No. _____

In The
Supreme Court of the United States

APPLIED UNDERWRITERS CAPTIVE
RISK ASSURANCE COMPANY, INC.,

Petitioner,

v.

MINNIELAND PRIVATE DAY SCHOOL, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that a delegation provision within an arbitration agreement should be enforced under Section Two of the Federal Arbitration Act, unless there is a specific (and successful) challenge to that delegation provision. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). Despite this Court's straightforward pronouncement, both federal and state courts have persisted in efforts to avoid enforcing otherwise valid delegation provisions, even without a specific challenge. In this action, the United States Court of Appeals for the Fourth Circuit joined the list of lower courts avoiding the *Rent-A-Center* rule.

The first question presented is:

1. Whether an argument that applies equally to the arbitration agreement as a whole is sufficient to specifically challenge a delegation provision under *Rent-A-Center*.

In reviewing the validity of a delegation provision, the rule of severability dictates that the provision must be analyzed without regard to the remainder of the arbitration agreement and without regard to the contract as a whole. In this action, without analysis, the appellate court treated the parties' delegation provision as if it were an insurance contract instead of merely an antecedent arbitration agreement.

QUESTIONS PRESENTED – Continued

The second question presented is:

2. Whether the severability doctrine requires enforcement of a delegation provision when the only defense to enforceability is a state anti-arbitration statute that does not address "who" gets to decide arbitrability.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The case caption contains the complete list of the parties to the proceeding. Petitioner Applied Underwriters Captive Risk Assurance Company, Inc. is a wholly owned subsidiary of Applied Underwriters, Inc., which is an indirect subsidiary of Berkshire Hathaway Inc., which is a publicly traded company listed on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Applied Underwriters Captive Risk Assurance Company, Inc. ("AUCRA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 867 F.3d 449 (4th Cir. 2017). App., *infra* 1a-20a. The order of the United States District Court for the Eastern District of Virginia is unreported. App., *infra* 36a-37a.

JURISDICTION

The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). The court of appeals had subject-matter jurisdiction under 9 U.S.C. § 16(a)(1)(C). The judgment of the court of appeals was entered on August 11, 2017. App., *infra* 1a. No petition for rehearing or hearing en banc was filed. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, provides, in pertinent part:

> 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 . . . 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.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, provides, in relevant part, that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . .

15 U.S.C. § 1012(b).

Section 38.2-312 of the Virginia Code Annotated contains an anti-arbitration rule that provides, in relevant part, that:

> No insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth . . . shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer.

Va. Code Ann. § 38.2-312(2).

STATEMENT

This action arises from the Fourth Circuit's refusal to enforce a clear and unmistakable and unchallenged agreement between the parties to delegate issues of arbitrability to an arbitrator. To reach this result, the appellate court ignored the severability doctrine concluding that the delegation provision was unenforceable based on a state anti-arbitration statute.

The appellate court's decision below avoided this Court's settled precedents by invalidating the delegation provision based on a *sua sponte* characterization of the contract which, if accepted, subjected the contract in issue to a state anti-arbitration statute.

This holding squarely conflicts with this Court's clear precedents interpreting the FAA, and joins a growing trend among state and federal courts to avoid enforcing delegation provisions without any specific, valid challenge to the provision as required by *Rent-A-Center* and its progeny.

The decision below demonstrates precisely the kind of judicial hostility to arbitration that the FAA was enacted to overcome. Indeed, the court of appeals' defiance of this Court's precedent is so clear that this Court should consider summary reversal.

A. The Arbitration Agreement and Delegation Provision

This action arises from Minnieland Private Day School, Inc.'s ("Minnieland") participation in Equity Comp®, a workers' compensation program. App., *infra* 38a-53a. In January of 2013, Minnieland entered into the Reinsurance Participation Agreement ("RPA") with AUCRA as a part of its participation in the Equity Comp® program. App., *infra* 54a-74a. The RPA contains a broad arbitration agreement with a delegation provision that provides, in pertinent part, that "[a]ll disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement . . . or (3) any other breach or claimed breach of this Agreement" shall be resolved "exclusively by binding arbitration." *Id.* at 63a. The arbitration agreement further specifies that all arbitration proceedings "shall be conducted . . . in accordance with the rules of the American Arbitration Association. . . ." *Id.*

B. The District Court Proceedings

In December of 2015, after defaulting on its obligations under the RPA, Minnieland filed the underlying complaint. App., *infra* 38a-53a. In its complaint, Minnieland cited to various provisions of the Virginia Code, including Section 38.2-312, that made up a non-exhaustive list of alleged statutory violations, and it sought a declaratory judgment that the RPA was void because it violated Virginia's public policy and

insurance laws. *Id*. Minnieland also asserted claims for fraud and breach of contract. *Id*. Notably, however, Minnieland's complaint never specifically challenged the RPA's arbitration agreement. *Id.*

In response, AUCRA moved the district court to compel arbitration under Sections 3 and 4 of the FAA. App., *infra* 78a-83a. In its motion to compel arbitration, AUCRA advanced the RPA's broad arbitration agreement which encompassed all of Minnieland's claims. Further, AUCRA expressly raised Minnieland's failure to specifically challenge the making of the arbitration agreement. *See id*.

Minnieland's response, again, failed to specifically challenge the delegation provision. App., *infra* 84a-97a. Instead, Minnieland argued that the RPA's arbitration agreement, as a whole, was invalid because it was contained in an unauthorized insurance contract that was subject to Virginia Code Annotated Section 38.2-312(2)[1], which targets and makes void any agreement in an insurance contract "depriving the courts of [Virginia] of jurisdiction in actions against the insurer." *Id.* at 93a-97a. Minnieland also asserted that the Virginia insurance code regulated the business of insurance and that, by operation of the McCarran-Ferguson Act,

[1] Approximately a dozen states have anti-arbitration statutes like the statute at issue in this case. *See* Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran-Ferguson Act: How Far Should the Protection to Policyholders Go?*, 1 U. P.R. Bus. L.J. 35, 45-58 (2010) (discussing states with anti-arbitration statutes).

the code reverse pre-empted the FAA, thereby rendering the arbitration agreement unenforceable. *See id.*

In its reply, AUCRA emphasized the RPA's unchallenged delegation provision and argued that this Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), compelled the district court to enforce the delegation provision and send Minnieland's arbitrability challenge to arbitration. App., *infra* 98a-105a.

1. The District Court Initially Granted, in Part, AUCRA's Motion to Compel Arbitration.

The district court initially held that under *Rent-A-Center*, the parties' delegation provision required an arbitrator to decide whether the RPA was subject to Virginia's anti-arbitration statute. App., *infra* 21a-30a.

The district court specifically found that: (1) "Plaintiff's claims are clearly within the scope of the parties' agreement to arbitrate," *id.* at 26a, and (2) under *Rent-A-Center*, "the parties have 'clearly and unmistakably' agreed . . . that all disputes, including enforceability, would be arbitrated." *Id*. at 28a. Because the RPA's delegation provision "clearly cover[ed]" the present dispute, the trial court granted, in part, AUCRA's motion and ordered the parties "to arbitrate whether the RPA is within the scope of Va. Code § 38.2-312, and in the event that the arbitrator finds that it

is not within the scope of [that section], all other issues deemed arbitrable under the RPA." *Id*. at 28a-29a.

2. The District Court Subsequently Denied AUCRA's Motion to Compel Arbitration.

Minnieland moved the district court to reconsider its order compelling arbitration. App., *infra* 107a-118a. In its motion, Minnieland asserted—for the first time—that it had specifically challenged the validity of the "arbitration provision itself" from "the inception of the Complaint." *Id.* at 107a-108a. For support, Minnieland pointed to paragraph 33 in its complaint, which listed the seven provisions from Virginia's insurance code, including the Virginia anti-arbitration statute. *Id*. Minnieland also argued that reconsideration was warranted because in other proceedings, AUCRA had allegedly taken inconsistent positions on the nature of the RPA. *Id*. at 116a-117a.

In its order granting Minnieland's motion to reconsider, the court affirmed its initial ruling on AUCRA's motion to compel arbitration and held Minnieland failed to challenge the RPA's arbitration agreement under § 2 of the FAA:

> Minnieland challenges the enforceability of [the] RPA's arbitration provisions not based on contract formation grounds that would warrant the revocation of a contract or a dispute that the enforceability of that arbitration agreement is not within the scope of their agreement to arbitrate, but rather based on a disputed characterization of the RPA, which if

> accepted, would subject it to Va. Code § 38.2-312.

App., *infra* 33a.

Nevertheless, the district court ultimately denied AUCRA's motion to compel holding that AUCRA was judicially estopped from "claiming that the [RPA] is a 'contract of reinsurance' and not a contract of insurance within . . . [Virginia's anti-arbitration statute], and therefore is judicially estopped from claiming that there is an arbitrable issue under the RPA." App., *infra* 36a-37a.

C. The Decision Below

In a published opinion, the Fourth Circuit affirmed, in part, and reversed, in part, the district court's ruling on AUCRA's motion to compel arbitration. App., *infra* 2a. The Fourth Circuit correctly recognized that the FAA generally preempts state laws that restrict the enforcement of arbitration agreements. *Id*. at 8a. It also recognized that the McCarran-Ferguson Act reverse preempts state laws that regulate the business of insurance, and it recognized that Virginia's anti-arbitration statute "renders void mandatory arbitration provisions in 'insurance contracts.'" *Id*. at 9a.

The Fourth Circuit did not expressly determine that Virginia's anti-arbitration statute was a state law regulating the business of insurance under the

McCarran-Ferguson Act. *See id.* Instead, it sidestepped that question:

> [AUCRA] does not contend that Section 38.2-312 does not generally reverse preempt the [FAA]. Rather, [AUCRA] argues that the district court improperly determined that Section 38.2-312 reverse preempts the arbitration provision in the RPA because the RPA included a so-called "delegation provision," which expressly delegated the authority to resolve questions of arbitrability to the arbitrator.

Id. at 9a.

The Fourth Circuit also found that AUCRA's delegation argument fell within this Court's decision in *Rent-A-Center*, which requires that, before a court considers a challenge to a delegation agreement, there must be a specific challenge to the making of the delegation agreement on "grounds as exist at law or equity for the revocation of any contract." *Id*. at 10a-12a.

However, the Fourth Circuit decided that Minnieland had sufficiently challenged the RPA's delegation clause simply because it asserted—in its motion to reconsider—that Virginia's anti-arbitration statute "rendered void 'any' arbitration provision in the RPA . . . necessarily including the delegation provision." *Id*. at 12a-13a. The Fourth Circuit further observed that:

> [T]o avoid any doubt that its challenge to the enforceability of the arbitration agreements in the RPA extended to the delegation

> provision, Minnieland expressly asserted that, under Section 38.2-312, "*[t]he court must resolve* the validity of the arbitration provision," an argument relevant only to the enforceability of the delegation provision.

Id. at 13a. Thus, the Fourth Circuit concluded that Minnieland "'challenged the validity of the delegation with sufficient force and specificity' to satisfy *Rent-A-Center*." *Id*.

Having disposed of the *Rent-A-Center* analysis, the Fourth Circuit ignored the rule of severability and proceeded to consider whether the Virginia anti-arbitration statute rendered the delegation provision unenforceable—without any analysis of whether that statute satisfied Section 2 of the FAA. *See id.* at 14a-17a.

Relying on this flawed analysis, the Fourth Circuit concluded that the delegation provision was unenforceable on two principal grounds. First, it held that Virginia makes void delegation provisions in "putative" insurance contracts. *Id*. at 14a. Second, it found that enforcing arbitration agreements that allow arbitrators to decide if a contract was an insurance contract "would undermine . . . a core question of Virginia insurance law." *Id*. at 15a.

Finally, the Fourth Circuit summarily dismissed AUCRA's assertion that its decision conflicted with decisions rendered by the Third and Sixth Circuits on delegation questions involving the RPA:

> Neither *South Jersey Sanitation* nor *Milan Express* considered—much less decided—whether the relevant state insurance laws rendered unenforceable the *delegation provision* in the RPA—the question we resolve here. Accordingly, [those cases] are inapposite to whether Section 38.2-312 renders void delegation provisions in putative insurance contracts governed by Virginia law.

Id. at 16a. As a result, the Fourth Circuit concluded that the district court did not "reversibly err" in denying AUCRA's motion to compel arbitration. *Id*. at 16a-17a.

REASONS FOR GRANTING THE PETITION

This Court unambiguously held in *Rent-A-Center* that delegation provisions—by which parties authorize arbitrators to decide arbitrability—are enforceable pursuant to Section 2 of the FAA, just like any other agreement to arbitrate. Despite that clear authority, a growing trend of state and federal courts continue to refuse to enforce delegation provisions, even without the specific, valid challenge required by *Rent-A-Center*.

The first reason supporting certiorari in this case is the court of appeals' refusal to enforce the delegation provision in the RPA despite *Rent-A-Center*. Even if Minnieland *had* specifically challenged the delegation provision, the Fourth Circuit improperly ignored the rule of severability in analyzing the validity of the delegation provision. It invalidated the delegation

provision by applying a Virginia anti-arbitration statute that governs only "insurance contracts," without any corresponding analysis of whether the delegation provision itself was an insurance contract, and without any consideration of whether the anti-arbitration rule satisfied Section 2 of the FAA.

To justify its refusal to apply this clear precedent, the court of appeals cited to the possibility of arbitrator error. In doing so, the decision below demonstrated precisely the kind of judicial hostility to arbitration that the FAA was enacted to overcome. Indeed, the court of appeals' distortion of *Rent-A-Center* is so clear that this Court should consider summary reversal.

I. THE DECISION BELOW DEFIES THIS COURT'S PRECEDENT IN *RENT-A-CENTER*

The *Rent-A-Center* decision was the natural outgrowth of this Court's severability doctrine.

This Court summarized three key principles of federal arbitration law in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006):

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.

Id. at 445-46. The first two principles had been a matter of settled precedent since *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). That case held that an arbitrator, not a court, should decide whether a contract containing an arbitration agreement was fraudulently induced.

In *Buckeye*, the plaintiff argued that the entire contract was void as a result of an alleged violation of state usury statutes; however, because the plaintiff had not lodged any challenge to the arbitration provision specifically, this Court applied the rule of severability and compelled arbitration. It noted "we cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'" *Buckeye*, 546 U.S. at 445.

In 2010, this Court expounded upon the principles established in *Buckeye Check Cashing* by holding that the rule of severability applies equally to a delegation provision within a larger arbitration agreement. It held that:

> 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. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract."

Rent-A-Ctr., W., Inc., 561 U.S. at 70. The rule of severability as articulated by *Rent-A-Center* is therefore analogous to the concept of Russian nesting dolls—in which the parties' contract is the biggest doll, the arbitration agreement within that contract is a smaller doll, and the delegation provision within the arbitration agreement is the smallest doll.[2] Under *Rent-A-Center*, unless the party seeking to avoid arbitration raises a specific challenge to the smallest doll—the delegation provision—the court must enforce it.

A. Minnieland Committed the Same Error As Jackson

In *Rent-A-Center*, this Court had no difficulty concluding that Jackson did not specifically challenge the delegation provision. It noted that "[n]owhere in his opposition to Rent-A-Center's motion to compel arbitration did he even mention the delegation provision." *Id.* at 72. His arguments that the arbitration agreement was unconscionable applied to the entirety of the arbitration agreement—"none of Jackson's substantive unconscionability challenges was specific to the delegation provision." *Id.* at 74. Even at this Court, the closest Jackson came to a specific challenge was to say

[2] *See id.* at 85 (Stevens, J., dissenting) (noting "[t]oday the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator.").

that the "*entire arbitration agreement*, including the delegation clause, was unconscionable."

Minnieland copied Jackson's error. It failed to specifically challenge the delegation provision. Minnieland never mentioned the delegation provision in its opposition to AUCRA's motion to compel arbitration. App., *infra* 84a-97a. Instead, its opposition at the district court was focused on the arbitration agreement as a whole and whether it violated the Virginia anti-arbitration statute. *See id*. For example, Minnieland argued in its concluding paragraph: "The arbitration provision in the insurance contract Applied seeks to enforce violates Virginia public policy regulating the insured/insurer relationship. . . . The arbitration provision is void and unenforceable." *Id.* at 97a. Minnieland made no attempt to show how that public policy or insurance statute impacted the delegation provision specifically.

Minnieland repeated its error at the court of appeals. It made no specific challenge to the delegation provision, but levied a broad assault on the validity of the arbitration agreement as a whole. It repeatedly argued that the entire arbitration agreement was void:

> As a matter of law, neither Minnieland nor Applied Underwriters could have agreed to deprive the courts of jurisdiction of Minnieland's action. Va. Code § 38.2-312 ("Any such condition, stipulation or agreement shall be void . . . "). The arbitration provision Applied Underwriters sought the District Court to enforce "is void and has no legal effect."

Brief of Appellee at 9, *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449 (4th Cir. 2017) (No. 16-1511), ECF No. 24-1, 2016 WL 4364185.

B. The Fourth Circuit Committed the Same Error As the Ninth Circuit Did In *Rent-A-Center*

Despite Minnieland's failure to challenge the delegation provision specifically, the Fourth Circuit rescued Minnieland by characterizing its statutory argument as "an argument relevant only to the enforceability of the delegation provision." App., *infra* 13a. Yet, as summarized above, Minnieland's statutory argument was that the Virginia statute made the *entire arbitration agreement* void and unenforceable. Minnieland's argument is no more specific to the delegation provision than Jackson's argument in *Rent-A-Center* that the "*entire arbitration agreement*, including the delegation clause, was unconscionable." *See* 561 U.S. at 73. Minnieland's argument should have failed in the Fourth Circuit, just as Jackson's attempt to circumvent the delegation provision failed in *Rent-A-Center*. There was no difference between the two arguments.

Because the Virginia anti-arbitration statute only applies to insurance contracts, and there was no finding that the RPA was an insurance contract, much less any finding that the arbitration agreement, or its delegation provision, were insurance contracts, the courts

below were obligated to enforce the delegation provision.[3] When faced with a similar argument—that a Georgia statute invalidated an entire arbitration agreement—the Eleventh Circuit has acknowledged that the challenge was not specific to the delegation provision, and it sent the substantive issue to the arbitrator. *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146-49 (11th Cir. 2015). The court correctly held that "[a]t no point in his complaint does [plaintiff] specifically challenge the parties' agreement *to commit to arbitration* the question of the enforceability of the arbitration agreement. Rather, he asks us to review the validity of the arbitration agreement as a whole, a task which the delegation provision expressly commits to an arbitrator." *Id.* at 1149; *see also Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P.*, 853 F.3d 804, 817-18 (5th Cir. 2017), *as revised* (Apr. 12, 2017) (rejecting challenge to validity of contract based on rule derived from state statute because "it [was] not, in actuality, a challenge directed specifically to the agreement to arbitrate").

In this case, by affirming the district court's denial of AUCRA's motion to compel arbitration despite Minnieland's failure to make any specific challenge to the parties' delegation provision, the Fourth Circuit ignored the clear mandate of *Rent-A-Center*.

