. Colo. 2012)	16, 17
<i>Hooters of Am. v. Phillips</i> , 39 F. Supp. 2d 582 (D.S.C. 1998)	15, 17
<i>Hughes v. Edwards</i> , 265 S.C. 529, 220 S.E.2d 231 (1975)	6
<i>Hutcherson v. Sears, Roebuck & Co.</i> , 793 N.E.2d 886 (Ill. App. Ct. 2003)	9
<i>In re Zappos, Inc.</i> , 893 F. Supp. 2d 1058 (D. Nev. 2012)	16, 17
<i>Jenkins v. CitiFinancial, Inc.</i> , No. 2:05-1199-PMD-GCK, 2007 U.S. Dist. LX 107874 (D.S.C. Jan. 16, 2007)	16
<i>Johnson v. Cont’l Fin. Co., LLC</i> , 131 F.4th 169 (4th Cir. 2025)	8, 14, 15, 17

<i>Lampo v. Amedisys Holding, LLC</i> , 445 S.C. 305, 914 S.E.2d 139 (2025)	i, 1, 2, 3, 5, 6, 7, 8, 9, 10
<i>Rd., LLC v. Beaufort Cty.</i> , 443 S.C. 11, 902 S.E.2d 366 (2024)	4, 18
<i>Sanders v. Savannah Highway Auto. Co.</i> , 440 S.C. 377, 892 S.E.2d 112 (2023)	13
<i>Sauner v. Pub. Serv. Auth. of S.C.</i> , 354 S.C. 397, 581 S.E.2d 161 (2003)	6
<i>SouthTrust Bank v. Williams</i> , 775 So. 2d 184 (Ala. 2000)	9, 11
Statutes	
S.C. Code Ann. § 37-2-416	11
Other Authorities	
Williston on Contracts (4th ed. 2025)	15

PRELIMINARY STATEMENT

The Court should not rewrite its precedent for SRP's benefit, nor allow SRP to "opt out" from the "longstanding, black-letter" contract principles governing contract law in South Carolina. *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 320, 914 S.E.2d 139, 147 (2025). Indeed, the Court should answer the questions before it by using the same method it employed in *Lampo*: "by applying the standard contract principles that have always governed the formation of contracts in this State." *Id.* at 314. And in *Lampo*, the Court reaffirmed those principles apply to all contracts equally and without exception, leading the Court to reject the "opt out" exception the *Lampo* defendant sought, thus "preserv[ing] the sanctity of contract in South Carolina." *Id.* at 320. So too here. All contracts have the same elements, and they should apply to all parties and contracts equally. Yet SRP's response seeks two exceptions that would disturb the "sanctity" this Court preserved in *Lampo*.

First, SRP seeks the same exception the *Lampo* defendant sought—to allow it to unilaterally foist arbitration terms on consumers using opt out offers. *Id.* In both cases, defendants offered plaintiffs the opt outs with notice and time to reject the opt out "offers," telling them they would be "accepting" the offers if they "failed" to opt out. *Id.* at 309. And in both cases, there is no dispute plaintiffs received the offers: in *Lampo*, plaintiff clicked that she acknowledged the offer, and here Plaintiffs received the offers by mail. *Id.* at 310. Yet in both cases plaintiffs responded with silence and inaction, never suggesting they accepted or rejected defendants' offers. *Id.* at 310. And the same facts call for the same results.

In *Lampo*, this Court rejected every ground defendant asserted to enforce the opt out. It held that merely receiving an arbitration offer is never the same as accepting it. *Id.* at 314. Thus, notice alone is not enough to form a contract because an arbitration contract is like any other

“bilateral” contract, it can only be formed “by mutual promises, not by one unilateral promise accepted by the other party’s performance.” *Id.* at 313. And under that standard, an offeree cannot accept an opt out with silence or inaction. *Id.* at 314–15. They must manifest their assent through words or action. *Id.* And without either there can be no assent; and without assent there is no contract. *Id.*

But the Court did not stop there. It recognized the opt out device for what it is, not just in that case, but in every case. It called the opt out a “new blight on the law of contracts” cloaked in a “clever disguise” and “employed to circumvent the longstanding, black-letter principles of contract law[.]” *Id.* at 320. For that reason, the Court held it would not allow that “blight” to infect South Carolina law, even if other jurisdictions allowed it. *Id.* (“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”). Even so, SRP says the Court should make an exception in this case.

