No. _____

IN THE
Supreme Court of the United States

BERKELEY COUNTY SCHOOL DISTRICT,

Petitioner,

v.

HUB INTERNATIONAL LIMITED; HUB INTERNATIONAL MIDWEST LIMITED,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where parties enter into an agreement which expressly terminates on a date certain, and which contains an arbitration provision with a delegation clause that does not survive the expiration of the agreement, should a court or an arbitrator decide whether the parties agreed to arbitrate claims arising from events occurring after the termination of the arbitration agreement?

PARTIES TO THE PROCEEDING

Petitioner in this Court is the Berkeley County School District, a public school district and body politic and corporate in Berkeley County, South Carolina. Respondents are HUB International Limited and HUB International Midwest Limited.

Knauff Insurance Agency, Inc., HUB International Southeast, and Brantley Thomas are also defendants in the proceedings below.

STATEMENT OF RELATED CASES

All proceedings directly related to this petition include:

- *Berkeley County School District v. HUB International Limited, et al.*, No. 19-1158, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Dec. 4, 2019.
- *Berkeley County School District v. HUB International Limited, et al.*, No. 21-1691, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Dec. 28, 2022.
- *Berkeley County School District v. HUB International Limited, et al.,* No. 24-1328, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Mar. 7, 2025.
- *Berkeley County School District v. HUB International Limited, et al.*, No. 2:18-cv-00151, U.S. District Court for the District of South Carolina. Orders denying motions to compel arbitration entered Mar. 30, 2024; June 3, 2021; Jan. 29, 2019.

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The two earlier opinions of the Fourth Circuit regarding arbitration (App. 72a, 131a) are unreported but available at 2022 WL 17974626 (Dec. 28, 2022) and reported at 944 F.3d 225 (Dec. 4, 2019), respectively. The two earlier opinions of the district court regarding arbitration (App. 131a, 168a) are unreported but available at 2021 WL 2253265 (D.S.C. June 3, 2021) and reported at 363 F. Supp. 3d 632 (D.S.C. Jan. 29, 2019), respectively.

JURISDICTION

The Fourth Circuit entered judgment on March 7, 2025. App. 1a. The court denied Petitioner's petition for rehearing en banc on April 4, 2025. App. 203a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides in relevant part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a

> contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

INTRODUCTION

This petition presents the question of whether a contract with an arbitration clause delegating questions of arbitrability to an arbitrator allows a party to compel arbitration of an unrelated dispute arising years after the agreed termination of the arbitration clause. The issue is not the breadth or scope of the arbitration clause, nor whether or when the contract was terminated. The issue is whether it is *possible* for contracting parties to agree to terminate the right to demand arbitration in a contract that delegates arbitrability disputes to an arbitrator.

No decision of this Court or of any court of appeals had directly addressed this question before the Fourth Circuit, after seven years of litigation and three appeals, decided that it is impossible for contracting parties to agree to terminate the right to demand arbitration in a contract with a delegation clause. App. 12a–13a. Certiorari is warranted because the Fourth Circuit's decision answers a legal question of exceptional importance with an extraordinary decision that is inconsistent with multiple decisions of this Court and lacks any support from other courts of appeals.

The rule for deciding whether a party can demand arbitration of a dispute arising after the expiration of the contract containing the arbitration provision is

straightforward and well-established. *See Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 205–06 (1991) (providing a claim brought after the expiration of a contract "can be said to arise under the contract only where it involves facts and occurrences that arose before expiration").[1] The issue presented here is whether a judge or an arbitrator applies that rule in cases in which the expired arbitration agreement had a delegation clause. The Fourth Circuit's decision is now the only appellate case law on this question.

That decision threw out of court a public-school district's effort to recover millions of dollars that an insurance company stole from taxpayers by bribing a school official because, over a decade earlier, officials who thought they were entering a one-year agreement for insurance services—and who were prohibited by law from entering an agreement longer than one year—unknowingly "agreed" to terms that waived the Berkeley County School District's rights forever. App. 103a ¶ 94. Whether that is really the law is a question of exceptional importance.

The precedents of this Court counsel that is not the law. "The first principle that underscores all of our arbitration decisions is that arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019) (internal quotation marks and

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[1] *Litton* involved labor dispute arbitration, but the courts of appeals universally apply it in the FAA context. *See* App. 63a n.31 (noting "at least seven courts of appeals have extended *Litton*'s holdings to the FAA because the decision was not based on the peculiarities of labor law" and collecting cases).

alterations omitted). Therefore, "the first question in any arbitration dispute must be: What have these parties agreed to?" *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024). Where "the question is whether the parties agreed to send the given dispute to arbitration . . . that question must be answered by a court." *Id.* at 150. In this case, it is a fact not challenged on appeal that the School District never consented to any arbitration agreement being in effect after June 29, 2004. App. 18a. The Fourth Circuit nevertheless held that federal law requires an arbitrator, not a court, to decide whether claims arising from events occurring no earlier than 2006, and sometimes as late as 2016, must be arbitrated.

The decision lacks support from any other court of appeals, as one would expect for a decision contrary to this Court's precedent. Excepting cases cited in a footnote narrating a district court holding that was not challenged on appeal, App. 10a n.3, the only sister-circuit case cited in the Fourth Circuit's opinion is the D.C. Circuit's decision in *National Railroad Passenger Corp. v. Boston and Maine Corp.* App. 14a (citing 850 F.2d 756, 759 (D.C. Cir. 1988)). The Fourth Circuit distinguished this case on the basis that it did not involve an arbitration agreement with a delegation clause because the D.C. Circuit rejected out-of-hand the idea that arbitration agreements do not expire when parties agree that they expire: "We also recognize that even a contract with a very broad arbitration clause is usually meant to have a finite duration, and that parties must be able effectively to provide for the expiration or termination of their obligation to arbitrate . . . ." 850 F.2d at 759.

Instead of following the decisions of this Court or even of other courts of appeals, the Fourth Circuit rendered a decision that is as novel as it is extraordinary: If two parties enter into a contract with an arbitration provision that delegates arbitrability questions to the arbitrator, then either party may demand arbitration of any subsequent dispute between them forevermore, even if the dispute arises from events occurring years or *decades* after the agreed expiration of the contract. At oral argument, Respondents pushed that position to its logical extreme, stating that an arbitration provision in a one-year brokerage services contract that expired over 20 years ago would compel the School District to arbitrate claims arising from a motor vehicle accident 100 years in the future. The Fourth Circuit agreed.

To reach that extraordinary result, the Fourth Circuit sidestepped the undisputed expiration of the arbitration agreement in this case by reading *Rent-A-Center, West, Inc. v. Jackson* and *Buckeye Check Cashing, Inc. v. Cardegna* to hold that an arbitration agreement not only is a severable or salvageable part of a contract when a party challenges the validity of the contract, but it is also salvageable from the parties' *agreements* regarding the contract, including their agreement to terminate it. App. 13a (citing 561 U.S. 63, 72 (2010) & 546 U.S. 440, 448–49 (2006)). By severing the arbitration clause from the agreed termination of the contract the Fourth Circuit's rule imposes immortal arbitration agreements on parties that never agreed to them.

In the typical case challenging the validity of an arbitration agreement, a party comes to court and says, "I agreed to this, but I should not have to do what

I agreed to do," because the agreement purportedly is unconscionable or illegal or otherwise invalid. In this case the actors are reversed. Petitioner seeks to hold Respondents to their agreement that their arbitration agreement expired on June 29, 2004. App. 18a. Respondents, 14 years later, came to regret that, so they came to court and asked to be relieved of their agreement. App. 17a. The Fourth Circuit granted their request and severed the arbitration agreement from its agreed expiration.

Unless this Court grants certiorari, that will remain the only reported appellate case on whether it is possible for contracting parties to agree to terminate the right to demand arbitration in a contract that delegates arbitrability disputes to an arbitrator. The Court should not allow it to remain the last word on this question because it is irreconcilable with the Court's arbitration jurisprudence. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. at 67 (noting "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract" and "thereby places arbitration agreements on an equal footing with other contracts"); *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) ("The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." (internal quotation marks omitted)); *Litton*, 501 U.S. at 206 (noting "an expired contract has by its own terms released all its parties from their respective contractual obligations" including the obligation to arbitrate disputes). If the parties agree to terminate an arbitration agreement (for example, as in this case, by agreeing it will expire on a date certain), they have not formed an agreement to arbitrate disputes arising after the termination.

This is what "termination" of the arbitration agreement means. HUB cannot demand arbitration for a dispute arising from events beginning in 2006 under an agreement that it agreed to terminate in 2004 any more than it can demand payment for services rendered in 2006 under that agreement.

The Court should grant certiorari to explain that delegation clauses do not make arbitration agreements immortal—they still must be treated and enforced no differently than any other contractual provision. *See Morgan*, 596 U.S. at 418 (explaining that "a court may not devise novel rules to favor arbitration over litigation" because "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration").

STATEMENT OF THE CASE

A. Legal Background

When parties enter into an arbitration agreement, they may also include a delegation clause that delegates questions of arbitrability, "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy," to an arbitrator. *Rent-A-Ctr.*, 561 U.S. at 68–69. But whether an operative arbitration agreement exists is the threshold question of formation, which is for a court to decide. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (holding that in considering "whether parties have agreed to submit a particular

dispute to arbitration," it is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide" (internal quotation marks and brackets omitted)). The formation question should be decided before reaching questions regarding the scope of the arbitration agreement—regardless of any delegation—because the existence of an agreement is a necessary antecedent to those questions. *See Henry Schein*, 586 U.S. at 69 ("*But if a valid agreement exists*, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." (emphasis added)).

"[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Granite Rock*, 561 U.S. at 296. In considering whether the parties have agreed to arbitrate a given dispute, courts "have used a trichotomy among the disputes that arise in arbitrability cases." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*, 815 F.3d 834, 844 (D.C. Cir. 2016) (internal quotation marks and brackets omitted).

> There are (1) "disputes over the formation of an agreement to arbitrate"; (2) "disputes over the breadth of an arbitration clause, where the parties disagree over whether a certain issue falls within or without the subject matter coverage of an undoubted agreement to arbitrate"; and (3) disputes that "relate[ ] to the length, rather than the breadth, of an arbitration clause." In other words, three types of

> arbitrability disputes typically arise: (1) formation disputes; (2) breadth disputes; and (3) duration disputes.

Id. (quoting *Nat'l R.R. Passenger Corp.*, 850 F.2d at 761) (citation omitted). A formation dispute is for courts to decide. *Granite Rock*, 561 U.S. at 296. Breadth and duration disputes may be delegated to arbitrators. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010); *Nat'l R.R. Passenger Corp.*, 850 F.2d at 762.

B. Statement of Facts

Petitioner, the Berkeley Count School District (the "School District"), began purchasing insurance through insurance representative Stan Pokorney in 1996. App. 86a ¶¶ 18–19. It continued to purchase insurance from Mr. Pokorney when he joined Respondents' predecessor-in-interest, Knauff, in 2001, and then from Respondents (collectively with Knauff, "HUB") after they purchased Knauff in 2012. App. 82a–83a, 87a ¶¶ 7, 21, 24.

In 2001, Brantley Thomas became Executive Director of Finance, and later Chief Financial Officer (CFO), for the School District, responsible for acquiring insurance. App. 87a ¶¶ 22–23. During his tenure, Mr. Thomas continued to purchase insurance from Mr. Pokorney at Knauff and later HUB. App. 87a ¶ 24. In February 2017, Mr. Thomas was terminated because the School District learned he was suspected of crimes including embezzlement and steering insurance contracts in exchange for bribes. App. 88a ¶ 26. Mr. Thomas was later indicted and, after pleading guilty, was sentenced to 63 months in

federal prison and 132 months in state prison. App. 88a ¶ 27.

The agreements at issue in this case are brokerage service agreements (BSAs) for insurance-related services like brokering and consulting. App. 88a–89a ¶¶ 28–29. There were at one time six BSAs at issue, identified by start date: the 2002 BSA, the 2003 BSA, the 2005 BSA, the 2006 BSA, the 2009 BSA, and the 2011 BSA. App. 83a ¶ 10. The terms of each would require the School District to pay a brokerage service fee. App. 89a ¶ 30. These fees were charged in lieu of the traditional 10% to 15% commission on insurance premiums. *Id.* Each BSA contains an arbitration provision:

> All disputes, claims or controversies relating to [these Agreements], or the services provided, which are not otherwise settled, shall be submitted to a panel of three arbitrators and resolved by final and binding arbitration, the exclusion of any courts of laws [*sic*], under the commercial rules of the American Arbitration Association.

App. 89a ¶ 31.

Under the terms of the 2002 BSA, the School District agreed to pay a brokerage service fee of $100,000 on certain lines of insurance for the 2002–03 fiscal year. App. 90a ¶ 34. Because the premiums for these lines exceeded $1 million, a $100,000 fee in lieu of a 10% to 15% commission was reasonable. App. 90a ¶ 35. The terms of the 2003 BSA were identical to the 2002 BSA, except that it was for the 2003–04 fiscal

year, and one line of insurance was added and another removed. App. 91a ¶¶ 37, 39.

There was no BSA for the period July 2004 to June 2005. For that period, Knauff and the School District agreed to discontinue their practice of a fee under a BSA having an arbitration provision and converted to a straight commission arrangement, which did not (and could not) include any arbitration agreement. App. 93a–94a ¶ 50. Nor was there a BSA for the period July 2005 to June 2006. In April 2005, the School District issued a Request for Proposals (RFP) for insurance services. App. 92a ¶ 42. Mr. Pokorney submitted a bid for Knauff. *Id.* But after a consultant advised the School District that its RFP did not include sufficient property and casualty coverage, the School District withdrew the RFP and procured insurance from a state agency. App. 93a ¶48.

Knauff retained a lawyer, filed a protest, and threatened litigation (not arbitration). App. 93a ¶ 49. On January 31, 2006, Knauff and the School District executed a settlement agreement. App. 93a–94a ¶ 50. Both parties agreed "that judicial venue for any suit, action or proceeding arising out of or relating to this Agreement shall be proper only in the Court of Common Pleas for Berkeley County, South Carolina." App. 93a ¶ 50. Unfortunately, the settlement agreement did not debar Knauff from future business with the School District.

After the RFP settlement agreement, Knauff and Pokorney were once again able to obtain the School District's insurance business, this time by bribing the School District's CFO, Brantley Thomas. They returned to charging fees in lieu of commissions—this

time because fees could conceal payments far larger, as a percentage of premiums, than would be possible through a commission charged as a disclosed percentage of the premiums. For example, for an associated entity with no employees and no expenses other than interest on property-secured debt, Knauff charged a fee of $118,625 per year for renewals of Directors' and Officers' coverage. App. 96a, 98a–99a, 123a ¶¶ 57–58, 72, 152. A 15% commission would have been $9,750 per year; instead, the 2006 BSA charged over 12 times that amount—effectively a *182.5% commission*. *See* App. 97a ¶ 67. For another example, Knauff and HUB charged an annual fee of $70,000 for services provided on School Leaders Errors and Omissions coverage. App. 101a ¶ 81. The customary 15% commission would have been $11,250. App. 101a ¶ 82. Over the six years of the policy term, the School District paid $420,000 in fees, over 37 times the customary commission—effectively a *560% commission*. *See id.*

In 2017, the School District learned Mr. Thomas had engaged in bribery and embezzlement. App. 104a ¶ 99. Mr. Thomas pleaded guilty to a 20-count federal information. App. 104a ¶ 100. Ten of those counts were honest services wire fraud offenses from March 2010 to November 2016, in which Mr. Thomas accepted bribes from Mr. Pokorney in exchange for steering insurance contracts to Knauff and HUB. App. 104a ¶ 101.

C. Procedural History

This case was filed in January 2018, alleging Mr. Thomas steered contracts for unnecessary or exorbitantly priced insurance services to Knauff and

HUB in exchange for bribes. App. 83a ¶ 8. HUB responded with its first motion to compel arbitration, arguing the School District assented to arbitration provisions in the six BSAs identified by start dates in 2002, 2003, 2005, 2006, 2009, and 2011. App. 83a ¶¶ 9–10. After briefing and argument, the district court denied the motion to compel arbitration. App. 84a ¶ 14, 169a.

HUB appealed. App. 84a–85a ¶ 15. On December 4, 2019, the Fourth Circuit vacated the district court's denial of the motion to compel arbitration. App. 167a. It held "there are multiple disputes of material fact as to 'the making of [any] arbitration agreement,'" and remanded for trial to resolve "factual disputes concerning the formation of the four unsigned [BSAs]"—meaning the 2005, 2006, 2009, and 2011 BSAs. App. 165a. As to the signed 2002 and 2003 BSAs, it held,

> Moreover, because the June 2002 Agreement terminated in June 2003, and the June 2003 Agreement ended in June 2004, the Arbitration Clauses therein could not require Berkeley Schools to arbitrate any claims on the basis of conduct that began after those Agreements terminated. At best, the June 2002 and June 2003 Agreements might be relevant to questions of whether Berkeley Schools had knowledge of, or assented to, the subsequent Brokerage Service Agreements and Arbitration Clauses.

App. 164a. (citation omitted).

The case was remanded for trial pursuant to 9 U.S.C. § 4. There was no jury demand, so the case was

tried to the bench for five days. On June 3, 2021, the district court concluded the School District did not assent to the 2005, 2006, 2009, or 2011 BSAs and so is not bound by their arbitration provisions, and again denied the motion to compel arbitration. App. 130a ¶ 175. Regarding the 2002 and 2003 BSAs, the district court held the earlier Fourth Circuit decision meant the 2002 and 2003 BSAs could be evidence of assent to later BSAs but could not directly bind the School District to arbitrate claims based on conduct beginning after their expiration in mid-2004. App. 121a–22a ¶¶ 145–147, 129a ¶ 169.

HUB again appealed. HUB did not challenge the district court's factual findings nor its conclusions regarding assent to the 2005, 2006, 2009, and 2011 BSAs. App. 74a. It only challenged the district court's conclusion that the Fourth Circuit decision that the 2002 and 2003 BSAs could not bind the School District to arbitrate claims asserted in the amended complaint was binding as the law of the case. *Id.* HUB argued that conclusion was erroneous because the appellate opinion was based only on the allegations in the amended complaint, but evidence at the subsequent trial showed the conduct complained of in that complaint began within the terms of the 2002 and 2003 BSAs, and so the prior decision was not law of the case.

In a brief unpublished decision, the Fourth Circuit vacated the district court's denial of HUB's first motion to compel arbitration in part, holding "we agree with HUB that the district court was not bound by our prior decision about the 2002 and 2003 BSAs because the Section 4 trial produced substantially different evidence on that score." App. 77a. The

Fourth Circuit noted the amended complaint had an "attached exhibit that quantified the financial losses it incurred by paying for allegedly fraudulent or unnecessary insurance policies and consulting services" of which "part of those alleged damages arose from insurance policies procured or services provided while the 2003 BSA was still in effect." *Id.*

On remand, the School District amended the complaint to clarify that the School District seeks no damages from before July 14, 2006 (over two years after the expiration of the 2003 BSA). HUB filed another motion to compel arbitration, which the district court denied. App. 16a. The district court noted "the court is tasked with determining whether the facts alleged in the operative complaint fall within the arbitration provisions in the 2002 and 2003 BSAs." App. 62a. The district court's statement is consistent with the second Fourth Circuit decision, which stated that "testimony [at the Section 4 trial] undermines our previous reliance on Berkeley Schools' allegations that its injuries arose after the 2003 agreement terminated. We therefore conclude that the district court erred by declining to consider new evidence implicating the 2002 and 2003 BSAs." App. 77a. It is also consistent with the first Fourth Circuit decision, which held the 2002 and 2003 BSAs "could not require Berkeley Schools to arbitrate any claims on the basis of conduct that began after those Agreements terminated." App. 164a. Following those decisions of the Fourth Circuit, the district court found "that the conduct at issue—which occurred years after the 2002 and 2003 BSAs expressly terminated—did not arise from those Agreements." App. 66a. The district court held it "need not reach

the question of scope because arbitration is a matter of consent and here the parties have not consented." App. 70a.

A third appeal followed. App. 2a. In its third appellate decision on the arbitration issue in this case, the Fourth Circuit held the fact that the 2002 and 2003 BSAs contain "an arbitration contract in which they agreed to arbitrate arbitrability" requires granting the motion to compel arbitration, App. 10a, regardless of whether the School District's claims arose "on the basis of conduct that began after those after those agreements terminated," App. 164a. This petition seeks review of that decision.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

Before the Fourth Circuit decision for which Petitioner seeks review, no decision of this Court nor of any federal court of appeals directly addressed the question of who decides whether contracting parties agreed to arbitrate claims arising from events occurring after the agreed termination of their arbitration agreement, where the expired agreement had a delegation clause.

The Court has addressed whether a claim asserted after the expiration of an arbitration agreement arises under the agreement and is therefore subject to arbitration. *See Litton* 501 U.S. at 205–06 (providing that claims brought after the expiration of a contract arise under the contract only where they involve facts and occurrences that arose before expiration, where

an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement). The rule is that there is no obligation to arbitrate claims arising from events occurring after the termination of the agreement because there is no agreement to arbitrate such claims, and arbitration is a matter of consent. *Cf. Lamps Plus*, 587 U.S. at 184. The test is when the claims arose, not when they are asserted. Disputes arising under a contract with an arbitration provision are arbitrable even if asserted post-expiration because the parties agreed to arbitrate those disputes, not because of the timing of the assertion of grievances. *See, e.g.*, *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 513 (1st Cir. 2020) ("When two parties commit to arbitrate disputes arising under a contract, they ordinarily mean to bind each other to arbitrate such disputes even if the grievant doesn't complain until after the contract expires.").

But before now no appellate court had addressed who applies the *Litton* standard where the expired arbitration agreement had a delegation clause. And the Fourth Circuit held the delegation clause "makes all the difference" in its analysis of the School District's challenge to HUB's invocation of an arbitration agreement that expired in 2004 to various claims arising from 2006 to 2016.[2] App. 14a.

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[2] The arbitration agreement at issue in this petition is in the 2003 BSA, which expired on June 29, 2004. App. 18a. There is an identical arbitration agreement in the earlier 2002 BSA, but it

The analysis turns on which of three buckets the School District's challenge should be placed. The D.C. Circuit provides a helpful "trichotomy among the disputes that arise in arbitrability cases . . . (1) formation disputes; (2) breadth disputes; and (3) duration disputes." *Nat'l R.R. Passenger Corp.*, 850 F.2d at 761; *Marine Eng'rs' Beneficial Ass'n*, 815 F.3d at 844. Formation disputes must be decided by a court. *Granite Rock*, 561 U.S. at 296. Breadth (or "scope") and duration disputes may be delegated to an arbitrator. *Rent-A-Ctr.*, 561 U.S. at 69; *Nat'l R.R. Passenger Corp.*, 850 F.2d at 762. If the School District's challenge to compelling arbitration based on the 2003 BSA—that the 2003 BSA expired years before the conduct giving rise to the School District's claims—is a formation dispute, then the district court was correct to apply the *Litton* factors itself. If it is a breadth or duration dispute, then the Fourth Circuit was correct to reverse the district court.

The duration dispute bucket may be dispensed with quickly. A duration dispute is a dispute about whether a contract has expired, not a dispute about the legal consequences of an admitted expiration. *See Nat'l R.R. Passenger Corp.*, 850 F.2d at 763. Sometimes a contract's expiration may be contingent on disputable facts, like whether negotiations have deadlocked. *E.g.*, *Marine Eng'rs' Beneficial Ass'n*, 815 F.3d at 837. Or a contract could have continued

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expired on the same day that the superseding 2003 BSA began and so is not relevant to claims arising after the expiration of the 2003 BSA.

beyond its expiration by implication from the parties' continued performance. *Seven Resorts, Inc. v. United States*, 112 Fed. Cl. 745, 780 (2013). But there is no duration dispute in this case. The district court found that the 2003 BSA states that it expires on June 29, 2004. App. 18a. It also concluded that the 2003 BSA did not continue beyond its expiration by implication. App. 121a–22a ¶ 147. Those findings and conclusions were not challenged on appeal. App. 74a.

The question here is not "when did the contract expire?" Rather, given that it did expire years before the School District's claims arose, the question is "who decides whether the contract still provides a basis for compelling arbitration—*i.e.*, an agreement to arbitrate the dispute at issue?" *Cf. Granite Rock*, 561 U.S. at 296.

HUB argues an arbitrator decides because it is undisputed that an arbitration agreement with a delegation clause was at one time formed, that a formed agreement may not be "un-formed" because future events cannot change past events, and therefore the dispute in this case cannot be a formation dispute. Instead, it must be a dispute about the breadth or scope of the arbitration agreement: whether claims arising after the expiration of the contract fall within the scope of the arbitration agreement in the expired agreement. Because the expired agreement has a delegation clause, breadth or scope disputes must be decided by an arbitrator, not a judge. The right to demand arbitration therefore may never expire because it is always a question of the scope of the expired agreement. Thus, whenever there is an arbitration agreement with a delegation clause, any dispute between the parties to the expired

agreement is subject to arbitration for all time, despite the parties' express agreement that the provision should expire and even though "the first question in any arbitration dispute must be: What have these parties agreed to?" *See Coinbase*, 602 U.S. at 148.

The School District argues a judge decides because the issue is a question of formation, not scope: The formation of a one-year agreement in 2003 was not the formation of an agreement to arbitrate a claim arising many years later. The Court addressed this issue in in *Litton*: "an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." 501 U.S. at 205–06; *see also, e.g.*, *Harris v. Reagan*, 161 A.D.3d 1346, 1348 (N.Y. App. Div. 2018) ("It is true that when a contract is terminated, such as by expiration of its own terms, the rights and obligations thereunder cease." (internal quotation marks and brackets omitted)).

This release of all obligations under the contract explains why contract termination or expiration concerns formation, not the breadth or scope of a contractual term. When all parties have been released from all obligations under a contract, including the agreement to arbitrate disputes, there simply is no obligation having any "scope" to discuss. The formation of a contract is, tautologically, the formation of the obligations of the contracting parties. Formation of those obligations requires mutual assent. "Under South Carolina law, a contract is formed between two parties when there is, inter alia, 'a mutual manifestation of assent to [its] terms.'" App. 153a–54a (quoting *Edens v. Laurel Hill, Inc.*, 247

S.E.2d 434, 436 (S.C. 1978)). Where a contract expires by its own terms on a date certain, there is no manifestation of mutual assent to be bound after that date—to the contrary, there is a clear manifestation of lack of assent. Where there is no mutual intent to be bound, no agreement is formed. App. 154a. In other words, parties not only can agree to form contracts, but they can also agree to end contracts—to "un-form" them. When they agree to end a contract, that decision is not a decision about the scope of some eternal term in the contract, it is a decision about the existence of mutual obligations that *form* the contract.

If the agreement has expired, and there is no dispute about that, then there is no arbitration clause anymore. The formation question is whether the parties have agreed to arbitrate a particular dispute. *Granite Rock*, 561 U.S. at 296. If they have provided for a date certain expiration of the obligation to arbitrate disputes, then they have not agreed to arbitrate disputes arising after that expiration. *See Nat'l R.R. Passenger Corp.*, 850 F.2d at 763.

The School District thereby argues the parties may indeed agree to terminate the formation of an agreement to arbitrate. *Coinbase* settled this issue where the termination is set forth in a separate contract: where "parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs." 602 U.S. at 152. But *Coinbase* further held "[i]n cases where parties have agreed to only one contract, and that contract contains an arbitration clause with a delegation provision, then, absent a successful

challenge to the delegation provision, courts must send all arbitrability disputes to arbitration." *Id.*

The question presented in this case turns on whether the mutually agreed and undisputed expiration of a contract containing the arbitration agreement is a "successful challenge to the delegation provision" as described in *Coinbase*. If it is successful, then the termination must mean an operative agreement to arbitrate is not formed. If it is not successful, the effect of the termination on later-arising claims must be a question of the breadth or scope of the expired agreement. In the latter case, termination of the obligation to arbitrate would require, per *Coinbase*, contracting parties to execute a separate termination agreement specific to the arbitration clause—a form-over-substance requirement not imposed on any other type of contractual clause. *Cf. Morgan*, 596 U.S. at 418 (holding "a court may not devise novel rules to favor arbitration over litigation").

This question is important because a great many contracts contain both fixed expiration dates and arbitration agreements with delegation clauses, including both agreements currently in force and an unknown number of agreements long dead (like the twenty-year-old 2003 BSA in this case) that the Fourth Circuit would unexpectedly resurrect. Contracts are "usually meant to have a finite duration" and "parties must be able effectively to provide for the expiration or termination of their obligation to arbitrate," *Nat'l R.R. Passenger Corp.*, 850 F.2d at 762, which they now cannot do unless this Court grants the petition and answers the question presented.

II. THE FOURTH CIRCUIT'S APPROACH TO THE QUESTION PRESENTED IS WRONG.

The Fourth Court held that it is *impossible* for parties to agree to the expiration of an arbitration agreement having a delegation clause (at least not by means of an expiration date appearing in the same contract). To reach that extraordinary conclusion, it invented a novel reading of *Rent-A-Center* and *Buckeye Check Cashing* to hold that an arbitration provision should be severed not to salvage it from a validity challenge to some other term in the contract, or to the whole contract, but to salvage it from the parties' agreement that it should expire on a given date. App. 13a (citing 561 U.S. at 72 & 546 U.S. at 448–49). If the severed agreement is severed from the contractual term providing for its expiration, it remains in force indefinitely, and if it still in force, then there obviously is no formation dispute. As explained above, there is no duration dispute in this case. The only remaining bucket is a breadth or scope dispute, which is delegated to an arbitrator. Therefore, the School District's resistance to arbitration disputes the breadth or scope of the arbitration agreement, which must be decided by an arbitrator. App. 12a.

The Fourth Circuit's approach is wrong. Its profoundly misguided reading of *Rent-A-Center* and *Buckeye Check Cashing* accomplishes what this Court

expressly declined to do in *Litton*: "make limitless the contractual obligation to arbitrate." 501 U.S. at 209.[3]

After explaining that the 2003 BSA contains an arbitration agreement with a delegation clause, which would require any breadth dispute to be decided by an arbitrator, the Fourth Circuit turns to the critical point in this case—the undisputed expiration of the arbitration agreement at issue—holding that "[d]isputes about whether the arbitration agreement terminated before the claim arose, or whether an expired agreement nevertheless covers a claim, are questions of contract duration and scope, not formation." App. 12a. The Fourth Circuit suggests a duration dispute with a carefully crafted subjunctive hypothetical: "One might argue that a court should not enforce a delegation clause in an agreement that an arbitrator might later find has expired and does not apply to the asserted postexpiration claims." App. 13a. One might, in a case presenting a duration dispute, but as explained above, there is no duration dispute in this case. A court may not manufacture a nonexistent dispute to create a predicate for

[3] The Fourth Circuit repeatedly cites *Henry Schein*, but the case is inapposite. A claim is not arbitrable—regardless of any delegation clause—if the parties never formed an agreement to arbitrate the claim. Where formation is contested the dispute must be decided by a court. *See Henry Schein*, 586 U.S. at 69. *Henry Schein* says nothing about whether the expiration of an arbitration agreement with a delegation clause should be considered a formation dispute or a breadth dispute. It only says that a court may not decide a breadth dispute itself, based on its own view of the merits.

arbitration. *Morgan*, 596 U.S. at 418 ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.")

What is left, then, is the assertion "whether the expired agreement nevertheless covers a claim" is a "question[] of contract . . . scope"—a breadth dispute. App. 12a. The Fourth Circuit's reasoning in support of that statement—the severability of arbitration agreements—cannot survive scrutiny.

In *Buckeye Check Cashing*, Florida state courts held that if a contract's validity is challenged on the basis that the contract is illegal, then the validity challenge must be decided by a court, not an arbitrator, even if the contract delegates challenges to the validity of the contract to an arbitrator. 546 U.S. at 443. They held the federal rule that the arbitration agreement is severable did not apply because it was a procedural rule grounded in §§ 3 and 4 of the FAA, not a § 2 substantive rule that must apply in state courts. *Id.* at 447. The Court reversed, holding that the severability of arbitration agreements is a federal substantive rule based on § 2 of the FAA, *id.* at 448–49, which salvaged the arbitration agreement since the illegality challenge—violation of usuary laws—had had nothing to do with the agreement to arbitrate.

In *Rent-A-Center*, the Ninth Circuit held that where it was asserted an employment contract containing an arbitration agreement with a delegation clause was unconscionable, the issue was for the court to decide because a party cannot meaningfully assent to an unconscionable agreement. 561 U.S. at 67. The Court reversed because the unconscionability challenge was not applicable to the delegation clause, which was

held to be severable from the arbitration agreement. *Id.* at 72–74.

In both cases, a challenge was brought against the validity of the contract as a whole or additionally against the arbitration agreement as a whole but not its delegation clause. Because those terms are severable, they were enforced despite the challenges. The Court held a usurious term in a contract did not challenge the validity of the arbitration agreement as a severable term. 546 U.S. at 447–49. The Court held an arbitration agreement that was allegedly unconscionably one-sided in the types of claims that were subject to arbitration did not challenge the validity of a clause delegating all validity questions to an arbitrator. 561 U.S. at 72–74.

These cases on severability are inapposite to the question presented in this case for two reasons.

First, the expiration of an arbitration agreement is a challenge to its enforcement that is specific both to the arbitration agreement and to its delegation clause. The severability principle "does not require that a party challenge *only* the arbitration or delegation provision." *Coinbase*, 602 U.S. at 151. "Rather, where a challenge applies 'equally' to the whole contract and to an arbitration or delegation provision, a court must address that challenge." *Id.* (citing *Rent-A-Center*, 561 U.S. at 71). A term providing for the express termination of a contract applies equally to the whole contract and to each clause and term within it that does not have its own durational clause. *See CNH Indus. N.V. v. Reese*, 583 U.S. 133, 139–41 (2018) (holding that "ordinary contract principles" require that if a specific contractual provision does not have

its own durational clause, the general durational clause of the contract applies to the provision).

Second, the agreed expiration is not a challenge to the validity of agreed contractual terms—it is itself an agreed contractual term the court should enforce on equal footing with all other terms. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (noting the purpose of the FAA is "to place arbitration agreements 'upon the same footing as other contracts . . . .'" (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). Courts sever contractual terms to protect them from challenges to the validity of other terms because the parties agreed they should be enforced even if other terms are unenforceable. Courts do not sever contractual terms to protect them from the parties' agreement that they should no longer be enforced.

Every other provision of the 2003 BSA expired when the parties agreed it would expire. The School District cannot use the 2003 BSA to demand HUB provide insurance brokerage services today, nor can HUB use it to demand the School District pay money today. But the Fourth Circuit held HUB can use it to demand the School District arbitrate any dispute arising from events happening today, or tomorrow, or a hundred years from now. The arbitration clause becomes, as the district court stated from the bench at its third hearing on HUB's motion to compel arbitration, a "zombie" agreement.

That places the arbitration clause in a unique and transcendent position over any other contractual term, which this Court prohibits. *Morgan*, 596 U.S. at 418; *Litton*, 501 U.S. at 205 ("The object of an

arbitration clause is to implement a contract, not to transcend it."). Agreements expire when the parties agree they expire, as expressed in the language of the agreement. The Fourth Circuit's rule severing arbitration agreements and delegation clauses from their durational clauses, so that the contractual obligation to arbitrate disputes can *never* expire, violates the Court's instruction that "the first question in any arbitration dispute must be: What have these parties agreed to?" *Coinbase*, 602 U.S. at 143. The Court should grant the petition to ensure federal courts uniformly resolve arbitration disputes in accordance with the Court's repeated admonition that "[a]rbitration is strictly 'a matter of consent.'" *Viking River Cruises, Inc. v. Moriana,* 596 U.S. 639, 651 (2022) (quoting *Granite* Rock, 561 U.S. at 299); *see also Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (same).

III. NO FUTURE CASE WILL GIVE THE COURT A VEHICLE AS IDEALLY SUITED TO RESOLVE THE QUESTION PRESENTED AS THIS CASE.

The question presented is important and the Fourth Circuit's answer conflicts with relevant decisions of the Court and with relevant decisions of other courts of appeals. *E.g.*, *Nat'l R.R. Passenger Corp.*, 850 F.2d at 762. The Court nevertheless might be tempted to wait until some other court of appeals directly refutes the Fourth Circuit's decision to create a more explicit circuit split for review. Petitioner respectfully submits that would be inadvisable for several reasons, including the strong public interest in a governmental effort to recover the proceeds of an

admitted criminal fraud for the public fisc, and that it would be highly disruptive to parties' settled expectations to revive expired arbitration agreements only on a regional basis while waiting for a problem created in the Fourth Circuit to percolate fully in other circuits.