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[3] When the delegation provision is severed from the remainder of the RPA, it is only an arbitration agreement, without any insurance or other industry overlay. *See* Section II, *infra*.

C. The Decision Below Is Part Of A Growing Trend To Evade *Rent-A-Center*

The decision below is not simply an outlier that misapplied this Court's precedent. Instead, it joins a growing trend of federal and state appellate decisions that have defied this Court's clear mandate in *Rent-A-Center* by refusing to enforce unchallenged delegation provisions.

1. Circuit Courts Have Refused to Enforce Unchallenged Delegation Provisions

In recent years, multiple circuit courts of appeals have evaded the ruling in *Rent-A-Center*. Instead of enforcing delegation provisions, these courts, in some cases, have chosen to conduct their own substantive review of arbitrability to determine whether it is "wholly groundless," even without any specific challenge to the delegation provision being raised.

The "wholly groundless" exception stems from a Federal Circuit decision that pre-dates *Rent-A-Center*: *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006). The Federal Circuit continued to rely on its holding in *Qualcomm* after *Rent-A-Center*. *See InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 718 F.3d 1336, 1347 (Fed. Cir. 2013), *vacated as moot sub nom. LG Elecs., Inc. v. InterDigital Commc'ns, LLC*, 134 S. Ct. 1876 (2014).

Currently, the United States Courts of Appeals for the Fifth, Sixth, and Federal Circuits have all held that

a "district court may decide the 'gateway' issue of arbitrability *despite a valid delegation clause*" if it finds the defendant's substantive argument for arbitrability "untenable." *IQ Products Co. v. WD-40 Co.*, 871 F.3d 344, 348-49 (5th Cir. 2017) (emphasis added); *see also Belnap*, 844 F.3d at 1785 (recognizing that the Fifth, Sixth, and Federal Circuits have adopted the "wholly groundless" approach); *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016) ("We have carved out a narrow exception to the *Rent-A-Center* rule: Where the argument for arbitration is 'wholly groundless,' we refuse to enforce a delegation clause.").

Earlier this year, a circuit split developed regarding whether "wholly groundless" is a valid exception to this Court's holding in *Rent-A-Center*. The Tenth and Eleventh Circuit Courts of Appeals rejected the "wholly groundless" approach as in conflict with this Court's ruling in *Rent-A-Center*. *See Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Cir. 2017) (recognizing that "the 'wholly groundless' approach . . . appears to be in tension with language of the Supreme Court's arbitration decisions"); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017) (holding "[w]e join the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception.").

Although the Fourth Circuit did not reference the wholly groundless exception in its decision below, it is improper for the same reason as the "wholly groundless" decisions. It authorized the district court to delve

into the merits of the arbitrability issue, an issue that the parties had clearly and unmistakably delegated to the arbitrator.

2. State Courts Have Refused to Enforce Unchallenged Delegation Provisions

The federal courts are not alone in finding ways to evade the Court's clear mandate in *Rent-A-Center*. The high courts of multiple states have refused to enforce delegation provisions, even though the plaintiff failed to specifically challenge the delegation provision.

For example, the Supreme Court of New Jersey recently found that because the arbitration agreement as a whole was not enforceable, it also would not enforce the delegation provision.

> The arbitration provision in the Sanford Brown enrollment agreement suffers from the same flaw found in the arbitration provision in *Atalese*—it does not explain in some broad or general way that arbitration is a substitute for the right to seek relief in our court system. That flaw—non-compliance with the dictates of *Atalese*—extends to the purported delegation clause.

Morgan v. Sanford Brown Institute, 137 A.3d 1168, 1179 (N.J. 2016).

The Supreme Court of Kentucky decided similarly in *Dixon v. Daymar Colleges Group, LLC*, 483 S.W.3d

332, 342 (Ky. 2015). After "conced[ing] that the delegation provision was clear," the court refused to enforce it, because it held the entire arbitration agreement was unenforceable due to the location of the signatures.

This trend has not escaped this Court's notice. West Virginia also refused to enforce a delegation provision in 2015, although the provision was unchallenged. *Schumacher Homes of Circleville, Inc. v. Spencer*, 774 S.E.2d 1, 13 (W. Va. 2015) (finding the delegation clause ambiguous), *judgment vacated*, 136 S. Ct. 1157 (2016).[4] This Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

On remand, West Virginia abandoned its attempt to circumvent *Rent-A-Center*, holding:

> The home buyer never specifically challenged the delegation language, before the circuit court or this Court. We find that the home buyer has therefore waived any right to challenge the delegation language. We remand the case to the circuit court, and direct that the parties' dispute regarding the validity, revocability, or enforceability of the arbitration agreement be referred to arbitration.

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[4] The Montana Supreme Court also recently refused to enforce an unchallenged delegation provision. *See Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 368 (Mont. 2016) (finding "[t]here is no 'clear and unmistakable' agreement in Global's language or elsewhere in the facts of this case to arbitrate questions of arbitrability.").

Schumacher Homes of Circleville, Inc. v. Spencer, 787 S.E.2d 650, 655 (W. Va. 2016).

Unfortunately, this Court's summary vacatur and remand in *Schumacher Homes* in 2016 has not slowed the growing trend amongst federal and state courts to evade *Rent-A-Center*. Now, in this action, the Fourth Circuit has joined the trend and added its own exception to undermine the enforcement of delegation provisions.

II. THE DECISION BELOW IMPROPERLY CONCLUDED THE DELEGATION PROVISION WAS AN INSURANCE CONTRACT

The decision below is also contrary to federal precedent for a second independent reason. Even if Minnieland had specifically challenged the delegation provision of the parties' RPA—which it did not—there was no basis to find the delegation provision invalid under Virginia's anti-arbitration statute. By reaching to find the delegation provision invalid, the decision below created a circuit split over whether the McCarran-Ferguson Act, and its "reverse preemption," should apply at the antecedent stage of enforcing delegation provisions.

A. The Court Improperly Assumed the Reinsurance Participation Agreement and Its Delegation Provision Were Insurance Contracts

The Virginia anti-arbitration statute at issue applies only to insurance contracts. It provides, in relevant part:

> No *insurance contract* delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth . . . shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer.
>
> * * *
>
> Any such condition, stipulation or agreement shall be void, but such voiding shall not affect the validity of the remainder of the contract.

Va. Code Ann. § 38.2-312 (emphasis added).

Instead of evaluating only the validity of the delegation provision, the Fourth Circuit erred by applying the statute without any showing that either the RPA or its arbitration agreement were, in fact, insurance contracts.

AUCRA's consistent response to Minnieland's allegation that the arbitration agreement was unenforceable was that the RPA was *not* an insurance contract and therefore was not subject to the statute. Nevertheless, in addressing the enforceability of the delegation provision, the Fourth Circuit breezed past

that key issue without comment. The decision below simply concluded, without any accompanying analysis, that the Virginia statute applied not just to insurance contracts, but also to "putative insurance contracts." *Id.* at 14a. "[W]e conclude that Section 38.2-312 renders invalid delegation provisions in *putative* insurance contracts governed by Virginia law. . . ." *Id.* (emphasis added).

Not only did the Fourth Circuit's decision apply the statute to a "putative" contract of insurance without any authority supporting that application, it also failed to analyze whether the Virginia anti-arbitration statute applied to the parties' precise dispute. The Virginia statute is silent on the issue of *who* should decide whether a dispute belongs in arbitration. Accordingly, the parties' clear and unmistakable agreement to delegate that issue to an arbitrator should have been enforced.

Further, the decision below incorrectly characterized the delegation provision as an insurance contract and therefore governed by the statute. However, because the delegation provision must be analyzed as a stand-alone contract under the severability doctrine first articulated in *Prima Paint*, the delegation provision could only be "void" under the statute if it was itself an "insurance contract." Nothing in the decision below draws that conclusion, and there is no language in the delegation provision that would factually support the conclusion of any court that the delegation provision was, itself, an insurance contract.

The court of appeals' defiance of this Court's severability doctrine presents an additional basis for review.

B. The Decision Below Demonstrates Judicial Hostility Toward Arbitration

The foundations of the decision below are, at best, unstated and, at worse, unsound. Unfortunately, the rationale for the result becomes clear when the court's judicial hostility to arbitration is considered. The Fourth Circuit proclaimed that the purpose of Virginia's anti-arbitration statute would be undermined if arbitrators were allowed to determine whether contracts are "insurance contracts," without citing to any evidence of legislative intent to support this declaration.

It also refused to give arbitrators the ability to determine a "core question of Virginia insurance law" by reasoning that doing so would "deprive" a Virginia insured "of resource to the judiciary." The court reasoned that:

> [W]ere an arbitrator to incorrectly determine that a contract was not an "insurance contract" for purposes of Virginia law and move forward with arbitration of the underlying dispute—or to correctly conclude that a contract was an insurance contract and then incorrectly move forward with arbitration of the underlying dispute—a Virginia insured would be deprived of recourse to the judiciary to resolve a dispute over the interpretation of an

> insurance contract governed by Virginia law, the precise outcome Virginia sought to prevent in enacting Section 38.2-312.

App., *infra* 15a-16a.

In short, the court of appeals concluded that the risk of an arbitrator wrongly deciding whether a contract was an insurance contract justified refusing to enforce the delegation provision. That is precisely the sort of judicial hostility to arbitration that the FAA was enacted to overcome, and that this Court has repeatedly held is impermissible:

> It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions.

Buckeye, 546 U.S. at 448-49; *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (noting that the Kentucky court's placement of "arbitration agreements within that class reveals the kind of 'hostility to arbitration' that led Congress to enact the FAA.").

C. The Decision Below Created A Circuit Split On Reverse Preemption

The decision below also creates a circuit split regarding whether to enforce the delegation provision in situations where the McCarran-Ferguson Act creates a potential exception to the FAA. Two other federal circuit courts of appeals have enforced the exact same delegation provision at issue here.

In the face of an argument that a Nebraska anti-arbitration statute invalidated arbitration provisions in insurance policies, the Third Circuit found "it is not clear that the short but obscure RPA falls within the ambit of the Nebraska Statute" and therefore "it is for the arbitrator to determine." *See S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 145 (3d Cir. 2016).

The Sixth Circuit likewise refused to address the merits of an argument that the Nebraska statute made the delegation provision unenforceable. It held that the plaintiff's "challenge, to the arbitration clause as a whole, is limited to the argument that it is unenforceable under Nebraska law. [Plaintiff] *may* be right about this, but enforceability is a question the parties expressly agreed to submit to arbitration, an agreement Milan has not challenged. . . ." *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, No. 14-5193, 2014 U.S. App. LEXIS 20637, at *10-11 (6th Cir. Oct. 23, 2014). At least one state court of last resort has also enforced a delegation provision, despite

arguments about state insurance laws. *Ex parte Foster*, 758 So. 2d 516, 519 (Ala. 1999).

III. THE QUESTIONS PRESENTED ARE IMPORTANT

This case weaves together two areas of great importance for how consumers and businesses safeguard against risk and resolve disputes: insurance and arbitration. Review is warranted for at least two reasons.

First, the enforceability of delegation provisions generally is an important issue that arises frequently in state and federal courts and impacts millions of individuals and businesses. A 2013 study by the Consumer Financial Protection Bureau found that a majority of arbitration agreements in consumer financial products delegate arbitrability to the arbitrator.[5] As demonstrated in Section I, circumventing delegation provisions is a growing trend in state and federal courts. This Court should take the opportunity to reiterate that lower courts may not contravene the clear precedent established in *Rent-A-Center*. Without such intervention, departures from precedent will multiply unabated.

Second, the more specific issue of whether delegation provisions should be enforced despite the potential application of state anti-arbitration statutes is one

[5] *See* Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results*, 36-37 (Dec. 12, 2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

that affects many insurers and insureds.[6] About a dozen states have anti-arbitration statutes like the statute at issue in this case. *See* Hernández-Gutiérrez, *supra*, at p. 5 n.1. The decision below in this action created a circuit split with the courts of appeals for the Third and Sixth Circuits, which have enforced arbitration in the face of similar arguments. Those with insurance contracts (or now even putative insurance contracts) governed by the laws of those states now face uncertainty about the applicability of their delegation provisions.

[6] The insurance industry relies heavily on arbitration for resolving disputes. *See generally*, A Steven Plitt, et al., *Couch on Insurance*, § 9:34 (3d ed. June 2017 update) ("Reinsurance contracts typically provide for arbitration of disputes between the reinsurer and the reinsured."); Yvette Ostolaza, *Enforcement of Arbitration Agreements in Consumer Financial Services Contracts*, 60 Consumer Fin. L.Q. Rep. 265, 265 (2006) (citing a study that "found that seventeen out of the eighteen contracts evaluated for homeowner's insurance, renter's insurance, auto insurance, and health insurance had arbitration clauses."); *Arbitration of Insurance Disputes Continues to Rise*, 15 No. 18 Andrews Ins. Indus. Litig. Rep. 18 (2000) (noting that "Property and casualty carriers and self-insureds made record use of arbitration last year, and resolved more than $1 billion in inter-company claims disputes in the process.").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1511

MINNIELAND PRIVATE DAY SCHOOL, INC., a Virginia corporation,

Plaintiff-Appellee,

v.

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:15-cv-01695-AJT-IDD)

Argued: May 10, 2017 Decided: August 11, 2017

Before GREGORY, Chief Judge, and SHEDD and WYNN, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Wynn wrote the opinion, in which Chief Judge Gregory and Judge Shedd joined.

ARGUED: Daniel William Olivas, LEWIS, THOMASON, KING, KRIEG & WALDROP, Nashville, Tennessee, for Appellant. James Scott Krein, KREIN LAW FIRM, Prince William, Virginia, for Appellee. **ON BRIEF:** R. Dale Bay, Emily H. Mack, LEWIS, THOMASON, KING, KRIEG & WALDROP, Nashville, Tennessee, for Appellant.

WYNN, Circuit Judge:

Defendant Applied Underwriters Captive Risk Assurance Company, Inc. ("Applied Underwriters"), a subsidiary of Berkshire Hathaway, Inc., appeals an order of the U.S. District Court for the Eastern District of Virginia (1) denying Applied Underwriters' motion to compel arbitration and (2) holding that Applied Underwriters was judicially estopped from arguing that an agreement between Applied Underwriters and Plaintiff Minnieland Private Day School, Inc. ("Minnieland") did not constitute an insurance contract for purposes of Virginia law. For the reasons that follow, we conclude that the district court correctly denied Applied Underwriters' motion to compel arbitration. But the district court reversibly erred in applying the doctrine of judicial estoppel to hold that the agreement constituted an insurance contract. Accordingly, we affirm in part, reverse in part, and remand the case to the district court for further proceedings consistent with this opinion.

I.

A.

Minnieland, a provider of child daycare, is required under Virginia law to provide workers' compensation insurance to its employees. In 2013, Minnieland entered into a "Reinsurance Participation Agreement" ("RPA") with Applied Underwriters, as part of Minnieland's purchase of Applied Underwriters' "Equity Comp" program, which Applied Underwriters held out to be a "Worker's Compensation Program." J.A. 9. Under the RPA, which had a three-year term, one or more "Issuing Insurers" – all of which were affiliates of Applied Underwriters and subsidiaries of Berkshire Hathaway – would issue workers' compensation insurance policies to Minnieland. Also pursuant to the RPA, Applied Underwriters would establish a "segregated protected cell" through which Minnieland would share in the Issuing Insurers' profits and losses attributable to Minnieland's policies. Following execution of the RPA, Applied Underwriters' affiliate, and Berkshire Hathaway subsidiary, Continental Indemnity Company ("Continental") issued a workers' compensation policy to Minnieland. The RPA appointed another Berkshire Hathaway subsidiary as the billing agent for Applied Underwriters and the Issuing Insurers. Throughout the term of the agreement, Minnieland paid premiums on the policy to Applied Underwriters.

The RPA included an arbitration provision mandating resolution of "any disputes arising under this Agreement" through binding arbitration in the British

Virgin Islands and under the provisions of the American Arbitration Association. J.A. 29-30. In particular, the arbitration agreement provided that "[a]ll disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement" were subject to mandatory binding arbitration. J.A. 30.

For the first 33 months of the 36-month term, Minnieland's monthly premiums averaged $58,810. But on November 9, 2015, Applied Underwriters billed Minnieland $471,213, a 1,167% increase from the October 2015 premium and an 801% increase from the average premium Minnieland had paid over the first 33 months of the policy. Though Applied Underwriters refused to disclose the basis for the premium increase, Minnieland nevertheless paid the November premium. After Minnieland failed to pay a second similarly large billed premium in December 2015, Applied Underwriters terminated the EquityComp program – and the Continental workers' compensation policy, in particular – and informed Minnieland that it had a significant outstanding balance on the policy.

B.

On December 24, 2015, Minnieland filed suit against Applied Underwriters in federal district court, alleging that Applied Underwriters engaged in the business of insurance in Virginia without complying

with Virginia insurance and workers' compensation laws. In particular, Minnieland alleged that the RPA amounted to an "insurance contract," not a "reinsurance" agreement, and therefore constituted an unlawful "attempt to circumvent" various Virginia laws related to insurance and workers' compensation. J.A. 12-13. The complaint also alleged that the arbitration provisions in the RPA violated Virginia insurance law. Minnieland sought a declaration (1) that the RPA constituted an insurance contract and was void due to Applied Underwriters' failure to comply with Virginia law; (2) as to what amount, if any, Minnieland owed Applied Underwriters under the RPA; and (3) that the premiums, deposits, and charges assessed by Applied Underwriters were excessive. Minnieland also sought damages for fraud and breach of contract.

On January 21, 2016, Applied Underwriters moved to compel arbitration. In response, Minnieland argued that under Virginia law "no provision of any insurance contract can . . . deprive 'the courts of this Commonwealth of jurisdiction in actions against the insurer,'" rendering any arbitration provision in the RPA "'void.'" J.A. 85, 88 (quoting Va. Code Ann. § 38.2-312). Applied Underwriters replied that, because the RPA delegated questions of arbitrability to the arbitrator, the arbitrator had exclusive authority to decide whether the RPA constituted an "insurance contract" subject to Section 38.2-312's prohibition on mandatory arbitration of disputes involving such contracts. The district court initially granted Applied Underwriters' motion, holding that "the arbitration provision in the

[RPA] requires that an arbitrator decide whether the parties' contract is subject to Va. Code § 38.2-312." *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, No. 1:15-cv-1695, 2016 WL 7199729, at *1 (E.D. Va. Mar. 17, 2016). The district court's initial order included the following note:

> In order to avoid unnecessary and unwarranted delay and expense, the Court urges Applied to consider whether, given the underlying merits of the issue to be arbitrated, the rulings already obtained in arbitration concerning whether the RPA is a "contract of reinsurance" (as advocated for by Applied), and the positions Applied has taken in other proceedings concerning whether the RPA is a "contract of reinsurance," Applied can continue to advocate in good faith before an arbitrator and without running afoul of 28 U.S.C. § 1927 that the RPA is a "contract of reinsurance" and therefore not a "contract of insurance" subject to Va. Code § 38.2-312.