SRP wants the Court to allow it to “unilaterally” add arbitration terms to its member contracts using “opt out” offers—all without allowing its members the same right. Def.’s Br. 10. And SRP says it needs this one-way exception to help run its business “efficiently” and adapt to “competitive market conditions.” *Id.* at 2. Understanding this approach would deviate from *Lampo*’s principles, SRP claims the case does not apply because Plaintiffs here are consumers and plaintiffs there were employees, leading SRP to suggest the Court should vary its approach by contract type. *Id.* at 1. But these contentions misunderstand the principles at issue.

No one doubts allowing SRP to amend its contracts with opt outs would help it operate “competitively.” The defendant in *Lampo* wanted the same right, argued it was “imperative” to its business, and would have benefited from its “efficiency.” *Lampo*, 445 S.C. 316. But courts do not foster competitive markets by tilting the rules to one side’s favor, they foster competition by

enforcing the rules equally. And those rules do not differ by contract type. No matter whether SRP is an employer or credit union, an arbitration contract is a bilateral contract and has the same elements as all other bilateral contracts, including the need for “assent.” *Lampo*, 445 S.C. 313 (“an agreement to arbitrate is—by definition—a bilateral contract”). And if silence and inaction in response to an opt out did not manifest assent in *Lampo*, then they do not here.

More to the point, SRP failed to address the question at issue: whether a consumer who agrees to a contract that may be “amended from time to time” agrees the other party may later amend the contract by opt out. *See* D. Ct. Order 31–32. SRP failed to answer this question in part because it focused on the wrong contract. SRP’s 2014 Membership Application includes the “amended from time to time” language, while its 2021 Membership Agreement has differing language at issue under the second certified question. *Id.* at 5. Indeed, the District Court focused on the 2014 agreement’s language for the first certified question and the 2021 agreement for the second certified question. *See* D. Ct. Order 31–32, 36. Yet SRP’s brief conflated the two when answering question one. *See* Def.’s Br. 18. But the Court should focus on the agreement question one focuses on. And on that question, SRP failed to locate South Carolina authority holding a contract that may be “amended from time to time” can be amended through an “opt out.” For good reason, there is none and should be none. Any contract, including the contract at issue in *Lampo*, may be amended “from time to time.” But that language does not constitute a “modification” clause warning members how SRP might modify the contract, nor can it transform SRP’s “unilateral” opt out offer into a bilateral contract. Arbitration agreements are “bilateral” by nature and must always fulfill the elements needed to form bilateral contracts.

Second, SRP seeks an exception to save its “illusory” 2021 Membership Agreement’s arbitration terms from themselves. But again, SRP’s brief spends time answering questions the

Court did not certify, at first suggesting the Court should not answer the second certified question at all. Def.’s Br. 35 (claiming “The Court should not reach the second certified question” under “*Prima Paint*”). But the Court should not avoid answering the question under the “*Prima Paint*” doctrine as SRP suggests because *Prima Paint*’s “arbitrability” doctrine is not at issue under the certified question, nor would it apply here in any event, as elaborated below.

Next, SRP re-examines whether its 2021 Agreement is “illusory,” again arguing a question that is not before the Court. The second certified question *assumes* the contract is “illusory” and questions whether the implied covenant can nevertheless “save” it. Dr. Ct. Order 36. Answering that question does not require the Court to rehash whether the agreement is “illusory” in the first place. In any event, Plaintiffs reestablish why the contract is illusory below—and why it also cannot be saved.

And last, on the question itself, SRP avoids Plaintiffs’ arguments. As Plaintiffs explained, the implied covenant applies only to formed contracts, and illusory contracts are, by definition, “unformed.” Pl.’s Br. 14–17. 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.” *Rd., LLC v. Beaufort Cty.*, 443 S.C. 11, 24, 902 S.E.2d 366, 372 (2024) (emphasis added). To use the covenant to form an unformed contract would be to use the covenant for a function it cannot fulfill.

The Court should therefore answer both questions with the same answer: “No.”

