**RECORD NUMBER: 19-1158(L), 19-1170, 19-1171**

**IN THE**

# United States Court of Appeals

**FOR THE FOURTH CIRCUIT**

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.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

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## INTRODUCTION

The district court denied arbitration of the dispute in this case on the theory that Brantley Thomas, the District's CFO, lacked authority to bind the District to the insurance Brokerage Service Agreements that contained the arbitration clauses. As the Insurance Defendants explained, that was error. The court and the District alike acknowledged that the procurement of insurance services was within the scope of Thomas's employment. Under South Carolina law, that is enough for Thomas's actions to bind the District. Even if the District could prove that Thomas also exploited his position for personal gain in the process—"steering" the District's insurance business to the Insurance Defendants in exchange for kickbacks, as the Complaint alleges—that does not warrant treating the Brokerage Service Agreements, which the parties performed under for years, as if they never were formed.

The District responds with obfuscation. It asserts, like the district court, that the District should not be bound because Thomas acted solely on his own behalf, and it received "no benefit" from the Brokerage Service Agreements. But the argument is built on a nonsensical effort to divorce the Brokerage Service Agreements from the procuring of insurance policies thereunder. The District acknowledges that "of course" it was "beneficial" for the District to have "secure[d] insurance policies," Response Br. 31, and repeatedly alleged that many of its

insurance policies were "purchased through" the Insurance Defendants. JA142 ¶¶48, 49. It therefore defies logic for the District to contend that it obtained no benefit from the Brokerage Service Agreements, which were the contracts under which the Insurance Defendants performed the role of an insurance broker and secured those policies for the District.

In any event, if there were a reasonable dispute as to whether the District obtained a benefit from the Brokerage Service Agreements, the Federal Arbitration Act required the district court to hold an evidentiary hearing on the issue. The court did not. It instead decided that point and a host of other factual issues against the Insurance Defendants without affording them the process that the FAA mandates. The District urges that the Insurance Defendants waived any right to an evidentiary hearing. But the Insurance Defendants did not request a hearing because the District's briefing below was devoid of record citation and failed to raise a material issue of fact on the relevant issues under the FAA's summary-judgment-like procedures. If the district court believed otherwise, it was required to hold an evidentiary hearing. Its failure to do so warrants reversal.

The district court's failure to hold the requisite evidentiary hearing resulted in an opinion lacking the requisite evidentiary support for key conclusions. The District purports to address those issues point-by-point. But its own brief proves

the absence of evidence, relying on conclusory statements and vague assertions rather than citation to the record.

Nor should the district court even have reached the issue it decided in the first place. Case after case confirms that the District's theory—that Thomas deceived the District into entering the Brokerage Service Agreements—sounds in fraudulent inducement. The District cannot deny that, under Supreme Court precedent, the arbitrators must resolve arguments that the underlying contract is unenforceable due to fraudulent inducement.

Finally, the District asserts an alternate ground for affirmance, arguing that its own Procurement Code renders the Brokerage Service Agreements unenforceable. This Court should not reach that argument, which the district court never addressed. But it fails in any event. To the extent the Procurement Code could be read to foreclose arbitration agreements, it is preempted by the FAA. The decision below should be reversed.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN HOLDING THAT THE SCHOOL DISTRICT WAS NOT BOUND BY ITS CFO'S PURCHASE OF INSURANCE SERVICES ON ITS BEHALF

The District does not dispute that, under South Carolina law, "a master is liable for and is charged with knowledge of the acts and conducts of his servants operating within the scope of their employment." *Murphy v. Jefferson Pilot*

*Commc'ns Co., WCSC, Inc.*, 613 S.E.2d 808, 812 (S.C. Ct. App. 2005); *see* Response Br. 27. Nor can the District dispute that "obtaining insurance contracts and selecting who would broker those contracts" was within the scope of Thomas's employment—the Amended Complaint makes that express representation. JA165 ¶171.