Id. at *3 n.6

Minnieland moved for reconsideration, again arguing that Section 38.2-312 rendered void "any" arbitration provision in the RPA and, therefore, that "[t]he court must resolve the validity of the arbitration provision." J.A. 208-09. Minnieland also attached to its motion additional materials from other regulatory and legal proceedings in which Applied Underwriters or its affiliates had either refused to dispute or conceded that the RPA constituted an insurance contract for

purposes of various other state laws. The district court orally granted Minnieland's motion, concluding that Applied Underwriters was judicially estopped from arguing that the RPA did not constitute a "contract of insurance." J.A. 465. As a result, the court observed that there was no "arbitrable issue to be submitted to the arbitrator under the RPA." J.A. 465. The district court further concluded that "Applied's assertion in this action that the RPA is not a contract of insurance but rather a contract of reinsurance must be viewed as an attempt to gain an unfair advantage in this proceeding by delaying what ultimately must be addressed by the Court and diverting this case procedurally to an arbitrable forum that is to play no role under the applicable Virginia law in deciding the merits of plaintiff's claims." J.A. 466.

Applied Underwriters timely appealed, arguing that the district court (1) reversibly erred in denying Applied Underwriters' motion to compel arbitration and (2) incorrectly held that the doctrine of judicial estoppel barred Applied Underwriters from asserting that the RPA does not constitute a "contract of insurance" for purposes of Virginia law. We hold that the district court correctly denied Applied Underwriters' motion to compel arbitration, but incorrectly applied the doctrine of judicial estoppel in holding that the RPA constitutes an "insurance contract" for purposes of Section 38.2-312.

II.

This Court reviews de novo a district court's order denying a motion to compel arbitration under the Federal Arbitration Act. *See Noohi v. Toll Bros.*, 708 F.3d 599, 605 (4th Cir. 2013). That statute provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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. The Federal Arbitration Act generally preempts state laws limiting the enforceability of arbitration agreements. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 352-53 (2008).

However, the federal McCarran-Ferguson Act endows states with plenary authority over the regulation of insurance and provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. "Thus, McCarran-Ferguson authorizes 'reverse preemption' of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance." *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (4th Cir. 2012). In other words, state laws invalidating arbitration agreements in insurance policies "reverse preempt[]" the Federal Arbitration Act. *E.g.*, *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006) (holding that Mississippi statute prohibiting required arbitration of disputes stemming from uninsured and underinsured

motorist coverage provisions of personal automobile insurance policies reverse preempts Federal Arbitration Act); *Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding that South Carolina law prohibiting mandatory arbitration provisions in insurance contracts reverse preempts the Federal Arbitration Act).

Virginia law, which the parties agree governs the present dispute, provides that "[n]o insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth . . . shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer," and that "[a]ny such condition, stipulation or agreement shall be void." Va. Code Ann. § 38.2-312. The district court concluded – and we agree – that Section 38.2-312 renders void mandatory arbitration provisions in "insurance contracts" governed by Virginia law. *Minnieland*, 2016 WL 7199729, at *1, *3.

On appeal, Applied Underwriters does not contend that Section 38.2-312 does not generally reverse preempt the Federal Arbitration Act. Rather, Applied Underwriters argues that the district court improperly determined that Section 38.2-312 reverse preempts the arbitration provisions in the RPA because the RPA included a so-called "delegation provision," which expressly delegated the authority to resolve questions of arbitrability to the arbitrator. In particular, Applied Underwriters asserts that the district court improperly concluded that the RPA constituted an "insurance

contract" for purposes of Section 38.2-312, when the RPA left that question of arbitrability to the arbitrator.

Applied Underwriters arbitrability argument principally rests on the Supreme Court's opinion in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). There, the arbitration agreement between the defendant, Rent-A-Center, and the plaintiff, Jackson, provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." 561 U.S. at 66 (alteration in original) (internal quotation marks omitted). Jackson sought to avoid the *arbitration agreement* on grounds of unconscionability, arguing that the mandatory arbitration provision was one-sided and involved unfair procedures limiting discovery and requiring fee-splitting. *Id.* at 73-74. Below, the Ninth Circuit concluded that the agreement unambiguously gave the arbitrator exclusive authority to resolve questions of arbitrability. *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 917 (9th Cir. 2009), *rev'd*, 561 U.S. 63 (2010). Nonetheless, the Ninth Circuit held that when "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." *Id.*

The Supreme Court reversed, holding that the Ninth Circuit's analysis improperly focused on the unconscionability of the *arbitration agreement* and not the *delegation provision*, which provided the arbitrator

exclusive authority to resolve questions of arbitrability. *See Rent-A-Center*, 561 U.S. at 72-74. "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," the Court explained. *Id.* at 70. Because Jackson's unconscionability arguments focused on "the *entire arbitration agreement*" – and not the delegation provision, in particular – the unchallenged delegation provision granted the arbitrator exclusive authority to determine whether the arbitration agreement was unconscionable. *Id.* at 72-74.

Rent-A-Center makes clear, however, that "[i]f a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4." *Id.* at 71. Accordingly, because delegation provisions constitute "an additional, antecedent agreement" to arbitrate, such provisions are "valid under § 2 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 69-70 (quoting 9 U.S.C. § 2). Federal courts, therefore, "must consider" challenges to delegation provisions "before ordering compliance with [such provisions]." *Id.* at 71. To that end, *Rent-A-Center* provides an illustration of how Jackson could have argued that the *delegation provision*, as opposed to the arbitration agreement as a whole, was "unconscionable" – and therefore unenforceable – because of the limitations on arbitral discovery and the fee-splitting procedures:

> To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the [arbitration] Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.

Id. at 74.

Accordingly, under *Rent-A-Center*, we first must decide whether Minnieland lodged a challenge against the delegation provision in the RPA, in particular. Second, if we conclude that Minnieland specifically challenged the enforceability of the delegation provision, we then must decide whether the delegation provision is unenforceable "upon such grounds as exist at law or in equity." 9 U.S.C. § 2.

Regarding the first question, Applied Underwriters argues that Minnieland, like the plaintiff in *Rent-A-Center*, failed to specifically challenge the delegation provision in the RPA. But before the district court, Minnieland argued that Section 38.2-312 rendered void "*any*" arbitration provision in the RPA, J.A. 208-09 (emphasis added), necessarily including the

delegation provision, which is simply "an additional, antecedent agreement" to arbitrate, *Rent-A-Center*, 561 U.S. at 70; *see also* J.A. at 85, 88 (arguing that under Virginia law "*no provision* of any insurance contract can . . . deprive 'the courts of this Commonwealth of jurisdiction in actions against the insurer,' " rendering any arbitration provision in the RPA " 'void' " (quoting Va. Code Ann. § 38.2-312) (emphasis added)). And to avoid any doubt that its challenge to the enforceability of the arbitration agreements in the RPA extended to the delegation provision, Minnieland expressly asserted that, under Section 38.2-312, "*[t]he court must resolve* the validity of the arbitration provision," an argument relevant only to the enforceability of the delegation provision. J.A. 208-09 (emphasis added). Accordingly, Minnieland "challenged the validity of that delegation with sufficient force and specificity" to satisfy *Rent-A-Center*. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671 n. 1 (4th Cir. 2016).

Applied Underwriters nevertheless argues that Minnieland failed to adequately contest the enforceability of the delegation provision because its *complaint* did not "specifically challenge" the delegation provision. Appellant's Br. at 5; Appellant's Reply Br. at 7-8. But a defendant who seeks to compel arbitration under the Federal Arbitration Act bears the burden of establishing the existence of a binding contract to arbitrate the dispute. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002). And until a defendant moves to compel arbitration, there is no reason for a plaintiff to assert any grounds for disregarding an

arbitration agreement. Accordingly, the absence of allegations in Minnieland's complaint challenging the enforceability of the delegation provision has no bearing on whether the district court properly denied Applied Underwriters' motion to compel arbitration.

Having concluded that Minnieland challenged the enforceability of the delegation provision, we now determine whether the delegation provision is unenforceable "upon such grounds as exist at law or in equity." 9 U.S.C. § 2. For several reasons, we conclude that Section 38.2-312 renders invalid delegation provisions in putative insurance contracts governed by Virginia law, at least to the extent such delegation provisions endow an arbitrator, as opposed to a court, with exclusive authority to determine whether the contract at issue constitutes an "insurance contract" for purposes of Virginia law.[1]

To begin, we find it significant that Virginia chose to treat arbitration provisions in insurance contracts as "void." Va. Code § 38.2-312. Under Virginia law, when a provision in an insurance contract is "void," it

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[1] In reaching this conclusion, we express no opinion as to whether Section 38.2-312 renders invalid a putative insurance contract's delegation of other gateway issues to arbitrators. Likewise, we express no opinion as to whether questions, gateway or otherwise, of *judicial* estoppel – a doctrine applied "to protect the integrity of the judicial process" and "to prevent improper use of judicial machinery" – are ever delegable to arbitrators. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal quotation marks omitted); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (holding that judicial estoppel "protect[s] the essential integrity of the judicial process").

is "unenforceable from its inception." *Liverpool & London & Globe Ins. Co. v. Bolling*, 10 S.E.2d 518, 522 (Va. 1940); *see also* Joseph M. Perrillo, Calamari and Perrillo on Contracts § 1.8(b) (6th ed. 2009) ("A contract is void, a contradiction in terms, when it produces no legal obligation. . . . It would be more exact to say that no contract was created."). If an agreement including a delegation provision constitutes an "insurance contract," the delegation provision – an "additional, antecedent agreement" to arbitrate, *Rent-A-Center*, 561 U.S. at 70 – is "unenforceable from its inception." Thus, Virginia's decision to treat delegation provisions in insurance contracts as void constitutes "grounds as exist at law . . . for the revocation of any contract." 9 U.S.C. § 2.

We also reach this conclusion because Section 38.2-312 reflects a state policy choice that insureds should have the option to seek enforcement of Virginia's insurance laws and regulations in court, rather than through arbitration. Enforcing contractual provisions that provide arbitrators with exclusive authority to determine whether a contract amounts to a "contract of insurance" – a term defined by Virginia law – would undermine that purpose by giving the arbitrators exclusive authority over a core question of Virginia insurance law. Indeed, were an arbitrator to incorrectly determine that a contract was not an "insurance contract" for purposes of Virginia law and move forward with arbitration of the underlying dispute – or to correctly conclude that a contract was an insurance contract and then incorrectly move forward

with arbitration of the underlying dispute – a Virginia insured would be deprived of recourse to the judiciary to resolve a dispute over the interpretation of an insurance contract governed by Virginia law, the precise outcome Virginia sought to prevent in enacting Section 38.2-312.

Applied Underwriters argues that this conclusion places this Court in conflict with the Third and Sixth Circuits, which have held that questions of arbitrability of RPAs between Applied Underwriters and other Equity Comp customers – and governed by different state laws – were for the arbitrator to resolve. *See S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 146 (3d Cir. 2016); *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 Fed. App'x 482, 486 (6th Cir. 2014). We disagree. Neither *South Jersey Sanitation* nor *Milan Express* considered – much less decided – whether the relevant state insurance laws rendered unenforceable the *delegation provision* in the RPA – the question we resolve here. Accordingly, *South Jersey Sanitation* and *Milan Express* are inapposite to whether Section 38.2-312 renders void delegation provisions in putative insurance contracts governed by Virginia law.

In sum, because Section 38.2-312 renders void delegation provisions in putative insurance contracts – at least to the extent such provisions authorize an arbitrator to resolve whether the contract at issue constitutes an "insurance contract" – we conclude that the

district court did not reversibly err in denying Applied Underwriters' motion to compel arbitration.

B.

Having concluded that the court, not an arbitrator, should determine whether the RPA constitutes an insurance contract for purposes of Virginia law, we now must decide whether the district court properly applied the doctrine of judicial estoppel to preclude Applied Underwriters from taking the position that the RPA is not an insurance contract. This Court reviews for abuse of discretion a district court's application of the equitable doctrine of judicial estoppel. *See King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998) ("As an equitable doctrine, judicial estoppel is invoked in the discretion of the district court. . . .").

"Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation." *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 28 (4th Cir. 1995). "The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." *Id.* at 29 (internal quotation marks omitted). "Even so, courts must apply the doctrine with caution." *Id.*

To that end, this Court has identified four elements that must be met before a court may apply judicial estoppel: (1) "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation;" (2) "the position

sought to be estopped must be one of fact rather than law or legal theory;" (3) "the prior inconsistent position must have been accepted by the court;" and (4) "the party sought to be estopped must have intentionally misled the court to gain unfair advantage." *Lowery v. Stovall*, 92 F.3d 219, 223-24 (4th Cir. 1996) (internal quotation marks omitted). We have characterized the final element as "determinative." *Id*. at 224 (internal quotation marks omitted). Applying this test, we conclude that the district court committed legal error in applying judicial estoppel and, therefore, abused its discretion. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) ("A district court abuses its discretion when it misapprehends or misapplies the applicable law.").

With respect the first element, the district court concluded that Applied Underwriters' position that "the RPA is a contract of reinsurance and not a contract of insurance" was "inconsistent with those [positions] asserted in other legal proceedings." J.A. 465. But none of the other proceedings in which Applied Underwriters allegedly took an inconsistent position involved whether the RPA constituted an "insurance contract" for purposes of *Virginia* law – the question at issue here. Therefore, Applied Underwriters' assertion that the RPA is not an insurance contract for purposes of Virginia law is not inconsistent with its legal position in any of those cases. Additionally, in several cases, Applied Underwriters has argued expressly that the RPA did not constitute an insurance contract for purposes of the relevant state law. *See S. Jersey*

Sanitation, 840 F.3d at 141 (stating that Applied Underwriters argued that, under Nebraska law, the RPA "was not a workers' compensation insurance policy, but rather an investment instrument[,] . . . a contract relating [to] or concerning a reinsurance policy" (internal quotation marks omitted)); *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 993 F. Supp. 2d 846, 856 (W.D. Tenn.) (noting that, "[a]ccording to [Applied Underwriters], . . . the RPA does not concern or relate to a policy of insurance and therefore is outside the scope of" the Nebraska state statute prohibiting mandatory arbitration provisions in insurance contracts (internal quotation marks omitted)), *vacated and remanded on other grounds*, 590 Fed. App'x 482 (2014). Accordingly, Applied Underwriters' position in this case is entirely consistent with the position it has taken in several other cases.

The second element – that judicial estoppel may only be applied when the position sought to be estopped is one of fact rather than law – also is not met in this case. Here, Applied Underwriters' position is that the RPA does not constitute an insurance contract for purposes of Virginia law. Under Virginia law, the interpretation of a contract – and an insurance contract, in particular – presents a question of law. *See PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707, 712-13 (Va. 2012). Likewise, the meaning of "insurance contract" in Section 38.2-312 poses a question of law. *See Conyers v. Martial Arts World of Richmond, Inc.*, 639 S.E.2d 174, 178 (Va. 2007) ("[A]n issue of statutory interpretation is a pure question of

law. . . .”). Accordingly, the position at issue is one of law, rather than fact.

Regarding the third and fourth elements – judicial reliance and intent to mislead to gain an unfair advantage – each of those elements necessarily contemplate that the position at issue is inconsistent with a position taken by the party in earlier litigation. Because Applied Underwriters' assertion that the RPA does not constitute an “insurance contract” for purposes of Section 38.2-312 is not inconsistent with any position taken by Applied Underwriters in previous proceedings, *see supra*, the third and fourth elements also do not support application of judicial estoppel.

III.

In sum, the district court correctly denied Applied Underwriters' motion to compel arbitration, but incorrectly applied the doctrine of judicial estoppel in holding that the RPA constitutes an “insurance contract” for purposes of Section 38.2-312. The parties have not had the opportunity to fully brief and argue whether, if judicial estoppel does not apply, the RPA is an insurance contract under Virginia law. As such, we remand for consideration of that issue in the first instance and further proceedings consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MINNIELAND PRIVATE DAY SCHOOL, INC., Plaintiff,	)	
v.	)	Civil Action No.
APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., Defendant.	)	1:15-cv-1695 (AJT/IDD)

ORDER

(Filed Mar. 17, 2016)

This action involves a dispute over premiums charged for a Workers' Compensation policy and the cancellation of that policy for non-payment of premiums. Pending before the Court is a Motion to Compel Arbitration [Doc. No. 4] (the "Motion") by defendant Applied Underwriters Captive Risk Assurance Company ("Applied"). Upon consideration of the Motion, the memoranda of law in support thereof and in opposition thereto, the arguments of counsel at the hearing held on February 19, 2016, and the supplemental pleadings filed after that hearing, the Court concludes based on *Rent-A-Center v. Jackson* (561 U.S. 63 (2010)) that the arbitration provision in the parties' contract requires that an arbitrator decide whether the parties' contract is subject to Va. Code § 38.2-312, which prohibits

arbitration provisions in contracts of insurance, and which, under the federal McCarran-Ferguson Act, preempts application of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*. Applied's Motion will therefore be GRANTED to the extent that this action is STAYED pending an arbitration ruling on that issue in the already instituted arbitration proceedings and is otherwise DENIED.

I. Background

Plaintiff Minnieland Private Day School Inc. ("Minnieland") is in the business of providing children's daycare in Virginia. Defendant Applied is part of an affiliated group that provides insurance to insureds.[1] On January 14, 2013 the parties entered into a Reinsurance Participation Agreement ("RPA"), pursuant to which Minnieland obtained through Applied a Workers' Compensation Insurance Policy (the "Policy"). For the year 2015, the Policy had a "Total Estimated Annual Premium" of $706,160 and, as alleged in the Complaint, for the first 33 of the Policy's 36 month-coverage, Minnieland's monthly premiums averaged $58,810. Compl. ¶¶ 13-16. However, in November and

[1] The Complaint alleges that Applied is a company incorporated under the laws of Iowa, headquartered in Nebraska. Complaint [Doc. No. 1] ("Compl.") ¶ 2. The insurance contract states that Applied is "a company organized and existing under the laws of the British Virgin Islands." [Doc. No. 1 Ex. 3]. It is unclear from the record whether Applied is incorporated under the laws of Iowa, as alleged in the Complaint, or the British Virgin Islands, as recited in the insurance contract. In any event, the issue is immaterial for the purposes of the Motion.

December 2015, Applied billed Minnieland for monthly premiums totaling approximately $470,000 and $415,000, respectively. *Id.* ¶¶ 17, 19. Minnieland paid the November 2015 premium but refused to pay the December premium. *Id.* ¶ 21. Accordingly, on December 16, 2015, Applied terminated the Policy effective December 27, 2015. *Id.* ¶ 22.