ARGUMENT

I. The Court should apply the “longstanding, black-letter” contract principles it articulated in *Lampo* without exception

The answer to the first certified question depends on whether “longstanding, black-letter” contract principles articulated in *Lampo* apply to all contracts, or whether “one-sided” exceptions to those principles exist. Plaintiffs assert all contracts and contract amendments have the same elements and the Courts should construe those elements in the same way without exception. SRP disagrees and proposes a “one-sided” exception in its response brief, asking the Court to find it can “unilaterally” change contract terms with “opt outs,” even if its members never respond to those opt out offers—all without allowing its members to force changes to the contracts in the same way. Def.’s Br. 10. As explained below, this was just the scenario in *Lampo* and the Court should decline to revise that precedent for SRP’s benefit.

But before analyzing SRP’s arguments, Plaintiffs must clarify the contract the parties and Court are construing. For the first certified question, the District Court questioned whether a contract that may be “amended from time to time” allows a party to later amend it using an opt out offer, even if the offeree never responds or otherwise signals their assent to the opt out. *See* D. Ct. Order 31–32. The District Court drew this “amended from time to time” language from SRP’s 2014 Membership Application Agreement. *Id.* But SRP’s analysis on this question focuses in part on another contract’s language, its 2021 Membership Agreement. Def.’s Br. 18. Unlike the 2014 agreement, the 2021 agreement detailed a “modification clause,” and that clause is at issue under the second question, not the first. *Id.* Plaintiffs raise this because the District Court ordered the questions this way for a reason, as its analysis seized on whether the 2014 Agreement’s language allowed for the opt out, and whether the 2021 Agreement’s modification clause rendered it “illusory.” *See* D. Ct. Order 31–32. Yet SRP’s analysis for the first question weaves between the

two clauses, confusing which is at issue. The Court should not make the same mistake, and construe the question as the Court certified it, relying on the 2014 language.

a. *Lampo* controls

SRP hinges its brief on one line, that its contract may be “amended from time to time”—as if that language allows SRP to amend its contracts however it wants whenever it wants, even through an opt out. It does not.

To answer the question at issue, the Court should remember first principles just as it did in *Lampo*, applying the “standard contract principles that have always governed the formation of contracts in this State.” *Lampo*, 445 S.C. 314. Contracts have elements. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Contract amendments have elements. *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). And the elements for each are the same, as a contract amendment is itself a contract. *Id.* Those elements are: offer, acceptance, consideration, and a “meeting of the minds” between the parties. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). The Court has never held those elements vary by contract type, as if employment contracts differ from consumer contracts in what they require. Nor should it, these are the elements that have “always” applied in South Carolina, without exception. *Lampo*, 445 S.C. 314.

Yet SRP believes otherwise, suggesting the circumstances here differ from those in *Lampo*, claiming the Court should vary how the elements apply to employment and consumer contracts. Def.’s Br. 13-22. In other words, SRP seeks an exception to the holding outlined in *Lampo*, asking the Court to allow it to impose the “blight” that plagues contracts across the country on its customers. *Lampo*, 445 S.C. 320. And it does so along three lines the Court should reject for three reasons.

First, SRP suggests this case differs from *Lampo* even though they overlap on the facts. In both cases, plaintiffs started out under contracts without arbitration agreements and in both cases, defendants sought to add them through opt outs. D. Ct. Order 4–5; *Lampo*, 445 S.C. 310. In both cases, there was no dispute plaintiffs had “received” the opt out offers, with plaintiff in *Lampo* “clicking” an acknowledgment and plaintiffs here presumed to have received them in the mail (although they deny it). D. Ct. Order 4–7, 24–25; *Lampo*, 445 S.C. 310. And in both cases, plaintiffs did nothing in response but respond with “silence and inaction.” D. Ct. Order 27–29; *Lampo*, 445 S.C. 314–315. Thus, the question in both cases should have the same answer: “silence and inaction” cannot constitute acceptance. *Lampo*, 445 S.C. 314–316.

The only nuance at issue between the cases is the one SRP fails to analyze—that SRP’s Membership Application stated the contract may be “amended from time to time.” *See generally* Def.’s Br. Like Plaintiffs, SRP located no cases holding that language alone allows for an opt out to be foisted on consumers in South Carolina. *Id.* For good reason. Language stating a contract may be “amended from time to time” says nothing but what is true about all contracts: they may be amended from time to time *on agreement between the parties*. In other words, the language constitutes a redundancy, repeating what can happen with any contract at any time. But in any event, it cannot erase the elements for forming an amendment, the parties must still accept and assent to amendment terms—because arbitration contracts cannot be formed “unilaterally,” they require “mutual promises[.]” *Lampo*, 445 S.C. 314. This is because “an agreement to arbitrate is—by definition—a bilateral contract[.]” meaning it must meet all the elements required to form a bilateral contract, including consideration and assent. *Id.* at 313.