The District nevertheless seeks to avoid the Brokerage Service Agreements Thomas entered into in the exercise of his authority by invoking South Carolina's adverse-interest exception. The District quibbles about whether the doctrine should be labeled the "adverse interest exception," *see* Response Br. 32, but it nevertheless acknowledges the standard applicable here: A principal is bound unless the agent completely abandons the principal's interest and acts solely for "some independent purpose of his own" that is "***wholly disconnected*** with the furtherance of his master's business." *Crittenden v. Thompson-Walker Co., Inc.*, 341 S.E.2d 385, 387 (S.C. Ct. App. 1986) (emphasis added); *see* Response Br. 27.[1]

[1] The District urges that the adverse-interest exception applies only to counter "the affirmative defense of *in pari delicto*." Response Br. 32. But of the cases the Insurance Defendants cited on this issue, only one—*In re Infinity Bus. Grp., Inc.*, 497 B.R. 794 (Bankr. D.S.C. 2013)—addressed the relevant agency principles in the context of *in pari delicto*. And the South Carolina case that *Infinity* principally invoked—*Citizens' Bank v. Heyward*, 133 S.E. 709 (S.C. 1925)—did not concern *in pari delicto*, but generally addressed when "the principal is responsible" for its agent's actions, *id.* at 713. In any event, if the District is correct that the adverse-interest exception "is inapplicable here," Response Br. 32, that undermines the ***District's*** case, not the Insurance Defendants'. It is the District, not the Insurance

As the Insurance Defendants explained, while the district court acknowledged that standard in its opinion, it never actually applied that standard when evaluating Thomas's conduct—a fact that alone warrants reversal. *See* Opening Br. 29-30. The District never urges otherwise. And the District's various efforts to evade the terms of the Brokerage Service Agreement under South Carolina agency law based on Thomas's misconduct fail, for the reasons below.

### A. The District's Efforts To Recast South Carolina Case Law Fail

The Insurance Defendants (at Br. 25-29) cited numerous South Carolina cases holding that a principal is bound unless the agent completely abandons the principal's interest and acts solely for some individual purpose "***wholly disconnected*** with the furtherance of his master's business." *Crittenden*, 341 S.E.2d at 387 (emphasis added). Those cases reflect the principle that, so long as "the servant is doing ***some act*** in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." *Id.* (emphasis added) (quoting *Jones v. Elbert*, 34 S.E.2d 796, 798-99 (S.C. 1945)). The Insurance Defendants explained that, under that law, Thomas bound the District to the Brokerage Service Agreements and the arbitration clauses within. Even if Thomas was motivated in part to receive kickbacks, he was still acting in furtherance of his duty to "obtain[] insurance contracts and select[] who

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Defendants, that seeks to invoke an exception to the general rule that an agent's actions bind its principal.

would broker those contracts" on the District's behalf when he entered the Brokerage Service Agreements. JA165 ¶171; *see* Opening Br. 30.

The District tries to muddy the issue by recasting the inquiry. *See* Response Br. 28-29. It cites *Crittenden*, in which the Court of Appeals of South Carolina held that a construction company was liable for its foreman's actions in assaulting a customer in an effort "to coerce" the customer "to pay a debt owed to" the company, 341 S.E.2d at 388, notwithstanding that the assault "was totally unexpectable by the company," *id.* at 387. The District states that, in that case, "the purpose of the assault was to further the ***employer's*** business" of "obtaining payment for work performed on the construction project." Response Br. 28. It urges that a different result is appropriate here because, "by contrast, Thomas's illegal kickbacks ***did not further the District's business*** . . . . His position as CFO provided him with the ability to engage in a kickback scheme, but his ***purpose*** in doing so was to enrich ***himself***, not to benefit the District." *Id.* at 28-29.

But *Crittenden* cannot sustain the District's effort to re-focus the inquiry on whether the ***kickback scheme*** was in furtherance of the District's business, instead of on whether Thomas's ***procurement of insurance services*** was in furtherance of its business. In *Crittenden*, the issue was whether the construction company was liable for the wrongful act itself—*i.e.*, whether the assault could be imputed to the company. *See* 341 S.E.2d at 387-88. Here, by contrast, the issue is not whether

the District is liable for Thomas's alleged illegal kickbacks. It is whether the District is bound by contracts for the provision of insurance services entered on the District's behalf, where Thomas is separately alleged to have enriched himself through kickbacks in the process. Whether the kickbacks ***themselves*** furthered the District's business is beside the point.