But by far the most important reason the Court should grant certiorari now is that the Court never again will be presented with a vehicle so perfectly suited for deciding the question presented. This case is a unique opportunity to decide the question for at least four reasons.

First, and most importantly, it is unique that a case presents a threshold arbitrability question to this Court for which all relevant material facts have been subject to extensive discovery, judicially determined after a bench trial, and set forth in complete findings of fact which are not disputed on appeal. This case does not ask the Court to credit unproven allegations *arguendo*, to consider disputed facts, or to make gap-filling assumptions about factual matters. The extensive record in this case has been distilled to a simple list of uncontested findings of fact. App. 80a–130a. No future case will present the question of who decides whether an expired arbitration agreement compels arbitration of claims arising from post-expiration events so completely separated from any thorny factual issues or unproven assumptions.

Second, the specific underlying facts of this case make it an ideal vehicle because they present the question so cleanly. There is one arbitration agreement at issue, the 2003 BSA, and it expired on an undisputed date certain. App. 18a. There is only

one durational term in the agreement. There is no contention that the agreement thereafter continued by implication. App. 121a–122a ¶ 147. Because the School District is a governmental entity, its contracting officials could not have intended the arbitration agreement to survive the termination of 2003 BSA—a fact of which HUB was aware when it drafted the 2003 BSA. App. 103a ¶ 94. There is no fraudulent inducement claim regarding the 2003 BSA. The School District merely asserts its claims arose from events first occurring years later. The question presented does not turn on whether this in fact is true. It turns on whether, as a matter of law, this is a formation challenge or a breadth or scope challenge to the enforcement of the expired arbitration agreement. A precedential ruling in this case on the question presented would be very difficult to factually distinguish in future disputes.

Third, this federal case presents no jurisdictional issue nor any questions of state law. The legal issues here are purely federal.

Fourth, this case presents a unique *reductio ad absurdum* of holding that an arbitrator, not a judge, should decide the arbitrability of claims arising after the agreed expiration of the arbitration agreement. Holding that a one-year agreement that expired in 2004 prevents a school district from suing to recover millions stolen through admitted criminal conduct occurring years later—or even, as HUB conceded, from hypothetical events that might occur in 2124—cleanly elucidates the absurdity of viewing an attempt to enforce contractual obligations which no longer exist as a question of the scope of the non-existent obligations rather than whether any operative

obligations are formed. The severability doctrine which the Fourth Circuit used to reach that absurd result is a construction of 9 U.S.C. § 2. *Buckeye Check Cashing*, 546 U.S. at 447. Where possible, statutes are not to be construed to produce absurd results. *E.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *United States v. Katz*, 271 U.S. 354, 357 (1926) ("All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it.").

The question presented is critically important, and because a court of appeals has answered it wrongly, this Court must one day answer it. Waiting for a contrary opinion from another circuit is unlikely to assist the Court in deciding whether arbitration agreements must be severed from their own agreed expirations. What will assist the Court's decision-making is a perfect vehicle for presenting the question—a case that has uncontested judicial findings of fact, lacks any collateral factual or legal issues to muddy the water, and that presents the logical extreme of the legal rule under review without any need for conjecture. It is exceedingly unlikely that any case will ever again present this question as cleanly as this case. The Court therefore should take the opportunity to decide the question now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 3, 2025.

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MARCH 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1328

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff-Appellee,

v.

HUB INTERNATIONAL LIMITED; HUB INTERNATIONAL MIDWEST LIMITED,

Defendants-Appellants,

and

KNAUFF INSURANCE AGENCY, INC.; BRANTLEY THOMAS; HUB INTERNATIONAL SOUTHEAST,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:18-cv-00151-DCN)

Argued: December 12, 2024 Decided: March 7, 2025

Appendix A

Before KING, GREGORY, and RUSHING, Circuit Judges.

Reversed and remanded by published opinion. Judge Rushing wrote the opinion, in which Judge King and Judge Gregory joined.

RUSHING, Circuit Judge:

The district court has thrice denied motions to compel arbitration of this case, filed by defendants HUB International Ltd. and HUB International Midwest Ltd. (collectively, HUB). We vacated the two prior denials and now we reverse the third. After the district court determined that the parties formed enforceable agreements to arbitrate, which delegate arbitrability questions to the arbitrator, the court should have granted the motion to compel. By proceeding further to decide whether this dispute falls within the scope of those agreements, the district court erroneously undertook a task the parties had reserved for the arbitrator. Accordingly, we reverse the district court's judgment and remand with instructions to compel arbitration.

I.

In 2018, the Berkeley County School District[1] sued several defendants, including HUB, alleging claims

1. The Berkeley County School Board of Trustees filed the original complaint. An amended complaint substituted the school district as the proper plaintiff.

arising from insurance policies and related services that defendants provided to Berkeley Schools. HUB moved to compel arbitration pursuant to brokerage service agreements (BSAs) dated in 2002, 2003, 2005, 2006, 2009, and 2011. The district court denied that motion, and HUB appealed. We reversed, holding that the district court overlooked material factual disputes regarding the making of any agreement, and remanded for the district court to conduct a trial under Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4. *See Berkeley Cnty. Sch. Dist. v. HUB Int'l, Ltd.*, 944 F.3d 225, 241 (4th Cir. 2019) (*Berkeley I*).

On remand, the district court conducted a bench trial, after which it again denied HUB's motion to compel arbitration. The court found no meeting of the minds between Berkeley Schools and HUB concerning the 2006, 2009, and 2011 BSAs. HUB disclaimed any further reliance on the arbitration agreement in the 2005 BSA. As for the 2002 and 2003 BSAs, the district court concluded that our prior decision precluded it from considering whether those agreements required the parties to arbitrate. HUB appealed only the court's ruling on the 2002 and 2003 BSAs. We vacated the judgment regarding those BSAs, explaining that new evidence produced at trial liberated the district court from the portion of our prior decision addressing the 2002 and 2003 BSAs. *See Berkeley Cnty. Sch. Dist. v. HUB Int'l Ltd.*, No. 21-1691, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2 (4th Cir. Dec. 28, 2022) (*Berkeley II*).

After the second remand, Berkeley Schools filed a Second Amended Complaint. In that complaint, Berkeley

Schools alleged that, although the validity of the 2002 and 2003 BSAs "was questionable," HUB's predecessor "performed the services and invoiced the fees described" in those BSAs, which Berkeley Schools paid, and "the arrangement was commercially reasonable." J.A. 36–37. The 2002 and 2003 BSAs include identical arbitration provisions, which state:

> All disputes, claims or controversies relating to this Agreement, or the services provided, which are not otherwise settled, shall be submitted to a panel of three arbitrators and resolved by final and binding arbitration, to the exclusion of any courts of laws, under the commercial rules of the American Arbitration Association.

J.A. 246 ¶ 4.4, 251 ¶ 4.4. HUB again moved to compel arbitration pursuant to the 2002 and 2003 BSAs.

The district court again denied HUB's motion to compel. At the outset, the court found that Berkeley Schools had conceded the 2002 and 2003 BSAs were valid and enforceable contracts, which the parties constructively ratified despite mistakes regarding signatory authority. Examining the arbitration provisions in the BSAs, the court noted that they incorporate the commercial rules of the American Arbitration Association (AAA), which empower the arbitrator to rule on arbitrability disputes. As the district court observed, other circuits have held that incorporating the AAA commercial rules into an arbitration clause evinces the parties' intent to delegate arbitrability questions to the arbitrator. The district

court accordingly concluded that the BSAs assign to the arbitrator, not the court, questions of arbitrability, including whether a particular dispute falls within the scope of the arbitration clause. Despite that conclusion, the district court went on to assess for itself "whether the facts alleged in the operative complaint fall within the arbitration provisions in the 2002 and 2003 BSAs." *Berkeley Cnty. Sch. Dist. v. HUB Int'l Ltd.*, No. 2:18-cv-00151-DCN, 2024 U.S. Dist. LEXIS 59484, 2024 WL 1349226, at *18 (D.S.C. Mar. 30, 2024). The court ultimately concluded that "the conduct at issue . . . did not arise from" the 2002 and 2003 BSAs, 2024 U.S. Dist. LEXIS 59484, [WL] at *20, and so denied HUB's motion to compel arbitration of any claims pursuant to those agreements.

HUB appealed. We have jurisdiction to hear an immediate appeal from the denial of a motion to compel arbitration. *See* 9 U.S.C. § 16(a). Our review is de novo. *See Berkeley I*, 944 F.3d at 233.

II.

"Under the [FAA], arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019); *see* 9 U.S.C. § 2 (providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Accordingly, a party aggrieved by another's refusal to honor an arbitration

agreement may petition a federal district court for an order enforcing the agreement, that is, "directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

In their contracts, "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Henry Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70.

Parties to a contract thus may find themselves disagreeing not only about (1) the merits of their dispute and (2) whether they agreed to arbitrate the merits but also about (3) "who should have the primary power to decide" whether they agreed to arbitrate the dispute—an arbitrator or a court. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (emphasis removed). Resolution of this third question, like the others, is a matter of contract. *See id.* at 943 ("[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter."). If the parties' contract delegates gateway arbitrability questions to an arbitrator, then a court must

enforce that delegation. "In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529.

Berkeley Schools and HUB disagree about the merits of this lawsuit and about whether the arbitration provisions in the 2002 and 2003 BSAs require them to arbitrate any part of it. But they agree that their contracts assign an arbitrator, not a court, responsibility for deciding disputes about the arbitrability of any claim. In our view, that delegation resolves this appeal.

A.

"Before referring a dispute to an arbitrator, . . . the court determines whether a valid arbitration agreement exists." *Coinbase, Inc. v. Suski*, 602 U.S. 143, 144 S. Ct. 1186, 1193, 218 L. Ed. 2d 615 (2024) (internal quotation marks and brackets omitted). The arbitration agreement at issue here is the delegation of arbitrability questions to the arbitrator. *See Rent-A-Center*, 561 U.S. at 71–72. The challenge to formation of that agreement, however, applies equally to the whole BSA. *See Coinbase*, 144 S. Ct. at 1194; *Berkeley I*, 944 F.3d at 234 n.9 ("[P]rovisions requiring the arbitration of arbitrability questions do not . . . preclude a court from deciding that a party never made an agreement to arbitrate *any* issue (which would necessarily encompass an arbitrability issue)."). "[O]rdinary state-law principles that govern the formation of contracts" apply. *First Options*, 514 U.S. at 944.

The district court found that, despite previous disagreements, Berkeley Schools and HUB both now

"accept[]" that the 2002 and 2003 BSAs "are valid and therefore enforceable." *Berkeley Cnty. Sch. Dist.*, 2024 U.S. Dist. LEXIS 59484, 2024 WL 1349226, at *5 n.14 (internal quotation marks omitted). As the district court explained, Berkeley Schools "unambiguously state[d] that it does not contest that the 2002 and 2003 [BSAs] were commercially reasonable and that both parties performed them without complaint, which constituted constructive ratification." *Id.*

On appeal, Berkeley Schools does not contest this conclusion or mount any further challenge to the formation or validity of the BSAs. Accordingly, we accept the parties' consensus that the 2002 and 2003 BSAs—and the arbitration agreements therein—are enforceable contracts.

B.

We next ask whether the arbitration agreements in fact delegate arbitrability questions to an arbitrator. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)); *see also Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc.*, 984 F.2d 113, 117 (4th Cir. 1993) ("[T]he general policy-based, federal presumption in favor of arbitration . . . is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves."). "The 'clear and unmistakable' standard is

exacting, and the presence of an expansive arbitration clause, without more, will not suffice." *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 102 (4th Cir. 2012).

The district court concluded that the arbitration provisions of the 2002 and 2003 BSAs clearly and unmistakably delegated "the question of arbitrability . . . to the arbitrator." *Berkeley Cnty. Sch. Dist.*, 2024 U.S. Dist. LEXIS 59484, 2024 WL 1349226, at *15; *see also* 2024 U.S. Dist. LEXIS 59484, [WL] at *8 ("[T]he court next considers whether the parties agreed to a delegation clause, ultimately finding that they have."). As the district court explained, the arbitration provisions incorporate the AAA commercial rules, which provide that the arbitrator "'shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.'" 2024 U.S. Dist. LEXIS 59484, [WL] at *14 n.24 (quoting AAA Commercial Arbitration Rules, R-7(a) (amended Oct. 1, 2013)). Although this Court has never decided the question,[2] other circuits have held that an arbitration provision's incorporation of the AAA commercial rules is a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator

2. In prior appeals of this case, we acknowledged that the arbitration provisions incorporate the AAA commercial rules but did not opine on whether that incorporation is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Berkeley I*, 944 F.3d at 234 n.9; *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2.

and not the court.[3] Finding those decisions persuasive, the district court concluded that, by incorporating the AAA commercial rules into the arbitration provisions of the BSAs, Berkeley Schools and HUB agreed to arbitrate arbitrability.

Neither party challenges this holding on appeal. HUB embraces it, and Berkeley Schools assures us we "can assume the [arbitration] clause delegates arbitrability." Resp. Br. 10 n.3. Therefore, as we did with the formation of a valid contract, we accept the parties' consensus that they agreed to arbitrate arbitrability in the 2002 and 2003 BSAs.

C.

Having determined that the parties formed a valid arbitration contract in which they agreed to arbitrate arbitrability, all that remains for a court to do is enforce that delegation agreement according to its terms. The parties debate whether the arbitration provisions of the 2002 and 2003 BSAs govern any claim in this lawsuit—in the words of the contracts, whether any of the claims "relat[e] to" those BSAs "or the services provided." J.A. 246 ¶ 4.4, 251 ¶ 4.4. But "whether their arbitration agreement applies to th[is] particular dispute" is a "threshold arbitrability question" that the parties have reserved for the arbitrators, not a court. *Henry Schein*, 139 S. Ct. at 527.

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3. *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

The district court erred, therefore, when it proceeded to decide for itself whether the arbitration provisions of the 2002 or 2003 BSAs apply to any claims in this case. "When the parties' contract delegates the arbitrability question to an arbitrator," a court "possesses no power to decide the arbitrability issue," "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.* at 529.

In an attempt to overcome this conclusion, Berkeley Schools advances five main arguments. None is persuasive.

First, Berkeley Schools contends HUB waived any reliance on the delegation of arbitrability by failing to raise the argument on its first appeal to this Court. That's incorrect. In its first motion to compel arbitration, HUB argued that any question of arbitrability must itself be resolved in arbitration. However, the district court did not decide that issue because it ruled that Berkeley Schools did not agree to any BSAs or arbitration provisions in the first place. HUB therefore had no occasion to press the delegation issue on appeal from the district court's first order denying arbitration and so did not waive the argument.

Second, Berkeley Schools asserts that HUB's argument contradicts our decision in *Berkeley II*. It does not. In *Berkeley II*, we vacated the district court's refusal to consider whether the 2002 and 2003 BSAs required Berkeley Schools to arbitrate. As we explained, the trial evidence freed the district court from the law of the case regarding the relevance of the 2002 and 2003 BSAs.

We clarified, however, that our decision did not opine on "whether the parties must arbitrate the question of arbitrability," which was an open issue for the district court to consider on remand. *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at * 2. HUB's position on that issue does not contravene our prior decision.

Third, Berkeley Schools argues that, by their terms, the 2002 and 2003 BSAs terminated before this dispute arose, and the expiration or termination of a contract is "a question of . . . formation" for the court to decide, "not [a question of] the breadth or scope of a particular contractual term." Resp. Br. 42. That is backwards. A court must be satisfied that the parties formed a contract before enforcing it. *See Mey v. DIRECTV, LLC*, 971 F.3d 284, 288 (4th Cir. 2020). When, as here, the court is satisfied that the parties formed a contract to delegate to an arbitrator any question about whether a particular claim is subject to their arbitration agreement, the court must enforce that contract, which is severable from the remainder of the arbitration agreement. *Rent-A-Center*, 561 U.S. at 71–72. Disputes about whether the arbitration agreement terminated before the claim arose, or whether an expired agreement nevertheless covers a claim, are questions of contract duration and scope, not formation. Berkeley Schools argues that "no agreement to arbitrate the dispute has been formed unless the dispute arises under the expired contract." Resp. Br. 42. But whether a dispute "arises under the . . . contract" is a quintessential scope question. *See, e.g., Mey*, 971 F.3d at 292. The district court similarly went astray when it reasoned that "whether the parties agreed to arbitrate *this dispute*"

presented a question of contract formation rather than arbitrability. *Berkeley Cnty. Sch. Dist.*, 2024 U.S. Dist. LEXIS 59484, 2024 WL 1349226, at *15 (emphasis added). After all, "whether the[] arbitration agreement applies to the particular dispute" is "the threshold arbitrability question." *Henry Schein*, 139 S. Ct. at 527. One might argue that a court should not enforce a delegation clause in an agreement that an arbitrator might later find has expired and does not apply to the asserted postexpiration claims. The Supreme Court has acknowledged this type of conundrum, however, and has resolved it in favor of the separate enforceability of delegation provisions. *See Rent-A-Center*, 561 U.S. at 72; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448–449, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

Fourth, Berkeley Schools would have us affirm the district court's analysis that the conduct alleged in the complaint does not arise under the 2002 or 2003 BSAs based on *Litton Financial Printing Division, Litton Business Systems, Inc. v. N.L.R.B.*, 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). *Litton* identifies circumstances in which a "postexpiration grievance can be said to arise under the contract." *Id.* at 205–206. By this argument, Berkeley Schools would have us ignore the delegation agreement entirely and plow ahead with deciding for ourselves whether the arbitration provisions of the 2002 and 2003 BSAs apply to any claims in this case. We have no authority to do so. *See Henry Schein*, 139 S. Ct. at 529. *Litton*, like the other cases on which Berkeley Schools relies, involved an arbitration provision that did not delegate threshold arbitrability questions to an

arbitrator. *See Litton*, 501 U.S. at 208–209; *Va. Carolina Tools*, 984 F.2d at 117; *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 759, 271 U.S. App. D.C. 63 (D.C. Cir. 1988). That makes all the difference.

Fifth and finally, Berkeley Schools warns that our decision will mean, "whenever there was an arbitration agreement with a delegation provision, any dispute between the parties to the expired agreement is subject to arbitration for all time," because a court will be unable to deny a motion to compel on the ground that the dispute lacks "any relationship to the expired agreement." Resp. Br. 59–60. The concern appears to be that parties will make frivolous motions to compel arbitration under expired agreements unrelated to the claims at issue. Yet binding precedent already requires a court to enforce an agreement to send arbitrability questions to an arbitrator even if the court considers the argument that the arbitration agreement applies to the particular dispute to be wholly groundless. *See Henry Schein*, 139 S. Ct. at 528. And as the Supreme Court has explained, "[a]rbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable." *Id.* at 531. Under certain circumstances, arbitrators may even "respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions," which will help deter and remedy frivolous motions to compel arbitration. *Id.* For these reasons, we find Berkeley Schools' concerns unfounded.

III.

The district court erred when it denied HUB's motion to compel arbitration based on its own assessment of whether the parties' arbitration agreements in the 2002 and 2003 BSAs apply to this dispute. After concluding that the parties formed a valid agreement to delegate arbitrability questions to an arbitrator, the court should have compelled arbitration of the parties' dispute about whether any claims in this case are subject to arbitration under those contracts. Accordingly, we reverse the district court's judgment and remand with instructions to compel arbitration of this threshold arbitrability question in accordance with the parties' agreement.

REVERSED AND REMANDED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FILED MARCH 30, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:18-cv-00151-DCN

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff,

vs.

HUB INTERNATIONAL LIMITED;
HUB INTERNATIONAL MIDWEST LIMITED;
HUB INTERNATIONAL SOUTHEAST;
KNAUFF INSURANCE AGENCY, INC.;
AND BRANTLEY LAMAR THOMAS,

Defendants.

Filed March 30, 2024

ORDER

The following matter is before the court on defendants HUB International Limited and HUB International Midwest Limited's (together, with HUB International Southeast, "HUB") motion to compel arbitration and stay this case. ECF No. 258. For the reasons set forth below, the court denies the motion.

Appendix B

I. BACKGROUND

This case arises out of the alleged embezzlement of millions of dollars from the Berkeley County School District (the "District").[1] The District alleges that its former Chief Financial Officer Brantley Thomas ("Thomas") conspired with Knauff Insurance Agency, Inc. ("Knauff"), HUB, and HUB's employees Stanley J. Pokorney and Scott Pokorney (together, "the Pokorneys")[2] (collectively, "defendants") to defraud the District through a concerted kickback scheme related to the purchasing of unnecessary insurance policies.

At the onset of this case, HUB filed a motion to compel arbitration based on the arbitration clauses in six Brokerage Service Agreements ("Agreements" or "BSAs") between the District and Knauff that spanned from 2002 to 2011.[3] Each Agreement is addressed to Thomas, and the dates of the Agreements are June 18, 2002; June 27, 2003; August 16, 2005; December 19, 2006; December 19, 2009; and May 1, 2011.[4] The 2002 Agreement

1. The court omits citations throughout the background section but notes that the facts are taken from the second amended complaint, the findings of fact and conclusions of law from the Section 4 Trial as well as previous decisions from the Fourth Circuit. ECF Nos. 102; 225; 240; 255, 2d Amend. Compl.

2. On October 9, 2020, the Pokorneys were terminated as defendants. ECF No. 182.

3. HUB acquired Knauff Insurance in 2012.

4. The court will identify the agreement it refers to by describing it in reference to the year it was signed (*e.g.*, the 2002 Agreement or the 2002 BSA).

was signed on behalf of the District by Angel Cartwright ("Cartwright"), the District's then-Risk Manager, and the 2003 Agreement was signed on behalf of the District by Thomas. The other four Agreements were not signed. The Agreements are contracts for insurance-related services like brokering and consulting but are not contracts for insurance coverage.

Relevant to the instant motion, the 2002 Agreement expressly terminated on June 29, 2003, and the 2003 Agreement expressly terminated on June 29, 2004. ECF No. 258-2. The District and Knauff meaningfully changed their relationship at that time. For the period from July 2004 to July 2005, Knauff and the District discontinued their previous practice of a brokerage service fee under an express agreement, and instead converted to a straight commission arrangement, which also paid for risk management services. This is a key distinction because it is through this new structure that the defendants were later able to allegedly "conceal payments far larger, as a percentage of premiums, than would be possible through a commission charged as a disclosed percentage of the premiums." 2d Amend. Compl. ¶ 62. The kickback scheme began in or around February 2006 and continued for many years. It was not discovered until February 6, 2017, when officials from the Federal Bureau of Investigation and Wells Fargo Bank met with officials of the District and informed them that Thomas was under federal investigation for misappropriation of public funds.[5]

5. Thomas has since pleaded guilty to four state charges of embezzlement. Thomas also pleaded guilty of ten counts of wire fraud in violation of federal law which arose out of the illegal

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On January 18, 2018, the District filed the complaint. ECF No. 1. On March 19, 2018, the District filed the first amended complaint. ECF No. 36. On January 29, 2019, the court denied HUB's first motion to compel, ECF No. 23, and found that the District did not agree to the Agreements and therefore did not agree to arbitrate (the "January 2019 Order"). ECF No. 63. HUB appealed the court's order. ECF No. 67. On December 4, 2019, the Fourth Circuit found that "there are multiple disputes of material fact as to 'the making of [any] arbitration agreement' between Berkeley Schools and the Appellants" and remanded the matter for a trial on that issue pursuant to Section 4 of the Federal Arbitration Act ("Section 4 Trial").[6] ECF No. 102, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd. ("Berkeley I"*), 944 F.3d 225, 241 (4th Cir. 2019).

On remand in January and February 2021, the court held a five-day bench trial over video.[7] ECF Nos. 206; 208; 211; 212; 217. On June 3, 2021, the court filed its findings of fact and conclusions of law and held that the District did not agree to arbitrate this dispute in the 2006, 2009,

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kickbacks in the amount of $36,000 that he received from "a broker employee" in exchange for "steer[ing] [the District's] insurance policy purchases through" the broker employee. ECF No. 36 at 9.

6. The Fourth Circuit did not opine as to this court's summary of arbitration law. *See Berkeley I*, 944 F.3d at 225-42. Rather, its decision primarily focused on the importance of the trial provision of the Federal Arbitration Act, *see* 9 U.S.C. § 4, and remanded for a trial in accordance with the same. *Berkeley I*, 944 F.3d at 225-42.

7. This trial was held over video due to the disruptions caused by the COVID-19 pandemic.

or 2011 Agreements. ECF No. 225. This court also found that the Fourth Circuit's opinion in *Berkeley I* regarding the 2002 and 2003 Agreements foreclosed this court from finding those Agreements to require this dispute be arbitrated, thus denying the motion to compel arbitration, ECF No. 23.[8] *Id.* HUB appealed that decision on June 17, 2021. ECF No. 227. On December 28, 2022, the Fourth Circuit vacated in part and remanded for additional proceedings and held that the district court erred by declining to consider new evidence implicating the 2002 and 2003 Agreements which arose from the Section 4 Trial.[9] ECF No. 236, *Berkeley Cnty. Sch. Dist. v. Hub*

8. At the Section 4 Trial, HUB disclaimed any further reliance on the arbitration clause in the 2005 Agreement. ECF No. 225 ¶ 47.

9. The district court concluded that "[t]he [Fourth Circuit] explicitly held that the signed BSAs—the 2002 and 2003 BSAs—'predate the steering and kickback fraud scheme and conspiracy alleged in the Operative Complaint' and therefore cannot provide grounds to compel arbitration." ECF No. 225 ¶ 15 (quoting *Berkeley I*, 944 F.3d at 241). In *Berkeley I*, the Fourth Circuit noted that the 2002 and 2003 BSAs might be relevant only to the extent that they bear on questions of whether the District had knowledge of, or assented to, the subsequent BSAs. *Id.* (citing *Berkeley I*, 944 F.3d at 241). In *Berkeley II*, the Fourth Circuit first noted that the district court correctly interpreted its prior decision in this case as it concerned the 2002 and 2003 Agreements. ECF No. 236, *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2 (4th Cir. Dec. 28, 2022). However, it then found that the district court "was not bound by [the Fourth Circuit's] prior decision about the 2002 and 2003 BSAs because the Section 4 trial produced substantially different evidence [from the operative complaint] on that score." *Id.* Thus, it remanded the case once again to the district court, finding that the court was freed from

Int'l Ltd. ("Berkeley II, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626 (4th Cir. Dec. 28, 2022). On remand, the district court's conclusion that the 2006, 2009, and 2011 Agreements do not require arbitration stands, and HUB remains bound by its waiver of any reliance on the 2005 Agreement. *Id.* However, the Fourth Circuit charged this court with re-evaluating its conclusions concerning the 2002 and 2003 Agreements in light of any new evidence produced at trial. *Id.*

On April 27, 2023, the District filed a second amended complaint, now the operative complaint.[10] ECF No. 255,

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the law of the case and should have considered any new evidence from the Section 4 Trial as to the 2002 and 2003 Agreements. *Id.*

10. The claims alleged in the operative complaint of the instant dispute include eleven causes of action. *See* 2d Amend. Compl. ¶¶ 172-313. First, the District alleges defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO") premised on wire fraud in violation of 18 U.S.C. §§ 1343, 1346; mail fraud in violation of 18 U.S.C. §§ 1341, 1346; bribery of a public official in violation of S.C. Code Ann. Sections 16-9-210 and 16-9-220; violation of 18 U.S.C. § 1961(4) for combining and conspiring to defraud the District and the taxpayers of Berkeley County; and conspiring to violate and violation of 18 U.S.C. § 1962(d) from at least 2007 through 2016. *Id.* ¶¶ 172-231. The remaining ten causes of action are slightly simpler to set out and the court lists them in turn with the causes of action asserted against all defendants unless stated otherwise: (2) fraud, *id.* ¶¶ 232-42; (3) negligent misrepresentation, *id.* ¶¶ 243-56; (4) civil conspiracy for the purpose of defrauding the District and causing the District damage, *id.* ¶¶ 257-67; (5) breach of fiduciary duty, *id.* ¶¶ 262-69; (6) aiding and abetting breach of fiduciary duty, *id.* ¶¶ 270-78; (7) negligence, *id.* ¶¶ 279-88; (8) negligence per se and violation of South Carolina law governing insurance providers

2d Amend. Compl. On June 2, 2023, HUB filed the instant motion to compel arbitration. ECF No. 258. On July 3, 2023, the District responded in opposition, ECF No. 259, to which HUB replied on July 31, 2023, ECF No. 260. The court requested that the parties file supplemental briefs on the issue of gateway questions of arbitrability on September 25, 2023. On October 10, 2023, the District filed its supplemental brief, ECF No. 263, as did HUB, ECF No. 264. On October 26, 2023, the parties filed a joint stipulation detailing that the 2002 and 2003 BSAs affected interstate commerce. ECF No. 266. The court held a hearing on this motion on November 15, 2023. ECF Nos. 267; 268.[11] At the hearing, the court requested that the parties provide written answers by email to additional questions posed by the court. *Id.* Both parties emailed responses to those questions on December 1, 2023.[12] As such, the motion is fully briefed and is now ripe for review.

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asserted against HUB and Knauff, *id.* ¶¶ 289-300; (9) conversion, *id.* ¶¶ 301-04; (10) breach of constructive trust, *id.* ¶¶ 305-09; and (11) unjust enrichment, *id.* ¶¶ 310-13.

11. The parties requested the filing of the official transcript from the hearing on November 15, 2023, which is available at ECF No. 268.

12. The court attaches the parties' respective email responses to this order at ECF No. 269-1 (HUB) and ECF No. 269-2 (District). To the extent that this court cites to those responses, it will cite to the respective attachments to this order.

Appendix B

II. STANDARD

Courts recognize that the Federal Arbitration Act ("FAA") creates a strong presumption in favor of arbitration. *See* 9 U.S.C. §§ 1-14. As the Supreme Court has explained, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). Arbitration "is a matter of consent, not coercion." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002); *see also Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."). Thus, arbitration "is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (internal quotation marks and citations omitted).

The Fourth Circuit has stated that,

> Application of the FAA requires demonstration of four elements: (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.

Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 84 (4th Cir. 2016) (alteration and internal quotation marks omitted) (quoting *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 696 n.6 (4th Cir. 2012)). Although courts must compel arbitration when a party satisfies these four factors, the standard of review and procedural mechanisms to be applied in resolving these four factors are less clear. *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 299 (E.D. Va. 2019), *aff'd sub nom. Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286 (4th Cir. 2020). "Recently, a number of district courts in the Fourth Circuit have determined the burden of proof is 'akin to the burden on summary judgment' because motions to compel arbitration often require courts to consider evidence outside of the pleadings."[13] *Id.* (quoting *Novic v. Midland Funding, LLC*, 271 F. Supp. 3d 778, 782 (D. Md. 2017), *rev'd on other grounds sub nom. Novic v. Credit One Bank, Nat'l Ass'n*, 757 F. App'x 263 (4th Cir. 2019)); *see also Galloway*, 819 F.3d at 85 n.3. As such, the party

13. Alternatively, courts evaluate a motion to compel arbitration under the standards espoused by § 4 of the FAA, which states in relevant part, that the district court will compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Under this standard, there must be "a judicial conclusion" that there is a validly formed, express agreement to arbitrate. *Granite Rock Co.*, 561 U.S. at 303. As another court has noted, "[i]t is unclear what daylight exists, if any, between the two approaches. Both require the party seeking arbitration to offer evidence to satisfy the court that an arbitration agreement actually exists, and both allow the non-moving party to rebut that evidence." *Gibbs*, 421 F. Supp. 3d at 299 n.51. The court opts to follow the logic of other courts within this district that have considered motions to compel arbitration under the burden of proof that is akin to a motion for summary judgment.

asserting an arbitration agreement has the burden to show the making of the agreement. *In re Mercury Constr. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981) (en banc), *aff'd sub nom. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

"[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (internal quotation marks omitted). Thus, the court "may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). "[A] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996)).

Whether an arbitration agreement has been formed is an issue of state contract law. *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 913 F.3d 409, 415 (4th Cir. 2019); *Hengle v. Treppa*, 19 F.4th 324, 334 (4th Cir. 2021) ("[A]rbitration is a matter of contract."). To determine whether the parties

assented to a contract to arbitrate, the court employs South Carolina law. *Livingston v. Atl. Coast Line R.R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (S.C. 1935) ("It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the *lex loci contractu* governs."). South Carolina's "presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167, 173 (S.C. 2019) (internal quotation marks omitted).

III. DISCUSSION

At the outset, the court notes that it is only evaluating whether HUB may compel arbitration under the 2002 and 2003 Agreements. *See* ECF No. 236. HUB moves under the FAA, 9 U.S.C. §§ 1-4, for an order compelling arbitration and staying this case. ECF No. 258 at 1. Essentially before the court are several overlapping questions: (1) whether the FAA governs this dispute; (2) whether the parties delegated questions of arbitrability to the arbitrator; (3) whether the parties agreed to the arbitration clause; and (4) whether this dispute falls within the scope of the arbitration clause.[14]

14. HUB implies that a fifth question is at issue: whether the 2002 and 2003 Agreements were valid. *See* ECF No. 258 at 12-14. The District unambiguously states that it does not contest that the 2002 and 2003 Agreements were commercially reasonable and that both parties performed them without complaint, which constituted constructive ratification despite mistakes regarding

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In its motion to compel arbitration, HUB primarily argues that the District must arbitrate all or part of this dispute and indicates its understanding that, should the court find otherwise, the express contractual language requires the parties arbitrate the question of arbitrability. *See* ECF No. 258 at 11-20. At base, HUB contends that the District's claims still fall within the scope of the arbitration clauses included within the 2002 and 2003 Agreements. *Id.* at 15. Namely, the alleged fraudulent conduct is HUB's purported recommendation that the District purchase unnecessary and/or duplicative coverage. *Id.* at 15-17. HUB lists eight categories of coverage that the District claims were fraudulently recommended and that list includes two services that the 2002 and 2003 Agreements also covered: excess liability and excess crime. *Id.* HUB provided the risk identification and evaluation as well as the brokering for all the Agreements—including the 2002 and 2003 Agreements—which are the services that the second amended complaint alleges that HUB failed to honestly and competently provide. *Id.* Thus, HUB argues the conduct named in the second amended complaint, at a minimum, bears a "significant relationship" to the 2002 and 2003 Agreements. *Id.*

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signatory authority. ECF No. 259 at 16-17. In other words, the District has accepted that the 2002 and 2003 Agreements are "valid" and therefore enforceable against the District despite the lack of proper signatory authority. *Id.* In its reply, HUB accepts that the District finds the 2002 and 2003 Agreements valid and therefore argues that the sole remaining issue is whether the merits of the District's claims must be resolved in arbitration. ECF No. 260 at 1.

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HUB anticipates the District's defense that the express language of the second amended complaint identifies conduct at issue which occurred *after* the termination of the 2002 and 2003 Agreements—meaning the arbitration clauses in the 2002 and 2003 Agreements would not apply. *Id.* at 18. HUB preemptively provides three counterarguments. *Id.* at 18-20. First, the conduct listed in the second amended complaint is not dispositive of the question. *Id.* at 18-19. Second, the causes of action not based in fraud, such as those alleging a breach of professional standard of conduct, have a significant relationship with the 2002 and 2003 Agreements. *Id.* Third, the sizable sought damages—tens of millions of dollars—implies that the District is seeking to recover for damages that date back to 2002, a time when the 2002 and 2003 Agreements were in force. *Id.* at 19-20.

In response, the District explains that HUB's real argument is "that although the actions giving rise to the claims asserted in the second amended complaint occurred years after the [2002 and 2003 Agreements] terminated, those claims nonetheless are 'significantly related' to the [2002 and 2003 Agreements]." ECF No. 259 at 19. The District emphasizes that its claims are in no way significantly related to the 2002 and 2003 Agreements. The District rebuts HUB's arguments by (1) showing that the facts underlying their claims do not significantly relate to the 2002 and 2003 Agreements, (2) detailing the actual damages sought in this action, and (3) unpacking flaws within HUB's assertion that the question of the case's arbitrability of the 2002 and 2003 Agreements must be decided by an arbitrator, not the court. *Id.* at 17-26.