In so holding, the Court recognized a distinction other courts often miss. Even if an underlying contract between parties is “unilateral” in nature, an arbitration contract is always

bilateral. *Id.* As the Fourth Circuit reasoned in *Johnson v. Cont'l Fin. Co., LLC*, 131 F.4th 169, 182 n.* (4th Cir. 2025), even when the parties start their relationship under a unilateral agreement, “the parties’ separate, bilateral arbitration agreement is supported *solely* by the mutual exchange of promises to arbitrate.” (Emphasis in original). And no modification proposed to change that contract can alter that requirement: “A modification that unilaterally withdraws one side’s promise with only *post hoc* notice—which the change clause here permits [defendant] to do at any time, including after arbitration begins—would torpedo that separate agreement.” *Id.* For that reason, a “unilateral” opt out offer cannot be “bilateral” by definition, meaning the Court can only reject it here just as it did in *Lampo* and the Fourth Circuit reasoned in *Johnson*. To hold otherwise would impose “no limit” on SRP’s ability to impose arbitration on its members. *Lampo*, 445 S.C. 316.

Second, SRP says employment relationships differ from consumer ones and thus dictate different rights under contract. Def.’s Br. 19–20. Not so, this misunderstands the contract at issue. This case is not about employment contracts or consumer contracts; it’s about an arbitration contract. And again, “an arbitration agreement must be formed by mutual promises, not by one unilateral promise accepted by the other party’s performance.” *Lampo*, 445 S.C. at 314. That is why what industry SRP occupies should not sway the analysis. Whether Plaintiffs are employees, consumers, patients, or contractors, arbitration contracts are arbitration contracts, and the law does not vary how it views them by context. Because arbitration contracts are “bilateral” in nature, SRP cannot impose them “unilaterally.”

And third, SRP cites cases from other jurisdictions that allowed companies to use opt outs. But here, as in *Lampo*, the cases SRP cites “arose under different factual situations that are significant to the question of acceptance of a contract offer.” *Lampo*, 445 S.C. 320. For example, in *Beneficial Nat’l Bank v. Payton*, the creditor relied on a “modification clause” its mechanism to

amend the contract by opt out. 214 F. Supp. 2d 679 (S.D. Miss. 2001). But here, there is no modification clause detailing how SRP contract may be modified—only the redundancy that the contract may be “amended from time to time.” For that same reason, the remaining cases SRP cite on this point are “distinguishable” because the defendants in each warned how they may modify the contracts at issue under modification clauses. *See Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 826 (S.D. Miss. 2001); *Gillam v. Branch Banking & Tr. Co. of Va.*, No. 3:17-cv-722, 2018 U.S. Dist. LEXIS 133255, at *14 (E.D. Va. Aug. 7, 2018); *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000); *see Hutcherson v. Sears, Roebuck & Co.*, 793 N.E.2d 886, 894 (Ill. App. Ct. 2003).

But even if every decision were on point, this Court still declined to follow them in *Lampo*: “Frankly [] some of the cases are directly on point. 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. Nothing suggests the Court should change its holding here when SRP only cites reasoning this Court has rejected.

The Court should therefore apply *Lampo*’s principles when answering the first question with “No.”

b. Adopting the RCC would change South Carolina law

SRP does not advocate that the Court should adopt the RCC but says it “confirms” the Court can apply its logic here. Def.’s Br. 23. Yet digging into the argument’s logic reveals why the Court should not. Consider the precedent SRP cites. In *Cornell v. Desert Financial Credit Union*, the Arizona Supreme Court adopted the RCC and allowed defendant to add arbitration terms by opt out. Def.’s Br. 23 (*citing Cornell v. Desert Fin. Credit Union*, 524 P.3d 1133 (Ariz. 2023)). But SRP misunderstands *Cornell*’s reasoning on why it did. The *Cornell* court found the

RCC could apply to arbitration contract offers because the underlying contract at issue was “unilateral” in nature. *Id.* at 1137–38. And because it was “unilateral,” the *Cornell* court found defendant could avoid the obligations that come with a “bilateral” agreement when modifying the contract, including the elements requiring “offer, acceptance, and consideration.” *Id.* at 1136.