On December 24, 2015, Minnieland filed a five-count Complaint alleging, *inter alia*, breach of contract and fraud [Doc. No. 1]. On January 15, 2016, Applied filed with the American Arbitration Association a Demand for Arbitration [Doc. No. 4, Ex. 1] and on January 21 filed the Motion to Compel Arbitration [Doc. No. 4] based on a broad arbitration provision in paragraph thirteen of the RPA. [Doc. No. 1 Ex. 3 at 3-4]. The Court held a hearing on the Motion on February 19, 2016, following which it took the Motion under advisement.[2]

II. Standard of Review

Arbitration clauses function as "a specialized kind of forum-selection clause" and a motion to compel arbitration should be treated as a motion to dismiss on the basis of improper venue under Federal Rule of Civil Procedure 12(b)(3). *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 365 n.9 (4th Cir. 2012) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); *see also Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258,

[2] After the hearing, the parties moved for leave to file supplemental authority [Doc. Nos. 18, 20]. The Court herein grants those motions and has accordingly considered such authority.

2015 WL 269483, at *1 n.1 (E.D. Va. Jan. 21, 2015) (motion to compel arbitration should be evaluated under Rule 12(b)(3)) (*rev'd on other grounds, Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016)); *Mitchell v. Sajed*, No. 3:13-CV-312, 2013 WL 3805041, at *4 (E.D. Va. July 22, 2013) (granting motion to compel and dismissing action based on improper venue). Under Rule 12(b)(3), a court may consider evidence outside the pleadings and "the pleadings are not accepted as true, as would be required under a Rule 12(b)(6) analysis." *Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549 (4th Cir. 2006) (internal quotations and citations omitted). Without an evidentiary hearing, however, "the trial court must 'draw all reasonable inferences in favor of the nonmoving party and resolve all factual conflicts in favor of the non-moving party.'" *Essex Ins. Co. v. MDRB Corp.*, 2006 WL 1892411, at *2 (D. Md. 2006) (quoting *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138-39 (9th Cir. 2003)). The court applies federal law to resolve whether the forum selection clause is enforceable. *The Hippage Co., Inc. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 611 (E.D. Va. 2008). However, a federal court sitting in diversity must first look to the forum state's choice of law rules to determine which state law applies. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

III. Analysis

Paragraph 13(B) of the RPA states in pertinent part:

> (B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement . . . or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be . . . finally determined exclusively by binding arbitration in accordance with the procedures provided herein . . . *All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause.*

(emphasis added). Va. Code § 38.2-312 – which, pursuant to § 38.2-300, applies to "all classes of insurance except [*inter alia*] contracts of reinsurance" – provides in pertinent part:

> No insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth, or which are performed in this Commonwealth shall contain any condition, stipulation or agreement:
>
> 1. Requiring the contract to be construed according to laws of any other state or country . . . or
>
> 2. Depriving the courts of this Commonwealth of jurisdiction in actions against the insurer.
>
> Any such condition, stipulation or agreement *shall be void*, but such voiding shall not affect the validity of the remainder of the contract.

(emphasis added). Finally, the McCarran-Ferguson Act, 15 U.S.C. §§ 1012-15, provides, in pertinent part:

> (a) State Regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal Regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . . "

Plaintiff's claims are clearly within the scope of the parties' agreement to arbitrate. Whether that arbitration agreement is enforceable under the FAA or "void" under Va. Code § 38.2-312 depends on two threshold determination [sic]. The first is whether Section 38.2-312, if applicable to the RPA, "reverse preempts" the FAA.[3] That issue depends on whether Section 38.2-312 was "enacted . . . for the purpose of regulating the business of insurance" and if so, whether the FAA "specifically relates to the business of insurance." If Section 38.2-312 does indeed reverse preempt the FAA, the second issue is whether the RPA is a "contract of insurance" other than a "contract of

[3] The Court views this question as the first inquiry since a finding that Section 38.2-312 does not "reverse preempt" the FAA would eliminate the need to decide the second issue.

reinsurance" whose arbitration provision is thereby subject to Section 38.2-312.

As to the first issue, under the McCarran-Ferguson Act, federal legislation cannot "invalidate, impair, or supersede" any state laws enacted "for the purpose of regulating the business of insurance" unless that federal law "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Here, there is little question that Va. Code § 38.2-312, as part of Title 38.2 governing "Insurance," was enacted to regulate the "business of insurance" in Virginia and that the FAA does not "specifically relate[] to the business of insurance." *See Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).[4] For these reasons, the Court finds that Section 38.2-312, if applicable to the RPA, would preempt the FAA, and that the arbitration provision in paragraph 13(B) of the RPA would therefore be void and unenforceable as a matter of law.

As to the second issue, the Court must first decide who has been allocated responsibility by the parties to decide the issue – an arbitrator or the Court. In

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[4] The Supreme Court in *Pireno* articulated three criteria for determining whether a state law regulates the "business of insurance" as contemplated by the McCarran-Ferguson Act. "[*F*]*irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." 458 U.S. at 129 (internal citations omitted) (emphasis in original.)

Rent-A-Center, West, Inc. v. Jackson, the United States Supreme Court held the enforceability of an agreement is within the scope of issues to be arbitrated under the FAA if the parties have "clearly and unmistakably" agreed to do so. 561 U.S. 63, 69 n.1 (2010); *see also AT&T Tech., Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 649 (1986). And in *Milan Express Company, Inc. v. Applied Underwriters Captive Risk Assurance Company*, Inc, the Sixth Circuit, relying on *Rent-A-Center*, held that an arbitrator was required to decide whether the parties' contract was subject to Nebraska's state law prohibition on arbitration provisions in insurance contracts. 590 Fed. App'x 482, 486 (6th Cir. 2014).[5] Although the facts and law in *Rent-A-Center* and *Milan* are distinguishable, the Court finds that the analysis of the Supreme Court and Sixth Circuit would apply with equal force to this case. In those cases, as here, there was no claim that the arbitration provision itself was unenforceable "upon such grounds as exist under law or in equity for revocation of [the] contract." 9 U.S.C. § 2. Likewise, in this case, as in those cases, the parties have "clearly and unmistakably" agreed – here, in paragraph 13(B) of the RPA – that all disputes, including enforceability, would be arbitrated, including all disputes pertaining to any provision of the RPA. *Rent-A-Center*, 561 U.S. at 69 n.1. That agreement clearly covers the present dispute concerning whether the RPA is subject to Va. Code § 38.2-312, and therefore

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[5] Although the RPA here, as in *Milan*, designates Nebraska law as the choice of law, Section 38.2-312, if applicable, mandates that Virginia law apply to the RPA. *See* Va. Code Ann. § 38.2-312(1).

unenforceable. That dispute must therefore be referred to arbitration.[6]

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant's Motion to Compel Arbitration [Doc. No. 41] be, and the same hereby is, GRANTED in part and DENIED in part. The Motion is GRANTED to [sic] extent that the parties are ordered to arbitrate whether the RPA is within the scope of Va. Code § 38.2-312, and in the event that the arbitrator finds that it is not within the scope of Section 38.2-312, all other issues deemed arbitrable under the RPA; and the Motion is otherwise DENIED; and it is further

ORDERED that this action be, and the same hereby is, STAYED pending the outcome of the arbitration proceedings currently pending before the American Arbitration Association and the parties are further

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[6] In order to avoid unnecessary and unwarranted delay and expense, the Court urges Applied to consider whether, given the underlying merits of the issue to be arbitrated, the rulings already obtained in arbitration concerning whether the RPA is a "contract of reinsurance" (as advocated for by Applied), and the positions Applied has taken in other proceedings concerning whether the RPA is a "contract of reinsurance," Applied can continue to advocate in good faith before an arbitrator and without running afoul of 28 U.S.C. § 1927 that the RPA is a "contract of reinsurance" and therefore not a "contract of insurance" subject to Va. Code § 38.2-312.

directed to notify the Court within five (5) days of any dispositive rulings in that arbitration.

The Clerk is directed to forward a copy of this Order to all counsel of record, and to place this matter inactive docket.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 17, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MINNIELAND PRIVATE DAY SCHOOL, INC., Plaintiff,	)	
v.	)	Civil Action No.
APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., Defendant.	)	1:15-cv-1695 (AJT/IDD)

ORDER

(Filed Mar. 24, 2016)

Plaintiff Minnieland Private Day School, Inc. ("Minnieland") has filed a Motion for Reconsideration [Doc. No. 23] with respect to the Court's Order dated March 17, 2016 [Doc. No. 22]. Minnieland contends that the Court clearly erred when it compelled arbitration concerning whether the parties' Reinsurance Participation Agreement ("RPA") is an "insurance contract" subject to Va. Code § 38.2-312 or, as Defendant Applied Underwriters Captive Risk Assurance Company, Inc. ("Applied") contends, a "contract of reinsurance" not subject to Section 38.2-312. Minnieland argues that the Court had an obligation to decide that issue since if the RPA is an "insurance contract," as it contends, the RPA's arbitration provisions are "void" and therefore unenforceable under Section 38.2-312.

Applied contends that whether the RPA is an "insurance contract" or a "contract of reinsurance" is an issue of the enforceability of a provision in the RPA and therefore within the scope of the parties' agreement to arbitrate as set forth in the RPA. Having considered the Motion for Reconsideration, the Court grants that Motion and upon reconsideration, affirms its Order in part and otherwise modifies that Order as set forth herein.

In its March 17, 2016 Order, the Court concluded that the threshold dispute concerning whether the RPA is an "insurance contract" subject to Va. Code § 38.2-312 is an arbitrable issue within the scope of the parties' agreement to arbitrate, relying on *Rent-A-Center, West, Inc. v Jackson*, 561 U.S. 63 (2010). Minnieland contends, however, that unlike the plaintiff in *Rent-A-Center*, here it has challenged the enforceability of the arbitration agreement in the RPA. Therefore, Minnieland argues, questions as to the enforceability of the arbitration agreement itself are properly before the Court.

Under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, ("FAA") the enforceability *vel non* of an arbitration provision is for the Court only when the dispute falls within the savings clause of FAA § 2, which provides that an arbitration agreement is "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Rent-A-Center* and other Supreme Court precedent has made clear that in light of FAA § 2, the enforceability of an arbitration agreement is for the court only when

the arbitration agreement is challenged based on state law contract defenses to the formation or enforceability of a contract, such as fraud, duress or unconscionability; or the issue of enforceability is not within the clear scope of the parties' agreement to arbitrate. *See Granite Rock v. Intl Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) ("[O]ur 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") (bold emphasis added).

Minnieland has challenged the enforceability of the RPA's arbitration clause on grounds outside the scope of Section 2's savings clause and within the scope of a contractually valid arbitration clause. In other words, Minnieland challenges the enforceability of RPA's arbitration provisions not based on contract formation grounds that would warrant the revocation of a contract or a dispute that the enforceability of that arbitration agreement is not within the scope of their agreement to arbitrate, but rather based on a disputed characterization of the RPA, which if accepted, would subject it to Va. Code § 38.2-312. Neither *Rent-A-Center, Granite Rock*, nor any other case that the Court has found stands for the proposition, advanced by Minnieland, that a court should decide challenges to the enforceability of an arbitration agreement that clearly applies to a dispute on grounds not within the scope of Section 2's savings clause. Minnieland's

position, in fact, conflicts with the fundamental principle, recognized in *Rent-A-Center* and *Granite Rock*, that a court has an obligation to compel arbitration when the parties have agreed to submit a dispute to arbitration. Here, the parties' dispute over the enforceability of their arbitration provision reduces to how the RPA is characterized, and therefore is not an issue related to contract formation. The parties' arbitration agreement clearly applies to that threshold dispute, even if a decision on that issue may cause the arbitration agreement to be "void" and unenforceable. For that reason, whether the RPA is subject to Va. Code § 38.2-312 is an arbitrable issue that the parties have assigned to an arbitrator.

Finally, in its Motion for Reconsideration, Minnieland has provided the Court with further evidence of Applied's acknowledgement and judicial admissions in other proceedings that the RPA, which appears to be a standard form contract, is an "insurance contract" and not a "contract of reinsurance" within the meaning of the Virginia Code. This evidence highlights for the Court the issue, not previously considered sufficiently, of whether Applied is judicially estopped in this action from taking a position as to the nature of the RPA that is inconsistent with its judicial admissions in other proceedings. *See generally King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998) ("Acting on the assumption that there is only one truth about a given set of circumstances, the courts apply judicial estoppel to prevent a party from benefiting itself by maintaining mutually inconsistent positions regarding

a particular situation"). Moreover, whether to apply the doctrine of judicial estoppel is within the sound discretion of the Court. *Id.* (citing *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616 (3d Cir. 1996)). Because the parties have not previously argued or briefed this issue explicitly, the Court will direct that the parties address this issue in supplemental briefing.

Accordingly, for the aforementioned reasons, it is hereby

ORDERED that the plaintiff's Motion for Reconsideration [Doc. No. 23] be, and the same hereby is, GRANTED; and it is further

ORDERED that within seven (7) days of the date of this Order, the parties shall file with the Court supplemental briefing concerning whether Applied is judicially estopped from claiming that the RPA is not an "insurance contract," with any reply briefs to be filed within five (5) days thereafter; and it is further

ORDERED that the Court's Order dated March 17, 2016 [Doc. No. 22] compelling arbitration be, and the same, hereby is, STAYED pending further order of the Court, and is otherwise AFFIRMED.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 24, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MINNIELAND PRIVATE DAY SCHOOL, INC., Plaintiff,	)	
v.	)	Civil Action No.
APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., Defendant.	)	1:15-cv-1695 (AJT/IDD)

ORDER

(Filed Apr. 19, 2016)

By Order dated March 24, 2016 [Doc. No. 26], the Court granted plaintiff Minnieland Private Day School Inc.'s Motion for Reconsideration [Doc. No. 23] of this Court's Order [Doc. No. 22] granting defendant Applied Underwriters Captive Risk Assurance Company, Inc.'s Motion to Compel Arbitration [Doc. No. 4]. In that Order, the Court directed the parties to file supplemental briefing with respect to whether defendant is judicially estopped from claiming that the Reinsurance Participation Agreement ("RPA") is a "contract of reinsurance" and not a "contract of insurance" within the meaning of Virginia Code § 38.2-312, and therefore is judicially estopped from claiming that there is an arbitrable issue under the RPA. The parties filed supplemental briefing as directed, and on Tuesday, April 19,

2016, the Court held a hearing on the issue of judicial estoppel. Upon consideration of the parties' supplemental memoranda, the arguments of counsel, and for the reasons stated in open Court at the April 19, 2016 hearing, it is hereby

ORDERED that upon reconsideration, defendant's Motion to Compel Arbitration [Doc. No. 41] be, and the same hereby is, DENIED.

The Clerk is directed to forward a copy of this Order to all counsel of record.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
April 19, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MINNIELAND PRIVATE DAY SCHOOL, INC. a Virginia corporation, Plaintiff, v. APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., Defendant.	Case No. 1:15-cv-1695

COMPLAINT

(Filed Dec. 24, 2015)

Plaintiff Minnieland Private Day School, Inc. (*Minnieland*), by counsel, moves this court for judgment against Defendant Applied Underwriters Captive Risk Assurance Company, Inc. (*Applied Underwriters*), and in support states the following:

Parties

1. Minnieland is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal place of business in Woodbridge, Prince William County, Virginia.

2. Applied Underwriters, upon information and belief, is and has been since 2011, an Iowa corporation,

with its principal place of business in Omaha, Nebraska.

Jurisdiction and Venue

3. This court has jurisdiction of this case pursuant to 28 U.S.C. §1332(a), as complete diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000.00.

4. Venue is proper pursuant to 28 U.S.C. §1391(a)(2), as a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated in this district and division.

Factual Overview

5. Minnieland is a provider of education and childcare services in Virginia, subject to the workers' compensation laws and requirements of Virginia.

6. Its workers' compensation insurance policy was expiring in January 2013.

7. In early January 2013, Mark Rousseau, Prince Wood Insurance (*Rousseau*) met with Minnieland in Woodbridge, Virginia.

8. At all times relevant to this Complaint, Rousseau was acting as Allied Underwriters' agent. Va. Code 98.2-1801(A) ("A licensed agent shall be held to the agent of the insurer that issued the insurance sold, solicited, or negotiated. . . .").

9. Rousseau recommended that Minnieland purchase a workers' compensation insurance policy from Applied Underwriters, specifically its EquityComp® profit sharing plan (*EquityComp*®).

10. Applied Underwriters specifically represented that EquityComp® was not a retrospective rating plan, e.g. its benefits were "no use of Loss Conversion Factors", it would not "require waiting for cumbersome retrospective or dividend calculations", and "premium taxes and assessments are calculated using the guaranteed cost premium." Exhibit "1".

11. It further specifically represented that it would apply Minnieland's workers' compensation insurance premiums to a "segregated cell" over a term of 3 years and permit Minnieland to share in the profits of its premiums.

12. In reliance on the representation that Applied Underwriters' policy would extend for a 3 year term, saving it from the yearly burden of policy placement, and that it would be able to share in the profits from its insurance premiums, Minnieland agreed to purchase workers' compensation insurance from Allied Underwriters.

13. On or about January 11, 2013, Rousseau notified Allied Underwriters that Minnieland had accepted its proposal and emailed its form "Request to Implement Program and Bind Coverage." Exhibit "2".

14. On January 14, 2013, Allied Underwriters had Minnieland sign its "Reinsurance Participation

Agreement" (*Agreement*), Exhibit "3", its "Request to Bind Coverages & Services", Exhibit "4", and pay it $81,298.00 (consisting of a $73,044 deposit and an $8,254.00 "nonrefundable fee"), Exhibit "5", all of which Minnieland did and copies of which Rousseau faxed to Allied Underwriters that day.

15. Pursuant to the Agreement, Minnieland was prohibited from electing a deductible workers' compensation insurance policy and was issued a guaranteed cost policy for the period 1/15/13 to 1/15/14 with a "Total Estimated Annual Premium $589,163", Exhibit "6" (information page), which was renewed for the period 1/15/14 to 1/15/15 with a "Total Estimated Annual Premium $642,333", Exhibit "7" (information page), and renewed again for the period 1/15/15 to 1/15/16 with a "Total Estimated Annual Premium $706,160." Exhibit "8" (information page).

16. For the first 33 of the 36 months of the EquityComp® profit sharing plan (January 2013 through October 2015), Minnieland's monthly premiums averaged $58,810; e.g. in October 2015 Applied Underwriters billed it $40,386. Exhibit "9".

17. Allied Underwriters billed Minnieland $471,213 for the November 2015 premium, an incomprehensible 1,167% increase from the October premium and a staggering 801% increase over the first 33 months' average. Exhibit "10".

18. Allied Underwriters refused to disclose the basis, including the rates and formulas, on which it

assessed the November 2015 premium, despite repeated efforts from Minnieland to have it do so.

19. Allied Underwriters billed Minnieland $414,604 for the December 2015 premium, a 1,027% increase from the October premium and a 705% increase over the first 33 months' average. Exhibit "11".

20. Rousseau also attempted, unsuccessfully, to get Allied Underwriters to disclose the basis for the November and December 2015 premiums, as late as December 15 requesting Allied Underwriters identify "which, and how, individual claim status changes translated to such an untoward premium figure. In other words, which claims reflect a change and how those changes individually contribute to the premium." Exhibit "12".