In reply, HUB first focuses on its final argument: the court has no authority to address the question of whether the 2002 and 2003 Agreements are significantly related to the claims in the second amended complaint "given that the arbitration clauses at issue require that threshold questions of arbitrability must themselves be decided in arbitration." ECF No. 260 at 1. HUB emphasizes that what the District really argues is that "it is entitled to a judicial determination of whether the parties' [2002 and 2003] Agreements *cover these claims—i.e.*, whether this dispute falls within the scope of the 2002 and 2003 Agreements' arbitration clauses." *Id.* at 3. Moreover, HUB claims that none of the cases that the District cites, or any other law, support the argument that because the 2002 and 2003 Agreements have expired, the District is no longer bound by the arbitration clauses' requirement that threshold questions of arbitrability be submitted to the arbitrator. *Id.* Second, HUB rebuts the District's claim that its second amended complaint concerns conduct which falls outside the scope of the 2002 and 2003 Agreements, because a significant relationship exists between this dispute and the 2002 and 2003 BSAs since the policies at issue were first placed during or before the term of the 2002 and 2003 Agreements. *Id.* at 7. Moreover, HUB contends that the District "nowhere denies that many of the causes of action it asserts do not require fraud or kickbacks, but only breach of the professional standard of care for an insurance advisor," which HUB posits could reach back to when the 2002 and 2003 Agreements were in force. *Id.* at 7-8. Thus, HUB argues that the question is whether any conduct at issue in this case may have occurred before 2005 and may thereby implicate the 2002

or 2003 Agreement. *Id.* at 10 (citing *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2).

The court requested that the parties file supplemental briefs on two discrete issues: (1) in what order must the court reach gateway questions of arbitrability, and (2) when the party moving to compel arbitration must meet its burden to prove that the FAA applies to the dispute. The parties filed those supplemental briefs on October 10, 2023. *See* ECF Nos. 263 (District); 264 (HUB).

The court first sets forth general principles of arbitration law before examining gateway questions which impact the matter's arbitrability. The court ultimately finds that the parties did not form an agreement to arbitrate this dispute such that the court must deny this motion.

A. Principles of Arbitration Law

In this court's January 2019 Order, the undersigned specified principles of arbitration law which help to explain the complexity of this case. Those principles bear repeating.

As an initial matter, courts use the word "agreement" in a variety of contexts when discussing arbitration, sometimes making it difficult to determine to which agreement the court is referring. The general meeting of the minds to use arbitration as a method of dispute resolution will be referred to as "an agreement to arbitrate." Within an agreement to arbitrate, parties may

also agree to send questions of arbitrability to arbitration. Arbitrability refers to "gateway questions," such as whether the parties agreed to arbitrate or whether the agreement to arbitrate covers a certain dispute. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). An agreement to arbitrate these gateway questions "is simply an additional, antecedent agreement" to an agreement to arbitrate. *Id.* at 70.

An agreement to arbitrate may be included in a contractual relationship in two ways. First, the parties may form a new relationship, for example, an employer/employee relationship. Pursuant to that relationship, they may sign a contract, the entirety of which requires parties to arbitrate any disputes related to their relationship. For example, in *Rent-A-Center*, the employer hired an employee, and they entered into a contract titled "Mutual Agreement to Arbitrate Claims" as a condition to the employee's employment. 561 U.S. at 65. The court will refer to this type of agreement to arbitrate as an "arbitration contract." Within an arbitration contract, there may be a delegation provision that delegates any dispute regarding the parties' relationship to arbitration ("delegation provision"). *Id.* at 68.

Alternatively, parties may enter into a contract related to any number of topics. The court will refer to this contract as a "container contract." Within that contract, there may be an arbitration clause ("arbitration clause") that requires any claim related to the container contract to be resolved by arbitration. An example of a container contract is found in *Simply Wireless, Inc. v. T-Mobile*

US, Inc., where the parties entered into a contract titled "Amended & Restated Limited Purpose Co-Marketing and Distribution Agreement for Equipment Sold th[r]ough HSN & QVC" pursuant to the parties' joint project. 877 F.3d 522, 527 (4th Cir. 2017), *abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 139 S. Ct. 524, 528, 202 L. Ed. 2d 480 (2019) (rejecting the wholly groundless doctrine). This contract contained an arbitration clause that sent claims related to the container contract to arbitration. *Id.* at 525. Moreover, within the arbitration clause, there may be a delegation provision that requires an arbitrator to resolve any arbitrability questions.

Here, the challenged agreement to arbitrate is an arbitration clause found within both the 2002 and 2003 BSAs, which are container contracts. The 2002 Agreement's arbitration clause provides:

> All disputes, claims or controversies relating to this Agreement, or the services provided, which are not otherwise settled, shall be submitted to a panel of three arbitrators and resolved by final and binding arbitration, to the exclusion of any courts of laws [sic], under the commercial rules of the American Arbitration Association [(the "AAA")].

ECF No. 258-1 at 4. The 2003 Agreement's arbitration clause is identically phrased. ECF No. 258-2 at 4. While there is no separate delegation provision in the Arbitration Clauses within the Agreements, HUB argues that the

incorporation of the AAA rules create a *de facto* delegation provision.

Thus, the court must determine whether the parties delegated questions of arbitrability to the arbitrator and, if so, whether there are any questions that this court may answer which nevertheless require the court deny the motion to compel arbitration.

B. Gateway Questions

Gateway questions are those questions whose "answer[s] will determine whether the underlying controversy will proceed to arbitration on the merits." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002). The phrase is applicable to those narrow circumstances where contracting parties would likely have expected a court—not an arbitrator—to have decided the gateway matter, in the absence of clear and unmistakable evidence to the contrary. *Id.* at 83-84; *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003). These include certain gateway matters such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy (*i.e.*, the applicability of the arbitration clause to the underlying dispute between the parties). *Bazzle*, 539 U.S. at 452.

There are three gateway questions at issue: (1) does the FAA govern this dispute; (2) does the arbitration clause include a valid and enforceable delegation clause;

and (3) did the parties agree to arbitrate this dispute. The parties disagree over which question the court must reach first. The District argues that the court must first decide whether the FAA applies to the dispute as well as whether there is an agreement to arbitrate which covers the relevant conduct identified in the operative complaint. ECF Nos. 259 at 25; 263 at 1. In contrast, HUB argues that the court must first reach the question of whether the parties agreed to arbitrate disputes of arbitrability and seems to contend that the District's argument is one of scope. ECF Nos. 258 at 20; 260 at 1-2. The court directed the parties to submit supplemental briefs on this issue. *See* ECF Nos. 263; 264.

There is somewhat conflicting authority as to which gateway question the court should consider first. *Compare Peabody Holding Co. v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 101 (4th Cir. 2012) (explaining that the court first determines who determines whether a dispute is arbitrable before reaching the question of whether a matter is arbitrable) *with Granite Rock Co.*, 561 U.S. at 297 (explaining that a court may order arbitration only when it is satisfied that the parties agreed to arbitrate). Further complicating matters, the Supreme Court has expressly held that under the FAA, parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Henry Schein, Inc.*, 139 S. Ct. at 529 (internal quotation marks and citations omitted).

When this court previously considered this issue in its January 2019 Order, it found that the court must first determine whether the parties formed an agreement to arbitrate before reaching the question of who determines the scope and the enforceability of that agreement. ECF No. 63 at 23; *see, e.g., Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 424 (E.D. Pa. 2016) ("When one party contends that an agreement to arbitrate was never formed, looking to the text of that very agreement is problematic because the agreement is only a valid indicator of the parties' intent if they agreed to be bound by its terms.").[15]

15. Several other circuits have reached this same conclusion. *See, e.g., China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) ("[I]ncorporation of [arbitration] rule[s] into the contract is relevant only if the parties actually agreed to its incorporation. After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it."); *VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 326 n.2 (2d Cir. 2013) ("The more basic issue . . . of whether the parties agreed to arbitrate in the first place is one only a court can answer, since in the absence of any arbitration agreement at all, 'questions of arbitrability' could hardly have been clearly and unmistakably given over to an arbitrator."); *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018) ("In summary, we first look to see if any agreement to arbitrate was formed, then determine if it contains a delegation clause."); *Nebraska Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014) (explaining that the court must first address the threshold question of the validity of the arbitration agreement before determining whether the parties intended to submit the case to an arbitrator).

The court first considers whether the FAA applies to this dispute, ultimately finding that it does. Thereafter, the court next considers whether the parties agreed to a delegation clause, ultimately finding that they have. Finally, the court considers whether the parties agreed to arbitrate, ultimately finding that they have not.

1. Applicability of the FAA

The District makes several overlapping arguments. First, the District argues that HUB has not demonstrated that the 2002 and 2003 Agreements purport to cover this dispute, which is a threshold requirement for the FAA to apply. ECF No. 259 at 17, 25. Second, the District argues that it never agreed to the arbitration clause. *Id.* at 25. These arguments blend in its motion such that the court is required to peel them apart to determine whether the District contests the formation of the arbitration clause, the scope of the arbitration clause, and/or the threshold question of whether HUB has met its burden of proof to demonstrate the applicability of the FAA. The court first focuses on the question of the applicability of the FAA.

The District claims that HUB has not met its burden of proof to demonstrate that the FAA applies to this dispute, which is a gateway question reserved for the court to determine. ECF No. 259 at 25. Application of the FAA requires that HUB demonstrate four elements:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to

> cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.

Galloway, 819 F.3d at 84 (quoting *Rota-McLarty*, 700 F.3d at 696 n.6); *see also Whiteside v. Teltech Corp.*, 940 F.2d 99,102 (4th Cir. 1991). The District primarily argues that HUB has not satisfied the second factor because it has not shown that the arbitration clauses in the 2002 and 2003 BSAs purport to cover this dispute.[16] ECF No. 259 at 25. HUB contends it has met the second factor because "the District admitted to the Fourth Circuit that 'the 2002 and 2003 agreements . . . are valid agreements.'" ECF No. 258 at 12 (citing Oral Argument at 14:20, *Berkeley Cnty. Sch. Dist. v. HUB Int'l Ltd.* (No. 21-1691), https://www.ca4.uscourts.gov/OAarchive/mp3/21-1691-20221208.mp3). HUB avers that the 2002 and 2003 Agreements are valid contracts and "it is also clear that the broad arbitration clauses in the 2002 and 2003 agreements bear a significant relationship to the allegations at the core of the District's case." *Id.* A district court "has no choice but to grant a

16. The District does not claim that HUB has failed to meet the remaining three factors, and the court likewise finds them met. In the interests of completeness, the court lists the facts providing said support: (1) as this court and the Fourth Circuit are well aware, there is clearly a dispute between the parties; (3) HUB has previously shown the relationship of the transactions to interstate commerce, ECF No. 23 at 12, and both parties have entered a stipulation to that effect, ECF No. 266; and (4) the District refuses to resolve the dispute in arbitration. ECF No. 258 at 12.

motion to compel arbitration where a valid arbitration agreement exists and the issues in a case *fall within its purview." Adkins v. Lab. Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (emphasis added). The District argues that the issues in this case do not fall within the purview of the 2002 or 2003 Agreements. ECF No. 259 at 25.

In its supplemental brief, HUB appears to shift its argument to contend that it has met all the required factors that it must show to this court under the FAA to demonstrate that the FAA applies to this dispute. ECF No. 264 at 1. The core of the argument is that HUB need not show the court the contested subpart of the second factor—whether the agreement purports to cover this dispute—because that is a question of scope reserved for the arbitrator. *Id.* at 2-3 (citing *New Prime Inc. v. Oliveira*, 586 U.S. 105, 139 S. Ct. 532, 538, 202 L. Ed. 2d 536 (2019)). In contrast, the District emphasizes in its supplemental brief that HUB must first demonstrate the FAA applies to this dispute by showing that all four factors are met in their entirety before a court may compel arbitration. ECF No. 263 at 6-9 (citing *Whiteside*, 940 F.2d at 102).

The Supreme Court has noted that "before invoking the severability principle, a court should 'determine[] that the contract in question is within the coverage of the Arbitration Act.'" *New Prime Inc.*, 139 S. Ct. at 538 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)). *New Prime* specifies that Sections 1 and 2 of the FAA "define the field in which Congress was legislating," and Sections 3 and 4 "apply only to contracts covered by

those provisions." *Id.*; *see also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02, 76 S. Ct. 273, 100 L. Ed. 199 (1956). Section 2 declares, with exceptions not relevant here, that

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable.

9 U.S.C. § 2. "Sections 3 and 4 [of the FAA] . . . provide two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, [*id.*] § 4." *Chorley Enters. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015) (alteration and internal quotation marks omitted). In other words, only if Section 2 applies can the court reach Sections 3 and 4. *See New Prime Inc.*, 139 S. Ct. at 538. Even where a delegation clause exists, the court may enforce that delegation clause only after a showing that the clause "appears in a 'written provision in . . . a contract evidencing a transaction involving commerce' consistent with § 2." *See id.* (quoting 9 U.S.C. § 2).

Based on the Fourth Circuit's decision in *Galloway*, a four-factor test determines whether Section 2 of the FAA is invoked. *See Galloway*, 819 F.3d at 84 (specifying the requirements of 9 U.S.C. § 2 before stating the four factors which demonstrate the FAA applies to a dispute);

see also James v. Synovus Bank, 2020 U.S. Dist. LEXIS 52078, 2020 WL 1479115, at *2 (D. Md. Mar. 26, 2020) (noting that the Fourth Circuit has required that four elements be established for § 2 of the FAA to apply). Given that interpretation and the Supreme Court's decision in *New Prime*, 139 S. Ct. at 538, the court initially concludes that all four factors—including whether the agreement purports to cover the dispute—must be shown by the party seeking to compel arbitration before the court delegates the matter to the arbitrator pursuant to Section 4, even where a delegation clause exists. Thus, the court finds that it may reach the question of whether the arbitration provision purports to cover the dispute notwithstanding the alleged delegation provision. However, a further review of caselaw indicates that this interpretation is not as straightforward as it might initially appear.

The Fourth Circuit has recognized that a court "may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Am. Recovery Corp.*, 96 F.3d at 92 (quoting *United Steelworkers of Am.*, 363 U.S. at 582-83). Nevertheless, as far as the court has found, there is not a clear test to determine whether an arbitration provision "purports to cover the dispute." *See Adkins*, 202 F.3d at 500-01. Upon a review of various decisions examining the second element, the court determines that an agreement purports to cover a dispute by first looking to the text of the agreement, determining the broad coverage of the plain language of the agreement, and then looking to the dispute between the parties and determining

whether the dispute falls within that coverage.[17] Thus, applying the logic from these cases, the court must assess whether the asserted claims—including, *inter alia*, RICO

17. A review of decisions from other courts in the Fourth Circuit indicates that a typical analysis requires a review of the text of the agreement and a review of the dispute itself. For example, the Northern District of West Virginia found that the provision at issue included in a lease agreement purported to cover the dispute because the dispute, and all the claims therein, "relate[d] either to the Lease itself, to the property, or to the circumstances surrounding the formation and alleged termination of the Lease." *See Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414, 429 (N.D.W. Va. 2012). Similarly, a court in that same district recently found that an arbitration agreement did not purport to cover a dispute when it found that "it [wa]s clear that the parties agreed to arbitrate disputes over damages to crops, trees, or fences." *Columbia Gas Transmission, LLC v. RDFS, LLC*, 2024 U.S. Dist. LEXIS 36569, 2024 WL 756286, at *3 (N.D.W. Va. Feb. 5, 2024). Yet, the dispute in that case "[wa]s not about damages to crops, trees or fences. The dispute [wa]s about whether Columbia has the authority to enter RDFS's property to perform subsidence mitigation work." *Id.* Accordingly, that Court found that the FAA did not apply because "the Right of Way Agreement d[id] not include an arbitration provision 'which purports to cover the dispute.'" *Id.* A recent decision from a court in the District of Maryland found that an employment contract contained an arbitration agreement that purported to cover the dispute because the language of the agreement indicated that "the parties must resolve any employment-related disputes through binding arbitration," when that agreement specified that the employee and company agreed to arbitrate any dispute arising out of or related to the employee's employment with or termination of employment with the company. *Apex Sys., LLC v. Foster*, 2024 U.S. Dist. LEXIS 23793, 2024 WL 555125, at *5 (D. Md. Feb. 12, 2024).

conspiracy, fraud, breach of fiduciary duty[18]—relate to or arise out of the 2002 and 2003 BSAs by construing them as generously as possible to determine whether the claims are "susceptible of an interpretation that covers the asserted dispute." 2d Amend. Compl. ¶¶ 172-313; *see also Am. Recovery Corp.*, 96 F.3d at 92.

However, such an analysis is the same analysis that the Fourth Circuit established to determine the *scope* of an arbitration clause. In its scope analysis, the Fourth Circuit determined whether that broad arbitration clause encompassed disputes beyond the underlying consulting agreement "by examining the significance between each of [the plaintiff's] claims and the consulting agreement." *Am. Recovery Corp.*, 96 F.3d at 93. It went on to specify that the court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Id.* The arbitration clause considered by the *American Recovery* panel included language which required arbitration of "any dispute that 'ar[ose] out of or related to' the consulting agreement" between the two parties ARC and CTI. *Id.* at 93. The court then considered plaintiff ARC's three claims, ultimately finding that each related to the underlying consulting agreement such that

18. The eleven causes of action are named in paragraphs 172 through 313 of the second amended complaint and are also detailed, *supra*, in footnote 8. In brief, the District alleges violation of the RICO Act, fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, negligence per se, breach of constructive trust, and unjust enrichment.

they were arbitrable.[19] *Id.* at 93-95. This is, in essence, the same analytical framework that each of the district courts applied to determine whether the FAA purported to cover a dispute. *See TriEnergy, Inc.*, 877 F. Supp. 2d at 429; *Columbia Gas Transmission*, LLC, 2024 U.S. Dist. LEXIS 36569, 2024 WL 756286, at *3; *Apex Sys., LLC*, 2024 U.S. Dist. LEXIS 23793, 2024 WL 555125, at *5.

Ultimately, the court infers, based on language from *American Recovery*, that the analytical framework to determine whether a contract purports to cover the dispute is the same framework as that of the scope analysis. *Am. Recovery Corp.*, 96 F.3d at 92-95. As such, the court is faced with contradictory binding precedent. One the one hand, the Supreme Court specified that the court must first determine whether the contract falls within or beyond

19. First, it considered ARC's claim that defendant CTI tortiously induced defendant Richard Secord's breach of fiduciary duty by secretly negotiating the personal services agreement with Secord and found that the claim significantly related to the consulting agreement and was thus arbitrable. *Am. Recovery Corp.*, at 93-94. Second, it considered ARC's claim that CTI tortiously interfered with ARC's contractual relationship with defendant Fluor-Daniel by inducing Fluor-Daniel to breach its noncircumvention agreement with ARC and found it clearly related to the consulting agreement because an express term of the consulting agreement mandated that CTI would not enter into any agreement with Fluor-Daniel. *Id.* at 94. Third, ARC claimed it was entitled to compensation in quantum meruit from CTI for security a financing commitment from EDS for the China project, which ARC contends was a duty that CTI requested it perform, and the court found that this claim related to the consulting agreement because ARC relied on the terms of the consulting agreement to prove its claim. *Id.* at 94-95.

the boundaries of §§ 1 and 2 of the FAA before invoking its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration. *New Prime Inc.*, 139 S. Ct. at 537-38. Even where a delegation clause exists, the court may enforce that delegation clause only after a showing that the clause "appears in a 'written provision in . . . a contract evidencing a transaction involving commerce' consistent with § 2." *See id.* at 539 (quoting 9 U.S.C. § 2). The Fourth Circuit's decision in *Galloway* logically reads to indicate that the four-factor test established in *Rota-McLarty*, 700 F.3d at 696 n.6, provides the framework to determine whether § 2 of the FAA governs a dispute. *Galloway*, 819 F.3d at 84. The second element of that test requires "a written agreement that includes an arbitration agreement which *purports to cover the dispute.*" *Id.* Thus, read together, binding precedent dictates that the court must find, *inter alia*, that the arbitration agreement purports to cover the dispute *before* staying litigation and compelling arbitration. *See New Prime Inc.*, 139 S. Ct. at 537-38; *Galloway*, 819 F.3d at 84.

On the other hand, the Fourth Circuit is silent as to how to determine whether an agreement purports to cover the dispute. *See generally Galloway*, 819 F.3d at 84. In practice, district courts look to the terms of the contract and the arbitration agreement and then look to the dispute and determine whether there is overlap. *See, e.g., TriEnergy, Inc.*, 877 F. Supp. 2d at 429; *Columbia Gas Transmission, LLC*, 2024 U.S. Dist. LEXIS 36569, 2024 WL 756286, at *3; *Apex Sys., LLC*, 2024 U.S. Dist. LEXIS 23793, 2024 WL 555125, at *5. That test is, in essence, a test of scope. *Am. Recovery Corp.*, 96 F.3d

at 93. As the court later concludes, the parties have delegated the question of scope to the arbitrator. *Henry Schein, Inc.*, 139 S. Ct. at 529. Thus, the conflict arises as to whether the court is required to determine scope in its analysis of whether § 2 of the FAA governs a dispute before compelling arbitration where the parties have agreed to a delegation provision which encompasses the question of scope.

The Fourth Circuit has indicated that it "'do[es] not lightly presume that the law of this circuit has been overturned, especially where as here' it is possible to read out existing precedent as 'harmonious[]' with the Supreme Court's current approach." *Doe v. Sidar*, 93 F.4th 241, 245-46 (4th Cir. 2024) (quoting *Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019)). In order to avoid running afoul of Supreme Court and Fourth Circuit precedent, the court concludes that the question of whether the arbitration "purports to cover the dispute" asks the question of "scope" which the court typically must determine *prior* to compelling arbitration *except* where the parties have explicitly delegated that question of arbitrability to the arbitrator.[20] Thus, where an arbitration agreement has

20. To be clear, this is a complex issue that requires the court to engage in a fair amount of interpretation. As such, additional guidance on this issue is likely warranted, particularly considering language from the Supreme Court which indicates that the court must find § 2 of the FAA to apply to a dispute *prior* to compelling arbitration consistent with a delegation clause. *New Prime Inc.*, 139 S. Ct. at 538. If the court is required to consider scope under the four-factor test established by the Fourth Circuit to determine whether § 2 of the FAA applies, *Rota-McLarty*, 700 F.3d at 696 n.6, such a requirement may run afoul of the Supreme Court's

delegated gateway questions of arbitrability, the question of whether the FAA "purports to cover this dispute" is eliminated from the four-factor test established in *Rota-McLarty*, 700 F.3d at 696 n.6. Here, when the question of whether the FAA "purports to cover this dispute" is eliminated from the test, the court finds that the FAA indeed governs this dispute because the parties do not dispute that the remaining factors of that test are met. *See also* ECF Nos. 259 at 25; 23 at 12; 266; 258 at 12. However, such a finding requires the court to interpret conflicting binding precedent and to reach the conclusion that the arbitration provision in the 2002 and 2003 Agreements includes a delegation clause requiring the arbitrator to resolve questions of arbitrability. The court will next analyze that latter conclusion.

2. Delegation Clause

Whether the arbitration provision also includes an agreement to arbitrate disputes of arbitrability, sometimes called a "delegation clause," is a "gateway question" to be decided first. *See Howsam*, 537 U.S. at 83-84; *Hengle*, 19 F.4th at 335. Arbitrability disputes often necessitate a two-step inquiry. *E.g., First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "First, we determine who decides whether a particular dispute is arbitrable: the arbitrator or the court." *Peabody Holding Co.*, 665 F.3d at 101. "Second, if we conclude that the court is the proper

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decision in *Henry Schein* which indicates that questions of scope may be expressly reserved for the arbitrator, *Henry Schein, Inc.*, 139 S. Ct. at 529.

forum in which to adjudicate arbitrability, we then decide whether the dispute is, in fact, arbitrable." *Id.*

As in any garden-variety contractual claim, the intent of the contracting parties guides the analysis. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 328-29 (4th Cir. 1999). Although the Fourth Circuit "has adopted a general policy-based, federal presumption in favor of arbitration, that presumption is not applied to resolve questions of the arbitrability of arbitrability issues themselves." *Peabody Holding Co.*, 665 F.3d at 102 (internal quotation marks and citations omitted). "Indeed, 'the question of arbitrability . . . is undeniably an issue for judicial determination.'" *Id.* (quoting *AT&T Techs., Inc.*, 475 U.S. at 649). "Parties, to be sure, can agree to arbitrate arbitrability, but such agreement "must . . . 'clearly and unmistakably' provide that the arbitrator shall determine what disputes the parties agreed to arbitrate." *Carson*, 175 F.3d at 329 (quoting *AT&T Techs., Inc.*, 475 U.S. at 649). "The 'clear and unmistakable' standard is exacting, and the presence of an expansive arbitration clause, without more, will not suffice." *Peabody Holding Co.*, 665 F.3d at 102. The Fourth Circuit has found that an arbitration clause "committing all interpretive disputes 'relating to' or 'arising out of' the agreement does not satisfy the 'clear and unmistakable' test." *Id.* (quoting *Carson*, 175 F.3d at 330). "Those who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect." *Carson*, 175 F.3d at 330-31.

HUB focuses on the latter half of the arbitration clause—namely, "shall be submitted to a panel of three arbitrators and resolved by final and binding arbitration . . . *under the commercial rules of the [AAA].*" ECF No. 258 at 20; ECF No. 260 at 5. Specifically, HUB takes that language, along with a footnote from this case's first appeal to the Fourth Circuit, to conclude that, because one of the commercial rules of the AAA indicates that an arbitrator may rule on arbitrability issues, the question of arbitrability is an issue left to an arbitrator. *Id.* Thus, HUB concludes that an arbitrator—not the court—must decide in the first instance whether under "the significant relationship test" the arbitration clauses included in the 2002 and 2003 Agreements compel arbitration of the District's claims. *See* ECF Nos. 258 at 20; 260 at 5. In other words, the arbitrator must determine the scope of the arbitration clauses in those agreements.

The court begins by examining whether its conclusion on this question is foreclosed by the law-of-the-case doctrine—namely, whether a Fourth Circuit conclusion as to this question forecloses the court's own determination. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). In Berkeley I, the Fourth Circuit included a footnote which said, "[h]ere, the Arbitration Clauses incorporate the Commercial Rules of the [AAA], which provide that an arbitrator has the power to rule on arbitrability issues."[21]

21. The footnote was provided in the context of that court's determination of whether the district court must conduct a Section 4 trial to determine whether the parties formed an agreement to arbitrate. *Berkeley I*, 944 F.3d at 234.

Berkeley I, 944 F.3d at 234 n.9 (citing Am. Arbitration Ass'n, *Commercial Arbitration Rules*, R-7(a) (amended Oct. 1, 2013)[22]). However, in *Berkeley II*, the Fourth Circuit specified that it did "not opine on whether [the new evidence of the 2002 and 2003 Agreements] leads to the conclusion that Berkeley Schools must arbitrate all or part of this dispute, whether the parties must arbitrate the question of arbitrability, or whether Berkeley Schools in fact assented to the 2002 or 2003 [Agreements]." *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2. Read together, the two decisions most logically indicate that the Fourth Circuit left the question of whether an arbitrator or the court must decide questions of arbitrability for this court to resolve, should the court find that to be at issue. *See Berkeley I*, 944 F.3d at 234 n.9 (noting that the Commercial Rules of the AAA indicate that an arbitrator has the power to rule on questions of arbitrability but not that the arbitrator must rule on questions of arbitrability); *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2 (declining to opine on whether the parties must arbitrate the question of arbitrability).

The court begins with an overview of the binding case law governing this issue. The Supreme Court has noted,

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22. R-7(a) provides, "[t]he 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." Am. Arbitration Ass'n, *Commercial Arbitration Rules*, R-7(a) (amended Oct. 1, 2013).

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.[23]

Henry Schein, Inc., 139 S. Ct. at 529 (footnote added). However, the Court's ruling on the wholly groundless exception relates to the scope of the agreement to arbitrate, not to its *formation*, and therefore it is inapplicable to a party's argument that it never formed an agreement to arbitrate. *See id.* Thus, the question becomes whether the parties' agreement delegates threshold arbitrability questions to the arbitrator by "clear and unmistakable" evidence. *Id.* at 530. However, as explained by the *Rent-A-Center* Court, the "clear and unmistakable" requirement relates "to the parties' *manifestation of intent*, not to the agreement's *validity.*" 561 U.S. at 69 n.1 (emphasis in original). Consequently, when deciding whether a party agreed to delegate questions of arbitrability to arbitration, a court looks to the parties' intent.

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23. The Supreme Court explicitly rejected the argument that "as a practical and policy matter[] it would be a waste of the parties' time and money to send the arbitrability question to the arbitrator if the argument for arbitration is wholly groundless." *Henry Schein, Inc.*, 139 S. Ct. at 530. The Court concluded that the FAA contains no "wholly groundless" exception and that courts may not engraft exceptions onto the statutory test, even where the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. *Id.*

Appendix B

The Fourth Circuit has held that contracting parties' express incorporation of the JAMS Comprehensive Rules and Procedures constitutes clear and unmistakable evidence of the sophisticated parties' intent to delegate to the arbitrator questions of arbitrability. *Simply Wireless*, 877 F.3d at 527. Several other circuit courts also reached this conclusion regarding the incorporation of the AAA Rules.[24] *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125,

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24. The court notes that there are meaningful differences between the applicable JAMS rule and the AAA commercial rule at issue in this case. Namely, Rule 11(b) of the JAMS Comprehensive Arbitration Rules and Procedures (effective July 1, 2014) provides that:

> Jurisdictional and *arbitrability disputes*, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought . . . *shall be submitted to and ruled on by the Arbitrator.* The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Simply Wireless, 877 F.3d at 527. In contrast, Rule R-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.

Am. Arbitration Ass'n, *Commercial Arbitration Rules*, R-7(a) (amended Oct. 1, 2013). The former dictates that the arbitration *shall* rule on arbitrability disputes whereas the latter, which governs this case, indicates that the arbitrator has the power to rule on arbitrability disputes but omits any requirement that he or she *must* rule on arbitrability disputes.

1130 (9th Cir. 2015); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), *abrogated by Henry Schein, Inc.*, 139 S. Ct. 524; *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005). Following the Fourth Circuit's decision in Simply Wireless, courts in this circuit have applied that incorporation principle to arbitral rules other than JAMS. *See, e.g, A Grade Above Others, LLC v. BCVP2 Baileys Run, LLC*, 2020 U.S. Dist. LEXIS 139673, 2020 WL 4501512, at *3 (D.S.C. Aug. 5, 2020), *on reconsideration*, 2020 U.S. Dist. LEXIS 207209, 2020 WL 6526047 (D.S.C. Nov. 5, 2020) (AAA's Construction Industry Arbitration Rules); *Choice Hotels Int'l, Inc. v. TK Hosp. Grp., LLC*, 2019 U.S. Dist. LEXIS 204811, 2019 WL 6324523, at *3 (D. Md. Nov. 26, 2019) (AAA Rules); *GlobalOne Mgmt. Grp. Ltd. v. Tempus Applied Sols., LLC*, 2018 U.S. Dist. LEXIS 207301, 2018 WL 6440890, at *6 (E.D. Va. Dec. 7, 2018) (ICC Rules); *Collins v. Discover Fin. Servs.*, 2018 U.S. Dist. LEXIS 206723, 2018 WL 6434503, at *2-3 (D. Md. Dec. 7, 2018) (AAA and JAMS Rules); *Sunbelt Residential Acquisitions LLC v. Crowne Lake Assocs. Ltd. P'ship*, 2021 U.S. Dist. LEXIS 25968, 2021 WL 512228, at *6 (M.D.N.C. Feb. 11, 2021), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 256291, 2021 WL 7186398 (M.D.N.C. Mar. 2, 2021) (AAA Rules). Thus, precedent and persuasive opinions from other circuits suggest that if the court finds that the parties agreed to arbitrate, the court must also find that the 2002 and 2003 Agreements' reference to the AAA Rules is "clear and unmistakable" evidence that the parties

intended questions of arbitrability under that agreement to be decided by the arbitrator, not the district court.[25] This is the crux of HUB's argument.

Precedent and persuasive authority dictates that when sophisticated parties expressly incorporate into a contract the AAA Rules that delegate questions of arbitrability to an arbitrator, the clear and unmistakable standard is met. *See Henry Schein, Inc.*, 139 S. Ct. at 529; *Simply Wireless*, 877 F.3d at 527. Thus, the question of arbitrability—*i.e.*, the scope of the arbitration clause—is reserved to the arbitrator even if HUB's argument that the claims are arbitrable is wholly groundless. *See id.*

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25. However, there is not unanimity among district courts, nor is circuit precedent clear, as to whether the holding in *Simply Wireless* applies to agreements between unsophisticated parties. *See Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 554 (D. Md. 2019); *see also Ashworth v. Five Guys Operations, LLC*, 2016 U.S. Dist. LEXIS 177407, 2016 WL 7422679, at *3 (S.D.W. Va. Dec. 22, 2016) (finding that incorporation by reference of the AAA Rules to an agreement between employee and employer could be considered clear and unmistakable only "if the true meanings of 'clear' and 'unmistakable' are ignored"); *Ingalls v. Spotify USA, Inc.*, 2016 U.S. Dist. LEXIS 157384, 2016 WL 6679561, at *3 (N.D. Cal. Nov. 14, 2016); *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016); *but see Miller v. Time Warner Cable Inc.*, 2016 U.S. Dist. LEXIS 179444, 2016 WL 7471302, at *5 (C.D. Cal. Dec. 27, 2016) (concluding that a reference to arbitration rules is clear and unmistakable evidence even when applied to agreements where one party is unsophisticated). The District does not contend that the two parties here are unsophisticated, nor does the court infer as much from the record. Therefore, this exception, to the extent it exists, does not apply.

However, to circle back to the District's argument, the determination of the applicability of the AAA Rules requires the court to first find that the parties agreed to an arbitration clause in the first place. Otherwise, the court would have to use the substance of an arguably unformed agreement to show that the agreement was formed, which "puts the cart before the horse." *See Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014). As such, the court evaluates whether the parties agreed to arbitrate this dispute.

3. Agreement to Arbitrate

The issue of whether an arbitration clause is valid under Section 2 of the FAA is a different issue from whether the parties ever formed an agreement to arbitrate.[26] *Rent-A-Ctr.*, 561 U.S. at 70 n.2; *see also*

26. As this court noted in its January 2019 Order, often the basic requirement that the parties agreed to arbitrate gets wrapped up in the "scope of" arbitrability analysis, creating confusion over whether it is the court's or the arbitrator's role to determine whether the parties agreed to arbitrate. ECF No. 63 at 18-19. Yet some courts have said that "[a]rguments that an agreement to arbitrate was never formed, though, are to be heard by the court even where a delegation clause exists." *Doordash*, 888 F.3d at 744. The court agrees; when a party disputes whether it agreed to the arbitration clause in the first place, as opposed to whether the clause is valid, it is exclusively within the court's province to determine if an agreement to arbitrate was formed. *Novic*, 757 F. App'x at 265 ("[W]hen the parties disagree whether they have delegated [the gateway issues of arbitrability] to an arbitrator, that question of arbitrability must be answered by the court."); *see also Granite Rock Co.*, 561 U.S. at 297 ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.").

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded.").[27] Indeed, the Supreme Court explained that the validity of an arbitration clause, which is governed by § 2, addresses "whether it is legally binding, *as opposed to whether it was in fact agreed to.*" *Rent-A-Ctr.*, 561 U.S. at 69 n.1 (emphasis added); *see also Nat'l Fed'n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 80 (1st Cir. 2018) ("Pursuant to established Supreme Court precedent, however, there's an important distinction between arguments challenging the *validity* of an agreement and those challenging an agreement's *formation*." (citations omitted)); *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P.*, 853 F.3d 804, 810 (5th Cir. 2017), *as revised* (Apr. 12, 2017) ("The Court made clear in *Buckeye Check Cashing* and *Rent-A-Center* that when it explained that '[t]here are two types of validity challenges under § 2,' it was not addressing a contention that no agreement was ever concluded by the parties.'" (citations omitted)). Therefore, determination of an arbitration clause's validity under § 2 goes to whether the clause may be enforced—requiring the court to send the dispute to arbitration—not whether the parties agreed to arbitrate in the first place.