The Supreme Court of South Carolina's decision in *Citizens' Bank v. Heyward*, 133 S.E. 709 (S.C. 1925), confirms that the question here is not whether the illegal act itself was intended to benefit the employer. Rather, *Heyward* explained, "[t]he proper inquiry is, ***whether the act was done in the course of the agency and by virtue of the authority as agent***." *Id.* at 713. Indeed, contrary to the District's argument, *Heyward* stressed the need to "distinguish" the "fraudulent act" itself and instead focus on the "***the business in the course of which the fraudulent act was committed***." *Id.* at 712-13 (emphasis added). There, a bank's president improperly took an additional two-percent commission in exchange for approving a loan. *Id.* at 710-11. The court held that it did not matter that the president's act of accepting the additional commission was for his personal benefit and adverse to the bank's interests—the bank was still liable for the underlying loan because the president's approval of loans was within the course of the bank's business. *Id.* at 713.

So too here. The issue is not whether Thomas's purpose in accepting kickbacks was "to enrich ***himself***, not to benefit the District." Response Br. 28-29. The issue is whether, in entering into the Brokerage Service Agreements, he acted in a manner "***wholly disconnected*** with the furtherance of his master's business." *Crittenden*, 341 S.E.2d at 387 (emphasis added). He did not. The District has admitted that conducting such business was in the scope of his employment. JA165 ¶171. He entered the contracts "in the course of the agency and by virtue of the authority as agent." *Heyward*, 133 S.E. at 713. That is dispositive.

### B. The District's Argument That It Obtained "No Benefit" from the Brokerage Service Agreements Fails

The District also attempts to distinguish cases like *Crittenden* and *Heyward*—which held employers bound by their rogue employees' actions—on the theory that, unlike the employers in those cases, "the District realized ***no benefit***" from Thomas's entry into the Brokerage Service Agreements. Response Br. 35-36; *see id.* at 29-31. As explained in Section II below, the District's claim of "no benefit" is not supported by any evidence. But the District's argument—which requires one to ignore the benefits of the insurance policies that it was the very purpose of the Brokerage Service Agreements to obtain—also defies logic. It cannot sustain the district court's decision.

In addressing the district court's unsupported conclusion that Thomas's dealings only "harmed the District," JA385, the Insurance Defendants pointed out

that their provision of insurance services plainly benefitted the District, *see* Opening Br. 41-42. Among other things, they explained that the Amended Complaint established that the District had previously employed a different broker to procure some of the same insurance coverage later procured by the Insurance Defendants; as a result, the District clearly had viewed the services as beneficial. *Id.*

The District responds by acknowledging the benefit of the insurance policies that the Insurance Defendants procured for them. It concedes that, "***Of course it is beneficial to secure insurance policies***." Response Br. 31 (emphasis added); *see also id.* at 2, 30, 44. But it claims that "is merely a benefit of ***having insurance***, not a benefit of contracting with the Insurance Defendants to charge fees for brokerage" under the Brokerage Service Agreements. *Id.* at 44. The Brokerage Service Agreements the Insurance Defendants "seek to enforce were not contracts for insurance." *Id.* at 31, 44 (emphasis omitted). And the District argues that it "received no benefit" from the "payment" of "brokerage fees" to the Insurance Defendants under those agreements. *Id.* at 31.

That makes no sense. One of the "services provided" by the Insurance Defendants under the Brokerage Service Agreements, expressly stated in the contracts themselves, was for them to "[p]lace coverages"—*i.e.*, obtain insurance policies—on behalf of the District. JA94; JA99; JA104; JA112; JA119 (Brokerage

Service Agreements). The District's Amended Complaint itself alleges that, "[a]s the District's insurance consultants, the Insurance Defendants recommended, and the District, through Thomas, purchased myriad commercial insurance policies." JA141 ¶44. And it repeatedly confirms that a number of the District's "insurance policies" were "purchased through" the Insurance Defendants. JA142 ¶¶48, 49; *see also* JA36 ¶104; JA154-158 ¶¶108-130, JA160-161 ¶¶144-150.

Given the District's concession that it "is beneficial to secure insurance policies," it simply cannot be that the District obtained "no benefit" at all from the Brokerage Service Agreements under which the Insurance Defendants "secure[d] insurance policies" for the District. Response Br. 31. The procurement of the insurance was an "actual benefit" the District "derived from the payment of the fees" to the Insurance Defendants in their capacity as the District's insurance broker under the Brokerage Service Agreements. *Id.* at 44. Put in the terms of *Heyward*, "it is a mistake to suppose that the [District] was not benefited" by Thomas's entry into the Brokerage Service Agreements, as the insurance procured thereunder "could not be carried into effect, except by securing" brokerage services. 133 S.E. at 714. It cannot be said that Thomas's actions in accepting the Brokerage Service Agreements on the District's behalf constitute "total abandonment of the [District's] interest and no benefit to the [District]." *Infinity*, 497 B.R. at 812. The District's argument fails.

## II. THE DISTRICT COURT ERRED IN RESOLVING CRITICAL FACTUAL ISSUES AGAINST THE INSURANCE DEFENDANTS WITHOUT A TRIAL AND WITHOUT EVIDENTIARY SUPPORT

### A. The District Court Improperly Resolved Disputed Factual Issues Without the "Trial" Required by the FAA

The District acknowledges that, "when a party resisting arbitration challenges the existence of an agreement to arbitrate, the court should initially apply a standard 'akin to . . . summary judgment.'" Response Br. 39 (quoting *Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015)). That means that, "[w]hen it's apparent from a quick look at the case that no material disputes of fact exist[,] it may be permissible and efficient for a district court to decide the arbitration question as a matter of law through motions practice . . . ." *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 978 (10th Cir. 2014) (Gorsuch, J.). But when an arbitration motion "presents unresolved questions of material fact, the FAA 'call[s] for an expeditious and summary hearing' to resolve those questions." *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015) (alteration in original). Section 4 of the FAA provides that, when "the making of the arbitration agreement . . . [is] in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

The District does not deny that the district court resolved material issues of fact relevant to the question of agency law that formed the basis for its decision. (It urges only that the court had "sufficient evidence before it" to support its

conclusions. Response Br. 38.) Nor does the District deny that the district court failed to hold the evidentiary "trial" that Section 4 of the FAA requires. Instead, it urges that the Insurance Defendants never asked the district court for a trial, and thus "waived any argument that a trial was required." *Id.* at 37. That argument fails, for several reasons.

1. Unlike the Seventh Amendment right to jury trial, nothing requires that a ***party*** request an FAA Section 4 trial, much less on pain of waiver. Rather, the statute directs "***the court***" that it "***shall proceed summarily to the trial***" whenever it determines that "the making of the arbitration agreement . . . be in issue." 9 U.S.C. §4 (emphasis added). Consistent with that, this Circuit has explained that the "'[o]ne thing the district court may ***never*** do is find a material dispute of fact does exist' and then deny the motion [to compel arbitration] without holding 'any trial to resolve that dispute of fact.'" *Dillon*, 787 F.3d at 713 (emphasis added) (quoting *Howard*, 748 F.3d at 978). Thus, the district court "***had*** to move promptly to trial of the unresolved factual questions" that it deemed necessary to deciding whether there was an "agreement to arbitrate," whether the parties requested it or not. *Howard*, 748 F.3d at 978-79 (emphasis in original); *see also Magnolia Capital Advisors Inc. v. Bear Stearns & Co.*, 272 F. App'x 782, 783-85 (11th Cir. 2008) (holding that district court was required to hold Section 4 trial where party requested such trial only after court decided motion to compel

arbitration against it). The district court's failure to do so here requires reversal. *See* Opening Br. 31-35.

2. Even if there were a general requirement that a party request an evidentiary trial under Section 4, the fact that the Insurance Defendants did not do so here should be excused. *See Henry A. Knott Co., Div. of Knott Indus., Inc. v. Chesapeake & Potomac Tel. Co. of W. Va.*, 772 F.2d 78, 81 (4th Cir. 1985). For one thing, the Insurance Defendants had no reason to believe that the "the making of the arbitration agreement" was "in issue," 9 U.S.C. §4, and thus no reason to request a Section 4 trial on contract formation, when they moved to compel arbitration. As explained in the opening brief (at 32), when the motion was filed, the District's own Complaint alleged that it had "entered into multiple contracts with the Insurance Defendants for consulting services," JA62-63 ¶234, and asserted claims under South Carolina law for breach of those contracts, *id.* ¶¶233-36. It was only ***after*** the Insurance Defendants filed their arbitration motion that the District reversed course and suddenly denied the contracts' existence. *See* Opening Br. 33.

The District nevertheless claims that the "Insurance Defendants were well aware, based on the District's Memorandum in Opposition to the Motion to Enforce, that the District was challenging the making of the Brokerage Service agreements." Response Br. 38. But even if the Insurance Defendants were then

aware of the District's "challenge," they had no reason to believe, under the summary-judgment-like procedures governing challenges to "the existence of an agreement to arbitrate," *Chorley*, 807 F.3d at 564, that the District had raised a material issue of fact warranting a trial. The District's argument that it was not bound by Thomas's actions was only a page long and cited not a shred of evidence, resting entirely on the "alleg[ations] in the Amended Complaint." Dkt. 33 at 26. As the Insurance Defendants explained in their brief (at 33), that was not enough to raise a material issue of fact. The District offers no response.

Nor did the oral argument on the motion to compel arbitration provide reason to request a trial. Oral argument focused almost entirely on legal issues. *See* JA343 ll. 15-16. The district court did not address the issue of Thomas's authority to bind the District at all, much less hint at the factual questions it would ultimately resolve in deciding the motion. The Insurance Defendants pointed that out in their brief too (at 33), and the District again has no response.

Ultimately, the Insurance Defendants "had no notice or opportunity to object" to the district court's resolution without a trial of the fact issues underpinning its decision "before the decision was made." *Henry A. Knott Co.*, 772 F.2d at 81; *cf. U.S. Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 735 (4th Cir. 1989) (court cannot grant summary judgment *sua sponte* without "provid[ing] the losing party with an adequate opportunity to demonstrate a

genuine issue of material fact"); *Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1561 (1st Cir. 1989) (noting that summary judgment requires "that the losing party had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward"). For that reason too, there is no waiver of the Insurance Defendants' right to a trial under Section 4. *Henry A. Knott Co.*, 772 F.2d at 81.

### B. The District Court's Key Findings Are Unsupported by Evidence

The Insurance Defendants explained that reversal is also required because the key findings the district court made in denying arbitration are unsupported by record evidence. Opening Br. 35-44. The District's response simply confirms that, as it cannot muster evidence to support the court's findings, either. That is fatal—a district court's decision denying arbitration should be reversed when its key "factual conclusion[s]" are "without evidentiary support." *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 253 (4th Cir. 2001).

#### 1. *The District Court's Finding That the District Did Not Know About the Contracts Cannot Be Sustained*

The Insurance Defendants explained (at 35) that the district court improperly concluded that the District never knew about the Brokerage Service Agreements, based only on the District's counsel's "represent[ation] to the court that it did not know" those contracts "even existed until HUB filed its motion to compel

arbitration." JA382. The court never addressed the ample evidence refuting that unsubstantiated representation.

The strongest evidence that the District knew about the Brokerage Service Agreements with the Insurance Defendants prior to the motion to compel arbitration is the District's own original Complaint. In the Complaint, the District represented that it had "entered into multiple contracts with the Insurance Defendants for consulting services," JA62-63 ¶234; asserted claims under South Carolina law for breach of those contracts, *id.* ¶¶233-236; and sought damages based on the precise amounts the District paid pursuant to those contracts, *see* JA63 ¶236; JA65. If the District did not believe that those allegations were true, then its conduct was sanctionable. *See* Fed. R. Civ. P. 11(b) ("By presenting to the court a pleading . . . an attorney . . . certifies . . . [that] the factual contentions have evidentiary support . . . .").

The District argues that those representations are irrelevant because, when caught off-guard by the Insurance Defendants' arbitration motion, it filed an Amended Complaint that omitted those allegations and claims. *See* Response Br. 40. But the fact that the Amended Complaint superseded the original Complaint does not mean the original allegations are treated as if they never existed. It is black-letter law that statements in a superseded pleading are still "evidence as an admission of the party" that made them. 6 Charles A. Wright, et al., Federal

Practice & Procedure § 1476 (3d ed.); *see also Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989). The District's authorities are not to the contrary. Both concern the effect of an amended complaint at the motion-to-dismiss stage, when courts are confined to the facts alleged in the operative complaint. *See* Response Br. 40-41; *Young v. City of Mount Ranier*, 238 F.3d 567, 573, 577 (4th Cir. 2001) (appeal from dismissal under Rule 12(b)(6)); *Fawzy v. Wauquiez Boats, SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (appeal from dismissal under Rule 12(b)(1)). Here, however, the district court was required to apply a standard "akin to . . . ***summary judgment***." *Chorley*, 807 F.3d at 564 (emphasis added). Under that standard, the district court should have considered all relevant evidence of the District's knowledge of the Brokerage Service Agreements, including admissions in its original Complaint. *E.g.*, *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) ("Despite the fact that [the defendant] later amended its answers to deny this allegation, [the] admissions are still admissible evidence."). But the court did not.

The Insurance Defendants also cited two letters, one from Thomas to the District's Board members, JA325, and another from the District's superintendent, JA327, showing the District both knew of and approved of Thomas entering into insurance agreements with the Insurance Defendants. The District, addressing only one of the letters, argues that "[n]owhere in the letter does it state that Thomas

will enter into a Brokerage Service Agreement with Pokorney or Knauff." Response Br. 42. But while the letter does not say the exact words "Brokerage Service Agreement," it does say that, "[a]s a result of a board vote," Stanley Pokorney was designated as the District's "Agent of Record in regard to all property/casualty insurance matters." JA325. And it further explains that the arrangement was memorialized in a "contract." *Id.* The notion that Thomas's agreements with the Insurance Defendants were unknown to the District ignores the evidence.

The rest of the record evidence shows the same thing. For example, the District paid $1.9 million in "consulting and broker's fees" to Knauff from 2001 to 2012. JA24 ¶44.[2] Yet the District never contends that Thomas somehow hid those payments from District officials. Given that, the District must have been aware of the Brokerage Service Agreements that required those payments. The only alternative is that all of the District's relevant employees neglected their oversight responsibilities, and its Board members were in breach of their fiduciary duties (a position the District has not taken).

[2] The District calls that amount "astronomical." Response Br. 35. But it cites no evidence that it was out of line with industry standards.

2. *No Evidence Supports the District Court's Conclusion That Thomas Was Engaged in a Kickback Scheme When He Entered the Brokerage Service Agreements*

Another foundation of the district court's ruling that the District is not bound by the Brokerage Service Agreements is its conclusion that Thomas entered those agreements "with the purpose of defrauding the District." JA383. That is not the legal standard. *See* pp. 3-8, *supra*. Regardless, as the Insurance Defendants explained (at 39-40), there is ***no evidence*** that Thomas was taking the alleged kickbacks at the time he entered the Brokerage Service Agreements. The court's finding was based only on general "allegations" in "the amended complaint." JA383.

The District argues that, "[a]ccording to the Federal Information, upon which Thomas has been convicted, the payment of kickbacks to Thomas by the Insurance Defendants extends back to at least March 2010." Response Br. 43. That is not correct. The Information states only that Brantley's "scheme to defraud the BCSD" began in 2010, with no further explanation. JA202. The earliest alleged kickback identified in the Information is from 2013. JA203-204. There is no evidence to support the court's conclusion that Thomas was accepting kickbacks when he entered into the Brokerage Service Agreements in 2002, 2003, 2006, 2009, and 2011. Opening Br. 9-12, 40. And even the general allegation of a

2010 start date the District identifies—without factual support—would not cover the first four of those agreements.

The District also argues that the lack of evidence of kickbacks before February 2013 is "a red herring" because, "in a settlement agreement entered into in 2006, any previous agreements between the District and [the Hub Defendants] were settled and could not [be] enforced." Response Br. 43. It is unclear why the District believes the settlement agreement has any bearing on the lack of evidence of kickbacks. To the extent the District means to suggest that the settlement agreement invalidated the arbitration clauses in the 2002, 2003, and 2006 Brokerage Service Agreements, it does not explain why that is so. Nor does it make sense. The 2006 settlement resolved a protest that Knauff had lodged relating to an invitation for bids for insurance services. *See* JA126-127. It did not purport to relieve the parties of all further obligations arising out of every Brokerage Service Agreement entered before that date. If anything, the settlement is yet more proof that the District knew about its arrangements with the Insurance Defendants, as it agreed to pay Knauff $12,500 "for claims management services on policies previously secured by Knauff." *Id.*

### 3. *There Is No Evidence Supporting the District Court's Conclusion That the District Was Only Harmed by the Brokerage Service Agreements*

The district court also held that Thomas "was not acting in furtherance of the District's business" when he ordered payments pursuant to the Brokerage Service Agreements "because the payments to the Insurance Defendants actually harmed the District." JA385. But the district court did not explain why that was so, much less support that conclusion with evidence. *See MicroStrategy*, 268 F.3d at 253. The District's response on this point confirms the lack of evidence of harm to the District—***it contains not a single record cite*** to support the district court's conclusion. *See* Response Br. 43-45. Indeed, while the District also states in other sections of its brief that it "received no benefit" from Thomas's dealings with the Insurance Defendants, not one of those sentences is supported by a record citation, either. *Id.* at 31, 45; *see also id.* at 30 & n.7, 35.

The District instead tries to flip the question, stating that the Insurance Defendants' supposed "failure to point to any actual benefit" from the Brokerage Service Agreements "establishes" that that they were not "beneficial." Response Br. 44. That misses the point—it was the district court's obligation to explain the evidentiary basis for its ruling, and it failed to do so. It made no finding that the

Insurance Defendants failed to perform their duties under the Brokerage Service Agreements, or that the insurance policies procured were worthless.[3]

Nor could it. The Insurance Defendants pointed out the benefits the District received from the services and insurance policies they provided. *See* Opening Br. 41. The District's contrary argument is based entirely on its nonsensical effort to divorce the admittedly "beneficial" insurance policies the Insurance Defendants obtained for the District from the Brokerage Service Agreements under which those policies were acquired. Response Br. 44. That fails, as explained above. *See* pp. 8-10, *supra*.

4. *The District Court Had No Factual Basis To Conclude That Angel Cartwright Could Not Bind the District*

Nor did the district court have an evidentiary basis for concluding that Angel Cartwright's signature on the 2002 Brokerage Service Agreement did not bind the District. Opening Br. 42-44. The District claims that the Insurance Defendants "waived" any challenge to the "characterization" of Cartwright as Thomas's "underling." Response Br. 45. But the issue is not the "characterization"—it is the conclusion the court drew from it. "Underling" is a term of no legal significance in determining whether Cartwright had authority to bind the District. The District cannot explain why, as a legal matter, Cartwright's supposed status as Thomas's

[3] The District asserts that "consulting" services "never occurred" under the Brokerage Service Agreements. Response Br. 30 n.7. That assertion, too, is completely unsupported by proof.

"underling" alone justifies the court's refusal to impute her signature to the District. Opening Br. 45.

The District also urges that the 2002 Brokerage Service Agreement "is irrelevant to the time period alleged in the Amended Complaint." Response Br. 45. That misses the point. The fact that the District executed the 2002 Brokerage Service Agreement has tremendous evidentiary significance—it further undermines the District's claim that it did not know about the Brokerage Service Agreements and would not have entered such an agreement because it provides "no benefit" to the District.

## III. THE DISTRICT'S ARGUMENT SOUNDS IN FRAUDULENT INDUCEMENT AND SHOULD HAVE BEEN RESERVED FOR THE ARBITRATORS

Where a party argues that it should not be held to a contract because it was entered in exchange for kickbacks, the claim sounds in fraudulent inducement. *E.g.*, *In re 604 Columbus Ave. Realty Tr.*, 968 F.2d 1332, 1347 (1st Cir. 1992). And the Supreme Court has held that arguments that the contract containing an arbitration clause was fraudulently induced must be decided by the arbitrators. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 (1967). Thus, when the district court concluded that Thomas only caused the District to perform under the Brokerage Service Agreements "as part of a scheme" to receive kickbacks, JA383, that theory sounds in fraudulent inducement and should have been left for the arbitrators to decide.

The District acknowledges that federal cases have viewed "kickback agreement[s]" as "amount[ing] to fraud in the inducement." Response Br. 47. But, citing a single case—*Jackson v. Bi-Lo Stores, Inc.*, 437 S.E.2d 168 (S.C. Ct. App. 1993)—it urges that South Carolina law is different. However, unlike the *604 Columbus* decision the Insurance Defendants cited (at 45-46), *Jackson* said nothing about whether allegations of kickbacks constitute fraudulent inducement. Invoking the "illegality" doctrine that "one who participates in an unlawful act cannot recover damages for the consequence of that act," the court there held that the plaintiff could not recover damages based on a contract acquired through bribery. 437 S.E.2d at 170; *see id.* ("bribes" were "inseparable from appellants' alleged damages"). That is not this case, and it does not address the fraudulent-inducement issue the Insurance Defendants raised.

The District nevertheless contends that *Jackson* stands for the proposition that a contract procured by a bribe is "illegal[ ]" under South Carolina law and thus "***void***, not ***voidable***." Response Br. 48. That argument does not help the District. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), the trial court had denied a motion to compel arbitration on that logic, "holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void *ab initio*." The Supreme Court reversed. It held that "because respondents challenge the Agreement, but not specifically its arbitration provisions," as illegal, "[t]he

challenge should therefore be considered by an arbitrator, not a court." *Id.* at 446. The same is true here.

## IV. THE DISTRICT'S ALTERNATE ARGUMENT BASED ON ITS PROCUREMENT CODE CANNOT SUSTAIN THE DISTRICT COURT'S DECISION

Finally, the District presses an alternate ground for affirmance that was not adopted by the district court. It argues that "Thomas had no authority to enter into the arbitration clauses contained within the Brokerage Service Agreements," because "[u]nder the District's [Procurement] Code, District employees are prohibited from entering into arbitration agreements with contractors." Response Br. 49. That argument fails.

The section of the Procurement Code the District invokes states that "[t]he procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor." S.C. Code § 11-35-4230(1). And that "procedure" requires that the controversy be resolved through "administrative review and decision" by "the appropriate chief procurement officer." *Id.* § 11-35-4230(4). The District urges that, pursuant to that provision, District employees have no authority to contract to resolve disputes by other means, such as arbitration. Response Br. 51-52.

To the extent that § 11-35-4230 could be read to foreclose arbitration here, however, it is preempted by the FAA. In *Preston v. Ferrer*, 552 U.S. 346 (2008), the Supreme Court addressed a California law that similarly purported to give a

state administrative agency exclusive jurisdiction to resolve certain contract disputes. *Id.* at 349. The Court held that the law was incompatible with Section 2 of the FAA, which "declare[s] a national policy favoring arbitration" and "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 353 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984)). As a result, the court held, "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Ferrer*, 552 U.S. at 349-50. That is controlling here. Because the Brokerage Service Agreements require arbitration of all disputes arising thereunder, the FAA supersedes § 11-35-4230's effort to lodge primary jurisdiction in an administrative forum.

The District invokes *Accela, Inc. v. South Carolina Department of Labor*, No. 3:11-cv-3326-CMC, 2011 WL 6817870 (D.S.C. Dec. 28, 2011), which found that Accela was unlikely to succeed on its request to enforce an arbitration clause against South Carolina's Department of Labor because § 11-35-4230's "exclusive means" provision would override that arbitration clause. *Id.* at *6. That decision, however, did not address federal preemption under the FAA.

The District also relies on *State v. Accela, Inc.*, 2012 SC CPO LEXIS 3 (Jan. 20, 2012), an administrative decision by the South Carolina Budget and Control

Board. The SCBCB rejected an argument that the FAA supersedes § 11-35-4230. *Id.* at *6. That decision is entitled to no weight in this Court. Whether a federal statute preempts a state statute is a question of federal law. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 830 (1988). And "a state agency's interpretation of federal law is not entitled to deference." *JG v. Douglas Cty. Sch. Dist.*, 552 F.3d 786, 797 n.8 (9th Cir. 2008); *see GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (similar).

The decision is also wrong. It summarily dismissed *Preston* on the ground that it involved a "contract between private parties" rather than "a contract with the state." *Accela*, 2012 SC CPO LEXIS at *6-7. But *Preston* contains no such limitation. It broadly holds that, with respect to arbitration, "the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." 552 U.S. at 359. Section 11-35-4230 falls squarely within that holding. *Accela* is also unpersuasive because, *Preston* aside, it did not conduct a proper preemption analysis. It discussed only South Carolina law. 2012 SC CPO LEXIS at *7-8. That is backwards. A preemption analysis must be framed in terms of the ***federal*** interest advanced by the FAA. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019). And time and again, the Supreme Court has held that the FAA "declare[s] a national policy favoring arbitration" and "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements."

*Preston*, 552 U.S. at 353. *Accela* does not explain why that emphatic national policy does not mandate preemption again here.

The District's proposed alternate ground for affirmance thus fails on the merits. But this Court should not even reach the issue. "[N]othing requires" this Court to address grounds that were not the basis of the district court's decision, and the Court should "decline to engage in such lengthy alternative analyses here." *Goldfarb v. Mayor and City Council of Balt.*, 791 F.3d 500, 515 (4th Cir. 2015). "The district court" would be "in a better position to consider the parties' arguments in the first instance, which can be presented at length rather than being discussed in appellate briefs centered on the issues the district court did decide." *Id.*

## CONCLUSION

The district court's order should be vacated. This Court should direct the district court to submit this case to arbitration or, alternatively, to conduct a trial of disputed issues under 9 U.S.C. § 4.

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Respectfully submitted,

/s/ Thomas J. Wiegand

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**
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