21. While Minnieland nevertheless paid the November premium it did not authorize payment of the $414,604 December 2015 premium.

22. On December 16, 2015, Allied Underwriters faxed Minnieland notice it terminated the EquityComp® profit sharing plan, effective December 27, 2015, for "Non-Payment of Premium; Client has an outstanding balance." Exhibit "13".

23. At no time relevant to this Complaint was Allied Underwriters licensed to transact business in Virginia, specifically including any insurance business.

24. At no time relevant to this Complaint has the Virginia Workers' Compensation Commission approved the Agreement.

25. At no time relevant to this Complaint has the Virginia State Commission approved the premiums, fees, rates, charges, or any other "balance" imposed and created pursuant to the Agreement.

26. At no time relevant to this Complaint has the Virginia State Corporation Commission approved any worker's compensation insurance rate applicable to the Agreement that would result in the October and November 2015 premiums assessed by Allied [sic] Underwriters.

27. While Applied Underwriters represented it would ensure "high-quality claims management" and produce "high-quality medical care at a low cost", it had the ability and motiviation to manipulate the manner in which it handled, classified, and reported claims for its own financial benefit to Minnieland's detriment and, on Minnieland's belief, it did so.

28. Applied Underwriters is a company engaged in the business of making contracts of workers' compensation insurance, including its EquityComp® profit sharing plan and the Agreement, and is an "insurance company" as defined by Virginia Code § 38.2-100.

29. Applied Underwriters is not qualified, authorized, or licensed to act as an insurance company or do insurance business in Virginia.

30. Applied Underwriters assessed workers' compensation insurance rates and premiums on Minnieland that were not disclosed to, let alone approved by, the Virginia State Corporation Commission and used a policy form that was not disclosed to, let alone approved by, the Virginia Workers' Compensation Commission.

31. The Agreement is not a contract of reinsurance.

32. Minnieland at all times in fact paid workers' compensation insurance premiums directly to Applied Underwriters, the purported reinsurer, which simply used those premiums it charged Minnieland to pay the guaranteed cost workers' compensation insurance policies issued by its affiliate insurance company Continental Indemnity Company, both of which are Berkshire Hathaway entities.

33. On Minnieland's information and belief, Applied Underwriters misrepresented its EquityComp® profit sharing plan, the Agreement in particular, to attempt to circumvent Virginia's insurance and workers' compensation laws, without limitation including:

a) Va. Code § 38.2-310 (each insurance policy or contract shall specify a statement of the premium;

b) Va. Code § 38.2-310 ("All fees, charges, premiums or other consideration charged for the insurance or for the procurement of insurance shall be stated in the policy . . . no person shall charge or receive any fee, compensation, or

consideration for insurance or for the procurement of insurance that is not included in the premium or stated in the policy");

c) Va. Code § 38.2-312 (no insurance contract "shall contain any condition, stipulation or agreement: 1. Requiring the contract to be construed according to the laws of any other state or country . . . ; or 2. Depriving the courts of this Commonwealth of jurisdiction in actions against the insurer.");

d) Va. Code § 38.2-1906 (every insurer must file its rates, no insurer shall make or issue an insurance contract or policy except in accordance with rate filings in effect at the time);

e) Va. Code §§ 38.2-1102 and 1108 (captive insurers must have licenses and pay taxes on premiums),

f) Va. Code § 65.2-813 (no corporation shall enter into any workers' compensation policy of insurance unless its form has been approved by the Workers' Compensation Commission);

g) Va. Code § 65.2-818 (requiring minimum standards of service for insurers writing workers' compensation policies, including but not limited to the servicing of such policies, the establishment of offices within the Commonwealth, and the payment of compensation).

34. Applied Underwriters has, directly and through its agents, collected premiums and other fees, charges, and assessments for contracts of insurance in

Virginia, and transacted matters subsequent to the execution of and arising out of contracts of insurance.

35. Applied Underwriters' EquityComp® profit sharing plan, including the Agreement specifically, and its transaction of the solicitation, procurement, matters after its execution, the collection of premiums, deposits, fees, charges, and other assessments pursuant to it, are in violation of Virginia's insurance and workers' compensation laws.

36. Applied Underwriters' EquityComp® profit sharing plan, specifically including the Agreement, is intentionally vague and misleading and is designed to and does impose excessive and unapproved insurance rates in violation of Virginia law.

37. Applied Underwriters has never accounted for the receipt, maintenance, and application of the premiums, fees, deposits, charges, and other assessments it has billed Minnieland for workers' compensation insurance and, on Minnieland's information and belief, Applied Underwriters has never applied investment income to its "segregated cell", if in fact any such "segregated cell" exists.

38. Applied Underwriters' Agreement is nothing more than an attempt to obtain premiums, fees, penalties, deposits, service charges, and other monies for the provision of a guaranteed cost workers' compensation insurance policy without authority of Virginia and without providing any additional benefit to Minnieland.

III. CAUSES OF ACTION
Count I: Declaratory Judgment

39. All previous allegations in this Complaint are incorporated here as if restated.

40. An actual controversy exists between Minnieland and Allied [sic] Underwriters regarding the validity of the Agreement, the premiums, deposits, fees, charges, and other monies paid by Minnieland to Allied [sic] Underwriters and whether, and to what extent, Minnieland has any further obligations to Allied [sic] Underwriters.

41. Applied Underwriters has transacted insurance business in Virginia without authority and a license.

42. Because the Applied Underwriters' EquityComp® profit sharing plan, specifically the Agreement, violates Virginia public policy and laws regarding insurance and workers' compensation, and because Applied Underwriters' transaction of business regarding and affecting Minnieland's workers' compensation insurance were without authority and license from Virginia, the Agreement is void.

43. Minnieland is entitled to a declaration from this court that:

(a) the Agreement is an insurance contract solicited, secured, and issued by Applied Underwriters,

(b) Applied Underwriters' actions in soliciting, entering, and issuing the Agreement and billing,

collecting, and demanding insurance premiums under it and handling claims constitute transacting insurance business in Virginia;

(c) Applied Underwriters is not qualified or authorized to do business in Virginia;

(d) Applied Underwriters' solicitation of the Agreement, collection of insurance premiums, fees, deposits, and other assessments from Minnieland under it are in violation of Virginia law; and

(e) the Agreement is void.

Count II: Declaratory Relief and Reformation of the Agreement

44. All previous allegations in this Complaint are incorporated here as if fully restated.

45. As an alternative to the relief sought in Count I, Minnieland is entitled to a declaration from this court:

(a) that the Agreement is an illegal insurance policy, and that the terms of the Agreement must be reformed to comply with Virginia law;

(b) as to what amounts Applied Underwriters was entitled to bill Minnieland under Virginia law; and

(c) as to what amounts, if any, Applied Underwriters must return to Minnieland.

Count III: Declaratory Relief

46. All previous allegations in this Complaint are incorporated here as if restated.

47. The premiums, fees, deposits, and other charges Applied Underwriters has billed and collected from Minnieland under the Agreement, and any sums it claims are due, constitute excessive insurance rates in violation of Virginia Code § 38.2-1904.

48. Minnieland is entitled to a declaration from this court:

(a) that the premiums, deposits, and other charges Applied Underwriters billed Minnieland under the Agreement were and are excessive as defined in Virginia Code § 38.2-1904;

(b) as to what amount of premiums Applied Underwriters was entitled to bill Minnieland; and

(c) as to what amount of premiums, if any, Applied Underwriters must return to Minnieland.

Count IV: Fraud

49. All previous allegations in this Complaint are incorporated here as if restated.

50. Applied Underwriters, by and through its agents and representatives, intentionally, fraudulently, and/or negligently misrepresented to Minnieland material facts about the expertise of their insurance agents, the ability and authority of Applied

Underwriters to conduct insurance business in Virginia, the true nature of the Agreement, and the excessive fees, surcharges, penalties, and premiums contained in the Agreement, among other misrepresentations as stated earlier.

51. On Minnieland's information and belief, Applied Underwriters fraudulently manipulated and misrepresented the claims of Minnieland's injured employees to arbitrarily increase premiums.

52. Minnieland reasonably relied on all of these misrepresentations which led it to do business with Applied Underwriters and ultimately to enter into the Agreement with Applied Underwriters. But for these misrepresentations, Minnieland would not have entered into the Agreement with Applied Underwriters.

53. As a result of Applied Underwriters' fraud, Minnieland has suffered damages which include, but are not necessarily limited to, payment of excessive premiums, deposits, fees, and other charges to Applied Underwriters. In addition, Minnieland has been forced to obtain alternative workers compensation insurance and pay additional premiums.

Count V: Breach of Contract

54. All previous allegations in this Complaint are incorporated here as if restated.

55. To the extent that the Court determines that the Agreement should be upheld, Minnieland asserts that Applied Underwriters breached it by prematurely

canceling the insurance policy and requiring Minnieland to obtain alternative workers' compensation insurance. Applied Underwriters also breached the Agreement by failing to negotiate in good faith before the premature cancellation of the Agreement.

56. On Minnieland's information and belief, Applied Underwriters also breached the Agreement by manipulating the claims of Minnieland's employees.

57. On Minnieland's information and belief, Applied Underwriters arbitrarily administered workers' compensation claims of Minnieland's employees for the financial benefit of Applied Underwriters at the expense and to the detriment of Minnieland to obtain from Minnieland an arbitrary profit not reasonably related to claims administration, expense, or underwriting.

58. Minnieland has suffered damages as a result of Applied Underwriters' breach of contract which include, but are not necessarily limited to, the cost of having to purchase alternative workers' compensation insurance and excessive premiums, fees, surcharges, and other charges billed by and paid to Applied Underwriters.

WHEREFORE, Minnieland prays that:

1. that this Court declare that the Agreement is void;

2. in the alternative, that this Court reform the Agreement to conform with Virginia law;

3. that this Court declare that the premiums, fees, and other charges Applied Underwriters billed to Minnieland were excessive;

4. that this Court declare what amount of premiums Applied Underwriters was entitled to bill Minnieland under Virginia law; and

5. that this Court declare what amount of premiums, if any, Applied Underwriters must return to Minnieland;

6. That this Court declare that Minnieland is entitled to a full, complete and accurate accounting from Applied Underwriters with regard to all premiums, fees, and other charges paid to, received, or processed by Applied Underwriters pursuant to the Agreement;

7. that as to Counts IV and V, a jury be empaneled to try this case and that Minnieland be awarded damages for Applied Underwriters' fraud and breach of contract in an amount to be determined by a jury at trial;

8. That Minnieland be awarded its costs in this behalf expended; and

9. Minnieland be awarded such other, further relief as the Court may deem just and proper.

MINNIELAND PRIVATE DAY SCHOOL, INC.
By counsel

/s/ J. Scott Krein
J. Scott Krein, VSB No. 26656
KREIN LAW FIRM
Counsel for Plaintiff
Minnieland Private Day School, Inc.
4000 Genesee Place, Suite 117
Prince William, VA 22192
tel. 703.580.8377
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jsk@kreinlaw.com

[Exhibits Omitted]

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.
PARTICIPANT NO. 862236
REINSURANCE
PARTICIPATION AGREEMENT

This reinsurance participation agreement (this "Agreement") is made and entered into by and between Applied Underwriters Captive Risk Assurance Company, Inc., a company organized and existing under the laws of the British Virgin Islands ("Company") as of January 15, 2013 and

Minnieland Private Day School, Inc., and

Columbia Academy, LLC, and

~~Country Day School, LLC~~ (collectively, "Participant").

Ashburn Village Country Day School, LLC

Whereas, Participant is desirous of participating in the Company's segregated protected cell reinsurance program designated Segregated Account No. 862236 ("Participation"); and

Whereas, the Company has entered into a Reinsurance Treaty (hereinafter referred to as the "Treaty") with California Insurance Company (NAIC No. 0031-38865) and, through its pooling arrangement, with other affiliates of Applied Underwriters, Inc., including, but not limited to Continental Indemnity Company (NAIC No. 0031-28258) (collectively the "Issuing Insurers"); and

Whereas, the Participant desires the Company to establish a segregated protected cell whereby the Participant may share in the underwriting results of the Workers' Compensation policies of insurance issued for the benefit of the Participant by the Issuing Insurers (the "Policies"); and

Whereas the Company will allocate a portion of the premium and losses under this Agreement to the Participant's segregated protected cell,

Now, therefore, in consideration of the mutual promises and undertakings set forth herein the parties do hereby agree as follows:

1. Participant agrees to participate in the Company's segregated protected cell reinsurance program in accordance with Schedule 1 attached hereto and incorporated herein by reference and additional Schedules as may be executed from time to time on a prospective basis only by the parties ("Additional Schedules").

2. Participant's interest in the Company is solely as a segregated protected "cell" with segregation of the Company's assets and liabilities among the segregated accounts (known as "cells") established by the Company. There is no "joint and several" liability. The cells of the Company are not liable for the debts and obligations and are not bound with respect to contracts entered into by another cell. Participant further acknowledges end agrees that Participant (1) will look solely to the assets of Participant's cell for satisfaction of the Company's liabilities hereunder; (2) has

consulted with legal counsel and other insurance advisers as to the applicability and effect of this Agreement; (3) irrevocably waives any right, substantive or procedural, which Participant may have to challenge the effectiveness and the Company's ability and right to segregate assets among the cells; and (4) covenants not to sue, attach, pursue or make any claim against or with respect to any asset, property or right of the Company which is not an asset, property or right of Participant's segregated protected cell.

3. Participant is participating in this Agreement for purposes of investment only. The Participation has not been registered under the United States Securities Act of 1933, as amended or any state securities laws. The Participation shall not be sold, transferred, hypothecated, pledged or otherwise assigned or encumbered and Participant acknowledges the following:

> "This Participation has not been registered under the Securities Act of 1933, as amended or qualified under any state securities law. This Participation has been acquired for investment and may not be sold, transferred, hypothecated, pledged or otherwise assigned or encumbered in the absence of registration or an exemption therefrom under such act and such laws."

4. This Agreement and any Schedules hereto may not be modified, amended or supplemented in any manner except in writing signed by the parties hereto and represents the entire understanding and agreement between the parties with respect to the subject

matter hereof and supersedes all prior negotiations, proposals, letters of intent, correspondence and understandings relating to the subject matter hereof. The initial term of this Agreement (the "Active Term") is for three (3) years and may be extended from time to time by the parties. All existing obligations from each party to the other or to third parties shall remain in force as of the expiration of the Active Term until this Agreement is terminated (the "Run-Off Term") as set forth in Schedule 1 or any Additional Schedules.

During the Active Term of this Agreement, Workers' Compensation Insurance coverage will be provided to Participant by one or more of the Issuing Insurers. If Participant elects to cancel this Agreement, or if any of the Policies are cancelled or non-renewed prior to the end of the Active Term ("Early Cancellation"), the Participant shall abide by the Early Cancellation terms set forth in Schedule 1 or any Additional Schedules.

If the Issuing Insurer is required to provide Workers' Compensation Insurance coverage on behalf of the Participant outside of the Active Term (the "Extension Period"), special extension terms ("Extension Terms") will apply during the Extension Period. The Extension Terms are: (1) Participant through their cell will be liable for all losses occurring during the Extension Period without limitation on any Policies issued by the Issuing Insurers on behalf of Participant; (2) the Company will allocate to Participant's cell an amount equal to 45% of premium earned during the Extension Period under any Policies issued by the Issuing Insurers on behalf of Participant; (3) Participant will immediately

pay to the Company a cash deposit equal to 55% of the premium anticipated, as determined exclusively by the Company, during the Extension Period under any Policies issued by the Issuing Insurers on behalf of Participant; (4) Participant will maintain at all times a cash deposit with the Company sufficient to cover outstanding losses occurring during the Extension Period plus incurred but not reserved and/or reported losses (IBNR) as determined exclusively by the Company; and (5) Participant will immediately pay to the Company an Early Cancellation fee equal to 20% of the premium anticipated, as determined exclusively by the Company, during the Extension Period under Policies issued by the Issuing Insurers on behalf of Participant.

5. Participant acknowledges that under the laws of some states, Participant may have the option to choose from various deductible amounts as a part of its Policies, but that opting for a deductible would preclude Participant from entering into this Agreement. Applicant, being fully advised, knowingly waives and relinquishes its right to choose a deductible on the Policies under applicable law as further consideration for this Agreement.

6. Participant may not assign or transfer its rights under this Agreement to any third party without the written consent of the Company which consent may be withheld in the Company's absolute discretion.

7. The parties' obligations under this Agreement shall survive the Active Term of this Agreement, and shall be extinguished only when the Company no

longer has any potential or actual liability to the Issuing Insurers with respect to the Policies reinsured by the Company under the Treaty.

8. Applied Risk Services, Inc. (Applied Risk Services of New York, Inc. in New York State) has been appointed the billing agent for the Company and the Issuing Insurers and is authorized by the Company, Issuing Insurers, and Participant to account for offset and true up any and all amounts due each of the parties. Participant will allow the Company to audit Participant's records on reasonable notice and during normal business hours that relate to the Policies. These records include, but are not limited to ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. Information developed by audit will be used to assign worker classifications, determine the compensability of payroll and claims, and determine final premium and cession amounts.

9. In the event the Participant is in default of any obligations to the Company under this Agreement or under any other agreement with any affiliate of the Company (Affiliated Agreements), the Company may take all reasonable steps to protect its and its affiliates' interests. The parties hereto shall have the right to the fullest extent provided by law to offset or recoup any balances due from one to the other under this Agreement or any Affiliated Agreements.

10. In consideration of the mutual benefits arising under this Agreement, Participant hereby grants

to Company, effective from and after the date hereof, a lien and security interest in all assets of Participant's cell to secure payment of any amounts owed by Participant under this Agreement. The provisions of this section shall create a security agreement under the Uniform Commercial Code (the "Code") in the state of Participant's domiciliary jurisdiction so that Company shall have and may enforce a security interest on all of Participant's assets in Participant's cell. Participant agrees to execute as debtor any financing statement Company may reasonably request in order that Company's security interest be protected pursuant to the Code, or Company is authorized to file a copy of this Agreement for such purpose.

11. Participant hereby represents and warrants to the Company as follows:

(A) Participant (i) is duly organized, validly existing and in good standing under the laws of its domiciliary jurisdiction, (if a corporation, partnership, or limited liability company), and (ii) has adequate power and authority and full legal right to carry on the businesses in which it is presently engaged and presently proposes to engage.

(B) Participant has adequate power and authority and has full legal right (i) to enter into this Agreement and (ii) to perform all of its agreements and obligations under this Agreement.

(C) The execution and delivery by Participant of this Agreement and the performance by Participant of all of its undertakings and obligations under this

Agreement, including any payments required to be made by Participant to the Company under this Agreement, have been duly and properly authorized by all necessary action on the part of Participant, and do not and will not (a) contravene any provision of the charter or by-laws of Participant (if a corporation, partnership or limited liability company) or other constitutional or governing documentation of Participant (each as in effect on the date hereof), (b) conflict with, or result in a breach of, the terms, conditions or provisions of, or constitute a default under, or (except as otherwise contemplated and required or permitted by this Agreement) result in the creation of any mortgage, lien, pledge, charge, security interest or other encumbrance upon any of the property of Participant under any agreement, trust deed, indenture, mortgage or other instrument to which Participant is a party or by which Participant or its respective property is bound or affected on the date hereof, (c) violate or contravene any provision of any law or published regulation or any published order, ruling or interpretation thereunder or any decree, order or judgment of any court or governmental or regulatory authority, bureau, agency or official (all as in effect on the date hereof and applicable to Participant), (d) require any waivers, consents or approvals by any of the creditors or trustees for creditors of record of Participant, or (e) require any consents or approvals by any Participant (except such as have been duly obtained and are in full force and effect on the date hereof).

(D) This Agreement, when executed and delivered, shall have been duly and properly executed and delivered by Participant.

(E) The agreements and obligations of Participant contained in this Agreement constitute legal, valid and binding obligations of Participant, enforceable against Participant in accordance with their terms.

(F) The information that has been and/or will be supplied to the Company by Participant or on Participant's behalf with respect to this Agreement is accurate and complete, and with respect to financial information, comports with generally accepted accounting principles.

12. Participant acknowledges that the Company has not made, and does not make, any oral, written or other representations, whether explicit, implied or otherwise, upon which Participant may rely concerning any possible tax benefits that may be derived from this Agreement. Participant further acknowledges that any tax liability resulting from this Agreement, including but not limited to any tax assessments or related examinations conducted by the Internal Revenue Service or other taxing authority, will be the sole responsibility of Participant.

13. Nothing in this section shall be deemed to amend or alter the due date of any obligation under this Agreement. Rather, this section is only intended to provide a mechanism for resolving accounting disputes in good faith.

(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to sub-paragraph (B) of Paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.

(B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. The reference to this arbitration clause in any specific provision of this Agreement is for emphasis only, and is not intended to limit the scope, extent or intent of this arbitration clause, or to mean that any other provision of this Agreement shall not be fully subject to the terms of this arbitration clause. All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause.

(C) Either party may initiate arbitration by serving written demand upon the other party or parties.

The demand shall state in summary form the issues in dispute in a manner that reasonably may be expected to apprise the other party of the nature of the controversy and the particular damage or injury claimed. The party receiving the demand shall answer in writing within 30 days and include in such answer a summary of any additional issues known or believed to be in dispute by such party described in a manner that reasonably may be expected to apprise the other party of the nature of the controversy and the particular damage or injury claimed. Failure to answer will be construed as a denial of the issues in demand.

(D) The parties shall select a mutually acceptable arbitrator within 30 days of the demand for arbitration. If the parties are unable to agree on an arbitrator within the 30 days, then each party shall appoint an arbitrator within 30 days, thereof. If a party fails to appoint its arbitrator within such 30 day period, the party shall thereby waive its right to do so, and the other party's selected arbitrator shall act as the sole arbitrator. All arbitrators shall be active or retired, disinterested officials of insurance or reinsurance companies not under the control or management of either party to this Agreement and will not have personal or financial interests in the result of the arbitration.

(E) If two party-appointed arbitrators have been selected, the selected arbitrators shall then choose an umpire within 30 days from the date thereof. If the two arbitrators are unable to agree upon an umpire within 30 days after the appointment of the party-appointed

arbitrators, the two party-appointed arbitrators shall each exchange a list of three (3) umpire candidates. Within ten (10) days thereafter, each party-appointed arbitrator shall strike two names from the other's list. The umpire shall be selected from the remaining two names by the drawing of lots no later than ten (10) days thereafter.

(F) If more than one arbitrator shall be appointed, the arbitrators shall cooperate to avoid unnecessary expense and to accomplish the speedy, effective and fair disposition of the disputes at issue. The arbitrator or arbitrators shall have the authority to conduct conferences and hearings, hear arguments of the parties and take the testimony of witnesses. All witnesses will be made available for cross-examination by the parties. The arbitrators may order the parties to exchange information or make witnesses available to the opposing party prior to any arbitration hearing.

(G) The arbitrator or arbitrators shall render a written decision (by majority determination if more than one arbitrator) and award within 30 days of the close of the arbitration proceeding. Judgment upon the award rendered by the arbitrator or arbitrators may be entered by any court of competent jurisdiction in Nebraska or application may be made in such court for judicial acceptance of the award and an order of enforcement as the law of Nebraska may require or allow.

(H) The award of the arbitrator or arbitrators shall be binding and conclusive on the parties, and shall be kept confidential by the parties to the greatest

extent possible. No disclosure of the award shall be made except as required by the law or as necessary or appropriate to effect the enforcement thereof.

(I) All arbitration proceedings shall be conducted in the English language in accordance with the rules of the American Arbitration Association and shall take place in Tortola, British Virgin Islands or at some other location agreed to by the parties.

(J) The arbitrator or arbitrators shall be advised of all the provisions of this arbitration clause.

(K) This arbitration clause shall survive the termination of this Agreement and be deemed to be an obligation of the parties which is independent of, and without regard to, the validity of this Agreement.

(L) Punitive damages will not be awarded. The arbitrator(s) may, however, in their discretion award such other costs and expenses as they deem appropriate, including, but not limited to, attorneys' fees, the costs of arbitration and arbitrators' fees.

(M) Participant acknowledges and agrees that it will benefit from this Agreement and that a breach of the covenants herein would cause Company irreparable damage that could not adequately be compensated by monetary compensation. Accordingly, it is understood and agreed that in the event of any such breach or threatened breach, Company may apply to a court of competent jurisdiction for, and shall be entitled to, injunctive relief from such court, without the requirement of posting a bond or proof of damages, designed

to cure existing breaches and to prevent a future occurrence or threatened future occurrence of like breaches on the part of Participant. It is further understood and agreed that the remedies and recourses herein provided shall be in addition to, and not in lieu of any other remedy or recourse which is available to Company either at law or in equity in the absence of this Paragraph including without limitation the right to damages.

14. Participant hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the Courts of Nebraska for the purpose of enforcing any arbitration award rendered hereunder and all other purposes related to this Agreement, and agrees to accept service of process in any case instituted in Nebraska related to this Agreement and further agrees not to challenge venue in Nebraska provided such process is delivered in accordance with the applicable rules for service of process then in effect in Nebraska. To the extent necessary, this consent shall be construed as a limited waiver of sovereign immunity only with respect to this Agreement.

15. All notices, requests, demands or other communications to the Company provided for herein shall be in writing, shall be delivered by hand, by first-class mail, postage prepaid, or by any form of commercial overnight courier, and shall be addressed to the parties hereto at their respective addresses listed below or to such other persons or addresses as the relevant party shall designate as to itself from time to time in a writing delivered in like manner to Applied Underwriters

Captive Risk Assurance Company, P.O. Box 3646, Omaha, NE 68103-0646 and to Participant at:

Minnieland Private Day School, Inc.
4300 Prince William Pkwy
Woodbridge, VA 22192-5361

Either party may designate a new address for notices by providing written notice to the other party as provided in this paragraph, or in the absence of such notification from Participant, at the address to which Participant's last billing statement was sent.

16. This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement that is not subject to the dispute resolution provisions of Paragraph 13 hereof shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws.

17. All amounts referred to herein are expressed in United States Dollars and all payments shall be made in such dollars.

18. Waiver. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of the performance of such provision on any other instance. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions hereof (whether or not similar) nor shall such waiver constitute a continuing waiver unless expressed in writing and signed by all parties.

19. Participation by Participant in this Agreement is subject to the prior written consent of the Company. Nothing in this Agreement, expressed or implied, is intended to confer upon any party, other than the parties hereto and their affiliates, successors and assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided herein.

IN WITNESS WHEREOF, the parties have set their hand.

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., SOLELY FOR AND ON BEHALF OF PROTECTED CELL NO. 862236

PARTICIPANT

By: /s/ Charles W. Leopold

Name: Charles W. Leopold

Title: Vice President/Secretary

Date: January 14, 2013

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.
PARTICIPANT NO. 862236
REINSURANCE
PARTICIPATION AGREEMENT
SCHEDULE 1
EFFECTIVE DATE: JANUARY 15, 2013

This Schedule 1 applies as of the Effective Date to all payroll, premium, and losses occurring under the Policies notwithstanding any Extension Terms which may apply ("Effective Period"). For purposes of this Schedule 1, unless otherwise noted, capitalized terms shall have the meaning set forth in the Agreement.

1. Calculation of Premium and Loss Amounts.

(a) Policy Payroll is defined as compensable payroll occurring during the Effective Period under the Policies subject to all customary limitations and caps. The Loss Pick Containment Amount is defined as the amount equal to the product of Policy Payroll and the respective Loss Pick Containment Rates listed in Table C. These rates are per $100 of Policy Payroll and are fixed for the Effective Period. Changes in experience modifiers and other modification or differential factors of the Policies will not affect these rates. If Policy Payroll occurs under a classification not listed herein, the Company shall, in its sole discretion, determine a rate for that classification commensurate with the rates otherwise listed and with the filed and approved rates of the Issuing Insurers.

(b) The Company will calculate loss development factors ("LDF's") for each loss under the Policies directly from the loss development factors published by the government rating bureau in the state where the exposure occurred. LDF's are subject to change without notice. The LDF's in effect as of the date of this Schedule 1 are listed in Table A (a composite using Policy Payroll by state is shown). If during the Active Term the Participant: i) is processing payroll with an affiliate of the Company, the LDF's titled "Weekly" will be used; or ii) is not processing payroll with an affiliate of the Company, the LDF's titled "Monthly" will be used. Unless an agreement for renewal is offered by an affiliate of the Company and then accepted by the Participant within six (6) months of the end of the Active Term, the LDF's titled "Run-Off" will be used. In determining the age of a claim, the Company in its sole discretion will use either the date of occurrence or the date the claim was reported. For so long as the Participant provides a claimant with modified duty employment that accommodates medical work restrictions, at a wage sufficient to make the claimant ineligible for workers' compensation disability benefits, the amount of the LDF for that claim in excess of one (1) shall be reduced by the Modified Duty Reduction Factor shown below Table A.

(c) Ultimate Loss is defined as aggregate incurred losses under the Policies multiplied by the applicable LDF. The Loss Ratio equals Ultimate Loss divided by the Loss Pick Containment Amount.

(d) The Exposure Group Adjustment Factor is determined from Table B using the Loss Ratio with intermediate values to be interpolated. The Exposure Group Adjustment Factor has been determined using NCCI Expected Unlimited Loss Group 31 and is subject to change without notice if Policy Payroll varies from estimates made in preparing this Schedule 1 or if NCCI Table M is revised.

2. Allocation of Premium and Losses.

An amount, equal to the premium earned under the Policies in excess of the Loss Pick Containment Amount multiplied by the applicable Exposure Group Adjustment Factor multiplied by the Allocation Factor listed in Table B, will be allocated to the Participant's cell. Fees for services charged by any affiliate of the Company are not considered premium under the Policies.

The Participant, through its cell account, will be responsible for an amount equal to all losses under the Policies in aggregate up to the Cumulative Aggregate Limit which equals 1.2000 multiplied by the Loss Pick Containment Amount. During the Active Term, Participant's liability limits will be estimated quarterly in advance.

3. Capital Deposits. Participant agrees to make and maintain a capital deposit in its cell equal to the Estimated Annual Loss Pick Containment Amount shown in Table C multiplied by 10% during year 1; 10% during year 2; or 10% thereafter. The Estimated Annual Loss Pick Containment Amount and the resulting

capital deposit are subject to change in the Company's sole discretion if Policy Payroll varies from estimates made as of the

Effective Date of this Schedule 1.

4. Additional Capital Deposits. Participant further agrees to make and maintain in its cell account an additional capital deposit equal to the lesser of Ultimate Loss or the Cumulative Aggregate Limit. For the purposes of calculating the additional capital deposit, a Loss Ratio of no less than 65% will be used in year 1, 40% in year 2, and 30% thereafter. During the Run-Off Term, capital deposits will be calculated using the LDF's titled "Run-Off" at a schedule determined by the Company but no less frequently than annually beginning nine months after the expiration of all Policies.

5. Notwithstanding anything to the contrary in the Agreement, the Company may terminate the Agreement and liquidate the cell in its sole discretion if i) all claims under the Policies are closed and three years have elapsed since the expiration of all of the Policies; or ii) the Participant's maximum liability has been reached and three years have elapsed since the expiration of all of the Policies; or iii) the amount of paid losses allocated to the cell under the Policies has exceeded the Participant's maximum liability; or iv) seven years have elapsed since the expiration of all of the Policies; or v) the Company deems itself insecure with respect to Participant's ability or willingness to fulfill its obligations under this Agreement.

6. In the event of Early Cancellation whether by the Participant or by the Company (limited to non-pay or a material change in risk): (a) the Exposure Group Adjustment Factor will be multiplied by 1.25; (b) the Cumulative Aggregate Limit will be determined using Policy Payroll annualized to reflect the full term of the Agreement; and (c) the following amounts will be immediately due and payable to the Company: i) any remaining premium, including short rate penalties, due under the Policies; ii) a capital deposit equal to the cell's maximum liability; and iii) a Cancellation Fee equal to 8% of the Estimated Annual Loss Pick Containment Amount.

7. In the event of any conflict between the Agreement and this Schedule 1, this Schedule 1 shall control.

PARTICIPANT

By: /s/ Charles W. Leopold

Name: Charles W. Leopold

Title: Vice President/Secretary

Date: January 14, 2013

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., SOLELY FOR AND ON BEHALF OF PROTECTED CELL NO. 862236

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.
PARTICIPANT NO. 862236
REINSURANCE PARTICIPATION AGREEMENT
SCHEDULE 1 TABLES
EFFECTIVE DATE: JANUARY 15, 2013

TABLE A
Loss Development Factors

Claim Age		Weekly		Monthly		Run-Off	
Month From	Month To	Open Claims	Closed Claims	Open Claims	Closed Claims	Open Claims	Closed Claims
00	06	2.125	1.232	2.167	1.257	3.192	1.201
07	09	2.108	1.151	2.150	1.174	3.192	1.201
10	12	2.096	1.101	2.138	1.123	3.192	1.201
13	15	2.085	1.084	2.127	1.106	3.097	1.111
16	18	2.074	1.078	2.115	1.099	3.097	1.111
19	21	2.062	1.069	2.103	1.090	3.097	1.111
22	24	2.049	1.055	2.090	1.077	3.097	1.111
25	27	2.036	1.046	2.077	1.067	2.997	1.064
28	30	2.024	1.044	2.065	1.065	2.997	1.064
31	33	2.012	1.040	2.052	1.060	2.997	1.064
34	36	1.999	1.032	2.039	1.053	2.997	1.064

The Modified Duty Reduction Factor is 25%

TABLE B
Exposure Group Adjustment Factors

Loss Ratio	Adjustment Factor	Loss Ratio	Adjustment Factor
0.00	1.0000	1.00	1.5663
0.10	1.3738	1.10	1.2776
0.20	1.3547	1.20	1.0082
0.30	1.2968	1.30	0.9780
0.40	1.2199	1.40	0.9780
0.50	1.1429	1.50	0.9780
0.60	1.0466	1.60	0.9780
0.70	1.0700	1.70	0.9780
0.80	1.7246	1.80	0.9780
0.90	1.8357	1.90	0.9780

The Allocation Factor is 0.34.

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.
PARTICIPANT NO. 862236
REINSURANCE
PARTICIPATION AGREEMENT
SCHEDULE 1 TABLES
EFFECTIVE DATE: JANUARY 15, 2013

TABLE C
Loss Pick Containment Rates and Estimated Annual Amounts

Class Code	Loss Pick Containment Rate	Estimated Annual Payroll
VA 8869	1.80	32,994,000
MD8869	2.27	4,602,700
VA 8810	0.27	3,473,000

VA 9058	3.12	497,300
VA 9052	3.68	231,900

The Total Estimated Annual Loss Pick Containment Amount is $730,441.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MINNIELAND PRIVATE DAY SCHOOL, INC.,	)	
Plaintiff,	)	
v.	)	1:15-CV-1695
APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,	)	JURY DEMAND
Defendant.	)	

DEFENDANT APPLIED UNDERWRITERS RISK ASSURANCE COMPANY, INC.'S MOTION TO COMPEL ARBITRATION

Defendant Applied Underwriters Risk Assurance Company, Inc. ("AUCRA"), by and through counsel under special appearance,[1] pursuant to Sections 3 and 4

[1] AUCRA states that nothing in this Motion or in its special appearance shall be construed as a waiver of any available rights or defenses that AUCRA is entitled to raise, whether found in law or in any agreement between the parties. Specifically the defenses and/or rights asserted by AUCRA include, but are not limited to:

1. All affirmative defenses listed in Fed. R. Civ. P. 8(c)(1);
2. The right to raise any defenses listed in Rule 12(b)(1)-(7) in AUCRA's first responsive pleading;
3. All contractual rights and defenses that may exist in any agreement between the parties;

of the Federal Arbitration Act, codified at 9 U.S.C. § 1, *et seq*. ("FAA"), and Rule 12(b)(3) of the Federal Rules of Procedure, files this motion to compel arbitration and would show the following:

1. Plaintiff Minnieland Private Day School, Inc. ("Minnieland") is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal place of business in Woodbridge, Prince William County, Virginia. (Compl. ¶ 1, ECF No. 1.)

2. Defendant AUCRA is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in Omaha, Nebraska.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 as there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. (*See also* Compl. ¶ 3, ECF No. 1.)

---

4. All rights to compel arbitration and challenge venue based on any forum selection clause or any other agreement between the parties;

5. Any other legal or contractual right, remedy, or defense.

AUCRA expressly disavows any claim that by virtue of its special appearance and/or filing it has waived any of these rights or defenses. Moreover, nothing in this special appearance or filing should be interpreted by the parties as creating any reasonable expectation that AUCRA will ultimately defend this suit on the merits. *See King v. Taylo*r, 694 F.3d 650, 660 (6th Cir. 2012).

4. In early January 2013, Minnieland sought workers' compensation coverage for its education and childcare business, and it selected the EquityComp® Program, which included entering into the Reinsurance Participation Agreement ("RPA"). (*Id.* ¶¶ 5, 12, 14.)

5. Minnieland attached as Exhibit 3 to its complaint a copy of the executed RPA, which is evidence of a transaction involving interstate commerce. (*See* RPA, Ex. 3 to Compl., ECF No. 1-3.)

6. In Paragraph 13, the parties agreed to a broad arbitration clause that sets out, in relevant part, the following:

> (A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation. . . . Any dispute . . . that is not resolved informally . . . arising out of or related to this Agreement shall be fully determined . . . under provisions of the American Arbitration Association.
>
> (B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of the [sic] this Agreement . . . or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be . . . finally determined exclusively by binding arbitration in accordance with the procedures provided herein.
>
> . . . .

> (I) All arbitration proceedings shall be conducted . . . in accordance with the rules of the American Arbitration Association and shall take place . . . at some other location agreed to by the parties.

(*Id.* ¶ 13.)

7. The RPA's arbitration clause is valid and enforceable under the FAA.

8. Minnieland has failed, neglected, or refused to arbitrate, and as evidence, on December 24, 2015, it filed this lawsuit in the United States District Court for the Eastern District of Virginia. (Compl., ECF No. 1.)

9. Minnieland's Complaint does not challenge the making of the RPA's arbitration provision, and all of its claims fall within the RPA's broad arbitration agreement.

10. On January 18, 2016, AUCRA demanded arbitration under the rules of the American Arbitration Association, as provided by the RPA's arbitration clause, and has agreed to arbitrate in Prince William, Virginia, which is within this Court's district. A copy of the arbitration demand is attached to this Motion as **Exhibit 1**.

11. This action should be dismissed under Federal Rule of Civil Procedure 12(b)(3) and Section 4 of the FAA, and the parties should be directed to proceed with arbitration consistent with the RPA.

12. In the alternative, for the reasons set out above, AUCRA moves the Court under Section 3 of the FAA to stay the action until arbitration has been had under the RPA.

13. Counsel for AUCRA has conferred with plaintiff's counsel in an effort to narrow the area of disagreement as required by Local Civil Rule 7(E), but has been unable to do so.

14. Finally, AUCRA states that it is not requesting oral argument on this Motion; however, undersigned counsel will confer with counsel for Minnieland and file an appropriate notification within the time required by Local Civil Rule 7(E).

WHEREFORE, AUCRA respectfully moves this Court, pursuant to 9 U.S.C. § 4 and Rule 12(b)(3) of the Federal Rules of Civil Procedure, to dismiss this action and refer it to binding arbitration under the RPA's arbitration clause. In the alternative, AUCRA respectfully moves this Court, pursuant to 9 U.S.C. § 3, to stay this action until the parties arbitrate under the RPA. In support of this motion, AUCRA relies on

the record as a whole and the exhibit referenced herein.

Respectfully submitted,

BOWMAN AND BROOKE LLP.

By: /s/ Nathan Colarusso

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Attorneys for Applied Underwriters Captive Risk Assurance Company, Inc.

[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MINNIELAND PRIVATE DAY SCHOOL, INC. a Virginia corporation, Plaintiff, v. APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., Defendant.	Case No. 1:15-cv-01695-AJT-IDD

OPPOSITION TO MOTION TO COMPEL ARBITRATION

The "arbitration provision" Defendant Applied Underwriters Captive Risk Assurance Company, Inc. (*Applied*) seeks to enforce violates Virginia public policy. As a matter of Virginia statutory and contract law, it is void and unenforceable. Applied's Motion to Compel should be denied.

I. Introduction

Plaintiff Minnieland Private Day School, Inc. (*Minnieland*) is a Virginia provider of education and childcare services in Virginia, subject to the workers compensation laws and insurance requirements of Virginia. Complaint ¶ 5 In January 2013, it fulfilled its obligation to "insure the payment of compensation to

[its] employees", Va. Code Ann. § 65.2-800(A), by purchasing Workers' Compensation Insurance from Applied. Complaint ¶¶ 6-12.

The "arbitration provision, which is the subject of [Applied's] motion to compel", Applied's Memorandum of Law In Support of Motion to Compel at page 2 (*Applied's Memorandum*) is contained in an insurance contract Applied titles a "Reinsurance Participation Agreement" Minnieland had to sign in order to procure the Workers' Compensation Insurance. Complaint, ¶ 14 – Exhibit "3" (*the insurance contract*). *See*, Applied's Memorandum at page 2 ("In early January 2013, Minnieland sought workers' compensation coverage for its education and childcare business . . . [M]innieland selected the EquityComp® Program, which included entering into the Reinsurance Participation Agreement ("RPA") with [Defendant]."

The Workers' Compensation Insurance coverage issued to Minnieland pursuant to the insurance contract[1] stated on its face premium amounts totaling $1,937,658. Complaint ¶ 15. Through September 30, 2015, Applied charged and Minnieland paid Applied $1,973,396 for Workers' Compensation Insurance coverage. Complaint ¶ 16 – Exhibit "9". ("Total Pay-In We Required Prior to 9/30/15"); through October

[1] "During the Active Term of this Agreement, Workers' Compensation Insurance coverage will be provided to [Minnieland] by one or more of the Issuing Insurers." Complaint, Exhibit "3" (second paragraph). Premiums, fees, deposits, rates, and other consideration Applied charged for the insurance and its procurement are purportedly scheduled in the Agreement. *Id.* at pages 7-10.

2015 Applied charged and Minnieland paid Applied $2,013,782. *Id.* and Complaint ¶ 17 – Exhibit "10." After paying Applied the $471,213 it charged Minnieland in November 2015, Complaint ¶ 17 and ¶ 21, Minnieland had been charged by, and paid to, Applied $2,484,995 for Workers' Compensation Insurance coverage procured and issued through the insurance contract. *Id.* and Complaint – Exhibit "11."

When Minnieland refused to "pay-in" an additional $414,604 charged by Applied on December 8, 2015, Complaint ¶ 21, Applied canceled "all insurance coverages, including but not limited to workers' compensation coverage" for "Non-Payment of Premium." Complaint, ¶ 22 – Exhibit "13."

While the insurance contract violates Virginia public policy in numerous ways described throughout the Complaint, of immediate concern to Applied's Motion to Compel are paragraphs 13 and 14 which specifically violate Virginia public policy prohibiting any provision of any insurance contract from "depriving the courts of this Commonwealth of jurisdiction in actions against the insurer" or requiring the contract to be construed according to any other state's law. Va. Code Ann. § 38.2-312.

II. Applicable law

A. Standard of review

"The law is well settled in this circuit that, if a party seeks to avoid arbitration and/or a stay of federal

court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an arbitration provision on any grounds that 'exist at law or equity for the revocation of any contract,' 9. U.S.C. § 2, the ground 'must relate specifically to the arbitration clause and not just to the contract as a whole.'" *Snowdon v. CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002).

"If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 425, 87 S. Ct. 1801, 1817, 18 L. Ed. 2d 1270 (1967) (court may consider issues relating to the making and performance of the agreement to arbitrate). "When deciding arbitrability, the court only determines whether, as a matter of contract between the parties, the underlying dispute should be resolved in court or by arbitration." *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991) (citation omitted).

Virginia law is clear that a contractual provision "that violates public policy is void and has no legal effect." *Uniwest Const., Inc. v. Amtech Elevator Services, Inc.*, 280 Va. 428, 440, 699 S.E.2d 223, 229 (Va. 2010) (citations omitted); *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 254 Va. 494, 497-98, 493 S.E.2d 364, 366 (1997); *Group Hospitalization Medical Services, Inc. v. Smith*, 236 Va. 228, 372 S.E.2d 159 (1988) (county's self-insured employee's health plan constituted "insurance agreement" subject to anti-subrogation statute).

B. Virginia public policy reflected in its insurance statutes

Title 38.2 of the Code of Virginia governs insurance and the contents of contracts of insurance. Chapter 1, Article 1 contains the following definitions:

> "Insurance" means the business of transferring risk by contract wherein a person, for a consideration, undertakes (i) to indemnify another person, (ii) to pay or provide a specified or ascertainable amount of money, or (iii) to provide a benefit or service upon the occurrence of a determinable risk contingency. Without limiting the foregoing, "insurance" shall include (i) each of the classifications of insurance set forth in Article 2 (§ 38.2-101 et seq.) of this title. . . .
>
> "Insurance company" means any company engaged in the business of making contracts of insurance.
>
> "Insurance transaction", "insurance business", and "business of insurance" includes solicitation, negotiations preliminary to execution, execution of an insurance contract, and the transaction of matters subsequent to execution of the contract and arising out of it.
>
> "Insurer" means an insurance company.
>
> . . .
>
> "Rate" or "rates" means any rate of premium, policy fee, membership fee or any other charge made by an insurer for or in connection with a contract or policy of insurance.
>
> . . .

> Without otherwise limiting the meaning of or defining the following terms, "insurance contracts" or "insurance policies" shall include contracts of fidelity, indemnity, guaranty and suretyship.

Va. Code Ann. § 38.2-100; *see e.g.* Complaint ¶¶ 33, 35. "Workers' compensation and employers' liability insurance" is classified and defined in Article 2 as "insurance against the legal liability of any employer for the death or disablement of, or injury to, his or its employee whether imposed by common law or by statute, or assumed by contract." Va. Code Ann. § 38.2-119.

Chapter 3 circumscribes provisions relating to insurance policies and contracts and "applies to all classes of insurance." Va. Code Ann. § 38.2-300. Among other provisions, Virginia mandates that "all fees, charges, premiums or other consideration charged for the insurance or for the procurement of insurance shall be stated in the policy . . . " Va. Code Ann § 38.2-310(A) and that no provision of any insurance contract can require its construction according to foreign law or deprive "the courts of this Commonwealth of jurisdiction in actions against the insurer":

> No insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth, or which are performed in this Commonwealth shall contain any condition, stipulation or agreement:

> 1. Requiring the contract to be construed according to the laws of any other state or country . . . ; or
>
> 2. Depriving the courts of this Commonwealth of jurisdiction in actions against the insurer.
>
> Any such condition, stipulation or agreement shall be void, but such voiding shall not affect the validity of the remainder of the contract.

Va. Code Ann § 38.2-312. Additionally, the form of every workers' compensation insurance policy must be approved by the Virginia Workers' Compensation Commission. Va. Code Ann. § 65.2-813 ("No corporation, association or organization shall enter into any such policy of insurance unless its form shall have been approved by the Workers' Compensation Commission.").

C. McCarran-Ferguson Act preemption

The McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011 *et seq.*, shields state law regulating the business of insurance from federal law that does not specifically relate to insurance:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

15 U.S.C.A. § 1012. "Statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance,' within the meaning of the phrase". *U.S. Department of Treasury v. Fabe*, 508 U.S. 491, 501, 113 S. Ct. 2202, 2208, 124 L.Ed. 2d 449 (1993) (citation omitted); *SEC v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969) ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the 'business of insurance.").

D. Federal Arbitration Act

The Federal Arbitration Act, 9 U.S.C.A. §§ 1-16 (*FAA*) "does not specifically relate to the business of insurance" nor does it preempt state laws regulating the relationship between insurer and insured, including state laws prohibiting arbitration of insurance contracts. *Am. Bankers Ins. Co. of Florida v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006); *Knight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854, 857 (11th Cir. 2004); *Standard Security Life Insurance Co. of NY v. West*, 267 F.3d

821 (8th Cir. 2001). As the Nebraska Supreme Court has held, "every federal appellate court to address this issue has held that state laws restricting arbitration provisions in insurance contracts regulate the business of insurance and are not preempted by the FAA." *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 606-607 (Neb. 2010) (citations omitted).

Section 2 of the FAA provides for the enforcement of arbitration provisions "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. Section 4 provides that on a motion to compel arbitration, "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C.A. § 4.

> In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary). *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). *They 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.

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 2407, 156 L. Ed. 2d 414 (U.S. 2003) (emphasis added).

> Consistent with arbitration's contractual nature, parties may give arbitrability questions to an arbitrator. This practice, however, cuts against the normal rule that these questions are for the court. Accordingly, a court must find by "clea[r] and unmistakabl[e]" evidence that the parties have chosen to give arbitrability questions to an arbitrator. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69, n.1, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (alterations in original) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

Hayes v. Delber Services Corporation, 2016 WL 386016 _F.3d_ n.1 (4th Cir. February 2, 2016).

III. Virginia public policy, statutory and common law prohibits enforcement of the arbitration provision

Virginia has unequivocally declared its public policy that no provision of any insurance contract may deprive "courts in the Commonwealth of jurisdiction in actions against the insurer." Va. Code Ann § 38.2-312. That public policy fundamentally regulating "the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement [is] the core of the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at

453. The McCarran-Ferguson Act, 15 U.S.C.A § 1012, shields it from and reverse preempts the FAA.

The arbitration provision cannot be enforced without defeating Virginia's emphatically stated public policy regarding the relationship between insured and insurer: "No insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth, or which are performed in this Commonwealth shall contain any condition, stipulation or agreement . . . Depriving the courts of this Commonwealth of jurisdiction in actions against the insurer. Any such condition, stipulation or agreement shall be void . . . " Va. Code Ann. § 38.2-312.

There is no ambiguity in the General Assembly's mandate regarding "actions against the insurer."

> While courts will not rewrite a clear and unambiguous contract between parties *sui juris, Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983), a court is bound to follow the plain meaning of a statute. *Earley v. Landsidle*, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999) ("[W]hen the language in a statute is clear and unambiguous, the courts are bound by the plain meaning of that language."). In addition, "a contract to perform an act prohibited by a statute is void." *Palumbo v. Bennett*, 242 Va. 248, 251, 409 S.E.2d 152, 153 (1991).
>
> . . .
>
> Code § 2.2-4335(A) means what it says: "*Any* provision . . . to waive, release, or extinguish

> the rights of a contractor . . . shall be void." The General Assembly's use of the inclusive and comprehensive term "any" is instructive and mandatory.

Blake Const. Co./Poole & Kent v. Upper Occoquan Sewage Auth., 266 Va. 564, 575-576, 587 S.E.2d 711, 717-18 (2003) (original emphasis).

In the event Applied characterizes the insurance contract as anything other than an insurance contract, the form of the title does not hide the substance. It clearly was the contract that provided Minnieland Workers' Compensation Insurance and determined and governed the execution and the transaction of all matters subsequent to execution of the contract of insurance and arising out of it. Va. Code Ann. § 38.2-100 (definition of "Insurance transaction", "insurance business", and "business of insurance").

Again, the insurance contract explicitly provided "Workers' Compensation Insurance coverage will be provided to [Minnieland] by one or more of the Issuing Insurers" and it determined the premiums, fees, deposits, rates, and other consideration Applied charged for the insurance and its procurement. *Supra* page 2 n.1.; Complaint – Exhibit "1". Moreover, the "Issuing Insurers" are all Berkshire Hathaway, Inc. companies. *Id.*; *See* Doc. 6 Page ID# 78 (Financial Interest Disclosure Form).

It unequivocally determined all the matters subsequent to its execution and arising out of it, definitively including the charges Applied levied for Minnieland's

Workers' Compensation insurance. Applied terminated "all [Minnieland's] insurance coverages, including but not limited to workers' compensation coverage", Complaint ¶ 22 – Exhibit "13", not for "Non-payment of Premium" of the only state approved insurance policies and consideration, Complaint ¶ 15 – Exhibits "6" through "8", but because Minnieland failed to pay Applied its second consecutive over 1,000% increased monthly charge at a time it had already been charged and $547,337 above the premiums stated on the face of the policies. *Supra* at page 2.

There is no doubt that the insurance contract was precisely that. All "the essential terms of a contract of insurance" were stated in it: the subject matter to be insured were Minnieland's employees (and Minnieland's statutory obligation to insure them), the risk insured against was Minnieland's workers need for care and compensation as a result of their injuries, the commencement of the risk undertaken by Applied began January 15, 2013 and was required by Applied to last for 3 years, the amount of the insurance was set by Minnieland's payroll, and the premium was charged by Applied monthly. It clearly was a contract of insurance. *Am. Sur. Co. of New York v. Commonwealth*, 180 Va. 97, 105, 21 S.E.2d 748, 752 (1942) ("Unquestionably the minds of the parties met on these essentials in the present case."); *Group Hospitalization Medical Services, Inc. v. Smith*, 236 Va. 228, 372 S.E.2d 159 (1988) (County's self-insured health benefit was an insurance agreement covered by the antisubrogation statute.

IV. Conclusion

The arbitration provision in the insurance contract Applied seeks to enforce violates Virginia public policy regulating the insured/insurer relationship. Va. Code § 38.2-312 is not preempted by the FAA, though [sic] the McCarran-Ferguson Act, it reverse preempts the FAA. The arbitration provision is void and unenforceable. Applied's Motion to Compel should be denied.

MINNIELAND PRIVATE
DAY SCHOOL, INC.
By counsel

/s/ J. Scott Krein

J. Scott Krein, VSB No. 26656
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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

MINNIELAND PRIVATE DAY SCHOOL, INC.,	)	
Plaintiff,	)	
v.	)	**1:15-CV-1695**
APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,	)	**JURY DEMAND**
Defendant.	)	

APPLIED UNDERWRITERS RISK ASSURANCE COMPANY, INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION

Defendant Applied Underwriters Risk Assurance Company, Inc. ("AUCRA"), by and through counsel under special appearance, submits this Reply to Plaintiff's Opposition to its Motion to Compel Arbitration.

I. Plaintiff's Attacks on the Enforceability of the RPA's Arbitration Provision Must be Decided by an Arbitrator, not this Court.

In its Opposition, Minnieland seeks to avoid the parties' express agreement to arbitrate by claiming that the RPA's arbitration agreement is unenforceable because it violates Virginia's public policy, among other reasons. In doing so, Minnieland does not attack the

RPA's delegation provision,[1] which requires that Minnieland's challenges to the enforceability of the arbitration provision be heard by an arbitration panel and not this Court. As such, the Court need go no further than to analyze the delegation issue to reach its decision.[2]

It is well-settled that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010). A provision that delegates to the arbitrator all determinations as to the scope or enforceability of this arbitration provision is referred to as a "delegation provision." *See generally id.* at 68-69 (referring to the provision delegating "gateway" question of enforceability to the arbitrator as the delegation provision). As such, enforcing delegation provisions "reflects the principle that arbitration is a matter of contract." *Id.* at 69.

In *Rent-A-Center*, the plaintiff opposing arbitration argued that various provisions of the arbitration agreement, such as limited discovery and unfair fee-splitting, rendered the agreement unconscionable as a whole. *Id*. at 72-74. The Court held that the delegation

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[1] Nor does Minnieland's complaint attack the arbitration clause or the delegation clause; rather, it only challenges the RPA as a whole. (*See generally* Compl, ECF No. 1).

[2] AUCRA disputes Minnieland's characterization of the RPA as an insurance contract as well as its assertion that the RPA is subject to Virginia's insurance statutes. AUCRA does not waive the right to defend or challenge these assertions.

provision was severable from the remainder of the arbitration agreement because Section 2 of the FAA "operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce," unless the plaintiff "challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id*. at 72 (emphasis added).

The United States Supreme Court found that, in light of the delegation clause, the lower courts erred in addressing the merits of the plaintiff's unenforceability defenses. *Id.* at 71-72. The Court determined that the arbitration agreement contained two separate agreements: (1) a delegation agreement – "which is simply an additional, antecedent agreement" to have an arbitrator decide whether the arbitration agreement was enforceable in the first place; and (2) a separate agreement to arbitrate the parties' claims. *Id*. at 68-70. Under the delegation agreement, the Court held that challenges to the enforceability of the entire arbitration agreement were for an arbitrator, not a court. *Id*. at 71-72.

Thus, "the presence of a delegation provision narrows a court's role to determining whether there is a valid delegation agreement, and if there is such an agreement, a court must then 'enforce the delegation provision by compelling arbitration and reserving for the arbitrator issues that implicate the agreement to arbitrate as a whole.'" *United States ex rel. Beauchamp & Shepherd v. Academi Training Ctr.*, No. 1:11cv371,

2013 U.S. Dist. LEXIS 46433, at *21 (E.D. Va. Mar. 29, 2013).

District courts within this circuit have followed *Rent-A-Center* and have declined to address challenges directed to the arbitration agreement as a whole, instead referring those matters to the arbitrator when the agreement at issue contains a delegation provision. *See, e.g.*, *Terra Holding GmbH v. Unitrans Int'l, Inc.*, No. 1:14-cv-1788, 2015 U.S. Dist. LEXIS 112570, at *9 (E.D. Va. Aug. 19, 2015); *Innospec Ltd. v. Ethyl Corp.*, No. 3:14-cv-158, 2014 U.S. Dist. LEXIS 152175, at *3 (E.D. Va. Oct. 27, 2014); *United States ex rel. Beauchamp & Shepherd*, 2013 U.S. Dist. LEXIS 46433, at *21.

The one caveat to the enforceability of a delegation provision is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Rent-A-Ctr. W., Inc.*, 561 U.S. at 69 n.1 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). This "clear and unmistakable requirement" refers to "the parties' *manifestation of intent*, not the agreement's *validity*." *Id*. This heightened standard is an "interpretive rule," based on an assumption about the parties' expectations. *Id*. If the court finds that the "clear and unmistakable" standard is met, then its arbitrability analysis is finished, and it must compel the parties to arbitrate without addressing the merits of the Plaintiff's challenges to arbitrability. *See id.*

In the present matter, the language of the RPA's arbitration provision clearly and unmistakably delegates issues of arbitrability to the arbitrator:

> (A) **It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation** in order to protect confidentiality of their relationship and their respective businesses and affairs. **Any dispute or controversy** that is not resolved informally pursuant to subparagraph (B) of paragraph 12 arising out of or related to this agreement **shall be** fully determined in the British Virgin Islands **under the provisions of the American Arbitration Association.**
>
> (B) **All disputes** between the parties relating in any way to (1) the execution and delivery, **construction or enforceability** of this Agreement, . . . or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among the parties hereto, and, failing such amicable settlement, **finally determined exclusively by binding arbitration** in accordance with the procedures provided herein. The reference to this arbitration clause in any specific provision of this Agreement is for emphasis only, and is not intended to limit the scope, extent or intent of this arbitration clause, or to mean that any other provision of this Agreement shall not be fully subject to the terms of this arbitration clause**. All disputes arising with respect to any**

> **provision of this Agreement shall be fully subject to the terms of this arbitration clause**.
>
> . . . .
>
> (I) All arbitration proceedings shall be conducted in the English **language in accordance with the rules of the American Arbitration Association** and shall take place in Tortola, British Virgin Islands or at some other location agreed to by the parties.
>
> . . . .
>
> (K) **This arbitration clause** shall survive the termination of this Agreement **and be deemed to be an obligation of the parties which is independent of, and without regard to, the validity of this Agreement**.

(RPA, ECF No. 1-3, at ¶ 13) (emphasis added).

The language shows the parties intended to resolve "**any dispute or controversy,**" including those regarding the "**enforceability**" of the Agreement, "**exclusively by binding arbitration**" and "**without resort to litigation**." (*Id.*) (emphasis added).

Because the RPA's delegation provision includes both expansive language and incorporates the American Arbitration Association's rules, it is indistinguishable from other cases from this District holding that the "clear and unmistakable" test is met. *See Terra Holding GmbH*, 2015 U.S. Dist. LEXIS 112570, at *7-8 (holding that the "clear and unmistakable" standard was met where the arbitration clause both includes

expansive language and incorporates a specific set of rules); *Innospec Ltd.*, 2014 U.S. Dist. LEXIS 152175, at *3 (recognizing that, although the Fourth Circuit has not ruled on the issue, "a majority of circuit courts have held that the incorporation of specific rules that allow arbitrators to determine arbitrability meets the 'clear and unmistakable standard'"); *United States ex rel. Beauchamp & Shepherd*, 2013 U.S. Dist. LEXIS 46433, at *15-16 (holding that the incorporation of the AAA Commercial Rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.")

Indeed, a majority of other circuits have also followed this line of authority. *See e.g. Awuah v. Coverall North Am., Inc.*, 554 F.3d 7, 11-12 (1st Cir. 2009) (recognizing that "[AAA] Rule 7(a) says plainly that the arbitrator may 'rule on his or her own jurisdiction' including any objection to the 'existence, scope or validity of the arbitration agreement.' This is about as 'clear and unmistakable' as language can get. . . ."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 877-78 (8th Cir. 2009) (concluding "that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator"); *Qualcomm Inc. v. Nokia Corp*., 466 F.3d 1366, 1373 (Fed. Cir. 2006) (noting an agreement that incorporates AAA Rules clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (holding

that when "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator"); *Terminix Int'l Co., LP v. Palmer Ranch L.P.*, 432 F.3d 1327 (11th Cir. 2005) (same).

Thus, the RPA's incorporation of the AAA Rules should yield the same finding: Minnieland and AUCRA clearly and unmistakably intended to delegate arbitrability questions to the arbitrator, not to the court.

CONCLUSION

Because the parties clearly and unmistakably agreed to submit all disputes regarding arbitrability to an arbitration panel, AUCRA respectfully moves this Court, pursuant to 9 U.S.C. § 4 and Rule 12(b)(3) of the Federal Rules of Civil Procedure, to dismiss this action and refer it to binding arbitration under the RPA's arbitration clause.

Respectfully submitted,

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MINNIELAND PRIVATE DAY SCHOOL, INC. a Virginia corporation, Plaintiff, v. APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., Defendant.	Case No. 1:15-cv-01695-AJT-IDD

BRIEF IN SUPPORT OF MOTION TO RECONSIDER

The Order entered March 17, 2016 (ECF Doc. 22) (*Order*) rests on a misapplication of *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (*Rent-A-Center*). The validity of the "arbitration provision itself", ¶ 13 of the RPA, has been specifically challenged by Minnieland from the inception of the Complaint. Depriving this court of jurisdiction, and compelling Minnieland to arbitrate its action, violates Virginia's public policy regulating the business of insurance, which, pursuant to the McCarran-Ferguson Act, 15 U.S.C.A. § 1012, preempt the Federal Arbitration Act, 9 U.S.C.A. §§ 1 *et seq.* (*FAA*).

The Court should reconsider the Order and deny Applied's Motion to Compel Arbitration in full.

I. Minnieland specifically challenged the validity of "the arbitration provision itself" from the inception of the Complaint

As the Court recognizes, pursuant to the McCarran-Ferguson Act, Va. Code Ann. § 38.2-312, preempts the FAA. Order at page 5. The Order, nonethless [sic], deprives it of jurisdiction over Minnieland's action against its insurer because Minnieland made "no claim that the arbitration provision itself was unenforceable 'upon such grounds as exist under law or in equity for revocation of [the] contract.' 9 U.S.C. § 2." Order at page 6.

From the inception of the Complaint, however, Minnieland has specifically challenged the validity of "the arbitration provision itself", ¶ 13 of the RPA, *see e.g.* Complaint ¶¶ 33 and 38 (ECF Doc. 1), as void and of no legal effect as a matter of Virginia statutory and common law which, pursuant to the McCarran-Ferguson Act, preempts the FAA. Opposition to Motion to Compel (ECF Doc. 14). *Hayes v. Delbert Services Corporation*, 811 F.3d 666, 671 n.1 (4th Cir. 2016) ("Delbert argues that the parties in this case clearly and unmistakably delegated arbitrability questions, including questions regarding the validity of the arbitration agreement, to arbitration. We find, however, that Hayes and his co-plaintiffs have challenged the validity of that delegation with sufficient force and specificity to occasion our review.")

Neither Minnieland nor Applied could have agreed to deprive this court of jurisdiction over this

action and subject Minnieland's action to arbitration. Regardless of intent, Virginia prohibits any such contractual provision as void; "an absolute nullity." *Id.* There is no valid arbitration provision to enforce

"If a contract violates public policy, it is void and of no legal effect." *Cohen v. Mayflower Corp.*, 196, Va. 1153, 1160, 86 S.E.2d 860, 864 (1955); Opposition Motion to Compel at page 4, 8-11 (ECF Doc. 14). While the choice of law and arbitration provisions of the RPA are severable by statute[1], they are "void and of no legal effect" and cannot be enforced to deprive this court of jurisdiction of this action.

II. The court must resolve the validity of the arbitration provision

Unlike the circumstances in this case, McCarran-Ferguson Preemption was not at issue in *Rent-A-Center*, where the Plaintiff challenged the "contract as a whole" rather than the specific arbitration provision sought to be enforced.

> The District Court correctly concluded that Jackson challenged only the contract as a whole. Nowhere in his opposition to Rent-A-Center's motion to compel arbitration did he even mention the delegation provision.

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[1] Va. Code Ann. § 38.2-312 ("Any such condition, stipulation or agreement shall be void, but such voiding shall not affect the validity of the remainder of the contract."). Opposition to Motion to Compel at page 5 (ECF Doc. 14).

561. U.S. 72, 130 S.Ct. 2779. Again,

> Jackson's appeal to the Ninth Circuit confirms that he did not contest the validity of the delegation in particular.

561. U.S. 74, 130 S.Ct. 2780.

Recognizing as "a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract", *Rent-A-Center* nonetheless made it clear courts must determine the validity of an arbitration agreement they are asked to enforce:

> But that agreements to arbitrate are severable does not mean that they are unassailable. **If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4**. In *Prima Paint*, for example, if the claim had been "fraud in the inducement of the arbitration clause itself," then the court would have considered it. 388 U.S., at 403-404, 87 S.Ct. 1801. "To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract," *id.*, at 404, n. 12, 87 S.Ct. 1801. In some cases the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in an employment contract many elements of alleged unconscionability

> applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case – as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract – we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.

561 U.S. 71, 130 S. Ct. 2778 (emphasis in bold added).

Three days after deciding *Rent-A-Center*, the Supreme Court reiterated the court's obligation to consider a challenge to "the validity under § 2 of the precise agreement to arbitrate at issue . . . before ordering compliance with that agreement under §4":

> Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute.* See *First Options*, *supra*, at 943, 115 S.Ct. 1920; *AT&T Technologies*, *supra*, at 548-649, 106 S.Ct. 1415. To satisfy itself that such agreement exists, 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. See, *e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, ___-___, 130 S.Ct. 2772, ___ L.Ed.2d ___ (2010) (opinion of SCALIA, J.). Where there is no provision validly committing them to an arbitrator, see *ante* at 2776-2778, these issues typically concern the scope of the arbitration

> clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include when that agreement was formed.

Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297, 130 S. Ct. 2847, 2856, 177 L. Ed. 2d 567 (2010) (*Granite Rock*). The court repeatedly emphasized the *validity* of an arbitration provision, specifically including "the formation of the parties' arbitration agreement", is an issue for judicial determination:

> Local, like the Court of Appeals, overreads our precedents. The language and holdings on which Local and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly "a matter of consent," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and thus "is a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration," *First Options*, 514 U.S., at 943, 115 S.Ct. 1920 (emphasis added). Applying this principle, 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. *Ibid.* **Where a party contests either or both**

> **matters, "the court" must resolve the disagreement.** *Ibid.*
>
> Local nonetheless interprets some of our opinions to depart from this framework and to require arbitration of certain disputes, particularly labor disputes, based on policy grounds even where evidence of the parties' agreement to arbitrate the dispute in question is lacking. See Brief for Respondent Local, p. 16 (citing cases emphasizing the policy favoring arbitration generally and the "impressive policy considerations favoring arbitration" in LMRA cases (internal quotation marks omitted)). That is not a fair reading of the opinions, all of which compelled arbitration of a dispute **only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable.** See, *e.g.*, *First Options*, *supra*, at 944-945, 115 S.Ct. 1920. That *Buckeye* and some of our cases applying a presumption of arbitrability to certain disputes do not discuss each of these requirements merely reflects the fact that in those cases some of the requirements were so obviously satisfied that no discussion was needed.

Id. at 299-300, 130 S.Ct. 2857-2858 (footnote 7 citations omitted) (emphasis in bold added).

The RPA is a contract of insurance between Minnieland, an insured, and Applied, an insurer. It constitutes, among other matters, "solicitation, negotiations preliminary to execution, execution of an insurance

contract, and the transaction of matters subsequent to execution of the contract and arising out of it." Va. Code § 38.2-100. Complaint at ¶¶ 9-22. It explicitly and exclusively establishes and determines, among other matters, the "rate of premium, policy fee, membership fee or any other charge made by an insurer *for or in connection with a contract or policy of insurance*." *Id.* (emphasis added); Opposition to Motion to Compel; Response to Motion For Leave to Submit Additional Case Law (ECF Doc. 20).

Applied cannot dispute that the RPA, if it does nothing else, determines the "rate of premium, policy fee, membership fee or any other charge made by an insurer *for or in connection with a contract or policy of insurance*" as defined by Va. Code § 38.2-100 and as its own description of the nature of the dispute on which it has demanded arbitration makes clear:

> [Minnieland] has failed to pay monies owed to [Applied] arising out of [Minnieland's] execution of the RPA and participation in the EquityComp Program, a loss sensitive workers' compensation program **through which Respondent obtained workers' compensation coverage.**

ECF Doc. 4-1 (describing itself as an "Insurance Company"). Applied terminated and cancelled Minnieland's Worker's Compensation Insurance Policy for failure to pay the rates charged by Applied pursuant to

the RPA – not the Policy. *Id.*[2] The fact that it seeks to avoid this action and compel arbitration of any dispute against it – pursuant to the RPA, not the Policy – further reflects substantive contractual change the RPA makes and effect it has on Minnieland's Workers' Compensation Insurance.

Nor has Applied offered anything to suggest the RPA is anything other than a contract for insurance subject to, among other requirements, Va. Code § 38.2-312.[3]

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[2] While the Workers' Compensation Policy and its stated rates have been submitted to and approved by the VWCC and VSCC, Complaint ¶ 15 and Exhibits 6-8 (ECF Doc. 1, 1-6, 1-7, 1-8), Minnieland had paid Applied $541,277 above the stated Policy premiums, and refused to pay another [sic] Applied an additional $414,604 premium (Complaint at ¶¶ 15-21; Opposition to Motion to Compel) when Applied terminated and cancelled the Policy for "Non-Payment of Premium | Client has an outstanding balance." Complaint Exhibit "13" (ECF Doc. 1-13).

[3] Applied's submission of the Sixth Circuit's unpublished opinion in *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Company*, 590 Fed. App. 482 (6th Cir. 2014) (*Milan*) had little to do with the court's "expressed concern about whether the contract at issue – the Reinsurance Particpation Agreement (RPA) – was a contract of insurance or a contract of reinsurance", Applied's Motion for Leave to Submit Additional Case Law in Support of its Motion to Compel Arbitration at ¶ 2 (ECF Doc. 18) and everything to do with distracting from what the RPA is in fact. Opposition to Motion to Compel. Insofar as it applies, *Milan* is an example of "overreading" *Rent-A-Center.* McCarran-Ferguson preemption is not mentioned and it is premised on Milan's failure to challenge "the arbitration clause itself . . . as invalid". ECF Doc. 18-1 (page 3). Both factors distinguish its applicability here.

The only signatories to the RPA are Minnieland, the insured, and Applied, the insurer. Minnieland's Response to Motion for Leave to Submit Additional Case Law (ECF Doc. 20). Regardless of the name Applied gives to the RPA, it is not a reinsurance contract. As Judge Rosi noted in *In the Matter of the Appeal of Shasta Linen Supply, Inc.*, California Insurance Commissioner, File AHB-WCA-14-31, Applied has specifically "stipulated that the RPA is not a reinsurance contract." ECF Doc. 20-2 (n.123).[4]

Applied has similarly stipulated in Vermont that the RPA is a contract of insurance that "materially modified the terms of Continental's approved and filed guaranteed-cost workers' compensation policy, bypassing the required review and approval of the Department [of Financial Regulation]." *In re Continental*

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[4] Applied's Stipulation was made by its counsel, Mr. De La Mora, in open court:

> So is what they call a reinsurance participation agreement really a reinsurance agreement [Page 614] at all?
>
> MR. DE LA MORA: Stipulated that it's not.
>
> JUDGE ROSI: Okay. Good.
>
> MR. FARMER: Why'd they name it –
>
> JUDGE ROSI: Well, we can talk to a bunch of people about why they named it that later. I look forward to it. But Mr. De La Mora has stipulated that in fact, it's not a reinsurance agreement at all. It's just called that. It's called a Reinsurance Participation Plan.
>
> MR. DE LA MORA: Correct. It would be illegal for an employer to issue a reinsurance policy, so of course it's not a reinsurance agreement. [Page 615]

Indemnity Company, Applied Underwriters, Inc., Applied Risk Services, Inc., Applied Underwriters Captive Risk Assurance Company, Inc., Vermont Department of Financial Regulation, Docket No. 15-0261. Exhibit "1" attached. *See also Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Insurance* [sic] *Company, Inc.*, No. CGC 15-548928, Superior Court of California, County of San Francisco, Dept. 92 (March 16, 2016) (applying *Rent-A-Center* and finding the RPA is an unfiled, unapproved endorsement to a Berkshire Hathaway guaranteed-cost workers' compensation policy that significantly altered the terms of that policy and, even if "issued in the form of a 'reinsurance' agreement issued by a separate, albeit related entity, to the entity that issued the workers' compensation policy", was void and unenforceable). Exhibit "2".

III. Conclusion

As the court recognizes, Va. Code § 38.2-312, through the McCarran – Ferguson Act, is not preempted by the FAA. Depriving itself of jurisdiction and denying Minnieland its Virginia right of jurisdiction of this action against its insurer in this court violates Virginia public policy and the McCarran-Ferguson Act preemption of the FAA. The court, respectfully, should

reconsider its Order and deny Applied's Motion to Compel Arbitrtion in full.

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RECORD NO. 16-1511

In The
United States Court of Appeals
For The Fourth Circuit

MINNIELAND PRIVATE DAY SCHOOL, INC.
a Virginia corporation

Plaintiff-Appellee,

- v. -

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

APPELLANT'S OPENING BRIEF

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* * *

STATEMENT OF ISSUES

1. Whether the district court erred when it denied AUCRA's motion to compel arbitration after it twice ruled that the parties had clearly and unmistakably delegated questions of arbitrability to the arbitrators, but then proceeded to consider the merits of Minnieland's defenses to arbitrability and used the doctrine of judicial estoppel to decide the arbitrability question itself?

* * *