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27. While the *Rent-A-Center* Court and the *Buckeye Check Cashing* Court both identify this distinction, they also both clarify that they only subsequently address validity of the agreements to arbitrate, not their formation. *Rent-A-Ctr.*, 561 U.S. 63, 71 n.2, 130 S. Ct. 2772, 177 L. Ed. 2d 403; *Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n.1. Therefore, neither Court discusses this distinction beyond its initial identification of the distinction.

Certainly, the Fourth Circuit has unequivocally held that incorporation of the rules of the AAA, which allow the arbitrator to rule on questions of arbitrability, "does not obviate the need for courts to decide the threshold issue of contract formation."[28] *Rowland v. Sandy Morris*

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28. This is not the first time the court has been asked to decide this issue. In this court's January 2019 Order, the court expressly distinguished between a challenge to the validity of the arbitration clause and a challenge to whether an agreement to arbitrate was formed in the first place. This distinction is worth repeating.

As the Supreme Court explained in *Buckeye Check Cashing*, there are two types of challenges under the FAA that a party may make related to the validity of an arbitration clause. 546 U.S. at 444. The first challenge is to the validity of entire container contract, and the second challenge goes to the validity of the arbitration clause itself. *Id.* A challenge to the validity of the container contract must go to an arbitrator because the arbitration clause within the container contract represents the parties' agreement to resolve the challenge through arbitration. *Id.* at 448-49. But a challenge to the validity of the arbitration clause itself may be considered by a court. *Id.* A court may do so because the arbitration clause provides the court the authority to compel arbitration, so if the arbitration clause is invalid, the court cannot compel arbitration. This distinction gives courts the ability to view the validity of an arbitration clause separately from the validity of the container contract. *Buckeye Check Cashing, Inc.*, 546 U.S. at 449. Courts refer to this as the severability rule. *See, e.g., Rent-A-Ctr.*, 561 U.S. at 71 (discussing this distinction and referring to it as "the severability rule"); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012) (noting that validity of the arbitration provision is subject to initial court determination under the severability rule); *Novic v. Credit One Bank, Nat'l Ass'n*, 757 F. App'x 263, 265 (4th Cir. 2019). Therefore, courts generally have the power to determine the validity of an arbitration clause before requiring the parties

Fin. & Est. Plan. Servs., 993 F.3d 253, 258 (4th Cir. 2021). "Section 4 of the FAA has made it clear that is it up to courts to determine whether a contract has been formed." *Id.* "[W]hen the parties disagree whether they have delegated th[e gateway issues of arbitrability] to an arbitrator, that question of arbitrability must be answered by the court." *Novic v. Credit One Bank, Nat'l Ass'n*, 757 F. App'x 263, 265 (4th Cir. 2019) (citing *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

A review of the operative complaint indicates that none of the conduct that gives rise to this action occurred during either the period covered by the 2002 or 2003 agreements. *See generally* 2d Amend. Compl. Rather, the earliest date in which the alleged fraudulent scheme began was in or around February 2006, which is over a year and a half after the 2003 Agreement expressly terminated. *See id.* ¶ 2; ECF No. 258-2. Thus, the court is confronted with the question of whether the arbitration clauses in the 2002 and 2003 Agreements nevertheless govern conduct which occurred *after* those constructively ratified agreements terminated.

The District primarily argues that it never agreed that the arbitrability clauses would be applicable to these facts. In other words, the arbitrability clauses are

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to arbitrate an issue. *See id.* However, if a party is challenging the validity of the container contract, the challenge must be heard by an arbitrator. *See id.* Here, the court confines its analysis to the District's argument that it never agreed to the arbitration provision.

not challenged as invalid, but the District challenges whether it ever agreed to the clauses notwithstanding the uncontested validity of the container contract.[29] Inevitably,

29. It is unclear whether the District makes the argument that because the contract was only constructively ratified, the District did not specifically agree to the arbitration clause. To be sure, it is well established that "[a]rbitration may only be judicially compelled when the parties have agreed to it, and then only for those kinds of disputes that the parties have agreed to submit to arbitration." *Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723, 727 (4th Cir. 1997). The parties have not identified, and the court has not found, court cases where a party is able to escape an arbitration clause in a contract that was constructively ratified by performance rather than express consent. The few cases relevant to this issue tend to show that where a party has benefited from an unsigned agreement, estoppel dictates that the arbitration clauses included within that agreement may be enforced against that party. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) ("A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.") (internal quotation marks and citations omitted); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597, 601 (S.C. Ct. App. 2012) (applying *Int'l Paper*). "[E]stoppel is appropriate if in substance the signatory's underlying complaint is based on the nonsignatory's alleged breach of the obligations and duties assigned to it in the agreement." *Lomax v. Weinstock, Friedman & Friedman, P.A.*, 583 F. App'x 100, 101 (4th Cir. 2014) (quoting *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 628 (4th Cir. 2006)).

To be sure, the facts in this case are unique in that one of the two signatories to the 2002 and 2003 Agreements was fraudulently in cahoots with the other party to the agreement, though purportedly not at the time the parties signed the 2002 and 2003 Agreements. Nevertheless, the District avers that the 2002 and 2003 Agreements were valid and constructively ratified

HUB disagrees with the District's arguments regarding the expiration of the contracts. *See* ECF Nos. 258 at 18-20; 260 at 2-5, 11; 264 at 5-6 n.1. In other words, the District and HUB disagree over whether there is an agreement to arbitrate, and the District avers that the court—not the arbitrator—must settle that dispute. ECF No. 259 at 25 (citing 9 U.S.C. § 2).

HUB points to *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, as authority which indicates that where a valid, enforceable delegation clause exists, the question of the arbitration clause's duration should be left to the arbitrator. ECF No. 260 at 4. In that case the Fourth Circuit first considered who—the court or the arbitrator—"should decide the threshold issue of the duration dispute's arbitrability." 984 F.2d 113, 117 (4th Cir. 1993). Second, the Fourth Circuit considered whether the district court, upon deciding that it should decide the duration dispute's arbitrability, correctly decided that the duration dispute was not arbitrable but should also be decided by the court. *Id.* The dispute arose partly over whether the entire contract—and, specifically, its arbitration clause—expired at the time the exclusive option provision expired or whether the expiration applied

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as commercially reasonable, meaning that the District received the benefits of those contracts such that the court may determine that principles of equity hold that the arbitration clauses contained within those Agreements should be enforced. *See Int'l Paper Co.*, 206 F.3d at 417-18. Thus, for the District to prevail on the gateway question, the court must find that the parties did not agree that the arbitration clauses in the 2002 and 2003 Agreements govern this dispute.

only to the exclusivity clause of the contract. *Id.* at 115. The Fourth Circuit affirmed the district court's conclusion that as a matter of law the question of whether the duration dispute was arbitrable was for the court, not the arbitrator, to decide. *Id.* at 117. The Fourth Circuit found that the contract at issue did not contain a specific, express provision committing arbitrability issues to an arbitrator. *Id.* Therefore, it opted not to opine on what might meet that first test to require the arbitrator to decide the second question. *Id.* Though the Fourth Circuit remained silent as to the question and impact of a delegation clause, HUB encourages the court to interpret *Virginia Carolina Tools* as indicating that where a valid, enforceable delegation clause exists, the question of the arbitration clause's duration should be left to the arbitrator. ECF No. 260 at 4.

Yet, in accordance with the Fourth Circuit's reasoning in that case, the question now before this court is question is one of "contract interpretation," which asks, "whether the parties, at the time they entered into the contract, intended that disputes over the duration of the contract would be decided by a court or the arbitrators." *Va. Carolina Tools, Inc.*, 984 F.2d at 118 (quoting *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 850 F.2d 756, 760, 271 U.S. App. D.C. 63 (D.C. Cir. 1988)) (internal quotation marks omitted). This speaks to agreement because it "simply appl[ies] the fundamental principle that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.'" *Id.* (quoting *United Steelworkers of Am.*, 363 U.S. at 582). Thus, the court evaluates whether the parties' express incorporation of a termination clause

into the 2002 and 2003 Agreements indicates their intent that their agreement to arbitration would not extend to facts which occurred after the contracts' respective terminations.

In general, parties likely would not intend, in the ordinary course of contractual relations, "to commit to arbitration disputes about the very existence (whether by origination or termination) of their contractual relationship." *Id.* Thus, the Fourth Circuit counsels that the general presumption in favor of arbitrability is accorded less force with respect to contract duration issues. *Id.*

Additionally, the Supreme Court has articulated that post-expiration grievances arise under the contract and are therefore arbitrable: (1) when the dispute "involves facts and occurrences that arose before expiration;" (2) when post-expiration action "infringes a right that accrued or vested under the agreement;" or (3) when "under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."[30] *Litton Fin. Printing*

30. *Litton* originally arose in the labor and employment context. *See Litton*, 501 U.S. at 193. It concerned a dispute over layoffs, which occurred after the expiration of a collective-bargaining agreement, and required the court to determine whether the dispute arose under the agreement despite its expiration. *Id.* Other courts have since applied the *Litton* factors in the context of the FAA for motions to compel or motions to stay where the conduct at issue occurred after the arbitration agreement's expiration. *See, e.g., Breda v. Cellco P'ship*, 934 F.3d 1, 7-8 (1st Cir. 2019); *CPR (USA) Inc. v. Spray*, 187 F.3d 245,

Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 206, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991); *see also United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC, Loc. No. 850L v. Cont'l Tire N. Am., Inc.*, 568 F.3d 158, 164 (4th Cir. 2009). The Court "refuse[d] to apply that presumption wholesale in the context of an expired . . . agreement, for to do so would make limitless the contractual obligation to arbitrate." *Litton Fin. Printing Div.*, 501 U.S. at 209; *see also Nolde Bros. v. Bakery & Confectionery Workers Union*, 430 U.S. 243, 255, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977) ("[W]here the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."). Thus, the court is tasked with determining whether the facts alleged in the operative complaint fall within the arbitration provisions in the 2002 and 2003 BSAs. Specifically, since the alleged actions underlying the complaint arose *after* the expiration of the 2002 and 2003 BSAs, the court must determine whether any of the three *Litton* circumstances apply whereby post-expiration grievances nevertheless arise under the contract.

254-56 (2d Cir. 1999), *abrogated on other ground as explained in Accenture LLP v. Spreng*, 647 F.3d 72, 76 (2d Cir. 2011); Stevens-Bratton v. TruGreen, Inc., 675 F. App'x 563, 567 (6th Cir. 2017); *Koch v. Compucredit Corp.*, 543 F.3d 460, 466-67 (8th Cir. 2008); *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1060-63 (9th Cir. 2020); *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 520-21, 385 U.S. App. D.C. 1 (D.C. Cir. 2009).

HUB has not explicitly stated how post-expiration grievances arise under the 2002 and/or 2003 BSAs under any of the three *Litton* exceptions. *See* ECF Nos. 258 at 18-20 (explaining that the second amended complaint does not change that the record reveals evidence that some supposedly fraudulent conduct may have occurred before 2005 and thereby implicate the 2002 or 2003 BSA); 260 at 2-5, 11 (explaining that persuasive authority leads to the conclusion that the arbitrator must decide the question of arbitrability notwithstanding the contention that an agreement had expired); 264 at 5-6 n.1 (emphasizing that the District's expiration argument invokes the significant relationship test and thereby implicates the question of scope). When the court specifically requested that the parties analyze *Litton*, HUB contended that the Supreme Court's decision in *Litton* was based on precedent premised on federal labor-law policy under the National Labor Relations Act regarding a collective bargaining agreement—not contract law in general.[31]

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31. While courts have primarily applied Litton in cases concerning unions and collective bargaining agreements, at least seven courts of appeals have extended *Litton's* holdings to the FAA because the decision was not based on the peculiarities of labor law. *See, e.g., Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp of Am.*, 97 F. App'x 462, 466 (5th Cir. 2004) ("While Litton involved a labor arbitration dispute, the decision is not based on peculiarities of labor law and we find its reasoning and holding applicable to the pending case."); *Breda v. Cellco P'ship*, 934 F.3d 1, 7 (1st Cir. 2019); *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 508-14 (1st Cir. 2020); *Brandom v. Gulf Coast Bank & Tr. Co.*, 253 F.3d 706 (5th Cir. 2001); *Huffman v. Hilltop Cos., LLC*, 747 F.3d 391, 395-98 (6th Cir. 2014); *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 520-21, 385 U.S. App. D.C. 1 (D.C. Cir.

ECF No. 269-1 at 4-5. HUB also argued that Litton was distinguishable because a party cannot be forced to arbitrate the arbitrability question under a collective bargaining agreement, meaning that the *Litton* court did not confront a delegation clause when it resolved the contract duration dispute. *Id.*

The court first addresses HUB's argument that both the principles established in *Litton* and its progeny, as well as the broad holdings as to the duration dispute in *Virginia Carolina Tools* are inapplicable to this case because a delegation clause exists. ECF No. 269-1 at 4-5. Namely, the Fourth Circuit did not reach the question in Virginia Carolina *Tools* of whether a delegation clause would have delegated the question of contract interpretation to the arbitrator so that he or she, and not the court, should decide the arbitrability of the agreement's duration because it found no such delegation clause in the contract. 984 F.2d at 117-18. Rather, it noted that "the typical, broad arbitration clause in the option agreement at issue here—which contains nothing approaching [a specific, express provision committing all arbitrability disputes to arbitration]—d[id] not" commit arbitrability issues to arbitration. *Id.* at 117. Thus, there is no binding caselaw requiring this court to come out as HUB desires on this issue.

2009); *Koch v. Compucredit Corp.*, 543 F.3d 460, 465-66 (8th Cir. 2008); *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1061-63 (9th Cir. 2020); *CPR (USA) Inc. v. Spray*, 187 F.3d 245, 254-56 (2d Cir. 1999), *abrogated on other grounds as explained in Accenture LLP v. Spreng*, 647 F.3d 72, 76 (2d Cir. 2011).

Moreover, the procedural history and prior court decisions evaluating HUB's motion to compel arbitration in this case weigh in favor of the District's position. In *Berkeley I*, the Fourth Circuit considered the signed 2002 and 2003 Agreements and found that,

> Those Agreements predate the steering and kickback fraud scheme and conspiracy alleged in the Operative Complaint. The [January 2019] Order deemed the June 2002 and June 2003 Agreements as relevant because the initial complaint had predicated some of its claims on conduct dating from 2001. We have recognized, however, that an amended complaint—such as the Operative Complaint here—supersedes an initial complaint and renders it "of no effect." *See Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (quoting *Young v. City of M[ount] Ranier*, 238 F.3d 567, 573 (4th Cir. 2001)).
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> Moreover, because the June 2002 Agreement terminated in June 2003, and the June 2003 Agreement ended in June 2004, *the Arbitration Clauses therein could not require Berkeley Schools to arbitrate any claims on the basis of conduct that began after those Agreements terminated.* At best, the June 2002 and June 2003 Agreements might be relevant to questions of whether Berkeley Schools had knowledge of, or assented to, the subsequent Brokerage Service Agreements and Arbitration Clauses.

Berkeley I, 944 F.3d at 241 (emphasis added). As specified above, this court interpreted *Berkeley I's* holding to be a decree regarding the 2002 and 2003 Agreements in the finding of facts and conclusions of law issued after the Section 4 Trial. ECF No. 225 ¶ 145 ("As the 'law of the case,' the court must abide by the Fourth Circuit's decree" that the 2002 and 2003 BSAs cannot compel this dispute to arbitration because it arose after the period covered by those BSAs). HUB challenged this conclusion in its second appeal to the Fourth Circuit. The Fourth Circuit noted that "[t]he district court correctly interpreted our prior decision in this case as it concerns the 2002 and 2003 BSAs" but found that the law-of-the-case doctrine did not prevent the court from reaching conclusions as to the 2002 and 2003 Agreements if new evidence arose in the Section 4 Trial or amended complaint which indicated that the implicated conduct arose *during* the terms of the 2002 or 2003 BSAs. *Berkeley II*, 2022 U.S. App. LEXIS 35772, 2022 WL 17974626, at *2.

Ultimately, the court finds that the conduct at issue—which occurred years after the 2002 and 2003 BSAs expressly terminated—did not arise from those Agreements. Persuasive caselaw from other district courts in the Fourth Circuit bolsters this conclusion. *See Beverage Network of Md. v. Hansen Bev. Co.*, 2009 U.S. Dist. LEXIS 146705, 2009 WL 10682449, at *8 (D. Md. Jan. 15, 2009) (finding that the conduct at issue did not arise from the expired agreement where the dispute arose from conduct that occurred after the agreement containing the arbitration provision terminated); *cf. Va. Pro. Staff Ass'n v. Va. Educ. Ass'n*, 2014 U.S. Dist. LEXIS 58727, 2014

WL 1670364, at *3-4 (E.D. Va. Apr. 28, 2014) (finding that the dispute arose under the expired contract where the infringed right accrued or vested under that agreement); *Cumberland Typographical Union No. 244 v. Times & Alleganian Co.*, 943 F.2d 401, 405 (4th Cir. 1991) (same). It does not appear that the District is presently suing HUB on the basis of a right that vested under the 2002 or 2003 Agreements, nor is it apparent that the allegations arose from those Agreements.[32]

This accords with the Fourth Circuit's previous review of the 2002 and 2003 Agreements. *See Berkeley I*, 944 F.3d at 241 (observing that because the June 2002 Agreement terminated in June 2003, and the June 2003 Agreement ended in June 2004, the Arbitration Clauses therein could not require Berkeley Schools to arbitrate any claims on the basis of conduct that began after those Agreements terminated); *Berkeley II*, 2022 U.S. App.

32. Further, although the Fourth Circuit has not examined the vested rights prong of the *Litton* test, the Sixth Circuit has held that a right may be "vested" within the meaning of *Litton* only if one of two conditions is satisfied. *See Cincinnati Typographical Union No. 3, Loc. 14519, Commc'ns Workers of Am. v. Gannett Satellite Info. Network, Inc.*, 17 F.3d 906, 910-11 (6th Cir. 1994). First, "a court may use standard principles of contract interpretation to determine whether a right is vested," and thus "might conclude the parties intended a right to vest if [it is] shown contract language or extrinsic evidence to support that conclusion." *Id.* at 910. Second, "rights that can be worked toward or accumulated over time," such as severance or vacation pay, are generally presumed to be vested "without any other evidence in the contract." *Id.* at 911. To reiterate, the *Litton* Court and the Sixth Circuit analyzed this issue in the context of employment disputes, though the test has also been applied to other arbitration issues.

LEXIS 35772, 2022 WL 17974626, at *2 (concluding that the district court was required to evaluate whether any of the conduct underlying this action occurred while the 2002 and 2003 BSAs were in effect). The court does not find an agreement to arbitrate because the facts underlying this action occurred *after* the 2002 and 2003 Agreements expressly terminated.[33]

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33. HUB also points to the District's purported inconsistency for challenging later insurance policies as fraudulently recommended when the District also paid for those same policies in prior contracts which were "commercially reasonable." ECF No. 258 at 18-19. The District emphasizes that those policies inclusion in the 2002 and 2003 Agreements were "'consistent' with customary rates and 'commercially reasonable.'" ECF No. 259 at 20. Indeed, if the policies' inclusion were neither consistent nor commercially reasonable, the District would have a strong argument that it never formed a contract through performance with HUB such that the motion to compel arbitration—and all arguments as to the delegation clause—would fail for lack of agreement. *See* ECF No. 259 at 16-17.

Importantly, HUB's argument misses the key fact that the District and Knauff meaningfully changed their commercial relationship after the 2002 and 2003 Agreements terminated. 2d Amend. Compl. ¶ 50. For the period from July 2004 to July 2005, Knauff and the District discontinued their previous practice of a brokerage service fee under an express agreement, and instead converted to a straight commission arrangement, which also paid for risk management services. *Id.* It was only through this new structure that the defendants were later able to allegedly "conceal payments far larger, as a percentage of premiums, than would be possible through a commission charged as a disclosed percentage of the premiums." *Id.* ¶ 62. Thus, the court looked at the claims in the second amended complaint, considered the underlying facts, and found them to not arise during the effective term of the 2002 and 2003 Agreements. *See* ECF Nos. 258 at 18-20; 260 at 7-9.

South Carolina law also bolsters this conclusion. "[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705, 708 (S.C. 2007) (quoting *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 588 S.E.2d 136, 140 (S.C. Ct. App. 2003)). "When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract." *Davis v. ISCO Indus., Inc.*, 434 S.C. 488, 864 S.E.2d 391, 395 (S.C. Ct. App. 2021) (quoting *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839, 846 (S.C. Ct. App. 1999)); *see also Zandford*, 112 F.3d at 727 (same). Using the same factors as identified by *Litton*, the court concludes that the parties' intent did not clearly indicate that the arbitration clauses of the 2002 and 2003 BSAs, which were constructive ratified by performance, were to extend beyond the termination of the contracts.

Notably, the 2002 and the 2003 Agreements included clauses which specified the term of the agreements. *See* ECF Nos. 258-1 at 3; 258-2 at 3. The Fourth Circuit has instructed that where the original contract had both a broad arbitration clause and an express termination date provision, such an existence should indicate to the court that there was "no incipient issue of contract duration in the parties' memorialized agreement, hence no built-in likelihood of a dispute over its duration." *Va. Carolina*

Tools, Inc., 984 F.2d at 118; *see also Nat'l R.R. Passenger Corp.*, 850 F.2d at 763 ("[I]f a contract provides that 'all disputes between the parties shall be arbitrated,' but with equal clarity provides that it will expire on a date certain, then any dispute over whether the contract actually expired or was extended by the parties must be decided by the court rather than by the arbitrator."). To reiterate, the court finds that the District constructively ratified the 2002 and 2003 Agreements, meaning it agreed to the clauses contained therein through performance of its respective obligations in the agreements. ECF No. 259 at 16 (referencing ECF No. 225 ¶¶ 32-41). Such constructive ratification included ratification of the termination clauses in addition to the arbitration clauses. *See id.* Thus, it would be illogical to conclude that it was the parties' intent that the arbitration clauses included in those agreements would not terminate on the same date as the container contract. Consequently, when the District filed the operative complaint based on allegations of misconduct which occurred *after* June 29, 2004, when the 2002 and 2003 Agreements terminated, those agreements cannot now be used to require arbitration of later misconduct. *See* ECF No. 258-2 at 3.

Having found that the parties did not agree to arbitrate, the court need not reach the question of scope because arbitration is a matter of consent and here the parties have not consented.[34] *See Waffle House, Inc.*, 534 U.S. at 294.

34. To be sure, the Fourth Circuit has held that "a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which

Appendix B

IV. CONCLUSION

For the reasons set forth above, the court **DENIES** the motion to compel arbitration.

AND IT IS SO ORDERED.

/s/ David C. Norton
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March 30, 2024
Charleston, South Carolina

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the arbitration clause is contained." *Long*, 248 F.3d at 316 (citing *Am. Recovery Corp.*, 96 F.3d at 93). However, read in full, those opinions clearly indicate that the significant relationship test is used to determine the scope of an arbitration clause, rather than whether the parties initially agreed to arbitration. *See Am. Recovery Corp.*, 96 F.3d at 93 ("In applying this standard, we must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim."). Thus, the only reason that this court would apply the significant relationship test is if it can reach the question of scope, which is a question delegated to the arbitrator.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED DECEMBER 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1691

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff-Appellee,

v.

HUB INTERNATIONAL LIMITED; HUB INTERNATIONAL MIDWEST LIMITED,

Defendants-Appellants,

and

HUB INTERNATIONAL SOUTHEAST; KNAUFF INSURANCE AGENCY, INC.; STANLEY J. POKORNEY; SCOTT POKORNEY; BRANTLEY THOMAS,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:18-cv-00151-DCN)

Argued: December 8, 2022 Decided: December 28, 2022

Appendix C

Before GREGORY, Chief Judge, and KING and RUSHING, Circuit Judges.

Vacated in part and remanded by unpublished opinion. Judge Rushing wrote the opinion, in which Chief Judge Gregory and Judge King joined.

Unpublished opinions are not binding precedent in this circuit.

RUSHING, Circuit Judge:

We previously vacated the district court's denial of a motion to compel arbitration filed by defendants HUB International Ltd. and HUB International Midwest Ltd. (collectively, HUB) and remanded for a trial under Section 4 of the Federal Arbitration Act (FAA). *See Berkeley Cnty. Sch. Dist. v. HUB Int'l Ltd.*, 944 F.3d 225 (4th Cir. 2019). On remand, the district court held a bench trial and again denied HUB's motion to compel arbitration. HUB now appeals that denial in part, arguing that the district court misapplied the law-of-the-case doctrine. After considering the parties' arguments, we vacate the district court's order in part and remand for further proceedings.

I.

In January 2018, the Berkeley County School District* sued several defendants, including HUB, alleging claims

* The Berkeley County School Board of Trustees filed the original complaint. The amended complaint substituted the school district as the proper plaintiff.

arising from insurance policies and related consulting services that those defendants provided to Berkeley Schools. HUB moved to compel arbitration pursuant to brokerage service agreements (BSAs) dated in 2002, 2003, 2005, 2006, 2009, and 2011. Berkeley Schools opposed arbitration and filed an amended complaint, which remains the operative complaint in this action. The district court denied HUB's motion, and HUB appealed. We reversed, holding that the district court overlooked material factual disputes concerning this case's arbitrability, and remanded for the district court to conduct a trial under Section 4 of the FAA. *See Berkeley Cnty. Sch. Dist.*, 944 F.3d at 240-241; *see also* 9 U.S.C. § 4.

On remand, the district court held a five-day bench trial. At trial, HUB disclaimed any further reliance on the arbitration clause in the 2005 BSA. Following the trial, the district court held there was no meeting of the minds between Berkeley Schools and HUB concerning the 2006, 2009, and 2011 BSAs because Berkeley Schools did not know about or assent to those agreements. As for the 2002 and 2003 BSAs, which are the subject of this appeal, the district court concluded that our prior decision precluded it from considering whether those agreements required the parties to arbitrate their dispute.

Now on appeal, HUB does not challenge the district court's ruling concerning the 2006, 2009, and 2011 BSAs. Rather, HUB argues only that the district court misapplied the law-of-the-case doctrine to bar evaluation of the 2002 and 2003 BSAs. We have jurisdiction to hear an immediate appeal from the denial of a motion to compel

arbitration. *See* 9 U.S.C. § 16(a); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 635 (4th Cir. 2002). Following a bench trial, we review factual findings for clear error and legal conclusions de novo. *See Helton v. AT&T Inc.*, 709 F.3d 343, 350 (4th Cir. 2013); Fed. R. Civ. P. 52(a)(6), 81(a)(6)(B). We also review de novo whether the district court correctly interpreted and carried out our mandate on remand. *See Brown v. Nucor Corp.*, 785 F.3d 895, 901 (4th Cir. 2015); *Doe v. Chao*, 511 F.3d 461, 464 (4th Cir. 2007).

II.

The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988); *see TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009). Relatedly, when we remand a case to the district court, that court must faithfully apply our mandate, which is "controlling as to matters within its compass." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184 (1939); *see JTH Tax, Inc. v. Aime*, 984 F.3d 284, 291 (4th Cir. 2021). On remand, the district court typically may not reevaluate "issues expressly or impliedly decided by the appellate court," nor may it "reconsider issues the parties failed to raise on appeal." *S. Atl. Ltd. P'ship of Tenn., LP v. Riese*, 356 F.3d 576, 584 (4th Cir. 2004) (internal quotation marks omitted). But the law-of-the-case doctrine is not absolute. Among the doctrine's exceptions, a district court need not follow an earlier appellate decision if "a subsequent trial produces

substantially different evidence." *TFWS, Inc.*, 572 F.3d at 191 (quoting *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999)).

The district court correctly interpreted our prior decision in this case as it concerns the 2002 and 2003 BSAs. In that decision, "we accept[ed] as true the allegations of the Operative Complaint that relate[d] to the underlying dispute between the parties," *Berkeley Cnty. Sch. Dist.*, 944 F.3d at 233 (internal quotation marks omitted), including the allegation that the disputed conduct "beg[an] in 2005 and continu[ed] into 2017," *id.* at 230. This led us to distinguish between "the formation of the four Agreements that fall within the period of the alleged claims (that is, 2005 to 2017)" and the "June 2002 and June 2003 Agreements and their Arbitration Clauses, both of which predate the alleged conduct underlying the Operative Complaint." *Id.* at 238. Regarding the former, we identified disputed material facts warranting a Section 4 trial. *See id.* at 238-241. But as to the latter, we concluded that because the 2002 and 2003 BSAs "predate the steering and kickback fraud scheme and conspiracy alleged in the" amended complaint, those agreements "could not require Berkeley Schools to arbitrate any claims on the basis of conduct that began after" those agreements terminated. *Id.* at 241. Thus, "[a]t best," the 2002 and 2003 BSAs were relevant only "to questions of whether Berkeley Schools had knowledge of, or assented to, the" later BSAs. *Id.* We left those lingering issues "for the remand proceedings." *Id.* The district court's explanation of our decision closely tracked our opinion and correctly interpreted it.

Nevertheless, we agree with HUB that the district court was not bound by our prior decision about the 2002 and 2003 BSAs because the Section 4 trial produced substantially different evidence on that score. The record reveals evidence that some conduct at issue in this case may have occurred before 2005 and may thereby implicate the 2002 or 2003 BSA. For example, Berkeley Schools made specific allegations in its amended complaint and an attached exhibit that quantified the financial losses it incurred by paying for allegedly fraudulent or unnecessary insurance policies and consulting services. At the Section 4 trial, Berkeley Schools' Rule 30(b)(6) witness testified that part of those alleged damages arose from insurance policies procured or services provided while the 2003 BSA was still in effect. Such testimony undermines our previous reliance on Berkeley Schools' allegations that its injuries arose after the 2003 agreement terminated.

We therefore conclude that the district court erred by declining to consider new evidence implicating the 2002 and 2003 BSAs. Although the district court correctly interpreted our prior decision, it incorrectly concluded it was bound by the portion of our decision reasoning that the 2002 and 2003 BSAs predate the allegedly injurious conduct and so cannot require Berkeley Schools to arbitrate. Because the bench trial produced substantially different evidence about the potential applicability of those agreements to the underlying dispute, the district court was freed from the law of the case and should have considered the new evidence. To be clear, we do not opine on what the new evidence shows. We also do not opine on whether it leads to the conclusion that Berkeley Schools

must arbitrate all or part of this dispute, whether the parties must arbitrate the question of arbitrability, or whether Berkeley Schools in fact assented to the 2002 or 2003 BSA. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019); *Berkeley Cnty. Sch. Dist.*, 944 F.3d at 234 n.9. We leave these issues entirely to the district court to consider in the first instance.

Berkeley Schools argues that even if the district court should have considered new evidence relating to the 2002 and 2003 BSAs, a 2006 settlement agreement between the parties precludes HUB from asserting its arbitration rights under those BSAs. We disagree. The 2006 settlement resolved a dispute over a 2005 request for proposals (RFP) that Berkeley Schools published and later withdrew. The settlement agreement's dispute resolution procedures apply only to "any suit, action or proceeding arising out of or relating *to this Agreement*." J.A. 139 (emphasis added). Berkeley Schools' allegations in this case do not arise from the RFP dispute or the subsequent settlement. And Berkeley Schools identifies nothing in the settlement agreement that bars HUB from asserting the arbitration clauses in the 2002 and 2003 BSAs to disputes within their scope. We therefore conclude that the settlement agreement does not foreclose reliance on the arbitration clauses in the 2002 and 2003 BSAs and this matter must be returned to the district court for further proceedings.

III.

Because HUB challenged only the district court's conclusions concerning the 2002 and 2003 BSAs, we vacate only the portions of the district court's order addressing those agreements. The district court's conclusion that the 2006, 2009, and 2011 BSAs do not require arbitration stands, and HUB remains bound by its waiver of any reliance on the 2005 BSA. We remand for further proceedings consistent with this opinion.

VACATED IN PART AND REMANDED

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FILED JUNE 3, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:18-cv-00151-DCN

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff,

vs.

HUB INTERNATIONAL LIMITED, HUB INTERNATIONAL MIDWEST LIMITED, HUB INTERNATIONAL SOUTHEAST, KNAUFF INSURANCE AGENCY, INC., STANLEY J. POKORNEY, SCOTT POKORNEY, and BRANTLEY THOMAS,

Defendants.

Filed June 3, 2021

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the court on defendants HUB International Limited, HUB International Midwest Limited, HUB International Southeast (collectively,

"HUB"), and Knauff Insurance Agency, Inc.'s ("Knauff") motion to compel arbitration, ECF No. 23. On January 29, 2019, the court denied the motion. ECF No. 63. On December 4, 2019, the Fourth Circuit vacated the court's order and remanded the matter for a fact-finding trial pursuant to Section 4 of the Federal Arbitration Act ("Section 4 Trial"), 9 U.S.C. § 4. *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225 (4th Cir. 2019). The court conducted the Section 4 Trial over five days from January 14, 2021 to February 1, 2021. Having considered the evidence and arguments there presented, the court makes the following findings of fact and conclusions of law, ultimately holding that plaintiff Berkeley County School District ("the District") did not agree to arbitrate this dispute.

I. FINDINGS OF FACT

A. Parties and Jurisdiction

1. The District is a body politic and corporate of the State of South Carolina. ECF No. 36, Amend. Compl. ¶ 1.

2. Knauff was an insurance agency and brokerage firm incorporated in North Carolina with its principal place of business located in Charlotte, North Carolina. Amend. Compl. ¶ 2.

3. Hub International Limited is an international insurance brokerage firm incorporated in Delaware with its principal office located in Chicago, Illinois. Amend. Compl. ¶ 3.

4. Hub International Midwest Limited is an insurance brokerage firm affiliated with Hub International Limited and incorporated in Indiana with its principal place of business located in Chicago, Illinois. Amend. Compl. ¶ 4.

5. Hub International Midwest Limited purchased Knauff, and Knauff was merged into Hub International Midwest Limited on December 31, 2012. ECF No. 23-8, Benfield Decl. ¶ 3.[1]

6. Defendant Brantley Thomas ("Thomas") is a former employee of the District currently incarcerated at Jesup Federal Correctional Institution in Georgia. ECF No. 189-2, Thomas Dep. 35:20–36:6. He proceeds *pro se* in this action.

7. Defendant Stanley Pokorney ("Pokorney," "Stan Pokorney," or "Mr. Pokorney") provided insurance brokerage and consulting services to the District from 1996 to 2017. Trial Tr. 528:1–2.[2] He was employed by insurance services provider Willis Corroon (or by entities purchased by Willis Corroon) until 2000, when he left and joined Knauff. Trial Tr. 531:7–532:2, 680:22–25. He was employed by Knauff until 2012, when Knauff was acquired by HUB. Trial Tr. 572:17–573:14; Benfield Decl.

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1. The District initially objected to the admission of this declaration into evidence on hearsay grounds but subsequently agreed to withdraw the objection and so clarified to the court.

2. The transcript of the Section 4 Trial proceedings is located at ECF Nos. 218–222. For the sake of efficiency, the court cites to the transcript as "Trial Tr."

¶ 3. He was employed by HUB until 2017. Trial Tr. 672:24, 674:12–15.

B. Procedural History

8. The District filed the present action on January 18, 2018, alleging that Thomas secured a series of excessive or unnecessary insurance policies and brokerage service contracts through HUB and Knauff, and that in exchange for Thomas's assistance in steering those contracts to them, HUB and Knauff paid Thomas bribes and assisted Thomas in embezzling money from the District. ECF No. 1, Compl.

9. On March 5, 2018, HUB and Knauff responded to the complaint with a motion to compel arbitration. ECF No. 23.

10. In their motion, HUB and Knauff argued that the District agreed to arbitrate this dispute by assenting to arbitration provisions contained in six Brokerage Service Agreements ("BSAs"). Each BSA is from Knauff and addressed to Thomas. The BSAs are dated June 18, 2002; June 27, 2003; August 16, 2005; December 19, 2006; December 19, 2009; and May 1, 2011, respectively.[3] ECF No. 23-2-23-7; Pl.'s Exs. 108, 109, 104, 105, 107, 111.

11. The 2002 BSA was signed on behalf of the District by Angel Cartwright ("Cartwright"), the District's

3. The court refers to each BSA according to the year corresponding to each's date. For example, the court refers to the BSA dated June 18, 2002 as the "2002 BSA."

then-Risk Manager, and the 2003 BSA was signed on behalf of the District by Thomas, then the District's Executive Director of Finance. The other four BSAs are unsigned.

12. On March 19, 2018, the District filed a memorandum in opposition to the motion to compel arbitration and an amended complaint, which remains the operative complaint in this action. ECF No. 33; Amend. Compl.