In other words, the *Cornell* court adopted the RCC in that context because it declined to find an agreement to arbitrate is “bilateral.” *Id.* But the problem with applying that logic here is this Court held the opposite: “an agreement to arbitrate is—by definition—a bilateral contract.” *Lampo*, 445 S.C. at 313. And this is because “the parties necessarily exchange mutual promises to take any dispute to an arbitrator.” *Id.* Indeed, this Court’s reasoning shows why the RCC cannot supply the bases to add arbitration terms by opt out, as “an arbitration agreement must be formed by mutual promises, not by one unilateral promise accepted by the other party’s performance.” *Id.* As above, this is the distinction courts sometimes miss with arbitration agreements: no matter whether the parties’ underlying agreement is unilateral or bilateral, arbitration agreements are always bilateral and require mutuality.

In sum, the RCC under *Cornell*’s formulation applies to “unilateral” contract relationships and thus cannot apply here when this Court has held arbitration relationships are “bilateral” by definition. The Court should therefore decline to adopt the RCC, not only for that reason, but also the reasons articulated in Plaintiffs’ opening brief (which Plaintiffs do not rehash here when SRP declined to address them).

c. SRP cites “consumer protection statutes” that do not apply

Last, SRP misquotes two consumer protection statutes to suggest they “support answering the first certified question, ‘Yes.’” Def.’s Br. 37. They do not. SRP says the statutes “expressly authorize a lender to change the terms of an initial agreement, even if the change was not

authorized by the initial agreement, upon proper notice to the consumer.” *Id.* (citing S.C. Code Ann. § 37-2-416 (“Change in terms of revolving charge accounts”) and S.C. Code Ann. § 37-3-408 (“Change in terms of revolving loan accounts.”)). But this overstates what the statutes say, as they do not provide SRP a freewheeling right to modify all aspects of its contracts.

Both statutes allow credit card and “revolving” loan lenders to change terms on customer accounts, but the statutes *limit* what the lenders may change. For instance, § 37-2-416 says a creditor may “change the terms of a revolving charge account *applying to any balance* incurred before or after the effective date of the change.” And § 37-2-408 says the same for loan accounts. In other words, both statutes thus allow only “cost and charge” changes, not “any” change to a lender’s agreement with a customer. S.C. Code Ann. § 37-2-416 and S.C. Code Ann. § 37-3-408. For that reason, SRP cannot stretch these statutes past their purpose, as nothing in them suggests they allow creditors to change other terms for other purposes, including to add arbitration terms to the parties’ contracts.

That is what separates this case from *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000). There, Alabama statutes permitted what SRP wants here, as they allowed creditors to modify their credit card agreements “in *any* respect *any* term of the credit card account,” not only “cost and charge” changes to account balances. *SouthTrust Bank*, 775 So. 2d at 190 (emphasis added). In other words, Alabama codified a creditors’ right to make notice-based changes in its statutes, and *SouthTrust* construed those statutes allow the “unilateral-contract” changes defendant made. *Id.* But again, that is not the case here. The statutes SRP cites here limit the notice-based changes creditors can make, and arbitration clause changes do not fall within those limits.

II. The “implied covenant of good faith and fair dealing” cannot “save” an “illusory” contract from itself

Unlike above, this question concerns the 2021 Agreement and its modification clause suggesting SRP may modify its terms in its “sole discretion” “at any time without notice except as expressly required by applicable law[.]” *See* D. Ct. Order at 32. The District Court found the “2021 Membership Agreement—and its arbitration provision—[are] unsupported by consideration” and thus “seem[ed] to fit [the] mold” for an “illusory” contract. *Id.* at 33-34. Yet the Court stopped short from holding it was illusory, instead asking this Court whether the covenant can “save” a contract like that from its illusoriness. *Id.* at 36. And that is the question this Court certified under Rule 244.

Yet SRP’s analysis does not focus on that question, instead asking the Court to avoid answering the question at all, claiming it is for the “arbitrator,” and reexamining the District Court’s analysis. But as explained below, the Court’s task under Rule 244 is answer the question the District Court certified, not reexamine the determinations leading to that question. And even if the Court were to reanalyze the District Court’s determinations, it should reach the same conclusions.

a. *Prima Paint* does not apply

SRP starts by contending the Court should not answer the second question at all because it believes Plaintiffs argued a point they did not argue. SRP says, “Plaintiffs’ current argument is much broader than the one originally raised to the district court[.]” claiming Plaintiffs “argued the change-in-terms provision and related arbitration amendments were void for illusoriness, not the entire contract.” Def.’s Br. 33. But this “*Prima Paint*” point misses the mark for three reasons.

First, Plaintiffs did not change their argument’s scope from the District Court to this Court. Reviewing Plaintiffs’ brief shows they answered the question before the Court: whether the implied covenant can save an illusory contract from itself. Pl.’s Br. 12–18. Their analysis focuses

only on that question, without trying to invalidate SRP’s “entire contract” as SRP suggests. *Id.* That aside, it was the District Court, not Plaintiffs, that suggested *both* the Agreement and its arbitration provision were at risk for illusoriness: “all of SRP’s promises would appear to be illusory, leaving the 2021 Membership Agreement—and its arbitration provision—unsupported by consideration.” D. Ct. Order 33-34. As SRP admits, Plaintiffs did not posit that before the District Court and focused only on the arbitration provision itself. Def.’s Br. 34. (“Plaintiffs proffered a much narrower illusory argument before the district court”). Thus, when SRP says “Plaintiffs broader argument seeks to avoid the effect of implied covenant of good faith and fair dealing existing in every [SRP] contract” that is not so. Plaintiffs are answering the certified question as it is posed and as the Court should answer it, too. Indeed, that is what Rule 244 requires, that the parties and Court answer “only the narrow legal question presented by the federal court.” *Denson v. Nat’l Cas. Co.*, 439 S.C. 142, 145 n.1, 886 S.E.2d 228, 229 (2023) (“this Court’s role on certification is to answer questions of law, not questions of fact, and noting we must answer those questions narrowly to ensure disputed facts do not impact the analysis or alter the conclusion”). Nothing in Plaintiffs’ brief suggests they tried to do otherwise, nor could they in any event.

Second, even if Plaintiffs were challenging SRP’s “entire” contract here (they are not), *Prima Paint* still would not apply. *Prima Paint* holds that challenging a contract’s validity “as a whole” is a question that the arbitrator decides, while challenging an arbitration term’s validity is for the Court. *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 385–86, 892 S.E.2d 112, 116 (2023). But what SRP misunderstands is that Plaintiffs are not challenging the contract’s validity, they are challenging the contract’s *formation*. In other words, Plaintiffs are challenging whether a contract even exists, arguing it is an unformed “illusion.” And contract formation

questions are always for the court to decide, never the arbitrator: “A claim that a contract is illusory calls into question the very existence of the contract, and it is always incumbent on the court to ensure that the parties *formed* a valid agreement to arbitrate before sending a dispute to arbitration.” *Johnson*, 131 F.4th 173. As the U.S. Supreme Court held: “courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor... its enforceability or applicability to the dispute is in issue[.]” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010).

In other words, Plaintiffs disputed whether the parties “formed a valid agreement to arbitrate” at the District Court level and have not “broadened” that challenge here. They answered the certified question, just as the Court should, too.

b. Whether SRP’s contract is “illusory” is not before the Court, but the contract is “illusory” in any event

SRP next re-argues whether its contract was, in fact, “illusory,” second-guessing the District Court’s analysis on this point. But this again misunderstands the question before the Court. The District Court did not ask whether SRP’s contract was “illusory,” it questioned whether an illusory contract can be “saved” by the implied covenant. D. Ct. Order 36. In other words, the District Court was satisfied the agreement was illusory but for that “narrow legal question[.]” *Denson*, 439 S.C. 145, n. 1. And here, as above, the Court should focus on the “narrow legal question,” not reanalyze what the District Court analyzed for itself. Yet even if the Court reevaluates whether the agreement is “illusory” but for the implied covenant (it should not), the answer is the same here as it was at the District Court.

As the District Court explained: “[a]n illusory promise is a ‘promise by which [its] terms make[s] performance entirely option with the promisor.’” D. Ct. Order 32 (*citing and quoting* Restatement (Second) of Contracts § 77 cmt. a; 17A Am. Jur. 2d Contracts § 125. 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*, 131 F.4th 178. 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. *Id.* at 176 (“Any new law student learns the distinction between contract formation and validity”).

Just last year the Fourth Circuit considered language like that in SRP’s agreements and found the defendant could not enforce it: “[the agreement] allows [defendant] to change ‘any term of [the] Agreement’ at its ‘sole discretion, upon such notice . . . required by law.’ The plain language of the clause merely commits [defendant] to do what it is already required to do by law.” *Johnson*, 131 F.4th at 180. The Court elaborated: “That cannot furnish consideration. A bargained-for-exchange by definition assumes that each party will undertake some obligation beyond those already imposed by law.” *Id.* And like SRP, defendant in *Johnson* tried “notifying” plaintiff by “by posting an updated version of the cardholder agreement on its website”—an act that could not “notify” plaintiff in any sense. *Id.*

This reasoning follows logic going back decades, including under the District Court’s decision in *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 617 (D.S.C. 1998). There, this Court repeated that a “promise whereby the promisor retained an unlimited right to decide later the nature or extent of her performance is, in law no promise.” *Id.* at 617 (citation and quotations omitted). So too under *Jenkins v. CitiFinancial*, holding that “where one party reserves without restriction the right to cancel or modify an agreement at any time, courts have held that the promise is illusory

and the agreement unenforceable.” *Jenkins v. CitiFinancial, Inc.*, No. 2:05-1199-PMD-GCK, 2007 U.S. Dist. LX 107874, at *18-19 (D.S.C. Jan. 16, 2007). And as explained in Plaintiffs’ opening brief, this reasoning matches the reasoning from across the country. “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).

SRP is trying the same trick here, reserving all amendment rights for itself without bargaining for them, and relying on them to force arbitration on Plaintiffs. The Court should reject the attempt for the same reason courts have in other cases. Not only did SRP roll out its arbitration terms in a haphazard way—to the point where it has not even produced all documents related to that rollout—but it did so claiming an “unlimited” right to amend the agreements in perpetuity.

In response, SRP says the agreement “is not illusory because SRP’s modification authority is constrained by the Agreement and by applicable law[.]” relying in part on provision’s requirement for “ten days’ notice” if the law requires notice but fails to provide a timeframe. Def.’s Br. 37. But the District Court rejected both arguments considering the Agreement’s language and precedent. As it held: “The court rejects SRP’s assertion that it has a ‘contractual obligation’ to give members at least 10 days’ notice... The modification clause’s second sentence applies *only if* some ‘applicable law’ requires notice[.]” D. Ct. Order 33. Under that term, the District Court found SRP “remains free to modify the agreement at a whim.” *Id.* That aside, agreeing to follow “applicable law” is not a restriction that can constitute consideration. *Id.* For that reason, the

agreement was “illusory” in the District Court’s view depending on the Court’s answer to the question at issue. And Plaintiffs address that question below.

c. The implied covenant cannot save an illusory contract from itself

Last, SRP misunderstands Plaintiffs’ argument when it says the argument “necessarily assumes, a valid Membership Agreement exists” between the parties. Def.’s Br. 42. Plaintiffs do not assume whether a “valid Membership Agreement exists”—they are arguing the arbitration agreement is “illusory.” *Id.* at 43. Again, Plaintiffs have only answered the question before the Court: whether the implied covenant can save an illusory contract from itself. And as Plaintiffs answered in their opening brief, it cannot.

SRP devotes only two paragraphs in substance to this question, string-citing cases holding the covenant can in some circumstances, in some courts, save an illusory contract. *Id.* at 40, 42. But it ignores the courts across the country that have rejected its position: “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 at 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”).

In other words, the prevailing precedent favors Plaintiffs' position and SRP supplies no reason to depart from it. As this Court held in *Beaufort* and SRP cited in its brief, the implied covenant's purpose is to govern "*existing* contractual rights" and "*existing* contractual duties." *Rd., LLC v. Beaufort Cnty.*, 443 S.C. 11, 24, 902 S.E.2d 366, 372 (2024). Put another way, it does not apply to contracts that do not exist. And because illusory contracts do not exist, the implied covenant cannot save them.

The Court should therefore answer this question as it should answer the last: "No."

CONCLUSION

For the reasons above, the Court should answer both questions "No" under its Rule 244 authority.

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Respectfully submitted,

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