13. The amended complaint alleges claims against HUB, Knauff, and Thomas for federal RICO violations, plus common law claims for fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, conversion, constructive trust, and unjust enrichment for the period of 2005 through 2017. Amend. Compl. ¶¶ 161–303.

14. After further briefing and a hearing held on May 17, 2018, the court denied HUB's motion to compel arbitration. ECF No. 63.

15. Pursuant to 9 U.S.C. §§ 16(a)(1)(A)–(B), HUB immediately appealed the denial order on February 11, 2019. ECF No. 72. On December 4, 2019, the Fourth Circuit vacated the court's order, finding that "there are multiple disputes of material fact as to 'the making of [any] arbitration agreement,'" and remanded the matter for a trial on that issue pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4. *Berkeley Cty. Sch. Dist.*, 944 F.3d at 241 (alternation in original). Specifically, the

Fourth Circuit instructed the court to hold the Section 4 Trial to resolve "some factual disputes concerning the formation of the four unsigned [BSAs]," meaning the 2005, 2006, 2009, and 2011 BSAs. The court explicitly held that the signed BSAs—the 2002 and 2003 BSAs—"predate the steering and kickback fraud scheme and conspiracy alleged in the Operative Complaint" and therefore cannot provide grounds to compel arbitration. *Id.* The Fourth Circuit noted that that the 2002 and 2003 BSAs "might be relevant" only to the extent that they bear on "questions of whether [the District] had knowledge of, or assented to, the subsequent [BSAs]." *Id.*

16. To be clear, the purpose of the Section 4 Trial and consequently this order is for the court to resolve the factual disputes underlying the issue of whether the District assented to the four unsigned BSAs—the 2005, 2006, 2009, and 2011 BSAs. While resolving that issue requires the court to probe beyond the District's allegations and into the substance of this dispute, the court's role is not to resolve the merits of this action, and it does not do so in this order. Instead, the court determines whether the District agreed to arbitrate this dispute by assenting to any of the four unsigned BSAs. Having received and considered the evidence, the court concludes that it did not.

C. Factual Background

17. In the early 1990s, the District purchased insurance through the South Carolina Insurance Reserve Fund (the "IRF"). Trial Tr. 17:23–18:1. The IRF is a

state-run agency that provides insurance coverage to governmental entities. It "operates like an insurance company" by issuing policies, collecting premiums, and paying claims. Insurance Reserve Fund. "Insurance Reserve Fund—About Us," https://www.irf.sc.gov/ (last visited May 5, 2021).

18. The District began to look for coverage outside the IRF in 1996, after Assistant Superintendent Ken Coffey ("Coffey") met Stan Pokorney at an annual conference for school-district vendors. Trial Tr. 18:2–17. Coffey oversaw the District's financial and operational services at the time; his job entailed making recommendations to the Berkeley County School Board of Trustees (the "Board") about the District's insurance. *Id.* at 17:15–22.

19. Later that year, the District began procuring insurance through Willis Corroon, for whom Pokorney worked. Trial Tr. 26:5–12. The District used Willis Corroon for its insurance services from 1996 to 2000 and decided to continue using Willis Corroon, by Board vote, in November 2000. *Id.* at 26:13–27:5.

20. Months later, at the beginning of the 2001–2002 fiscal year, Pokorney left Willis Corroon and began working for Knauff. Trial Tr. at 27:10–19, 76:25–77:4. Porkorney testified that he left Willis Corroon because he was unhappy with his compensation, which he believed to be inadequate. Trial Tr. 531:7–532:2. In response, Willis Corroon sought a temporary restraining order ("TRO") to prohibit the District from working with Pokorney. Defs.' Ex. 13.

21. Despite the TRO, the District chose to continue working with Pokorney and accordingly, in the beginning of the 2001 fiscal year, began to use Knauff as its insurance provider. Trial Tr. at 30:7–15; Defs.' Ex. 15. That decision was made by Coffey, who remained in charge of the District's insurance matters at that time. *Id.*

22. In 2001, finance was removed from Coffey's portfolio of duties, and Thomas became Executive Director of Finance and later Chief Financial Officer ("CFO"), reporting directly to the Superintendent. Trial Tr. 64:9–18, 101:1–3, 787:17–788:1. Coffey has no knowledge regarding insurance matters after 2001. Trial Tr. 63:4–12, 65:8–23.

23. From 2002 to 2017, Thomas, as the District's Executive Director of Finance and later CFO, was responsible for securing contracts to broker insurance policies for the District. Trial Tr. 787:17–20.

24. Throughout that time, Pokorney provided insurance brokerage and consulting services to the District, first on behalf of Knauff, Trial Tr. 572:17–573:14, and then—after HUB purchased Knauff—on behalf of HUB, Trial Tr. 672:24, 674:12–15.

25. While he acted as the District's insurance broker, Pokorney was assisted by his wife, Jana Pokorney née Zuerner ("Jana Pokorney" or "Ms. Pokorney"), who was employed by Knauff and HUB as Mr. Pokorney's account manager. Dep. of Brooks Jones, November 6, 2020, 94:1–95:13; *see* Pl.'s Ex. 115. HUB's Rule 30(b)(6) representative

testified that while acting as Mr. Pokorney's account manager, Ms. Pokorney's duties included ensuring that BSAs with Mr. Pokorney's clients were fully executed. Jones Dep. 95:5–13. Ms. Pokorney, however, testified that she was not required to get signatures and that the usual practice was to work without a signed agreement. Trial Tr. 37:6–23. Mr. Pokorney married Ms. Pokorney in 2005. Trial Tr. 427:1–20. She retired from HUB at the end of 2014. Trial Tr. 401:22–25.

26. In February 2017, the District learned that Thomas was suspected of crimes including embezzlement and steering insurance contracts in exchange for bribes. Trial Tr. 793:13–16.

27. Thomas was indicted and, after pleading guilty, was convicted for those crimes. Pl.'s Exs. 1-4, 6, 7, 9, 10, 13, 15. He was sentenced to a term of incarceration of 63 months in a federal penitentiary to be followed by 132 months in state prison. Pl.'s Exs. 13, 15.

D. The BSAs

28. The six BSAs at issue here are dated from 2002 to 2011 and obligated Knauff to provide the following services:

a. Risk Identification and Evaluation

b. Risk Finance Program Design

c. Market Submission Preparation and Review

d. Brokering

e. Risk Finance Program Execution

f. Ongoing Client Service

g. Claims Services

29. To be clear, the BSAs are contracts for insurance-related services, like brokering and consulting, not contracts for insurance coverage.

30. Each BSA called for the District to pay a brokerage service fee in exchange for the above services to be provided. These fees were charged in lieu of commission. Trial Tr. 421:9–15. The customary broker's commission on insurance in this context is 10 to 15 percent of the premium the insured pays on the relevant policies. Trial Tr. 800:4–9.

31. Each BSA also contains the following arbitration provision:

> All disputes, claims or controversies relating to [these Agreements], or the services provided, which are not otherwise settled, shall be submitted to a panel of three arbitrators and resolved by final and binding arbitration, to the exclusion of any courts of laws, under the commercial rules of the American Arbitration Association.

See, e.g., Defs.' Ex. 18 at 3–4.

Appendix D

1. The 2002 BSA

32. The 2002 BSA was signed on behalf of the District by Angel Cartwright, the District's risk manager who reported to Thomas. Trial Tr. 800:15–24; Dep. of Angel Cartwright, Oct. 7, 2020, 13:23–14:18 Pokorney signed on behalf of Knauff. Pl.'s Ex. 108.

33. The District located a copy of the 2002 BSA agreement in a binder maintained by Cartwright. Trial Tr. 800:25–801:2; Cartwright Dep. 107:19–109:8.

34. The 2002 BSA called for the District to pay Knauff $100,000 in twelve monthly installments as a brokerage service fee for services provided on Commercial Package, Excess Liability, Activity Bus Travel Accident, Excess Crime, Boiler & Machinery, and Medical Professional Liability lines of insurance. Pl.'s Ex. 108. Each of those policies was renewed from an existing line of coverage that the District purchased in 1996, when Pokorney was working for Willis Corroon. Trial Tr. 36:21–41:11.

35. From June 2002 to June 2003, the District paid Knauff insurance premiums (not including brokerage service fees) exceeding $1 million. Defs.' Ex. 76 at 79. Some of those premiums were for lines of insurance beyond the scope of the BSA, but the BSA's $100,000 brokerage service fee is consistent with a customary 10 to 15 percent commission on insurance.

36. Knauff invoiced the fees described in the 2002 BSA, which the District paid. Trial Tr. 803:22–25; Defs.' Exs. 1–3.

2. The 2003 BSA

37. The 2003 BSA was signed by Thomas on behalf of the District. Trial Tr. 802:12–14. Pokorney signed on behalf of Knauff. Pl.'s Ex. 109.

38. When searching its files, the District located a cover letter addressed to Cartwright referring to the 2003 BSA but could not locate the BSA itself, which was addressed to Thomas. *Compare* Trial Tr. 236:15–237:10 *and* Defs.' Ex. 20 at 1–2 (Bates labeling showing the cover letter was produced by the District) *with* Trial Tr. 237:11–24 *and* Defs.' Ex. 20 at 3–6 (Bates labeling showing the agreement was produced by HUB).

39. The 2003 BSA called for the District to pay Knauff $100,000 in twelve monthly installments as a brokerage service fee for services provided on Commercial Package, Inland Marine, Excess Liability, Activity Bus Travel Accident, Excess Crime, and Boiler & Machinery lines of insurance. Pl.'s Ex. 109.

40. Like the 2002 BSA, the 2003 BSA's $100,000 brokerage service fee is consistent with a customary 10% to 15% commission on the insurance the District purchased through Knauff. *See* Defs.' Ex. 76 at 79.

41. Knauff invoiced the fees described in the 2003 BSA, which the District paid. Trial Tr. 803:22–25; Defs.' Exs. 1–3.

3. The 2005 BSA

42. In April 2005, the District issued Request for Proposals No. 181-(04-05) for insurance services (the "2005 RFP"). Trial Tr. at 118:3–6, 119:2–14. Stan Pokorney submitted a bid on behalf of Knauff. Defs.' Ex. 36.

43. At some point in 2005, Knauff authored the 2005 BSA. The District was not able to locate a copy of this agreement in its files and was unaware of the 2005 BSA's existence before HUB filed its motion to compel arbitration. Trial Tr. 820:11–821:11.

44. The 2005 BSA was for an indefinite term, Pl.'s Ex. 104, and not signed by anyone. Trial Tr. 820:9–10.

45. The only copy of the 2005 BSA that HUB produced has a handwritten note that says "proposed" at the top of the first page. Pl.'s Ex. 104.

46. The 2005 BSA called for the District to pay Knauff $177,000 in quarterly installments as a fee for services provided. Trial Tr. 821:12–14. The District never paid these brokerage service fees. Trial Tr. 821:15–16.

47. HUB's 30(b)(6) representative testified that, due to the 2005 RFP dispute discussed below, the 2005 BSA was never put into place. Jones Dep. 91:13–92:1. In closing arguments, HUB abandoned its argument that the District assented to this agreement. ECF No. 222, Closing Arg. Tr. 4:13–5:2.

48. In June 2005, an independent insurance consultant concluded that the District's RFP did not include sufficient property and casualty coverage. Defs.' Ex. 39 at 5; Trial Tr. 124:15–125:2. The District thereafter withdrew the 2005 RFP and made an emergency procurement of insurance services from the IRF. Trial Tr. 131:1–8, 197:16. 198:3. As a result of that decision, the District moved its property and casualty lines of insurance from Knauff to the IRF. *Id.*

49. In response, Knauff retained a lawyer, filed a formal protest, Defs.' Ex. 41, and threatened litigation, Trial Tr. 600:14–601:19, 835:17–20.

50. On January 31, 2006, Knauff and the District resolved that dispute by executing a settlement agreement. Pl.'s Ex. 160. The District agreed to pay Knauff a 15% commission on five enumerated insurance policies that Knauff had placed net of commission. *Id.* The District also agreed to pay Knauff $12,500 for claims management services on those policies and not to debar Knauff from offering insurance services to the District in the future. *Id.* Knauff agreed to withdraw its protest and agreed it had no claim for any commissions, fees, or other charges not provided in the settlement agreement. *Id.* Finally, both parties agreed:

> All appeals, claims, or disputes between Knauff and the District will be resolved in accordance with the District's Procurement Code, as may be amended or updated. After exhausting the administrative process under the District's

> Procurement Code, Knauff agrees that judicial venue for any suit, action or proceeding arising out of or relating to this Agreement shall be proper only in the Court of Common Pleas for Berkeley County, South Carolina and Knauff and the District hereby waive and disclaim any and all right to a jury trial on any controversy arising from this Agreement. This Agreement shall be governed by the laws of the State of South Carolina. Knauff and the District agree that before initiation of litigation concerning a dispute arising under this Agreement, the parties will submit such dispute to an agreed upon neutral for non-binding mediation.

Id.

51. The District continued buying property and casualty coverage through the IRF for the next decade.[4] *See* Trial Tr. at 781:16–782:6. The annual premium for those policies totaled "over two million dollars." *Id.* at 782:1–5. Knauff continued providing insurance-related services on that IRF-provided coverage, even though it had not brokered the policies. *See* Defs.' Exhibit 84; Trial Tr. 880:17–881:2.

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4. After 2005, as the court outlines below, the District purchased other lines of coverage through private brokers, meaning that it did not procure all of its insurance coverage exclusively through the IRF.

4. The 2006 and 2009 BSAs

52. The 2006 and 2009 BSAs were not signed by anyone. Trial Tr. 827:10–19, 831:13–18; Pl.'s Exs. 105, 107.

53. No witness testified that any version or copy of the 2006 or 2009 BSA was ever signed. Stan Pokorney declined to so testify. Trial Tr. 627:19–628:15. The person responsible for obtaining signatures, Jana Pokorney, testified that she was not required to—and usually did not—obtain signatures on agreements. Trial Tr. 370:6–23.

54. The District was not able to locate a copy of the 2006 or 2009 BSA in its files and was unaware of the 2006 and 2009 BSAs' existence before HUB filed its motion to enforce arbitration. Trial Tr. 827:20–25, 831:19–21.

55. The District is not a party to the 2006 and 2009 BSAs, which both state that they are between Knauff and Securing Assets for Education ("SAFE"). Pl.'s Exs. 105, 107.

56. SAFE is a 501(c)(3) entity that was created in 2003 to build, manage, and lease new buildings for the District. Trial Tr. 292:12–16. To finance its operations, SAFE issued installment purchase revenue bonds. *Id.* at 292:17–19. It used the proceeds from those bonds to build new facilities, which it would then lease back to the District. *Id.* at 292:18–23. The District would own the facilities once the bonds were repaid. *Id.* at 292:21–23.

57. SAFE had no employees, and it had no expenses other than interest. Trial Tr. 337:10–338:5; *see* Defs.' Ex. 65.

58. The 2006 BSA called for a brokerage service fee of $118,625 per year for three years as a fee for services provided to SAFE on its Directors and Officers ("D&O") coverage. Pl.'s Ex. 105. The 2009 BSA likewise called for a brokerage service fee of $118,625 per year for three years as a fee for services provided to SAFE on D&O coverage. Pl.'s Ex. 107.

59. Knauff and HUB demonstrated awareness that SAFE was a separate entity from the District by addressing invoices for fees to SAFE rather than the District. *See* Trial Tr. 828:21–829:4. Pokorney considered SAFE a separate client from the District. Trial Tr. 629:24–630:5.

60. The SAFE board authorized Thomas to purchase D&O coverage for SAFE from Knauff in 2003. Defs.' Ex. 25; Trial Tr. 326:5–8. SAFE's bylaws provide that SAFE may purchase and maintain insurance on behalf of its directors. Defs.' Ex. 24 at 13–14.

61. Neither SAFE nor the District authorized Thomas to procure the consulting services or pay the fees outlined in the BSAs on behalf of the District. Trial Tr. 322:7–11, 324:23–25, 326:9–12.

62. Thomas was never a director, officer, or employee of SAFE. Trial Tr. 325:25–326:4. SAFE's bylaws

prohibited District employees from serving as directors or officers. Defs.' Ex. 24 at 3, 7. Thomas signed SAFE's tax returns (IRS Form 990) under the title "Finance Director" because of a mistake by Greene Finney & Horton, LLP, the external accounting firm acting as the paid preparer of the return. Trial Tr. 337:1–9. SAFE never had a "Finance Director." Trial Tr. 326:2–4.

63. Thomas caused the District to purchase D&O coverage for the SAFE board in 2003. Pl.'s Ex. 202 at 2. The initial premium was $3,300. *Id.*

64. SAFE had no funds with which to purchase insurance. Trial Tr. 337:10–22. The District therefore paid for SAFE's D&O coverage as a donation. Trial Tr. 338:6–11, 339:1–4. Knauff invoiced SAFE for the fees described in the 2006 and 2009 BSAs. *See e.g.*, Pl.'s Ex. 113.

65. The 2006 BSA requires each party to perform over a three-year period, from December 19, 2006 to December 19, 2009. Pl.s' Ex. 105.

66. The 2009 BSA requires each party to perform over a three-year period, from December 19, 2009 to December 19, 2012. Pl.'s Ex. 107.

67. The D&O coverage premium from 2006 to 2012 was only $65,000 per year. Trial Tr. 432:12–20; Pl.'s Ex. 38. A customary 15 percent commission would have been $9,750 per year. The 2006 and 2009 BSAs charged a brokerage service fee of $118,625, over twelve times the customary commission. Pl.'s Ex. 105, 107

68. No claims against the D&O coverage were ever made. Trial Tr. 832:8–10.

69. There is no documentary evidence demonstrating that Knauff ever provided any consulting services regarding SAFE's D&O coverage. Jones Dep. 35:20–38:24; Trial Tr. 451:1–452:4, 669:2–670:8.

70. Stan and Jana Pokorney asserted that the $118,625 per year brokerage service fee was justified by the difficulty of placing D&O coverage for SAFE. Trial Tr. 451:1–18; 644:20–645:16. That assertion is not credible.

71. Mr. Pokorney testified that the difficulty in placing D&O coverage for SAFE stemmed from a public controversy surrounding SAFE. Indeed, HUB produced evidence that the District's use of SAFE to finance school buildings was the subject of some public scrutiny. Pl.'s Ex. 152. And HUB demonstrated that the legality of a similar nonprofit entity associated with the Greenville School District had recently been called into question by a lawsuit. Trial Tr. 862:18–864:2; Defs.' Ex. 89. The court finds that these "concerns" cannot justify the exorbitant brokerage service fees included in the 2006 and 2009 BSAs.

72. The brokerage fees at issue in the 2006 and 2009 BSAs regard D&O coverage placed many years before. *Compare* Pl.'s Ex. 202 *with* Pl.'s Exs. 105, 107. The D&O insurance was placed in 2003, very shortly after SAFE directed Thomas to acquire it, and the initial premium was only $3,300. Pl.'s Ex. 202 at 2. The premium later

increased, presumably a result of SAFE issuing bonds, and then decreased, presumably because the outstanding debt decreased, yet the service fee remained unchanged. *See* Pl.'s Exs. 113 (2006 invoice for $65,000 premium), 203 (2016 invoice for $32,131 premium).

73. No witness explained how SAFE's questionable legal status could impute liability onto its board members. *See, e.g.*, Trial Tr. 866:5–10 ("Q: And in your experience, that means there's a possibility that the board of SAFE could be held liable to people who thought they were going to be paid by these bonds, correct? A: I don't know that that's the legal conclusion I'd draw. My tendency is to draw otherwise."). And no witness offered any other explanation as to why it would be difficult to insure the directors and officers of a real estate holding company that had no employees and only issued debt backed by real property and funded by leases with a governmental entity.

74. Further, Mr. Pokorney's assertion that he "called in a favor from a Cincinnati [Insurance Company] director on the board" to place the D&O coverage is not credible. Trial Tr. 645:10–16. The D&O insurance was initially placed with the Cincinnati Insurance Company in December 2003 for $3,300. Pl.'s Ex. 202 at 2. The coverage was $1 million with a $5,000 deductible. *Id.* Mr. Pokorney's claim that no other insurance company would offer that coverage "for four or five hundred thousand dollars with a hundred-thousand dollar deductible," Trial Tr. 645:11–13, is not believable.

75. By way of comparison, Santee Cooper (which is also located in Berkeley County) is a multibillion-dollar

water and energy company that operates nuclear power facilities and has over $2 billion in property insurance coverage alone. Trial Tr. 344:4–345:7. The court heard testimony that from 2000 to 2017, Santee Cooper never paid more than $150,000 for brokerage and consulting services for all lines of insurance, even though Santee Cooper had hundreds of employees and was the subject of three major class action lawsuits during that time. *Id.*

76. In sum, no claims were ever made and therefore no claims management services were ever provided under the 2006 or 2009 BSAs, and no evidence of advisory or consulting work product was ever produced. The D&O coverage was placed in 2003, meaning that it was already in place during the period covered by the 2006 and 2009 BSAs. Therefore, the District received no benefit from any agreement to pay brokerage service fees of $118,625 on existing D&O coverage for SAFE.

4. The 2011 BSA

77. The 2011 BSA was not signed by anyone. Pl.'s Ex. 111.

78. No witness testified that any version or copy of the 2011 BSA was ever signed. Mr. Pokorney declined to so testify. Trial Tr. 627:19–628:15. The person responsible for obtaining signatures, Ms. Pokorney, testified that she was not required to—and usually did not—obtain signatures on agreements. Trial Tr. 370:6–23.

79. The District was not able to locate a copy of this agreement in its files. Trial Tr. 240:22–241:6.

80. The Board did not approve the 2011 BSA. Trial Tr. 823:19–20.

81. The 2011 BSA called for the District to pay Knauff $70,000 annually as a brokerage service fee for services provided on School Leaders Errors & Omissions Liability ("E&O") coverage. Trial Tr. 822:8–18.

82. The E&O coverage premium was $75,000 for six years' coverage. Trial Tr. 823:5–7. A customary 15% commission would have been $11,250. Over the six years of the policy term, the 2011 BSA called for the District to pay $420,000, over 37 times the customary 15% commission. *See* Trial Tr. 823:10–11.

83. The 2011 BSA was for "multi-year periods," which given the policy term of the associated E&O coverage must be six years long. *See* Pl.'s Ex. 111; Trial Tr. 439:11–16; 823:7. The 2011 BSA requires the District to pay $70,000 annually over a six-year period from 2011 to 2017. *Id.*

84. The District had E&O coverage in place before 2011. Trial Tr. 823:21–23.

85. No claims were made against the District's E&O policy from 2011 to 2017. Trial Tr. 823:24–824:1.

86. There is no documentary evidence demonstrating that any consulting services were ever provided in connection with the E&O coverage. Jones Dep. 35:20. 38:24; Trial Tr. 451:1–452:4, 669:2–670:8, 824:14–24.

87. Neither Mr. Pokorney nor Ms. Pokorney offered any explanation for the size of the E&O brokerage service fees relative to the policy premiums. *See generally* Trial Tr. 352–489, 527–719.

88. Knauff invoiced the annual fees described in the 2011 BSA, which the District paid. Trial Tr. 823:8–13.

89. Knauff mailed the invoices for the fees described in the 2011 BSA directly to Thomas's home address instead of mailing them to the District's offices or post office box. Trial Tr. 825:6–826:9; Pl.'s Ex. 110.

E. Thomas's Authority to Bind the District

90. HUB has presented evidence that the 2006, 2009, and 2011 BSAs were sent to Thomas. Pl.'s Ex. 105, 107, 111.

91. Thomas's authority to bind the District was limited by dollar amount. From 2002 to 2008, Brantley Thomas had signing authority up to $75,000. Trial Tr. 789:21–25. After August 26, 2008, he had signing authority up to $100,000. Trial Tr. 790:14–18; Pl.'s Ex. 31. Thus, Thomas did not have the authority to approve fees in the amounts specified in the 2006, 2009, or 2011 BSAs. Those required superintendent approval. *Id.*

92. The District's procurement rules require a formal solicitation process to obtain new insurance but not to renew existing insurance. Trial Tr. 787:4–16. The solicitation process requires issuing an RFP, formally evaluating the proposals received, and presenting an award recommendation to the Board. *Id.*

93. Pokorney admitted that the District never issued an RFP regarding the 2006, 2009, or 2011 BSAs. Trial Tr. 588:24–589:6. While Thomas had the authority to renew existing insurance coverage, which was exempted from procurement processes, Trial Tr. 787:8–16, neither Thomas nor the superintendent had the authority to approve the 2006, 2009, or 2011 BSAs on behalf of the District without an RFP for the consulting services described therein.

94. Board approval is required for any multiyear contract because it commits unbudgeted school funds in future years. Trial Tr. 790:19–23. This rule is the same in any school district. Trial Tr. 790:24–791:19. Pokorney was aware of this rule, given his 46 years of experience working with school districts. Trial Tr. 686:23–25.

95. The Board never approved the 2006, 2009, or 2011 BSAs, given that no one at the District, other than Thomas, had knowledge of them. Trial Tr. 845:14–22.

96. Pokorney was aware Thomas needed Board approval for any BSA. Trial Tr. 564:3–8.

97. Pokorney asserts that he simply assumed that Thomas obtained board approval. Trial Tr. 696:22–25. Pokorney was aware of communications with and between Board members. Trial Tr. 538:1–11, 539:10–18, 608:7–14. In 2005, he prepared a 250-page proposal in response to the District's RFP and successfully litigated a dispute over that RFP. Defs.' Ex. 36; Trial Tr. 600:14–601:19. Given his intimate involvement in the process by which the District

procured insurance coverage, Porkorney's assertion that he remained unaware for twelve years that the Board never approved his contracts for brokerage service fees exceeding one million dollars is not credible.

F. The Bribing of Brantley Thomas

98. Thomas approved payments of brokerage service fees to Knauff and HUB from 2002 to 2017. Trial Tr. 845:20–22. No other District employee could approve Knauff or HUB's invoices during that period. *See* Trial Tr. 815:22–816:2.

99. The District first learned of Thomas's embezzlement and bribery schemes in early February 2017. Trial Tr. 793:12–16.

100. Thomas pleaded guilty on January 16, 2018 to a twenty-count federal criminal information and was sentenced to an imprisonment term of 63 months. Pl.'s Exs. 6, 8, 13.

101. Ten counts in the information were honest services wire fraud offenses for the period of March 2010 to November 2016. Pl.'s Ex. 6. Those offenses related to Thomas receiving bribes, in the form of checks for $2,000, from an insurance broker in exchange for steering insurance contracts to the broker. *Id.* ¶¶ 5, 7, 16–23. The information notes that Thomas received and deposited ten separate $2,000 checks from an insurance broker from 2013 to 2016. *Id.* ¶ 23.

102. Thomas testified that Pokorney sent $2,000 checks directly to Thomas beginning "around 2010," Thomas Dep. 14:12–15:7, which Thomas regarded as bribes, Thomas Dep. 18:7–19:3, 20:24–21:13, and which, according to Thomas, Pokorney regarded as bribes, *id.* 21:11–13. Thomas testified that Pokorney made comments insinuating that the $2,000 payments were bribes, such as "[i]t's between us," "[n]o one will find out," "you do not have to worry," and "we'll protect you." *Id.* 12:9–13, 14:5–7.

103. Pokorney denies bribing Thomas, but the court finds his denial not credible. Pokorney admits to sending multiple $2,000 checks to Thomas. Trial Tr. 556:7–23. Pokorney claims that he periodically—"with no rhyme or reason [as] to when [he] sent them"—sent Thomas $2,000 checks to help fund Thomas's daughter's college education, based on Thomas's purported complaints that his salary was too low. *Id.* Thomas testified, however, that Pokorney's sending of the checks coincided with the "annual renewal periods" for the services Thomas purchased on behalf of the District, signaling to Thomas that the payments were bribes. Thomas Dep. 57:20–58:10. Pokorney testified that the "gifts" to Thomas were simply another way to "mak[e] sure a child gets a good education." Trial Tr. 694:9–10. This testimony is not credible. The court finds that Pokorney sent Thomas the $2,000 checks in an effort to bribe him.

104. While the federal investigation into Thomas was ongoing, he was indicted by a South Carolina grand jury in connection with the steering and bribery scheme. Pl.'s Exs. 1, 2, 3, 9, 10. Thomas was charged with multiple embezzlement offenses, and he pleaded guilty to all of them. Pl.'s Ex. 15.

105. Regarding one embezzlement charge, Thomas admitted to deliberately causing the District to overpay a vendor by $22,700, and then having the vendor send a refund of the overpayment to his home address, which he converted to his personal use in November 2007. Pl.'s Ex. 3 at 3.

106. The vendor was Knauff. Thomas testified that Stan and Jana Pokorney knowingly assisted him in stealing this $22,700 in November 2007. Thomas Dep. 8:1. 12:16, 77:3–25.

107. On November 19, 2007, Thomas sent a letter to Ms. Pokorney stating that he made a "double payment" for the commercial inland marine policy and requesting that Knauff send a refund payable to Wachovia (Thomas's bank) to his home address using an enclosed self-addressed envelope. Pl.'s Ex. 167; Trial Tr. 794:10–17.

108. On November 22, 2007, Thomas emailed Ms. Pokorney from his personal email account, again asking her to use the self-addressed stamped envelope to send the inland insurance premium refund to his home address. He also again asked for the refund check to be payable to "Wachovia" instead of to the District. Pl.'s Ex. 123; Trial Tr. 795:25–796:7.

109. Ms. Pokorney made out a check to the District for the refund amount and mailed it to Thomas. The check was issued to the District, not Wachovia as Thomas had requested. Trial Tr. 384:18–385:2; Pl.'s Ex. 120; Defs.' Ex. 50 at 2.

110. Thomas returned the check and asked Ms. Pokorney to submit the refund payable to the Wachovia account, rather than to the District itself. Defs.' Ex. 50 at 2. Ms. Pokorney apologized via email and promised to have the check reissued to Wachovia. Pl.'s Ex. 120. Ms. Pokorney promised "I'll do better next time," to which Thomas responded, "No prob baby. . . ." Pl.'s Ex. 126.

111. Ms. Pokorney attempted to reissue the refund check, but Knauff's accounting department informed Ms. Pokorney that it would only issue the check payable to a client, meaning the District. Trial Tr. 384:25–385. The accounting department also recommended that Thomas simply endorse the original check over to Wachovia after receiving it. Trial Tr. 387:25–388:9; Defs.' Ex 50 at 2.

112. Responding again to the same email the next day, Thomas stated, "good suggestion I called [W]achovia and asked if I could endorse and they said yes." Pl.'s Ex. 127. Reflecting on the event, Thomas testified, "I do believe that [Ms. Pokorney] knew that I was planning to take the money," Thomas Dep. 11:9–18, that he did in fact steal the money, Thomas Dep. 77:4–25, and that Mr. Pokorney afterward acknowledged that Thomas stole the money, *id.*

113. Ms. Pokorney denies assisting Thomas in his scheme to steal this $22,700. Trial Tr. 471:22–24. And HUB has presented some evidence supporting her assertion. For example, HUB notes that, according to the federal information, Thomas utilized the same scheme with respect to at least four other vendors. Defs.' Ex. 76 at 58–59.

114. The District insists that Ms. Pokorney's denial is not credible and has likewise presented some supporting evidence. For example, Ms. Pokorney testified that she "had all checks returned to me" so she could send them to Thomas herself, "because if I didn't, they would put—our accounting people put them in a window envelope and they'd wind up somewhere in the school district." Trial Tr. 461:4–7. Further, Ms. Pokorney's testimony denying a close personal relationship with Thomas is not true. Trial Tr. 461:16–20 ("I never socialized with Brantley. I probably met him on one occasion at a luncheon."). Her denial was directly contradicted by an email from April 2015 in which she told Thomas, "Just want to say hi and thank you for the funniest dinner ever. My face hurt the next day from laughing so much. I so enjoyed seeing you again—again—and spending time with you." Trial Tr. 475:12–15. Ms. Pokorney also testified that she only socialized with Thomas after her December 31, 2014 retirement. But that testimony, too, was directly contradicted by other evidence. Mr. Pokorney testified that "[m]y wife and I considered Brantley almost like a family member, certainly one of my best, best, best friends . . . we considered Brantley as close a friend as we had." Trial Tr. 549:3–14. Obviously, Ms. Pokorney's testimony minimizing her relationship with Thomas cannot be true.

115. In sum, the parties dispute whether Ms. Pokorney knowingly assisted Thomas in converting the $22,700 from the District for personal use, and each party has presented evidence in support of its position. The court need not issue a finding of fact with respect to this dispute because it can resolve the relevant issue—

whether the District assented to any of the four unsigned BSAs—without it.

116. According to Thomas, Stan Pokorney mailed documents like checks and invoices to Thomas's home address to help him avoid necessary approvals for the District to pay them. Thomas Dep. 15:8–16:7. The District considers it "very inappropriate" to send invoices directly to a District employee's home. Trial Tr. 826:6–9.

117. Pokorney denies sending documents to Thomas's home to help conceal activities from the District, but, again, his denial is not credible. Pokorney testified that items were sent to Thomas's home address "[b]ecause he asked for them to" be mailed to his house and "it was not uncommon for any of our clients to have something sent to their home." Trial Tr. 636:18–637:5. To be sure, it would not be unusual for an insurance broker to send certain personal items (e.g., a Christmas card) to a client's employee's home. But the issue here is whether it is unusual for an insurance broker to send invoices for hundreds of thousands of dollars to the home of an employee of a client rather than sending those invoices to the client's accounts payable department. Undoubtedly, such activity is unusual. Pokorney failed to explain why it was necessary or appropriate to send invoices addressed to the District to Thomas's home instead of sending them to the District's offices. Nor could he provide any example of any other client who received invoices at an employee's home. Instead, he testified that he sent "something" to the home of the Oconee County School District's risk manager when the risk manager was having major

surgery. Trial Tr. 639:6–15. Pokorney's testimony implies that the "something" he sent was personal in nature, not a document related to the employee's capacity as risk manager. Surely, sending a personal item to an employee's home after he or she underwent major surgery is a far cry from routinely sending him or her invoices for hundreds of thousands of dollars. When asked specifically about the nature of his gift to the Oconee risk manager on cross-examination, Pokorney was evasive and nonresponsive. *See* Trial Tr. 639:19–24.

118. Additionally, Pokorney repeatedly pointed a finger at his "service team" when asked about mailing documents to Thomas's home, testifying, "I was not involved with that" and "[t]hat was my service team." Trial Tr. 637:23–638:20. The court finds this assertion, too, to be incredible. In late 2017, after Thomas's crimes came to light, the District's risk manager, Rainy Talbert ("Talbert"), was preparing a spreadsheet of fees paid to Knauff and HUB. Talbert asked a member of Pokorney's "service team," Renee Jones ("Jones"), why Talbert had never seen certain invoices for fees. Jones told Talbert, "You would not have seen those invoices because I was directed to send them straight to [Thomas] or to his home." ECF No. 169-2, Talbert Dep. 59:4–23. Logically, that direction must have come from Pokorney, who was in charge of his "service team."

119. Thomas agreed to purchase services from Knauff and HUB to further his own interests and not the interests of the District. Thomas Dep. 13:3–21. Specifically, Thomas steered contracts for brokerage and

other insurance services to Knauff and HUB because Pokorney bribed him and willfully turned a blind eye to his other illegal activities. Thomas Dep. 23:13–24:6.

120. Thomas testified that he agreed to the fee amounts described in the BSAs not after an actual negotiation, but "based on trying to cover up the bribing." Thomas Dep. 73:20–74:20. Knauff nor HUB ever performed the consulting services described in the BSAs, Thomas Dep. 27:25–29:18, but Thomas had the District pay for those services because Pokorney was bribing him, Thomas Dep. 29:20–30:2, 73:20–74:20. Thomas conspired with Pokorney when he was employed by Knauff and HUB to have the District pay for services that Knauff and HUB never rendered. In exchange, Pokorney gave Thomas bribes in the form of $2,000 checks and stuck his head in the sand with respect to Thomas's other illegal activities. Thomas Dep. 30:22–32:8.

121. Pokorney denies having any knowledge of Thomas's illegal activities prior to 2017 and likewise denies that he intended the checks he mailed to Thomas to be bribes. The court finds these denials incredible. Having already been convicted, sentenced, and jailed for his crimes, Thomas now has nothing to gain from lying about those crimes. *See* Thomas Dep. 33:4–25. Pokorney, on the other hand, has much to gain or at least to protect. Pokorney had a substantial financial incentive to bribe Thomas. Pokorney received 40 percent of the total revenue he generated at Knauff. Trial Tr. 568:16–21. Revenue includes service fees and commissions but not premiums. Trial Tr. 571:9–20. So, by way of an example, on a 15

percent commission on a policy with a $65,000 premium, Pokorney would earn $3,900 on the $9,750 commission. But when $118,625 brokerage services fees were charged in lieu of a commission on the same policy, Trial Tr. 421:9–15; Pl.'s Ex. 105, Pokorney earned $47,450. Hence the incentive to bribe Thomas.

122. Further, Pokorney's testimony that he thought HUB acquired Knauff in 2006, as opposed to 2012, is incredible. *See* Trial Tr. 682:5–9. While it is understandable that a person might misremember distant dates, Pokorney's demeanor during a full day of cross-examination showed his mind was not so far gone that he would forget who employed him for seven years. He had no difficulty remembering that he worked for Collier Cobb, Corroon and Black, and Willis Corroon before leaving for Knauff in 2000. Trial Tr. 531:10–24.

123. Pokorney's "misremembering" is material here because it was an attempt to assert his personal stake in the fees charged to the District during the period covered by the BSAs at issue was 9 percent rather than 40 percent. *See* Trial Tr. 670:25–671:1 ("[Q.] What piece of that 118 [thousand] did you get out of HUB? A. I told you, 9 percent. Q. Okay. And when did that start when HUB took over? A. When HUB bought Knauff, correct."). Pokorney received 40 percent of total revenue he generated at Knauff, Trial Tr. 568:16–21; he received a 9 percent after HUB purchased Knauff, Trial Tr. 670:25. 671:1. By way of example based on the above numbers, at 9 percent Pokorney would earn $10,676.25 for a $118,625 fee. Based on the same fee, at 40 percent Pokorney would

earn $47,450. When compared to the $3,900 Pokorney would earn on a traditional commission, $10,676.25 is not nearly as egregious as $47,450.

124. In any event, the evidence demonstrates that Pokorney's true commission at HUB was closer to 30 percent. Trial Tr. 673:6–10. The reduction to 9 percent was to cover the salary and costs of his son, Scott Pokorney, whom HUB employed because of Mr. Pokorney's desire to have his son inherit his book of business. *Id.*

125. In sum, the court finds that Stan Pokorney knew of Thomas's illegal activities well prior to 2017 and that he sent Thomas bribes to steer the District's business to Knauff and HUB. In exchange for Pokorney's willful blindness of Thomas's illegal activities and at least ten $2,000 bribes, Pl.'s Ex. 6. ¶¶ 5, 7, 16–23, Thomas caused the District to pay exorbitant brokerage service fees, a significant portion of which was paid directly to Pokorney.

II. CONCLUSIONS OF LAW

126. The court held the Section 4 Trial to resolve factual disputes underlying HUB's motion to compel arbitration. HUB asserts that the District agreed to arbitrate this dispute by assenting to five of the BSAs—the 2002 BSA, the 2003 BSA, the 2006 BSA, the 2009 BSA, and the 2011 BSAs.[5] The District opposes arbitration,

5. HUB has conceded that the District did not assent to the 2005 BSA and therefore does not argue it provides a ground for compelling arbitration. HUB's 30(b)(6) representative testified that, due to the 2005 RFP dispute, the 2005 BSA was never put

arguing that it never assented to the relevant BSAs and thus that it cannot be bound by their arbitration provisions. For the following reasons, the court finds that the District did not assent to any of the relevant BSAs and therefore denies HUB's motion to compel arbitration.

A. Agreements to Arbitrate

127. Arbitration "is a matter of consent, not coercion." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002); *see also Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.").

128. When the making of an arbitration agreement is at issue, 9 U.S.C. § 4 requires the district court to decide whether the parties have formed an agreement to arbitrate. *Berkeley Cty. Sch. Dist.*, 944 F.3d at 234 (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) and *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002)).

129. Where genuine issues of material fact underlie the existence of an agreement to arbitrate, the court must "conduct a trial on the motion to compel arbitration" to resolve relevant factual disputes. *Id.*

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into place. Jones Dep. 91:13–92:1. In closing arguments, HUB abandoned any claim that this agreement was ever formed. ECF No. 222, Closing Arg. Tr. 4:13–5:2. Accordingly, the court is left with five BSAs—the 2002, 2003, 2006, 2009, and 2011 BSAs.

130. The party asserting an arbitration agreement has the burden to show the making of the agreement. *In re Mercury Constr. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981) (en banc).

131. Whether an arbitration agreement has been formed is an issue of state contract law. *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 913 F.3d 409, 415 (4th Cir. 2019).

B. South Carolina Contract Law

132. To determine whether the parties assented to a contract to arbitrate, the court employs South Carolina law. *Livingston v. Atl. Coast Line R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (S.C. 1935) ("It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs.").

133. Under South Carolina law, a contract is formed between two parties when there is, inter alia, "a mutual manifestation of assent to [its] terms." *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434, 436 (S.C. 1978) (internal quotation marks omitted). Such assent "must be as to all the terms of the contract." *Id.*

134. South Carolina's "presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C.

326, 827 S.E.2d 167, 173 (S.C. 2019) (internal quotation marks omitted).[6]

135. For multiyear commercial contracts such as the BSAs at issue here, assent is ordinarily shown by authorized signature. But assent may be shown by other means. South Carolina "courts have held that '[a] contract does not always require the signature of both parties; it may be sufficient, if signed by one and accepted and acted on by the other.'" *Pools Plus, Inc. v. Timmons*, 2008 WL 9841169, at *1 (S.C. Ct. App. Mar. 25, 2008) (quoting *Jaffe v. Gibbons*, 290 S.C. 468, 351 S.E.2d 343, 346 (S.C. Ct. App. 1986)). For example, the manifestation of assent can be demonstrated by a return promise or performance. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (S.C. 2003).

136. Additionally, a contract may be accepted on a principal's behalf by an agent acting with due authority. The Fourth Circuit explained in this case that "an entity (such as [the District]) can be bound by an acceptance made by another (such as Thomas) of terms of an offer if there is an agency relationship between the two." *Berkeley Cty. Sch. Dist.*, 944 F.3d at 236.

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6. Such is the case with respect to the federal presumption in favor of arbitration as well. *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 526 (2d Cir. 2011) ("[W]hile doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made.").

C. Mutual Assent

137. "A contract is an agreement between two or more parties, the preliminary step in the making of which is the offer by one party and the acceptance by the other, in which the minds of the two parties meet and concur in the understanding of the terms." *Lee v. Travelers' Ins. Co. of Hartford, Conn.*, 173 S.C. 185, 175 S.E. 429, 433 (S.C. 1934). Thus, to prove the existence of a contract, the proponent must offer evidence that the other party "concur[red] in the understanding of the terms[.]" *Id.* As the South Carolina Supreme Court has repeatedly made clear, a party cannot be bound by a contract absent a showing that it assented "to all the terms of the contract." *Edens*, 247 S.E.2d at 436.

1. The District's Payment of Brokerage Service Fees

138. The District paid the brokerage service fees described in the 2006, 2009, and 2011 BSAs. HUB argues that the District's payment of these brokerage fees provides sufficient evidence to establish its assent to the BSAs. The court disagrees. Payment alone does not demonstrate that the District knew of and agreed to all terms in the BSAs—especially the arbitration provisions. The South Carolina Supreme Court addressed this issue over 100 years ago:

> The ordinary unsigned railroad ticket is not itself the sole evidence of the contract of carriage. Such a ticket is a token or receipt

> given to show that the passenger has paid his fare from the place of departure mentioned therein to the place of destination mentioned therein. Hence parol evidence is admissible to prove the terms of the contract entered into, or the representation made by the agent at the time the ticket was purchased.

Levan v. Atl. Coast Line R. Co., 86 S.C. 514, 68 S.E. 770, 773–74 (S.C. 1910). In other words, a purchased ticket shows payment of a fare for transport but is insufficient to show agreement to terms not included on the ticket. While other evidence might prove the terms under which the ticket was sold, payment for the ticket alone does not evidence that ticketholder's assent to additional contract terms. Here, likewise, the fact that the District paid brokerage service fees to Knauff and HUB only shows payments for services; it is insufficient to show agreement to terms not on the invoice. Accordingly, payment alone falls short of establishing the District's assent to "all the terms of the" BSAs. *Edens*, 247 S.E.2d at 436.

139. HUB failed to present any evidence of the District's (or SAFE's) assent to the terms of the 2006, 2009, or 2011 BSAs. HUB produced no correspondence exchanging or discussing drafts of those BSAs. Further, the BSAs do not appear in the District's files. Findings of Fact ("FOF") ¶¶ 54, 79, supra. And the court has found that the District was not aware of the 2006, 2009, or 2011 BSAs before this litigation. *Id.*

140. To be sure, HUB has presented some evidence that the BSAs were sent to Thomas, then an employee

of the District. FOF ¶ 90. But, during that period and specifically in relation to the relevant BSAs, Thomas was acting with Pokorney, Knauff, and HUB against the District's interests. FOF ¶¶ 100–17, 119–121. Accordingly, Thomas's knowledge of the specific terms of the BSAs cannot be imputed to the District. *Knobelock v. Germinia Sav. Bank*, 50 S.C. 259, 27 S.E. 962 (S.C. 1897) (holding that a principal is not charged with the knowledge of his agent when the agent "meditates a fraud against his principal or some third person in his own interest"); *see also Galphin v. Pioneer Life Ins. Co.*, 157 S.C. 469, 154 S.E. 855, 864 (S.C. 1930) ("[T]he principal will not be bound by the knowledge of the agent if the agent is acting in fraud of his principal. . . .").

141. Thus, assuming Thomas may have had knowledge of the 2006, 2009, and 2011 BSAs does not establish the District's knowledge of those agreements. Similarly, evidence that the District paid the brokerage service fees outlined in the 2006, 2009, and 2011 BSAs is insufficient to establish its assent to all the terms of those agreements, including their arbitration clauses.

2. The District's Assertion of Breach-of-Contract Claims

142. HUB argues that the District's assertion of breach-of-contract claims in its original complaint demonstrates that it knew about and assented to the relevant BSAs. The court disagrees.

143. First, the Fourth Circuit explicitly noted in this very case that "an amended complaint—such as

the Operative Complaint here—supersedes an initial complaint and renders it *of no effect." Berkeley Cty. Sch. Dist.*, 944 F.3d at 241 (emphasis added) (quoting *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017)).

144. More fundamentally, HUB's second argument suffers from the same fatal flaw as its first. The fact that the District asserted breach-of-contract claims with respect to unidentified contracts governing Knauff and HUB's services does not equate to any knowledge of or assent to the specific BSAs at issue here or all of the terms included therein. The District's original complaint merely alleges that "[t]he District entered into multiple contracts with [Knauff] for consulting services, which required [Knauff] to use [its] expertise as [an] insurance consultant[] to provide sound advice concerning the insurance needs of the District." Defs.' Ex. 76 ¶ 234. The District does not dispute that it paid Knauff and HUB brokerage service fees. Of course, the District was aware that it paid fees to Knauff and HUB pursuant to some agreement between the parties. However, there is no evidence that the District ever received the specific BSAs at issues here, much less that it assented to all of their terms. The District's general assertion of a breach-of contract claims is, at best, weak evidence that it had knowledge of the specific BSAs at issue here, especially given the more convincing evidence to the contrary. In other words, binding the District to the BSAs based on its assertion of generalized and since. abandoned breach-of-contract claims is a bridge too far.

3. The 2002 and 2003 BSAs

145. HUB argues that the 2002 and 2003 BSAs bind the District to arbitration. Unfortunately for HUB, the law of the case says otherwise. The Fourth Circuit explicitly held that the 2002 and 2003 BSAs "predate the steering and kickback fraud scheme and conspiracy alleged in the Operative Complaint" and therefore cannot provide grounds to compel arbitration. *Berkeley Cty. Sch. Dist.*, 944 F.3d at 241. In other words, the Fourth Circuit held that the 2002 and 2003 BSAs cannot compel this dispute to arbitration because—according to the operative complaint—this dispute arose after the period covered by those BSAs. As the "law of the case," the court must abide by the Fourth Circuit's decree. *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.").

146. Thus, the court does not consider whether the District agreed to arbitrate this dispute by assenting to the 2002 and 2003 BSAs. Instead, the court only considers the 2002 and 2003 BSAs to the extent that they are "relevant to questions of whether [the District] had knowledge of, or assented to, the subsequent [BSAs]." *Berkeley Cty. Sch. Dist.*, 944 F.3d at 241.

147. Further, the court finds that the 2002 and 2003 BSAs constitute weak evidence of District's assent to subsequent BSAs. As the court has found, the 2005 RFP cut off any "continuing conduct" or "continuing performance" with respect to the 2002 and 2003 BSAs.

When the RFP was withdrawn, the District moved its business from Knauff to the IRF. FOF ¶ 48. HUB's 30(b)(6) designee admitted that the 2005 BSA was never put in place because of the RFP dispute. Jones Dep. 91:13–92:1. Knauff claimed the loss of its book of business with the District violated its rights, and in January 2006 Knauff and the District settled those claims in a fully executed settlement agreement. FOF ¶¶ 49–50. The settlement expressly terminates any obligations the District might have had under previous agreements, meaning that the District had no obligation to continue to perform under any such agreements. *Id.* Accordingly, the court finds that the 2002 and 2003 BSAs do little to show the District's assent to subsequent BSAs.

4. The 2006 and 2009 BSAs

148. The 2006 and 2009 BSAs are unsigned. FOF ¶ 52.

149. The District is not a party to the 2006 or 2009 BSA. FOF ¶¶ 52–55. Those BSAs concern D&O coverage for SAFE's board of directors. *Id.* SAFE is a 501(c)(3) corporation distinct from the District. FOF ¶ 56.

150. As a nonparty to the 2006 and 2009 BSAs, the District cannot be bound by their arbitration provisions, absent some exception under the law. *Wilson*, 827 S.E.2d at 173 ("[T]he general rule that a nonsignatory is not bound by an arbitration clause") (quoting *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006)).

151. "In the arbitration context," the doctrine of benefits estoppel "recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Id.* at 175. A nonparty to an arbitration agreement may nonetheless be bound by it only where he "knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Id.* In other words, a nonparty who relies on a contract as a sword to obtain its benefits may not subsequently shield himself from the effect of the contract's arbitration provision. "However, direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence[.]" *Id.* at 176.

152. The doctrine of benefits estoppel does not apply here because the court has determined that the District, a nonparty, received no benefit from the 2006 and 2009 BSAs. Even assuming that the placement of D&O coverage for SAFE's board somehow benefits the District (perhaps because the District paid for it), the D&O coverage for SAFE had been put in place years before December 2006, and HUB has presented no credible evidence that claims were ever made or consulting services were ever provided. FOF ¶¶ 63, 68–69. At most, the District paid exorbitant brokerage service fees for a line of insurance that had been in place since 2003.

153. Accordingly, the District did not assent to the 2006 and 2009 BSAs.

5. The 2011 BSA

154. As the court has found, the 2011 BSA is unsigned, FOF ¶ 77, and HUB failed to produce any convincing evidence that anyone at the District knew of or assented to the 2011 BSA. The District was not able to locate a copy of this agreement in its files, FOF ¶ 79, and the Board did not approve it, *id.* ¶ 80. Further, Knauff sent the invoices associated with the 2011 BSA to Thomas's house, not the District's office. *Id.* ¶ 89.

155. Accordingly, the court finds that no one at the District assented to the 2011 BSA.

D. Thomas's Authority

156. "An agent contracting with the authority of his principal binds him to the same extent as if the principal personally made the contract." *Berkeley Cty. Sch. Dist.*, 944 F.3d at 237 (internal quotation marks omitted). Whether an agency relationship exists and the extent of the agent's authority are questions of fact under South Carolina law. *See Am. Fed. Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 467 S.E.2d 439, 442 (S.C. 1996); *Hiott v. Guar. Nat'l Ins. Co.*, 329 S.C. 522, 496 S.E.2d 417, 421 (S.C. Ct. App. 1997).

157. An agency relationship may be established by evidence of actual or apparent authority. *Fochtman v. Clanton's Auto Auction Sales*, 233 S.C. 581, 106 S.E.2d 272, 274–75 (S.C. 1958). "[A]ctual authority is that which is expressly conferred upon the agent by the principal."

Charleston, S.C. Registry for Golf & Tourism, Inc. v Young Clement Rivers & Tisdale, LLP, 359 S.C. 635, 598 S.E.2d 717, 721 (S.C. Ct. App. 2004). A principal's express direction to enter into a contract on the principal's behalf is an example of actual authority. *See e.g., Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 748 S.E.2d 801, 805 (S.C. Ct. App. 2013).

158. Apparent authority "focuses on the principal's manifestations to a third party that the agent has certain authority." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 296 (S.C. 1996). It exists where "the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority." *Berkeley Cnty. Sch. Dist.*, 944 F.3d at 237 (quoting *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263, 265 (S.C. 2009)). A "principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption." *Rickborn*, 468 S.E.2d at 296. This inquiry turns on whether the third party's belief that the agent possesses actual authority is reasonable.

159. "Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority." Restatement (Third) of Agency § 3.11. Regarding the reasonableness of a third party's belief, the Restatement comments observe:

> If a third party knows that the actor in question is an agent and knows the identity of the principal, the third party should assess what is observed of the agent in light of the agent's position as a fiduciary with a duty to use authority on behalf of the principal. In a transactional context, *the agent's position as a fiduciary should prompt doubt in the mind of the reasonable third party when the agent appears to be using authority to bind the principal to a transaction that will not benefit the principal.*

Restatement (Third) Of Agency § 2.03 cmt. d (2006) (emphasis added).

160. In South Carolina, "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292, 304 (S.C. Ct. App. 2018).

1. Thomas's Actual Authority

161. Even if Thomas did have knowledge of the 2006, 2009, or 2011 BSAs, he did not have the actual authority to bind the District them without the approval of his superiors or the Board. All the BSAs demanded fee amounts exceeding his signing authority. FOF ¶ 91. No RFP soliciting the BSAs ever issued. FOF ¶¶ 92–93. Neither Thomas nor any other District employee is permitted to execute multiyear agreements without Board approval. FOF ¶ 94.

162. HUB argues that Thomas had actual authority to enter into the 2006 and 2009 BSAs because the SAFE board directed Thomas to place insurance on its behalf. To be sure, HUB has presented evidence that the SAFE board did just that in 2003. Defs.' Ex. 25. But, as the court has found, SAFE and the District are separate entities. FOF ¶ 59. The authority SAFE conferred onto Thomas to place insurance on its behalf in 2003 does not somehow equate to authority from the District to bind the District to over a million dollars in brokerage service fees from 2006 to 2017. In other words, Thomas had the authority to procure insurance, not to procure illusory brokerage services in exchange for exorbitant fees. FOF ¶ 61. The relevant inquiry is whether the District conferred upon Thomas actual authority to enter into the 2006 and 2009 BSA, not whether SAFE conferred authority upon Thomas to place insurance in 2003. Accordingly, the court finds that Thomas did not have the actual authority to bind the District to the 2006 and 2009 BSAs.

2. Thomas's Apparent Authority

163. Thomas lacked apparent authority to enter into the 2006, 2009, and 2011 BSAs because any third-party belief that Thomas had the actual authority to enter into those agreements was unreasonable.

164. Pokorney's purported belief that Thomas had the actual authority to enter into the BSAs is unreasonable because Pokorney knew about Thomas's illegal scheme to defraud the District. FOF ¶¶ 121–125. Certainly, no reasonable person can believe that an agent has the

actual authority to defraud and embezzle money from his principal.

165. Further, Pokorney bribed Thomas to steer policies to Knauff and HUB, meaning that he knew Thomas was not acting in the District's best interest. No reasonable person would believe that an agent has the actual authority to act against his principal's best interest. *See GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1315 (S.D. Fla. 2017) ("[T]here is not a reasonable belief the agent possessed apparent authority where he/she, in self-dealing, was acting, not just for his/her own interest, but directly contrary to the interests of the principal.").

166. Moreover, the court has found that the brokerage service fees associated with the 2006, 2009, and 2011 BSAs were far greater than those customary in the industry. FOF ¶¶ 30, 75. Therefore, even aside from Pokorney's knowledge of Thomas's scheme, the BSAs at issue cost too much and offered too little for Knauff or HUB to reasonably believe the District's employee could agree to them. A customary insurance broker commission is 15 percent. FOF ¶ 30. The 2006, 2009, and 2011 BSAs charged fees that were wildly more—by 1200 and 3700 percent. FOF ¶¶ 67, 82. The BSAs demanded fees far exceeding the premiums for the lines of insurance purportedly being serviced. The 2006 and 2009 BSAs demanded fees that were twice the premiums for the purportedly serviced D&O coverage, and the 2011 BSA demanded fees well over five times the premium for the purportedly serviced E&O coverage. *Id.* Further, Knauff

nor HUB provided consulting services or even placed new insurance. FOF ¶¶ 63, 68–69.

167. No reasonable person could believe Thomas had the authority to bind the District to pay many hundreds of thousands of dollars for many years in exchange for literally nothing.

168. Thus, the court finds that Thomas had neither actual nor apparent authority to bind the District to the 2006, 2009, or 2011 BSAs.

E. Summary of Conclusions

169. The law of the case is that the arbitration provisions in the signed 2002 and 2003 BSAs cannot require the District to arbitrate this dispute because they predate the conduct alleged in the operative complaint.

170. Knauff and the District never agreed to the 2005 BSA.

171. The District had no knowledge of the 2006, 2009, and 2011 BSAs and therefore never assented to the arbitration provisions contained therein.

172. The District is not a party to the 2006 and 2009 BSAs and, as a nonparty, cannot be bound by their arbitration provisions because the District received no benefit from those BSAs.

173. Thomas did not have actual authority to execute the 2006, 2009, or 2011 BSA on behalf of the District.

174. Thomas did not have apparent authority to execute the 2006, 2009, or 2011 BSA on behalf of the District.

175. Accordingly, the District did not assent to the 2006, 2009, or 2011 BSAs, meaning that it cannot be bound by the arbitration provisions contained within them.

III. CONCLUSION

For the foregoing reasons the court **FINDS** that the District did not agree to arbitrate this dispute and therefore **DENIES** the motion to compel arbitration.

AND IT IS SO ORDERED.

/s/ David C. Norton
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

June 3, 2021
Charleston, South Carolina

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED DECEMBER 4, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1158

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff-Appellee,

v.

HUB INTERNATIONAL LIMITED;
HUB INTERNATIONAL MIDWEST LIMITED,

Defendants-Appellants,

and

KNAUFF INSURANCE AGENCY, INC.;
STANLEY J. POKORNEY; SCOTT POKORNEY;
BRANTLEY THOMAS,

Defendants.

Appendix E

No. 19-1170

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff-Appellee,

v.

SCOTT POKORNEY,

Defendant-Appellant,

and

HUB INTERNATIONAL LIMITED;
HUB INTERNATIONAL MIDWEST LIMITED;
KNAUFF INSURANCE AGENCY, INC.;
STANLEY J. POKORNEY; BRANTLEY THOMAS,

Defendants.

Appendix E

No. 19-1171

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff-Appellee,

v.

STANLEY J. POKORNEY,

Defendant-Appellant,

and

HUB INTERNATIONAL LIMITED;
HUB INTERNATIONAL MIDWEST LIMITED;
KNAUFF INSURANCE AGENCY, INC.;
SCOTT POKORNEY; BRANTLEY THOMAS,

Defendants.

Appeals from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:18-cv-00151-DCN-MGB)

Argued: October 29, 2019
Decided: December 4, 2019

Before KING, FLOYD, and RUSHING, Circuit Judges.

Vacated and remanded by published opinion. Judge King wrote the opinion, in which Judge Floyd and Judge Rushing joined.

Appendix E

KING, Circuit Judge:

Four defendants in the underlying proceedings—Hub International Limited and Hub International Midwest Limited (collectively, "Hub International"), along with two of their employees, Stanley Pokorney and Scott Pokorney (together with Hub International, the "Appellants")—pursue these consolidated appeals from the district court's denial of their motion to compel arbitration. The Appellants sought arbitration of federal and state claims alleged against them by plaintiff Berkeley County School District ("Berkeley Schools") in the District of South Carolina. The district court denied the Appellants' motion to compel arbitration, ruling that Berkeley Schools had not agreed to arbitrate those claims. *See Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 363 F. Supp. 3d 632, 651 (D.S.C. 2019) (the "Denial Order"). In rendering its decision, however, the court failed to resolve—in the proper manner—factual disputes that are material to the arbitration agreement issue. Because federal law, that is, 9 U.S.C. § 4, requires those disputes to be resolved in trial proceedings, we vacate and remand.[1]

I.

A.

On January 18, 2018, a plaintiff denominated as the Berkeley County School Board of Trustees filed suit in the

1. Section 4 of Title 9 of the United States Code provides, in pertinent part, that "[i]f the making of [an] arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof."

District of South Carolina against multiple defendants. Pertinent here, the complaint alleged federal and state claims against the four Appellants, plus Knauff Insurance Agency, Inc. (which Hub International purchased in 2012), and Brantley Thomas, a former Berkeley Schools Chief Financial Officer. The claims were predicated on a massive insurance contract steering and kickback fraud conspiracy that spanned the period from 2001 to 2016, and that was perpetrated by the Appellants, Knauff Insurance, and CFO Thomas. The complaint alleged that the steering and kickback fraud scheme caused Berkeley Schools to lose millions of dollars.

B.

1.

On March 5, 2018, appellant Hub International moved in the district court to compel arbitration of the claims alleged, pursuant to the Federal Arbitration Act (the "Arbitration Motion").[2] Appellants Stanley Pokorney and Scott Pokorney joined the Arbitration Motion, and Hub International supported it with six purported Brokerage Service Agreements between Knauff Insurance and Berkeley Schools, spanning the period from 2002 to 2011 (the "Brokerage Service Agreements" or the

2. Although they are named as defendants in the complaint, Knauff Insurance and CFO Thomas did not seek to compel arbitration. Neither Knauff Insurance nor Thomas are appellants in these proceedings.

"Agreements").[3] The Agreements generally provided that, in exchange for annual fees, Knauff Insurance would provide insurance-related services to Berkeley Schools. Those services included identifying risks, reviewing existing insurance contracts, recommending additional insurance policies, arranging the purchase of new policies, and monitoring insurance claims made under the various policies.

The Arbitration Motion emphasized that each of the Brokerage Service Agreements contained an arbitration clause. In that regard, the Agreements provided thusly:

> All disputes, claims or controversies relating to [these Agreements], or the services provided, which are not otherwise settled, shall be submitted to a panel of three arbitrators and resolved by final and binding arbitration, to the exclusion of any courts of laws, under the commercial rules of the American Arbitration Association.

See J.A. 91, 96, 101, 106, 114, 121 (the "Arbitration Clauses").[4] Invoking the Arbitration Clauses, the

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3. Hub International also supported the Arbitration Motion with the declaration of Julia Benfield, a former Knauff Insurance employee and current Hub International employee. Benfield declared that she discovered the Brokerage Service Agreements in Hub International's files in its Charlotte, North Carolina, office.

4. Citations herein to "J.A._" refer to the contents of the Joint Appendix filed by the parties in these appeals.

Arbitration Motion contended that the claims alleged in the complaint related to the Agreements and thus had to be arbitrated.[5]

As pertinent here, the six Brokerage Service Agreements were each addressed to CFO Thomas and dated June 18, 2002; June 27, 2003; August 16, 2005; December 19, 2006; December 19, 2009; and May 1, 2011. The June 2002 Agreement was for one year and was signed on behalf of Berkeley Schools by a person named Angel Cartwright and on behalf of Knauff Insurance by Stanley Pokorney. The June 2003 Agreement was also for one year and was signed on behalf of Berkeley Schools by CFO Thomas and on behalf of Knauff Insurance by Stanley Pokorney. In contrast to the two earlier Agreements, the August 2005, December 2006, December 2009, and May 2011 Agreements were not signed, but generally purported to be between Berkeley Schools and Knauff Insurance for multi-year periods.

2.

A.

On March 19, 2018—about two weeks after the Appellants moved to compel arbitration—Berkeley Schools substituted itself for the Berkeley County School Board of Trustees as the only plaintiff in these

5. As previously specified, Hub International purchased Knauff Insurance in 2012. Hub International thus invoked the Arbitration Clauses as Knauff Insurance's purported successor-in-interest.

proceedings and filed an amended complaint. *See Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151 (D.S.C. Mar. 19, 2018), ECF No. 36 (the "Operative Complaint").[6] The Operative Complaint names as defendants the four Appellants, Knauff Insurance, and CFO Thomas.[7]

According to the Operative Complaint, Knauff Insurance and its employee, Stanley Pokorney, had provided insurance brokerage and consulting services to Berkeley Schools from 2001 to 2012. After acquiring Knauff Insurance in 2012, Hub International began providing insurance brokerage and consulting services to Berkeley Schools, and Stanley and Scott Pokorney—who became Hub International employees after it purchased Knauff Insurance—were closely involved in providing those services.

The Operative Complaint alleges, inter alia, that beginning in 2005 and continuing into 2017, Berkeley Schools CFO Thomas helped the Appellants and Knauff

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6. Under South Carolina law, Berkeley Schools is ostensibly the proper named plaintiff and is entitled to pursue a lawsuit in its own name. *See* S.C. Code Ann. § 59-17-10 (providing that "[e]very school district is and shall be a body politic and corporate" and "may sue and be sued" in its own name).

7. The parties and the district court apparently treated the Operative Complaint as properly filed "as a matter of course" pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure. The Operative Complaint was filed within 21 days of the Arbitration Motion, which was apparently considered to be "a responsive pleading," as contemplated by Rule 15(a)(1)(B). The Appellants did not seek to strike the Operative Complaint.

Insurance secure contracts to broker insurance policies for Berkeley Schools and to conduct reviews of the existing insurance policies of Berkeley Schools. In exchange for Thomas's assistance in steering those contracts to them, the Appellants and Knauff Insurance paid Thomas kickbacks "in the form of cash, expensive trips, hotel rooms, dinners, and spa services." *See* Operative Complaint ¶ 62. The Appellants and Knauff Insurance were the "insurance consultants" for Berkeley Schools, *id.* ¶ 238, and repeatedly breached their fiduciary duties by advising Berkeley Schools to purchase insurance that was unnecessary and excessive, and by charging Berkeley Schools "sham consulting fees for brokerage and insurance review," *id.* ¶ 213.

The Operative Complaint alleges that CFO Thomas, acting on Berkeley Schools' behalf, secured from the Appellants and Knauff Insurance a series of excessive and unnecessary insurance policies. Even though Thomas purportedly obtained those policies for Berkeley Schools, the Schools already had insurance coverage for most of the risks. For policies secured from the Appellants and Knauff Insurance that were not duplicative, the Operative Complaint specifies that they were entirely unnecessary for other reasons, i.e., that Berkeley Schools had not historically purchased them, or that they were "highly unusual and prohibitively expensive." *See* Operative Complaint ¶ 96. Under the Operative Complaint, from 2005 to 2012, Berkeley Schools paid Knauff Insurance more than $3,300,000 in insurance premiums and approximately $1,600,000 in consulting and broker's fees. From 2012 through 2017, Berkeley Schools paid Hub International

more than $3,400,000 in insurance premiums and about $1,500,000 in consulting and broker's fees.

According to the Operative Complaint, Berkeley Schools first learned on February 6, 2017, of the steering and kickback fraud scheme and conspiracy that the Appellants, Knauff Insurance, and CFO Thomas had orchestrated and executed. On that occasion, federal agents informed Berkeley Schools officials that CFO Thomas was the subject of a criminal investigation. In connection with that investigation, Thomas pleaded guilty in Charleston on January 16, 2018, to a twenty-count criminal Information filed on December 7, 2017, by the United States Attorney for the District of South Carolina. The Information charged Thomas with a single count of fraud and embezzlement from a federally funded program, nine counts of money laundering, and ten counts of honest services wire fraud.[8]

Pursuant to the Information, the ten honest services wire fraud offenses spanned the time period from March 2010 through November 2016. Those offenses related to Thomas receiving kickbacks from an insurance broker in exchange for steering insurance contracts to the broker. The Information further alleged that Thomas had used his CFO position with Berkeley Schools to steer the contracts to the broker, in that Thomas was responsible for

8. On May 17, 2019, the district court entered judgment with respect to the Information, sentencing Thomas to 63 months in prison and ordering him to pay Berkeley Schools more than $1,000,000 in restitution. *See United States v. Thomas*, No. 2:17-cr-01150 (D.S.C. May 17, 2019), ECF No. 52 at 2, 5.

procuring insurance policies on Berkeley Schools' behalf and for ensuring payments to its vendors. The Information identified ten checks received from the broker by Thomas between February 2013 and November 2016, and alleged that those checks represented wire fraud kickbacks. The Operative Complaint identifies the broker as appellant Stanley Pokorney.

In late 2017, while the federal investigation into Thomas's conduct was ongoing, he was indicted by a South Carolina grand jury in Columbia, in connection with the steering and kickback fraud scheme. The state Indictment charged Thomas with four embezzlement offenses, and Thomas pleaded guilty to all counts. Pertinent here, Thomas admitted to "deliberately causing [Berkeley Schools] to overpay a vendor, and then having the vendor send a refund of the overpayment to his home address, upon which the funds were converted to his personal use." *See* J.A. 209. The Operative Complaint alleges that the person who sent the refund to Thomas's home was appellant Stanley Pokorney, who was working for Knauff Insurance. That unlawful conduct occurred in November 2007.

Berkeley Schools attached to the Operative Complaint a total of twenty-three exhibits, including the federal Information, the state Indictment, and various emails that carried out and implemented the scheming and conspiratorial dealings between the Appellants and Thomas. Berkeley Schools also attached thereto a spreadsheet specifying payments for brokerage services from Berkeley Schools to Knauff Insurance beginning in March 2005 and continuing through November 2012.

Predicated on the steering and kickback fraud scheme and conspiracy, the Operative Complaint alleges claims against the Appellants, Knauff Insurance, and Thomas for federal RICO violations, that is, civil violations of the Racketeer Influenced and Corrupt Organizations Act, plus state law claims for fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, negligence, conversion, constructive trust, and unjust enrichment. The Operative Complaint seeks statutory treble damages totalling more than $29,000,000, pursuant to 18 U.S.C. § 1964(c) (authorizing "threefold" damages to party injured by RICO violations).

B.

On March 19, 2018, the very day it filed the Operative Complaint, Berkeley Schools responded to the Arbitration Motion, denying that it had ever agreed to arbitrate any claims against the Appellants and Knauff Insurance. Berkeley Schools filed with its response the March 19, 2018 declaration of Marcia Abrahamson, Berkeley Schools' Director of Procurement and Contracting, confirming that there was nothing in the Berkeley Schools' records relating to or containing the unsigned Brokerage Service Agreements of August 2005, December 2006, December 2009, and May 2011. In addition, Abrahamson swore that "Thomas, in his position as Chief Financial Officer, did not have any authority to unilaterally contract for the procurement of insurance consulting services . . . on behalf of [Berkeley Schools] during the period from 2005 through the present." *See* J.A. 125.

3.

On March 26, 2018, the Appellants filed a reply in further support of the Arbitration Motion, contending that the Operative Complaint was "part of a thinly-veiled attempt to gerrymander [Berkeley Schools'] case to avoid arbitration." *See Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151 (D.S.C. Mar. 26, 2018), ECF No. 38 at 1. The Appellants thus maintained that the Arbitration Clauses also mandated arbitration of Berkeley Schools' claims alleged in the Operative Complaint.

C.

1.

The district court conducted a non-evidentiary hearing on the Arbitration Motion in Charleston on May 17, 2018. During the hearing, Hub International's counsel maintained that the Arbitration Clauses require arbitration of Berkeley Schools' claims. He asserted that the Operative Complaint had changed the beginning date of the steering and kickback fraud scheme and conspiracy from 2001 to 2005 in order to "dodge" the June 2002 and June 2003 Brokerage Service Agreements, which were signed by Cartwright and Thomas, respectively, on Berkeley Schools' behalf. *See* J.A. 331. According to counsel, the June 2002 and June 2003 Agreements related to the Operative Complaint's claims, and Berkeley Schools had—at the very least—knowledge of those Agreements and the Arbitration Clauses. Counsel emphasized that Berkeley Schools had paid invoices submitted by Knauff

Insurance for services provided pursuant to the four unsigned Brokerage Service Agreements. He thus argued that Berkeley Schools had accepted those Agreements by performance and had consequently agreed to the Arbitration Clauses contained therein.

Berkeley Schools' lawyer orally responded that Berkeley Schools had never agreed to arbitrate any of its claims against the Appellants and Knauff Insurance. He represented to the court that Berkeley Schools never knew that the Brokerage Service Agreements (including the Arbitration Clauses) existed until receiving the Arbitration Motion on March 5, 2018. As for the June 2002 Agreement signed by Cartwright, Berkeley Schools' lawyer advised the court that she was simply CFO Thomas's "underling" at Berkeley Schools, and thus had no authority to bind Berkeley Schools. *See* J.A. 351. The lawyer stressed that the four Agreements purportedly formed within the timeframe alleged in the Operative Complaint were never signed by anyone or any party, and that Abrahamson could not locate any of them in the Berkeley Schools' records.

2.

On January 29, 2019, the district court entered its Denial Order. By that point in time, no answer had been filed by the Appellants to either the initial complaint or the Operative Complaint. And no discovery of any kind or type had been conducted. Thus, the court had before it only the Operative Complaint and its exhibits, the Arbitration Motion and its exhibits, Berkeley Schools' response to

the Arbitration Motion and supporting exhibits, and the Appellants' reply thereto.

In assessing the Brokerage Service Agreements and the Arbitration Clauses, the Denial Order accepted the factual representations made by Berkeley Schools' lawyer that the Schools had no prior knowledge of the unsigned Agreements. And the court determined that the lawyer's representations were supported by the lack of signatures on those Agreements. The Denial Order ruled that Berkeley Schools "could not have agreed to the Brokerage Service Agreements if it did not know they existed," and therefore "there was no meeting of the minds where [Berkeley Schools] agreed to be bound by the Brokerage Services Agreements or the Arbitration Clauses." *See Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 363 F. Supp. 3d 632, 649 (D.S.C. 2019).

Insofar as the Appellants asserted that Berkeley Schools had accepted the unsigned Brokerage Service Agreements and the Arbitration Clauses by "paying the broker's and consultant's fees," the Denial Order concluded that the "usual rule" that a party can accept an offer by performance does not apply "to this most unusual set of facts." *See Berkeley Cty. Sch. Dist.*, 363 F. Supp. 3d at 649. Accepting the allegations of the Operative Complaint, the Denial Order determined that Thomas "caused [Berkeley Schools] to make the payments and perform the contract[s]," and that he "did so as part of a scheme to defraud [Berkeley Schools]." *Id.* For those reasons, the court was "unwilling to consider [Berkeley Schools'] payment of the broker's and consultant's fees as

[Berkeley Schools'] acceptance of the Brokerage Service Agreements." *Id.* at 650.

Having resolved that Berkeley Schools had not assented to the unsigned Brokerage Service Agreements, the district court assessed the June 2002 Agreement signed by Cartwright. In that regard, the Denial Order accepted the factual representation of Berkeley Schools' lawyer that Cartwright was Thomas's "underling," and doing his bidding. *See Berkeley Cty. Sch. Dist.*, 363 F. Supp. 3d at 650 & n.10. Based on the lawyer's representation, the court "impute[d] [Cartwright's] signature to Thomas," and rejected any notion that Cartwright had bound Berkeley Schools to the June 2002 Agreement. *Id.* at 650 n.10.

Finally, the district court considered whether Thomas had bound Berkeley Schools to any of the Brokerage Service Agreements and Arbitration Clauses. The Denial Order ruled that Thomas had not acted within "the scope of his employment" as the CFO for Berkeley Schools when he signed (or caused Cartwright to sign) the June 2002 and June 2003 Brokerage Service Agreements, and when "he caused [Berkeley Schools] to pay the fees [pursuant to the unsigned Agreements] to the [Appellants and Knauff Insurance]." *See Berkeley Cty. Sch. Dist.*, 363 F. Supp. 3d at 650. The Denial Order explained that, under South Carolina law, an employee's conduct falls outside the scope of his employment and "will not be imputed to his employer" when he "'acts for some independent purpose of his own, wholly disconnected from the furtherance of his employer's business.'" *Id.* (quoting *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425, 429 (S.C.

Ct. App. 1991)). Because Thomas's actions were, the court found, "for the independent purpose of receiving kickbacks" and "actually harmed" Berkeley Schools, the court concluded that Thomas did not bind Berkeley Schools to the Brokerage Service Agreements and the Arbitration Clauses. *Id.* And because Berkeley Schools did not otherwise assent thereto, the Arbitration Motion was denied.

The Appellants noticed three separate appeals from the Denial Order, and those appeals have now been consolidated. We possess jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(B), which provides for interlocutory appellate review of an order denying a motion to compel arbitration.

II.

We review de novo the district court's denial of the Arbitration Motion, which was pursued under 9 U.S.C. § 4. *See Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 913 F.3d 409, 415 (4th Cir. 2019). In making that review, we accept as true the allegations of the Operative Complaint that relate to the "underlying dispute between the parties." *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 113 (2d Cir. 2012) (explaining that, in reviewing the denial of a § 4 motion, a court accepts as true the allegations in the "complaint that relate to the underlying dispute between the parties"); *Suburban Leisure Ctr., Inc. v. AMF Bowling Prods., Inc.*, 468 F.3d 523, 525 (8th Cir. 2006) (accepting allegations of complaint as true in reviewing court's denial of motion to compel arbitration).

Appendix E

Section 4 of Title 9 authorizes a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition [a] United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *See* 9 U.S.C. § 4. Section 4 provides that, when presented with such a petition (or motion), a court

> shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Id. On the other hand, § 4 further provides that if the "making of the arbitration agreement . . . be in issue," then "the court shall proceed summarily to the trial thereof." *Id.* (the "Trial Provision").

Section 4 thus requires that the district court—rather than an arbitrator—decide whether the parties have formed an agreement to arbitrate. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (explaining that dispute over formation of agreement to arbitrate "is generally for court[] to decide"); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) (agreeing with other courts of appeals that party's assent to arbitration provision is question for court).[9] In making such a decision,

9. The Supreme Court has recognized "that parties may agree to have an arbitrator decide not only the merits of a

the court is obliged to conduct a trial under the Trial Provision when a party unequivocally denies "that an arbitration agreement exists," and "show[s] sufficient facts in support" thereof. *See Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015).

To decide whether "sufficient facts" support a party's denial of an agreement to arbitrate, the district court is obliged to employ a standard such as the summary judgment test. *See Chorley Enters., Inc.*, 807 F.3d at 564; *see also* Fed. R. Civ. P. 56(a). In applying that standard, the court is entitled to consider materials other than the complaint and its supporting documents. *See Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 86 (4th Cir. 2016) (evaluating materials outside of complaint in assessing motion to compel arbitration). If the record reveals a genuine dispute of material fact "regarding the existence of an agreement to arbitrate," *see Chorley*

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particular dispute but also gateway questions of arbitrability." *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019) (internal quotation marks omitted). Here, the Arbitration Clauses incorporate the Commercial Rules of the American Arbitration Association, which provide that an arbitrator has the power to rule on arbitrability issues. *See* Am. Arbitration Ass'n, *Commercial Arbitration Rules*, R-7(a) (amended Oct. 1, 2013). Such provisions requiring the arbitration of arbitrability questions do not, however, undermine § 4 of Title 9 and preclude a court from deciding that a party never made an agreement to arbitrate *any* issue (which would necessarily encompass an arbitrability issue). *See*, *e.g.*, 9 U.S.C. § 4; *Lloyd's Syndicate 457 v. FloaTEC, LLC*, 921 F.3d 508, 514 (5th Cir. 2019); *Rivera-Colón v. AT&T Mobility P.R., Inc.*, 913 F.3d 200, 207 (1st Cir. 2019).

Enters., Inc., 807 F.3d at 564, the "court shall proceed summarily" and conduct a trial on the motion to compel arbitration, *see* 9 U.S.C. § 4. A factual dispute is material if the resolution thereof "might affect the outcome of the [motion] under the governing law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

III.

Here, the Appellants contend that the district court erred in denying the Arbitration Motion for two primary reasons. First, they maintain that the court misapprehended the applicable South Carolina legal principles in ruling that Thomas did not bind Berkeley Schools to the Brokerage Service Agreements and the Arbitration Clauses. Second, the Appellants contend that the court erred when it resolved disputed material factual issues without a trial, in contravention of the Trial Provision.[10] As explained below, although no party

10. At oral argument of these appeals, Hub International's lawyer initially appeared to change his position on whether material factual disputes exist in relation to the Arbitration Motion. That is—contrary to Hub International's appellate briefs—counsel asserted that there are no material factual disputes. Counsel later returned to his initial position, however, maintaining that the district court should have conducted a trial on the Arbitration Motion and conceding that the parties do not agree on the relevant facts. Despite the potential disconnect between the briefing and the oral argument representations, we are satisfied to address the issue as presented in the briefs. *See Baker v. Corcoran*, 220 F.3d 276, 295 n.16 (4th Cir. 2000) (electing to address issue as raised in appellate brief where conflict existed between brief and oral argument).

requested a trial on the Arbitration Motion, we are satisfied that the court was obliged to conduct one, in that genuine disputes of material fact exist regarding whether Berkeley Schools agreed to arbitrate the claims alleged in the Operative Complaint.

A.

We begin with the contention of Berkeley Schools that we should decline to address whether the district court erred in not conducting a trial on the Arbitration Motion, in that the Appellants did not properly preserve the factual disputes issue in the district court. Although Berkeley Schools is correct that we generally do not consider an issue raised for the first time on appeal, we possess the discretion to do so. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *United States v. Simms*, 914 F.3d 229, 238 n.4 (4th Cir. 2019) (en banc) (explaining discretion of court of appeals to review issue presented for first time on appeal); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 396-97 (4th Cir. 2004) (en banc) (same). And we have exercised such discretion where, inter alia, a district court makes an error that is "plain," or where declining to decide the issue "would result in a fundamental miscarriage of justice." *See Dixon v. Edwards*, 290 F.3d 699, 719 (4th Cir. 2002); *see also Williams v. Prof'l Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002) (explaining that we may decide issue first raised on appeal under "exceptional circumstances").

Here, we will assess and resolve the factual disputes issue because the district court plainly erred in failing to conduct the proceedings mandated by the Trial Provision. *See* 9 U.S.C. § 4 ("If the making of the arbitration agreement . . . be in issue, the court *shall* proceed summarily to the trial thereof." (emphasis added)); *Brickwood Contractors, Inc.*, 369 F.3d at 399 (resolving challenge to imposition of sanctions presented for first time on appeal because lower court contravened mandatory language of Rule 11).[11] Moreover, none of the parties to these appeals will be prejudiced by this exercise of discretion. That is, the record is sufficiently developed on the question of whether the Trial Provision was contravened, and the parties have had a full opportunity to brief and argue it. *See Abril v. Virginia*, 145 F.3d 182, 185 n.4 (4th Cir. 1998) (emphasizing "fairness" considerations when exercising discretion to address issue first presented on appeal).

B.

Exercising our discretion to review and resolve the factual disputes issue, we are satisfied that a remand is required by the Trial Provision of § 4. In explaining our ruling, we will begin with a summary of pertinent

11. Put succinctly, the district court's error in failing to adhere to the Trial Provision is plain, and the failure to conduct a trial pursuant thereto impacted the substantial rights of the Appellants. *See In re Celotex Corp.*, 124 F.3d 619, 630-31 (4th Cir. 1997) (applying plain error standard in civil appeal). And, in these circumstances, our failure to recognize the error would seriously affect the fairness and integrity of the proceedings. *Id.*

contract and agency law principles that relate to whether Berkeley Schools has agreed to the Brokerage Service Agreements and the Arbitration Clauses therein, and whether Thomas—as Berkeley Schools' agent—bound the Schools to those Agreements and Clauses. Applying those contract and agency law principles, we will then identify some material factual issues that the trial proceedings must resolve.

1.

Before identifying factual disputes on which a trial must be conducted, we will elucidate some state law principles that render those disputes material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (explaining that "substantive law" identifies "which facts are material"). Because the issue of whether an arbitration agreement has been formed is an issue of contract law, we apply the "ordinary state-law principles that govern the formation of contracts" in reviewing a challenge under § 4. *See Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 913 F.3d 409, 415 (4th Cir. 2019) (internal quotation marks omitted). In these appeals, Berkeley Schools and the Appellants agree that South Carolina law applies. *See Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 85 (4th Cir. 2016) (applying state law agreed upon by parties in deciding arbitration issue).

Under South Carolina law, a contract is formed between two parties when there is, inter alia, "a mutual

manifestation of assent to [its] terms." *See Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434, 436 (S.C. 1978) (internal quotation marks omitted); *see also Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696, 701 (S.C. 2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement."). Such mutual manifestation "ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party." *See* Restatement (Second) of Contracts § 22 (Am. Law Inst. 1981); *see also Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (S.C. 2003) ("The necessary elements of a contract are an offer, acceptance, and valuable consideration."). And the manifestation of assent can be a return promise or performance. *See Sauner*, 581 S.E.2d at 165-66.

As the Denial Order recognized, an entity (such as Berkeley Schools) can be bound by an acceptance made by another (such as Thomas) of terms of an offer if there is an agency relationship between the two. *See Sampson & Wyatt v. Singer Mfg. Co.*, 5 S.C. 465, 467 (S.C. 1875) (explaining that agent can bind his principal if agent has authority to do so and "duly exercise[s] it"). In that situation, the entity is the "principal," and the person binding the entity is the principal's "agent." Put succinctly, "[a]n agent contracting *with the authority of his principal* binds him to the same extent as if the principal personally made the contract." *See S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E.2d 617, 624 (S.C.

Ct. App. 1986) (emphasis added).[12] And that proposition can encompass an agreement to arbitrate made between an agent (for example, Thomas) on behalf of his principal (Berkeley Schools), on the one hand, and a third party (the Appellants or Knauff Insurance), on the other. *See Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167, 174 (S.C. 2019).[13]

Whether the essential agency relationship actually exists, and the extent of the agent's authority, is a question of fact under South Carolina law. *See Am. Fed. Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 467 S.E.2d 439, 442 (S.C. 1996) (existence of agency relationship is question of fact); *Hiott v. Guar. Nat'l Ins. Co.*, 329 S.C. 522, 496 S.E.2d 417, 421 (S.C. Ct. App. 1997) (extent of agent's authority is question of fact). The necessary agency relationship can be proven "by evidence of actual [authority] or apparent authority." *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113, 117 (S.C. Ct. App. 2000).

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12. A published decision of the intermediate court of appeals of South Carolina generally constitutes binding precedent, unless the decision conflicts with a decision from the high court of South Carolina. *See State v. Ross*, 423 S.C. 504, 815 S.E.2d 754, 757 n.5 (S.C. 2018) (explaining that published opinion of South Carolina appellate court is binding precedent); S.C. App. Ct. R. 220(a) (explaining publication of appellate decisions); *see also* S.C. Const., art. V. § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

13. South Carolina's highest court "has recognized several theories that could bind nonsignatories to arbitration agreements." *See Wilson*, 827 S.E.2d at 174. We focus on agency relationship concepts because they more likely resemble the parties' positions in these proceedings.

Under South Carolina law, "actual authority [must be] expressly conferred upon the agent by the principal." *See Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263, 265 (S.C. 2009). Apparent authority, on the other hand, can exist where "the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority." *Id.* In other words, an apparent authority inquiry "focuses on the principal's manifestation to a third party that the agent has certain authority." *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 296 (S.C. 1996). Under the concept of apparent authority, the principal is "bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption." *Id.* When, however, a person dealing with an agent has notice of restrictions on the agent's authority and the agent contravenes those restrictions, or that person could not reasonably believe that the principal authorized the agent's conduct, the principal will not be bound by the agent's actions. *See id.*; *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425, 428-29 (S.C. Ct. App. 1991).

Important here—on the interplay of agency and contract principles—whether the agent possesses actual or apparent authority to bind his principal goes to the formation of a contract. *See Nat'l Fed. of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 81 (1st Cir. 2018) ("A challenge to formation can . . . be done by showing that one party never agreed to the terms of the contract, [or]

that a signatory did not possess the authority to commit the principal. . . ." (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (explaining that whether agent had authority to bind principal is contract formation issue); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991) (same). Accordingly, if the agent (for example, Thomas) lacks authority to bind his principal (Berkeley Schools) to a contract with a third party (the Appellants or Knauff Insurance) yet purports to do so anyway, no contract is formed between the principal and the third party. *See, e.g.*, *Nat'l Fed. of the Blind*, 904 F.3d at 81; *Sphere Drake Ins. Ltd.*, 256 F.3d at 591; *cf. Sauner*, 581 S.E.2d at 166 (emphasizing that offer and acceptance are "necessary elements" to form contract); *Edens*, 247 S.E.2d at 436 (explaining that mutual assent to terms is required to form contract). In sum, the existence of a contract is ultimately a question for a factfinder where "the evidence is either conflicting or admits of more than one inference." *See Small v. Springs Indus., Inc.*, 292 S.C. 481, 357 S.E.2d 452, 454 (S.C. 1987).

2.

Consistent with the South Carolina legal principles spelled out above, we are satisfied that there are genuine disputes of material fact that must be resolved in order to determine whether Berkeley Schools agreed to arbitrate its claims against the Appellants. To assist that endeavor, we will identify factual disputes concerning certain

Brokerage Service Agreements and the Arbitration Clauses, including disputes regarding Berkeley Schools' knowledge of the unsigned Agreements, whether Thomas possessed actual authority to approve those Agreements for Berkeley Schools, and whether Thomas possessed any apparent authority in that respect.[14] In so doing, we begin with the formation of the four Agreements that fall within the period of the alleged claims (that is, 2005 to 2017). We then turn to the June 2002 and June 2003 Agreements and their Arbitration Clauses, both of which predate the alleged conduct underlying the Operative Complaint.

A.

(1)

To start, there is a significant factual dispute regarding Berkeley Schools' knowledge of the Brokerage Service Agreements purportedly formed during the period encompassed by the Operative Complaint, i.e., the four unsigned Agreements. On the one hand, those Agreements are in the nature of fugitive documents and are not signed by Berkeley Schools or anyone else. *See*

14. We assess the Brokerage Service Agreements and the Arbitration Clauses together because, in these circumstances, the latter could not exist without the former. That is—although an arbitration clause is generally "severable from the contract in which it appears"—if the contract in which the arbitration clause "appears" was never formed, then the arbitration clause therein does not exist. *See Granite Rock Co.*, 561 U.S. at 299 (explaining severability principle and that such principle does not apply where party challenges formation of contract containing arbitration clause).

Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854-55 (11th Cir. 1992) (concluding that dispute of fact existed where party denied existence of arbitration agreement and contract containing arbitration clause was unsigned), *abrogation on other grounds recognized by Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329-30 (11th Cir. 2016). And Abrahamson (Berkeley Schools' Director of Procurement and Contracting) has sworn that those Agreements were not in the Berkeley Schools' files. *See Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 162 (3d Cir. 2009) (ruling that party's sworn assertion that she never received purported agreement containing arbitration clause created material dispute of fact).

On the other hand, the Appellants rely on the fact that Berkeley Schools made payments of large sums of money to Knauff Insurance for purported brokerage services from 2005 through 2012. A reasonable factfinder could thus infer Berkeley Schools' knowledge of, and acquiescence to, the Agreements, which contained provisions relating to brokerage services. A factual dispute therefore exists with respect to Berkeley Schools' knowledge of the unsigned Agreements. And that dispute is material in these proceedings because it concerns Berkeley Schools' acceptance of the Agreements and the Arbitration Clauses. *See Sauner*, 581 S.E.2d at 166 (emphasizing that acceptance of offer is necessary to form contract).

(2)

Next, there are readily identifiable factual disputes regarding Thomas's actual or apparent authority to

assent—on Berkeley Schools' behalf—to the four unsigned Brokerage Service Agreements and their Arbitration Clauses. *See Hiott*, 496 S.E.2d at 421 (explaining that extent of agent's authority is question of fact). As to *actual* authority, Abrahamson explained in her declaration that

> Thomas, in his position as Chief Financial Officer, did not have any authority to unilaterally contract for the procurement of insurance consulting services . . . on behalf of [Berkeley Schools] during the period from 2005 through the present.

See J.A. 125; *see also Richardson*, 682 S.E.2d at 265 (explaining that "actual authority is expressly conferred upon the agent by the principal"); *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679, 686 (S.C. Ct. App. 2016) (agreeing with other courts that agent may not expand actual authority).

In contrast, the Information filed by the United States Attorney—to which Thomas pleaded guilty—specifies that, as Berkeley Schools' CFO, Thomas was "responsible for procuring and paying for [its] insurance policies." *See* J.A. 199; *see also Thompson v. Greene*, 427 F.3d 263, 268 (4th Cir. 2005) (considering document attached to pleading as part thereof). Whether Thomas had actual authority to accept the Agreements and the Arbitration Clauses on behalf of Berkeley Schools is thus a disputed material fact, and that dispute relates directly to the formation of those Agreements. *See Nat'l Fed. of the Blind*, 904 F.3d at 81 (explaining that scope of agent's authority goes to

formation of contract); *Sphere Drake Ins. Ltd.*, 256 F.3d at 591 (same); *Three Valleys Mun. Water Dist.*, 925 F.2d at 1140-41 (same).

There is also a factual dispute concerning Thomas's *apparent* authority to assent, on Berkeley Schools' behalf, to the four unsigned Brokerage Service Agreements and the Arbitration Clauses therein. In support of apparent authority, Berkeley Schools held Thomas out as its CFO. That fact might lead a reasonable person to believe that Berkeley Schools had granted Thomas ample authority to contract on its behalf. *See Rickborn*, 468 S.E.2d at 296 (explaining that a principal is "bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence . . . are led to believe that the agent has certain authority"); *WDI Meredith & Co. v. Am. Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885, 887 (S.C. Ct. App. 2004) (relying, in part, on employee's "vice president" title in assessing apparent authority). And the payment of substantial brokerage fees to the Appellants and Knauff Insurance by Berkeley Schools could prompt a person of ordinary prudence to believe that Thomas had the authority to enter into the Agreements on the Schools' behalf.

On the other hand, however, a rational factfinder might well conclude that a reasonable person would not believe that Berkeley Schools had granted Thomas any authority to illegally steer contracts, like the Brokerage Service Agreements, to the Appellants and Knauff Insurance. *See Vereen*, 412 S.E.2d at 428-29 (emphasizing that principal is not bound by agent's conduct where third party could

not reasonably believe that principal authorized agent's conduct). Indeed, the Operative Complaint and the federal Information, read together, convincingly show that Thomas illegally steered insurance contracts to the Appellants and Knauff Insurance. They also reveal that Thomas's acts of contract steering were ongoing in March 2010, shortly after the December 2009 Brokerage Service Agreement was purportedly formed (and while—according to its terms—it was in effect), and before the May 2011 Agreement was allegedly formed. A reasonable factfinder could also conclude that those Agreements resulted from actions to carry out the steering and kickback fraud scheme and conspiracy, and that the other unsigned Agreements (i.e., the August 2005 and December 2006 Agreements) also resulted therefrom. *See Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32-33 (2d Cir. 2001) (remanding for trial on motion to compel arbitration where third party knew, or should have known, that agent had exceeded his authority by entering into contract containing arbitration clause).

Additionally, the Operative Complaint and state Indictment (to which Thomas also pleaded guilty) show that Thomas was actually involved in criminal conduct with the Appellants and Knauff Insurance over many years and as early as November 2007. That fact could readily undermine any understanding that Thomas possessed apparent authority to enter into the unsigned Agreements.

Turning to Berkeley Schools' payments of brokerage fees to the Appellants and Knauff Insurance, the record is

unclear as to who approved those payments from Berkeley Schools. On this record, however, Thomas alone likely did so, as he oversaw payments to Berkeley Schools' vendors. And if Thomas arranged those payments as part of the kickback and fraud scheme and conspiracy with the Appellants and Knauff Insurance, a factfinder might well decline to attribute them to Berkeley Schools for apparent authority purposes. *See R & G Constr., Inc.*, 540 S.E.2d at 118 (explaining that focus of apparent authority inquiry is on principal's actions).

In sum, questions of material fact abound with respect to Thomas's actual or apparent authority to assent—on Berkeley Schools' behalf—to the fugitive documents that constitute the unsigned Brokerage Service Agreements and the Arbitration Clauses therein. *See Hiott*, 496 S.E.2d at 421 (explaining that extent of agent's authority is question of fact). Those factual questions concern the formation of the Agreements and the Arbitration Clauses, and can only be resolved by proceedings conducted pursuant to the Trial Provision. *See*, *e.g.*, *Nat'l Fed. of the Blind*, 904 F.3d at 81 ("A challenge to formation can . . . be done by showing . . . that a signatory did not possess the authority to commit the principal. . . ."); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000) (affirming denial of motion to compel arbitration pending trial on agent's authority to enter into arbitration agreement); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir. 1980) (remanding for trial to decide employee's authority to bind employer to arbitration agreement).

B.

Having identified some factual disputes concerning the formation of the four unsigned Brokerage Service Agreements and the Arbitration Clauses, we turn to the June 2002 and June 2003 Agreements. Those Agreements predate the steering and kickback fraud scheme and conspiracy alleged in the Operative Complaint. The Denial Order deemed the June 2002 and June 2003 Agreements as relevant because the initial complaint had predicated some of its claims on conduct dating from 2001. We have recognized, however, that an amended complaint—such as the Operative Complaint here—supersedes an initial complaint and renders it "of no effect." *See Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (quoting *Young v. City of Mt. Ranier*, 238 F.3d 567, 573 (4th Cir. 2001)).

Moreover, because the June 2002 Agreement terminated in June 2003, and the June 2003 Agreement ended in June 2004, the Arbitration Clauses therein could not require Berkeley Schools to arbitrate any claims on the basis of conduct that began after those Agreements terminated. At best, the June 2002 and June 2003 Agreements might be relevant to questions of whether Berkeley Schools had knowledge of, or assented to, the subsequent Brokerage Service Agreements and Arbitration Clauses. We leave such issues, however, for the remand proceedings.[15]

15. In assessing the June 2002 Brokerage Service Agreement, the Denial Order determined that Cartwright (who signed that Agreement) could not bind Berkeley Schools because she was

C.

At bottom, there are multiple disputes of material fact as to "the making of [any] arbitration agreement" between Berkeley Schools and the Appellants. *See* 9 U.S.C. § 4. The Trial Provision obliged the district court to conduct trial proceedings and thereby resolve those disputes before resolving the Arbitration Motion. *See id.* (requiring trial to be conducted where "the making of the arbitration agreement" is "in issue"); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (explaining that appellate court is obliged to remand for trial when "factual issue exists regarding the formation of the arbitration agreement"); *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015) (emphasizing that district court must conduct trial on motion to compel arbitration where material factual dispute exists).

With respect to the type of trial proceedings that the district court might conduct on remand, we observe that § 4 provides as follows:

> If no jury trial be demanded by the party alleged to be in default, . . . the court shall hear and determine such issue. Where such an issue

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Thomas's "underling," and doing his bidding. *See Berkeley Cty. Sch. Dist.*, 363 F. Supp. 3d at 650 & n.10. That conclusion was predicated solely on the representation of Berkeley Schools' lawyer at the May 2018 hearing. We have explained, however, that the statements of a lawyer are not evidence. *See Couch v. Jabe*, 679 F.3d 197, 202 n.4 (4th Cir. 2012). Such reliance was therefore unwarranted.

> is raised, the party alleged to be in default may . . . on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury[.]

See 9 U.S.C. § 4. Section 4 thus authorizes the "party alleged to be in default"—that is, the party that failed to comply with an arbitration agreement—to request a jury trial "on or before the return day of the notice of application." *Id.*; *see also Burch v. P.J. Cheese, Inc.*, 861 F.3d 1338, 1349 (11th Cir. 2017) (explaining that party that failed to comply with arbitration agreement is "party alleged to be in default").[16] In these circumstances, it appears that Berkeley Schools, as "the party alleged to be in default" of the Arbitration Clauses, could have demanded a jury trial on the Arbitration Motion. *See* 9 U.S.C. § 4. Berkeley Schools could also presumably have waived a jury and accepted a bench trial.

Finally, we recognize § 4's objective of encouraging the district courts to decide an arbitration dispute "quickly so the parties can get on with the merits of their dispute in the right forum." *See Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 978 (10th Cir. 2014). In that regard, the Trial Provision requires a court to "proceed summarily"

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16. The "notice of application" in § 4 is apparently the notice of the filing of the motion to compel arbitration, and the "return day" therein is the date set for responding to such a motion. *See Burch*, 861 F.3d at 1349 n.19 (determining that the "return day of the notice of application" was when the party that received the motion to compel arbitration was required to respond).

to trial when there is a material factual dispute related to the making of an arbitration agreement. *See* 9 U.S.C. § 4; *see also Howard*, 748 F.3d at 978-79 ("Having found unresolved questions of material fact precluded it from deciding definitively whether the parties agreed to arbitrate, the district court was in no position to *deny* a motion to arbitrate. It *had* to move promptly to trial of the unresolved factual questions surrounding the parties' claimed agreement to arbitrate."). The courts of appeals may disagree somewhat on the procedures that a district court should employ before conducting the trial, and there is not a great deal of authority on that topic. *Compare Howard*, 748 F.3d at 984 ("[W]hen factual disputes may determine whether the parties agreed to arbitrate, the way to resolve them isn't by round after round of discovery and motions practice."), *with Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 776 (3d Cir. 2013) (explaining that "limited discovery" and motions practice may be appropriate under § 4). In order to resolve these appeals, we do not delineate the pretrial procedures to which a court should adhere. Those procedures are reserved to the able lawyers for the parties and the sound discretion of our distinguished colleague on the district court.

IV.

Pursuant to the foregoing, we vacate the Denial Order and remand for such other and further proceedings as may be appropriate.

VACATED AND REMANDED

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FILED JANUARY 29, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:18-cv-00151-DCN

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff,

vs.

HUB INTERNATIONAL LIMITED,
HUB INTERNATIONAL MIDWEST LIMITED,
HUB INTERNATIONAL SOUTHEAST,
KNAUFF INSURANCE AGENCY, INC.,
STANLEY J. POKORNEY, SCOTT POKORNEY,
AND BRANTLEY THOMAS,

Defendants.

Filed January 29, 2019

ORDER

This matter is before the court on defendants HUB International Limited, HUB International Midwest Limited, HUB International Southeast, and Knauff Insurance Agency, Inc.'s (collectively, "HUB") motion

to compel arbitration. Defendants Stanley J. Pokorney ("Pokorney") and Scott Pokorney ("Scott Pokorney") (collectively with HUB, "the Insurance Defendants") joined in the motion. For the reasons set forth below, the court denies the motion to compel arbitration.

I. BACKGROUND

This case arises out of the alleged embezzlement of millions of dollars from plaintiff Berkeley County School District ("the District"). The District alleges that its former Chief Financial Officer Brantley Thomas ("Thomas") conspired with HUB and HUB's employees Pokorney and Scott Pokorney to defraud the District through a concerted kickback scheme related to the purchasing of unnecessary insurance policies. Specifically, the District alleges that "Thomas engaged in a pervasive scheme of corruption, in which he embezzled and misappropriated District funds, demanded and accepted multiple illegal kickbacks, and exposed the District to exorbitant fees and losses that have cost the taxpayers of Berkeley County tens of millions of dollars." ECF No. 36 at 2. Thomas allegedly conspired with Pokorney, who was the District's insurance consultant and broker, and HUB to concoct a scheme in which Thomas helped Pokorney and HUB obtain the District's insurance business in exchange for kickbacks. As part of this scheme, the District alleges, Thomas and the Insurance Defendants advised the District to purchase insurance policies that they knew were excessive and duplicative and for which the Insurance Defendants received commissions. The District also alleges that the Insurance Defendants charged sham broker's and

consulting fees for the management of this insurance and the associated insurance reviews that were improperly conducted. The District alleges that from 2005 to 2017, it paid $6,799,956.50 in premiums and $2,994,311.65 in broker's fees to the Insurance Defendants. Throughout the scheme, Thomas was provided with kickbacks totaling $32,000, in addition to expensive trips, hotel rooms, meals, and spa services.[1]

As part of their alleged concerted effort to defraud the District, Thomas and the Insurance Defendants entered into a number of brokerage service agreements ("the Brokerage Service Agreements"), each containing the following arbitration clause:

> All disputes, claims or controversies relating to this Agreement, or the services provided, which are not otherwise settled, shall be submitted to a panel of three arbritrators and resolved by final and binding arbitration, to the exclusion of any courts of laws, under the commercial rules of the American Arbitration Association.
>
> In those instances where any party is involved in an underlying claim or coverage dispute but the other is not, it is agreed that the arbitrators shall not be bound by any factual or legal determinations in such underlying claim or coverage dispute and that the arbitrators shall,

1. The court has reviewed Thomas's presentence report and Preliminary Order of Forfeiture, which lead the court to believe the kickbacks far exceed $32,000.

> in those cases where liability and/or damages cannot fairly be evaluated until resolution of the underlying claim or coverage dispute, defer their consideration pending resolution of any such underlying claim or coverage dispute.

See, e.g., ECF No. 23, Ex. B at 3 ("the Arbitration Clauses"). The District claims that it had never seen these Brokerage Service Agreements until the Insurance Defendants filed the motion at issue here.

On November 15, 2017, a South Carolina grand jury indicted Thomas on four counts of embezzlement. In one of the counts, the grand jury charged that Thomas deliberately caused the District to overpay a vendor and then ordered the vendor to send the refund of the overpayment to Thomas's home so that Thomas could use the refund for personal use. The complaint alleges that the vendor was Knauff Insurance Agency ("Knauff"), the predecessor to HUB, and Pokorney was the Knauff employee who refunded to the overpayment to Thomas. Thomas entered a plea of guilty to all of the state charges.

In addition, on December 7, 2017, the United States Attorney for the District of South Carolina charged Thomas with ten counts of wire fraud arising out of the illegal kickbacks in the amount of $32,000 that he received from "a broker employee" in exchange for "steer[ing] [the District's] insurance policy purchases through" the broker employee. ECF No. 36 at 9. Thomas entered a guilty plea to these charges. The broker employee, the District alleges, is Pokorney.

Appendix F

On January 18, 2018, the District filed suit in this court alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the South Carolina Unfair Trade Practices Act, fraud, aiding and abetting fraud, civil conspiracy, breach of fiduciary duty, negligence, constructive trust, and unjust enrichment against all defendants, and negligence per se and breach of contract against the Insurance Defendants. On March 5, 2018, HUB filed a motion to compel arbitration, arguing that all of the District's claims stem from the Brokerage Service Agreements that contain the Arbitration Clauses. ECF No. 23. Scott Pokorney joined the motion on March 12, 2018, ECF No. 29, and Pokorney joined the motion on March 19, 2018, ECF No. 35. On March 19, 2018, the District filed a response to the motion to compel arbitration. ECF No. 33. On that same day, the District also filed an amended complaint. ECF No. 36. In this amended complaint, now the operative complaint in this case, the District removes certain claims, such as the breach of contract claim, and levies the following causes of action: RICO, fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, conversion, constructive trust, and unjust enrichment against all defendants, and negligence per se against the Insurance Defendants. HUB filed a reply on March 26, 2018. ECF No. 38. The court held a hearing on May 17, 2018. Pursuant to the court's request, the parties submitted supplemental briefing on July 6, 2018 addressing the potential impact of the United States Supreme Court's grant of certiorari in *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017), cert. granted, 138 S. Ct.

2678, 201 L. Ed. 2d 1071 (2018) (mem.). ECF Nos. 57-59.[2] The motion has been fully briefed and is now ripe for the court's review.

II. DISCUSSION

The Insurance Defendants contend that this case must be resolved by arbitration because the Arbitration Clauses in the Brokerage Service Agreements clearly evince the parties' intent to submit the threshold question of arbitrability to the arbitrator. As such, they argue, any questions about the validity, scope, or enforceability of the Arbitration Clauses have been reserved for the arbitrators to decide. The District opposes arbitration and submits a number of challenges to both the Arbitration Clauses and the entirety of the Brokerage Service Agreements, including: (1) the are invalid under South Carolina law because the District never agreed to them and was unaware they existed until the filing of this motion to compel; (2) Thomas could not have agreed to

2. The Supreme Court recently issued its opinion in this case. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 202 L. Ed. 2d 480, 2019 WL 122164 (U.S. 2019). On January 9, 2019, HUB filed a notice alerting the court of the Supreme Court's opinion and arguing that it provides support for the motion to compel arbitration. ECF No. 60. The District responded to the notice on January 23, 2019, ECF No. 61, and HUB filed a motion to strike the District's response on January 28, 2019, ECF No. 62. As discussed in greater detail below, the court does not rely on *Henry Schein, Inc.* in its order. Nor does the court rely on the additional authorities included in the District's response and identified in HUB's motion. Therefore, the court finds HUB's motion to strike to be moot.

the Brokerage Service Agreements because the South Carolina state procurement code requires that the District undertake a competitive bid process to enter into such contracts, which was not followed here, and the procurement code does not allow for the District to enter into contracts that require arbitration; (3) the Arbitration Clauses should be found null and void because they were induced by fraud; (4) the Arbitration Clauses are unenforceable because the Insurance Defendants' and Thomas's actions related to the Brokerage Service Agreements were illegal, outrageous, and fraudulent; (5) Thomas was acting outside of the scope of his agency when he entered into the Brokerage Service Agreements; (6) not all of the claims in the amended complaint relate to the Brokerage Service Agreements; (7) the District is not seeking to enforce the Brokerage Service Agreements, which would in turn require enforcing the Arbitration Clauses; and (8) the Arbitration Clauses do not require arbitrators to determine arbitrability. The Insurance Defendants counter that all of the District's challenges to the existence of both the Arbitration Clause and the Brokerage Service Agreements must be resolved by the arbritrator, because the commercial rules of the American Arbitration Association ("AAA") were incorporated by reference into the Arbitration Clauses. The rules state that "[t]he 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." ECF No. 38 at 3 (citing AAA Rules, R-7(a)). Thus, according to the Insurance Defendants, there is "clear and unmistakable evidence of the parties' intent to arbitrate arbitrability,"

meaning the court has no jurisdiction to determine even the threshold question of arbitrability and must send the case to arbitration. *See Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017).

The law on arbitration has become rather complex. There are nuances that can be easy to overlook, and courts use various terms interchangeably, which has led to areas of the law becoming convoluted. Therefore, before addressing the specific arguments of the case at hand, the court will provide an overview of the law related to the relevant arbitration principles at issue here.

As an initial matter, courts use the word "agreement" in a variety of contexts when discussing arbitration, sometimes making it difficult to determine to which agreement the court is actually referring. The general meeting of the minds to use arbitration as a method of dispute resolution will be referred to as "an agreement to arbitrate." Within an agreement to arbitrate, parties may also agree to send questions of arbitrability to arbitration. Arbitrability refers to "gateway questions," such as whether the parties agreed to arbitrate or whether the agreement to arbitrate covers a certain dispute. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). An agreement to arbitrate these gateway questions "is simply an additional, antecedent agreement" to an agreement to arbitrate. *Id.* at 70.

An agreement to arbitrate may be included in a contractual relationship in two ways. First, the parties

may form a new relationship, for example, an employer/employee relationship. Pursuant to that relationship, they may sign a contract, the entirety of which requires parties to arbitrate any disputes related to their relationship. For example, in *Rent-A-Center*, the employer hired an employee, and they entered into a contract titled "Mutual Agreement to Arbitrate Claims" as a condition to the employee's employment. 561 U.S. at 65. The court will refer to this type of agreement to arbitrate as an "arbitration contract." Within an arbitration contract, there may be a delegation provision that delegates any dispute regarding the parties' relationship to arbitration ("delegation provision"). *Id.* at 68.

Alternatively, parties may enter into a contract related to any number of topics. The court will refer to this contract as a "container contract." Within that contract, there may be an arbitration clause ("arbitration clause") that requires any claim related to the container contract to be resolved by arbitration. An example of a container contract is found in *Simply Wireless, Inc.*, where the parties entered into a contract titled "Amended & Restated Limited Purpose Co-Marketing and Distribution Agreement for Equipment Sold th[r]ough HSN & QVC" pursuant to the parties' joint project. 877 F.3d at 524. This contract contained an arbitration clause that sent claims related to the contract to arbitration. *Id.* at 525. Moreover, within the arbitration clause, there may be a delegation provision that requires an arbitrator to resolve any arbitrability questions. Here, the challenged agreement to arbitrate is an arbitration clause found within the Brokerage Service Agreements, which are

container contracts. While there is no separate delegation provision in the Arbitration Clauses within the Brokerage Service Agreements, the Insurance Defendants argue that the incorporation of the AAA rules create a de facto delegation provision. Therefore, for ease of reference and where appropriate, in subsequent discussion the court will refer to agreements to arbitrate as arbitration clauses.

A. Principles of Arbitration Law

First, the court will discuss how a challenge to the validity of an arbitration clause under the § 2 of the Federal Arbitration Act ("FAA") is handled. Then the court will distinguish between a challenge to the validity of the clause and a challenge to whether an agreement to arbitrate was formed in the first place. This distinction between validity and formation will become important later in the discussion. After identifying the distinction, the court will explain that when a party argues that it never agreed to arbitrate, it is generally the court's role to determine whether the parties did in fact form an agreement to arbitrate. In addition, the court will analyze the question of whether it must constrain its formation determination to the arbitration clause, or if it may consider formation of the container contract as well. Then, the court will discuss how challenges to a delegation provision are handled. Within this discussion, the court draws another distinction between the arbitrability issues of scope and formation. The court concludes by explaining that even if it appears that the parties agreed to arbitrate issues of arbitrability, the court still must first determine whether those parties entered into an

agreement to arbitrate in the first place, meaning that here, the court must determine whether the District formed an agreement to arbitrate with the Insurance Defendants. The court also concludes that it may consider both the Arbitration Clauses and the Brokerage Service Clauses to determine if such an agreement exists. For the reasons discussed further below, the court finds here that an agreement to arbitrate was not properly formed, and thus denies the Insurance Defendants' motion to compel arbitration.

1. Challenges to Validity of an Arbitration Clause under § 2 of the FAA

Under the FAA, arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (U.S. 1983). As the Supreme Court explained in *Buckeye Check Cashing, Inc. v. Cardegna*, there are two types of challenges under § 2 that a party may make related to the validity of an arbitration clause. 546 U.S. 440, 444, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). The first challenge is to the validity of the arbitration clause itself, and the second challenge goes to the validity of the entire container contract. *Id.* A challenge to the validity of the container contract must go to an arbitrator, because the arbitration clause within the container contract represents

the parties' agreement to resolve the challenge through arbitration. *Id.* at 448-49. But a challenge to the validity of the arbitration clause itself may be considered by a court. *Id.* A court may do so because the arbitration clause provides the court the authority to compel arbitration, so if the arbitration clause is invalid, the court cannot compel arbitration. This distinction gives courts the ability to view the validity of an arbitration 9 clause separately from the validity of the container contract. *Id.* at 449. Courts refer to this as the severability rule. *See, e.g., Rent-A-Center*, 561 U.S. at 71 (discussing this distinction and referring to it as "the severability rule"). Therefore, courts generally have the power to determine the validity of an arbitration clause before requiring the parties to arbitrate an issue. However, if a party is challenging the validity of the container contract, the challenge must be heard by an arbitrator.

2. Validity Distinguished from Formation

The issue of whether an arbitration clause is valid under § 2 of the FAA is a different issue from whether the parties ever formed an agreement to arbitrate. *Rent-A-Center*, 561 U.S. at 70 n.2; *see also Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n.1 ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded.").[3] Indeed, the Supreme Court explained

3. While the *Rent-A-Center* Court and the *Buckeye Check Cashing, Inc.* Court both identify this distinction, they also both clarify that they only subsequently address validity of the agreements to arbitrate, not their formation. *Rent-A-Center*,

that the validity of an arbitration clause, which is governed by § 2, addresses "whether it is legally binding, *as opposed to whether it was in fact agreed to*." *Rent-A-Center*, 561 U.S. at 69 n.1 (emphasis added); *see also Nat'l Fed'n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 80 (1st Cir. 2018) ("Pursuant to established Supreme Court precedent, however, there's an important distinction between arguments challenging the *validity* of an agreement and those challenging an agreement's *formation*." (citations omitted) (emphasis in original)); *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P.*, 853 F.3d 804, 810 (5th Cir. 2017) ("The Court made clear in *Buckeye Check Cashing* and *Rent-A-Center* that when it explained that '[t]here are two types of validity challenges under § 2,' it was not addressing a contention that no agreement was ever concluded by the parties.'" (citations omitted)). Therefore, an arbitration clause's validity under § 2 goes to whether the clause may be enforced, requiring the court to send the dispute to arbitration, not whether the parties agreed to arbitrate in the first place.

3. Challenges to the Formation of an Agreement to Arbitrate

When a party disputes whether it agreed to the arbitration clause in the first place, as opposed to whether the clause is valid, it is exclusively within the court's province to determine if an agreement to arbitrate was

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561 U.S. 63, 71 n.2, 130 S. Ct. 2772, 177 L. Ed. 2d 403; *Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n.1. Therefore, neither Court discusses this distinction beyond its initial identification of the distinction.

formed. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below)[4] should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). This stems from the basic principle that arbitration is a matter of contract law, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). "This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (citing *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374, 94 S. Ct. 629, 38 L. Ed. 2d 583 (1974)). As with any contract dispute, courts have the authority to evaluate whether an agreement to arbitrate was formed. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) ("[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate."). Therefore, "a court may order arbitration only when it 'is satisfied that the parties agreed to arbitrate.'" *Lorenzo v. Prime Commc'ns, L.P.*, 806 F.3d 777, 781 (4th Cir. 2015) (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010)).

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4. This qualification relates to challenges to delegation provisions, which the court discusses in the next section.

Appendix F

When a party challenges whether it agreed to arbitrate, it is unclear if the court is constrained to only consider the formation of the arbitration clause, or if it may consider the formation of the entire container contract as well. While the severability rule clearly establishes that a court may only consider the validity of an arbitration clause and not the validity of the container contract, there is a distinction between validity and formation. This suggests that the severability rule may not apply to formation challenges. The Supreme Court has not provided a clear answer to this question. In *Buckeye Check Cashing, Inc.*, the Court specifically referred to a contract when discussing the validity/formation distinction, suggesting that a court may consider the container contract's formation. *See* 546 U.S. at 444 n.1 ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded."). However, in *Rent-A-Center*, the Court used the word "agreement" ambiguously, making it difficult to determine if the Court was referring to the agreement to arbitrate or the container contract.[5] In its discussion, the *Rent-A-Center* Court first distinguished between challenges to the validity of "the agreement to arbitrate" and to the validity of "the contract as a whole." 561 U.S. at 70. It continued by stating that it would only consider the first challenge, and then said in a footnote that "[t]he issue of

5. Notably, the agreement to arbitrate at issue in *Rent-A-Center* was an arbitration contract with a delegation provision. 561 U.S. at 65-66. However, the Court held that the principles it discussed apply whether the agreement to arbitrate was an arbitration contract or an arbitration clause within a container contract. *Id.* at 71-72.

the agreement's 'validity' is different from the issue [of] whether any agreement between the parties 'was ever concluded.'" *Id.* at 70 n.2. The footnote cited *Buckeye Check Cashing*, suggesting that the "agreement" to which the Court refers is the container contract. However, the Court previously used the word "contract" to refer to the container contract instead of "agreement," suggesting that "agreement" applies to the agreement to arbitrate.

This lack of clarity was perpetuated in *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010). In *Granite Rock Co.*, local union members went on strike on June 9, 2004 when their negotiations to enter into a new collective bargaining agreement ("CBA") with Granite Rock failed. *Id.* at 292. On July 2, the parties agreed to a CBA, which contained a no-strike provision and an arbitration clause. *Id.* However, the relationship soured again, the strike continued, and Granite Rock initiated a lawsuit on July 9 for violation of the no-strike provision, pursuant to the terms of the new CBA. *Id.* at 293-94. In response, the union argued that the CBA was not ratified until August 22, meaning that it was not ratified when the suit was filed or while the strike was occurring. *Id.* at 304. This created a debate over whether, under the new CBA, the parties had to arbitrate the ratification date dispute. The issue presented to the Supreme Court was whether the question of when the CBA was ratified, and therefore formed, was a question for the court or arbitration. The Supreme Court held that it was an issue for the court to decide, because if the CBA was not ratified at the time the suit was filed, then the parties had not agreed to arbitrate at that time, and the dispute could not be sent to arbitration. *Id.* at 305.

However, as at least one commentator has noted, "[t]he decision is fundamentally ambiguous" in that the Court "describes the issue in some places in the opinion as entailing the existence of the contract as a whole, and in other places as entailing the existence of the arbitration agreement as such—almost as if that distinction no longer mattered, provided the existence of the one or the other is in issue." George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 50 n.133 (2012). Indeed, in some places of the opinion, the Court considered whether the CBA as a whole, which was the container contract, was formed to determine if the parties agreed to the arbitration clause within the CBA. *See Granite Rock Co.*, 561 U.S. at 305 ("If . . . the CBA containing the parties' arbitration clause was not ratified, and thus not formed, until August 22, there was no CBA for the July no-strike dispute to 'arise under,' and thus no valid basis for the . . . conclusion that Granite Rock's July 9 claims arose under the CBA and were thus arbitrable.").

In subsequent circuit court cases, some courts have only considered challenges to the formation of the agreement to arbitrate and not challenges to the formation of the container contract. For example, in *Nat'l Fed'n of the Blind*, the First Circuit only addressed the formation of the agreement to arbitrate. 904 F.3d at 83-84. It interpreted the plaintiffs' challenge as being to the formation of the agreement to arbitrate and did not reach the issue of whether formation challenges to the container contract belong with the court. *Id.* at 82 n.16. Yet in *Edwards v. Doordash Incorporated*, the Fifth Circuit considered whether the entire container contract

was formed, not the narrower question of whether an agreement to arbitrate was formed. 888 F.3d 738, 744 (5th Cir. 2018).

This is where the validity and formation distinction plays an important role. When a party challenges validity, the court may only look at the validity of the arbitration clause, not the validity of the container contract, as required by the severability rule. However, validity and formation are different, suggesting that a court may not be bound by the severability rule when considering formation. This would allow the court to consider both the arbitration clause and the container contract to determine whether the parties ever formed an agreement to arbitrate. From a practical standpoint, it would be quite difficult to view the arbitration clause in isolation from the container contract when determining formation issues, because indicators of mutual assent, such as a party's signature, normally apply to the entire contract, not just an individual clause. Indeed, "[w]hen one has not manifested assent to the container contract, one cannot be bound by a single stitch of its text." David Horton, *Arbitration about Arbitration*, 70 Stan. L. Rev. 363, 424 (2018); *see also Lorenzo*, 806 F.3d at 782 (finding no agreement to arbitrate by relying on a signed acknowledgement form that the parties did not agree to be contractually bound by the employee handbook, which contained an arbitration clause); *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 372 (2d Cir. 2003) (finding no agreement to arbitrate because each party signed different contract addenda containing arbitration provisions that mandated arbitration in different states, meaning there was no meeting of the minds). Based on

the foregoing discussion, the court finds that it is not bound to solely consider the formation of the Arbitration Clauses, and it may consider whether the parties formed the Brokerage Service Agreements as well.

4. Challenges to a Delegation Provision

These concepts become even more complicated when the parties challenge a delegation provision within an arbitration clause. Because a delegation provision is simply an "additional, antecedent agreement" to arbitrate, a party may challenge the validity of a delegation provision under § 2 of the FAA. *Rent-A-Center*, 561 U.S. at 70. However, as discussed above, there is a distinction between validity and formation. The issue here is whether this court may determine if the parties formed an agreement to delegate arbitrability questions to an arbitrator.

Disputes over arbitrability require a two-step process. *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 101 (4th Cir. 2012). First, the court must "determine *who* decides whether a particular dispute is arbitrable: the arbitrator or the court." *Id.* (emphasis in original). If the court determines "the court is the proper forum in which to adjudicate arbitrability, [it] then decide[s] whether the dispute is, in fact, arbitrable." *Id.* When conducting the first step, the court must find "clear and unmistakable" evidence that the parties agreed to delegate arbitrability questions to arbitration. *Simply Wireless, Inc*, 877 F.3d at 526. This is because "empowering an arbitrator to determine arbitrability in the first instance 'cuts against

the normal rule' that arbitrability disputes are for the court to resolve." *Id.* (quoting *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671 (4th Cir. 2016)). As such, "[t]he 'clear and unmistakable standard' is exacting, and the presence of an expansive arbitration clause, without more, will not suffice." *Peabody Holding Co.*, 665 F.3d at 102. As explained by the *Rent-a-Center* Court, the "clear and unmistakable" requirement relates "to the parties' *manifestation of intent*, not to the agreement's *validity*." 561 U.S. at n.1 (emphasis in original). This relates back to the distinction between formation and validity. Therefore, 16 when deciding whether a party agreed to delegate questions of arbitrability to arbitration, a court does not do so under § 2 of the FAA but instead by determining the parties' intent.

Courts use the term "arbitrability" generally and liberally, but it is important to distinguish between two different arbitrability issues: (1) the scope of an arbitration clause, i.e., whether a particular dispute should be subject to arbitration; and (2) whether the parties agreed to arbitrate.[6] Despite the importance of this distinction, it

6. As an additional matter, the District submitted its amended complaint on March 19, 2018—after HUB filed its motion to compel arbitration. In the amended complaint, the District removed the cause of action for breach of contract and also removed reference to any time periods during which the scheme was perpetrated. This is, HUB defendants argue, "part of a thinly-veiled attempt to gerrymander the District's case" to circumvent the arbitration requirement in the Brokerage Service Agreements. ECF No. 38 at 1. Based on the timing of the filing of the amended complaint after HUB's motion to compel arbitration and on the same day as the District filed its response, as well as the fact that the amended

has gotten lost through the catchall use of the phrase "arbitrability." But in cases such as this, where the District argues that it did not agree to arbitrate anything, including questions of arbitrability, the distinction is crucial.[7]

In most cases discussing arbitrability, the arbitrability question is one related to the scope of the clause, because the parties do not dispute the fact that they entered into an agreement to arbitrate. Instead, they dispute whether their specific claim falls within the type of claims that they agreed to arbitrate, and who should decide if the claim falls within the scope. In these scenarios, it makes sense for the court to look at the language of an arbitration clause to determine whether the parties "clearly and unmistakably"

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complaint removes the breach of contract claim and all references to specific time periods yet maintains substantially the same factual allegations, the court is inclined to agree. Nonetheless, it is the amended complaint that is the operative complaint. Moreover, this argument goes to whether the District's claims fall within the scope of the arbitration clause, and the court need not reach that issue because it finds that no agreement to arbitrate was formed in the first place.

7. This distinction makes the recent opinion in *Henry Schein, Inc.*, 139 S. Ct. 524, 202 L. Ed. 2d 480, 2019 WL 122164, inapplicable to the instant case. In *Henry Schein, Inc.*, the Court rejected the "wholly groundless" exception that would allow courts to determine whether an agreement to arbitrate applied to a particular dispute, even when the parties agreed to arbitrate arbitrability. 139 S. Ct. 524, 202 L. Ed. 2d 480, *Id.* at *3, *5. The "wholly groundless" exception relates to the scope of the agreement to arbitrate, not to its formation. Therefore, it is inapplicable to the District's argument that it never formed an agreement to arbitrate.

intended that an arbitrator would determine an issue because the parties agreed to the language. *See Simply Wireless, Inc.*, 877 F.3d at 528 (language of arbitration clause evinces parties' clear and unmistakable intent to delegate question of whether claim fell within scope of clause to an arbitrator); *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-30 (4th Cir. 1999) (language of arbitration clause in the collective bargaining agreements was too broad to evince clear and unmistakable evidence that the parties agreed that an arbitrator would determine whether the discrimination claims at issue fell within the scope of the arbitration clause); *E.I. DuPont de Nemours and Co. v. Martinsville Nylon Employees' Council Corp.*, 78 F.3d 578 [published in full-text format at 1996 U.S. App. LEXIS 3208], 1996 WL 84501, at *1-2 (4th Cir. 1996) (unpublished table opinion) (language in arbitration clause contained no provision that clearly and unmistakably agreed to let an arbitrator determine whether a claim fell within the scope of the arbitration clause).

The issue of whether the parties agreed to arbitrate, however, raises fundamental concerns about whether the parties gave up their rights to resolve their claims in court and instead consented to arbitration. Despite the development of the jurisprudence on arbitrability, the basic concept that parties must agree to arbitrate remains true. *See United Steelworkers of Am.*, 363 U.S. at 582 ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). However, when courts generally refer to "arbitrability," which can include "whether the parties agreed to arbitrate," *see Rent-A-Center*, 561 U.S. at 69, the basic requirement that

the parties agreed to arbitrate gets wrapped up in the "scope of" arbitrability analysis, creating confusion over whether it is the court's or arbitrator's role to determine whether the parties agreed to arbitrate. Because arbitrability includes whether the parties agreed to arbitrate, the question seems as though it should fall into the arbitrability framework discussed above. Yet some courts have said that "[a]rguments that an agreement to arbitrate was never formed, though, are to be heard by the court even where a delegation clause exists." *Edwards*, 888 F.3d at 744.

The court's ability to determine whether an agreement to arbitrate was formed in the first place, even when a delegation provision exists, can be gleaned from the Supreme Court's review of arbitration framework in *Granite Rock Co.* The Court explained first that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." 561 U.S. at 297. In order to do so, "the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.* The Court went on to explain that "[w]here there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability." *Id.* In other words, when a delegation provision exists, the court should not determine the *scope* and *enforceability* of an arbitration clause. But the Court continued, stating that "*[i]n addition*, these issues *always* include whether the clause was agreed to, and may include when that agreement was formed." *Id.* (emphasis added).

This language clearly indicates that regardless of whether a delegation provision exists, it is always within the court's province to determine whether an agreement was *formed* in the first place. The Court provided further support for this concept, stating that

> our precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, "the court" must resolve the disagreement.

Id. at 299-300 (emphasis in original). Again, the Court identified that whether the parties formed an agreement to arbitrate is separate from issues related to a delegation provision. Therefore, whether a party formed an agreement to arbitrate, including whether it agreed to arbitrate arbitrability, is a question for the court to resolve. As discussed above, when considering a challenge to the formation of an agreement to arbitrate, a court may consider both the formation of the arbitration clause and the container contract.

Moreover, there can be no "clear and unmistakable" evidence in an arbitration clause that parties intended to delegate questions of arbitrability to arbitration when the parties disagree over whether the arbitration clause was formed in the first place. The distinction between

the arbitrability concepts of scope and agreement to arbitrate illustrates this point well and is best exemplified by arbitrability cases involving arbitration clauses that incorporate the JAMS rules or AAA rules. Courts are frequently and consistently finding that when an arbitration clause incorporates arbitration rules, whether they be JAMS or AAA rules, there is clear and unmistakable evidence that the parties intended to arbitrate arbitrability. *See, e.g., Simply Wireless, Inc*, 877 F.3d at 528; *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). Indeed, the Insurance Defendants, relying on *Simply Wireless* and various other circuit court cases, argue here that the parties agreed to arbitrate arbitrability because the AAA rules are incorporated in the Arbitration Clauses. However, in *Simply Wireless*, the arbitrability issue was the *scope* of the arbitration clause, so it made sense to look at the language of the clause. The parties did not dispute the fact that they had formed an agreement to arbitrate when they executed the contract containing the arbitration clause. 877 F.3d at 526. Instead, the parties disagreed on whether Simply Wireless's claims fell within the scope of the arbitration agreement. *Id.* Thus, the court found it appropriate to send the question of arbitrability to the arbitrator to determine whether this dispute fell within the scope of the arbitration clause. *Id.* at 529. Other circuit court cases in which the parties' incorporation of JAMS or AAA rules are used to meet the "clear and unmistakable" standard also involve whether the parties' dispute falls within the scope of the arbitration clause, not whether the parties agreed to *form* the arbitration clause. *See Brennan*, 796 F.3d at 1127-28 (party opposing arbitration argued that the arbitration

clause was unconscionable and did not argue that he never agreed to arbitration in the first place); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 674-75 (5th Cir. 2012) (parties did not dispute whether they had formed an agreement to arbitrate); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1331-32 (11th Cir. 2005) (party opposing arbitration argued that arbitration clause was unenforceable, not that it never formed an agreement to arbitrate); *Contec Corp. v. Remote Sols., Co.*, 398 F.3d 205, 210-11 (2d Cir. 2005) (parties did not dispute that they had formed an agreement to arbitrate).

It simply makes no sense for a court to determine that a party clearly and unmistakably chose to give arbitrability issues to an arbitrator based on the content of an arbitration clause, namely the incorporation of AAA Rules, when the party argues that *it did not agree to an arbitration clause in the first place*. To do so would be using the substance of an arguably unformed agreement to show that the agreement was formed. This argument is circular and nonsensical, and as the Eight Circuit describes, it "puts the cart before the horse." *Nebraska Machinery Co. v. Cargotec Solutions, LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014). It is impossible to infer that the District intended to delegate issues of arbitrability to an arbitrator from the language of the Arbitration Clauses, including the incorporation of the AAA Rules, if the District did not agree to the Arbitration Clauses or the Brokerage Service Agreements in the first place. As the U.S. District Court for the Eastern District of Pennsylvania explained, "[w]hen one party contends that

an agreement to arbitrate was never formed, looking to the text of that very agreement is problematic because the agreement is only a valid indicator of the parties' intent if they agreed to be bound by its terms." *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 424 (E.D. Pa. 2016); *see also China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) ("[I]ncorporation of [arbitration] rule[s] into the contract is relevant only if the parties actually agreed to its incorporation. After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it."). As a result, "[t]he more basic issue . . . of whether the parties agreed to arbitrate in the first place is one only a court can answer, since in the absence of any arbitration agreement at all, 'questions of arbitrability' could hardly have been clearly and unmistakably given over to an arbitrator." *VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 326 n.2 (2d Cir. 2013). Therefore, "while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 526 (2d Cir. 2011).

Here, the District argues that it never agreed to arbitrate in the first place. Therefore, it would make no sense for the court to look for "clear and unmistakable" evidence of the District's intent in the Arbitration Clauses to which the District argues it never agreed to in the first place. Instead, the court must look at South Carolina

contract formation law to determine if the parties ever agreed to arbitrate in the first place, and in doing so, the court may look at the entirety of the Brokerage Service Agreements, not just the Arbitration Clauses within them.

B. Contract Formation under South Carolina Law

The District made various challenges to both the Arbitration Clauses and the Brokerage Service Agreements to show that it did not agree to arbitrate. As discussed above, the court may consider both types of challenges when determining whether the District ever agreed to arbitrate. The District's challenges that go to the formation of the Arbitration Clauses or the Brokerage Service Agreements are: (1) some of the Brokerage Service Agreements are not signed by the District, and the District was unaware that the agreements existed until the motion to compel was filed;[8] and (2) Thomas acted outside of the scope of his agency when he entered into the Brokerage Service Agreements.[9] The court now turns to examine each of the Brokerage Service Agreements containing the Arbitration Clauses.

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8. While the District titled the section of its brief containing this argument as "The 'Agreements' Are Invalid Under South Carolina Law," the substance of the argument clearly discusses the formation of the agreements, not their validity.

9. The District also argues that the Arbitration Clauses are void because they violate South Carolina's procurement code and they were induced by fraud. These arguments go to the validity of the clause, not its formation. The District's other arguments go to the enforceability and the scope of the arbitration clause, which the court will not consider at this time.

Appendix F

The first Brokerage Service Agreement, Exhibit B to the Benfield Declaration, covering 2002-2003, was signed by Angel Cartwright, who the District explained was three or four levels below Thomas—an "underling." Tr. 24:3-5. In the second Brokerage Service Agreement, Exhibit C, covering 2003-2004, the contract was signed by Thomas. The third Brokerage Service Agreement, Exhibit D, is a letter dated August 16, 2005 with the handwritten notation "proposed 05/06" with a term, partially amended by handwriting, of "as long as either the Insurance Reserve Fund (Property/Casualty), the School Board Trust (Workers Compensation) or any of the Knauff insurance contracts remain in force." ECF 23-4 at 2-3. It is not signed by either party. The fourth Brokerage Service Agreement, Exhibit E, indicates that the "Agreement shall be for multi-year periods commencing on December 19, 2006 unless earlier terminated by either party" and it is not signed by either party. ECF No. 23-5 at 3. The fifth Brokerage Service Agreement, Exhibit F, contains a similar clause stating that the term of the agreement is "for multi-year periods commencing on December 19, 2009 unless earlier terminated by either party" and again is not signed by either party. ECF No. 23-6 at 6. Notably, this contract was sent to Thomas at his home address. In the final contract, Exhibit G, the same "multi-year period" term appears, with the agreement commencing on June 29, 2011. ECF No. 23-7 at 5. Again, the agreement is unsigned. With these descriptions of the Brokerage Service Agreements in mind, the court now turns the District's formation challenges and finds that the District did not agree to any of the Brokerage Service Agreements or the Arbitration Clauses within them.

Appendix F

When a court decides if parties agreed to arbitrate, it applies state law on contract formation. *First Options of Chicago, Inc.*, 514 U.S. at 944; *Lorenzo*, 806 F.3d at 781 ("And the question of whether the parties agreed to arbitrate is resolved by application of state contract law."). Under South Carolina law, "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205, 209 (S.C. Ct. App. 2012). "A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696, 701 (S.C. 2014). Here, the Brokerage Service Agreements found in Exhibits D through G are not signed by either party. Moreover, the District represented to the court that it did not know these Brokerage Service Agreements containing the Arbitration Clauses even existed until HUB filed its motion to compel arbitration, which is supported by the fact that the agreements are unsigned. The District obviously could not have agreed to the Brokerage Service Agreements if it did not know they existed. Therefore, it is clear that there was no meeting of the minds where the District agreed to be bound by the Brokerage Service Agreements or the Arbitration Clauses.

The Insurance Defendants argue that while the District may have not accepted the terms of the Brokerage Service Agreements through signing the agreements, it did accept them through performance, i.e., paying the broker's and consultant's fees. It is true that a party may accept an offer and form a contract through performance.

See Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 581 S.E.2d 161, 165-66 (S.C. 2003) ("A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance."). But where the Insurance Defendants falter is by applying the usual rule to this most unusual set of facts. The Insurance Defendants overlook the fact that it was Thomas who caused the District to make the payments and perform the contract. And as the District alleges, Thomas did so as part of a scheme to defraud the District. Thomas was the Comptroller, Executive Director of Finance, and Chief Financial Officer of the District during the relevant time period. The amended complaint alleges that "the District, *through Thomas*, purchased a myriad [of] commercial policies" recommended by the Insurance Defendants. ECF No. 36 at 14 (emphasis added). In addition, the amended complaint alleges, Thomas would "ensure" that the Insurance Defendants were paid their brokerage fees. *Id.* at 18. Moreover, the amended complaint, through the incorporation of the Information in Thomas's federal criminal case, alleges that Thomas "was responsible for procuring and paying for [the District's] insurance policies," which were maintained by an insurance broker. ECF No. 36-1 at 2. That insurance broker, the amended complaint alleges, was HUB. In doing so, Thomas was allegedly able "to enrich himself by steering insurance contracts and business and accepting cash payments, or kickbacks, paid by an insurance broker employee." *Id.* at 6. The amended complaint alleges that the insurance broker employee was Pokorney. Yet another allegation of Thomas's control over the District's payments to the Insurance Defendants is contained in the amended

complaint's discussion of the state indictment. The District alleges that Thomas "deliberately caus[ed] the [District] to overpay a vendor," and that the vendor is Knauff. ECF No. 36 at 11.

Considering these allegations together, the amended complaint alleges that it was Thomas who caused the District to pay the brokerage service fees, and he did so with the purpose of defrauding the District. As such, the court is unwilling to consider the District's payment of the broker's and consultant's fees as the District's acceptance of the Brokerage Service Agreements. To do so would validate Thomas's fraud and self-enrichment to the detriment of the District, the victim of his scheme. Instead, if the performance of payment is to be considered acceptance of the Brokerage Service Agreements, the court imputes that performance to Thomas. In a similar vein, the Brokerage Service Agreements in Exhibits B and C were signed by an "underling" of Thomas and Thomas, respectively. Therefore, when considering both the agreements that were signed by Thomas (or his "underling") and the agreements that were unsigned but for which Thomas orchestrated payment, the question becomes whether the District may be bound by the Brokerage Service Agreements that were entered into by Thomas.

Normally, Thomas, as the Chief Financial Officer of the District, would have the authority to act on behalf of the District, binding the District to the Brokerage Service Agreements. This argument would be convincing if it were not for the glaring fact that Thomas used his position

to defraud the District. Under South Carolina law, an employer is bound by its employee's actions only when the employee is acting within the scope of his employment. *Murphy v. Jefferson Pilot Comms. Co.*, 364 S.C. 453, 613 S.E.2d 808, 812 (S.C. Ct. App. 2005) (citing *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748, 753 (S.C. Ct. App. 1984)). "An important factor in determining if an employee acted within the scope of his employment is whether the act was in furtherance of the employer's business." *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425, 429 (S.C. Ct. App. 1991) (citing *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 341 S.E.2d 385 (S.C. Ct. App. 1986)). But if the employee "acts for some independent purpose of his own, wholly disconnected from the furtherance of his employer's business," then his conduct is outside of the scope of his employment, and it will not be imputed to his employer. *Id.*

Clearly, Thomas did not act within the scope of his employment when he caused the District to pay the fees to the Insurance Defendants. Thomas did so for the independent purpose of receiving kickbacks, and he was not acting in furtherance of the District's business because the payments to the Insurance Defendants actually harmed the District. Similarly, Thomas was not acting within the scope of his employment when he signed the first and second Brokerage Service Agreements.[10] He acted for his own benefit, namely to receive kickbacks

10. The court notes that Angel Cartwright signed the first contract between HUB and the District. However, as explained at the hearing, Angel Cartwright was an "underling" of Thomas. Tr. 24:3-5. As such, the court imputes the signature to Thomas.

from HUB. However, to drive the point home, the Fourth Circuit, interpreting South Carolina law, considered a factually similar scenario in *Young v. FDIC*, 103 F.3d 1180 (4th Cir. 1997). The plaintiff brought claims for civil conspiracy and fraudulent misrepresentation, among others, against a bank based on the actions of the bank's vice president. *Id.* at 1189-90. The plaintiff alleged the bank's vice president conspired with other actors to defraud the plaintiff and negligently misrepresented to the plaintiff that the company from whom the plaintiff had bought a surety bond deposited a sum of money at the bank when it had not. *Id.* The Fourth Circuit, interpreting South Carolina law, held that the bank could not be held liable for its vice president's actions because the vice president was acting "to benefit his own independent purpose of defrauding" the plaintiff. *Id.* at 1190. Here, not only was Thomas clearly acting to benefit the independent purpose of lining his pocket with taxpayer money, but he was also acting to the detriment of his employer, the District. It would simply make no sense to bind the District to its rogue employee's actions that were part of a criminal enterprise to defraud the District.

In sum, the District never agreed to the Brokerage Service Agreements or the Arbitration Clauses upon which the Insurance Defendants rely in asking the court to compel arbitration. Any appearance of agreement to the Brokerage Service Agreements is based on Thomas's actions, and Thomas was clearly acting outside of the scope of his employment. Therefore, he did not bind the District to the Brokerage Service Agreements or the Arbitration

Clauses. Because there was no agreement to arbitrate, the court will not send the District's claims to arbitration.[11]

III. CONCLUSION

For the reasons set forth above, the court **DENIES** the Insurance Defendants' motion to compel arbitration.

AND IT IS SO ORDERED.

/s/ David C. Norton
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

January 29, 2019
Charleston, South Carolina

11. Pokorney and Scott Pokorney made the additional argument that they, as nonsignatories to an arbitration agreement, may compel arbitration. However, because the court finds that no agreement to arbitrate was formed, it need not consider this argument.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1328
(2:18-cv-00151-DCN)

BERKELEY COUNTY SCHOOL DISTRICT,

Plaintiff-Appellee,

v.

HUB INTERNATIONAL LIMITED; HUB INTERNATIONAL MIDWEST LIMITED,

Defendants-Appellants,

and

KNAUFF INSURANCE AGENCY, INC.; BRANTLEY THOMAS; HUB INTERNATIONAL SOUTHEAST,

Defendants.

Filed April 4, 2025

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R.

Appendix G

App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk