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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson., Circuit Court Judge

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed Aug. 10, 2022)

Nicole Lampo Petitioner,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, ... Respondents.

JOINT APPENDIX

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INDEX TO APPENDIX

I.	Record on Appeal	1
II.	Briefs	
	Final Brief of Appellants	185
	Final Brief of Respondent.....	211
	Final Reply Brief of Appellants	244
III.	Published Opinion of the Court of Appeals	263
IV.	Petition for Rehearing	
	Respondent's Petition for Rehearing.....	271
	Order Denying Petition for Rehearing	284

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2018-CP-2201001
Appellate Case No.: 2019-000451

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JUL 22 2019
SC Court of Appeals

Nicole Lampo,..... Respondent,

v.

Amedisys Holding, LLC, and
Leisa Victoria Neasbitt Appellants.

RECORD ON APPEAL

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INDEX

ORDERS

Form 4 Order Denying Defendants' Motion to Dismiss filed March 1, 2019.....	2
Order Denying Defendants' Motion to Dismiss filed March 11, 2019	5

PLEADINGS

Plaintiff's Complaint filed December 7, 2018	10
Defendants' Motion and Memorandum in Support of their Motion to Dismiss or, in the alternative, to Stay Proceedings and Compel Arbitration filed February 4, 2019	25
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion filed February 26, 2019	122

TRANSCRIPTS

Transcript of March 1, 2019 Hearing before the Honorable Benjamin H. Culbertson.....	147
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OTHER DOCUMENTS

Defendants' Notice of Appeal filed March 29, 2019.....	179
--	-----

CERTIFICATE OF APPELLANTS' COUNSEL

Certificate.....	181
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Georgetown
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2201001

Nicole Lampo
PLAINTIFF(S)

Amedisys Holding Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Defendant's Motion to Dismiss or in the Alternate to Stay and Compel Arbitration is DENIED.

Attorney James Paul Porter to Prepare Order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/01/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Georgetown
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2201001

Nicole Lampo
PLAINTIFF(S)

Amedisys Holding Llc et al
DEFENDANT(S)

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NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Georgetown Common Pleas

Case Caption: Nicole Lampo VS Amedisys Holding Llc , defendant, et al

Case Number: 2018CP2201001

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-03-01 11:42:00 page 3 of 3

ELECTRONICALLY FILED - 2019 Mar 01 11:54 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2201001

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-01001

ORDER

This order follows oral argument on the Defendants' Motion to Compel Arbitration held on March 1, 2019. Defendant's Motion is DENIED because the Court finds that there is insufficient evidence of a valid acceptance to give rise to an enforceable contract to arbitrate under South Carolina contract law.

1. Introduction

This case involves a wrongful termination claim against the Plaintiff's former employer, Amedisys Holding, LLC and post-termination tort claims against her former employer and former supervisor. Defendants are attempting to enforce an unsigned arbitration agreement that it sent via a company-wide email on August 6, 2013. The record evidence reflects that the email was two lines and included a link that, according to the subject line of the email, related to an "Important Policy Change." According to the Defendant's brief,¹ "upon clicking on the email to open it in their inbox" each employee "received a pop-up Acknowledgement Form." The pop-up did not describe what arbitration was and required Plaintiff to click "I acknowledge." The pop-up did not require employees to click "I agree" or allow for them to disagree or refuse to acknowledge. According to the Defendant, after an

¹ At argument, Defendants pointed to an affidavit of one of its employees suggesting that the pop-up arose after clicking the link in the email. The discrepancy between Defendants' brief and supporting affidavit is immaterial to this order.

employee “acknowledged” the pop-up they were carried to a webpage where they could access the arbitration agreement and other documents. There is no record evidence of the Plaintiff accessing the arbitration agreement. Plaintiff submitted an affidavit that said she had no notice or recollection of the arbitration agreement. The arbitration agreement did not include a place for employees to sign it, electronically or otherwise. The arbitration agreement did allow employees to opt-out of the agreement. Although, the arbitration agreement was emailed to employees, to opt-out of the agreement employees were required to print out a separate form, fill it out, and mail it to Defendant Amedisys’ corporate office. According to the arbitration agreement, if an employee did not opt out within 30 days of receiving the agreement, they were bound to it.

2. Standard of Review

Rule 12(b)(3), SCRCP allows a party to move for dismissal on the basis of “improper venue.” “A motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion.” *Holroyd v. Requa*, 361 S.C. 43, 65, 603 S.E.2d 417, 428 (Ct. App. 2004). Furthermore, while the Court may view evidence outside of the pleadings on a 12(b)(3) motion, the evidence before the Court must be viewed most favorably toward the non-moving Plaintiff. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012) (“In assessing whether there has been a prima facie venue showing, we view the facts in the light most favorable to the plaintiff.”). “Arbitrability determinations are subject to de novo review.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); citing, *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App.2005). “Nevertheless, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.2003).

3. Discussion

“A party can compel arbitration if he establishes: “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005); *quoting, Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–01 (4th Cir.2002). Plaintiff concedes that this agreement, if enforceable, would be governed by the Federal Arbitration Act (FAA). Plaintiff, however, argues that there is not an enforceable agreement between the parties under South Carolina contract law. *See, Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001). (“General contract principles of state law apply to arbitration clauses governed by the FAA.”).

Defendants contend that the arbitration agreement is enforceable based on its company-wide email, Plaintiff's pop-up acknowledgement form, and Plaintiff's failure to opt out of the purported arbitration agreement. Plaintiff counterargues that she did not have requisite actual notice of the agreement, that there is no evidence of mutual assent or a meeting of the minds, that the agreement is unconscionable, and that the agreement does not encompass the entire scope of this dispute. Plaintiff also demands a jury trial on the fact issues underlying actual notice should the Court not find that she is entitled to denial of Defendants' motion as a matter of law. *See*, 9 U.S.C. § 4 (“Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.”). The Court questions whether enough evidence of actual notice is in the record to create a fact issue in favor of arbitrability. The Court, however, does not need to delve into that issue or the myriad of other arguments raised by the

Plaintiff because it finds that there is no competent record evidence of acceptance, mutual assent, or a meeting of the minds to warrant declaring the arbitration agreement enforceable.

“Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.” *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff’d sub nom. Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007). The formation of a binding contract requires “the parties [to] have a meeting of the minds with regard ‘to all essential and material terms of the agreement.’” *Vessell v. DPS Associates of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998). “The necessary elements of a contract are an offer, acceptance, and valuable consideration.” *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). A meeting of the minds is “an objective manifestation of the parties’ mutual assent to the essential and material terms of the contract.” *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 760 (D.S.C. 1999). “A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.” *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); *Gaskins v. Blue Cross–Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978). Here the Court, based on South Carolina contract law and the record evidence, finds that there is insufficient evidence of an acceptance to justify compelling arbitration.

4. Conclusion

The Court based on the record and the above legal analysis orders that the Defendants’ motion to compel arbitration and alternative motion to stay is DENIED.

Benjamin H. Culbertson
Fifteenth Circuit Court Judge

March ____, 2019
Georgetown, South Carolina



Georgetown Common Pleas

Case Caption: Nicole Lampo VS Amedisys Holding Llc , defendant, et al

Case Number: 2018CP2201001

Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

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STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-_____

SUMMONS

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your answer to this Complaint upon the subscriber at the address shown below within thirty (30) days (thirty five (35) days if served by United States Mail) after service hereof, exclusive of the date of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

BY: s/J. Paul Porter

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Attorneys for Plaintiff

December 7, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-_____

COMPLAINT
(Jury Trial Demanded)

EMPLOYMENT CASE

Plaintiff, complaining of the Defendants, respectfully makes the following allegations.

PARTIES AND JURISDICTION

1. Plaintiff Nicole Lampo is a citizen and resident of Horry County.
2. Defendant Amedisys Holding, LLC is a Louisiana Company operating in Horry County and Georgetown County, South Carolina.
3. Defendant Leisa Victoria Neasbitt is, upon information and belief, a citizen and resident of Georgetown County, South Carolina.
4. Defendant Amedisys Holding formerly employed Plaintiff and Defendant Neasbitt in Horry County and Georgetown County. Most of the events giving rise to lawsuit occurred in Horry County, but some events occurred in Georgetown County where Defendant Nesbitt resides.
5. Plaintiff alleges defamation against both Defendants and wrongful discharge against Defendant Amedisys Holding
6. These claims are pled and the alternative where necessary.
7. These claims arise under the common law of South Carolina.

8. The parties have sufficient connections, this forum is convenient, and the events occurred in or near Georgetown County, South Carolina; thus, this Court is a proper venue for these claims.

FACTUAL ALLEGATIONS

9. Plaintiff is a Doctor of Physical Therapy and a Certified Lymphedema and Wound Care Specialist.

10. Plaintiff has been practicing Physical Therapy since 2010.

11. Prior to becoming a Physical Therapist, Plaintiff was a certified Physical Therapy technician, so she has over one decade of relevant experience in the field of Physical Therapy.

12. Plaintiff was hired by Defendant Amedisys Holding, LLC on July 8, 2013 as a Doctor of Physical Therapy headquartered at its Horry County location in Myrtle Beach.

13. Plaintiff worked as needed at Defendant Amedisys Holding, LLC's Georgetown County office.

14. Plaintiff job duties primarily involved providing physical therapy and rehabilitative care to Defendant Amedisys Holding LLC's patients who were located at Skilled Nursing Care facilities, at their homes for home health and hospice patients, and at Long Term Care Facilities through Horry and Georgetown Counties.

15. Incident to Plaintiff job duties, she also supervised Physical Therapy Assistants, Interdisciplinary Communication with Occupational Therapist, Skilled Nursing, Physicians, and Social Workers, and she was responsible for various administrative tasks regarding her case load such as submitting documentation for patient billing.

16. Altogether, Plaintiff's primary concern, consistent with her moral obligations and the laws and regulations governing her practice, has constantly remained patient care.

17. Plaintiff consistently met, if not exceeded, the legitimate employment expectations of Defendant Amedisys Holding, LLC.

18. Plaintiff received annual performance evaluations and those evaluations issued by Defendant Amedisys Holding, LLC consistently stated that she met or exceeded expectations overall and in all relevant regards.

19. Plaintiff received no disciplinary actions during her tenure until April 2017.

20. Defendant Amedisys Holding, LLC hired Defendant Neasbitt to serve as its Director of Operations (DOO) in March 2017.

21. Plaintiff had a good working relationship with Defendant Neasbitt's predecessor.

22. As Defendant Neasbitt transitioned into her role, the interim Operations Officer encouraged Plaintiff and peers to share any concerns they had about Defendant Amedisys Holding, LLC's practice in Myrtle Beach.

23. Regular meetings were held for providers share their concerns on Tuesdays.

24. On April 12, 2017, in the presence of a Regional Therapy Manager, Plaintiff verbally raised concerns about an Occupational Therapist who was engaging in unsafe practices, recertifying patients beyond medical necessity, co-treating between an Occupational Therapist and Physical Therapist, writing orders to hospitalists without going through his patient's physicians in addition to concerns about overbooking patients and general office concerns.

25. After Defendant Neasbitt's hire, Plaintiff observed that her schedule was being overbooked and at the same time Plaintiff received a disciplinary writeup in April 2017 from Defendant Neasbitt for her "transmission time."

26. "Transmission time" as used by Defendants refereed to time between when a patient is seen, and documentation is sent to billing regarding that patient to bill that patient.

27. Plaintiff's transmission time had slowed because Defendants were overscheduling visits for Plaintiff and to provide patients appropriate medical care non-medically urgent matters such as billing became appropriately subservient to patient needs.

28. That write-up falsely claimed that Plaintiff had received prior verbal counseling about her Transmission Times.

29. Plaintiff was given the writeup by a Corporate Operations Official ostensibly at the direction of Defendant Neasbitt.

30. Plaintiff, in response to that writeup, emailed a compliance complaint to the Corporate Operations Official outlining that she did not have inexcusably delayed transmission times, that she was being over-booked, that she felt the writeup was initiated in retaliation for a complaint she had made about "unprofessional behavior," and her describing other issues primarily with respect to negligence in scheduling patients and overscheduling patients at the Myrtle Beach Office.

31. Plaintiff received no response of substance to her email.

32. Plaintiff next made a corporate compliance complaint where she complained the above incident and the practices of the Occupational Therapist she had complained about on April 12, 2017.

33. Plaintiff did not make her corporate compliance call anonymously because her complaint was very specific to her given that it concerned, in part, a writeup she personally received. She did note during the call that she was fearful of retaliation.

34. Plaintiff observed no action taken in response to her corporate compliance call.

35. Nevertheless, Plaintiff made follow-up complaints to corporate compliance throughout 2017.

36. Plaintiff was not the only provider who made corporate compliance complaints about the Defendants' practice of over-scheduling at the Myrtle Beach office.

37. Plaintiff observed that Defendant Neasbitt was distant and subject to sporadic mood swings toward Plaintiff after Plaintiff made her corporate compliance calls.

38. This tacit atmosphere of microaggression continued for approximately 11 months.

39. On March 1, 2018, Defendant Neasbitt texted Plaintiff asking to call her and when Plaintiff called her she claimed that Plaintiff's patients from at an Assisted living facility, Hope Arbor, were being removed from her caseload because there had been a complaint that "the Physical Therapist had several disagreements with the Nurse Practitioner and Director of Nursing" and had been discussing hospice patients with Defendant Amedisys Holding, LLC without consulting with the Nurse Practitioner first.

40. Plaintiff responded that they must have had her confused with her Physical Therapy Assistant ("PTA").

41. Furthermore, the disagreements between that PTA and the Nurse Practitioner and Director of Nursing had to do with the PTA insisting on actions that were necessary for patient care for patients who should not have necessarily been in the assisted living facility at issue, but rather should have been in a skilled care facility or with a 24-hour caregiver.

42. Plaintiff made multiple inquiries to Defendant Neasbitt as to the status of the issues at that assisted living facility, but she received no response.

43. Plaintiff visited that Assisted living facility on March 8, 2018 where she was informed that the facility did not have any issues or complaints about her but rather had concerns about a hospice nurse for Defendant Amedisys Holding, LLC talking to a patient at the facility who was being treated by a nurse practitioner who worked for a competing hospice provider.

44. After learning this, Plaintiff informed Defendant Neasbitt she had looked into the issue and the assisted living facility had no issue with her.

45. Defendant Neasbitt was angry in response to Plaintiff having visited the assisted living facility, even though Plaintiff was never prohibited from doing so.

46. However, Defendant Neasbitt did not initiate any disciplinary action against Plaintiff at that time.

47. Plaintiff continued to perform her job without issue and received no further questioning about her visit to the assisted living facility for the next several weeks.

48. Plaintiff was hauled into a meeting on March 26, 2018 with Defendant Neasbitt and a Corporate Manager and was terminated on the stated basis that she was insubordinate because she was told not to return to the assisted living facility at issue.

49. The reason for her termination is pretext because: (1) she was never told not to visit the Assisted living facility, (2) had she been given such a directive it would have been legally inappropriate, and (3) had this been the real reason for her termination she would not have been allowed to work for nearly three calendar weeks thereafter.

50. Defendant Neasbitt, after Plaintiff was terminated, sent out an office-wide email stating that Plaintiff had been separated from the company without describing the nature of the separation. This alone may have been appropriate; however, after sending the email Defendant Neasbitt, on the behalf of Defendant Amedisys Holding, LLC, informed an unprivileged employee of Defendant Amedisys Holding, LLC that she had terminated the Plaintiff because she had engaged in inappropriate behavior at the Assisted living facility at issue and later told the Physical Therapist who replaced Plaintiff that Plaintiff had been banned from Defendant Amedisys. Defendant Neasbitt had made previous false statements to the Director of the Assisted living facility in question that Plaintiff had been transferred.

51. The above representations by Defendant Neasbitt, and Defendant Amedisys Holding, LLC were false and made with reckless disregard for the truth.

52. Later, in November 2018, as Plaintiff was attempting to mitigate her losses, she was conditionally offered a position as a facility director in Horry County, South Carolina.

53. Defendant Amedisys Holding, LLC, did not run or own that facility but did provide home health care to a plurality of its patients.

54. That facility, through its 3rd party hiring agent, contacted Defendant Amedisys Holding, LLC in order to ascertain whether or not it would continue to service the facility if Plaintiff served as its facility Director.

55. According to the facility's hiring agent, "someone in corporate" at Defendant Amedisys Holding, LLC informed her that Defendant Amedisys Holding, LLC would not work with the facility if Plaintiff was serving as its facility Director. The Corporate agent for Defendant Amedisys Holding, LLC further informed the facility's hiring agent that Plaintiff was on some sort of no-rehire and no contractor status list.

56. Plaintiff was not formally offered the job as facility Director solely because of the actions of Defendant Amedisys Holding, LLC described above.

FIRST CAUSE OF ACTION
Against Amedisys Holding, LLC
 Wrongful Discharge

57. Plaintiff realleges the foregoing where consistent.

58. Plaintiff was terminated by the Defendant Amedisys Holding, LLC because: (1) she appropriately prioritized patient care above "transmission times," (2) she made complaints about overbooking that disadvantaged the level of care received by patients, and/or (3) she made complaints about an Occupational Therapist who was engaging in unsafe practices including recertifying patients beyond medical necessity, co-treating with a Physical Therapist and writing orders to hospitalists without his patients' physicians' approval.

59. Plaintiff's termination on the above grounds violated some or all of the foregoing clear mandates of public policy in South Carolina:

- 59.1. S.C. Code Ann. § 40-45-60 which authorizes the South Carolina Board of Physical Therapy to promulgate governing regulations and ethics for the practice of Physical Therapy.
- 59.2. S.C. Reg. 101-11 which provides that a Physical Therapist may not continue treatment after an initial 30 days has expired unless a physical therapist receives an oral or written referral by a licensed medical doctor or dentist.

- 59.3. S.C. Reg. 101-13 which promulgates the Code of Ethics for Physical Therapists, requiring as relevant:
 - 59.3.1. That Physical Therapists respect the rights and dignity of all individuals.
 - 59.3.2. That Physical Therapists seek remuneration for their services that is deserved and responsible.
 - 59.3.3. That Physical Therapists provide accurate information to the consumer about the profession and about those services they provide; and
 - 59.3.4. That Physical Therapists accept the responsibility to protect the public and the profession from unethical, incompetent, or illegal acts.
- 59.4. S.C. Code Ann. § 44-81-10 *et seq.* setting forth the Bill of Rights for Residents of Long-Term Care Facilities “to preserve the dignity and personal integrity of residents of long-term care facilities.”
- 59.5. S.C. Code Ann. § 40-47-30 requiring licensure to practice medicine as a physician.

60. Defendant Amedisys Holding, LLC terminated Plaintiff in violation of a clear mandate of public policy and is liable to the Plaintiff for all damages resulting therefrom.

61. Those damages include lost wages, diminished earning capacity, lost benefits, consequential financial damages, and other actual, general, and specific damages recoverable at law.

62. The discharge described herein was intentional and wanton, and Plaintiff is entitled to punitive damages for the same.

SECOND CAUSE OF ACTION
Against Amedisys Holding, LLC
 Defamation

63. Plaintiff realleges the foregoing where consistent.

64. Defendant Neasbitt acting with actual, implicit, or apparent authority on behalf of Defendant Amedisys Holding, LLC defamed the Plaintiff when she published the false, pretextual grounds for Plaintiff's termination to unprivileged third-party former coworkers of Plaintiff.

65. Defendant Neasbitt did so after having sent an office-wide email stating that Plaintiff had been separated from the company without describing the nature of her separation.

66. That email might have been subject to a qualified privilege; however, any privilege existing was abused when Defendant Neasbitt informed an unprivileged employee after Plaintiff's separation that she had been terminated because she engaged in inappropriate behavior at an assisted living facility

and when she later told the Physical Therapist who replaced Plaintiff that she had been banned from that assisted living facility.

67. Defendant Neasbitt also may have defamed Plaintiff, insinuating that she had abandoned her patients without notice, in representations to the Director of the above referenced assisted living facility when she stated that Plaintiff had been transferred to another facility.

68. Plaintiff had not been banned from the subject assisted living facility, engaged in inappropriate behavior therein, or been transferred.

69. Thus, Defendant Neasbitt made knowingly false statements to unprivileged third parties.

70. Those false publications were defamatory in that the lessened Plaintiff's standing in her profession, amounting to special harm, and undermined Plaintiff's professional fitness, amounting to per se defamation.

71. Defendant Neasbitt defamed Plaintiff with malice, ostensibly because she was angry at Plaintiff for complaining about inappropriate practices by Defendant Neasbitt and Defendant Amedisys Holding, LLC and because Plaintiff investigated and refuted Defendant Neasbitt's and Defendant Amedisys Holding, LLC's stated reason for removing her from the assisted living facility at issue.

72. Defendant Amedisys Holding, LLC is vicariously liable for Defendant Neasbitt's conduct under theories of respondeat superior and apparent authority, and Defendant Amedisys Holding, LLC ratified Defendant Neasbitt's conduct when it sanctioned Plaintiff's termination.

73. Defendant Amedisys Holding, LLC is therefore liable to the Plaintiff for damages resulting from her termination.

74. Those damages include reputational losses, shock, humiliation, embarrassment, lost earnings, and lost benefits, as well as pain and suffering incidental to the same.

75. The defamation described herein was intentional and wanton and Plaintiff is entitled to punitive damages for the same.

THIRD CAUSE OF ACTION
Against Defendant Neasbitt
Defamation

76. Plaintiff realleges the foregoing where consistent.

77. Defendant Neasbitt defamed the Plaintiff when she published the false, pretextual grounds for Plaintiff's termination to unprivileged third-party former coworkers of Plaintiff.

78. Defendant Neasbitt did so after having sent an office-wide email stating that Plaintiff had been separated from the company without describing the nature of her separation.

79. That email might have been subject to a qualified privilege; however, any privilege existing was abused when Defendant Neasbitt informed an unprivileged employee after Plaintiff's separation that she had been terminated because she engaged in inappropriate behavior at an assisted living facility and when she later told the Physical Therapist who replaced Plaintiff that she had been banned from that assisted living facility.

80. Defendant Neasbitt also may have defamed Plaintiff, insinuating that she had abandoned her patients without notice, in representations to the Director of the above referenced assisted living facility when she stated that Plaintiff had been transferred to another facility.

81. Plaintiff had not been banned from the subject assisted living facility, engaged in inappropriate behavior therein, or been transferred.

82. Thus, Defendant Neasbitt made knowingly false statements to unprivileged third parties.

83. Those false publications were defamatory in that they lessened Plaintiff's standing in her profession, amounting to special harm, and undermined Plaintiff's professional fitness, amounting to per se defamation.

84. Defendant Neasbitt defamed Plaintiff with malice, ostensibly because she was angry at Plaintiff for complaining about inappropriate practices by Defendant Neasbitt and Defendant Amedisys Holding, LLC and because Plaintiff investigated and refuted Defendant Neasbitt's and Defendant Amedisys Holding, LLC's stated reason for removing her from the assisted living facility at issue.

85. Defendant Neasbitt is liable to the Plaintiff for damages resulting from this public policy discharge which include lost wages, diminished earning capacity, lost benefits, loss of companionship, pain and suffering, shock, humiliation, embarrassment, and emotional distress.

86. The defamation described herein was intentional and wanton and Plaintiff is entitled to punitive damages for the same.

FOURTH CAUSE OF ACTION
Against Defendant Amedisys Holding, LLC
Tortious Interference with Prospective Contractual Relations

87. Plaintiff realleges the foregoing where consistent.

88. Those damages include lost wages, diminished earning capacity, lost benefits, consequential financial damages, and other actual, general, and specific damages recoverable at law.

89. Defendant Amedisys Holding, LLC was aware of Plaintiff's prospective employment as a facility Director for a third-party facility that it provided home health care to after she was terminated by Defendant Amedisys Holding, LLC.

90. Defendant Amedisys Holding, LLC intentionally interfered with those prospective contractual relations when it stated to that facility's hiring agent that Plaintiff was ineligible for rehire and that it would not continue to work with that facility if Plaintiff was named facility director.

91. The same constitutes actionable interference with prospective contractual relations in South Carolina which has caused the Plaintiff injury for which Defendant Amedisys Holding, LLC is liable.

92. The damages resulting from the tort described herein include: lost wages, diminished earning capacity, lost benefits, consequential financial damages, and other actual, general, and specific damages recoverable at law.

FURTHER ALLEGATIONS REGARDING JURISDICITON

93. Plaintiff realleges the foregoing where consistent.

94. Plaintiff requests a jury trial on these claims and all incidents regarding the same including whether Plaintiff had actual notice of any arbitration provision that Defendant Amedisys Holding and any fact issues regarding the arbitrability of this action in general.

95. Plaintiff was not presented any sort of Arbitration Agreement upon her hire.

96. Defendant Amedisys Holding, LLC has expressed a belief that this action is subject to an arbitration agreement it claims was entered between Amedisys, Inc. and Plaintiff.

97. Defendant Amedisys Holding, LLC was not a party to that agreement.

98. The entity asserting to be a party to that agreement, Amedisys, Inc. is not registered entity licensed to practice business in South Carolina and did not employ the Plaintiff.

99. Defendant Amedisys Holding, LLC has not presented Plaintiff with an agreement signed by her or any official with the authority to bind Amedisys Holding, LLC or Amedisys, Inc. for that matter.

100. Plaintiff did not sign any arbitration agreement.

101. Plaintiff was never informed by Defendant Amedisys Holding, LLC that it desired to enter an arbitration agreement even though Defendant Amedisys Holding, LLC had ample opportunities to express a desire to enter into to such an agreement at weekly meetings and prior to her hire.

102. Defendant Amedisys Holding, LLC is expected to attempt to enforce an e-mailed, inconspicuous, click-wrap style arbitration agreement with an auto-opt in and manual opt-out provision.

103. Plaintiff has no recollection of receiving an optout arbitration agreement from the Defendant Amedisys Holding, LLC via email or otherwise.

104. Plaintiff did not receive actual notice of any arbitration agreement from Defendant Amedisys Holding, LLC.

105. Defendant Neasbitt is not a party to any agreement to arbitrate disputes with the Plaintiff.

106. The arbitration agreement Defendant Amedisys Holding, LLC is expected to attempt to enforce is not supported by consideration, deprives the Plaintiff of substantial legal rights in adhesive fashion absent notice, and is otherwise unenforceable under South Carolina Law.

107. Plaintiff's actions for defamation and tortious interference with prospective contractual relations are not reasonably read to be within the terms of the subject arbitration agreement since they are not directly related to a period within which Plaintiff was an "employee" of Defendant Amedisys Holding, LLC as she is referred to in the subject agreement.

108. Triable issues of fact underly the enforceability of the subject arbitration agreement and should the Defendants attempt to enforce the agreement Plaintiff requests a jury trial with respect to the same.

PRAYER FOR RELIEF

109. Plaintiff realleges the foregoing where consistent.

110. Plaintiff requests a jury trial on all legal and triable claims and issues.

111. Plaintiff requests that the jury award, within its discretion, all damages she seeks on the above claims.

112. Plaintiff requests that the Court award her all equitable relief it deems just and necessary up to and including reinstatement or front pay.

113. Plaintiff requests punitive damages based on the Defendants intentional and willful conduct described above.

- 114. Plaintiff requests attorney fees and costs.
- 115. Plaintiff last requests pre-judgment interest.

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

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Attorneys for Plaintiff

December 7, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NO.: 2018-CP-2201001
	)	
Nicole Lampo,	)	
	)	
Plaintiff,	)	DEFENDANTS' MOTION TO
	)	DISMISS OR, IN THE
v.	)	ALTERNATIVE, TO STAY
	)	PROCEEDINGS AND COMPEL
Amedisys Holding, LLC, and Leisa Victoria	)	ARBITRATION
Neasbitt,	)	
Defendants.	)	
	)	
	)	

Defendants Amedisys Holding, LLC and Leisa Neasbitt respectfully move this Honorable Court at such place and time as the Court may appoint, for an Order dismissing Plaintiff Nicole Lampo's Complaint or, in the alternative, to stay the proceedings and compel arbitration. This motion is based upon S.C. R. Civ. P. 12, and the Federal Arbitration Act, 9 U.S.C. §§ 1, *et. seq.* The grounds for this motion are that Plaintiff agreed to and is bound by an arbitration agreement mandating that her claims in her Complaint be relegated to mandatory arbitration and adjudicated solely in an arbitral forum, as established in the attached Memorandum of Law.

WHEREFORE, Defendants' respectfully request that this Court compel arbitration under the terms of the Arbitration Agreement and dismiss this action or, alternatively, to stay this action pending arbitration.

Respectfully submitted,

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Leisa Neasbitt

Dated this 4th day of February, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NO.: 2018-CP-2201001
	)	
Nicole Lampo,	)	
	)	DEFENDANTS' MEMORANDUM OF
Plaintiff,	)	LAW IN SUPPORT OF THEIR
	)	MOTION TO DISMISS OR, IN THE
v.	)	ALTERNATIVE, TO STAY
	)	PROCEEDINGS AND COMPEL
Amedisys Holding, LLC, and Leisa Victoria	)	ARBITRATION
Neasbitt,	)	
	)	
Defendants.	)	

INTRODUCTION

Notwithstanding the fact that Plaintiff Nicole Lampo ("Plaintiff") entered into a written Dispute Resolution Agreement ("Arbitration Agreement")¹ with Defendant Amedisys Holding, LLC ("Amedisys") agreeing to arbitration all claims arising from her employment relationship, Plaintiff filed a Complaint in this Court on December 7, 2018 alleging that Amedisys violated South Carolina common law by "wrongfully discharging" her (Count I), tortiously interfering with her "prospective contractual relations" (Count IV), and that Amedisys and Leisa Neasbitt ("Neasbitt"), Plaintiff's former supervisor, defamed Plaintiff (Counts II and III). *See* Plaintiff's Complaint, *passim*. As established below, Plaintiff's claims against Amedisys and Neasbitt fall squarely under and within the Arbitration Agreement and there is no legal or factual justification for her attempt to circumvent the binding Arbitration Agreement or the Federal Arbitration Act's ("FAA") mandate that Plaintiff's claims be heard exclusively in an arbitral forum. Therefore, for the reasons established below, Amedisys and Neasbitt respectfully move this Court for an Order

¹ As demonstrated below, the Arbitration Agreement at issue in this case has been upheld by Courts throughout the Country and there is no reason for this Court not to uphold the Arbitration Agreement in this case.

dismissing this matter and compelling Plaintiff to arbitrate her claims pursuant to her Arbitration Agreement. In the alternative, Amedisys and Neasbitt respectfully move this Court for an Order staying this action pending arbitration.

RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

Amedisys provides home health and hospice services to patients throughout the United States. *See* Complaint, ¶¶ 12-14. Plaintiff began working for Amedisys as a Physical Therapist on or about July 8, 2013. *See id.* Plaintiff primarily worked out of Amedisys' Horry and Georgetown County, South Carolina care centers. *See id.* As part of Plaintiff's onboarding process, which occurred in and around July 2013, Amedisys provided Plaintiff with a unique username and password enabling her to logon to Amedisys' computer-based onboarding system, known as "SharePoint." *See* Affidavit of T. Terrell West ("West Aff."), attached hereto as Exhibit A, ¶ 4. During that time, Amedisys also assigned Plaintiff a unique email accessible only to her via her unique username and password, which Plaintiff had the ability to change at her leisure. *See* Exhibit A, West Aff., ¶¶ 4-5.

On August 6, 2013, Amedisys emailed all employees, including Plaintiff, concerning the Arbitration Agreement. The email subject line stated, "Important Policy Change – Must Read." *See* August 6, 2013 Email, attached hereto as Exhibit B. The message stated: "[t]his e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." *See id.* Upon clicking on the email to open it in their inbox, each employee, including Plaintiff, received a pop-up Acknowledgement Form. The Acknowledgment Form stated:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

By clicking “Acknowledge” below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today’s date, you will be bound by it, which will affect your legal rights.**

By clicking the “Acknowledge” button on this screen I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.”

See Acknowledgement Form, attached hereto as Exhibit C (emphasis in original); *See also* Exhibit A, West Aff. ¶¶ 4-5. Once an employee clicked on the “Acknowledge” button on the Acknowledgement Form, they were directed to a webpage that provided descriptions and links to all of the Amedisys’ Arbitration Program materials, which included a cover letter, the Arbitration Agreement, and a six-page fact sheet of FAQs. *See* Exhibit A, West Aff. ¶ 6. These three documents were the only documents located on the webpage. *See id.* Plaintiff clicked the “Acknowledge” button on August 6, 2013 at 1:55 p.m. *See* Affidavit of Larry Bracey (“Bracey Aff.”), attached hereto as Exhibit D, ¶¶ 2-4. Thereafter, Plaintiff had unfettered access to Amedisys’ Arbitration Program materials.

The Arbitration Agreement provides for mutual arbitration, and states “This Dispute Resolution Agreement (“the “Agreement”) is an agreement to resolve any and all legal disputes between you (“Employee”) and Amedisys before an arbitrator, rather than in court.” *See* “Arbitration Agreement,” attached hereto as Exhibit E; *See also* Exhibit A, West Aff. ¶ 3. The Arbitration Agreement states it “is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above.” *See* Exhibit E, Arbitration Agreement. The Arbitration Agreement also reiterates that “Arbitration is not a mandatory condition of Employee’s employment at the Company, and therefore an Employee may submit a

form stating that the Employee wishes to opt out and not be subject to this Agreement.” *See id.* To ensure it was easy for employees to opt out of the program if they wanted to, Amedisys included a simple “Dispute Resolution Agreement Opt-Out Form” as Attachment “A” to the Arbitration Agreement. *See id.* Thus, to “opt-out” of the Arbitration Agreement, all an employee needed to was sign, date, and return the Arbitration Agreement Opt-Out Form within 30 days of the employee’s receipt of the same. To make sure employees understood this, the cover letter provided to Plaintiff further explained:

What if I do not want to arbitrate? You have 30 days from the date of this memorandum to opt out of the Dispute Resolution Agreement. You may do so by printing the Opt-Out Form (Attachment A to the Agreement), printing and signing your name . . . and sending it by U.S. Mail to Amedisys, Inc., postmarked no later than 30 days from the date you acknowledged receipt of the Dispute Resolution Agreement.

See August 6, 2013 Cover Letter, attached hereto as Exhibit F; *See also* Exhibit A, West Aff. ¶ 6.

Amedisys’ Human Resources Department maintains a file containing the actual hard copy of all opt-out forms completed by any employee who chose to opt-out of the Arbitration Agreement. *See* Exhibit A, West Aff. ¶ 8. Plaintiff did not opt-out of the Arbitration Agreement. *See id.*, ¶¶ 8-9. Rather, she continued to work for Amedisys until March 2018. *See* Complaint, ¶ 48. She is, therefore, bound by the Arbitration Agreement, including the obligation to arbitrate the claims alleged in her Complaint in an arbitral forum.

Amedisys’ arbitration procedures are outlined in detail in the Arbitration Agreement. *See* Exhibit E, Arbitration Agreement. The Arbitration Agreement states it is governed by the Federal Arbitration Act and applies to “any dispute arising out of or related to Employee’s employment with Amedisys or termination of employment regardless of its date of accrual and survives after

the employment relationship terminates.” Exhibit E, Arbitration Agreement, p. 1.² Under the Arbitration Agreement, the employee and Amedisys may select an arbitrator by mutual agreement, and if they are unable to do so, the selection proceeds under American Arbitration Association (“AAA”) rules. *See id.*, p. 3. Written discovery, depositions and dispositive motions are allowed. *See id.*, p. 4. Furthermore, the Arbitration Agreement states that Amedisys will pay the arbitrator’s fees and any costs in accordance with AAA rules and, like it would be in litigation, the Plaintiff is responsible for her own attorney’s fees, witness fees, costs and expenses such as those incurred in discovery. *See id.*, p. 6.

In her Complaint, Plaintiff alleges that Amedisys “wrongfully” terminated her employment in violation of public policy after Plaintiff purportedly made compliance-related reports to Amedisys’ corporate office. *See* Complaint, ¶¶ 24, 27, 30-38, 57-62. Thereafter, Plaintiff alleges that Amedisys and Neasbitt “defamed” her by making false statements regarding Plaintiff that purportedly “lessened Plaintiff’s standing in her profession . . .” *See id.*, ¶¶ 50-51, 63-86. Plaintiff also alleges—in wholly conclusory fashion—that Amedisys tortuously interfered with her “prospective employment” when some unknown person from Amedisys made someone unknown statement(s) to some unknown prospective employer preventing Plaintiff from obtaining “prospective” employment. *See id.*, ¶¶ 52-56, 87-92. Plaintiff’s Complaint is clearly grounded in factual assertions that arise from and out of her former employment with Amedisys (and her relationship with her former supervisor, Neasbitt). Plaintiff cannot, in good faith, argue otherwise.

² As established below, because Plaintiff’s claims against Neasbitt derive from her employment with Amedisys, her inclusion of Neasbitt as an individual defendant in this case is inconsequential for purposes of ordering this matter be arbitrated.

Thus, as established below, Plaintiff's claims are preempted by the FAA and relegated to mandatory arbitration, based upon Plaintiff's voluntary acceptance of the Arbitration Agreement.³

STANDARD

Due to the liberal policy in favor of arbitration, the party challenging the validity of an arbitration agreement bears the burden of showing that the arbitration agreement is unenforceable. *See Green Tree Fin. Corp., v. Randolph*, 531 U.S. 79, 92 (2000); *Rock v. Solar Rating & Cert. Corp.*, 2018 WL 3750617, 6 (D.S.C. 2018). "Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002). Thus, where a valid arbitration agreement exists and covers the claims at issue, the Court has "no choice but to grant a motion to compel arbitration." *Id.* at 500.

LEGAL ARGUMENT

To compel arbitration, the Court must conclude that: (1) a dispute exists between the parties; (2) there is a valid, written agreement to arbitrate that encompasses the dispute; (3) the transaction relates to interstate commerce; and (4) Plaintiff refuses to arbitrate. *See American Gen. Life & Accident Ins., Co.*, 429 F.3d 83, 87, (4th Cir. 2005). The first and fourth elements are clearly met as there is certainly a dispute between the parties and Plaintiff has refused to submit her claims to arbitration pursuant to her agreement and, instead, has filed the instant lawsuit. As established below, elements two and three are also met as Amedisys is involved in and affects "interstate commerce" and there is a valid, written agreement to arbitrate that encompasses the dispute.

³ As demonstrated below, where appropriate, Plaintiff's attempt to plead around the Arbitration Agreement is a non-starter. Indeed, Plaintiff's Complaint alleges that "Amedisys Holding, LLC" was not a party to the Arbitration Agreement. *See* Complaint, ¶ 97. Yet, the Arbitration Agreement specifically identifies—by name—"Amedisys Holding, LLC" as a party to the Arbitration Agreement. As explained below, Plaintiff's other preemptive contentions fare no better.

A. The Agreement is Governed by the Federal Arbitration Act

As the United States Supreme Court reaffirmed in the landmark decision *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740, 1745 (2011), the FAA reflects “a liberal federal policy favoring arbitration” and requires courts to compel the arbitration of any claims covered by an arbitration agreement in accordance with its terms. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd* 470 U.S. 213, 218 (1985); *see also Scherk v. Alberto-Culver Co.* 417 U.S. 506, 511 (1974). In enacting the FAA, Congress intended to overcome the past reluctance of courts to enforce arbitration agreements by placing such agreements on an equal footing with other contracts and establishing a federal policy in favor of arbitration:

[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

Perry v. Thomas, 482 U.S. 483, 483 (1987) (citation omitted).

A court must interpret arbitration provisions liberally, resolving doubts in favor of arbitration: “The Federal Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.*, quoting *Moses H. Cone Mem’l Hosp v. Mercury Constr. Corp.* 460 U.S. 1, 24 (1983); *see also AT&T Tech., Inc. v. Coication Workers of Am.* 475 U.S. 643, 650 (1986), quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (“[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the

arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage”). South Carolina shares the FAA’s mandate and has a strong public policy favoring arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001) (“[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered . . .”).

With this backdrop of a healthy regard for enforcement of arbitration agreements, the FAA states that any written agreement to arbitrate “evidencing a transaction involving commerce” is “valid, irrevocable, and enforceable” under the FAA. 9 U.S.C. § 2. “Involving commerce” is to be construed as broadly as possible, meaning that any arbitration agreement that affects commerce in any way is governed by the FAA. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–281 (1995) (phrase “involving commerce” is to be read as broadly as possible in favor of coverage if agreement affects commerce in any way). In other words, the FAA applies to all arbitration agreements where a party to that agreement is involved in interstate commerce. *See id.* at 282.

In this case, Amedisys and its affiliated companies employ in excess of 16,000 people in thirty-four (34) states. *See* Exhibit A, West Aff. ¶ 1. Amedisys orders supplies and receives payments for services across state lines. *See id.* There simply is no dispute that Amedisys is a nationwide company that operates facilities and conducts transactions in interstate commerce. *See e.g., Lesneski v. Ross Stores, Inc.*, 2017 WL 2919014, *2 (W.D.N.C. 2017) (compelling arbitration and finding that arbitration agreement between employee and employer doing business in more than 30 states evidenced “business involve[ing] interstate commerce.”); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (holding that the FAA was applicable to arbitration agreement between a sales associate and her multistate employer.). Thus, the only question is whether the

Agreement is valid under state law and whether it encompasses Plaintiff's claims. Amedisys respectfully submits that the answer to both inquiries is unequivocally, yes.

B. The Arbitration Agreement is A Valid and Enforceable Contract.

Having established that the FAA governs the Arbitration Agreement, the Court must now apply contract law to determine whether the agreement is enforceable. *Futrelle v. Duke Univ.*, 127 N.C. App. 244, 247-48 (1997); *Stroman v. Barefoot*, 2018 WL 3120678, *2 (D.S.C. 2018). For a valid contract to exist under South Carolina law, such as the case here, the three elements of offer, acceptance, and consideration must be present, and none of the recognized defenses to contract formation, such as fraud, duress, or unconscionability, should apply. *See, e.g., Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 166 (S.C. 2003); *Young v. AMISUB of South Carolina, Inc.*, 2018 WL 5668619, *3 (D.S.C. 2018).

As an initial matter, Amedisys notes that at least one other Court has held that the exact same Arbitration Agreement at issue in this case to be a valid and enforceable contract. *See Knight v. Amedisys Holding, LLC*, 2016 WL 5661227 (W.D. Ky. 2016) (upholding exact same arbitration agreement at issue in this case and ordering the plaintiff arbitrate her claims against Amedisys and her non-signatory former supervisor).⁴ There is no reason to divert from the well-reasoned holding in *Knight* in this case. First, on August 6, 2013—just like *Knight*—Amedisys tendered to Plaintiff an offer to participate in Amedisys' alternative dispute resolution program. *See* Exhibits B, August 6, 2013 Email; Exhibit F, August 6, 2013 Cover Letter. In its Cover Letter (Exhibit F) and Acknowledgment (Exhibit C) clicked on by Plaintiff, Amedisys made clear that Plaintiff is accepting the contract unless she opted-out within thirty (30) days. By doing so, Amedisys made clear that it was offering Plaintiff an opportunity to mutually agree to arbitrate any dispute arising

⁴ And, one other Court has upheld the agreement even when Amedisys did not permit the Plaintiff to opt out. *See Langlois v. Amedisys*, 2016 WL 4059670 (M.D. La. 2016).

from Plaintiff's employment relationship. *See* Exhibit E, Arbitration Agreement; Exhibit A, West Aff. ¶ 3. Thus, there is no question that Amedisys made an "offer" to Plaintiff.

Second, like *Knight*, there is also no question that Plaintiff accepted Amedisys' offer to mutually arbitrate any claims "arising out of or related to" Plaintiff's employment with Amedisys. *See* Exhibit E, Arbitration Agreement, p. 1. It is well-settled in the Fourth Circuit that it is unnecessary that an arbitration agreement be signed by a party against whom arbitration is sought. *See Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79 (4th Cir. 2016) (an acceptance to a contract may be manifested by actions as well as by words); *Hightower v. GMRI, Inc.*, 272 F.3d 239, 232-243 (4th Cir. 2001) citing *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 516 S.E. 2d 879 (1999) (holding that an employee who received a copy of the company's dispute resolution procedure in the mail and continued to work for less than three months after its effective date was bound by the arbitration provision despite never signing anything). This is consistent with the text of § 2 of the FAA, which requires only that arbitration agreements be in writing.

In this case, just as the Plaintiff in *Knight*, Plaintiff's actions irrefutably demonstrate her acceptance to the Arbitration Agreement. In fact, after receiving Amedisys' August 6, 2013 email, at 1:55 p.m. that same day, Plaintiff—using her unique username and password of which only she had access—clicked that she "Acknowledged" Amedisys' alternative dispute resolution procedure, including the Arbitration Agreement. *See* Exhibit C, Acknowledgment. Such method of acceptance has already been considered and approved as a valid form of acceptance under governing Fourth Circuit and South Carolina law. *See, e.g., Rock*, 2018 WL 3750617, at *6 (by clicking the "I agree" box as part of a "clickwrap" agreement, the employee manifested her assent to the arbitration agreement).⁵ Thereafter, despite having the unfettered ability to do so, Plaintiff

⁵ As discussed in more detail below, the *Rock* opinion has already addressed—and rejected—most of the allegations contained in Plaintiff's Complaint. That same opinion makes clear that a plaintiff

never opted-out of the Arbitration Agreement. *See* Exhibit A, West Aff. ¶¶ 8-9. Instead, she continued to work for Amedisys for almost five years until Amedisys terminated her employment. *See* Complaint, ¶ 48. Plaintiff's decision to not opt-out of the Arbitration Agreement and continue working for Amedisys is, as the Arbitration Agreement states, constituted: "[Plaintiff's and [the] Company's 'mutual acceptance' of the terms of the Agreement." *See* Exhibit E, Arbitration Agreement, ¶ 9. Put simply, Plaintiff's actions evidence her clear and unequivocal assent to the Arbitration Agreement.

Finally, the agreement is supported by adequate consideration. Under South Carolina law, "a mutual promise to arbitrate constitute[s] sufficient consideration to enforce an arbitration agreement. . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 40, 524 S.E.2d 839, 845 (Ct. App. 1999); *Adkins*, 303 F.3d at 501 ("[b]ecause no consideration is required above and beyond the agreement to be bound by the arbitration process for any claims brought by the employee, ... [Defendant's] promise to arbitrate its own claims is *a fortiori* adequate consideration for this agreement."); *See also Hamlin v. Dollar Tree Stores, Inc.*, 2017 WL 6034325, at *2 (D.S.C. 2017). In this case, the Arbitration Agreement makes clear that both Plaintiff and Amedisys agree to arbitrate any claims against the other "arising out of or relat[ing] to [Plaintiff's] employment . . ." *See* Exhibit E, Arbitration Agreement, p. 1. Thus, there is no question that the Arbitration Agreement is supported by adequate consideration.

C. Plaintiff Lacks Any Cognizable Defense to the Enforcement of the Arbitration Agreement.

cannot escape arbitration by stating, as Plaintiff has done here, that she does not "recall" agreeing to the arbitration agreement.

Plaintiff's Complaint prospectively raises several deficient defenses to the Arbitration Agreement. *See, e.g.*, Complaint, ¶¶ 93-108. Each of Plaintiff's prospective defenses have been considered—and, routinely, rejected—by Court's in the Fourth Circuit. Each are addressed below.

First, Plaintiff alleges that because neither “Amedisys Holding, LLC” or Neasbitt are parties to the agreement, they are precluded from compelling arbitration. *See* Complaint, ¶¶ 97-99, 105. First, in the very first paragraph, the Arbitration Agreement makes clear that it includes “Amedisys Holding, LLC.” *See* Exhibit E, Arbitration Agreement, p. 1. So, Plaintiff's first contention is simply false. Second, just because Neasbitt is not a “party” to the Arbitration Agreement does not render her unable to compel arbitration or Plaintiff to escape her obligations under the Arbitration Agreement. In fact, in the Fourth Circuit, a non-signatory can compel arbitration if the claims against her are “intertwined” with an arbitration agreement. *See Carter v. MasTec Services Co., Inc.*, 2010 WL 500421, *4 (D.S.C. 2010); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005); *See also Arnold v. Arnold Corp.*, 920 F. 2d 1269, 1281 (6th Cir. 1990) (if a plaintiff “can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants in his complaint . . . the effect of the rule requiring arbitration would, in effect, be nullified.”). Under the “intertwined test,” Plaintiff is estopped from avoiding arbitration against a non-party if the “issues [Neasbitt] is seeking to resolve in arbitration are intertwined with the agreement” to which Plaintiff is bound. *See Wike v. Holiday Kamper Company of Columbia, LLC*, 2014 WL 1234311, *2-3 (D.S.C. 2014) (granting motion to compel arbitration with an alleged non-party to the arbitration agreement at issue finding that the plaintiff's claims against the alleged non-party were “interdependent” of the claims with a party to the arbitration agreement).

In this case, by virtue of Neasbitt's relationship with Amedisys and Plaintiff, there is little dispute that she has standing to compel arbitration on those claims brought individually against her. In fact, every allegation lodged against Neasbitt derives from her employment relationship with Amedisys and her role as Plaintiff's former supervisor. *See, e.g.*, Complaint, ¶¶ 76-86. It is clear that Plaintiff's claims against Neasbitt in this case are interdependent with her claims against Amedisys. Moreover, the clear intent of the language in the Arbitration Agreement is to provide a single arbitral forum to resolve all disputes. *See* Exhibit E, Arbitration Agreement, pp. 1-2. And, because "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, it is clear that Plaintiff's claims brought individually against Neasbitt should be relegated to an arbitral forum. *Moses H. Cone Hosp.*, 460 U.S. at 24-25; *See Gadberry v. Rental Services Corp.*, 2011 WL 766991 (D.S.C. 2011) (granting non-signatory's motion to compel arbitration and forcing former employee to arbitrate based upon the "intertwined claims doctrine"). Thus, Plaintiff's prospective contentions in this regard also run afoul of well-settled law.

Second, Plaintiff maintains that the Arbitration Agreement is somehow unenforceable because it constituted a "click-wrap" contract of adhesion.⁶ *See* Complaint, ¶¶ 102, 105. First, the Arbitration Agreement was not a contract of "adhesion" presented to Plaintiff on a take-it-or-leave-it basis. It was the opposite. Rather, the Arbitration Agreement had an "opt-out" provision permitting Plaintiff with up to 30 days to consider the Arbitration Agreement and the option to opt out of it. *See* Exhibit C, Acknowledgment Form; Exhibit E, Arbitration Agreement. Moreover, Amedisys made clear that there would be no retaliation or reprisal of any kind if Plaintiff opted out of the Arbitration Agreement. *See* Exhibit E, Arbitration Agreement, ¶¶ 9-10. Thus, by its

⁶ A contract of adhesion is a form contract presented on a "take-it-or-leave-it" basis. *See Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001).

very terms, the Arbitration Agreement is not a contract of adhesion.⁷ Second, Plaintiff's characterization of the Arbitration Agreement as a "click-wrap" agreement is legally inconsequential. A "click-wrap" agreement by which an employee is required to "click-through" to affirmatively click an "I Acknowledge" box, is—like any other contract—a "valid, enforceable contract." *See Rock*, 2018 WL 3750617, at *5 (collecting cases and holding that clicking "I agree" box evidenced express agreement to contract). Thus, Plaintiff's "click-wrap" argument is a non-starter. This is especially true where, as in this case, Plaintiff had 30 days to "opt-out" of the Agreement. She chose not to do so and pursuant to her Arbitration Agreement, made clear that her "continuation of . . . her employment with [the] Company [constituted Plaintiff's] and [Amedisys'] mutual acceptance of the terms of the [Arbitration] Agreement." *See* Exhibit E, Arbitration Agreement, ¶ 9.

Finally, Plaintiff alleges that the Arbitration Agreement is unenforceable because her claims for "tortious interference" and "defamation" accrued after Plaintiff's employment with Amedisys ended.⁸ *See* Complaint, ¶ 107. Again, Plaintiff's prospective argument ignores the plain language of the Arbitration Agreement, which makes clear that it encompasses those claims "arising out of or related to [Plaintiff's] employment with Amedisys . . . regardless of its date of accrual and survives after the employment relationship terminates." *See* Exhibit E, Arbitration Agreement, ¶ 1. Thus, Plaintiff's temporally-based argument is contradicted—indeed, negated—by the plain language of her Arbitration Agreement. *See Id.* And, for the reasons established in

⁷ Even if the Arbitration Agreement were a contract of "adhesion," that does not render the Arbitration Agreement unenforceable. *See, e.g., Towles*, 524 S.E.2d at 845-846 (upholding adhesion arbitration agreement that conditioned employee's continued employment on acceptance of the arbitration policy.)

⁸ As established in the Section below, any "doubt" in whether the Arbitration Agreement covers the "dispute at issue" in this case should be resolved in favor of arbitration. *See, e.g., United Steelworkers*, 363 US at 582-583.

the Section immediately below, even those claims accruing after Plaintiff's employment with Amedisys ended must be arbitrated.

Put simply, Plaintiff has not (and cannot) met her burden establishing that the Arbitration Agreement is unenforceable. *Joyner v. GE Healthcare*, 2009 WL 3063040, at *3 (D.S.C. 2009). Thus, the only remaining question is whether the Arbitration Agreement covers the claims in Plaintiff's lawsuit, which as established below, the answer is indisputably yes.

D. The Arbitration Agreement Covers the Dispute At Issue.

The arbitration provision in Plaintiff's Arbitration Agreement reads: "[t]his Agreement applies to any dispute arising out of or related to [Plaintiff's] employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates." See Exhibit E, Arbitration Agreement, ¶ 1. The Arbitration Agreement then goes on to state that it encompasses, without limitation, all disputes relating to Plaintiff's "termination," and "all other state statutory and common law claims." See *id.*

The Fourth Circuit has held that the language "arising out of or related to" constitutes a "broad arbitration clause[] capable of an expansive reach." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). The Fourth Circuit has further stated that a "broad arbitration clause 'd[oes] not limit arbitration to the literal interpretation or performance of the contract, but embrace[s] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute.'" *Id.* (quoting *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)) (emphasis in original); *Webb v. Oaktree Med. Ctr., P.C.*, 2018 WL 3153614, at *3–4 (D.S.C. 2018).

In this case, Plaintiff's allegations and causes of action against Amedisys and Neasbitt clearly show that they "arise out of" or are "related to" Plaintiff's former employment with

Amedisys. Any conclusion to the contrary is simply disingenuous. In fact, each cause of action contained in Plaintiff's Complaint arises directly out of decisions made by Amedisys and Neasbitt (as a supervisory employee of Amedisys) regarding Plaintiff's work-relationship (and cessation thereof) with Amedisys. *See* Complaint, *passim*. Under no circumstance can Plaintiff meet her burden establishing otherwise.

CONCLUSION

When parties agree to arbitrate their claims, they must honor that commitment. Accordingly, this Court should require Plaintiff to honor her commitment and order this case to be heard in its entirety in an arbitral forum. And, because all four claims contained in Plaintiff's Complaint should be arbitrated, the appropriate remedy is to dismiss this case, without prejudice, to permit the parties to do so. *See, e.g., Rock*, 2018 WL 3750617 at *8 (collecting cases).

WHEREFORE, Defendants' respectfully request that this Court compel arbitration under the terms of the Arbitration Agreement and dismiss this action or, alternatively, to stay this action pending arbitration.

Respectfully submitted,

FISHER & PHILLIPS LLP

By: s/ J. Hagood Tighe
 J. Hagood Tighe (SC# 9513)
 htighe@laborlawyers.com
Fisher & Phillips LLP
 Post Office Box 11612
 Columbia, South Carolina 29211
 Telephone: (803) 255-0000
 Facsimile: (803) 255-0202
 Attorneys for Defendants
 Amedisys Holding, LLC and
 Leisa Neasbitt

Dated this 4th day of February, 2019

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NO.: 2018-CP-2201001
	)	
Nicole Lampo,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Amedisys Holding, LLC, and Leisa Neasbitt,	)	
	)	
Defendants.	)	
	)	
	)	

**AFFIDAVIT OF TERRELL WEST IN SUPPORT
OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND
DISMISS, ALTERNATIVELY TO STAY ACTION PENDING ARBITRATION**

I, T. Terrell West, being duly sworn, do hereby states as follows:

1. I am currently employed by Amedisys Holding, LLC ("Amedisys" or "the Company") as its Director of Talent Operations and Compliance. Amedisys is a nationwide home health and hospice company that employs in excess of 16,000 individuals and operates facilities and conducts transactions in at least 34 states. Amedisys orders supplies and receives payments for services across state lines. I have been employed by Amedisys for more than 10 years. I offer this Affidavit in support of Defendants' Motion to Compel Arbitration and Dismiss or Alternately to Stay Action Pending Arbitration (hereinafter "Motion"). I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, I could and would testify competently to each fact.

2. As part of my responsibilities as Director of Talent Operations and Compliance, I am familiar with Amedisys' policies and practices. I am familiar with the employee personnel and relations processes, and I am frequently involved in personnel issues, including hiring, new hire

forms, discipline, termination, policies and procedures and/or other paperwork retention issues. In my position, I have access to and authority over the personnel records and other Human Resources records that are kept in the normal course of business at Amedisys regarding Amedisys' current and former employees, including Nicole Lampo ("Ms. Lampo"). In my role, I am also familiar with Amedisys' business practice of asking employees to electronically sign acknowledgments of receipt of certain documents through Amedisys' Sharepoint system.

3. In August 2013, Amedisys rolled out a new, nationwide dispute resolution program, called the "Dispute Resolution Agreement" ("Arbitration Agreement"), to its employees. At that time, I was involved in the implementation and distribution of Amedisys' arbitration policy. Attached as Exhibit E to Defendants' Memorandum of Law is a true and correct copy of the Arbitration Agreement. I have personal knowledge of the manner in which this distribution occurred, including how the Amedisys email system was used in this process. As a threshold measure, in order to receive and view Amedisys' emails, employees must log in to the Amedisys email system by using their unique username and password. Employees must enter their unique username and password in the appropriate fields in order to access their email account. No other Amedisys employees may access the Amedisys' email system using another employee's login unless that employee has shared their login and password. Notably, under Amedisys' policy, unauthorized disclosure of computer passwords is a form of misconduct that can result in the termination of employment without prior disciplinary warning.

4. At the time of Ms. Lampo's hire in July 2013, Amedisys provided Ms. Lampo with a unique username and password enabling her to log into Amedisys' computer-based onboarding system, known as "Sharepoint," as well as her assigned email address. Once Ms. Lampo logged on, she had the ability and authority to change her password at her leisure.

4. On August 6, 2013, Amedisys' Human Resources distributed the Arbitration Agreement to all employees via email. The email subject line stated, "Important Policy Change – Must Read." The message contained a link to the Arbitration Agreement materials and stated: "[t]his email contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please [click here](#) to receive them." Attached as Exhibit B to Defendants' Memorandum is a true and correct copy of the email message that Human Resources sent to employees on August 6, 2013 in the ordinary course of business.

5. Once the employee clicked on the link embedded in the August 6, 2013 email, the employee received an acknowledgment form "pop-up." An example of the acknowledgement form pop-up viewed by an employee once they clicked on the hyperlink from their email is attached as Exhibit C to Defendants' Memorandum. Employees were required to acknowledge receipt of the materials by clicking on an "Acknowledge" button, and Amedisys' system, in the ordinary course of business, created a record documenting the appropriate date and time of the employee's acknowledgement based on the employee's unique usernames that logged in to the system. This allows Amedisys to track each employee who received the materials so that the Company can be sure that they received the Arbitration Agreement and related materials.

6. Once the employee clicked the "Acknowledgment" button, they were directed to a secure webpage that provided descriptions and links to all of the Amedisys' Arbitration Program materials, which included a cover letter, the Arbitration Agreement, and a six-page fact sheet of FAQs. A true and correct copy of the cover letter and FAQs are attached as Exhibit F to Defendants' Memorandum. These three documents were the only documents located on the webpage.

7. Also as part of the August 2013 distribution of the Arbitration Agreement, employees were given the option to "opt out" of the Arbitration Agreement by printing, signing and forwarding an Opt-Out Form by U.S. Mail to Amedisys, postmarked no later than 30 days from the date he/she acknowledged receipt of the Arbitration Agreement. *See* Exhibit E to Defendants' Memorandum.

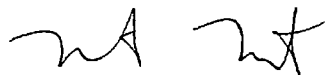
8. Amedisys' Human Resources Department maintains a file containing the actual hard copy opt-out forms submitted by all employees who chose to opt-out of the Arbitration Agreement. I have searched this file for an opt-out form from Ms. Lampo. There is no opt-out form on file for Ms. Lampo.

9. In reviewing Ms. Lampo's personnel file, which has been maintained consistent with Amedisys' regular course of business, I have confirmed that she was an employee of Amedisys from at least July 8, 2013 through approximately March 26, 2018. Based on a review of the exhibits and processes described above, Ms. Lampo received and acknowledged the Arbitration Agreement, did not opt out, and continued to work for Amedisys for more than four years thereafter.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

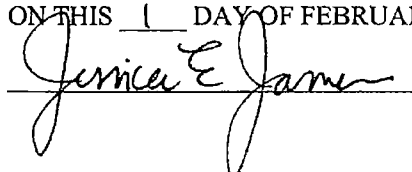
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THIS ENDS MY AFFIDAVIT.



T. TERRELL WEST

SUBSRIED AND SWORN TO ME
ON THIS 1 DAY OF FEBRUARY 2019



Jessica E. James

Jessica E. James
Notary Public No. 67576
State of Louisiana
Parish of East Baton Rouge
My Commission is for Life

EXHIBIT B

From: Martha.Williams@amedisys.com
Sent: Tuesday, August 6, 2013 12:30:58 PM
To: Undisclosed recipients:
Subject: Important Policy Change - Must Read
Importance: Normal

This e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them.

EXHIBIT C

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGMENT FORM

By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NO.: 2018-CP-2201001
	)	
Nicole Lampo,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Amedisys Holding, LLC, and Leisa Neasbitt,	)	
	)	
Defendants.	)	
	)	

**AFFIDAVIT OF LARRY BRACEY IN SUPPORT
OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND
DISMISS, ALTERNATIVELY TO STAY ACTION PENDING ARBITRATION**

I, Larry Bracey, being duly sworn, do hereby states as follows:

1. I am currently the SharePoint Analyst for Amedisys, Holding, LLC. ("Amedisys" or "the Company"). I have been employed by Amedisys for approximately two (2) years. I offer this Affidavit in support of Defendant's Motion to Compel Arbitration and Dismiss or Alternately to Stay Action Pending Arbitration. I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, I could and would testify competently to each fact.

2. In the scope of my employment with Amedisys, I am familiar with the electronic systems used by Amedisys to share Company policies with its employees and Amedisys' business practice of asking employees to electronically sign acknowledgements of receipts of certain documents through Amedisys' Sharepoint system, including how records of those acknowledgments are created and maintained in Amedisys' internal computer systems. In addition, I am familiar with Amedisys' dispute resolution and arbitration program that was rolled out to Amedisys' employees via the SharePoint system in August 2013.

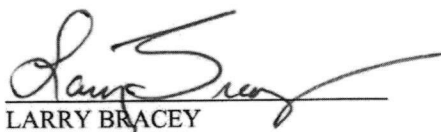
3. SharePoint is a tool that was used to provide access to and monitor receipt and acknowledgement of the Amedisys Dispute Resolution Agreement ("Arbitration Agreement"). The SharePoint system made records of the date and time employees acknowledged receiving the Arbitration Agreement that was distributed in August 2013. The system has been in place and used in the regularly conducted course of business since before August 2013.

4. As the SharePoint Analyst, I have access to SharePoint to run reports detailing whether an employee acknowledged the Arbitration Agreement, among other things. On July 12, 2018 and January 29, 2019, I ran a report from SharePoint detailing Ms. Nicole Lampo's access and acknowledgment of the Arbitration Agreement. Attached as Exhibit 1 to this Affidavit is a report that identifies Ms. Lampo by her Amedisys username (nicole.lampo@amedisys.com) and the fact that she acknowledged the Arbitration Agreement on August 6, 2013 at 1:55 p.m., using her unique username electronic signature and verification. Exhibit 1 is a document kept in the SharePoint system in the course of regularly conducted business, and it was in the regular course of business of Amedisys to employ SharePoint to make the record of Ms. Lampo's acknowledgment at the time she clicked the "Acknowledge" button.

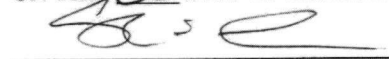
I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

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THIS ENDS MY AFFIDAVIT.


LARRY BRACEY

SUBSRIBED AND SWORN TO ME
ON THIS 20 DAY OF FEBRUARY 2019



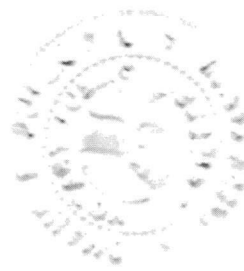
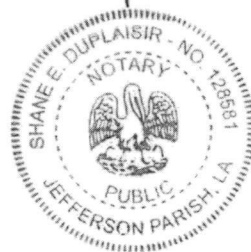


EXHIBIT 1

Amedisys Arbitration Program > EA1 > NameSearch

Search this site...

Libraries	Type	Name	Email Address	User Name	Acknowledge	Date	Verbiage 1	Created	Created By	Email Alert - EA1	Name
EA1		nicole.lampo	nicole.lampo@amedisys.com	nicole.lampo	Yes	8/6/2013	ACKNOWLEDGMENT FORM	8/6/2013 1:53 PM	Nicole Lampo		nicole.lampo
EA2											
EA3											
EA											

Recycle Bin

All Site Content

DISPUTE RESOLUTION AGREEMENT

You are receiving a copy of the Company's Dispute Resolution Agreement, together with a letter from the Chief Human Resources Officer concerning it. Please read it carefully. Unless you opt out of the Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.

By clicking the "Acknowledge" button below on this screen, I acknowledge receipt and understanding of the above.

Edit

Copy

Cut

Paste

Clipboard

Amedisys

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGMENT FORM

By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

X nicole.lampo

Electronic Signature

Date: 8/6/2013

Acknowledge

EXHIBIT E

AMEDISYS, INC. DISPUTE RESOLUTION AGREEMENT

Please Read Carefully

This Dispute Resolution Agreement (the "Agreement") is an agreement to resolve any and all legal disputes between you ("Employee") and Amedisys before an arbitrator, rather than in court. Any reference to "Amedisys" or "Company" in this Agreement includes reference to Amedisys, Inc., its insurance carriers, subsidiaries, affiliates, parent companies, and any related or parent organizations or entities of which it is a part, whether directly or indirectly, including without limitation Amedisys Holding, L.L.C., and each of their respective affiliates, successors, assigns, and former or current officers, directors, shareholders, employees, agents, and attorneys, and any other persons acting by, through, under or in concert with any of the persons or entities listed above, and their successors. Under the Agreement, the parties have the same substantive rights, such as rights to proper payment of wages, or to assert claims of discrimination/harassment under state or federal law, as they would have had the case been filed and litigated in court. However, these rights will be resolved by an arbitrator, under the procedures described below. The Agreement below provides for resolution of disputes by either Employee or Amedisys against the other individually, and not as part of a class (*see* Section 5, below).

This Agreement contains an "opt-out" provision (*see* Section 9, below). Unless Employee opts out of the Agreement, the Agreement will govern the terms and conditions of your employment, and will require that any claim Employee may have, now or in the future, be resolved in arbitration and not in court. The choice is up to the Employee whether he or she wishes to opt out or accept the Company's offer that Employee and the Company will be bound by this Agreement. The Company will not tolerate retaliation against any employee who elects to opt out of this Agreement. The Company will not notify supervisors concerning which of their employees have exercised their opt-out rights, and opt-out information will not be kept in any employee's personnel files.

1. How This Arbitration Agreement Applies.

This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and evidences a transaction involving commerce. This Agreement applies to any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates. Nothing contained in this Agreement shall be construed to prevent or excuse Employee or the Company from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures.

Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration, and therefore **this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.** Such disputes include, without limitation, disputes arising out of or relating to interpretation or application of this Agreement, but not as to the enforceability, revocability or validity of this Agreement or any portion of this Agreement. Except as it otherwise provides, this Agreement also applies, without limitation, to disputes arising out of or related to the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, discrimination or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act of 1974 (excluding any claims involving benefits funded by insurance (hereafter referred to as "Employee Benefit Claims Funded by Insurance")), Genetic Information Non-Discrimination Act, Worker Adjustment and Retraining Notification Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims.

2. Limitations On How This Agreement Applies.

This Agreement does not apply to Employee Benefit Claims Funded by Insurance or claims for workers compensation, state disability insurance and unemployment insurance benefits.

Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlr.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp). Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency or to do anything else that is required to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

Disputes that may not be subject to predispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) are excluded from the coverage of this Agreement. Likewise, this Agreement shall not be construed to require the arbitration of any *qui tam* claims brought pursuant to the False Claims Act, 31 U.S.C. § 3729(a)(1)(A) – (G), or any whistleblower claims made to the Centers for

Medicare & Medicaid Services ("CMS") pursuant to 42 C.F.R. § 420.405, or any claims brought pursuant to the or any claims against a contractor that may not be the subject of a mandatory arbitration agreement as provided by section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims.

3. Selecting the Arbitrator.

The parties shall select the neutral arbitrator by mutual agreement. However, if the parties are not able to mutually agree to an arbitrator, the arbitration will be held under the auspices of the American Arbitration Association ("AAA") and, except as provided in this Agreement, shall be in accordance with the Employment Arbitration Rules of the AAA ("AAA Rules") (the AAA Rules are available through the Company's Human Resources Department, by searching for "AAA Employment Arbitration Rules" using a service such as www.google.com or via the internet at www.adr.org/employment). Unless the parties jointly agree otherwise, the Arbitrator shall be either an attorney who is experienced in employment law and licensed to practice law in the state in which the arbitration is convened, or a retired judge from any jurisdiction (the "Arbitrator"). Unless the parties jointly agree otherwise, the arbitration shall take place at a location within 45 miles of where Employee was last employed by the Company.

In the event the parties mutually choose a sponsoring organization, or AAA is designated, the Arbitrator shall be selected as follows: The organization selected shall give each party a list of eleven (11) arbitrators drawn from its panel of arbitrators. Each party shall have ten (10) calendar days from the postmark date on the list to strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the Arbitrator. If more than one common name remains on the lists of all parties, the parties shall strike names alternately from the list of common names until only one remains, with the party to strike first to be determined by a coin toss. If no common name remains on the lists of all parties, the selected organization shall furnish an additional list of eleven (11) arbitrators from which the parties shall strike alternately, with the party striking first to be determined by a coin toss, until only one name remains. That person shall be designated as the Arbitrator.

4. Starting The Arbitration.

All claims in arbitration are subject to the same statutes of limitation that would apply in court. The party bringing the claim must demand arbitration in writing and deliver the written demand by national courier delivery service (with

evidence of delivery provided) or certified U.S. mail, return receipt requested, to the other party within the applicable statute of limitations period. The demand for arbitration shall include identification of the parties, a statement of the legal and factual basis of the claim(s), and a specification of the remedy sought. Any demand for arbitration made to the Company shall be provided to the Amedisys Arbitration Program, c/o Amedisys Legal Department, 5959 S. Sherwood Forest Boulevard, Baton Rouge, Louisiana 70816. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief or that such relief is necessary in order to prevent the unauthorized use of patient or referral source information or confidential proprietary business information.

5. How Arbitration Proceedings Are Conducted.

In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. To this end: (1) each party shall have the right to take the deposition of one individual and any expert witness designated by another party; (2) each party also shall have the right to propound requests for production of documents to any party; (3) additional discovery may be had by mutual agreement of the parties or where the Arbitrator selected so orders pursuant to a request by either party; (4) and each party shall have the right to subpoena witnesses and documents for the arbitration, as well as documents relevant to the case from third parties.

Employee and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. Accordingly,

(a) There will be no right or authority for any dispute to be brought, heard or arbitrated as a class action ("Class Action Waiver"). The Class Action Waiver shall not be severable from this Agreement in any case in which (1) the dispute is filed as a class action and (2) a civil court of competent jurisdiction finds the Class Action Waiver is unenforceable. In such instances, and provided the Company has not been able to overturn the findings of unenforceability through exercise of any right to appeal that may exist, the class action must be litigated in a civil court of competent jurisdiction.

(b) There will be no right or authority for any dispute to be brought, heard or arbitrated as a collective action ("Collective Action

Waiver"). The Collective Action Waiver shall not be severable from this Agreement in any case in which (1) the dispute is filed as a collective action and (2) a civil court of competent jurisdiction finds the Collective Action Waiver is unenforceable. In such instances, and provided the Company has not been able to overturn the findings of unenforceability through exercise of any right to appeal that may exist, the collective action must be litigated in a civil court of competent jurisdiction.

(c) There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general representative action ("Private Attorney General Waiver"). The Private Attorney General Waiver shall be severable from this Agreement in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable. In such instances, and provided the Company has not been able to overturn the findings of unenforceability through exercise of any right to appeal that may exist, the Private Attorney General action must be litigated in a civil court of competent jurisdiction.

Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims.

Notwithstanding any other clause or language contained in this Agreement and/or any rules or procedures that might otherwise be applicable by virtue of this Agreement or by virtue of any arbitration organization rules or procedures that now apply or any amendments and/or modifications to those rules, any claim that the Class Action Waiver or Collective Action Waiver or Private Attorney General Waiver, or any portion of the Class Action Waiver or Collective Action Waiver or Private Attorney General Waiver, is unenforceable, inapplicable, unconscionable, or void or voidable, shall be determined only by a court of competent jurisdiction and not by an arbitrator.

The Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration.

6. Paying For The Arbitration.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. However, subject to applicable law, the Company will pay the Arbitrator's and arbitration fees in accordance with the AAA Rules, and Employee will be responsible for any fee required by the AAA Rules to be paid by the Employee; any disputes in this regard will be resolved by the Arbitrator.

7. The Arbitration Hearing And Award.

The parties will arbitrate their dispute before the Arbitrator, who shall confer with the parties regarding the conduct of the hearing and resolve any disputes the parties may have in that regard. Within 30 days of the close of the arbitration hearing, any party will have the right to prepare, serve on the other party and file with the Arbitrator a brief. The Arbitrator shall follow the applicable substantive law in adjudicating a party's claims. Accordingly, the Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Agreement. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as required by law or the rules of any applicable securities exchange, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration.

8. *[This section was left blank intentionally].*

9. An Employee's Right To Opt Out Of The Arbitration Agreement.

Arbitration is not a mandatory condition of Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement. If Employee does not want to be subject to this Agreement, Employee may opt out of this Agreement by printing out Attachment A to the Agreement ("Dispute Resolution Agreement Opt-Out Form"), printing and signing Employee's name, writing in the last four numbers of Employee's Social Security Number, and sending it by U.S. Mail to Amedisys, Inc., c/o Frank Redmond, 5959 S. Sherwood Forest Boulevard, Baton Rouge, Louisiana 70816. In order to be effective, the Opt-Out Form must be postmarked within 30 days of Employee's acknowledgment of receipt of this Agreement. Any employee's decision to opt

out will not be communicated to the employee's supervisor and will be kept by Human Resources in a file separate from the employee's personnel file. Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee's continuation of his or her employment with Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement.

10. No Retaliation.

It is against Company policy for any Employee to be subject to retaliation if he or she exercises his or her right to assert claims under this Agreement or to opt out of this Agreement. If any Employee believes that he or she has been retaliated against by anyone at the Company, the Employee should immediately report this to the Human Resources Department.

11. Right To Consult With An Attorney.

Employee has the right to consult with private counsel of Employee's choice with respect to any aspect of, or any claim that may be subject to, this Agreement. If Employee has retained counsel with respect to any claim that may be subject to this Agreement, Employee should consult that counsel.

12. Enforcement Of This Agreement.

This Agreement is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above. This Agreement is the full and complete agreement relating to the formal resolution of disputes covered by this Agreement, and it supersedes any prior arbitration agreement between Employee and the Company. Except as stated in Section 5, above, in the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is deemed to be unenforceable, the Company and Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

ATTACHMENT A
DISPUTE RESOLUTION AGREEMENT
OPT-OUT FORM

I hereby certify that I have read the Company's Dispute Resolution Agreement and that I do not want be bound by it.

I understand that in order for this Opt-Out Form to be effective, it must be completed and sent to Amedisys, Inc., c/o Frank Redmond, 5959 S. Sherwood Forest Boulevard, Baton Rouge, Louisiana 70816 by U.S. Mail postmarked no later than 30 days from the date I acknowledged receipt of the Dispute Resolution Agreement.

Please date, sign and print your name, and write in the last four numbers of your Social Security Number.

Date: _____

Employee Signature

Print Employee's Name

Print Last Four Numbers of Employee's
Social Security Number

EXHIBIT F

**COVER LETTER TO THE AMEDISYS ARBITRATION PROGRAM AND
DISPUTE RESOLUTION AGREEMENT**

To: All Employees

From: Martha S. Williams, PhD
Chief Human Resources Officer

Date: August 6, 2013

Re: The Amedisys Arbitration Program and
Dispute Resolution Agreement – Please Read

Importance: High

Amedisys, Inc. has adopted a Company-wide policy, called the "Amedisys Arbitration Program," that requires most employment-related disputes to be resolved through arbitration, as provided in the accompanying "Dispute Resolution Agreement." Amedisys believes that disputes can usually be resolved in arbitration more quickly and less expensively than if they were brought in court and therefore that this policy benefits Amedisys and its employees alike. Others prefer litigation to arbitration, though, and it is entirely your choice whether or not to participate in the new arbitration program. **However, if you do not want to be covered by the new policy outlined in the Dispute Resolution Agreement and instead desire to preserve your right to bring disputes before a court, you must notify Amedisys within 30 days in the manner described below.** Amedisys therefore strongly recommends that you read the Dispute Resolution Agreement carefully.

What is arbitration? Amedisys hopes that any dispute that might arise between you and the Company will be resolved informally, either through discussions with your supervisor or Human Resources. However, if that does not happen, the Dispute Resolution Agreement requires both sides to submit the dispute to "arbitration" instead of filing a lawsuit in court. This means that you and Amedisys would pick a neutral, independent person, called an "arbitrator," who would make a determination after listening to the evidence presented by each side. The arbitrator can award any form of individual relief that can be awarded by a court. Except for your payment of a \$200 filing fee (Amedisys must pay its own filing fee of \$1,350) to initiate the arbitration, Amedisys will pay for all of the arbitration costs, including the fees charged by the arbitrator (but not your own attorney's fees, should you engage an attorney). Amedisys believes disputes can generally be resolved more quickly, and less expensively, in arbitration because arbitration proceedings are less formal and are focused upon individual claims. In fact, disputes resolved through the court system can sometimes take years, whereas disputes resolved through arbitration often can

be resolved much more quickly. In addition, parties in arbitration have more limited rights to appeal than in a lawsuit.

What cannot be arbitrated? While the Dispute Resolution Agreement provides that you can arbitrate the same claims on behalf of yourself as you can in court, it does *not* allow you to bring claims on behalf of *other* employees, as with class actions. The U.S. Supreme Court has observed that if class claims were brought in arbitration, the advantages of arbitration would be lost, making arbitration as slow and as costly as class action court proceedings, which often take years to resolve, with little benefit to the class members.

What if I do not want to arbitrate? You have **30 days** from the date you acknowledged receipt of this letter and the Dispute Resolution Agreement to opt-out of the Dispute Resolution Agreement. **You may do so by printing the Opt-Out Form (Attachment A to the Agreement), printing and signing your name, writing in the last four numbers of your Social Security Number, and sending it by U.S. Mail to Amedisys, Inc., postmarked no later than 30 days from the date you acknowledged receipt of the Dispute Resolution Agreement.** If you opt-out in this manner within the 30-day period, you will not be required to arbitrate disputes between you and Amedisys. However, if you do not opt-out within this period, or if you do nothing, you and Amedisys will be bound by the Dispute Resolution Agreement. Thereafter, you must arbitrate any employment-related dispute with Amedisys that cannot be resolved informally.

Will I be retaliated against if I choose to opt-out? Amedisys will not tolerate retaliation against any employee who elects to opt-out of the Dispute Resolution Agreement. Amedisys will not notify supervisors concerning which of their employees have exercised their opt-out rights, and opt-out information will not be kept in any employee's personnel files.

How will the Agreement affect my rights? The Dispute Resolution Agreement provides that you and Amedisys each waive the right to file a lawsuit in court against one another, that any disputes between you and Amedisys will be resolved before an arbitrator, and that any claim that is arbitrated must be done on behalf of you alone, and not on behalf of a class of employees. For instance, if you wanted to make a claim against Amedisys, you would be required to arbitrate that claim on behalf of yourself only, and you would not be able to participate in any class action, either as a plaintiff or as a class member.

May I consult an attorney? Amedisys believes the Dispute Resolution Agreement will benefit everyone. Nevertheless, the decision to waive your right to have a court hear your dispute or your right to participate in a class action is a significant one, and you have the right to consult an attorney of your choice.

If you have any questions, Amedisys has set up a toll-free Arbitration Hotline at 866-998-2460, which it encourages you to use. Calls to the Arbitration Hotline will be handled by members of the Human Resources Department, and will be kept confidential and not shared with supervisors.

Thank you,

Martha S. Williams, PhD
Chief Human Resources Officer

2017 WL 2919014

Only the Westlaw citation is currently available.
United States District Court, W.D. North Carolina,
Charlotte Division.

Amy LESNESKI, an Individual, Plaintiff,

v.

ROSS STORES, INC., a Delaware Corporation,
and Mark Stegall, an Individual jointly and
severally, directly and vicariously, Defendant.

CIVIL ACTION NO. 3:16-CV-00754-GCM

Signed 07/07/2017

Attorneys and Law Firms

Daniel Chappell Flint, Law Offices of Daniel C. Flint, PC,
Southfield, MI, for Plaintiff.

Kristine Marie Sims, Constangy, Brooks & Smith, LLP,
Winston-Salem, NC, Tamula R. Yelling, Constangy,
Brooks, Smith & Prophete, LLP, Birmingham, AL, for
Defendant.

ORDER

Graham C. Mullen, United States District Judge

*1 **THIS MATTER** is before the Court upon the Defendants' Motion to Dismiss or in the Alternative, to Stay This Action and Compel Arbitration. (Doc. No. 9). Plaintiffs have filed a response memorandum and defendants have filed a reply memorandum. This matter is now ripe for disposition.

I. BACKGROUND

Ross is an off-price retailer of brand-name and designer apparel, accessories, footwear and home goods. Ross hired Plaintiff as a Supervisor at its Rock Hill Distribution Center Operations, 2nd Shift on October 6, 2014. On December 18, 2014, Plaintiff signed a Dispute Resolution Agreement ("DRA") with Ross. The DRA includes the following language:

This Agreement sets forth the procedures that you and Ross Stores, Inc. ("Ross") mutually agree must be used to resolve any and all "Covered Disputes" arising out

of or related to your employment with Ross or its termination. Covered Disputes will be resolved by final and binding arbitration and not by a court or jury.

For the purposes of this Agreement Covered Disputes include any and all disputes both between you and Ross and between you and any other Ross Associate, agent or employee of Ross, arising out of or related to your employment with or separation of employment from Ross regardless of who initiates the claim. Covered Disputes include, but are not limited to, disputes related to the use of trade secrets, unfair competition, compensation, termination, retaliation, whistleblower claims, workers' compensation retaliation claims, harassment, discrimination and claims based on the Civil Rights Act of 1964, the American with Disabilities Act, the Age Discrimination in Employment Act, Family Medical Leave Act, the Employee Retirement Income Security Act, Fair Labor Standards Act and all similar state statutes and all related common law claims.

Doc. No. 10 at 2-3. On or about June 25, 2015, Plaintiff resigned from her employment with Ross. Plaintiff filed a Complaint in the United States District Court for the Western District of North Carolina on November 1, 2016. In her Complaint, Plaintiff alleges that she was harassed on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964, and she raises violations of the common law.

Upon receiving notice of the filing of this lawsuit, Defense counsel advised Plaintiff's counsel that Plaintiff had entered into the DRA with Ross and provided Plaintiff's counsel with a copy of the same. In this motion, Defendants ask this Court to dismiss or stay this case and Plaintiff be compelled to pursue her claims in accordance with the DRA and FAA.

II. DISCUSSION

The Federal Arbitration Act (FAA) provides:

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

in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

***2** 9 U.S.C. § 2 (2012)

As an initial matter, the Court notes “North Carolina has a strong public policy favoring arbitration.” *Raper v. Oliver House, LLC*, 637 S.E.2d 551, 554 (N.C. Ct. App. 2006) (quoting *Red Springs Presbyterian Church v. Terminix Co.*, 458 S.E.2d 270, 273 (N.C. Ct. App. 1995); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369 (N.C. 2008)). And this preference has been widely recognized in the employment context for both state and federal law claims. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121-23 (2001) (“We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context”); *Thomas v. The Right Choice MWM, Inc.*, 2014 WL 1632946 (W.D. N.C. Apr. 23, 2014) (compelling arbitration of Title VII, ADA and ADEA claims); *Mahmoud v. Carmax Auto Superstores, Inc.*, 2011 WL 32518 (W.D. N.C. Jan. 5, 2011) (Title VII and wrongful termination in violation of North Carolina public policy claims subject to compulsory arbitration).

To compel arbitration, the court must conclude that: (1) a dispute exists between the parties; (2) there is a valid, written agreement to arbitrate that encompasses the dispute; (3) the transaction relates to interstate commerce; and (4) Plaintiff’s refusal to arbitrate. See *American Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). The first and fourth elements are clearly met as there is certainly a dispute between the parties and Plaintiff has refused to submit her claims to arbitration and, instead, has filed the instant lawsuit.

The United States Supreme Court has held that the FAA’s reference to interstate commerce reflects Congress’ intent to extend the FAA’s coverage to the limits of federal power under the Commerce Clause. *Allied-Bruce Terminix Comp., Inc. v. Dobson*, 513 U.S. 265, 277-81 (1995). The Court also recognized that the determination of whether a transaction or contract “involves” interstate commerce

requires an expansive construction of the term in order to effectuate Congress’ goal of encouraging alternative dispute resolution mechanisms. *Id.* at 274. Thus, a matter “involves” commerce under the FAA if it merely “affects” commerce—a standard commonly applied by the courts to situations in which it is clear that Congress intended to exercise its Commerce Clause powers to the fullest extent. *Id.* Accordingly, with the exception of agreements involving transportation workers, the FAA applies to all agreements to arbitrate employment disputes, provided the employment involves interstate commerce. See *Circuit City*, 532 U.S. at 120-21.

Ross operates locations in more than 30 States, the District of Columbia and Guam, which evidences that its business involves interstate commerce. Plaintiff’s employment with, and agreement to arbitrate claims against her multistate employer, involved interstate commerce. See *Circuit City*, 532 U.S. at 123 (holding that the FAA was applicable to arbitration agreement between a sales associate and her multistate employer); *Allied-Bruce*, 513 U.S. at 281-82 (finding jurisdictional element of the FAA was met by, among other things, multistate nature of company entering into contract).

***3** Plaintiff does not dispute that those three elements are met in this case. However, Plaintiff argues that the DRA is not a valid, written agreement because (1) the signing of the DRA was procedurally unconscionable, (2) the DRA itself is substantively unconscionable and (3) there was no consideration.

a. Procedural Unconscionability

The Court first notes that the FAA “require[s] the application of contract law to determine whether a particular arbitration agreement is enforceable;” thereby placing arbitration agreements “‘upon the same footing as other contracts.’” *Futrelle v. Duke Univ.*, 127 N.C.App. 244, 247-248 (1997) (quoting *Doctor’s Associates, Inc. v. Casarotto*, 116 S.Ct. 1652, 1656 (1996)). So, arbitration agreements may be invalidated through generally applicable contract defenses, such as unconscionability. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2001).

Unconscionability is an affirmative defense, so the party asserting it bears the burden of proof. *Westmoreland v.*

High Point Healthcare Inc., 721 S.E.2d 712, 717 (N.C. Ct. App. 2012) (citing *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369 (N.C. 2008)). The North Carolina courts have set a high standard for a court to hold a contract unenforceable because it is unconscionable, which is

only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Westmoreland, 721 S.E.2d at 716 (citing *Brenner v. Little Red Sch. House Ltd.*, 274 S.E.2d 206, 210 (N.C. 1981); *Tillman*, 655 S.E.2d at 369). "An inquiry into unconscionability requires that a court 'consider all the facts and circumstances of a particular case,' and '[i]f the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.' " *Westmoreland*, 721 S.E.2d at 716 (citing *Tillman*, 655 S.E.2d at 369; *Brenner*, 274 S.E.2d at 210).

"[P]rocedural unconscionability involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Westmoreland*, 721 S.E.2d at 717 (citing *Tillman*, 655 S.E.2d at 370) (plurality opinion) (citing *Rite Color Chem. Co. v. Velvet Textile Co.*, 411 S.E.2d 645, 648 (N.C. Ct. App. 1992)). Whereas, "[s]ubstantive unconscionability ... refers to harsh, onesided, and oppressive contract terms." *Westmoreland*, 721 S.E.2d at 719 (citing *Tillman*, 655 S.E.2d at 370; *Rite Color Chem. Co.*, 411 S.E.2d at 648-49).

Plaintiff claims the DRA was procedurally unconscionable because of unfair surprise, lack of meaningful choice, and unequal bargaining power. In general these claims stem from the Plaintiff being presented with and signing the DRA 2 months after she was hired. Plaintiff has failed to present case law in support of these claims. The North Carolina courts and

the Fourth Circuit have upheld arbitration agreements entered into 5 years and 3 years after the start of the Plaintiff's employment. See *Howard v. Oakwood Homes Corp.*, 516 S.E.2d 879 (N.C. Ct. App. 1999); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).

Plaintiff's claims for procedural unconscionability boil down to the fact that she was shown the DRA 2 months after the start of her employment, she had to sign the DRA or lose her job, and Defendant is a large corporation. In *Howard*, the arbitration agreement was found to be valid even though the plaintiff was not told of the arbitration agreement at the time of hiring, plaintiff had to sign it or be fired, and defendant was a large corporation. *Id.* at 880.

*4 In this case, Plaintiff has not presented facts to carry their burden of proof that procedural unconscionability existed.

b. Substantive Unconscionability

The Court now turns to the Plaintiff's claims that the DRA is substantively unconscionable because the contract terms are harsh, one-sided, and oppressive. All of Plaintiff's claims of substantive unconscionability revolve around Plaintiff's lack of knowledge of the agreement terms when it was signed and the agreement, specifically the class-action waiver, being allegedly one-sided.

The law in North Carolina is that "the law will not relieve one who can read and write from liability upon a written contract, upon the ground that [s]he did not understand the purport of the writing, or that [s]he has made an improvident contract, when [s]he could inform [herself] and has not done so." *Westmoreland*, 721 S.E.2d at 718 (*Weaver v. St. Joseph of the Pines, Inc.*, 652 S.E.2d 701, 712 (N.C. App. 2007)).

Plaintiff cannot now allege that the agreement is unconscionable because she failed to read or understand it, especially when she was affirmatively advised that she could seek legal advice prior to signing. *Westmoreland*, 721 S.E.2d at 718. The DRA clearly lists the disputes that are covered by the agreement, and the DRA clearly states that Plaintiff and Ross were waiving their right to a jury trial with respect to those disputes. Again, Plaintiff has not cited to any case law in making these allegation.

Plaintiff has failed to meet her burden of demonstrating that the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and [that] the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Westmoreland*, 721 S.E.2d at 716 (citing *Brenner*, 274 S.E.2d at 210, quoted with approval in *Tillman*, 655 S.E.2d at 369) (emphasis added). Thus, Plaintiff has failed to meet her burden of proof that the DRA is substantively unconscionable.

c. Consideration

Finally, Plaintiff argues that there is no consideration because the arbitration agreement was signed after Plaintiff began working for Defendant. Plaintiff points to the principle that, in North Carolina, when an employee signs an agreement after they have begun working for an employer, the agreement must be supported by new or separate consideration. *See Hejl v. Hood, Hargett & Associates, Inc.*, 674 S.E.2d 425, 428 (N.C. App. 2009).

However, this argument ignores the fact that Defendant also bound themselves to arbitration in the event of a dispute and mutual promises to arbitrate disputes is sufficient consideration. *See Howard*, 134 N.C.App. at 118-120; *O'Neil*, 115 F.3d at 275-76; *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998). As in *O'Neil* and *Johnson*, both parties agreed to be bound by the arbitration process for the resolution of the disputes covered by the agreement. Consequently, this Court holds that the DRA was supported by adequate consideration.

Since the DRA is not procedurally or substantively unconscionable and is supported by valid consideration, it is a valid, written agreement to arbitrate that encompasses the dispute. Therefore, all four elements necessary for the Court to compel arbitration are met. Section 3 of the FAA provides as follows:

*5 If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit

is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay trial of the action until such arbitration has been had in accordance with the terms of the agreement, ...

9 U.S.C. § 3. Thus this Court will direct the parties to proceed to arbitration on this dispute and stay judicial proceedings.

d. Attorneys' Fees

Lastly, Defendants ask the Court to impose sanctions on the Plaintiff for those attorneys' fees that Defendants incurred in preparing the Motion to Dismiss and Reply memorandum. The Supreme Court has held that federal courts have inherent power to assess attorneys' fees against a party that acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See Chambers v. NASCO*, 501 U.S. 32, 43-50 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).

In support of this motion, Defendants alleged that Plaintiff acted in wantonly and in bad faith in not dismissing this action after Defendants' counsel contacted Plaintiff's counsel to inform him of the arbitration provisions contained in the DRA and to request that his client voluntarily dismiss this action. The Fourth Circuit has previously stated in considering whether to impose attorney's fees under this standard that if a party conducts fraud upon the Court, this is cause to impose sanctions. *Kilborn v. Bakhir*, 2003 WL 21693707 at *1 (4th Cir. 2003). Additionally where a party delays or disrupts litigation, this can be reason to find bad faith and impose an assessment of attorney's fees. *Id.*

Evidence only that the Defendant told the Plaintiff to dismiss action and the Plaintiff did not do so is not sufficient to show evidence of bad faith or wanton conduct. There has been no evidence that Plaintiff disobeyed a court order or that she proceeded with litigation for bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* In addition, Plaintiff points out

that the DRA states that "Ross Associates, acting alone or together, will not be disciplined or retaliated against for challenging the enforceability of part, or, all of the Agreement." (Defs. Ex. A, ¶ 6).

III. CONCLUSION

For the foregoing reasons the Court finds that the Defendants' Motion to Dismiss or in the Alternative, to Stay This Action and Compel Arbitration. (Doc. No. 9) be **GRANTED IN PART AND DENIED IN PART**. This

matter is hereby **STAYED** pending arbitration. Plaintiff must submit her claim for arbitration within 30 days of this order and notify the Court when she has done so. Defendant's motion for attorneys' fees is hereby **DENIED**.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2919014

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2018 WL 3120678

Only the Westlaw citation is currently available.

United States District Court, D.
South Carolina, Columbia Division.

Shaneeka Monet STROMAN, Plaintiff,

v.

Tiwana BAREFOOT; Randy Young; Meghan
Blackwell, Paralegal; Dolgencorp, LLC, Defendants.

C/A No.: 3:17-2760-CMC-SVH

Signed 01/23/2018

Attorneys and Law Firms

Shaneeka Monet Stroman, Swansea, SC, pro se.

Christopher Ray Thomas, William L. Duda, Ogletree
Deakins Nash Smoak and Stewart PC, Columbia, SC, for
Defendants.

REPORT AND RECOMMENDATION

Shiva V. Hodges, United States Magistrate Judge

*1 In this employment discrimination case, Shaneeka Monet Stroman ("Plaintiff") sues Tiwana Barefoot,¹ Randy Young, Meghan Blackwell, and Dolgencorp, LLC (dba Dollar General) (collectively "Defendants"), alleging federal discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* [ECF Nos. 1, 6, 16]. This matter comes before the court on Defendants' motion to dismiss in favor of arbitration [ECF No. 24]. The motion having been fully briefed [ECF No. 37, 38, 40, 41], it is ripe for disposition.

¹ The court instructs the Clerk to correct the spelling of Ms. Barefoot's first name in the case caption, per ECF No. 24, n1.

All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civ. Rule 73.02(B)(2)(g) (D.S.C.). The undersigned denies Plaintiff's motion to stay [ECF No. 42]. Because the motion to dismiss [ECF No. 24] is dispositive, this report and recommendation is entered for the district judge's consideration. For the reasons that follow, the undersigned recommends the district

court grant Defendants' motion to dismiss to compel arbitration.

I. Factual Background

Plaintiff is a former employee of Dollar General who claims she was subjected to disparate terms and conditions, retaliated against, and constructively discharged because of her race and gender. [ECF No. 16 at 4]. According to the undisputed testimony of Debbie Roach, Dollar General's Senior Human Resources Shared Services ("HRSS") Manager, the company has an "Express Hiring" system through which Plaintiff was hired. *See* Decl. of Debbie Roach at ¶¶ 1-3 [Roach Decl. docketed at ECF No. 24-1]. On December 20, 2016, Plaintiff accepted the Dollar General Employee Arbitration Agreement ("Agreement") [ECF No. 24-1 at 6-7]. By executing the Agreement, Plaintiff agreed to submit to binding arbitration, as follows:

You agree that, with the exception of certain excluded claims described below,¹ any legal claims or disputes that you may have against Dollar General, its parent and subsidiary corporations, employees, officers and directors arising out of your employment with Dollar General or termination of employment with Dollar General ("Covered Claim" or "Covered Claims") will be addressed in the manner described in this Agreement. You also understand that any Covered Claims that Dollar General may have against you related to your employment will be addressed in the manner described in this Agreement.

* * *

The procedures in this Agreement will be the exclusive means of resolving Covered Claims relating to or arising out of your employment or termination of employment with Dollar General, whether brought by you or Dollar General. This includes, but is not limited to, claims alleging violations of wage and hour laws, state and federal laws prohibiting discrimination, harassment, and retaliation, claims for defamation or violation of confidentiality obligations, claims for wrongful termination, tort claims, and claims alleging violations of any other state or federal laws, except claims that are prohibited by law from being decided in arbitration, and those claims specifically excluded in the paragraph below.

*2 fn1: Covered Claims do not include claims for unemployment insurance benefits, workers' compensation benefits [workers' compensation discrimination and retaliation are Covered Claims], whistleblower claims under the Sarbanes-Oxley Act, and claims for benefits under the Employee Retirement Income Security Act. Covered Claims also do not include claims pending in court as of the date this Agreement is signed by you, and claims concerning the scope or enforceability of this Agreement.

Id. at 6. The Agreement also specifically states that it "is governed by the Federal Arbitration Act." *Id.*

On October 12, 2017, Plaintiff filed the instant complaint against Defendants, asserting causes of action arising out of her employment with Dollar General. [ECF No. 1]. On November 28, 2017, Defendants filed this motion to dismiss in favor of arbitration. [ECF No. 24].

II. Discussion

A. Legal Standard

Defendants move to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), which provides in part that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Section 2 of the FAA states that a written arbitration agreement "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. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23–24 (1983). Although federal law governs the arbitrability of disputes, ordinary state-law principles resolve issues regarding the formation of contracts. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005).

"Motions to compel arbitration in which the parties dispute the validity of the arbitration agreement are treated as motions for summary judgment." *Rose v. New*

Day Fin., LLC, 816 F. Supp. 2d 245, 251 (D. Md. 2011). "Accordingly, arbitration should be compelled where 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Erichsen v. RBC Capital Markets, LLC*, 883 F. Supp. 2d 562, 566–67 (E.D.N.C. 2012) (quoting Fed. R. Civ. P. 56). A trial is necessary if the material facts regarding the making of an agreement to arbitrate are in dispute. *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997).

To compel arbitration under the FAA, a litigant must demonstrate the following: "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–01 (4th Cir. 2002) (quoting *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991)).

B. Analysis

Defendants argue Plaintiff must be compelled to arbitrate her claims based on the terms of the Agreement. Defendants, as the parties seeking to enforce the Agreement, bear the initial burden of "persuading this court that the parties entered into an enforceable arbitration agreement." *Drake v. Mallard Creek Polymers, Inc.*, 2014 WL 7405762, at *1 (W.D.N.C. Dec. 30, 2014). If Defendants make such a showing, then "the burden shifts to the plaintiff to show that even though there was some written contract, [s]he did not actually agree to it—because the signature was forged, the terms of the contract were misrepresented, or some other reason evincing lack of true agreement." *Czopek v. TBC Retail Grp., Inc.*, 2014 WL 5782794, at *4 (M.D. Fla. Nov. 6, 2014); see also *Gordon v. TBC Retail Grp., Inc.*, 2016 WL 4247738, at *6 (D.S.C. August 11, 2016) (applying summary judgment standard to motion to compel arbitration). "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally [assuming clear and unmistakable evidence of agreement] should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995).

1. Prima facie showing

*3 A review of the language of the Agreement reveals it obligates Plaintiff to submit her claims to arbitration, as her claims are subsumed in the category of “any legal claims or disputes that [she] may have against Dollar General, its parent and subsidiary corporations, employees, officers and directors arising out of [her] employment with Dollar General or termination of employment with Dollar General,” defined as “Covered Claims.” [ECF No. 24-1 at 6].

Defendants submitted the declaration of Debbie Roach, who reviewed Plaintiff’s personnel records and testified that Plaintiff signed the Agreement at issue. [ECF No. 24-1]. Defendants have produced a printout of the Agreement showing that Plaintiff “signed” the Agreement through an electronic “Express Hiring” system. According to Roach, this system required candidates for hiring, including Plaintiff, to enter their unique login identification number (i.e., a form of their social security number) and their password (a form of their birthdate) before being required to immediately create a unique password. *Id.* at 2–3. Once logged into Express Hiring, candidates for hiring are presented with initial hiring documents including the Agreement, to which they can agree or opt out. *Id.* at 3. Defendants’ records reflect that on December 20, 2016, Plaintiff logged into the Express Hiring system using her unique login identification number and password, to which no one else had access. *Id.* Defendants’ records reflect that while logged in, Plaintiff selected the option stating that she agreed to the terms of the Agreement, and that she understood and acknowledged that by checking the box, both Dollar General and she would be bound by the terms of the Agreement. *Id.* at 3, 7. Defendants’ records reflect that Plaintiff thereafter affixed her initials to the document, certifying that the above information was true and correct and agreeing to the conditions of hiring. *Id.* at 7.

“To establish that evidence is authentic, a proponent need only present ‘evidence sufficient to support a finding that the matter in question is what the proponent claims.’ ” *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009) (quoting Fed. R. Evid. 901(a)). “[T]he burden to authenticate under Rule 901 is not high—only a prima facie showing is required,” and a “district court’s role is

to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.” *Id.* “A signature demonstrates that the signer intends to authenticate a document as her own act through the use of a mark.” *Hamdi Halal Mkt. LLC v. United States*, 947 F. Supp. 2d 159, 164 (D. Mass. 2013). South Carolina has adopted the Uniform Electronic Transactions Act (“UETA”). See S.C. Code Ann. § 26-6-10, *et seq.* South Carolina’s version of the UETA provides the following:

An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of a security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

S.C. Code Ann. § 26-6-90.

Some courts “have found the declaration of the human resource employees sufficient to authenticate electronic signatures.” *Tagliabue v. J. C. Penney Corp., Inc.*, 2015 WL 8780577, at *2 (E.D. Cal. Dec. 15, 2015) (collecting cases). Other courts have focused on the factual circumstances surrounding the purported signature. See *Jones v. U-Haul Co. of Mass. & Ohio Inc.*, 16 F. Supp. 3d 922, 934 (S.D. Ohio 2014) (assessing security measures used to protect defendants’ online system and finding employee’s claim that her signature was not authentic failed to create a genuine issue of material fact).

*4 Under either approach, the undersigned finds that Defendants have satisfied their burden to authenticate the proffered screenshots and signature pages. Defendants’ submission of Roach’s declaration attests to the records’ authenticity. Roach’s declaration outlined the process new employees used to access the Agreement, which required candidates for hire employees to enter personal information to access the Agreement and then take some specific action to “agree” and “sign” the Agreement. These measures are similar to those used by the defendants in *Jones*, which the Southern District of Ohio found

sufficient to establish the authenticity of the plaintiff's electronic signature. *See Jones*, 16 F. Supp. 3d at 934 (describing security steps, including "a requirement that employees enter their social security number, or their 'System Member Identification Number and a confidential, self-selected password' to access the online system" and stating that "[e]mployees then needed to input their names into the system to verify their signatures"). In light of these security measures and the supporting declaration of Debbie Roach, the court finds Defendants have made a threshold showing that the screenshots and signature pages are authentic.

Despite submitting two responses in opposition to Defendants' motion to dismiss, Plaintiff has failed to substantively contest the authenticity of her signature or the validity of the arbitration provision contained in the Agreement. Absent a showing that Plaintiff's signature was forged, the terms of the contract were misrepresented, or some other reason evincing lack of true agreement, Plaintiff has not sustained her burden of demonstrating a genuine dispute of fact concerning the enforceability of the Agreement.

The court finds Plaintiff's claims in the complaint fall within the scope of "Covered Claims" contained in the Agreement. Specifically, the Agreement is applicable to "any legal claims or disputes that [she] may have against Dollar General, its parent and subsidiary corporations, employees, officers and directors arising out of [her] employment with Dollar General or termination of employment with Dollar General." [ECF No. 24-1 at 6]. Additionally, the Agreement includes claims alleging violations of "state and federal laws prohibiting discrimination, harassment, and retaliation, ... [and] claims for wrongful termination." *Id.* Plaintiff's complaint sets forth causes action alleging Defendants discriminated and retaliated against her in violation of Title VII. Discrimination disputes are expressly identified and included in the Agreement as subject to resolution through binding arbitration.

2. Relationship to interstate commerce

The court finds the Agreement has the required relationship to interstate commerce. The FAA applies to any contract "evidencing a transaction involving interstate commerce." 9 U.S.C. § 2. The United States

Supreme Court has held that the phrase "involving interstate commerce" amounts to the functional equivalent of "affecting commerce" and shows Congress's "intent to exercise [its] commerce power to the full." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995). The Supreme Court has further ruled that arbitration contracts in employment agreements involve interstate commerce, and, thus, are governed by the FAA. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14 (2001); *Long v. Silver*, 248 F.3d 309, 313 (4th Cir. 2001) (compelling arbitration and staying litigation pending arbitration where arbitration provision included in employment agreement). Therefore, the undersigned finds the arbitration provision in the Agreement involves interstate commerce.

Because arbitration is compelled "unless it may be said with positive assurance that the arbitration [agreement] is not susceptible of an interpretation that covers the asserted dispute," *Peoples Sec. Life Ins. Co.*, 867 F.2d at 812 (citations omitted), the undersigned recommends Defendants' motion to dismiss in favor of arbitration be granted.

III. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends that the district judge grant Defendants' motion to dismiss in favor of arbitration. [ECF No. 24].

***5 IT IS SO RECOMMENDED.**

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

Attachment

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the

record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court

901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

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Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Rock Hill Division.

Suzanne YOUNG, Plaintiff,

v.

AMISUB OF SOUTH CAROLINA, INC. d/
b/a Piedmont Medical Center, Defendant.

Civil Action No.: 0:18-cv-01601-JMC

Signed 11/01/2018

Attorneys and Law Firms

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Sue Erwin Harper, Nelson Mullins Riley and
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ORDER AND OPINION

J. MICHELLE CHILDS, United States District Judge

*1 This matter is before the court for review of the Magistrate Judge's Report and Recommendation ("Report") filed on August 17, 2018. (ECF No. 12.) The Report addresses Defendant AMISUB of South Carolina, Inc. d/b/a Piedmont Medical Center's ("Defendant") Motion to Compel Arbitration and to Dismiss or Stay All Claims ("Motion to Compel Arbitration") (ECF No. 6) and recommends that the court grant Defendant's Motion to Compel Arbitration and retain jurisdiction over the parties for all matters relating to this action. (*Id.* at 10-11.) For the reasons set forth herein, the court **ACCEPTS** the Magistrate Judge's Report, **GRANTS** Defendant's Motion to Compel Arbitration, and **DISMISSES** the action without prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Report sets forth the relevant facts and legal standards which this court incorporates without a full recitation. (*Id.* at 2-3.) As brief background, around April 2011, Plaintiff Suzanne Young ("Plaintiff") was hired by

Defendant as its Director of Imaging and Pain Services. (ECF No. 1-1 at 6; ECF No. 6 at 1; ECF No. 12 at 2.) Shortly after being hired, on April 12, 2011, Plaintiff signed a document titled "Acknowledgement," which includes provisions relating to arbitration ("Arbitration Agreement"). (ECF No. 6-1 at 1; ECF No. 14-1 at 18.) In pertinent part, the Arbitration Agreement states:

Except to the extent that any applicable collective bargaining agreement provided otherwise, I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenent. I understand that final and binding arbitration will be the sole and exclusive remedy of any such claim or dispute against Tenent or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to the use of arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ("AAA").

I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative cost of the AAA will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a non-exempt employee) or a mandated cap, if lower, and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except in writing by both me and the Company.

*2 (ECF No. 6-1 at 1.) On or about June 18, 2017, Defendant terminated Plaintiff. (ECF No. 1-1 at 9.) On May 25, 2018, Plaintiff filed suit against Defendant in the Court of Common Pleas for York County, South

Carolina. (*Id.* at 5-13.) In her Complaint, Plaintiff alleges that Defendant violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* (*Id.* at 9-11.)

On June 12, 2018, Defendant removed this matter from state court to federal court. (ECF No. 1.) On June 14, 2018, Defendant filed its Motion to Compel Arbitration. (ECF No. 6.) On June 28, 2018, Plaintiff filed her Memorandum of Law in Opposition to Defendant's Motion ("Memorandum"). (ECF No. 10.) On July 5, 2018, Defendant replied to Plaintiff's Memorandum. (ECF No. 11.)

After reviewing the filings of the parties, the Magistrate Judge filed a Report on August 17, 2018. (ECF No. 12.) In the Report, the Magistrate Judge determined that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, applied to Plaintiff's claims against Defendant because "Defendant provided the signed Agreement containing the arbitration provision[.]" "Defendant's economic activity has a nexus to interstate commerce[.]" and "Plaintiff ... failed to show [that] the arbitration provision is unconscionable." (*Id.* at 6-10.) Additionally, the Magistrate Judge declined to find that Plaintiff waived her substantive rights under Title VII. (*Id.* at 10.) The Report ultimately recommends that the court grant Defendant's Motion to Compel Arbitration and dismiss the action. (*Id.* at 10-11.) The Report also advises the court to retain jurisdiction over the parties for all matters relating to this action. (*Id.* at 11.)

The parties were apprised of the opportunity to file specific objections to the Magistrate Judge's Report by August 31, 2018. (*Id.* at 12.) On August 31, 2018, Plaintiff filed her Objection to the Report. (ECF No. 14.) In her Objection, Plaintiff argues that the Arbitration Agreement lacks consideration to form a valid contract, the Arbitration Agreement is unconscionable, and anti-discrimination statutes should not be subject to arbitration because "courts have the final responsibility for enforcing discrimination claims." (*Id.* at 2-4.) Defendant replied to Plaintiff's Objection on September 11, 2018. (ECF No. 15.) Defendant maintains that there was sufficient consideration for the Arbitration Agreement, the Magistrate Judge properly held that Plaintiff has not shown that the Arbitration Agreement is unconscionable, and discrimination claims are routinely

subject to arbitration. (*Id.* at 1-5.) Plaintiff did not respond to Defendant's contentions, which makes the Report ripe for review.

II. STANDARD OF REVIEW

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge only makes a recommendation to this court, and the recommendation has no presumptive weight. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The responsibility to make a final determination remains with the court. *Id.* at 271. As such, the court is charged with making *de novo* determinations of those portions of the Report and Recommendation to which specific objections are made. *See* 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). Furthermore, a failure to file specific written objections to the Report results in a party's waiver of the right to appeal from the judgment of the court based upon such recommendation. 28 U.S.C. § 636(b)(1). Thus, the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

III. DISCUSSION

*3 In her Objection, Plaintiff presents three arguments to the Magistrate Judge's Report. (*See* ECF No. 14 at 1-5.) First, Plaintiff maintains that the Report is "silent about the sufficiency of consideration" in the Arbitration Agreement, and consideration must be examined because she denies that "a valid arbitration agreement ... was ever formed[.]" (*Id.* at 1-2.) Second, Plaintiff continues to argue, under the totality of the circumstances, that the Arbitration Agreement is unconscionable because it "granted her no meaningful choice" and contained "non-negotiable terms." (*Id.* at 3.) Lastly, Plaintiff forcefully submits that "Congress clearly intended to enable courts to have the final responsibility for enforcing discrimination claims, and thus, deferral to arbitration is inconsistent with the original intent of Congress." (*Id.* at 4.) The court will consider each of Plaintiff's objections in turn.

A. Consideration for the Arbitration Agreement

Plaintiff first argues that “the Report is silent about the sufficiency of consideration” relating to the Arbitration Agreement.” (*Id.* at 2.) Specifically, Plaintiff requests the court to examine whether there was sufficient consideration within the Arbitration Agreement. (*Id.*) While the Report neglected to give attention to the Arbitration Agreement’s consideration (*see* ECF No. 12 at 5-6), Plaintiff’s argument is not successful on this ground.

Under section 2 of the FAA, “[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. Additionally, under section 4 of the FAA, “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. The FAA reflects “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). “Underlying this policy is Congress’s view that arbitration constitutes a more efficient dispute resolution process than litigation.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002).

In order to compel arbitration, a moving party must demonstrate the following: “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) (quoting *Adkins*, 303 F.3d at 500-01). When determining whether there is a valid arbitration agreement between two parties, a federal court is required to apply state law principles governing contracts.¹ *See Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 179 (4th Cir. 2013) (“We apply ordinary state law principles governing the formation of contracts, including principles concerning the ‘validity, revocability, or enforceability of contracts generally.’” (quoting *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005))). *See also First Options of Chi., Inc. v.*

Kaplan, 514 U.S. 938, 944 (1995). If a valid arbitration agreement exists under state law, a federal court has “no choice but to grant a motion to compel arbitration.” *Adkins*, 303 F.3d at 500. In this case, the court is required to look to principles of South Carolina contract law. *See Weckesser v. Knight Enters. S.E., LLC*, 735 F. App’x 816, 819-21 (4th Cir. 2018) (applying South Carolina law when interpreting the validity of an arbitration provision).

1 Plaintiff abandoned her previous theory that a dispute between a healthcare professional and a medical center does not involve interstate commerce. (*Compare* ECF No. 10 at 3-5, with ECF No. 14 at 1-5.) Plaintiff’s Objection only contests whether the Arbitration Agreement possesses sufficient consideration under South Carolina law. (ECF No. 14 at 1-3.) As such, the court only examines whether the Arbitration Agreement passes legal muster under South Carolina’s legal principles governing contracts and declines, in the absence of a specific objection from Plaintiff, to take any further analysis required under the FAA. *See Thomas v. Arn*, 474 U.S. 140, 151 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”). *See generally Nichols v. Colvin*, 100 F. Supp. 3d 487, 497 (E.D. Va. 2015) (“The purpose of magistrate review is to conserve judicial resources.”).

*4 Under South Carolina law, a valid contract must include the following elements: (1) offer; (2) acceptance; and (3) valuable consideration. *See Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 166 (S.C. 2003) (“The necessary elements of a contract are an offer, acceptance, and valuable consideration.”). “Valuable consideration may consist of ‘some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.’” *Hennes v. Shaw*, 725 S.E.2d 501, 505 (S.C. Ct. App. 2012) (quoting *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 503 S.E.2d 184, 186 (S.C. Ct. App. 1988)). Additionally, “[i]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both.” *Jaffe v. Gibbons*, 351 S.E.2d 343, 346 (S.C. Ct. App. 1986).

Upon review of the Arbitration Agreement, it is clear that Plaintiff signed the contract on April 12, 2011, and Defendant accepted it by employing Plaintiff until on or

about June 18, 2017. (ECF No. 1-1 at 9; ECF No. 6-1 at 1.) Therefore, under South Carolina law, the Arbitration Agreement is binding upon both parties, and the court's inquiry should end here. *See Jaffe*, 351 S.E.2d at 346. Nevertheless, the court will still examine whether there was sufficient consideration between the parties to have an enforceable contract.

In order to have valuable consideration between Plaintiff and Defendant, there must have been a benefit to one party and a detriment to the other. *See Hennes*, 725 S.E.2d at 505. Upon review of the Arbitration Agreement, there is sufficient consideration between the parties because Plaintiff, presumably to her detriment, is required to submit "any and all claims" to arbitration and "forego any right ... to a jury trial[.]" while Defendant, conceivably to its benefit, is able to avoid court proceedings in the event of a dispute. (*See* ECF No. 6-1 at 1.) Moreover, Defendant, to its detriment, is also required to submit "all claims and disputes" that it may have with Plaintiff to binding arbitration, which is likely a benefit to Plaintiff since Defendant is subject to the same commitment as Plaintiff. (*Id.*) Thus, there is sufficient consideration between the parties because there is an exchange of benefits and detriments as it relates to arbitration. *See Hennes*, 725 S.E.2d at 505.

In addition to the foregoing analysis, the court must consider the approach of courts interpreting arbitration provisions under South Carolina law. In comparison to the Arbitration Agreement before this court, South Carolina courts have found that similar arbitration provisions are legally binding because they have sufficient consideration. *See Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 845 n.4 (S.C. Ct. App. 1999) ("Although *Towles* does not raise the issue, we note *Towles*'s continued employment constituted sufficient consideration to render the Acknowledgement legally binding." (citations omitted)). Interpreting South Carolina law, the United States Court of Appeals for the Fourth Circuit has stated: "A mutual promise to arbitrate constitutes sufficient consideration for [an] arbitration agreement." *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (citing *Rickborn v. Liberty Life Ins. Co.*, 468 S.E.2d 292, 300 (1996)). As noted above, Defendant and Plaintiff have mutually promised to arbitrate any employment-related dispute (ECF No. 6-1 at 1), which is valuable consideration under South Carolina law. *Id.* Most recently, the South

Carolina Court of Appeals, applying South Carolina law, has determined that Defendant's Arbitration Agreement possesses sufficient consideration in order to form a valid contract. *See Marzulli v. Tenet S.C., Inc.*, No. 2015-002363, 2018 WL 1531507, at *1, *4 (S.C. Ct. App. Mar. 28, 2018) ("We also disagree with the circuit court that the Agreement lacked consideration. Marzulli signed the Agreement about a month after she started work, and we have held continued employment sufficient consideration to support arbitration agreements."). Therefore, Defendant's Arbitration Agreement does not lack sufficient consideration. As Plaintiff's objection is plainly at odds with the law, it is overruled. *See id.*; *Towles*, 524 S.E.2d at 845 n.4.

B. The Unconscionability of the Arbitration Agreement

*5 Plaintiff continues to maintain, relentlessly, that the Arbitration Agreement is an "unconscionable contract of adhesion because it granted her no meaningful choice and was offered to her on a 'take-it-or-leave-it' basis with non-negotiable terms." (ECF No. 14 at 3.) Plaintiff requests the court to consider whether the Arbitration Agreement is unconscionable under "the totality of the circumstances." (*Id.*) Plaintiff misses the mark in this regard, and her argument is in stark tension with a recent decision from the South Carolina Court of Appeals.

In order to show that an arbitration provision is unconscionable, Plaintiff is required to show the following under South Carolina law²: "(1) she lacked a meaningful choice as to whether to arbitrate because the [Arbitration] Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them." *Marzulli*, 2018 WL 1531507, at *3 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007)). Plaintiff is required to show both prongs in order to invalidate the Arbitration Agreement. *See Simpson*, 644 S.E.2d at 668 ("In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, *together with* terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." (emphasis added)). In *Marzulli*, the South Carolina Court of Appeals held that the Arbitration Agreement, the same one at issue before this court, is not oppressive and one-sided under South Carolina law. *Id.* at *4. Therefore, regardless of whether Plaintiff can

show that she lacked a meaningful choice in whether to arbitrate, she cannot show that the Arbitration Agreement is unconscionable because she cannot meet the second prong as already decided by the *Marzulli* court. *Id.* As such, Plaintiff's objection is overruled.

- 2 Under the FAA, an arbitration provision may be invalidated if it can be rendered unenforceable under applicable state law. *See Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 364 (S.C. 2001) ("General contract principles of state law apply to arbitration clauses governed by the FAA." (citation omitted)).

C. Anti-Discrimination Statutes and Arbitration Under the FAA

Lastly, Plaintiff submits that "Congress clearly intended to enable courts to have the final responsibility for enforcing discrimination claims, and thus, deferral to arbitration is inconsistent with the original intent of Congress." (ECF No. 14 at 4.) While this is an interesting and novel argument before the court, it is wholly without merit and contrasts with well-established case law.

Notwithstanding the ongoing debate among legal commentators regarding the use of legislative intent and history,³ courts routinely examine it, whether rightly or wrongly, when presented with certain legal questions. *See Chevron, U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837, 862-64 (1984). *See also Hillman v. I.R.S.*, 263 F.3d 338, 342-43 (4th Cir. 2001); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000). The court need not address this debate because the United States Supreme Court has already handed down significant decisions in which employees were forced to arbitrate their discrimination claims when there was a valid agreement between the employee and employer.⁴ *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) ("Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA."). *See generally Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law...."); *Mitsubishi Motors Corp. v. Soler Chrysler-*

Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.... Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."). Additionally, the Fourth Circuit has unequivocally stated that discrimination statutes are subject to arbitration under the FAA and forcefully rejected Plaintiff's argument.⁵ *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) ("The EEOC as amicus curiae contends that employees cannot agree to arbitrate Title VII claims in predispute agreements. We disagree. The Supreme Court has made it plain that judicial protection of arbitral agreements extends to agreements to arbitrate statutory discrimination claims.... The EEOC argues that in passing the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress evinced an intent to prohibit predispute agreements to arbitrate claims arising under Title VII. This circuit, however, has already rejected this argument." (citing *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996))). Based on the foregoing, Plaintiff's objection is overruled because it has been emphatically rejected by the Supreme Court and the Fourth Circuit, and is therefore without legal merit. *See Circuit City Stores*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 29; *Hooters of Am.*, 173 F.3d at 937.

- 3 Compare Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL'Y 61, 62 (1994) ("Wait. Am I not a notorious opponent of legislative history? That is indeed my position...."), and Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 517 ("And to tell the truth, the quest for 'genuine' legislative intent is probably a wild-goose case anyway."), with Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation."), and Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593-94 (1995) ("To carry out its [interpretive] task, the court must adopt—at least implicitly—a theory about its own role by

defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature.”).

4 “[A] lower court generally is ‘bound to carry the mandate of the upper court into execution....’” *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (quoting *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 168 (1939)).

5 “Coherent and consistent adjudication requires respect for the principle of stare decisis and the basic rule that the decision of a federal circuit court of appeals left undisturbed by United States Supreme Court review is controlling on the lower courts within the circuit.” See *Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014).

IV. CONCLUSION

*6 After a thorough review of the Magistrate Judge’s Report (ECF No. 12) and Plaintiff’s Objection (ECF

No. 14), the court **ACCEPTS** the Magistrate Judge’s Report and Recommendation (ECF No. 12), **GRANTS** Defendant’s Motion to Compel Arbitration and to Dismiss (ECF No. 6), and **DISMISSES** the action without prejudice (ECF No. 1).⁶

6 In accordance with prior decisions from this court, the court dismisses the action as opposed to merely staying the proceedings. See *Willard v. Dollar Gen. Corp.*, No. 3:17-cv-00675, 2017 WL 4551500, at *4 (D.S.C. Oct. 12, 2017); *Cox v. Assisted Living Concepts, Inc.*, No. 6:13-00747-JMC, at *7 (D.S.C. Mar. 18, 2014); *Fleetwood Transp. Corp. v. Packaging Corp. of Am.*, No. 6:10-01219-JMC, 2012 WL 761737, at *5 (D.S.C. Mar. 8, 2012).

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 5668619

2016 WL 4059670
United States District Court, M.D. Louisiana.

Maellen LANGLOIS

v.

AMEDISYS, INC.¹

- ¹ In her *Opposition*, Langlois explained that she misspelled Defendant's name in the caption and sought to correct her error. (In her *Complaint* she erroneously spelled Defendant's name as "Amedisy's, Inc."). Rec. Doc. 8, n. 1.

CIVIL ACTION 15-835-SDD-RLB

Signed 07/27/2016

Attorneys and Law Firms

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RULING

SHELLY D. DICK, UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendant Amedisys Holding, LLC's *Motion to Compel Arbitration and Dismiss, Alternatively to Stay Action Pending Arbitration*.² Plaintiff, Maellen Langlois, has filed an *Opposition*.³ To which Amedisys has filed a *Reply*.⁴ For the following reasons, the Court grants Amedisys' *Motion*.

- ² Rec. Doc. 4.

- ³ Rec. Doc. 8.

- ⁴ Rec. Doc. 13.

I. FACTUAL BACKGROUND

Plaintiff, Maellen Langlois ("Langlois"), filed this employment discrimination suit against her former employer, Amedisys Holding, LLC ("Amedisys"), claiming that, after 4 1/2 years of working for Amedisys,

she was unlawfully terminated in July of 2015.⁵ She has asserted claims arising under the Age Discrimination in Employment Act ("ADEA"); the Americans with Disabilities Act ("ADA"); Louisiana's Employment Discrimination Law ("LEDL"); the Family and Medical Leave Act ("FMLA"); and under Louisiana's common law of tort and breach of contract. In response to her lawsuit, Amedisys filed a motion requesting the Court to compel arbitration and dismiss Langlois' claims. In the alternative, Amedisys requests a stay pending arbitration.

- ⁵ Rec. Doc. 1.

The Parties do not dispute the fact that, on August 6, 2013, Amedisys emailed all employees, including Langlois, about Amedisys' new Arbitration Program.⁶ The email message informed all recipients that it contained "time-sensitive materials" and instructed all employees to review them because these materials could affect their legal rights.⁷ All email recipients were instructed to "click" the email to open the materials.⁸ Upon clicking on the email, the recipient received a pop-up Acknowledgement Form that stated:

- ⁶ Rec. Doc. 4-2; Rec. Doc. 4-4, pp. 3-4, ¶4 (Affidavit of T. Terrell West, Director of HR Governance, Diversity, and Compliance for Amedisys).

- ⁷ Rec. Doc. 4-4, p. 4, ¶4.

- ⁸ Rec. Doc. 4-2.

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button on this screen I acknowledge and understand that I will be given access

to the materials described in the above paragraph and that I am required to review these materials.⁹

After clicking the Acknowledge button, an employee was directed to a webpage that included access to Amedisys' Arbitration Program materials,¹⁰ including the Arbitration Agreement and a Dispute Resolution Agreement Opt-Out Form.¹¹ Notably, as part of the August 2013 email distribution, Amedisys employees were given the option to "opt out" of the "[Dispute Resolution Agreement] by printing, signing and forwarding an Opt-Out Form by U.S. Mail to Amedisys, Inc., postmarked no later than 30 days from the date he/she acknowledge[d] receipt of the Dispute Resolution Agreement."¹²

⁹ Rec. Doc. 4-3 (emphasis original).

¹⁰ Rec. Doc. 4-4, p. 4, ¶6.

¹¹ Rec. Doc. 4-6, pp. 2-8 ("Amedisys, Inc. Dispute Resolution Agreement"); Rec. Doc. 4-6, p. 9 ("Dispute Resolution Agreement Opt-Out Form"). Also included was the "Cover Letter to the Amedisys Arbitration Program and Dispute Resolution Agreement" (Rec. Doc. 4-7) and "Amedisys Arbitration Program—Frequently Asked Questions" (Rec. Doc. 4-8). Rec. Doc. 4-4, p. 4, ¶6.

¹² Rec. Doc. 4-4, p. 4, ¶7.

*2 The Arbitration Agreement requires mutual arbitration for the resolution of "all legal disputes between [employees] and Amedisys before an arbitrator, rather than in court."¹³ The Arbitration Agreement expressly provides that it is governed by the Federal Arbitration Act (FAA) and applies to "any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates."¹⁴ The Agreement further states that, after the Arbitrator issues his/her decision, "[a] court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration."¹⁵

¹³ Rec. Doc. 4-6, p. 2.

¹⁴ Rec. Doc. 4-6, p. 2.

¹⁵ Rec. Doc. 4-6, p. 7, ¶7.

It is undisputed that Langlois acknowledged receipt of the email on August 6, 2013.¹⁶ It is also undisputed that she never opted out of the Arbitration Agreement.¹⁷ Considering the express terms of the Arbitration Agreement, Amedisys asserts that Langlois' claims are preempted by the FAA and subject to mandatory arbitration. In response, Langlois challenges the validity of the Arbitration Agreement by asserting that Louisiana's policy prohibiting the enforcement of a forum selection clause in a pre-dispute arbitration agreement conflicts with the FAA. Therefore, Langlois contends that Amedisys' Arbitration Agreement is unenforceable.

¹⁶ Rec. Doc. 4-5, p. 3, ¶4 (Bharath Kumar Arja, Senior SharePoint Administrator for Amedisys, attested to the fact that Langlois acknowledged the Dispute Resolution Agreement on August 6, 2013 at 2:50p.m.). Rec. Doc. 4-5, p. 4 (SharePoint system document depicting Langlois' acknowledgement).

¹⁷ Rec. Doc. 4-4, p. 5, ¶¶8-9 (Langlois' personnel file at Amedisys contains no opt-out form.).

II. LAW AND ANALYSIS

A. Federal Arbitration Act

The Fifth Circuit has recognized that "[a]rbitration is favored in the law."¹⁸ Moreover, there is a "liberal Federal Policy favoring arbitration agreements."¹⁹ When presented with a motion to compel arbitration under the FAA, a court must initially determine whether the FAA is applicable.²⁰ Section 2 of the FAA provides that a written agreement to arbitrate related to a transaction involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²¹ In this case, the Parties do not dispute that the contract is governed by the FAA. Therefore, the Court finds that the FAA is applicable to the Arbitration Agreement.

¹⁸ *Gregson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 526 (5th Cir. 2000)(citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

¹⁹ *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 91 (2000)(citing *Moses*, 460 U.S. at 24).

20 *Thomas v. Louis Dreyfus Commodities, LLC*, 2016 WL 3197562, *2 (M.D. La. June 8, 2016).

21 9 U.S.C. § 2.

When contracts, such as the one at issue, are governed by the FAA, courts generally engage in a two-step inquiry.²² “First, the court must determine whether the parties agreed to arbitrate the dispute.”²³ “This involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.”²⁴ “Courts apply the federal policy favoring arbitration when addressing ambiguities regarding whether a question falls within an arbitration agreement’s scope but not when determining whether a valid arbitration agreement exists.”²⁵ In resolving the question of whether an arbitration agreement is “contractually valid, courts apply ‘ordinary state-law principles that govern the formation of contracts.’”²⁶ If the court finds that the parties agreed to arbitrate, then the court must consider “whether any federal statute or policy renders the claims non-arbitrable.”²⁷

22 *Webb v. Investacorp, Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996).

23 *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004)(internal citations omitted).

24 *Webb*, 89 F.3d at 258 (citations omitted).

25 *LeBlanc v. Texas Brine Co., LLC*, 2016 WL 2849506, *3 (E.D. La. May 10, 2016)(citing *Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008)).

26 *Lizalde v. Vista Quality Markets*, 746 F.3d 222, 225 (5th Cir. 2014)(quoting *Morrison v. Amway Corp.*, 517 F.3d 248, 254 (5th Cir. 2008)).

27 *Banc One Acceptance Corp.*, 367 F.3d at 429 (internal citations omitted).

*3 In her *Opposition*, Langlois’ only challenge is to the Arbitration Agreement’s validity under Louisiana law. As such, the Court’s analysis shall focus solely on this issue.

B. Validity of Arbitration Agreement Pursuant to Louisiana Law

Under Louisiana law, “[a] contract is an agreement by two or more parties whereby obligations are created,

modified, or extinguished.”²⁸ A valid contract requires “the capacity to contract (La. C.C. art. 1918); (2) mutual consent (La. C.C. art. 1927); (3) a certain object (La. C.C. art. 1971); and (4) a lawful cause (La. C.C. art. 1966).”²⁹ In her *Opposition*, Langlois contends that, because the Arbitration Agreement constitutes a choice of forum clause, the Court “must consider the impact of [La. R.S.] 23:921 (A)(2)” in determining the validity of the Agreement.³⁰ La. R.S. 23:921(A)(2) provides as follows:

The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum or choice of law clause in an employee’s contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

Because she entered into the employment Arbitration Agreement before the dispute giving rise to this litigation occurred, and she has not subsequently agreed to the terms of the Arbitration Agreement, Langlois argues that pursuant to La. R.S. 23:921(A)(2), the Arbitration Agreement is null and void. Langlois further contends that La. R.S. 23:921(A)(2) is not preempted by the FAA because it is based on strong public policy governing only when an arbitration agreement may be entered into and, therefore, does not conflict with the use of or purpose of the FAA.

28 La. Civ. Code. art. 1906.

29 *Gipson v. Fortune*, 45,021(La.App. 2 Cir. 1/27/10), 30 So.3d 1076, 1079.

30 Rec. Doc. 8, p. 3.

Because the “FAA preempts state laws that restrict the enforcement of arbitration agreements ... thereby conflict[ing] with the FAA’s dispute resolution regime,”³¹ the Court must first determine whether such a conflict exists here. The express language of the FAA makes arbitration agreements entered into pre-dispute enforceable, since it makes “a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... valid, irrevocable, and enforceable.”³² In contrast, La. R.S. 23:921(A)(2) only authorizes employers and employees to enter into post-dispute arbitration agreements.

31 *Sherman v. RK Restaurants Holdings, Inc.*, 2014 WL 4540023, *7 (E.D. La. Sept. 11, 2014).

32 9 U.S.C. § 2.

As for Langlois’ public policy argument, the Court acknowledges that 9 U.S.C. § 2 gives States a method of “regulat[ing] contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of *any* contract.’”³³

But the Supreme Court has instructed that, “[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms ... but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration on an unequal ‘footing,’ directly contrary to the [FAA’s] language and Congress’ intent.”³⁴

33 *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 115 S.Ct. 834, 843, 130 L.Ed.2d 753 (1995)(quoting 9 U.S.C. § 2)(emphasis added)).

34 *Id.* (citing *Volt Info. Sci., Inc. v. Board of Tr. Of Leland Stanford U.*, 489 U.S. at 468, 474, 109 S.Ct. 1248, 1253, 103 L.Ed. 2d 488 (1989)).

*4 In *Sherman v. RK Restaurants Holdings, Inc.*, the Eastern District of Louisiana considered whether the FAA preempted La. R.S. 23:921.³⁵ In conducting its analysis, the *Sherman* court relied heavily on the Fifth Circuit’s decision in *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, in which the Fifth Circuit held that the FAA preempted La. R.S. 9:2779—another Louisiana

statute that prohibited forum selection clauses outside of Louisiana in construction contracts.³⁶ In finding that the district court properly compelled the parties to arbitrate, the *Chet Morrison* court explained:

La. R.S. 9:2779 declares “null and void an unenforceable against public policy any provision in [certain construction subcontracts] ... which [] [r]equires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of [Louisiana]. La. Rev. Stat. Ann. 9:2779(B)(1). The statute directly conflicts with § 2 of the FAA because the Louisiana statute conditions the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally. *See Doctor’s Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652. The FAA therefore preempts the Louisiana statute, which prohibits the arbitration agreement between CMC and OPE.”³⁷

Noting the similar forum selection language in La. R.S. 23:921 and La. R.S. 9:2779, the *Sherman* court explained how La. R.S. 23:921 placed conditions on the enforceability of the arbitration agreement at issue, thereby precluding the enforcement of the agreement’s forum selection clause. Because the FAA imposed no similar restrictions on the arbitration agreement, the *Sherman* court concluded that La. R.S. 23:921 directly conflicted with the FAA. Hence, the *Sherman* court held that the FAA preempted La. R.S. 23:921.

35 *Sherman*, 2014 WL 4540023.

36 *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001).

37 *Id.* at 447.

As in *Sherman*, the Court finds that the FAA imposes no similar forum selection clauses as required by La. R.S. 23:921; therefore, La. R.S. 23:921 directly conflicts with the FAA. Moreover, the public policy behind La. R.S. 23:921 places arbitration agreements in the employment context on “unequal footing” with other contracts, which likewise runs afoul to 9 U.S.C. § 2. Accordingly, the Court finds that the FAA preempts La. R.S. 23:921 and the Court shall grant Amedisys’ *Motion to Compel Arbitration*.³⁸

38 Langlois does not dispute the fact that her claims fall within the scope of the Arbitration Agreement,

nor does Langlois assert that any recognized federal statute or policy renders her claims nonarbitrable.

Signed in Baton Rouge, Louisiana on July 27, 2016.

III. CONCLUSION

For the foregoing reasons, it is hereby ordered that Amedisys Holding, LLC's *Motion to Compel Arbitration and Dismiss, Alternatively to Stay Action Pending Arbitration*³⁹ is hereby GRANTED, and Plaintiff Maellen Langlois' claims shall be dismissed without prejudice.

39 Rec. Doc. 4.

All Citations

Not Reported in Fed. Supp., 2016 WL 4059670, 2016 Fair Empl.Prac.Cas. (BNA) 242,340, 2016 Wage & Hour Cas.2d (BNA) 242,340

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2018 WL 3750617

Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Anderson Division.

Michael C. ROCK, individually and as successor
by dissolution to K-Cor, Inc., Plaintiff,

v.

SOLAR RATING & CERTIFICATION
CORPORATION, Defendant.¹

- ¹ Plaintiff named two Defendants in his Complaint —Solar Rating & Certification Corporation and North Carolina State University. [See Doc. 1-1.] On January 22, 2018, Plaintiff filed a stipulation of dismissal, dismissing North Carolina State University from this action. [Doc. 22.]

Case No. 8:17-cv-3401-DCC-JDA

Signed 07/23/2018

Attorneys and Law Firms

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Plaintiff.

**REPORT AND RECOMMENDATION
OF THE MAGISTRATE JUDGE**

Jacquelyn D. Austin, United States Magistrate Judge

*1 This matter is before the Court on a motion to dismiss and to compel arbitration filed by Defendant Solar Rating & Certification Corporation ("SRCC"). [Doc. 7.] On May 10, 2018, the Honorable Donald C. Coggins, Jr., referred the motion to the undersigned magistrate judge [Doc. 15], who is authorized to review the motion and to provide a report and recommendation to the District Court.

PROCEDURAL HISTORY

Plaintiff commenced this action by filing a Complaint in the Anderson County Court of Common Pleas on September 22, 2017, alleging that SRCC breached its contract with Plaintiff. [Doc. 1-1.] Thereafter, SRCC

removed the case to this Court on diversity jurisdiction grounds. [Doc. 1.] On December 21, 2017, SRCC filed a motion to dismiss and to compel arbitration. [Doc. 7.] Plaintiff filed a response in opposition on January 4, 2018 [Doc. 8], to which SRCC filed a reply on January 11, 2018 [Doc. 9]. The motion is now ripe for review.

BACKGROUND

This matter stems from an alleged breach of contract between Plaintiff and SRCC. [See Doc. 1-1.] In the Complaint, Plaintiff alleges that he is an inventor who developed a unique solar collector unit designed for home use and capable of efficiently heating water using solar energy. [Id. at 4 ¶ 5.] Plaintiff contends that he expended considerable sums of money in developing his product and secured patents for his invention. [Id. at 4 ¶ 6.] Plaintiff incorporated a business, known as K-Cor, Inc., to own Plaintiff's intellectual property and the products associated therewith.² [Id. at 4 ¶ 7.] Plaintiff invented the "Rocket Dome" solar collector, which incorporated an innovative design featuring a curved collection surface and a dome covering the top of the collector. [Id. at 4 ¶ 8.] To facilitate the testing, production, and marketing of the Rocket Dome, Plaintiff sought to standardize production and to ensure compliance with all requirements for necessary testing prior to market entry. [Id. at 4 ¶ 9.] Plaintiff alleges that he developed a network of distributors who were prepared to market and sell the Rocket Dome once testing had been completed and production was underway. [Id. at 4 ¶ 10.]

- ² K-Cor filed for dissolution on December 15, 2015. [Doc. 1-1 at 3 ¶ 2.] Plaintiff, who was the sole owner of K-Cor, is the successor by dissolution to any claims owned by K-Cor at the time of dissolution. [Id.]

In 2014, Plaintiff entered into a contract with SRCC to perform the required testing of the Rocket Dome, including testing for durability, functionality, and efficiency. [Id. at 5 ¶¶ 11-12.] Plaintiff contends that SRCC contracted with third-parties to conduct the testing, including the North Carolina State University ("NCSU"), through its North Carolina Clean Energy Technology Center, a lab certified to conduct testing pursuant to SRCC guidelines. [Id. at 5 ¶ 13.] Pursuant to Plaintiff's contract with SRCC, the Rocket Dome underwent testing to determine its instantaneous thermal

efficiency (“efficiency rating”). [*Id.* at 5 ¶ 14.] SRCC was supposed to use standard testing methods and definitions. [*Id.* at 5 ¶ 15.]

*2 Plaintiff alleges, however, that SRCC performed multiple calculations that resulted in an efficiency rating that was inaccurate and not in conformity with appropriate standards. [*Id.* at 6 ¶ 18.] Due to its design, the Rocket Dome did not fit within SRCC’s testing protocol, and the standards used by SRCC did not take the Rocket Dome’s unique design into consideration. [*Id.* at 6–7 ¶ 22.] SRCC refused to alter its testing methodology accordingly, causing the actual functionality and thermal efficiency of the Rocket Dome to be inaccurate and misleading. [*Id.* at 6–7 ¶¶ 22–23.] According to Plaintiff, despite being informed of the inaccuracy, SRCC deliberately chose to report only the inaccurate efficiency rating based on the incorrect methodology it applied. [*Id.* at 7 ¶ 24.] SRCC reported the inaccurate results of its testing on its publicly available website and in other places. [*Id.* at 7 ¶ 25.] As a result of SRCC’s published inaccurate information about the Rocket Dome, Plaintiff was unable to sell his product and the distributors were no longer interested in marketing the Rocket Dome to potential customers. [*Id.* at 8 ¶ 29.]

In response, Plaintiff commenced this action and, in his Complaint, asserts causes of action for breach of contract [*id.* at 8–9 ¶¶ 29–35] and for product disparagement [*id.* at 9–10 ¶¶ 36–46]. SRCC now seeks to compel arbitration of the claims alleged in the Complaint. [*See* Doc. 7.]

APPLICABLE LAW

Motion to Compel Arbitration

The Federal Arbitration Act (“FAA”) establishes a “strong federal public policy in favor of enforcing arbitration agreements” and is designed to “ensure judicial enforcement of privately made agreements to arbitrate.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 219 (1985). The FAA was enacted “in 1925 in order ‘to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.’” *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 639 (4th Cir. 2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

“Underlying this policy is Congress’s view that arbitration constitutes a more efficient dispute resolution process than litigation.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (citation omitted).

The FAA provides that arbitration clauses in contracts involving interstate commerce “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. Under the FAA, a district court must compel arbitration and stay court proceedings if the parties have agreed to arbitrate their dispute. *Id.* §§ 2, 3. But, if the validity of the arbitration agreement is in issue, a district court must first decide if the arbitration clause is enforceable against the parties. *Id.* § 4. “[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 349 (4th Cir. 2001) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). “A court should not deny a request to arbitrate an issue ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” *Id.* at 349–50 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)). Nevertheless, “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

A party seeking to compel arbitration must do so by establishing the following four elements: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision purporting to cover the dispute; (3) the relationship of the transaction, as evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal of a party to arbitrate the dispute. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005); *see also Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991); *Energy Absorption Sys. v. Carsonite Int’l*, 377 F. Supp. 2d 501, 504 (D.S.C. 2005). “[E]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.” *Adkins*, 303 F.3d at 501 (internal quotations and citation omitted). “Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation.” *Id.* (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). “[T]he party resisting arbitration bears the burden of proving

that the claims at issue are unsuitable for arbitration.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 81 (2000). Thus, where a valid arbitration agreement exists and covers the claims at issue, this Court has “no choice but to grant a motion to compel arbitration.” *Adkins*, 303 F.3d at 500 (4th Cir. 2002).

Motion to Dismiss

*3 The FAA requires a court to stay “any suit or proceeding” pending arbitration of “any issue referable to arbitration under an agreement in writing for such arbitration, and “[t]his stay-of-litigation provision is mandatory.” *Adkins*, 303 F.3d at 500; *see also* 9 U.S.C. § 3. But, the Fourth Circuit has also held that if all of the claims asserted in a complaint are subject to arbitration, dismissal of the complaint is “an appropriate remedy.” *Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001). Although the Fourth Circuit has acknowledged the inconsistency between its opinions on this issue, *see Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012) (“There may be some tension between our decision ... indicating that a stay is required when the arbitration agreement ‘covers the matter in dispute’—and *Choice Hotels*—sanctioning dismissal ‘when all of the issues presented ... are arbitrable.’”), presently in this Circuit, a district court must stay an action pending arbitration of any arbitrable claims, with the exception that it may instead dismiss an action if all claims asserted are arbitrable. *See Weckesser v. Knight Enterprises S.E., LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017).

DISCUSSION

SRCC seeks to compel arbitration of the claims alleged in Plaintiff’s Complaint. [Doc. 7 at 1.] SRCC also asks the Court to dismiss Plaintiff’s Complaint. [Id.] The Court will address each issue below.

Motion to Compel Arbitration

SRCC argues that the claims raised in the Complaint are subject to an arbitration agreement. [Doc. 7-1 at 1, 3.] Plaintiff, on the other hand, counters that he should not be compelled to arbitration. [Doc. 8.] Specifically, Plaintiff contends that SRCC has failed to prove that the Contract between the parties contains an agreement to arbitrate. [Id. at 3–4.] Plaintiff also contends that, to the

extent the Court finds SRCC met its burden of proving the existence of an agreement to arbitrate, any such arbitration agreement is unconscionable and therefore unenforceable. [Id. at 4–6.]

As noted, a party seeking to compel arbitration must do so by establishing the following four elements: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision purporting to cover the dispute; (3) the relationship of the transaction, as evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal of a party to arbitrate the dispute. The Court will evaluate the parties’ arguments and apply each of the elements of the four-part test to compel arbitration outlined above.

Existence of a Dispute and Refusal to Arbitrate

As an initial matter, the parties’ submissions show, and neither party has denied, (1) that a dispute exists between the parties and (2) that Plaintiff has refused to arbitrate. Thus, the first and fourth elements are met.

Relationship to Interstate Commerce.

The transaction between the parties involves interstate commerce as defined in the FAA. [Doc. 7-1 at 5–6.] The FAA defines “commerce” to include “commerce among the several States.” 9 U.S.C. § 1. “[T]he term ‘involving commerce’ in the FAA [is] the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” *Citizens Bank v. Alafabco*, 539 U.S. 52, 56 (2003).

As alleged in the Complaint, K-Cor, the company created to own Plaintiff’s intellectual property and the products associated therewith, was a South Carolina corporation. [Doc. 1-1 at 3 ¶ 2.] SRCC is a Florida corporation. [Id. at 3–4 ¶ 3.] NCSU is a political subdivision of the State of North Carolina. [Id.] As Plaintiff alleges, SRCC and NCSU provided K-Cor with services, including testing, which were performed, in part, at the North Carolina Clean Energy Technology Center on NCSU’s campus in Raleigh, North Carolina. [Id. at 5 ¶ 13.] Based on these allegations, it is clear that the transaction involved interstate commerce. Plaintiff makes no argument to the contrary in his submissions. Therefore, the undersigned finds that the Program Agreement involves interstate commerce and is subject to the FAA.

***4 Existence of an Agreement to Arbitrate Covering the Dispute**

As to the second element, requiring a written agreement that includes an arbitration provision covering the dispute, the parties disagree as to whether such an agreement exists. As noted, Plaintiff alleges in his Complaint that the parties entered into a valid and enforceable Contract, wherein SRCC agreed to evaluate the efficiency of the Rocket Dome, among other things, and to report accurate results. [Doc. 1-1 at 8 ¶¶ 30–31.] Despite referencing the Contract in the Complaint, Plaintiff did not attach a copy of the Contract to his Complaint.

SRCC, on the other hand, attached a document, entitled “SRCC™ OG-100 Certification Program Agreement” (“Program Agreement”), to its motion to compel arbitration, which SRCC contends is the Contract between the parties. [Doc. 7-2.] Paragraph 16 of the Program Agreement provides for “Dispute Resolution” as follows:

All disputes concerning product certification will be resolved consistent with the SRCC *Certification and Approval Appeal Policy*. Any questions arising from interpretation of this Agreement shall be settled through discussion between the Parties in good faith. If such matters or questions are not settled between the Parties, the Parties agree that all disputes arising from, or related to, this Agreement shall be resolved through binding contract arbitration to be held in the state of Florida in the United States of America, and to be governed by the laws of the State of Florida, U.S.A.

[Doc. 7-2 at 6.]

Despite SCRR’s production of the Program Agreement, Plaintiff argues SRCC has failed to demonstrate the

existence of a valid agreement to arbitrate. [Doc. 8 at 3–4.] Plaintiff notes that, while he “signed several documents and arranged to pay applicable fees,” he “has not maintained a copy of any written agreement with the SRCC.” [Id. at 2.] Plaintiff further explains he “does not recall ever signing an agreement that contained language binding the parties to arbitrate any disputes.” [Id.] More specifically, Plaintiff argues he “recalls receiving a copy of a fee schedule and policies for testing methodology ... [and] recalls signing documentation allowing the SRCC to take possession of his property for purposes of testing ... [but] does not recall signing the [Program] Agreement or ever seeing documentation related to arbitration.” [Id. at 2 n.2.] Finally, Plaintiff asserts that the Program Agreement is both unsigned and lacks any specific references to Plaintiff. [Id. at 4.] The Court finds that Plaintiff’s arguments are without merit and, for the reasons that follow, that SRCC has met its burden of showing the existence of a written agreement between the parties that contains a valid agreement to arbitrate.

SRCC has submitted the Declaration of Eileen Prado, the Executive Director of SRCC. [Doc. 9-1.] In her Declaration, Prado avers that SRCC administers a number of programs, including the OG-100 Certification Program (the “Program”), through which SRCC certifies the compliance of solar thermal collectors, such as the Rocket Dome, with standards promulgated by the International Code Counsel and SRCC. [Id. at 2–3 ¶¶ 3–4.] Before SRCC will evaluate a product through the Program, an applicant must register for an account with SRCC on the SRCC website. [Id. at 3 ¶ 5.] After registering an account, an applicant must apply for the Program. [Id. at 3 ¶ 6.] The only way for an applicant to apply for the Program, at the time Plaintiff applied, was through the online application process. [Id. at 3 ¶ 7.] The Program Agreement is formed during the application process through transactions on the SRCC website. [Id. at 3 ¶ 8.]

*5 Prado avers that Plaintiff requested an SRCC assessment for his product on February 16, 2014, registering for the Program through the SRCC website, at which time he created a username and password and submitted an online payment to SRCC in the amount of \$500. [Id. at 3 ¶¶ 9–10.] On February 26, 2014, Plaintiff logged into his account on the SRCC website and selected the “Collector Package.” [Id. at 3 ¶ 12.] Plaintiff progressed through the application process and

input the required information regarding his product. [*Id.* at 4 ¶¶ 13–14.] Plaintiff was then prompted to submit an online payment to SRCC in the amount of \$2,750 to participate in the Program’s Collector Package. [*Id.* at 4 ¶ 14.] Before transmitting payment, Plaintiff was required to check a box acknowledging that he read and understood the Program Agreement, with a link to the Program Agreement and the following statement: “I have acknowledge [sic] that I have read and understand the SRCC OG-100 Certification Program Agreement and hereby attest that I am duly authorized to agree to the terms and conditions ...” [*Id.* at 4–5 ¶¶ 15–18.] The website would not allow Plaintiff to complete the payment transaction without checking the appropriate box acknowledging and accepting the terms of the Program Agreement. [*Id.* at 5 ¶ 19.] Plaintiff checked the box, acknowledging and accepting the terms of the Program Agreement, and initiated the payment to enter the Program’s Collector Package. [*Id.* at 5 ¶¶ 20–21.] A link to the Program Agreement was made available to Plaintiff in his online account. [*Id.* at 5 ¶ 22; Doc. 9-1 at 9.] Thus, in light of the evidence proffered by SRCC, the Court finds that Plaintiff consented to the Program Agreement by providing his electronic signature.

Plaintiff contends that he does not recall signing the Program Agreement [Doc. 8 at 2–4]. The Court finds this argument lacks merit and is insufficient to challenge the validity of the arbitration agreement.

[A] witness who states that he cannot remember whether or not an event alleged to have happened by the moving party actually took place does not help the nonmoving party to meet its burden. The nonmoving party must come up with evidence that negates the version of events alleged by the moving party—an acknowledgment that the event may have occurred, but the witness cannot remember, falls short.

Gordon v. TBC Retail Grp., Inc., No. 2:14-cv-03365-DCN, 2016 WL 4247738, at *7 (D.S.C. Aug. 11, 2016) (explaining that a signatory’s inability to remember signing an agreement, or other surrounding facts, is

insufficient to create a genuine dispute of fact as to the authenticity of the signature) (quoting *Cox v. United States*, No. 1:13-cv-582-2015 WL 1040577, at *3 (M.D.N.C. Mar. 10, 2015)). SCRR has presented evidence that Plaintiff electronically signed the arbitration agreement using a digital signature that only Plaintiff was capable of entering. Plaintiff admits that he signed various documents in his brief, though he does not specifically recall signing the Program Agreement. Finally, and importantly, “an unsworn failure to recall signing the agreement is insufficient to create an issue of fact as to the validity of the arbitration agreement.” *Hamlin v. Dollar Tree Stores, Inc.*, No. 2:17-cv-2648-PMD, 2017 WL 6034325, at *1 (D.S.C. Dec. 6, 2017); see also *Gadberry v. Rental Servs. Corp.*, No. 0:09-cv-3327-CMC-PJG, 2011 WL 766991, at *2 (D.S.C. Feb. 24, 2011) (finding no genuine issue of material fact where an employee failed to introduce affirmative evidence that he did not sign the contract containing an arbitration agreement).

As noted above, SCRR employed a “click-through” process for its Program Agreement, which required Plaintiff to affirmatively click an “I Agree” box before entering the Program, a process which has been termed a “clickwrap” agreement by courts. See *Kraft Real Estate Investments, LLC v. HomeAway.com, Inc.*, No. 4:08-cv-3788, 2012 WL 220271, at *7 (D.S.C. Jan. 24, 2012) (collecting cases). “Most courts have concluded that clickwrap agreements are valid, enforceable contracts” and have concluded that “by affirmatively clicking an ‘I Agree’ box, a party demonstrates acceptance of these contracts in accordance with the posted terms.” *Id.* (citing *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162 (E.D. Cal. 2003) (finding that clicking an “I agree” box on web site evinced express agreement to terms); *i. Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (holding that clicking “I agree” box is an appropriate way to form enforceable contract)). Plaintiff’s electronic signature acknowledging and accepting the terms of the Program Agreement, by clicking the “I agree” box, constitutes a valid and binding agreement.

*6 In sum, SRCC has submitted a copy of the Program Agreement, in which the parties agreed that “all disputes arising from, or related to, this Agreement shall be resolved through binding contract arbitration.” [Doc. 7-2 at 6 ¶ 16 (emphasis added).] While Plaintiff contends he does not recall signing the Program Agreement [Doc.

8 at 2], SRCC has produced sufficient evidence in the form of an affidavit and screen shots from Plaintiff's online account [Doc. 9-1] to demonstrate that Plaintiff electronically signed the Program Agreement, which contained an arbitration provision. Accordingly, the undersigned finds that SRCC has met its burden of showing that a written agreement exists, electronically signed by Plaintiff on February 26, 2014, that includes an arbitration provision.

Further, the dispute between the parties falls within the scope of the arbitration agreement. In his Complaint, Plaintiff asserts claims for breach of contract and product disparagement, both arising from SRCC's contractual obligations to test the Rocket Dome using appropriate standards. [Doc. 1-1 at 8-10 ¶¶ 29-46.] As noted above, the Program Agreement provides that all legal disputes arising from the Program must be resolved through binding arbitration. [Doc. 7-2 at 6 ¶ 16.] Accordingly, the claims asserted by Plaintiff are clearly within the scope of the Program Agreement, and Plaintiff has made no arguments to the contrary.

Having found that SRCC has satisfied all four elements of the applicable test to compel arbitration, the Court will now address Plaintiff's arguments that the arbitration agreement is nevertheless unenforceable.

Enforceability of the Agreement

Plaintiff contends that the Program Agreement is unenforceable because it is unconscionable. [Doc. 8 at 4-6.] Because Plaintiff challenges the validity of the Program Agreement, the Court must determine if the arbitration clause is enforceable against the parties. *See* 9 U.S.C. § 4. To determine whether an agreement to arbitrate between the parties is valid, the Court must look to state contract law. The Supreme Court of South Carolina has held, "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 672 S.E.2d 571, 574 (S.C. 2009) (citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 579 S.E.2d 132, 134 (S.C. 2003)). "If the language is clear and unambiguous, the language alone determines the contract's force and effect." *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 413 S.E.2d 866, 868 (S.C. Ct. App. 1992) (citing *Connor v. Alvarez*, 328 S.E.2d 334 (S.C. 1985)). "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used,

to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enters., Inc. v. S.C. Health and Human Servs. Fin. Comm'n*, 373 S.E.2d 584 (S.C. 1988) (citing *Warner v. Weader*, 311 S.E.2d 78, 79 (S.C. 1983)).

As noted, Plaintiff argues that the Program Agreement is unconscionable. [Doc. 8 at 4-6.] "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007). The party challenging the validity of an arbitration agreement bears the burden of showing that the arbitration agreement is unenforceable. *Joyner v. GE Healthcare*, No. 4:08-cv-2563-TLW-TER, 2009 WL 3063040, at *3 (D.S.C. Sept. 18, 2009) (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 644 S.E.2d at 669 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

*7 Plaintiff first argues that the Program Agreement is unconscionable because it is a contract of adhesion. [Doc. 8 at 5.] "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 644 S.E.2d at 669 (citing *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001)). "Adhesion contracts, however, are not per se unconscionable." *Simpson*, 644 S.E.2d at 669; *see also* *Towles v. United HealthCare Corp.*, 524 S.E.2d 839, 845-46 (S.C. Ct. App. 1999) (upholding arbitration agreement that conditioned employee's continued employment on acceptance of arbitration policy). As the South Carolina Supreme Court has noted, the standardization of contracts is "a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations." *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898, 902 (S.C. Ct. App. 1998) (quoting *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1015 (M.D. Ala. 1997)). Plaintiff makes no argument as to how the arbitration agreement is unconscionable other than to say it is an adhesion contract, and he fails to

present any evidence to support such an argument. Thus, this claim is without merit.

Next, Plaintiff argues that the Program Agreement is unconscionable because the parties are “grossly unequal in their relative bargaining power,” asserting that Plaintiff is a small business owner with insignificant experience entering and negotiating contracts, that Plaintiff was not represented by counsel in entering the Program Agreement, and that the parties did not negotiate the contract terms. [Doc. 8 at 5.] Such arguments are insufficient to avoid a binding arbitration agreement. The “mere fact that one party to the contract is larger than the other” cannot be the basis of a finding of unconscionability of an arbitration clause in a contract. *Rowe v. AT & T, Inc.*, No. 6:13-cv-01206-GRA, 2014 WL 172510, at *10 (D.S.C. Jan. 15, 2014) (citing *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991)); see also *AT & T Mobility, LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011) (explaining that “the times in which consumer contracts were anything other than adhesive are long past”). Likewise, “[i]nequality of bargaining power alone will not invalidate an arbitration agreement.” *Munoz*, 542 S.E.2d at 365 n.5 (internal citations omitted). Moreover, a party to a contract has a duty to read the contract and learn its contents before signing it. See *id.* at 365 (“[A] person who can read is bound to read an agreement before signing it.”); *Regions Bank v. Schmauch*, 582 S.E.2d 432, 440 (S.C. Ct. App. 2003) (“A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.”); *Burwell v. S.C. Nat'l. Bank*, 340 S.E.2d 786, 789 (S.C. 1986); *Cont'l Jewelry Co. v. Kerhulas*, 134 S.E. 505, 507 (S.C. 1926) (emphasizing that a defendant who is “not capable of reading understandingly for himself” has a “duty ... to read the contract he was requested to sign, or to have it read and explained to him by some other person”). Further, Plaintiff’s contention that the Program Agreement is unconscionable because he is a small business owner is unavailing because “setting up a small business requires business acumen and likely legal assistance.” *Farrow Rd. Dental Grp., P.A. v. AT&T Corp.*, No. 3:17-cv-01615-CMC, 2017 WL 4216158, at *4 (D.S.C. Sept. 22, 2017) (finding arbitration clause was not unconscionable).

Plaintiff also contends that the Program Agreement fails because he was compelled to seek the services of SRCC and lacked meaningful choice in selecting an entity to certify his product. [Doc. 8 at 5.] As noted by SRCC, Plaintiff was not obligated to use SRCC’s services. [Doc. 9 at 7.] Further, Plaintiff’s argument addresses the lack of his meaningful choice as to the entire contract, not specifically the arbitration clause. “There are two types of challenges to the validity of arbitration agreements. One challenges specifically the agreement to arbitrate and the other challenges the agreement (contract) as a whole. The former is an issue to be addressed by the courts and the latter is to be addressed by an arbitrator.” *Smalls v. Advance Am.*, No. 2:07-cv-3240-TLW-TER, 2008 WL 4177297, at *9 (D.S.C. Sept. 5, 2008) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). Here, Plaintiff challenges the validity of the contract as a whole because he asserts he had no meaningful choice in selecting a certification entity. This Court’s review, however, is limited to the substantive validity of the agreement to arbitrate.

*8 Finally, Plaintiff argues that the arbitration provision in the Program Agreement is “one-sided,” claiming that the language of the arbitration provision indicates that any dispute resolution shall be resolved based on SRCC policy. [Doc. 8 at 5–6.] This contention misstates the plain language of the arbitration clause, which provides that “all disputes arising from, or related to, this Agreement shall be resolved through binding contract arbitration to be held in the state of Florida in the United States of America, and to be governed by the laws of the State of Florida, U.S.A.” [Doc. 7-2 at 6 ¶ 16.] Thus, Plaintiff has failed to advance any valid argument that the binding arbitration, to be conducted pursuant to Florida state law according to the Program Agreement, would be one-sided or unconscionable. This court cannot conclude that Plaintiff did not have a meaningful choice when entering the Program Agreement or that the arbitration clause is not “geared towards achieving an unbiased decision by a neutral decision-maker.” *Wiley v. Advance Am.*, No. 3:07-cv-3533-TLW-TER, 2008 WL 4179652, at *14 (D.S.C. Sept. 5, 2008) (quoting *Simpson*, 644 S.E.2d at 669).

Based on the clear and unambiguous language of the Program Agreement, the undersigned finds the Program Agreement is valid and enforceable, and that Plaintiff’s claims are expressly covered by its mandatory requirement to arbitrate. Furthermore, SRCC has demonstrated all

of the required elements for compelling arbitration. Therefore, it is recommended that the SRCC's motion to compel arbitration be granted. *See Adkins*, 303 F.3d at 500–01.

Motion to Dismiss

Having concluded that arbitration is proper in this case, the Court must now consider whether to dismiss this action. SRCC asks that the Court dismiss this case with prejudice. [Doc. 7-1 at 9–10.] “When an order to arbitrate has been issued for all claims brought before a court, courts are split on whether the filed action should be dismissed or stayed pending the outcome of the arbitration.” Richard A. Bales & Melanie A. Goff, *An Analysis of an Order to Compel Arbitration: To Dismiss or Stay?*, 115 Penn St. L. Rev. 539, 541 (2011) (collecting cases). The FAA requires a district court, upon motion by any party, to stay judicial proceedings involving issues covered by written arbitration agreements. 9 U.S.C. § 3. However, the FAA is silent as to whether a court may dismiss a case when all issues involved are covered by the applicable arbitration agreement.

As stated, the Fourth Circuit has concluded that, while the FAA requires judges to stay a case involving issues covered by a written arbitration agreement, dismissal without prejudice is the proper remedy when all of the issues presented in a lawsuit are subject to arbitration. *See Choice Hotels*, 252 F.3d at 709–10 (“Notwithstanding the terms of § 3 [of the FAA], however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.”); *Greenville Hosp. Sys. v. Emp. Welfare Ben. Plan for Emps. of Hazellhurst Mgmt. Co.*, 628 F. App'x 842, 845–46 (4th Cir. 2015) (affirming dismissal and holding that when “a court determines, after applying this presumption in favor of arbitration, that all of the issues presented are arbitrable, then it may dismiss the case, as the district court did here”).

Courts in this District have routinely held that dismissal is the proper remedy when all claims asserted in a case fall within the scope of an arbitration agreement. *See, e.g.,*

Cox v. Assisted Living Concepts, Inc., No. 6:13-cv-00747, 2014 WL 1094394, at *8 (D.S.C. Mar. 18, 2014); *Fleetwood Transp. Corp. v. Packaging Corp. of Am.*, No. 6:10-cv-1219-JMC, 2012 WL 761737, at *5 (D.S.C. Mar. 8, 2012); *Thomas v. Santander Consumer USA Inc.*, No. 0:15-cv-04980-CMC-PJG, 2016 WL 5956279, at *4 (D.S.C. Oct. 14, 2016) (“Dismissal is appropriate when, as here, all claims fall within the scope of an enforceable arbitration provision”); *Patterson v. Asbury SC Lex, L.L.C.*, No. 6:16-cv-1666-MGL, 2016 WL 7474377, at *4 (D.S.C. Dec. 29, 2016) (compelling arbitration and dismissing case where the “only issue in Plaintiff’s suit is arbitrable”); *Carmichael v. Hilton Head Island Dev. Co., LLC*, No. 9:16-cv-1641-PMD, 2016 WL 4527194, at *4 (D.S.C. Aug. 30, 2016) (“the proper course of action is to dismiss the case” when all claims are arbitrable); *St. Denis v. OneMain Fin., Inc.*, No. 8:12-cv-01669-TMC, 2012 WL 6061022, at *3 (D.S.C. Dec. 6, 2012) (dismissing action and compelling arbitration where plaintiff’s sole claim was subject to arbitration); *St. Andrews Townhomes Homeowners’ Ass’n, Inc. v. Beazer Homes USA, Inc.*, No. 4:09-cv-00382-TLW-TER, 2010 WL 985385, at *2 (D.S.C. Mar. 12, 2010); *Willard v. Dollar Gen. Corp.*, No. 3:17-cv-00675-JMC, 2017 WL 4551500, at *4 (D.S.C. Oct. 12, 2017). Based on the foregoing, and because the Court finds that all of the claims in this dispute are subject to arbitration, it is recommended that the Complaint be dismissed.

RECOMMENDATION

*9 Accordingly, for the reasons explained above, it is recommended that SRCC’s motion to compel arbitration [Doc. 7] be GRANTED and that the case be DISMISSED.

IT IS SO RECOMMENDED.

All Citations

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Only the Westlaw citation is currently available.

United States District Court, D.
South Carolina, Charleston Division.

Jacqueline HAMLIN, Plaintiff,

v.

DOLLAR TREE STORES, INC., Defendant.

C.A. No.: 2:17-cv-2648-PMD

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Signed 12/05/2017

|
Filed 12/06/2017

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Defendant.

ORDER

PATRICK MICHAEL DUFFY, United States District
Judge

*1 This matter is before the Court on Defendant Dollar Tree Stores, Inc.'s motion to dismiss or, in the alternative, to compel arbitration. (ECF No. 4). For the reasons set forth herein, the Court grants Dollar Tree's request to compel arbitration and consequently denies its motion to dismiss as moot.

BACKGROUND AND PROCEDURAL HISTORY

This action arises out of an employment dispute. Plaintiff Jacqueline Hamlin alleges that she was terminated for refusing to falsify a submission to OSHA, and filed this action against Dollar Tree because her termination violated public policy. Dollar Tree filed the instant motion on October 2, 2017. Hamlin responded on October 16, and Dollar Tree replied on October 23. Accordingly, this matter is ripe for consideration.

LEGAL STANDARD

Once a litigant moves to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, the district court determines whether a matter should be resolved through arbitration depending on (1) whether a valid arbitration agreements exists and, if so, (2) whether the dispute falls within the scope of the arbitration agreement. *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986); *see Hooters of Am. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). The Supreme Court has consistently encouraged a "healthy regard for the federal policy favoring arbitration." *Levin v. Alms & Assocs.*, 634 F.3d 260, 266 (4th Cir. 2011) (internal quotation marks and citation omitted). "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Id.* (citation omitted).

DISCUSSION

Hamlin's arguments all relate to whether a valid arbitration agreement exists, and does not contend that this dispute falls outside the scope of the agreement. Hamlin maintains that the arbitration agreement is invalid for several reasons. First, she briefly argues that she does not recall signing the arbitration agreement. Additionally, she argues that the arbitration agreement lacks consideration, is procedurally unconscionable, and is adhesive in nature.

The Court first addresses Hamlin's argument that she does not recall signing the arbitration agreement. It is not clear whether Hamlin makes this argument in earnest or merely references her lack of recollection as an additional fact for the Court to consider. In any event, the Court concludes that her argument lacks merit. First, Dollar Tree has presented evidence that Hamlin digitally signed the arbitration agreement using a digital signature that only she was capable of entering. Second, Hamlin admits that she signed the agreement in various places in her brief. Finally, an unsworn failure to recall signing the agreement is insufficient to create an issue of fact as to the validity of the arbitration agreement. *See Gadberry v. Rental Servs. Corp.*, No. 0:09-cv-3326-CMC-PJG, 2011 WL 766991, at *2 (D.S.C. Feb. 24, 2011) (finding no genuine issue

of material fact where an employee failed to introduce affirmative evidence that he did not sign the contract containing an arbitration agreement). Accordingly, the Court rejects Hamlin's contention that she does not recall signing the arbitration agreement as a ground to challenge the validity of that arbitration agreement.

*2 The Court next turns to consideration. "[E]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) (quoting *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997)). "Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation." *Id.* (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). "An arbitration agreement is supported by adequate consideration when the parties mutually agree to be bound by the arbitration process and the agreement does not permit the employer to ignore the results of arbitration." *Anschel v. Edward D. Jones & Co.*, No. 4:10-cv-1651-TLW-TER, 2010 WL 5625710, at *3 (D.S.C. Oct. 12, 2010) (citing *Adkins*, 303 F.3d at 501).

Hamlin's consideration arguments are based on Maryland law and are premised on the idea that an offer of employment, or continued employment, is not sufficient consideration for an arbitration agreement. The Court is perplexed by Hamlin's reliance on Maryland law, as this arbitration agreement was entered into in South Carolina, for employment in South Carolina, and there are no choice of law provisions electing Maryland law. When looking to state law on contract formation, the Court sees no reason to look anywhere but South Carolina. Here, Hamlin's employment at Dollar Tree was adequate consideration to support the arbitration agreement under South Carolina law, *see Towles v. United HealthCare Corp.*, 524 S.E.2d 839, 845 n.4 (S.C. Ct. App. 1999), and the mutual obligation to arbitrate is also itself adequate consideration, *see Anschel*, 2010 WL 5625710, at *3. Accordingly, the Court rejects Hamlin's argument that the arbitration agreement was not supported by consideration.

Next, the Court turns to Hamlin's argument that the arbitration agreement is procedurally unconscionable. The Court concludes that the arbitration agreement is not procedurally unconscionable. Here, Hamlin admits that she signed the arbitration agreement but states that

it was buried among other work training documents. Additionally, she states that no one explained the agreement to her, and that the agreement was mandatory. This Court has previously held on similar facts that such circumstances do not make a contract unconscionable. In *Ortberg v. Holiday Kamper Co. of Columbia, LLC*, the plaintiff admitted that she received and signed an arbitration agreement, but argued that no one explained the arbitration agreement to her. No. 2:10-cv-962-CWH-BM, 2010 WL 6647761, at *4 (D.S.C. Aug. 27, 2010), *adopted by* 2011 WL 1883853 (D.S.C. May 17, 2011). This Court held that the lack of explanation did not invalidate the arbitration agreement. *Id.* As the South Carolina Court of Appeals has explained, South Carolina law "does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Towles*, 524 S.E.2d at 845. Thus, Dollar Tree's failure to explain the arbitration agreement is hardly fatal to its argument.

Finally, Hamlin argues that the arbitration provision is adhesive in nature and thus provides another basis for the Court to hold that the arbitration agreement is unconscionable. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 669 (S.C. 2007) (citing *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001)). "Adhesion contracts, however, are not per se unconscionable." *Id.* "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 757 (S.C. 2004) (citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (S.C. 1996)).

*3 Hamlin argues that Dollar Tree drafted the arbitration agreement, that she had no meaningful bargaining power, that she cannot select the arbitrator and has no say in who is on the list of proposed arbitrators, and that the arbitration agreement does not allow for any meaningful discovery. The Court accepts Hamlin's first two arguments. It is clear that Dollar Tree drafted the agreement and that Hamlin had no meaningful bargaining power. However, the Court disagrees with Hamlin's other contentions. A plain reading of the arbitration agreement

reveals that the parties may mutually select the arbitrator that will decide their dispute. Thus, Hamlin is afforded the opportunity to participate in the selection of the arbitrator at the outset. Additionally, if the parties do not agree on an arbitrator, then they must resort to the JAMS rules. Under those rules, the default is again for the parties to agree on an arbitrator. In the event that the parties cannot agree on an arbitrator, JAMS facilitates the selection of an arbitrator from its list. Although Hamlin complains that she has no input as to who is on the list of proposed arbitrators, Dollar Tree does not have any input as to who is on the list either. As for discovery, Hamlin and Dollar Tree are subject to the same JAMS discovery rules and discovery is permitted. Hamlin has not made any showing of how the list of arbitrators or the discovery rules are one-sided, which is the touchstone of unconscionability. Thus, the Court concludes that the arbitration agreement is not unconscionable.

Having concluded that these claims should be arbitrated, the Court stays this action in accordance with the direction in 9 U.S.C. § 3 that cases sent to arbitration should be stayed.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that Dollar Tree's motion to compel arbitration is **GRANTED**. Accordingly, this action is **STAYED**.

AND IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 6034325

2010 WL 500421

Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Charleston Division.

David CARTER and Joseph Gilliard, on Behalf of
Themselves and Others similarly situated, Plaintiffs,

v.

MASTEC SERVICES COMPANY, INC.
d/b/a MasTec Advanced Technologies,
MasTec North America, Inc. d/b/a MasTec
Advanced Technologies, MasTec North
America AC, LLC, d/b/a MasTec Advanced
Technologies, and DirecTV, Inc., Defendants.

C.A. No. 2:09-2721-PMD.

|
Feb. 5, 2010.

West KeySummary

1 Alternative Dispute Resolution

⊞ Validity of assent

Employment arbitration provision was enforceable against employees because the employees failed to opt out of it within the 30-day period provided to take such action. Employees claimed that the employee acknowledgement failed to create a binding arbitration agreement because employer failed to explain the dispute resolution policy to them. However, the employees had ample time to review the dispute resolution policy, as each employee had 30 days to decide if he or she wanted to opt out of it, and the policy encouraged employees to discuss the matter with private legal counsel. 9 U.S.C.A. § 1 et. seq.

5 Cases that cite this headnote

Attorneys and Law Firms

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Jamie Elizabeth Kitces, John T. Stembridge, Lisa A. Schreter, William Keefer Brumbach, III, Littler Mendelson, Atlanta, GA, for Defendants.

ORDER

PATRICK MICHAEL DUFFY, District Judge.

*1 This matter is before the court on Defendants MasTec Services Company, Inc., MasTec North America, Inc., MasTec North America AC, LLC, (collectively "MasTec"), and DirecTV, Inc.'s motion to stay this proceeding and compel Plaintiffs David Carter and Joseph Gilliard ("Plaintiffs") to arbitrate their claims on an individual basis. For the reasons set forth herein, the court grants Defendants' motion.

BACKGROUND

MasTec is in the business of installing satellite dishes, satellite receivers, and related equipment for DirecTV, and Plaintiffs began working for MasTec in October of 2007. According to Plaintiffs, MasTec regularly required "installation personnel" to work more than 40 hours per week, but refused to compensate them for the overtime work completed. When Plaintiffs informed MasTec of its failure to completely compensate them for their overtime work, it allegedly threatened to terminate their employment with the company, and as a result, Plaintiffs eventually ended their employment relationship with MasTec and filed this class action lawsuit to seek relief. As against all Defendants, Plaintiffs allege five causes of action: (1) violation of the Fair Labor Standards Act; (2) violation of the South Carolina Payment of Wages Act; (3) conversion; (4) unjust enrichment; and (5) wrongful discharge in violation of public policy. All five causes of action are based on Defendants' alleged refusal to compensate Plaintiffs for overtime work performed.

In response to Plaintiffs' suit, Defendants contend that both Plaintiffs agreed to submit the claims asserted in their complaint to arbitration; therefore, they ask the court to stay the current action pending the outcome of arbitration. To support its motion, Defendants provided a portion of each Plaintiffs' signed employee handbook, which contains the following provision:

VII. DISPUTE RESOLUTION POLICY

This Dispute Resolution Policy is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. This Policy applies to any dispute arising out of or related to Employee's employment with the Company or termination of employment. **Except as it otherwise provides, this Policy requires all such disputes that have not otherwise been resolved to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.** Such disputes include, without limitation, disputes arising out of or relating to interpretation or application of this Policy, but not as to the enforceability or validity of the Policy or any portion of the Policy. **The Policy also applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the ... Fair Labor Standards Act, ... and all other state statutory and common law claims** (excluding workers compensation, state disability insurance and unemployment insurance claims).

*2

An Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Policy. The Employee must submit a signed and dated statement on a "Dispute Resolution Policy Opt Out" form ("Form") that can be obtained from the Company's Legal Department, 800 Douglas Road, 11th Floor, Coral Gables, Florida 33134, by calling 305-406-1875. In order to be effective, the signed and dated Form must be returned to the Legal Department within 30 days of the Employee's receipt of this Policy. An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision.

(Def. Mot. in Supp. Ex. A (emphasis added).) According to Defendants, each Plaintiff agreed to this provision by signing an acknowledgement, which stated that the employee received a copy of the handbook and that the handbook contained a dispute resolution policy which the employee could opt out of. Defendants have provided the signed acknowledgment for each Plaintiff, and the acknowledgements state, in relevant part:

VIII. EMPLOYEE ACKNOWLEDGEMENT

Each employee receiving this Handbook is required as a condition of his or her employment to acknowledge receipt of the Handbook by signing and dating this form where indicated and by returning the form to the Human Resources Contact.

I acknowledge that on the date recorded below I received the MasTec Employee Handbook ("Handbook"). I acknowledge that the Handbook describes the terms and conditions of my employment with MasTec and that I will review the Handbook immediately.

....

I further acknowledge that the Handbook contains a Dispute Resolution Policy on pages 40-41. The Dispute Resolution Policy provides for final and binding arbitration of designated employment-related disputes. I will review the Dispute Resolution Policy immediately, and I understand I may discuss it with my private legal counsel should I so desire. I acknowledge that I have **thirty (30) days** from the date of my receipt of the Handbook to decide whether I wish to accept the Dispute Resolution Policy or to opt out of being bound by that Policy. If I choose to opt out, I understand that I must return a signed and dated form to that effect to the Company's Legal Department within the 30-day period, as provided in the Dispute Resolution Policy. If I do not return that form within the specified period of time, the Dispute Resolution Policy will apply to both MasTec and me.

(*Id.* Ex. B (emphasis in original).) Based on these provisions, Defendants believe Plaintiffs' claims fall within the scope of the dispute resolution policy and ask the court to enforce the policy by requiring Plaintiffs to proceed with their suit in arbitration on an individual basis.

ANALYSIS

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, "to replace judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552

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U.S. 576, 128 S.Ct. 1396, 1402, 170 L.Ed.2d 254 (2008) (internal quotations and alterations omitted). Section 2 of the Act declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime 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, and § 4 allows a party to such an arbitration agreement to "petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." Pursuant to § 3, the FAA requires a court to stay "any suit or proceeding" pending arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration, and "[t]his stay-of-litigation provision is mandatory." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir.2002). "A district court therefore has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Id.* (citing *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir.2001)).

*3 In the Fourth Circuit, arbitration is appropriate under the FAA if a litigant can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir.2005) (internal quotation omitted). In this matter, Plaintiff contests the second element, denying the existence of a binding contract to arbitrate their dispute. Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

First, Plaintiffs argue the employee acknowledgement failed to create a binding arbitration agreement because Defendants' managers, supervisors, and human resources personnel failed to explain the dispute resolution policy to them. As such, Plaintiffs contend they never knowingly assented to that provision of the handbook. Defendants contend that Plaintiffs had ample time to review the dispute resolution policy, as each employee had 30 days to decide if he or she wanted to opt out of it, and that the policy encourages employees to discuss the

matter with private legal counsel. The court agrees with Defendants. In *Towles v. United Healthcare Corporation*, the South Carolina Court of Appeals rejected a similar argument made by an employee who also had signed an acknowledgement of an employee handbook that required the arbitration of employment-related disputes. 338 S.C. 29, 37-38, 524 S.E.2d 839, 844 (Ct.App.1999). The court found that the employee could not legitimately claim that his employer failed to provide actual notice of the arbitration provision because "the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Id.* at 39, 524 S.E.2d at 845. As the court found in *Towles*, this court finds that Plaintiffs cannot legitimately claim they did not knowingly assent to the dispute resolution policy when they failed to opt out of it within the 30-day period provided to take such action. Also, with respect to Plaintiffs contention that the dispute resolution policy violates public policy because they were forced to sign the acknowledgment of receipt of the handbook to remain employed with Defendants, the court disagrees. In fact, with respect to the arbitration provision, the opposite is true, as Defendants provided Plaintiffs with the choice to opt out of it. Moreover, as stated in the policy, an employee's decision to opt out of the arbitration provision would "not be subject to any adverse employment action as a consequence of that decision." (Def.Mot.Ex. A.) Therefore, Plaintiffs' consent to the dispute resolution policy was not a condition of their employment in violation of S.C.Code Ann. § 15-48-10(b)(2).

*4 Next, Plaintiffs argue the agreement to arbitrate is illusory because Defendants can unilaterally modify the policy. Defendants contend that Plaintiffs have failed to quote any language from the dispute resolution policy that enables them to modify that agreement, and the court, after reviewing the policy itself, did not find any language that supports Plaintiffs' position. The only language cited to by Plaintiffs that permits Defendants to modify the terms of the employment relationship concerns Defendants ability to modify each Plaintiffs' status as at-will employees, which has nothing to do with the matters before this court. Therefore, the court finds no merit in Plaintiffs' argument that its agreement to arbitrate is illusory.

Lastly, Plaintiffs seek to avoid arbitration by arguing that Defendants were never a party to the dispute

resolution policy because they never signed the policy in question, and as a result, they cannot enforce it. MasTec argues the fact that one of its agents did not sign the handbook receipt does not prevent it from enforcing the arbitration provision, and the court agrees. Under South Carolina law, an arbitration provision located within an employment agreement signed by an employee but not the employer can be enforceable and binding on both parties. *See Poteat v. Rich Prods. Corp.*, 91 F. App'x 832, 834 (4th Cir.2004) (finding an agreement to arbitrate was enforceable under South Carolina law despite the fact that the employer never signed the agreement that contained the arbitration provision); *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct.App.1986) (“[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both.”).

DirecTV argues that Plaintiffs' must also pursue their claims against it in arbitration, as the dispute resolution policy covers “any dispute arising out of or related to [their] employment with the Company or termination of employment.” (Defs. Mot. in Supp. Ex. A.) Moreover, DirecTV contends that, although it did not sign the acknowledgment to the employee handbook, Plaintiffs' claims against it are based on the same facts and are inherently inseparable from the claims they assert against MasTec; therefore, Plaintiffs should be required to resolve all of their claims in arbitration. Courts have allowed a nonsignatory to an arbitration agreement to force one of the signatories to that agreement to arbitrate claims against it pursuant to a so-called “intertwined claims” test. *See, e.g., Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528–30 (5th Cir.2000); *Hughes Masonry Co., Inc. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n. 9 (7th Cir.1981). Under the intertwined claims test, “the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.” *Thomson*, 64 F.3d at 779; *see also Choctaw Generation Ltd. P'ship v. American Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir.2001). The rationale for preventing signatories from avoiding arbitration with nonsignatories is based on principles of equitable estoppel. This circuit has explicitly applied the intertwined claims test as articulated by the Eleventh Circuit:

***5 Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.**

Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392, 395–96 (4th Cir.2005) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999) (citations omitted) (emphasis added)). In this case, Plaintiffs allege that DirecTV and MasTec committed the same misconduct by failing to compensate them for overtime work performed; therefore, Plaintiffs' allegations against both Defendants are substantially interdependent of each other. Because Plaintiffs and Defendants formed a valid, binding arbitration agreement, which encompasses Plaintiffs' claims, the court finds the FAA requires arbitration, and it stays the proceedings in this matter, pending the outcome of arbitration.

CONCLUSION

For the foregoing reasons, the court **GRANTS** Defendants' motion to compel arbitration and stay proceedings.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 500421

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Report and Recommendation Adopted as Modified by Wike v. Holiday
Kamper Co. of Columbia, LLC, D.S.C., March 25, 2014

2014 WL 1234311

Only the Westlaw citation is currently available.

United States District Court, D.
South Carolina, Florence Division.

Richard WIKE, Plaintiff,

v.

HOLIDAY KAMPER COMPANY OF
COLUMBIA, LLC d/b/a Camping World RV
Sales, and FreedomRoads, LLC, Defendants.

C/A No. 4:13-2984-RBH-KDW.

Signed March 5, 2014.

Attorneys and Law Firms

Mark Andrew Nappier, Jeffcoat Pike and Nappier,
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D. Michael Henthorne, Littler Mendelson, Kiosha
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Defendants.

REPORT AND RECOMMENDATION

KAYMANI D. WEST, United States Magistrate Judge.

*1 Plaintiff Richard Wike filed this action in the South Carolina Court of Common Pleas, in Horry County against his former employer Defendant Holiday Kamper Company of Columbia, LLC d/b/a Camping World RV Sales ("Camping World") and FreedomRoads, LLC (collectively "Defendants"). ECF No. 1-1. Defendants timely removed this action to federal court on November 1, 2013. ECF No. 1. On November 8, 2013, Defendants filed a Motion to Stay Action Pending Arbitration. ECF No. 5. Plaintiff filed an opposition brief on November 25 2013; Defendant filed a Reply on December 4, 2013. ECF Nos. 8, 9. Having considered the parties' briefs, the undersigned submits this Report recommending the court grant Defendants' Motion.¹

¹ All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28,

U.S.C. § 636(b)(1) (B) and Local Rule 73.02(B)(2)(g),
D.S.C.

I. Background

Plaintiff was employed at Camping World and on June 4, 2010 signed an Arbitration Agreement ["Arbitration Agreement" or "Agreement"]. ECF No. 5-1. In his Complaint Plaintiff asserts that on February 25, 2012, while at his place of employment, he was sexually harassed by a co-worker. Compl. ¶ 4, ECF No. 1-1. Plaintiff alleges that he reported the incident to his superiors and was subsequently terminated for pursuing the harassment matter. Compl. ¶¶ 6-8. Plaintiff alleges causes of action for sexual harassment and retaliation pursuant to Title VII of the Civil Rights Act of 1964 as amended, for breach of contract, and for unlawful employment practices in violation of S.C.Code Ann. § 1-13-80. Compl. ¶¶ 11-31.

Defendants argue that the issues in Plaintiff's lawsuit fall within the coverage of the Arbitration Agreement, and therefore, the Federal Arbitration Act ("FAA") requires a stay of the proceedings pending arbitration of Plaintiff's claims. ECF No. 5 at 2. Plaintiff argues that the Arbitration Agreement "does not clearly define what company is subject to the Agreement" and, as indicated by an earnings statement, FreedomRoads, LLC was one of his employers and was "not a party to the alleged Arbitration Agreement and therefore any claims against Freedom Roads, LLC are not subject to the Arbitration Agreement." ECF No. 8 at 1. Plaintiff does not dispute that the claims alleged in his Complaint are subject to arbitration under the terms of the Agreement.

II. Law/Analysis

"The [FAA], 9 U.S.C. §§ 1-16 (2006), governs the rights and responsibilities of the parties with respect to an arbitration agreement." *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 342 (4th Cir.2009). "Under the [FAA], a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir.2001) (internal quotation marks omitted).

The court views a motion to compel arbitration in light of the strong federal and state policy favoring arbitration. *See, e.g., Patten Grading & Paving, Inc. v. Skanska United States Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir.2004) (noting

strong federal policy favoring arbitration); *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752, 755 (S.C.2004) ("South Carolina law generally favors arbitration."). The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). To that end, "the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir.1989) (citation omitted). Thus, the court may not deny a party's request to arbitrate an issue "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.*

*2 A litigant can compel arbitration under the FAA if the litigant can demonstrate: "(1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect or refusal of the [party] to arbitrate the dispute." *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir.1991).

Plaintiff opposes arbitration stating the agreement "does not clearly define what company is subject to the Agreement." ECF No. 8. The Arbitration Agreement specifically names the parties to the agreement as Camping World RV Sales defined as "the Company" and "the undersigned Associate of the Company." ECF No. 5-1 at 2. Plaintiff executed the last page of the agreement by signing the blank designated "Associate's Signature." *Id.* at 4. Accordingly, the Arbitration Agreement clearly sets forth what company is subject to the Agreement. Additionally, the first paragraph of the Agreement states that all claims and disputes that the Associate may have "with or against the Company, any parent or subsidiary of, or any Company affiliated with the Company or any of its subsidiaries" are subject to the Agreement. *Id.* at 2.

In his Complaint Plaintiff refers to Defendants collectively as Camping World and states in February 2012 he "was employed at Camping World." ECF No. 1-1 at 1. In opposing the Motion to Stay Plaintiff further argues, citing to a March 2012 Earnings Statement, that FreedomRoads, LLC was one of his employers and was not a party to the Arbitration Agreement. Defendants assert that "pursuant to the express terms of the parties' agreement, the Arbitration Agreement applies to [Camping World] and to FreedomRoads as the parent company." ECF No. 9 at 3. Defendants include a footnote explaining that "FreedomRoads acts as the common paymaster for all of its subsidiary dealerships' employees." *Id.* at n. 3. Defendants provide no other documentation regarding the relationship between Camping World and FreedomRoads, LLC. However, even if FreedomRoads, LLC is not a signatory to the Arbitration Agreement, Plaintiff should still be required to resolve his claims in arbitration pursuant to the "intertwined claims" test. *Carter v. MasTec Services Co., Inc.*, C.A. No. 2:09-2721-PMD, 2010 WL 500421, at *4 (D.S.C. Feb.5, 2010) (citing *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528-30 (5th Cir.2000); *Hughes Masonry Co., Inc. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 841 n. 9 (7th Cir.1981)). Based on principles of equitable estoppel, under the intertwined claims test, a signatory to an arbitration agreement is estopped from avoiding arbitration with a nonsignatory "when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Id.*

*3 [A]pplication of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Id. at *5 (quoting *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir.2005)).

In *Carter*, defendant DirecTV argued that the plaintiffs also had to pursue their claims against it in arbitration because, although it did not sign the arbitration acknowledgment, the plaintiffs' claims against it were "based on the same facts and are inherently inseparable from the claims they assert against MasTec." *Id.* The court agreed, finding that because plaintiffs alleged that DirecTV and MasTec committed the same misconduct, plaintiffs' allegations against both defendants were "substantially interdependent of each other." *Id.* at 5. Here, as in *Carter*, Plaintiff's claims against FreedomRoads, LLC are interdependent with his claims against Camping World. Accordingly, even if it is determined that FreedomRoads, LLC is not a party to the Arbitration Agreement, under the principles of equitable estoppel, Plaintiff should be required to pursue his claims against both named Defendants in arbitration.

The FAA requires a court to stay "any suit or proceeding" pending arbitration of "any issue referable to arbitration

under an agreement in writing for such arbitration." 9 U.S.C. § 3. "This stay-of-litigation provision is mandatory." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir.2002). Based on the terms of the Arbitration Agreement, this action should be stayed pending arbitration.

III. Conclusion

Based on the foregoing, the undersigned recommends that Defendants' Motion to Stay Action Pending Arbitration, ECF No. 5, be granted and this matter stayed pending the outcome of the arbitration. It is recommended that the stay be granted with leave to petition the court to dismiss or reinstate the action if necessary and that the parties be instructed to advise the court within 30 days of the close of arbitration.

IT IS SO RECOMMENDED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1234311

2009 WL 3063040
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Florence Division.

Lyndon B. JOYNER, Plaintiff,
v.
GE HEALTHCARE, et. al, Defendants.

C.A. No. 4:08-2563-TLW-TER.
|
Sept. 18, 2009.

West KeySummary

1 Alternative Dispute Resolution

⇒ Validity

Employee was bound by an agreement that any employment discrimination claims were resolved by an enforceable arbitration agreement and thus could not bring a suit against the employer.

9 Cases that cite this headnote

Attorneys and Law Firms

Phoebe A. Clark, Wukela Law Firm, Florence, SC, for Plaintiff.

Benjamin P. Glass, Susanna Hancock Murray, Ogletree Deakins Nash Smoak and Stewart, Charleston, SC, for Defendants.

ORDER

TERRY L. WOOTEN, District Judge.

*1 The Plaintiff brought this civil action arising out of the termination of his employment with Defendant GE Healthcare. On October 24, 2008, Defendants filed a motion to dismiss and petition to compel arbitration and stay proceedings.

This matter is now before the undersigned for review of the Report and Recommendation ("the Report") filed June 26, 2009, by United States Magistrate Judge Tom Rogers, to whom this case had previously been assigned pursuant to 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2) (D.S.C.). In his Report, Magistrate Judge Rogers recommends that the Defendants' motion be granted and that this case be dismissed. The Plaintiff has not objected to the Report.

This Court is charged with conducting a *de novo* review of any portion of the Magistrate Judge's Report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636. In the absence of objections to the Report and Recommendation of the Magistrate Judge, this Court is not required to give any explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir.1983).

In light of this standard, the Court has carefully reviewed the Report and has concluded that the Report accurately summarizes this case and the applicable law. For the reasons articulated by the Magistrate Judge, it is hereby **ORDERED** that the Magistrate Judge's Report is **ACCEPTED** (Doc. # 41), the Defendants' motion is **GRANTED** (Doc. # 22), and this case is dismissed.

IT IS SO ORDERED.

LYNDON B. JOYNER,

Plaintiff,

-VS-

GE HEALTHCARE, KIRK SANSBURY, DARRYL DAVIDS and MARK RIESCH,

Defendants.

REPORT AND RECOMMENDATION

THOMAS E. ROGERS, III, United States Magistrate Judge.

I. INTRODUCTION

Plaintiff filed this action *pro se* on July 15, 2008, alleging causes of action arising out of the termination of his employment with Defendant GE Healthcare. Liberally

construed¹, Plaintiff's Complaint alleges causes of action for racial discrimination, harassment and retaliation pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and violation of the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq.*

¹ A *pro se* litigant's pleadings are accorded a liberal construction. *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed. 163 (1980); *Haines v. Kerner*, 404 U.S. 519, 97 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir.1978); *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.1978).

Defendants filed a Motion to Dismiss Individual Defendants (Document # 21) and a Motion to Dismiss or, in the alternative, Petition to Compel Arbitration (Document # 22) on October 24, 2008. Thereafter, Plaintiff retained counsel and filed Responses to the Motions to Dismiss and a Motion to Amend the Complaint (Document # 37).

All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), DSC. Because the Motions to Dismiss are potentially dispositive of Plaintiff's claims, this Report and Recommendation is entered for review by the district judge.

II. STANDARD OF REVIEW

*2 A motion to dismiss under Rule 12 tests the sufficiency of the complaint. It does not resolve conflicts of facts. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. It does not resolve conflicts of facts, the merits of the claim, or the applicability of defenses asserted. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999), *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In considering a motion to dismiss, the factual allegations in the complaint are accepted as true and the plaintiff is afforded the benefit of all reasonable inferences that can be drawn from those allegations. *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993).

Materials outside the pleadings which relate to jurisdiction can be considered on a motion to dismiss for lack of

jurisdiction. *Land v. Dollar*, 330 U.S. 731, 735, 67 S.Ct. 1009, 1011, 91 L.Ed. 1209 (1947); *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 n. 29 (9th Cir.), cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982). Whether the parties have agreed to arbitrate their disputes is a jurisdictional question. *See Bhd of Ry. & S.S. Clerks v. Norfolk S. Ry. Co.*, 143 F.2d 1015, 1017 (4th Cir.1944) ("Arbitration deprives the judiciary of jurisdiction over the particular controversy and the courts have long ruled that there must be strict adherence to the essential terms of the agreement to arbitrate."). Thus, the Court may consider materials outside the pleadings to determine whether a valid arbitration agreement exists.

III. DISCUSSION

Defendants have filed a Motion to Dismiss Individual Defendants, a Motion to Dismiss, or in the alternative, to Compel Arbitration and Plaintiff has filed a Motion to Amend Complaint. Because the arbitration issue is a question of jurisdiction, that motion will be addressed first.

As noted above, Plaintiff's Complaint can be read to assert claims pursuant to Title VII, the ADA, and the FMLA. Defendants assert that Plaintiff's claims are subject to binding arbitration pursuant to a valid arbitration agreement signed by Plaintiff.

Plaintiff was employed by GE Healthcare (GEHC) as a machinist from July 7, 2003, until July 31, 2007. On June 20, 2003, Plaintiff entered into an agreement with GEHC to submit certain employment disputes to binding arbitration pursuant to GEHC Procedure 2.12 (the RESOLVE program). *See* Exhibit A to Defendant's Motion (Document # 22). The RESOLVE program was updated on November 1, 2006, and was included in the GEHC-Florence Associate Handbook that Plaintiff acknowledged receiving on December 6, 2006. Plaintiff originally agreed on June 20, 2003, that "as a condition of my being hired, I shall use [GEHC]² Procedure 2.12 (RESOLVE Resolution Program) as the exclusive means to resolve certain legal claims related to my employment." Exhibit A to Defendants' Motion (Document # 22). He further agreed that "[i]f I do not settle my covered claims with the Company before the arbitration level of the Dispute Resolution Program, I understand and agree that I must submit such claims to arbitration WHICH SHALL BE FINAL AND BINDING FOR BOTH THE

COMPANY AND ME.” *Id.* He acknowledged that “I will not be employed by the Company until I have signed this Agreement.” *Id.*

2 The agreement signed by Plaintiff on June 20, 2003 referenced GEMS (GE Medical Systems), which is now GEHC.

*3 Included as covered claims are

1. Claims relating to compensation and leaves of absence;

* * *

3. Claims relating to involuntary terminations, such as layoffs and discharges (including constructive discharges), and notice of mass layoffs and/or plant closings;

4. Employment discrimination and harassment claims, based on, for example, age, race, sex, religion, national origin, veteran status, citizenship, handicap/disability, or other characteristic protected by law;

5. Retaliation claims for legally protected activity and/or for whistleblowing, including claims under Sarbanes-Oxley;

6. Claims of breach of contract or covenant (express or implied) and/or promissory estoppel.

Exhibit C to Defendants' Motion (Document # 22).

The Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.* “creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). While Congress considered the advantage of expeditious resolution of disputes through arbitration in enacting the FAA, its primary purpose was to enforce agreements into which parties have entered. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).

“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Gilmer*, 500 U.S. at 26. The “liberal federal policy favoring

arbitration agreements manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements; the Act simply ‘creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.’ “ *Mitsubishi*, 473 U.S. at 625 (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). However, “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’ “ *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, at *al.*, 473 U.S. 614, 627). Section 2 of the FAA provides that a written arbitration agreement “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.

State law contract principles govern whether a valid arbitration agreement exists. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Under South Carolina law, formation of a valid contract requires an offer, the acceptance of the offer, and valid consideration. *Sauner v. Public Serv. Authority of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (2003).

Plaintiff argues that the arbitration agreement is not valid because it is unconscionable, is not supported by valid consideration, and does not cover the claims asserted by Plaintiff. Plaintiff bears the burden of showing that the arbitration agreement is unenforceable. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Under South Carolina law, unconscionability is defined as “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752, 757 (S.C.2004). Plaintiff appears to assert that the arbitration agreement is unconscionable because he was required to enter into it as a condition of employment. It appears that Plaintiff is arguing that the arbitration agreement is an adhesion contract, which is standard form contract offered on a take-it-or-leave-it basis with terms that are not negotiable. *Simpson*, 373 S.C. at 26–27, 644 S.E.2d at 669 (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). However,

adhesion contracts are not per se unconscionable. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct.App.1998). As the South Carolina Supreme Court has noted, the standardization of contracts is “‘a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations.’” *Id.* (quoting *Goodwin v. Ford Motor Credit Co.*, 970 F.Supp. 1007, 1015 (M.D.Ala.1997)). Plaintiff makes no argument as to how the arbitration agreement is unconscionable other than to say it was offered on a “take-it-or-leave-it” basis, and fails to present any evidence to support such an argument. Thus, this claim is without merit.

*4 Plaintiff also argues that the arbitration agreement lacks consideration. An arbitration agreement is supported by adequate consideration when the parties mutually agree to be bound by the arbitration process and the agreement does not permit the employer to ignore the results of arbitration. *See e.g., Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir.2002) (finding that the agreement to be bound by arbitration is adequate consideration); *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir.1998) (finding arbitration agreement where employee and employer are bound gives adequate consideration). Plaintiff argues that, because GEHC reserves the right to, within its sole discretion, alter, amend, modify or revoke the program at any time, its promise to arbitrate is merely illusory and GEHC is not really promising anything. However, GEHC's ability to modify or revoke the RESOLVE program in not without limitations. The agreement requires GEHC to provide 30 days notice before modifying or discontinuing the program. Exhibit C, § E, to Defendants' Motion to Dismiss (Document # 22). Furthermore, the agreement provides,

An employee shall complete the processing of any concern/claim pending in RESOLVE prior to the effective date of an announced change under the terms of the procedure, as it existed when the concern/claim was initially submitted to RESOLVE. The Company shall be obligated to proceed with any Covered Claim it may have against an employee under

the version of RESOLVE in place at the time the Covered Claim arose.

Id. Courts have upheld agreements with similar “change-in-terms” language. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, (5th Cir.2004) (rejecting challenges to arbitration clauses containing change-in-terms provisions where the company was required to give prior notice of the change); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir.2003) (same); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir.2002) (same); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F.Supp.2d 1212, 1215 (E.D.Okla.2003) (same). Thus, the provision that allows GEHC to modify or discontinue the RESOLVE program does not make its agreement to arbitrate illusory.³

3 Additionally, continued at-will employment after the implementation of a mandatory arbitration program is sufficient consideration to support the agreement to arbitrate. *See Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir.2001); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839, 845 n. 4 (S.C.Ct.App.1999).

Finally, Plaintiff argues that not all of his claims are covered by the agreement. Plaintiff asserts that some of his claims could arguably fall under the “Excluded Claims” section of the arbitration agreement and, thus, an ambiguity exists. Therefore, Plaintiff argues, the ambiguity should be resolved in favor of the non-drafting party. However, it is well established that any ambiguities regarding the arbitrability of a dispute must be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Accord American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996).

IV. CONCLUSION

Plaintiff has failed to meet his burden of establishing that the arbitration agreement is unenforceable. Thus, Plaintiff's claims are subject to arbitration and are not proper in this court. As such, this Court lacks jurisdiction to address Defendants' Motion to Dismiss Individual Defendants or Plaintiff's Motion to Amend his Complaint. Because all of Plaintiff's claims are covered by the arbitration agreement, dismissal of an action to pursue

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arbitration is a proper remedy. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir.2001). Therefore, it is recommended that Defendants' Motion to Dismiss or, Petition to Compel Arbitration and Stay Proceedings (Document # 22) be granted and the case be dismissed. In the alternative, it is recommended

that the Motion be granted and the case be stayed pending arbitration.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3063040

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2018 WL 3153614
United States District Court, D.
South Carolina, Columbia Division.

Stephanie WEBB, Plaintiff,
v.
OAKTREE MEDICAL CENTER, P.C., Defendant.

Civil Action No.: 3:18-cv-00924-JMC

Signed 06/28/2018

Attorneys and Law Firms

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Phillip Arthur Kilgore, Steven Michael Nail, Ogletree
Deakins Nash Smoak and Stewart, Greenville, SC, for
Defendant.

ORDER AND OPINION

J. Michelle Childs, United States District Judge

*1 Plaintiff Stephanie Webb ("Plaintiff") filed a Complaint against Defendant Oaktree Medical Center, P.C. ("Defendant"), alleging pregnancy discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); sex discrimination in violation of Title VII, and breach of contract. (ECF No. 1-1.) This matter is before the court upon review of Plaintiff's objections to the Report and Recommendation ("Report") (ECF No. 14) issued by the Magistrate Judge on May 16, 2018, recommending that the court grant Defendant's Motion to Stay Litigation and to Compel Arbitration. (ECF No. 15.) For the reasons set forth herein, the court **ACCEPTS** the Report of the Magistrate Judge. (ECF No. 14.) The court thereby **GRANTS** Defendant's Motion to Stay Litigation and to Compel Arbitration. (ECF No. 9.)

I. FACTUAL AND PROCEDURAL BACKGROUND

The court concludes upon its own careful review of the record that the factual summation in the Magistrate Judge's Report is accurate, and the court incorporates this

summary herein without a recitation. (*See* ECF No. 14.) On November 5, 2015, Plaintiff and Defendant executed a "Physician Employment Agreement" ("Agreement"), under which the parties agreed to arbitrate "[a]ny controversy, dispute, or disagreement arising out of or relating to the Agreement, or breach thereof...." (ECF No. 9-2 at 24 ¶ 12.) On March 2, 2018, Plaintiff filed the above-mentioned Complaint against Defendant in the Court of Common Pleas in the Eleventh Judicial Circuit of South Carolina. (ECF No. 1-1.) On April 5, 2018, the matter was removed to this court under diversity of citizenship and federal question original jurisdiction pursuant to 28 U.S.C. § 1441. (ECF No. 1.)

On April 12 2018, Defendant filed a Motion to Stay Litigation and to Compel Arbitration (ECF No. 9), pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, which provides in part that "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* On April 26, 2018, Plaintiff filed a reply brief in opposition to Defendant's Motion to Stay Litigation and to Compel Arbitration (ECF No. 11), and on May 3, 2015, Defendant filed a reply brief in support of its motion. (ECF No. 13.)

Pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civ. Rule 73.02(B)(2)(g), all pretrial proceedings in this case were referred to United States Magistrate Judge Shiva V. Hodges. On May 16, 2018, The Magistrate Judge issued the Report recommending that the court grant Defendant's Motion to Stay Litigation and to Compel Arbitration. (ECF No. 14.) On May 30, 2018, Plaintiff filed Objections to the Report. (ECF No. 15.) Defendant has not filed Objections to the Report. On June 13, 2018, Defendant filed a Response in Opposition to Plaintiff's Objection. (ECF No. 17.) Plaintiff then filed a Motion for Extension of Time, (ECF No.18), to file a Reply, and the court granted the motion, stating that Plaintiff's Reply was due by June 27, 2018. (ECF No. 19.) Plaintiff has not filed a Reply. The Report of the Magistrate Judge and Plaintiff's Objections are before the court for review.

II. STANDARD OF REVIEW

1. The Magistrate Judge's Report

*2 The Magistrate Judge's Report and Recommendation is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. See *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court reviews *de novo* only those portions of the Report and Recommendation to which specific objections are filed. See *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005). The court reviews those portions which are not specifically objected to only for clear error. *Id.* at 316. The court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

2. The Federal Arbitration Act

Congress enacted the FAA to address the hostility in American courts toward the enforcement of arbitration agreements by compelling judicial enforcement of a wide range of written arbitration agreements. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2004). Section 2 of the FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce ... 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. To compel arbitration under the FAA, the moving party must demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect, or refusal of the defendant to arbitrate the dispute." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002) (quoting *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991)). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23-24 (1983).

"Although federal law governs the arbitrability of disputes, ordinary state-law principles resolve issues regarding the formation of contracts." *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). "For

instance, 'generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.'" *Id.* (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

III. ANALYSIS

1. Interstate Commerce

Plaintiff first objects to the Magistrate Judge's finding in the Report that the Agreement is one "involving commerce," as required under section 2 of the FAA, 9 U.S.C. § 2. (ECF No. 15 at 1.) In doing so, Plaintiff filed an affidavit, attached as Exhibit B to her objections, in which she affirmatively disputes that she ever treated any patient from outside South Carolina during her employment with Defendant and alleges that medical providers, such as Defendant, who style themselves as "pain management centers," avoid marketing to out-of-state patients in order to prevent exposure to patients with "drug-seeking behaviors." (ECF No. 15-2.) This statement is contrary to what was alleged in paragraph 9 of the Declaration of David Webb attached as Exhibit A to Defendant's original Motion to Stay Litigation and Compel Arbitration, which stated that Plaintiff had treated a number of patients with addresses from outside of South Carolina during her employment. (ECF No. 9-2 at ¶ 9.) Plaintiff argues that because there is a dispute of material fact pertaining to whether the Agreement affects interstate commerce, the court cannot grant Defendant's Motion to Compel Arbitration at this time. (ECF No. 15 at 3.)

*3 The Supreme Court has held that the phrase "involving commerce" is "the functional equivalent of 'affecting' [commerce]," *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 274 (1995), and "signals Congress' intent to exercise its commerce power to the full." *Id.* at 273. Further, the Supreme Court has held that the phrase "involving interstate commerce" includes employment contracts. See *Circuit City Stores, Inc.*, 532 U.S. at 113-114. While Plaintiff's affidavit and the Declaration of David Webb call into dispute whether Plaintiff treated patients with addresses from outside of South Carolina during her employment with Defendant, Plaintiff has not introduced any facts which address the other reasons provided by Defendant and noted by the Magistrate Judge in finding that the Agreement affected interstate

commerce.¹ (ECF No. 9-1 at 9-10; ECF No. 14 at 6.) Regardless of whether or not Plaintiff treated patients with addresses outside of South Carolina, Defendant's remaining arguments are sufficient for this court to find that the Agreement at issue affects interstate commerce.² "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'" *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). For example, Defendant's evidence that 95% of approximately four-hundred shipments of equipment and supplies received by Defendant during Plaintiff's employment were shipped from outside of South Carolina (ECF No. 9-2 at ¶ 11; ECF No. 9-1 at 10), would likely, on its own, be sufficient for this court to find that the Agreement at issue affects interstate commerce. *See Citizens Bank*, 539 U.S. at 57 (noting that "the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce.") (citing *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964)); *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-cv-02861, 2011 WL 6318575, at *5 (D.S.C. Dec. 15, 2011) (finding that a nursing care provider's operations affected interstate commerce because food was purchased from a corporation outside of South Carolina, other supplies were purchased from manufacturers outside of South Carolina and shipped across state lines, and the provider participated in federal Medicare and Medicaid programs).

¹ In the Report, the Magistrate Judge noted five arguments made by defendant: "(1) Defendant recruited Plaintiff from New York and paid [a] certain [portion] of her moving expenses; (2) Plaintiff treated numerous patients with addresses outside of South Carolina during her employment; (3) Plaintiff attended a continuing education conference in North Carolina during her employment; (4) Defendant receives payments for its services from banks outside of South Carolina; and (5) Defendant receives the vast majority of it[s] supplies and equipment from outside of South Carolina." (ECF No. 14 at 6.)

² Plaintiff also objects to the Magistrate Judge's finding in the Report that, based on the arguments provided by Defendant, the Agreement affected interstate commerce. Plaintiff's counsel argues that

the Agreement does not affect interstate commerce under the holdings in *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83 (S.C. Ct. App. 2012), and *Lucy v. Meyer*, 736 S.E.2d 274 (S.C. Ct. App. 2012), and objects to the Magistrate Judge's lack of consideration of these cases in the Report. (ECF No. 15 at 3-4.) The issue of whether an arbitration agreement "involves commerce" under section 2 of the FAA is a question regarding the interpretation of a federal statute and does not involve "issues regarding the formation of contracts." *See Am. Gen. Life & Acc. Ins. Co.* 429 F.3d at 87. As such, the South Carolina cases of *Flexon* and *Lucy* are not binding on this court.

Plaintiff notes that the Magistrate Judge determined that Defendant's Motion to Compel Arbitration is to be treated as a motion for summary judgment pursuant to *Rose v. New Day Fin., LLC*, 816 F. Supp. 2d 245, 251 (D. Md. 2011).³ She further argues that, as the non-moving party, she is entitled to have the facts viewed in the light most beneficial to her and is entitled to the benefit of all inferences to be drawn therefrom, and that because the material facts are in dispute the court should not grant Defendant's motion at this time. (ECF No. 15 at 2-3.) However, as noted previously, even if the court were to find that Plaintiff never treated any patients with addresses outside of South Carolina during her employment with Defendant, given the additional reasons provided by Defendant, the Agreement at issue nonetheless affects interstate commerce. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although Plaintiff disputes whether she treated out-of-state patients, this dispute does not challenge *material* facts. Therefore, the court finds that the Agreement at issue constitutes an agreement "involving commerce" for the purposes of the FAA, 9 U.S.C. § 2.

³ The court notes that it is not necessary to address the question of whether to treat Defendant's Motion to Compel Arbitration as a motion for summary judgment because, as explained in this opinion, the issue is not determinative in this case. *See generally U.S. ex rel. TBI Investments, Inc. v. BrooAlexa, LLC*, 119 F. Supp. 3d 512, 523 (S.D.W. Va. 2015) ("[M]otions to compel arbitration exist in the netherworld between a motion to dismiss and a motion for summary judgment." (quoting *Shaffer v.*

ACS Gov't Servs., Inc., 321 F. Supp. 2d 682, 683 (D. Md. 2004)).

2. Coverage of Arbitration Provision

*4 Plaintiff also objects to the Magistrate Judge's finding in the Report that Plaintiff's pregnancy discrimination and sex discrimination claims under Title VII were covered by the arbitration provision in the Agreement.⁴ (ECF No. 15 at 4.) The arbitration provision in the Agreement reads: "Any controversy, dispute or disagreement arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration...." (ECF No. 9-2 at 24 ¶ 12.) The Fourth Circuit has held that the language "arising out of or related to" constitutes a "broad arbitration clause[] capable of an expansive reach." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). Although Plaintiff emphasizes that unlike her breach of contract claim, her pregnancy and gender discrimination claims could have been brought without the existence of a written employment Agreement (ECF No. 15 at 4),⁵ the Fourth Circuit has further stated that a "broad arbitration clause 'd[oes] not limit arbitration to the literal interpretation or performance of the contract, but embrace[s] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute.'" *Id.* (quoting *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)) (emphasis in original). While Plaintiff's pregnancy and gender discrimination claims may not rely on the language of the employment Agreement itself, these claims nonetheless have a "significant relationship" to the Agreement in that the Agreement forms the basis of her employment with Defendant, particularly because her claims relate to the circumstances in which her employment with Defendant was terminated. (See ECF No. 1-1 at 3-9; ECF No. 11 at 1-2.)

⁴ Plaintiff does not object to the Magistrate Judge's finding that her breach of contract claim is covered by the provision. (ECF No. 15 at 4.)

⁵ Plaintiff's counsel in the original response brief cites only South Carolina case law in making this argument. (ECF No. 11 at 10-11.) The court notes that while state law resolves issues regarding the formation of contracts, the question of whether the arbitration provision covers the dispute sufficiently as to make it subject to the FAA is a question of federal statutory interpretation, and not a "generally

applicable contract defense[], such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc.*, 517 U.S. at 687; See also *Am. Gen. Life & Acc. Ins. Co.*, 429 F.3d at 87 ("Although federal law governs the arbitrability of disputes, ordinary state-law principles resolve issues regarding the formation of contracts.").

Further, federal case law regarding the FAA does not suggest that Plaintiff's Title VII claims are presumed to be outside the scope of the arbitration provision in the Agreement. The Supreme Court has held that there is "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Courts have previously construed arbitration clauses worded similarly to the one in this case to cover employment discrimination claims under Title VII. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26 (1991) (compelling arbitration for claim brought under the Age Discrimination in Employment Act); *Cherry v. Wertheim Schroder & Co.*, 868 F. Supp. 830, 834 (D.S.C. 1994) (compelling claimant to arbitrate sexual harassment claim brought under Title VII). For these reasons, Plaintiff's sex and pregnancy discrimination claims are covered by the arbitration provision in the Agreement.

3. Other Findings

Plaintiff has not made any objections to the findings of the Magistrate Judge other than those addressed above. As such, the court need not review the remainder of the Report de novo but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond*, 416 F.3d at 315 (quoting Fed. R. Civ. P. 72 advisory committee's note). The court does not find clear error and therefore accepts the Report by the Magistrate Judge.

IV. CONCLUSION

Based on the aforementioned reasons and a thorough review of the Report of the Magistrate Judge and the record in this case, the court **ACCEPTS** the Report of the Magistrate Judge (ECF No. 14), and **GRANTS** Defendant's Motion to Stay and to Compel Arbitration (ECF No. 9). The court **DENIES** Defendant's Motion to Dismiss. The court **INSTRUCTS** Defendant to file

Webb v. Oaktree Medical Center, P.C., Slip Copy (2018)

2018 WL 3153614, 2018 Fair Empl.Prac.Cas. (BNA) 231,075

a report every 180 days from this Order's entry date to update the court regarding the status of the matter.

All Citations

Slip Copy, 2018 WL 3153614, 2018 Fair Empl.Prac.Cas. (BNA) 231,075

IT IS SO ORDERED.

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STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-01001

MEMORANDUM IN OPPOSITION

This is a memorandum in opposition to the Defendants' Motion to Compel Arbitration.

1. Introduction

Defendants are attempting to enforce an unsigned arbitration agreement based on a click-wrap acknowledgement of receipt that does not evidence assent, that does not mention arbitration, and that Plaintiff does not recall seeing. Defendants use distinguishable, non-governing precedent in support of their endeavor. Arbitration agreements, to be enforced in South Carolina, must satisfy the basic requirements of an enforceable contract under South Carolina law. This agreement fails in that regard.

"It is not too much to ask an employer to provide actual notice to its employees before significantly restricting rights created by decades of state and federal legislation." *Reese v. Commercial Credit Corp.*, 955 F.Supp. 567, 569 (D.S.C. 1997). The unsigned agreement that the Defendants are attempting to enforce, based on a purported acknowledgement, fails to satisfy the basic elements of an enforceable contract in South Carolina. Principally, there is no reasonable argument that Plaintiff had actual notice of the subject unsigned arbitration agreement. Moreover, there is, at worst, a triable fact issue with respect to the enforceability of the unsigned arbitration agreement which under the provisions of the Federal Arbitration Act (FAA) must be decided by a jury before arbitration can be compelled. Additionally, this unsigned arbitration agreement is unconscionable because it

unreasonably restricts the Plaintiff to only being able to take one fact witness deposition. Finally, this unsigned agreement does not fully apply to the dispute at issue where 3 of the 4 claims alleged are based on post-termination conduct by the Defendants.

The question presented by Defendants' motion is whether an arbitration agreement that was not ratified by a party can be enforced because a party did not opt out of the agreement even if they did not know about the agreement. This question has not been directly answered under South Carolina law. However, the basic principles of actual notice, in addition to the other arguments listed above, dictate an answer of no. At bottom, a contract is not formed under South Carolina law on the lone basis that a party was presented with a contract, and did not sign it, but also did not opt out of it. Plaintiff therefore asks the Court to deny Defendants' Motion and allow Plaintiff's claims to proceed in state court.

2. Facts

Plaintiff alleges a wrongful discharge claim against Defendant Amedisys Holding, LLC, her former employer. That claim alleges that Plaintiff was terminated on a pretextual basis because she, a licensed Doctor of Physical Therapy, made internal complaints about patient care issues and other improper and unsafe practices. (Compl. ¶¶ 57-62). Plaintiff also alleges separate defamation claims against Amedisys and her former supervisor Leisa Neasbitt. The defamation claims concern false, critical remarks by Ms. Neasbitt about the reason for Plaintiff's termination. (Compl. ¶¶ 63-86). Plaintiff last alleges tortious interference with prospective contractual relations against Amedisys because, as Plaintiff was attempting to mitigate her damages, Amedisys told a third-party facility, that wanted to hire Plaintiff as its director, that Plaintiff was ineligible for rehire and that it would not continue to service residents at the facility if it hired Plaintiff. (Compl. ¶¶ 87-92). This conduct caused Plaintiff not to get the Facility Director job she was seeking and senselessly hampered her attempts to mitigate her damages. (*Id.*). The defamation and tortious interference with contract claims naturally

concern post-termination torts by the Defendants that were not a part of the parties' employer-employee relationship.

Plaintiff, through her attorney, was first informed about the unsigned arbitration clause at issue during pre-suit talks. Regarding that unsigned arbitration clause, Plaintiff pled:

FURTHER ALLEGATIONS REGARDING JURISDICTION

93. Plaintiff realleges the foregoing where consistent.
94. Plaintiff requests a jury trial on these claims and all incidents regarding the same including whether Plaintiff had actual notice of any arbitration provision that Defendant Amedisys Holding [claims exists] and any fact issues regarding the arbitrability of this action in general.
95. Plaintiff was not presented any sort of Arbitration Agreement upon her hire.
96. Defendant Amedisys Holding, LLC has expressed a belief that this action is subject to an arbitration agreement it claims was entered between Amedisys, Inc. and Plaintiff.
97. Defendant Amedisys Holding, LLC was not a party to that agreement.
98. The entity asserting to be a party to that agreement, Amedisys, Inc. is not registered entity licensed to practice business in South Carolina and did not employ the Plaintiff.
99. Defendant Amedisys Holding, LLC has not presented Plaintiff with an agreement signed by her or any official with the authority to bind Amedisys Holding, LLC or Amedisys, Inc. for that matter.
100. Plaintiff did not sign any arbitration agreement.
101. Plaintiff was never informed by Defendant Amedisys Holding, LLC that it desired to enter an arbitration agreement even though Defendant Amedisys Holding, LLC had ample opportunities to express a desire to enter into to such an agreement at weekly meetings and prior to her hire.
102. Defendant Amedisys Holding, LLC is expected to attempt to enforce an e-mailed, inconspicuous, click-wrap style arbitration agreement with an auto[-]in and manual opt-out provision.

103. Plaintiff has no recollection of receiving an optout arbitration agreement from the Defendant Amedisys Holding, LLC via email or otherwise.

104. Plaintiff did not receive actual notice of any arbitration agreement from Defendant Amedisys Holding, LLC.

105. Defendant Neasbitt is not a party to any agreement to arbitrate disputes with the Plaintiff.

106. The arbitration agreement Defendant Amedisys Holding, LLC is expected to attempt to enforce is not supported by consideration, deprives the Plaintiff of substantial legal rights in adhesive fashion absent notice, and is otherwise unenforceable under South Carolina Law.

107. Plaintiff's actions for defamation and tortious interference with prospective contractual relations are not reasonably read to be within the terms of the subject arbitration agreement since they are not directly related to a period within which Plaintiff was an "employee" of Defendant Amedisys Holding, LLC as she is referred to in the subject agreement.

108. Triable issues of fact underly the enforceability of the subject arbitration agreement and should the Defendants attempt to enforce the agreement Plaintiff requests a jury trial with respect to the same.

(Compl. ¶¶ 93-108). Plaintiff has verified the above via a sworn affidavit affirming the factual statements involved in Complaint ¶¶ 93-108. (Ex. 1 Pl. Aft. ¶ 4). Plaintiff had no clue the unsigned arbitration agreement even existed until presuit talks. (Ex. 1 Pl. Aft. ¶ 5).

Plaintiff was hired as a Physical Therapist by the Defendant on July 8, 2013. (Ex. 1 Pl. Aft. ¶ 6). Plaintiff was not given an arbitration agreement prior to her hire, upon her hire, or as a part of regular onboarding. (*Id.* at ¶ 7). Thus, Plaintiff's initial offer of employment was not consideration for the unsigned arbitration agreement at issue.

Instead, Defendants' own brief suggests that Plaintiff received an innocuous email on August 6, 2013 addressed to "Undisclosed Recipients" that bore: the subject "Important Policy Change – Must Read", the importance designation "Normal", and contained the following language via a hyperlink in the body of the email "This e-mail contains important time-sensitive materials that the

Company requires that you read as they could affect your legal rights. Please click here to receive them.” (Def. Memo. Ex. B.) The email described a policy change and not a voluntary agreement.¹ (*Id.*) The email was not designated “Important” or “Urgent”; but rather bore the designation “Normal”. Last, the body of the mass-email did not mention arbitration at all nor did it mention that it was anything employees could opt out of. That is, this email looked like many other generic corporate-wide emails that Plaintiff received from Amedisys on a regular basis throughout her tenure. (Ex. 1: Pl. Aft. ¶ 8).

Upon opening the email, a pop-up appeared that said:

By clicking “Acknowledge” below, you will be given access to Amedisys Arbitration program materials which includes a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today’s date, you will be bound by it, which will affect your legal rights.**

By clicking the “Acknowledge” button on this screen I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.”

(Def. Memo Ex. C) (Emphasis Original). The pop-up gave no option other than to click “Acknowledge.” (Def. Memo. Ex. 1 to Ex. D). The pop-up did not say “Arbitration”, describe what arbitration was, or describe the sort of legal rights at issue. According to a self-serving affidavit purporting to authenticate records regarding Amedisys’ arbitration program, Plaintiff, though she has no recollection of the experience, clicked the compulsory “Acknowledge” button shortly after the

¹ The policy vs. agreement distinction is critical because as a matter of law South Carolina employers can unilaterally change their employment policies at-will upon *reasonable notice* (as opposed to actual notice) to an employee. *Adams v. Square D. Co.*, 775 F. Supp. 869, 873 (D.S.C. 1991) (“We hold that for ... [an amendment] to become legally effective, reasonable notice must be uniformly given to affected employees.”); *quoting, In re Certified Question*, 432 Mich. 438, 443 N.W.2d 112 (1989). That is, notifying an employee of a unilateral policy change is far different than proposing a bilateral agreement.

email was sent. (Def. Memo. Ex. D). That pop-up, according to Amedisys, led the employee to a web page containing links to the subject unsigned arbitration agreement, a cover letter, and FAQs. (Def. Memo p. 3). There is no record evidence of how long Plaintiff was on the web page, if she clicked any links, if the webpage even used the word “Arbitration”, or if Plaintiff even scrolled through the purported unsigned arbitration agreement. Compellingly, there is similarly no evidence that Plaintiff electronically signed or otherwise affirmed the unsigned arbitration agreement.

The agreement is inconspicuously termed a “Dispute Resolution Agreement” and the word “Arbitration” is not mentioned until the bottom of the first page. (Def Memo. Ex. E). The agreement restricts itself to disputes “arising out of or related to [an] Employee’s employment with Amedisys or termination of employment.” (*Id.* at p. 1). The agreement also severely narrows the scope of discovery providing “each party shall have the right to take the deposition of one individual and any expert witness designated by another party.” (*Id.* at p. 4). Thus, in a case such as this, Defendants will have access to gather information from and prepare witness testimony and affidavits for its many active employees; meanwhile, Plaintiff, a terminated employee, can only depose one named witness to conduct discovery and prepare for arbitration. Defendants have already proffered affidavits from two witnesses in support of this memorandum. If this arbitration agreement were enforced, Plaintiff could only depose one of those affiants and would do so at the expense of deposing all other listed fact witnesses.

There is no place on the agreement to affirm or electronically sign the agreement. The agreement does contain an opt-out provision at page 6 of the agreement which provides that an employee must print out an attachment to the agreement, sign it, and mail it to Amedisys’ corporate headquarters in Louisiana within 30 days of their clicking the previously discussed compulsory pop-up. (*Id.* at pp. 6-7). Even though Amedisys used a nondescript e-mail to distribute the agreement to employees, Amedisys did not allow employees to communicate a desire to opt-out of the agreement.

via reply email. (*Id.*). The answer to “*why not?*” (regarding the use of mail rather than email for the opt-out form) is compelling and self-evident.

Plaintiff was a party to regular in-service meetings at her work locations for Amedisys. (Ex. 1: Pl. Aft. ¶ 11-12). At those meetings, Amedisys regularly advised employees of important policy changes and work directives. Amedisys circulated documentation evidencing the same at those meetings. (*Id.*). Amedisys never described its arbitration agreement at those meetings. (*Id.*). Plaintiff has no recollection of the subject unsigned arbitration agreement or the circumstances wherein she supposedly acknowledged (absent a choice not to acknowledge) her receipt of the email that directed employees to a web page containing a link to the agreement. (Ex. 1: Pl. Aft. ¶¶ 13-14).

Should the Court find that a jury trial is necessary to ascertain whether the subject unsigned arbitration agreement is enforceable, there is ample reason for pre-trial discovery. Defendants claimed that they “maintain[] a file containing the actual hard copy of all opt-out forms completed by any employee who chose to opt-out of the Arbitration Agreement.” Plaintiff, if the Court does not find this unsigned agreement is unenforceable as a matter of law, should be permitted to conduct limited discovery on actual notice and adequacy of consideration as follows:

1. How many, if any, employees actually went through the process of opting-out of the so-called agreement?
2. If any, what proportion of employees opted out?
3. Why Amedisys emailed out a link to the arbitration agreement, but required employees to mail opt-out forms back?
4. Why Amedisys did not include a place to sign, e-sign, or opt-out of the arbitration agreement?
5. Why Amedisys did not send the arbitration agreement within or as an attachment to the email?
6. Why Amedisys did not include the word “arbitration” in the email or pop-up it sent to all employees?
7. Why Amedisys did not simply present, via a meeting or in writing, the arbitration agreement to its employees, and if it claims cost was the reason it did not:
 - a. How much it estimates those distribution costs would have been, and
 - b. How much it spent on the sophisticated mass email, pop-up, and tracking system it did use?
8. Whether Amedisys has sued any of its employees in state or federal court since distributing the arbitration agreement; thus, undermining its purported bilateral nature.

9. Why Amedisys restricted the parties to one fact witness deposition?
10. Whether Amedisys can verify that Plaintiff clicked the link to review the subject agreement?
11. If not, why Amedisys did not at least use available scroll-wrap technology to verify that Plaintiff reviewed the agreement? And,
12. Why Amedisys decided to circulate the arbitration agreement in the first place?

Each of these questions are facially relevant to whether the subject agreement is enforceable under South Carolina contract law and each of these questions should be easily answerable based on Amedisys' internal communications and records.

However, as discussed in more detail below, the Court need not trouble itself with discovery and an FAA mandated trial on arbitrability because an unsigned agreement sent via a pop-up and non-descript email is simply unenforceable as a matter of South Carolina Contract law. Furthermore, most of the claims in this case are not even covered by the agreement in the first place. If the Defendants wanted Plaintiff to give up her constitutional rights to a jury trial then "[i]t [was] not too much to ask [Amedisys] to provide actual notice to its employees before significantly restricting rights created by decades of state and federal legislation." *Reese v. Commercial Credit Corp.*, 955 F.Supp. 567, 569 (D.S.C. 1997).

3. Standard of Review

Rule 12(b)(3), SCRCP allows a party to move for dismissal on the basis of "improper venue." Defendant has not articulated what Rule 12(b) provision it is moving under, but presumably it is moving under Rule 12(b)(3). "A motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Holroyd v. Requa*, 361 S.C. 43, 65, 603 S.E.2d 417, 428 (Ct. App. 2004). Furthermore, while the Court may view evidence outside of the pleadings on a 12(b)(3) motion, the evidence before the Court must be viewed most favorably toward the non-moving Plaintiff. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012) ("In assessing whether there has been a prima facie venue showing, we view the facts in the light most favorable to the plaintiff."). "Arbitrability determinations are subject to de novo review." *Simpson v.*

MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); citing, *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App.2005). “Nevertheless, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Thornton v. Trident Med. Ctr.*, L.L.C., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.2003).

4. Argument

“Everyone knows the Federal Arbitration Act favors arbitration. But before the Act’s heavy hand in favor of arbitration swings into play, the parties themselves must agree to have their disputes arbitrated.” *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014). “[T]he court can only compel arbitration if the parties have agreed to arbitrate.” *Reese v. Commercial Credit Corp.*, 955 F.Supp. 567, 569 (D.S.C. 1997). “What happens when it’s just not clear whether the parties opted for or against arbitration? The FAA tells district courts to ‘proceed summarily to the trial’ of the relevant facts.” *Howard*, 748 F.3d at 977 (citing 9 U.S.C. § 4).

The “[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA.” *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001). “It [i]s for the court, not the arbitrator, to decide in the first instance whether the dispute [i]s to be resolved through arbitration.” *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 651, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). In deciding a motion regarding arbitration, the court must use a limited, two-part test to ensure that the dispute is arbitrable. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937-38 (4th Cir. 1999). The two-part inquiry consists of: (1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the specific dispute is within the scope of the agreement. *Id.* at 938. The court may look for contractual defects and may investigate any grounds that may exist to revoke a contract in law or equity. *Id.* (noting such defects as lack of mutual assent, want of consideration, unfairness, and bad faith).

Defendants' unsigned agreement is not valid under state contract law due to lack of actual notice, lack of mutual assent, and unconscionability and it therefore fails the first prong of the Court's two-part inquiry as matter of law. Furthermore, Plaintiff's claims of defamation and tortious interference with contract concern torts that occurred after the parties' employment relationship ended thus they are not covered by the unsigned arbitration agreement at issue. *See, Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937-38 (4th Cir. 1999). (The two-part inquiry consists of: (1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the specific dispute is within the scope of the agreement. *Id.* at 938. The court may look for contractual defects and may investigate any grounds that may exist to revoke a contract in law or equity.). Last, even if the unsigned agreement were not legally unenforceable, then Plaintiff requests and is legally entitled to a jury trial on the issue of actual notice.

4.1. Actual Notice

"It is not too much to ask an employer to provide actual notice to its employees before significantly restricting rights created by decades of state and federal legislation." *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997). Plaintiff cannot be made to arbitrate a claim when she never received actual notice of the arbitration agreement. *Id.*, 955 F. Supp. 567, 570 (D.S.C. 1997); ("The court believes that the South Carolina Supreme Court would apply the same actual notice requirement to an employer's implementation of an arbitration agreement."); *see also, Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (S.C. Ct. App. 2005). The law, to modify even a unilateral employment contract, imposes a "reasonable notice requirement for modification [that] requires actual notice to the employee." *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994).

"Whether the employer has provided actual notice of a modification of the employment contract created by an employee handbook in most cases will be for the jury to determine." *Fleming v.*

Borden, Inc., 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994). Actual notice can be express or implied. *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 63, 504 S.E.2d 117, 122 (S.C. 1998). Express actual notice has been found in employment cases when plaintiffs have received, read, understood, and signed new agreements. *See, Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 89-90, 459 S.E.2d 851, 856-57 (S.C. Ct. App. 1995). However, the South Carolina Supreme Court has declined to find actual notice where “there [wa]s no evidence that [the plaintiff] had read and understood” an updated handbook. *Id.* 319 S.C. at 90. Actual notice can also be implied through act, such as attending a meeting, personally disseminating information to others, or filing a claim through mediation. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (applying North Carolina law).

Here, the Defendant relies on a generic company-wide email and a compulsory pop-up in attempting to establish notice. That does not satisfy the high bar of actual notice required by South Carolina contract law. Plaintiff has no recollection of receiving the subject arbitration agreement, there is no signed arbitration agreement, and the Defendant has produced no record evidence that Plaintiff even reviewed the subject unsigned agreement. Thus, there is no competent, reliable evidence of actual notice and the Defendant’s motion should be denied as a matter of law.

4.2. Mutual Assent

The formation of a binding contract requires “the parties [to] have a meeting of the minds with regard ‘to all essential and material terms of the agreement.’” *Vessell v. DPS Associates of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998). “The necessary elements of a contract are an offer, acceptance, and valuable consideration.” *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). There is no evidence of actual notice so there can be no requisite showing of mutual assent or a meeting of the minds.

Defendants argue that Plaintiff acknowledged Defendant Amedisys’ alternative dispute resolution procedure and that the purported acknowledgement is a sufficient indication of Plaintiff’s

manifestation of assent to be bound by the proposed arbitration agreement. (Def Memo. p. 10). Defendants rely on an unpublished, district court opinion to support this argument.² *Rock v. Solar Rating & Certification Corp.*, 2018 WL 3750617, at *6 (D.S.C. 2018). However, the facts of that case are distinguishable from this case. The employee in *Rock* clicked a box on a “clickwrap” agreement that said, “I agree.” *Id.* There is an obvious distinction between “I agree” regarding the terms of an agreement and “I acknowledge” regarding the receipt of an email. Defendant alleges only that Plaintiff acknowledged receipt of a “clickwrap” pop-up that followed an email linking Plaintiff to a webpage where she could access proposed arbitration agreement. This is materially different from assenting to the terms of an agreement.

A meeting of the minds is “an objective manifestation of the parties’ mutual assent to the essential and material terms of the contract.” *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 760 (D.S.C. 1999). There is no meeting of the minds when terms are left for future agreement since parties must mutually understand “all essential and material terms of the agreement.” *Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (S.C. 2014). “A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.” *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); *Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978). The only manifestation of assent the Defendants point to is that Plaintiff continued working (a thing she was already doing for the

² Defendants also rely on an unpublished district court opinion from the Western District of Kentucky for its arguments that the proposed arbitration agreement is valid and enforceable. (Def Memo. pp. 9-11); *Knight v. Amedisys Holding, LLC*, 2016 WL 5661227 (W.D. Ky. 2016). This case purports to involve the same agreement at issue; however, this opinion has no precedential value before this Court. The enforceability of an arbitration agreement is analyzed under contract law, which is unique to each state. The court in *Knight* was applying Kentucky, not South Carolina, contract law. This same premise applies to Defendants citation to *Langlois v. Amedisys*, 2016 WL 4059670 (M.D. La. 2016). Notably, neither *Knight* or *Langlois* appear to involve an analysis of actual notice, mutual assent, and unconscionability or a request for a jury trial.

Defendant) and that she did not opt out of an agreement she was not aware of. (Def Memo. pp. 10-11). This is not enough to establish an enforceable contract. *See, Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (S.C. Ct. App. 2005) (“A party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.”).

4.3. Unconscionability

Even if Plaintiff had notice or assented to the unsigned arbitration agreement at issue, South Carolina has invalidated arbitration agreements where terms are one-sided or oppressive. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32, 644 S.E.2d 663, 672 (2007) (“However, we find that the provision in the arbitration clause dictating that the dealer’s judicial remedies supersede the consumer’s arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum.”) (clause carved out certain remedies for car dealer from arbitration clause). Here, the unsigned agreement incorporates American Arbitration Association Rules “except as provided in [the] Agreement.” The AAA rules have been found to be fair in response to unconscionability challenges; however, here, the Defendant makes one major deviation from those rules by providing: “each party shall have the right to take the deposition of one individual and any expert witness designated by another party.” (Def. Ex. E p. 4). Restricting a Plaintiff in an employment case to deposing one fact witness, where the Defendant Employer employees many of the conceivable fact witnesses is one-sided and oppressive. *See, Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 718, 13 Cal. Rptr. 3d 88, 98 (2004) (“Certainly, a dramatic disparity of information between employer and employee may constitute a ‘compelling’ reason to exceed the discovery limit in the [Employer] policy, but when employees are only allowed to depose two witnesses in an attempt to establish that need, they are not given sufficient opportunity to vindicate their statutory claims.”); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 787 (9th Cir. 2002) (“We follow *Mercurio* in holding that the discovery provisions alone are not unconscionable, but in the context of an arbitration agreement which unduly favors [the

Employer] at every turn, we find that their inclusion reaffirms our belief that the arbitration agreement as a whole is substantively unconscionable.”). Therefore, viewing this unusual limitation appropriately within the context of an employment claim provides the Court yet another basis to deny Defendants motion—unconscionability.

4.4. Scope of the Agreement

Even if Amedisys’ unsigned arbitration agreement was enforceable, the discharge claim is the only claim encompassed by the scope of the agreement. Plaintiff’s tortious interference with contract and defamation claims are post-termination torts which are not covered by the unsigned agreement. Specifically, Plaintiff’s defamation claim refers to defamatory publications of the pretextual reason for Plaintiff’s termination to unprivileged coworkers and a former customer and Plaintiff’s tortious interference claim refers to interference with her ability to gain post-termination employment. (Compl. ¶¶ 64-67, 89-90). None of these claims involve conduct that was incidental or necessary to the parties’ former employment relationship; therefore, they are not implicated by Amedisys’ unsigned arbitration agreement. For that reason, the motion to compel arbitration as applied to those claims should be denied on the separate ground that those claims are not covered by the unsigned, arbitration agreement in play.

Defendants argue that the “plain language of [the] Arbitration Agreement” negates this contention. (Def. Memo. pp. 14-16). Defendants make broad conclusory assertions that all of Plaintiff’s allegations arise out of or are related to her employment with Defendant Amedisys. (Id. at pp. 15-16). However, Defendants provide no explanation of how making defamatory statements about a former employee or intentionally interfering with a former employee’s ability to acquire new employment is incidental to an ordinary employer-employee relationship. Defendants rely on a Fourth Circuit decision for the proposition that the language “arising out of or related to” denotes a broad arbitration clause. *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir.

1996). The factual distinctions between this case and the instant action make its holding inapplicable to the analysis of whether Plaintiff's defamation and tortious interference with prospective contractual relations claims are within the scope of the proposed arbitration agreement.

The *American Recovery Corp.* case that Defendants rely on considered whether claims that involved the breach of a consulting agreement which contained an arbitration clause were arbitrable. *American Recovery Corp.*, 96 F.3d at 92. There, the Fourth Circuit held that the district court erred in finding the claims alleged were not within the scope of the consulting agreement's arbitration clause because each claim concerned the consulting agreement itself. *Id.* *American Recovery Corp.* is inapplicable to this argument because this argument is premised on the plain language of the unsigned arbitration clause which limits its scope to "any dispute arising out of or related to the Employee's employment with Amedisys or termination of employment." (Def. Memo. Ex. E p. 1).

"It is well settled that ambiguities arising within a contract must be construed against the drafter." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). "This rule applies with particular force in cases involving a contract of adhesion." *Id.*; *See also, Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998; *citing*, 1 *Corbin on Contracts* § 1.4 (rev. ed. 1993) ("recognizing adhesion contracts as agreements in which one party has virtually no voice in the formulation of their terms and language").³ Here, Defendants' unsigned arbitration agreement only

³ Further, regarding adhesion contracts:

South Carolina case law has yet to specifically define an adhesion contract[.] . . . The federal district court applying South Carolina law recently stated the following definition, '[A] contract of adhesion is generally thought of as a standard form contract offered on a 'take-it-or-leave-it' basis. The terms of the contract of adhesion are not negotiable. An offeree faced with such a contract has two choices: complete adherence or outright rejection.'

applies to disputes arising out of related to employment. Plaintiff's defamation and tortious interference claims are not the natural result of an employment relationship. The stated scope of the unsigned arbitration clause must be construed against the Defendants. When the scope is appropriately considered, the lion-share of Plaintiff's complaint is not subject to arbitration.

4.5. Defendant Neasbitt is not a Party to the Agreement

Defendant Neasbitt, Plaintiff's former supervisor, is not a party to the arbitration clause at issue and she cannot enforce it against the Plaintiff for post-termination conduct. Defendants argue that Defendant Neasbitt may compel arbitration of the defamation claim against her as a non-signatory under an "intertwined claims" test. (Def Memo. pp 12-13). Defendants cite to an unpublished district court opinion for its discussion of this test. *Carter v. MasTec Services Co., Inc.*, 2010 WL 500421, at *4 (D.S.C. 2010). Applying this test to the facts in the instant case makes clear that the claim against Defendant Neasbitt is not "intertwined" with the proposed arbitration agreement. The "intertwined claims" test is based on the doctrine of equitable estoppel and allows a non-signatory to compel arbitration in two instances: (1) where the plaintiff/signatory to a written agreement must rely on the terms of that agreement for its claims against the non-signatory or (2) where the plaintiff/signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Carter*, 2010 WL 500421, at *5. The first scenario inapplicable as there is no agreement between Plaintiff and Defendant Amedisys which formulates the basis for Plaintiff's defamation claim against Ms. Neasbitt. The second scenario is also

Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998); quoting *Wingard v. Exxon Co.*, 819 F.Supp. 497, 503 (D.S.C.1992) (citing E. Allen Farnsworth, *Contracts* § 4.26 at 295 (1982)). Although not dispositive to the instant arguments, Defendants claim the existence of an opt-out provision render its unsigned arbitration agreement non-adhesive. However, the above law makes clear that the question in determining whether a contract is a contract of adhesion is the level of mutual negotiation not whether a party could have rejected it.

inapplicable because Plaintiff's defamation claim is not dependent on her other claims against Amedisys. Therefore, neither avenue under the "intertwined claims" test Defendants cite is applicable in the instant case, and Defendant Neasbitt is precluded from compelling arbitration.

4.6. Jury Trial on Notice

"What happens when it's just not clear whether the parties opted for or against arbitration? The FAA tells district courts to 'proceed summarily to the trial' of the relevant facts." *Howard*, 748 F.3d at 977 (citing 9 U.S.C. § 4). Plaintiff requested a jury trial regarding the fact issues underlying the enforcement of the instant, unsigned arbitration clause. (Compl. ¶ 94). Under the FAA, if the party opposing arbitration does not demand a jury trial "then court shall hear and determine" arbitrability. 9 U.S.C.A. § 4 (West). However, where a party opposing arbitration does make a jury demand, as the Plaintiff has, then "the court shall make an order referring the issue or issues to a jury." *Id.* Here, fact issues abound particularly with respect to the concept of actual notice and those fact issues, if this motion is not denied as a matter of law, must be heard by a jury. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) ("Moreover, the party who is contesting the making of the agreement has the right to have the issue presented to a jury.") *El Hoss Eng'g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) ("These issues should not be determined on affidavits, but rather a full trial should be had.").

Notice is a fact-controlled concept. *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994). "Whether the employer has provided actual notice of a modification of the employment contract created by an employee handbook in most cases will be for the jury to determine." *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994). Here there are, at worst, issues of fact concerning whether Plaintiff received actual notice of the subject unsigned arbitration agreement and assented to it. Those issues must be heard by a jury.

District Judge Joseph F. Anderson recently ordered a jury trial, pursuant to 9 U.S.C. § 4, on actual notice in a case involving a similar agreement where there was more record evidence of actual notice than in this case. *Doris Mazone v. Dolgencorp, LLC* C/A No. 3:17-1088-JFA-PJG (Ex. 2: Mazone Order). (“Therefore, this Court will hold a jury trial on the limited issue of whether Plaintiff was sufficiently on notice of Defendant’s arbitration agreement to establish a meeting of the minds under South Carolina Law.”). That persuasive ruling involved a case where, like here, there was an online arbitration clause with an opt-out provision circulated to employee’s through a companies’ intranet. However, there the employer went two steps further than Amedisys by allowing employees to affirm assent to the agreements on the agreements and by mailing a postcard to employees who had not assented.⁴ There, even where a presumption of mailing made the case for arbitrability stronger, the District Court, applying South Carolina common law and the FAA provision on jury trials regarding arbitrability, ordered a jury trial. Here, where there is far less record evidence of actual notice and mutual assent, if the Court is not convinced to rule against Defendants as a matter of law, then a jury trial should be held.

5. Conclusion

Plaintiff, based on the preceding argument and analysis, requests that the Defendants’ Motion to Compel Arbitration be DENIED or, alternatively that a Jury Trial be ORDERED on the fact issues incident to Defendants’ Motion to Compel Arbitration.⁵

⁴ The affidavits which establish the prior two sentences are a part of the docket in that case, which involved the undersigned as Plaintiff’s counsel, and copies of the same will be available at the hearing for review.

⁵ Should the Court disagree with the above, Plaintiff requests that this case be STAYED while arbitration proceeds to allow her to return to this Court should the need arise or should any necessary appeals be determined non-interlocutory; thus, preserving this case during the completion of arbitration. 9 U.S.C.A. § 3 (WEST) (“The court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had

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Attorneys for Plaintiff

February 26, 2019

in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.”).

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-01001

MEMORANDUM IN OPPOSITION

Exhibit 1

Exhibit 1: Plaintiff's Affidavit

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-01001

Affidavit

1. I, Nicole Lampo, am over 18 and am competent to testify.
2. This affidavit is made voluntarily, truthfully, and upon my own personal knowledge.
3. I am the Plaintiff in this case.
4. I have read and reviewed paragraphs 93-108 of my Complaint which concern an arbitration clause that the Defendants are attempting to enforce. I cannot speak to the statements of law in those paragraphs, but I can verify that the factual statements in those paragraphs are all true to the best of my knowledge and recollection.
5. I had no clue the unsigned arbitration clause at issue even existed until pre-suit talks preceding this legal action.
6. I was hired by Amedisys Holding, LLC as a Doctor of Physical Therapy on July 8, 2013.
7. Amedisys was an extremely fast-paced work environment.
8. I was not given an arbitration agreement prior to my hire, upon my hire, or as part of regular onboarding.
9. I have reviewed the email that Amedisys attached to their brief in support of arbitration. That email was similar in form to many other generic corporate-wide emails that I received in my tenure.

10. I do not remember receiving or reviewing that email or the pop-up that apparently came with

11.

11. I regularly attended in-service meetings as an employee of Amedisys. At those meetings,

Amedisys would inform me and other employees about directives and changes to policies and procedures. Amedisys would also circulate documentation at those meetings.

12. Amedisys never described arbitration or an arbitration agreement at those meetings despite ample opportunity.

13. I do not remember ever being presented with the subject unsigned arbitration agreement.

14. I had no notice that the unsigned agreement at issue even existed until presuit talks.

Nicole Lampo

SWORN to before me this
25th day of February, 2019.

Notary Public for South Carolina

My Commission Expires: 10/28/24

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Nicole Lampo,

Plaintiff,

v.

Amedisys Holding, LLC, and Leisa Victoria
Neasbitt,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH CIRCUIT
CASE NO. 2018-CP-22-01001

MEMORANDUM IN OPPOSITION

Exhibit 2

Exhibit 2: Mazone Order

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Doris Mazone,

Plaintiff,

v.

Dolgencorp, LLC,

Defendant.

C/A No. 3:17-1088-JFA-PJG

ORDER

On or about April 26, 2017, Doris Mazone ("Plaintiff") filed this action against Dolgencorp, LLC ("Defendant"). (ECF No. 1). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2), D.S.C., the case was referred to the Magistrate Judge.

The Magistrate Judge assigned to this action¹ prepared a thorough Report and Recommendation ("Report") and opines that this Court should hold a jury trial on the limited issue of whether Plaintiff was sufficiently on notice of Defendant's arbitration agreement to establish a meeting of the minds under South Carolina law. (ECF No. 21). The Report sets forth in detail the relevant facts and standards of law on this matter, and this Court incorporates those facts and standards without a recitation.

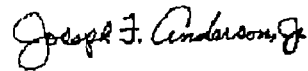
After carefully reviewing the applicable laws, the record in this case, as well as the Report, this Court finds the Magistrate Judge's recommendation fairly and accurately summarizes the facts and applies the correct principles of law. Accordingly, the Court adopts the Report and

¹ The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261 (1976).

Recommendation. (ECF No. 21). Therefore, this Court will hold a jury trial on the limited issue of whether Plaintiff was sufficiently on notice of Defendant's arbitration agreement to establish a meeting of the minds under South Carolina law. This trial will take place during the January/February 2018 term of court, with jury selection on January 11, 2018.

IT IS SO ORDERED.

November 29, 2017
Columbia, South Carolina



Joseph F. Anderson, Jr.
United States District Judge

ELECTRONICALLY FILED - 2019 Feb 26 10:33 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2201001

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)	2018-CP-22-1001
Nicole Lampo,	)
	)
Plaintiff,	)
	)
Versus	)
	)
Amedisys Holding LLC, et al.,	)
	)
Defendants.	)
_____	)

Transcript of Record

March 1, 2019

B E F O R E:

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

James Paul Porter, Esquire
Attorney for Plaintiff

George A. Reeves, III, Esquire
Attorney for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)
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1 (On the record, March 1, 2019.)

2 THE COURT: All right. Next is 2018-CP-22-1001, Nicole
3 Lampo versus Amedisys Holding LLC and others. According to my
4 roster, the matter is before the Court on a motion to dismiss
5 or in the alternative stay and compel arbitration.

6 Please give the court reporter your names and who you
7 represent.

8 MR. REEVES: Your Honor, George Reeves with Fisher &
9 Phillips representing the Defendants Amedisys Holding LLC and
10 Leisa Neasbitt.

11 MR. PORTER: And Your Honor, Paul Porter from Cromer,
12 Babb, Porter & Hicks representing Nicole Lampo.

13 THE COURT: All right. And this is your motion, Mr.
14 Reeves?

15 MR. REEVES: It is, Your Honor.

16 THE COURT: All right. Let me hear from you.

17 MR. REEVES: Okay. Your Honor, we are here on a motion
18 to compel arbitration. This motion was filed after Plaintiff
19 filed a complaint alleging various causes of action that arose
20 out of her termination of employment.

21 I'll start with talking about the timeline for the
22 arbitration agreement, which will lead into the allegations, I
23 believe, Your Honor. On August of, as I said, Ms. Lampo was a
24 former employee of Amedisys Holding LLC. On August 6, 2013,
25 the Defendant sent an email to all 16,000 of its employees,

1 over 30-something states stating that the email contained
2 time-sensitive materials that may affect the employee's legal
3 rights. A copy of that email, Your Honor, is attached to the
4 brief that we submitted, and that is actually Exhibit B.
5 Again, it says that this email contains important time-
6 sensitive materials that the company requires you read as it
7 could affect your legal rights, and then there's a link in
8 that email, excuse me, Your Honor, to receive that
9 information. According to the records of the company, as
10 evidenced by Plaintiff -- excuse me, Defendants' Exhibit D,
11 the affidavit of Larry Bracey, Ms. Lampo, who was at the time
12 an employee, clicked on that link. That link took her to the
13 next document, which is Exhibit C. It is an acknowledgment
14 form. That acknowledgment form says the Amedisys arbitration
15 program. [As read], "Acknowledgment form. By clicking
16 acknowledge below you'll be given access to the Amedisys
17 arbitration program materials, which include cover letter,
18 dispute resolution agreement and FAQs." It indicates in that
19 acknowledgment that unless the employee opts out of the
20 program within 30 days they would be bound by that program.
21 According to the records, and according to the affidavit
22 testimony of Mr. Bracey at Exhibit D the SharePoint software
23 that was used indicates that Ms. Lampo on the same day clicked
24 that she acknowledged the, the document, received and
25 acknowledged the document, which took her to the documents,

1 the arbitration agreement, the cover letter with the FAQs,
2 etcetera, that outlined the arbitration provisions. Now, as
3 far as Ms. Lampo's ability to, to access this and establish
4 that she was, in fact, the one who saw this, Ms. Lampo, as all
5 employees of Amedisys have a unique username and password
6 that's -- that they are assigned, only they can access it
7 using those credentials. The information from the SharePoint
8 program shows that Ms. Lampo used those unique user ID and
9 password to access this document, again, on the day that the
10 email went out. Now, that's important because I anticipate
11 the primary issue we're going to have today is whether or not
12 Ms. Lampo received notice of the arbitration agreement at
13 issue.

14 So once, once that link, once she clicked that link and
15 acknowledged that she received the documents, at that point
16 the burden was on Ms. Lampo as an employee to read that
17 information and opt out and she chose not to. In fact,
18 anecdotally, I understand hundreds of employees did exercise
19 that option. Ms. Lampo, however, did not. She continued to
20 work there for several years until her later termination in,
21 in 2018.

22 Excuse me. The dispute resolution agreement itself and
23 the opt out form have been attached to our brief at Exhibit E.
24 The cover letter explaining the agreement with the questions
25 and answers, including -- explaining to the individual that

1 they could opt out and suggests that they could consult with
2 legal counsel prior to opting out, those are included in
3 Exhibit E and F. Now, the arbitration agreement, as you can
4 see, from Exhibit E that was not -- that was not an
5 arbitration provision that was buried in another policy. It's
6 a standalone policy which outlines all the rights and
7 responsibilities of the parties, indicates that all causes of
8 action arising out of the employment relationship would be
9 subject to arbitration and that the arbitration was mutually
10 binding on both parties. As I said, Ms. Lampo did not opt out
11 of the agreement and continued her employment with the
12 Defendant for another five years or so until her termination.

13 Now, the -- her termination is, is what, what we're here
14 for about, the complaint. She alleges several, several causes
15 of action, one, wrongful discharge, two causes of defamation,
16 one against Ms. Neasbitt individually, one against the company
17 and then the tortious interference with contract. We believe
18 that all these items are subject to the arbitration agreement
19 as they all arise out of the employment agreement, and
20 therefore, we're seeking to compel the arbitration that was
21 entered into.

22 So in order to compel arbitration, Your Honor, the Court
23 has to conclude or examine four elements, first, whether or
24 not a dispute exists between the parties. Clearly, the fact
25 that we have this complaint here that we do have a dispute.

1 Whether or not there's a valid written agreement that covers
2 the dispute, whether or not there's a transaction that relates
3 to interstate commerce, and finally, whether or not the
4 Plaintiff has refused to arbitrate. As I said, clearly we
5 have a dispute and despite pre-suit notice of the arbitration
6 agreement, Plaintiff has filed this. So the first and fourth
7 element are, are satisfied. I don't believe there's any
8 argument regarding the third element as to interstate
9 transactions. This is a company that operates in 30-something
10 states, takes payments and orders things across state lines.
11 I believe that is, is satisfied. So that really leaves us
12 with the second element and that's whether or not there's a
13 valid written agreement that covers the dispute.

14 So in order to determine that we have to look at basic
15 contract laws for South Carolina and that would require us to
16 look at whether or not there is an offer, acceptance and
17 consideration for the agreement. As far as the offer, as I've
18 gone through, Your Honor, the evidence that we've presented
19 here establishes that the Defendant offered a mutual release
20 -- a mutual arbitration agreement to Ms. Lampo via this
21 system, and, and that she was provided the opportunity to opt
22 out. She didn't. She did not do so. I believe that --

23 THE COURT: So you're saying by not opting out she
24 accepted.

25 MR. REEVES: That is exactly what I was leading into is

1 that by, by acknowledging it, and which we can show through
2 the system that she acknowledged, and --

3 THE COURT: But I mean, is that contract law? If I offer
4 you to sell my house and you tell -- and I say, "You don't
5 contact me back and tell me you don't want to do it," then
6 we've got a contract and you got to buy my house?

7 MR. REEVES: Continued employment, Your Honor, as well.

8 THE COURT: Okay.

9 MR. REEVES: That, that from that point on her not
10 accepting it did not lead to her termination. This was not a
11 take it or leave it.

12 THE COURT: Well, I thought I read in here where it was
13 not a condition of employment.

14 MR. REEVES: It was not a condition of employment, but
15 she, but she continued -- she, she had the right to opt out.
16 She didn't opt out and then continued to work for the company.

17 THE COURT: But I mean, how is continuing to work for the
18 company acceptance?

19 MR. REEVES: Well, or the --

20 THE COURT: She was -- I mean, even if she opted out she
21 was going to continue to work for the company.

22 MR. REEVES: Correct, but I believe, Your Honor, the fact
23 that she, she acknowledged -- she received and acknowledged
24 this arbitration agreement and did not opt out that would be
25 the acceptance, but not opting out of it.

1 THE COURT: So the legal question is whether or not
2 rejection of an offer or failure to reject an offer is an
3 acceptance.

4 MR. REEVES: Correct, Your Honor.

5 THE COURT: Okay. All right. Go ahead.

6 MR. REEVES: And so, again, as I said the acceptance
7 there would be the receipt of the agreement, the decision not
8 to opt out, although she had the right to, and she chose to --
9 not to and continued employed -- be employed. The -- and then
10 obviously the consideration there I think is an easier call
11 because we have clear case law in South Carolina that a
12 mutually binding arbitration agreement such as this where each
13 party is giving up their right to a jury trial is adequate
14 consideration.

15 So once the, once those elements are established then the
16 burden would be on Plaintiff to establish that it was -- that
17 it didn't apply or that there was some reason to avoid it.
18 In, in the brief that has been filed and I anticipate will be
19 argued today, Plaintiff makes a couple of arguments. The
20 first that these were non-parties to the agreement. As far as
21 Amedisys LLC there's really no basis for that assertion
22 because in Exhibit E, which is the arbitration agreement, the
23 first paragraph, Amedisys Holding LLC is actually specifically
24 named as a party to this agreement, and as far as Ms.
25 Neasbitt, while she's not a signatory or identified in this,

1 it does indicate that it applies to their employees, etcetera,
2 and if we look at the allegations of Plaintiff's complaint
3 they're completely entwined. The allegations are that Ms.
4 Neasbitt, working through her official capacity as an employee
5 of the company and as a manager of Ms. Plaintiff or, excuse
6 me, Ms. Lampo, undertook all the actions, and therefore, she
7 was acting on behalf of the company. These are not causes of
8 action that are being brought against her in any individual
9 capacity, instead the way it's pled is this is, this is
10 thoroughly through her capacity as an, as an agent of the
11 company, and in fact, as pled the Plaintiff seeks to establish
12 liability on the part of Amedisys through her conduct. So I
13 don't believe that we can say that she as a non-party here is
14 not covered.

15 Also, looking at the causes of action, the arbitration
16 says that it's all causes or, let's see, all disputes, I
17 believe is the word, arising out of the employment
18 relationship. The wrongful termination is a, is an easy one.
19 That's directly related to her employment. The defamation, if
20 we look at the Plaintiff's complaint the, the paragraphs in
21 support of that clearly arise during the relationship because
22 the allegations are that Amedisys and, and its employees made
23 comments about her performance during her employment and made
24 comments after her employment to others about things that
25 allegedly happened during her employment, excuse me. So I

1 believe that it's, it's clear that, that all the allegations
2 that Plaintiff brings as far as the defamation are related to
3 the employment.

4 As far as the tortious interference, again, if we're
5 looking at the allegations as pled in the complaint, the
6 information is, again, related to her performance as an
7 employee of the company and that the company allegedly
8 disseminated this information to a third-party after the
9 termination. Now, it also says that in the arbitration
10 agreement that the arbitration agreement survives the
11 termination of the employment, and so between the fact that
12 these are intertwined and arise out of the employment
13 relationship, I believe that there's no question really that
14 the arbitration agreement at issue covers the dispute that we
15 have here. Plaintiff has also argued that this was a contract
16 of adhesion. Again, this is not a take it or leave it. She
17 had the option to opt out. She was provided with 90 days.
18 There's a considerable bit of information that went along with
19 this, Q and A and everything of her rights, that included
20 information about contacting legal counsel before agreeing to.
21 So I don't -- this, this again, and as we talked about --

22 THE COURT: But I mean, why didn't they just put out
23 there, rather than opting out, why didn't they just say return
24 the form, "I agree or I opt out"?

25 MR. REEVES: Your Honor, as one who did not draft this --

1 THE COURT: Yeah.

2 MR. REEVES: -- or put it out I can't answer that
3 question. All I know is that I, I would assume that this is
4 a, more of a example of how business is being conducted more
5 and more these days with electronic signatures. The fact that
6 you have a company that has 16,000 employees over 30 states,
7 in order to administer this in the most efficient manner they
8 know that they have email addresses that are unique to each
9 employee and only that employee using their ID, user ID and
10 password can access that, I believe that -- I would, I would
11 assume, Your Honor, that it's more of an administrative
12 function, efficiency, than, than having them just return it,
13 but --

14 THE COURT: I mean, has this issue ever -- is there any
15 appellate issue that deals with this whether or not a, a
16 person's failure to opt out of a contract term deems an
17 acceptance of that term to the contract.

18 MR. REEVES: On that specific issue as we stand here,
19 Your Honor, I'm, I'm not aware of an appellate decision on
20 that.

21 THE COURT: Okay.

22 MR. REEVES: I, I do know that, however, that we have
23 cases that acknowledge that accepting agreements through, you
24 know, that's what we call the clickwrap notice of where
25 something pops up, a pop-up and, and accepting it has -- is

1 sufficient as far as acceptance goes. We'd cite to the Rock
2 case in our brief on that.

3 THE COURT: What do you mean acceptance, acceptance of
4 the notice, but is it acceptance of the offer?

5 MR. REEVES: That next step, right, Your Honor. That's
6 -- that next step that, that you've identified, that, to my
7 knowledge, has not specifically been addressed.

8 THE COURT: Okay.

9 MR. REEVES: And so finally, the last point here, Your
10 Honor, is that has been raised that the agreement itself is
11 unconscionable. This, of course, is Plaintiff's burden to
12 show that. He would, in order to do that, have to show that
13 they lacked a meaningful choice between the arbitration --
14 because the arbitration agreement is so one-sided and that the
15 terms were so oppressive that no fair and honest person would
16 accept them. Your Honor, I don't believe that's the case
17 here, and in, in support of that, Plaintiff has identified the
18 fact that the arbitration rules limit each side to one
19 deposition. However, if we read through that Exhibit E as
20 well, it -- it's -- it also allows for other written discovery
21 and gives the arbitrator the discretion to, let's see,
22 additional discovery may be had by mutual agreement of the
23 parties or where the arbitrator selected so orders pursuant to
24 a request by other party. So it's not locked in that there
25 can be only one. There is some flexibility built in that. In

1 support of their position, Your Honor, I believe there's a
2 couple of 9th Circuit cases that the Plaintiff cites. In those
3 situations, as best I could tell from them being nonbinding,
4 it was -- the, the arbitrator did not have that kind of
5 authority to add additional depositions, nor did it seem -- I
6 don't think we had the actual arbitration language to allow
7 for the written discovery, and so the point there was that a
8 Defendant such as in this case may have an advantage because
9 they would have all the documents necessary and witnesses that
10 the Plaintiff would not be able to get without those discovery
11 mechanisms. I don't believe that's the case here as this is
12 written as it does allow for the written discovery and it does
13 allow the arbitrator some, some discretion in order to conduct
14 additional depositions or discovery as necessary.

15 So, Your Honor, in sum, we believe that the arbitration
16 agreement, although not handed to, signed and returned,
17 believe that the conduct here would indicate that it was
18 accepted and that these causes of action that have been
19 asserted would be covered under that arbitration agreement.

20 THE COURT: All right. Thank you. All right, sir.

21 MR. PORTER: May it please the Court, Your Honor, I have
22 a courtesy copy of our brief. This also includes, and I've
23 provided it to Defense counsel, two exhibits that I do not
24 want to file. I mention them via footnote in our brief, two
25 exhibits that were affidavits from a companion case I cite to

1 that I've provided to Defense counsel, because they are from a
2 separate case, I didn't feel like it was necessary to put them
3 on the docket. I thought it confused the issue. So they're
4 solely for reference. May I approach and hand it up?

5 THE COURT: All right. So have they been e-filed?

6 MR. PORTER: The two exhibits, three and four, I'm
7 treating as reference exhibits.

8 THE COURT: Okay.

9 MR. PORTER: These are by context to the Munoz case we've
10 cited.

11 THE COURT: Okay. All right.

12 MR. PORTER: Thank you, Your Honor.

13 THE COURT: All right.

14 MR. PORTER: Your Honor, briefly I want to address a few
15 things that were -- I don't think intentionally
16 mischaracterized but a little wrong and they've become very
17 important within the context of actual notice. The link, the
18 link does not take you to the pop-up. Clicking the link in
19 the email does not take you to the pop-up. The pop-up occurs
20 as soon as you click open to open the email. So you have no
21 choice to, to select the link, and there's no evidence that
22 she actually clicked the link in the email. According to the
23 Defendants' own brief at page two, once upon clicking on the
24 email to open it in their inbox each employee, including
25 Plaintiff, received a pop-up acknowledgment form. The kicker

1 to the word acknowledgment form is what distinguishes this
2 from the Rock case which is a District Court case. That was a
3 clickwrap thing that said, "I agree". This is a clickwrap
4 thing that says, "I acknowledge," and, and you're, indeed,
5 acknowledging a pop-up. Your only way to get a -- get rid of
6 the pop-up is to click, "I acknowledge". There was no option
7 for, "I do not acknowledge". The email does not even mention
8 arbitration. I misstated in the brief that the pop-up didn't
9 -- George and I talking about it this morning, I did observe
10 it says it twice referring to an arbitration program on the
11 pop-up, doesn't say what arbitration is, doesn't say you're
12 giving up rights. According to the record, and this is the
13 Defense own evidence that all, all we know is that after being
14 forced to click acknowledge it appears it took you to a
15 webpage. It didn't take you straight to the arbitration
16 agreement. It just allegedly took you to a webpage where you
17 had four links to a cover letter, FAQs, an arbitration
18 agreement, so on and so forth, and there's no evidence that,
19 that, you know, A, nobody saw Nicole Lampo access it. She
20 submitted an affidavit that says, "I don't remember ever
21 seeing an arbitration agreement," and there's no evidence that
22 she clicked the link, and there were ways that the Defendant
23 could have done this in a less costly manner to demonstrate
24 actual notice. One is if they wanted to do this
25 electronically we all, all know how to use read receipts on an

1 email, include the arbitration agreement in the email, mention
2 arbitration in the email. Two is now while I, I think there's
3 problems with it from, from kind of a, a fairness standpoint,
4 but they have been upheld in courts, they could have used
5 scroll wrap where you have to scroll through the actual
6 agreement, but I, I think the reason that Amedisys did not do
7 those two electronic options is because they're not looking
8 for actual notice here. The kicker when you read the
9 agreement is while, you know, we say we're doing this from an
10 electronical efficiency standpoint, yet to opt out an employee
11 has to print out a form, fill out the form and mail it back
12 in. This is not a signed agreement. I've discussed the Munoz
13 case in, in brief when I talk about a jury trial. There's no
14 signed agreement that's being attempted to enforce. So I
15 don't think there's any evidence of acceptance, but I don't
16 even think we get there because there's no evidence of actual
17 notice, which is pretty particularly defined under state
18 contract law. So usually in these arbitration disputes we
19 start off with the FAA has a presumption in favor of
20 arbitration, but, but the case law is coming around to the
21 point that everyone knows the FAA favors arbitration, but the
22 arbitration agreement first has to be an actual agreement
23 under state contract law, which is where our motion comes in.
24 Our arguments to, to distinguish a little bit we, we've
25 basically given you the arguments that, in my opinion, are,

1 are not even debatable. One, there's no evidence of actual
2 notice and there's no actual notice as a matter of law. Two,
3 there is no mutual assent. Three, the agreement
4 unconscionably restricts discovery limiting depositions to
5 only one fact witness which creates a, a vast unfair system
6 particularly in an employment case when the employer still
7 employs all the witnesses. Four, the unsigned agreement
8 restricts itself to only employment matters and does not apply
9 to the majority of the lawsuit, which is based on post-
10 termination torts, and again, here, under state contract law,
11 you have to construe any ambiguity with respect to scope
12 against the drafter. Five, the unsigned agreement cannot be
13 enforced by Ms. Neasbitt because she is not a party to it and
14 her claims are subject to stand on their own.

15 I'll briefly talk about the intertwined claims test later
16 that Mr. Reeves mentioned, but how it works is basically if
17 the claim cannot stand without the other claims then it's
18 intertwined. This is a post, post-employment defamation tort
19 claim that can stand on its own. As pled against Ms. Neasbitt
20 it's pled against her individually.

21 We've talked about the facts a fair amount. So I'll try
22 to keep it brief here. Ultimately, the question presented by
23 the Defendants is whether or not an agreement that's not
24 ratified can be enforced on the basis that a party did not opt
25 out of it, regardless of if they even knew it existed.

1 We have one employment law claim. I, I would concede
2 that if this agreement were enforceable, the wrongful
3 discharge claim is a tort arising out of employment. We have
4 three post-termination tort claims, a defamation claim
5 regarding what her supervisor said about the reason she was
6 terminated to unprivileged coworkers and a defamation claim
7 regarding what she said to a vendor, and then a tortious
8 interference claim where Amedisys told a third-party that its
9 services -- Amedisys does hospice care, so this was an
10 assisted living facility or it might've been a skilled care.
11 I may have gotten the nomenclature wrong, but it said
12 basically, "We're not going to service you if you hire
13 Nicole." Again, this is after employment, not subject to the
14 agreement.

15 The Plaintiff's affidavit shows the Court that she was
16 hired as a doctor of physical therapy in July of 2013, that
17 she had no clue about any purported arbitration agreement
18 until pre-suit talks, that she did not sign an agreement.
19 There's no signed agreement in the record, that this was not
20 given to her as part of a hire or incident to onboarding, that
21 she has no recollection of receiving it or the pop-up itself
22 and that the Defendant throughout her employment communicated
23 major policy changes and directives in person through weekly
24 in-service meetings. In the beginning I talked about examples
25 of easier ways they could have done this electronically. I

1 think it would've been easier and cheaper to do this the old-
2 fashioned way which is if you have something important that
3 you want somebody to know about put the paper in their hand,
4 tell them about it. I, I assume that Defendants are going to
5 cite cost. If you do not find there is no actual notice as a
6 matter of law under the FAA since there are worse fact issues,
7 the, the law dictates the Court to direct a jury trial on the
8 issue of arbitrability, we would seek pretrial discovery, you
9 know, if they're going to use the cost and efficiency excuse
10 how much it cost to set up this sophisticated pop-up system
11 versus how much it would've cost to print a piece of paper for
12 each employee in each office and have the manager tell them
13 about it.

14 Moving on into some of the legal arguments, I do want to
15 point out though, we mention it, the arbitration agreement,
16 well, we mention restricts itself to only one fact witness
17 deposition, and here in an employment case the employer
18 employs all the witnesses in most circumstances.

19 The standard, just briefly, I know Your Honor knows the
20 standard, but this is a 12(b)(3) motion. So you are allowed
21 to look outside of the pleadings, but all the evidence has to
22 be viewed in our favor of the nonmoving party. The general
23 contract principles of state law apply to arbitration clauses
24 governed by the FAA. That comes from the Munoz case 343 S.C.
25 531. Really we can call it a two-part inquiry at this stage

1 because the other two elements aren't at issue or the other
2 elements three aren't an issue. It's whether an agreement
3 exists and whether the specific dispute is within the
4 agreement. As to three claims the dispute is not within the
5 agreement and as to all claims the agreement does not exist.
6 When the -- when it is not clear if the parties opted for
7 arbitration the FAA as a matter of -- an explicit reading of
8 the law tells the Court should proceed summarily to a trial of
9 the relevant facts. We don't think you need to do that here
10 but that comes from 9 U.S.C.A. § 4. I think the key
11 persuasive authority here, I'll call it persuasive because
12 like the Rock case this is in the District Court, is a
13 decision called Reese v. Commercial Credit Corp. that I think
14 was a handbook case, but it applies here because we're talking
15 actual notice. It says, [as read], "It is not too much to ask
16 an employer to provide actual notice to its employees before
17 significantly restricting rights created by state -- decades
18 of state and federal litigation [sic]." Other holdings out
19 there say that a Plaintiff clearly cannot be compelled to
20 arbitrate a claim when she did not receive actual notice of
21 the arbitration agreement. Actual notice is a particularly
22 defined term. The Strother case is cited in the brief but
23 this provision is not quoted. That's Strother v. Lexington
24 County Rec Commission, 504 S.E.2d 117. We find in the context
25 of the act actual notice means all the facts are disclosed and

1 there is nothing left to investigate. I don't think there's
2 any record evidence that all the facts are disclosed. An even
3 tighter, tighter analysis when we apply that in the Shelton
4 case, [as read], "Based on the record before us we decline to
5 hold as a matter of law that Shelton had actual knowledge of
6 the disclaimer in the revised handbook because there is no
7 evidence that he read or understood the disclaimer." I don't
8 think they've given you any evidence that she read or
9 understood the arbitration agreement. They've cited to a pop-
10 up that your only choice was, "I acknowledge", not "I agree",
11 but not the arbitration agreement, and again, there are means
12 they could have done so, and out of -- a Minnesota case,
13 "Actual notice is synonymous with knowledge."

14 "Whether the employer has provided actual notice," this
15 is the South Carolina Supreme Court, "of a modification the
16 employment contract created by an employee handbook in most
17 cases will be for the jury to determine." Again, here, we
18 think you can do this as a matter of law.

19 Moving on into the, the more brief and concise arguments,
20 actual notice is a bit broad because of its, you know, its
21 meaning. If there's no actual notice, if there's no signed
22 agreement, we don't think there can be a formed contract
23 because there's no evidence of meeting of the minds or mutual
24 assent. The reliance on Rock, the Rock case from District
25 Court is, again, unpersuasive because we're talking about a

1 pop-up that says, "I agree" versus it's a pop-up that says "I
2 acknowledge". I've talked to you about the unconscionability.
3 I think in the context of this very troubling agreement that
4 could have been given in a much more on the level fashion,
5 face-to-face basically how Amedisys did communicate policy
6 directives when it wanted the employees to take action. I
7 think the unconscionability issue can, can be magnified in the
8 Ferguson case which as, as Mr. Reeves said is 9th Circuit, but
9 that's where a lot of these arbitration issues are fought,
10 talks about how you can view the issue of unconscionability in
11 the context of a case, a particular type of case with respect
12 to an arbitration agreement.

13 Moving on to scope, the languages arising out of and
14 related to employment I do not think defaming somebody after
15 they've been terminated is subject to regular, ordinary
16 employment. I, you know, I don't think they use specific
17 enough evidence to say that anything that possibly had to do
18 with your employment is subsumed by this agreement, and so
19 with you sitting in the position as the Court on an ambiguity
20 with respect to scope you have to construe it against them.
21 So I think that brings your defamation and then even more so
22 your tortious interference, interfering with a job after the
23 fact.

24 So what does this mean if we were to say this tortious
25 interference is within the scope of employment? Therefore, if

1 Amedisys gives her a bad reference or forces an assisted
2 living facility not to hire Dr. Lampo five years from now is
3 she still bound by this agreement that she has no remembrance
4 of ever seeing, and the same with Dr. Neasbitt, Dr. Neasbitt's
5 not a party. Dr. Neasbitt's not listed. We're not
6 necessarily challenging this motion. So we don't think it's
7 the clearest cut ground that Amedisys Holding LLC is not a
8 party. It is not the explicit party on the agreement but it
9 is referenced in the agreement, but Defendant Neasbitt is not
10 referenced, and so we think when you combine the fact that
11 she's not referenced with the fact that this is a post-
12 termination tort, there's no way she can enforce it. The
13 tests that the Defendant cited to is from a District Court
14 case Carter 2010 WL 500421. The test is that a nonparty can
15 compel an arbitration agreement where the Plaintiff signator
16 to the -- to a written agreement must rely on the terms of the
17 agreement for its claims against the non-signator, don't have
18 that, or, two, where the Plaintiff signator raises allegations
19 of substantially interdependent and concerted misconduct by
20 both the non-signator and one or more of the signatores
21 to the contract. The key word in that sentence is and the
22 allegations are not substantially interdependent. This is a
23 standalone claim against Ms. Neasbitt.

24 Last, the jury trial, 9 U.S.C. § 4 under that if a party
25 opposing arbitration does not demand a jury trial then the

1 court shall hear and determine arbitrability. However, where
2 a party opposing arbitration does make a jury demand, which we
3 did several times, then the court shall make an order
4 referring the issues to a jury. We don't think you need to do
5 this because we don't think there's a scintilla of evidence of
6 actual notice here. It does not meet the actual notice
7 standard under the law, but if you are inclined to lean away
8 from any of our arguments, we would request a jury trial and
9 note that the Fleming v. Borden case says that notice is a
10 fact controlled concept. I had a similar argument that I
11 cited to on brief, and this -- the order is part of your
12 brief. It's Exhibit Two. It's an order from Judge Joe
13 Anderson. It involves Dollar General which did an online
14 arbitration agreement rollup, and they did theirs different in
15 some pretty key ways that I think makes their arbitration
16 agreement more enforceable. What they did is they plug this
17 on on their company Internet. When you signed on you saw it,
18 and, and then you have the option to electronically sign.
19 Again, on this agreement, which I believe is Exhibit D of
20 Defendants' brief, there's no signature spot. They didn't
21 want there to be one, and if you did not opt out within 30
22 days your signature would be electronically signed for you,
23 but to, to, to bolster their defenses, if you had not opted
24 out within 30 days they would send you a postcard saying,
25 "Hey, this thing is out there. If you, you know, never saw

1 it, you go opt out." Even there Judge Anderson and Judge
2 Shiva Hodges rules and those reference exhibits give more of
3 the factual flavor because Judge Anderson's ruling is only two
4 pages, that despite that increased evidence of potential
5 actual notice a jury trial was appropriate. Here I don't
6 think we have anything close to that, and I do not think a
7 jury trial is necessary. So our request is in the one hand
8 that the Defendants' motion be outright denied or
9 alternatively that a jury trial be ordered on the factual
10 issues and we would ask for some pretrial discovery, and I
11 think I put 12 specific things I want to ask the Defendants
12 about if we are going to a jury trial. Should the Court
13 disagree with us, we would formally request on record that the
14 matter be stayed pending arbitration. Thank you.

15 THE COURT: All right. Anything in reply?

16 MR. REEVES: Just a couple of quick points, Your Honor,
17 starting with the reference to this Munoz matter, that, while
18 I understand while -- why that's being brought in, we don't
19 have, that is a District Court case. We don't even have a
20 reported decision. We're just operating off of some
21 affidavits that are being provided, but there is a distinction
22 thereto whereas if Judge Anderson said he believes that
23 there's a question as to whether or not there is actual
24 notice, I believe -- my understanding of what limited
25 information we have is that there was no, there, there was

1 nothing that would link the agreement ever or never -- would
2 establish that the Plaintiff ever received any kind of notice
3 about this despite the efforts of having the meetings and
4 things of that nature. Whereas, here we do at least know that
5 the Plaintiff using her login credentials did acknowledge, did
6 go in and acknowledge receipt of these items. That we can
7 prove. So we can say that she at least received some notice
8 or whatever. Going to the actual notice, I, I know Mr. Porter
9 --

10 THE COURT: Well, excuse me. I mean, I -- his argument
11 was that she had to acknowledge, once she came on there's no
12 way she could not acknowledge.

13 MR. REEVES: Well, I, I don't believe that that was
14 accurate and I was just about to address that, Your Honor. If
15 we look at the language of the affidavit of Mr. -- let me make
16 sure I'm referring to the same one here. Yes. Exhibit A,
17 the affidavit of Terrell West who is the director of talent
18 operations and compliance, paragraph five of his affidavit
19 states, [as read], "Once the employee clicked on the link
20 embedded in the August 6, 2013 email, the employee received an
21 acknowledgment form pop-up. An example of the acknowledgment
22 form pop-up viewed by the employee once they clicked on it is
23 attached." So it was, in fact, that the employee first had to
24 click on the link in the email and it's at that point they get
25 the pop-up acknowledging the arbitration materials. Once they

1 acknowledge that it -- well, then they have access to the
2 materials. So at -- it's at that point once after they've
3 gone through the email --

4 THE COURT: They have access but it doesn't acknowledge
5 that they actually reviewed it.

6 MR. REEVES: Which would take us into, into discussion as
7 to whether -- whose burden once, once someone signs a document
8 acknowledging that they've received and understood it, whether
9 or not that individual actually understood it, I mean, it's
10 been my experience in, in matters that once, that once someone
11 signs it they're presumed to have read it.

12 THE COURT: All right. Go ahead.

13 MR. REEVES: And so in that -- and so I just wanted to
14 straighten that, that one point out, and again, I don't
15 believe that necessarily Munoz should be controlling here
16 because of the, the procedural posture that, one, it's in and,
17 two, that it is a District Court case.

18 As regarding the acceptance, Your Honor, the question
19 that you had posed earlier is whether or not there was a -- if
20 South Carolina has a Court of Appeals case that says that
21 continued employment or, or, or no action, so to speak, that
22 not electing to opt out, whether or not that's acceptance,
23 there -- in our brief we do cite to a North Carolina case on
24 that issue or a couple of cases, actually, and I thought I had
25 a copy of it and it appears I have a copy of every case but

1 that one, but specifically, we have Hightower v. GMRI, Inc.,
2 and that's a 4th Circuit case, 272 F.3d 239. It's 4th Circuit
3 2001. In that they cite to a North Carolina State case,
4 Howard v. Oakwood Homes Corp. and that is 516 S.E. 2d 879, a
5 1999 North Carolina case where an employee who received a copy
6 of dispute resolution procedure in the mail and continued to
7 work for less than three months after that was, was bound by
8 the arbitration provision despite never signing anything. So
9 that case, and Your Honor, if, if, if that's an issue that's a
10 sticking point that we need to -- if you need to take this
11 under advisement where I can either provide that document or
12 brief that issue out if that is a determinative issue, I can
13 certainly do that. I apologize for actually not having a copy
14 of that case with me. So, so while we don't have a South
15 Carolina case there is authority from other jurisdictions
16 which would indicate that in a similar situation the receipt,
17 the continued employment without exercising that right would
18 constitute acceptance.

19 THE COURT: All right. Thank you. All right. I'm going
20 to deny the motion. I question whether or not there was
21 adequate notice. Number one, I'm positive that there was no
22 agreement to arbitrate. I mean, basically your argument is,
23 "We send you this attachment in an email, if you do nothing
24 you've accepted it. If you don't accept it, you've got to
25 print it out, sign it, put it in the mail and mail it to us

1 within 30 days." I don't think that's an acceptance of an
2 offer and there's certainly no, no agreement to arbitrate in
3 this case. So I'm going to deny the motion on those grounds.
4 Do you want a formal order to that effect or will a form 4
5 denying suffice?

6 MR. REEVES: Your Honor, I believe a formal order if, if
7 you would.

8 THE COURT: Okay. All right. Mr. Porter, if you would
9 prepare an order.

10 MR. PORTER: Yes, Your Honor. I'll aim for next Friday
11 if that's suitable.

12 THE COURT: That'll be fine. Well, if I hadn't got it
13 within 30 days I'll contact you.

14 MR. PORTER: Yeah.

15 THE COURT: So, yeah, that'll be fine.

16 MR. PORTER: Well, I meant, this -- I guess seven days
17 from now is what I'll aim for, sir.

18 THE COURT: That'll be fine. All right. And that's
19 basically my understanding. It's, it's -- I question the
20 notice. I'm pretty confident that there was no agreement for
21 arbitration in this case.

22 MR. REEVES: And Your Honor, just for clarification,
23 that's based on the, the fact that there was the, the -- it
24 was -- that the acceptance is based on an inaction by the
25 Plaintiff?

1 THE COURT: Yeah. I mean, I -- did -- yeah. She did not
2 -- there is nothing to indicate that she told your client, "I
3 agree to arbitration." There's no arbitration agreement
4 signed by the parties. There's no acknowledgement other than
5 the fact that there's an acknowledgement that she received it
6 on the email and then there was inaction. So you know, to
7 fall back on my prior decision, I send you a contract for the
8 purchase of my property and I send it via email and I say, "If
9 you want to buy it under these terms don't do anything, we've
10 got a contract. If you want to -- if you don't accept this,
11 print out this rejection, sign it, put it in the mail and get
12 it to me within 30 days," and I just don't think that that's
13 an adequate acceptance. All right.

(Adjourned.)

C E R T I F I C A T E

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I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Nicole Lampo versus Amedisys Holding LLC, et al., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on March 1, 2019.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Grace L. Hurley, CVR-CM-M
Official Reporter

April 15, 2019.

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-22-01001

Nicole Lampo,

Respondent,

v.

Amedisys Holding, LLC, and
Leisa Victoria Neasbitt,

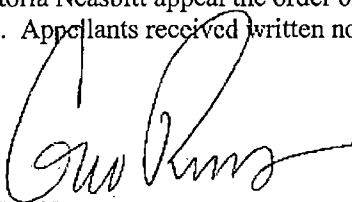
Appellants.

RECEIVED
MAR 18 2019
SC Court of Appeals

NOTICE OF APPEAL

Amedisys Holding, LLC and Leisa Victoria Neasbitt appeal the order of the Honorable Benjamin H. Culbertson dated March 11, 2019. Appellants received written notice of entry of this order on March 11, 2019.

March 18, 2019


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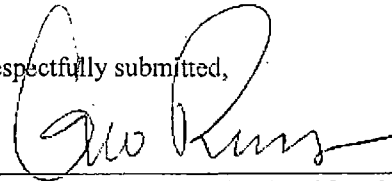
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CERTIFICATE OF APPELLANTS' COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court titled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,



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Columbia, South Carolina
July 22, 2019

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2018-CP-2201001
Appellate Case No.: 2019-000451

Nicole Lampo,..... Respondent,

v.

Amedisys Holding, LLC, and
Leisa Victoria Neasbitt Appellants.

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Record on Appeal** in the above-captioned case has been served upon Respondent's counsel via electronic mail and First Class U.S. Mail, postage prepaid, as follows:

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Dated this 22nd day of July 2019.

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TABLE OF CONTENTS

STATEMENT OF ISSUE ON APPEAL	1
STATEMENT OF THE CASE	2
RELEVANT BACKGROUND	2
I. Relevant Factual Background	2
II. Relevant Procedural Background	6
STANDARD OF REVIEW	7
LEGAL ARGUMENTS	7
I. The Arbitration Agreement is Governed by the Federal Arbitration Act	8
II. The Arbitration Agreement is a Valid and Enforceable Contract	10
III. The Arbitration Agreement Covers the Dispute	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Labor Ready, Inc.</i> , 303 F.3d 496, 501 (4th Cir. 2002).....	10, 17
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265, 273-281 (1995)	9
<i>Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.</i> , 96 F.3d 88, 93 (4th Cir. 1996)....	19
<i>American Gen. Life & Accident Ins. Co. v. Wood</i> , 429 F.3d 83, 87 (4th Cir. 2005)	8
<i>Arnold v. Arnold Corp.</i> , 920 F. 2d 1269, 1281 (6th Cir. 1990)	20
<i>AT&T Mobility, LLC v. Concepcion</i> , 131 S. Ct. 1740, 1751 (2011)	9
<i>AT&T Techs., Inc. v. Commn's Workers of Am.</i> 475 U.S. 643, 650 (1986)	9
<i>Brantley v. Republic Mortg. Ins. Co.</i> , 424 F.3d 392, 396 (4th Cir. 2005)	20
<i>Brown v. Five Star Quality Care, Inc.</i> 2016 WL 8710474 (D.S.C. 2016).....	11, 12, 15
<i>Brumfield v. Kindred Healthcare Inc.</i> , 2018 WL 3222614, at *1 (D.S.C. 2018).....	19
<i>Carter v. MasTec Services Co., Inc.</i> , 2010 WL 500421, *4 (D.S.C. 2010);.....	20
<i>Circuit City Stores, Inc. v. Adams</i> , 552 U.S. 105 (2001)	8, 9, 10
<i>Collins v. Ky. Lottery Corp.</i> , 399 S.W.3d 449, 455 (Ky. App. 2012).....	11
<i>Gissel v. Hart</i> , 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).....	7
<i>Green Tree Fin. Corp., v. Randolph</i> , 531 U.S. 79, 92 (2000)	7
<i>Hamlin v. Dollar Tree Stores, Inc.</i> , 2017 WL 6034325, at *2 (D.S.C. 2017)	18
<i>Hightower v. GMRI, Inc.</i> 272 F.2d 239, 242 (4th Cir. 2001)	16
<i>J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.</i> , 863 F.2d 315, 321 (4th Cir. 1988).....	19
<i>Knight v. Amedisys Holding, LLC</i> , 2016 WL 5661227 (W.D. Ky. 2016)	10, 11, 15
<i>Langlois v. Amedisys, Inc.</i> , 2016 WL 4059670 (M.D. La. 2016)	11, 13, 15
<i>Lesneski v. Ross Stores, Inc.</i> , 2017 WL 2919014, *2 (W.D.N.C. 2017)	10

<i>Gadberry v. Rental Services Corp.</i> , 2011 WL 766991 (D.S.C. 2011).....	21
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	9, 18
<i>Proctor v. Steedley</i> , 398 S.C. 561, 573, 730 S.E.2d 357 (Ct. App. 2012).....	7
<i>Regions Bank v. Schmauch</i> , 354 S.C. 648, 662-63, 582 S.E.2d 432, 440 (Ct. App. 2003).....	15
<i>Richland Cty. v. Caroline Chloride, Inc.</i> 382 S.C. 634, 656, 677 S.E.3d 892, 903 (Ct. App. 2009)	8
<i>Rock v. Solar Rating & Cert. Corp.</i> , 2018 WL 3750617, *6 (D.S.C. 2018)	7
<i>Sauner v. Pub. Serv. Auth. of S.C.</i> , 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003)	10
<i>Small v. Springs Indus., Inc.</i> , 292 S.C. 481, 483-84, 357 S.E.2d 452, 454 (1987).....	16
<i>Towles v. United HealthCare Corp.</i> , 338 S.C. 29, 524 S.E. 839 845 (Ct. App. 1999).....	12, 13, 15, 17
<i>W.E. Gilbert & Assocs. v. S.C. Nat. Bank</i> , 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).....	7
<i>Webb v. Oaktree Med. Ctr., P.C.</i> , 2018 WL 3153614, at *3-4 (D.S.C. 2018).....	19
<i>Wike v. Holiday Kamper Co. of Columbia, LLC</i> , 2014 WL 1234311, *2-3 (D.S.C. 2014)	20
<i>Willard v. Dollar Gen. Corp.</i> , 2017 WL 4551500, *1 (D.S.C. 2017)	11, 13, 15
<i>Young v. AMISUB of South Carolina, Inc.</i> , 2018 WL 5668619, *3 (D.S.C. 2018).....	10
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 597, 553 S.E.2d 110, 118-19 (2001)	9

Statutes

9 U.S.C. § 2.....	9
9 U.S.C. §§ 1-14	8
La. Civ. Code, arts. 1918, 1927, 1971, 2029 cmt. B (1991).....	11

STATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court erred by refusing to enforce the Parties written agreement to arbitrate claims that arise out of or relate to Respondent's employment?

STATEMENT OF THE CASE

Ms. Lampo formerly worked for Amedisys as a Physical Therapist. In August 2013, Ms. Lampo agreed to binding arbitration with Amedisys for any claim or dispute arising from or related to Ms. Lampo's employment. Notwithstanding her agreement, on December 7, 2018, Ms. Lampo filed a lawsuit in the Court situated in Georgetown County alleging: (1) wrongful discharge; (2) tortious interference; and (3) defamation. Thereafter, Amedisys notified Ms. Lampo that it intended to enforce her contractual agreement to arbitrate those claims, but Ms. Lampo refused to honor her obligation to arbitrate. Consequently, Amedisys and Ms. Neasbitt—Ms. Lampo's former supervisor named individually as a defendant—moved to compel arbitration, but the Trial Court denied the motion holding that "there is insufficient evidence of a valid acceptance to give rise to an enforceable contract under South Carolina contract law." As established below, Amedisys and Ms. Neasbitt respectfully believe the Circuit Court erred in its decision. Thus, Amedisys and Neasbitt now appeal.

RELEVANT BACKGROUND

I. Relevant Factual Background

Amedisys provides home health and hospice services to patients throughout the United States. R. p. 12. In July 2013, Amedisys hired Ms. Lampo to work as a Physical Therapist primarily out of its Horry and Georgetown County, South Carolina care centers. *See id.* Like all employees, Amedisys provided Ms. Lampo (at the time of hire) with a unique username and password permitting Ms. Lampo to log into Amedisys' computer-based system, known as "SharePoint." R. pp. 45-46. During that time, Amedisys also assigned Ms. Lampo a unique email accessible only to her via her unique username and password, which Ms. Lampo had the ability to change at her discretion. R. pp. 45-46.

On August 6, 2013, Amedisys emailed all employees, including Ms. Lampo, concerning the Company's written Dispute Resolution Agreement ("Arbitration Agreement"). R. pp. 46, 50. The email subject line stated, "Important Policy Change – Must Read." *Id.* The subject of the email stated: "[t]his e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." *Id.* Upon clicking on the email to open it in their inbox, each employee, including Ms. Lampo, was provided with an Acknowledgment Form, which stated:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button on this screen I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials."

R. pp. 43, 52. Once an employee clicked "Acknowledge" on the Acknowledgment Form, they were directed to a webpage that provided descriptions and links to all of the Amedisys' Arbitration Program materials, including a cover letter, the Arbitration Agreement, and a six-page fact sheet of FAQs explaining the Arbitration Agreement.¹ R. pp. 46, 52, 60-71. These three documents were the only documents located on the webpage. *See id.* Ms. Lampo clicked "Acknowledge" on August 6, 2013 at 1:55 p.m. R. pp. 55, 58. Thereafter, Ms. Lampo had unrestricted access to Amedisys' Arbitration Program materials and could read them, consult

¹ Included in the materials was information regarding a "hotline" Ms. Lampo (or any other employee) could call if she had questions about the Arbitration Agreement. R. p. 71.

with an attorney (or anyone else) about them if she chose (including a Company-provided Hotline), and then make a decision if she wanted to participate or opt out.

The Arbitration Agreement, which Ms. Lampo “Acknowledged” she was “required” to review (*see* R. p. 52) provides for mutual arbitration, and states:

“This Dispute Resolution Agreement (“the “Agreement”) is an agreement to resolve any and all legal disputes between you (“Employee”) and Amedisys before an arbitrator, rather than in court.” The Arbitration Agreement states it “is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above.”

R. pp. 45, 60. The Arbitration Agreement reiterated that “Arbitration is not a mandatory condition of Employee’s employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement.” *See id.* The Arbitration Agreement states it is governed by the Federal Arbitration Act and applies to “any dispute arising out of or related to Employee’s employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates.”² *See id.* Under the Arbitration Agreement, the employee and Amedisys may select an arbitrator by mutual agreement, and if they are unable to do so, the selection proceeds under American Arbitration Association (“AAA”) rules. R. p. 62. Written discovery, depositions and dispositive motions are allowed. R. p. 63. Furthermore, the Arbitration Agreement states that Amedisys will pay the arbitrator’s fees and any costs in accordance with AAA rules and Ms. Lampo is responsible for her own attorney’s fees, witness fees, costs and expenses, just like she would if this matter were litigated in court. R. p. 65.

² As established below, because Ms. Lampo’s claims against Ms. Neasbitt derive from her employment with Amedisys, her inclusion of Neasbitt as an individual defendant in this case is inconsequential for purposes of ordering this matter be arbitrated. *See infra.*

To ensure it was easy for employees to opt out of the Arbitration Agreement if they desired, Amedisys included a simple "Dispute Resolution Agreement Opt-Out Form" as Attachment "A" to the Arbitration Agreement. R. pp. 47, 67. Thus, to "opt-out" of the Arbitration Agreement, all an employee needed to do was sign, date, and return the Arbitration Agreement Opt-Out Form within 30 days of the employee's receipt of the same. *See id.* To make sure employees understood this, the cover letter provided to Ms. Lampo, which she "Acknowledged" she was required to review, explained:

What if I do not want to arbitrate? You have 30 days from the date of this memorandum to opt out of the Dispute Resolution Agreement. You may do so by printing the Opt-Out Form (Attachment A to the Agreement), printing and signing your name . . . and sending it by U.S. Mail to Amedisys, Inc., postmarked no later than 30 days from the date you acknowledged receipt of the Dispute Resolution Agreement.

The Arbitration Agreement itself also states, in relevant part:

Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee's continuation of his or her employment with the Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement.

R. pp. 46-47, 65-66, 69-70.

Amedisys' Human Resources Department maintains a file containing the actual hard copy of all opt-out forms completed by any employee who chose to opt-out of the Arbitration Agreement. R. p. 47. Ms. Lampo does not allege she opted out of the Arbitration Agreement and Amedisys did not have an "opt out" form for her. R. pp. 47, 142-143. Rather, Ms. Lampo continued to work for Amedisys until March 2018 at which point Ms. Lampo alleges Amedisys terminated her employment. R. pp. 10-24.

II. Relevant Procedural Background

On December 7, 2018, Ms. Lampo filed a four-count complaint alleging Amedisys violated South Carolina common law by “wrongfully discharging” her from her employment with Amedisys (Count I), tortiously interfering with her “prospective contractual relations” (Count IV), and that Amedisys and Ms. Neasbitt defamed Ms. Lampo (Counts II and III). R. pp. 10-24. Specifically, Ms. Lampo alleges that Amedisys “wrongfully” terminated her employment in violation of public policy after she purportedly made compliance-related reports to Amedisys’ corporate office. R. pp. 13-14, 17-18. Thereafter, Ms. Lampo alleges that Amedisys and Ms. Neasbitt “defamed” her by making false statements regarding Ms. Lampo that “lessened [Ms. Lampo’s] standing in her profession.” R. pp. 16, 18-21. Ms. Lampo also alleges that Amedisys tortiously interfered with her “prospective employment” when some unknown person made someone unknown statement(s) to some unknown prospective employer preventing Ms. Lampo from obtaining some unknown job. R. pp. 16-17, 21-22.

On February 4, 2019, Amedisys and Ms. Neasbitt filed their Motion establishing that Ms. Lampo’s claims were preempted by the Federal Arbitration Act (“FAA”) and relegated to mandatory arbitration, based upon Ms. Lampo’s voluntary acceptance of the Arbitration Agreement. R. pp. 25-121. On February 26, 2019, Ms. Lampo filed her “Memorandum in Opposition.” R. pp. 122-46.

On March 1, 2019, the Parties, through counsel, appeared before the Honorable Presiding Circuit Court Judge, Benjamin H. Culbertson, for a hearing on Amedisys and Ms. Lampo’s Motion. R. pp. 147-78. At the conclusion of the hearing, Judge Culbertson denied Amedisys’ Motion holding that failing to opt out of the Arbitration Agreement did not evince Ms. Lampo’s

acceptance of the agreement. R. p. 175. Thereafter, on March 11, 2019, Judge Culbertson entered an Order prepared unilaterally by Ms. Lampo's counsel. R. pp. 5-9.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357 (Ct. App. 2012). The “determination of whether a claim is subject to arbitration is subject to *de novo* review.” *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Where, as here, the material facts concerning the formation of a contract are not in dispute, the issue of contract *vel non* is a question of law. *W.E. Gilbert & Assocs. v. South Carolina Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

LEGAL ARGUMENTS

Due to the liberal policy favoring arbitration, the party challenging the validity of an arbitration agreement—here, Ms. Lampo—bears the burden showing the agreement at issue is unenforceable. *See Green Tree Fin. Corp., v. Randolph*, 531 U.S. 79, 92 (2000); *Rock v. Solar Rating & Cert. Corp.*, 2018 WL 3750617, *6 (D.S.C. 2018). To compel arbitration, four requirements must be met: (1) a dispute between the parties; (2) a valid, written agreement to arbitrate encompassing the dispute; (3) a transaction relating to interstate commerce; and (4) a refusal to arbitrate. *See American Gen. Life & Accident Ins., Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005).

Before the Circuit Court, Ms. Lampo did not challenge the first, third, or fourth requirements and, thus, has waived the ability to do so on appeal. R. pp. 122-46. *See Richland Cty. v. Caroline Chloride, Inc.* 382 S.C. 634, 656, 677 S.E.3d 892, 903 (Ct. App. 2009). Instead, Ms. Lampo challenged the second requirement arguing that her failure to opt out of the Arbitration Agreement did not evidence her acquiescence to the agreement. *See id.* As

established below, Ms. Lampo's argument, adopted by the Circuit Court, oversimplifies and contorts Ms. Lampo's actions, such that her decision to click "Acknowledge," not opt out of the Arbitration Agreement, and continue working for Amedisys evidences her unequivocal agreement to arbitrate. Thus, Amedisys and Ms. Neasbitt respectfully argue that the Circuit Court erred when it refused to enforce the Arbitration Agreement and did not order this case to be resolved in binding arbitration. Accordingly, this Honorable Court should reverse the Circuit Court's Order denying Amedisys and Ms. Neasbitt's Motion and mandate this case be decided pursuant to the Arbitration Agreement between the Parties.

I. The Arbitration Agreement is Governed by the Federal Arbitration Act.

Before the Circuit Court, Ms. Lampo did not challenge the applicability of the FAA to the Arbitration Agreement. To be sure, though, the FAA, 9 U.S.C. §§ 1-14, applies to written arbitration agreements between employers and employees in transactions involving interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). "Involving commerce" is to be construed as broadly as possible, meaning that any arbitration agreement that affects commerce in any way is governed by the FAA. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-281 (1995). In other words, the FAA applies to all arbitration agreements where a party to that agreement is involved in interstate commerce. *See id.* at 282.

Under the FAA, a provision in a written agreement to resolve controversies between the parties by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011); 9 U.S.C. § 2. As the Supreme Court has repeatedly emphasized, the FAA "strongly favors the enforcement of agreements to arbitrate as a means of securing 'prompt, economical, and adequate solution of controversies.'" *Circuit City Stores, Inc.*, 532

U.S. at 132; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). Thus, the FAA establishes a “federal policy favoring arbitration.” *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Therefore, a motion to compel arbitration should not be denied unless it may be said “with positive assurance” that the issues are outside the scope of the arbitration clause. *AT&T Techs., Inc. v. Comm’n’s Workers of Am.*, 475 U.S. 643, 650 (1986). And, courts must interpret arbitration provisions liberally, resolving doubts in favor of arbitration. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 (1983); *see also AT&T Tech., Inc.* 475 U.S. at 650. South Carolina shares the Supreme Court’s strong public policy favoring arbitration. *See, e.g., Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001) (“[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered . . .”).

In this case, the Arbitration Agreement makes clear that it is governed by the FAA. R. p. 60. Furthermore, as of date Amedisys filed its Motion, Amedisys and its affiliated companies employ in excess of 16,000 people in thirty-four (34) states. R. p. 44. Amedisys orders supplies and receives payments for services across state lines, including from the federal government. *See id.* There simply is not (and cannot be) any dispute that Amedisys is a nationwide company that operates facilities and conducts transactions in interstate commerce. *See e.g., Lesneski v. Ross Stores, Inc.*, 2017 WL 2919014, *2 (W.D.N.C. 2017); *Circuit City Stores, Inc.*, 532 U.S. at 123 (holding that the FAA was applicable to arbitration agreement between a sales associate and her multistate employer). Thus, the Arbitration Agreement is governed by the FAA, and according to both long-established legal precedent and Congressional intent, and any doubts concerning arbitrability must be resolved in favor of arbitration.

II. The Arbitration Agreement is a Valid and Enforceable Contract.

“Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002). Thus, where a valid arbitration agreement exists and covers the claims at issue, the Court has “no choice but to grant a motion to compel arbitration.” *Id.* at 500. For a valid contract to exist under South Carolina law, such as the case here, the three elements of offer, acceptance, and consideration must be present, and none of the recognized defenses to contract formation, such as fraud, duress, or unconscionability, should apply. *See, e.g., Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003); *Young v. AMISUB of South Carolina, Inc.*, 2018 WL 5668619, *3 (D.S.C. 2018). In this case, all three elements are present, and no defenses to the Arbitration Agreement exist.

On two different occasions, federal district courts in Kentucky and Louisiana have enforced the exact same Arbitration Agreement at issue in this case. *See Knight v. Amedisys Holding, LLC*, 2016 WL 5661227 (W.D. Ky. 2016); *Langlois v. Amedisys, Inc.*, 2016 WL 4059670 (M.D. La. 2016).³ While neither *Knight*, nor *Langlois* is binding on this Honorable Court, they are persuasive in one critical context. Like South Carolina, both Kentucky and Louisiana require, among other things, evidence of “acceptance” to contract. *See, e.g., Collins v. Ky. Lottery Corp.*, 399 S.W. 3d 449, 455 (Ky. App. 2012) (the elements of a contract include, among other things, “acceptance”); La. Civ. Code, arts. 1918, 1927, 1971, 2029 cmt. B (1991) (a valid contract must have, *inter alia*, “consent”). In *Langlois*, the District Court found that the plaintiff accepted the offer to arbitrate by clicking “Acknowledge,” failing to opt out, and continuing to work for Amedisys. In *Knight*, the District Court explicitly found as much,

³ And, in the *Knight* matter, against the plaintiff’s non-signatory former supervisor. 2016 WL 5661227.

holding: “[b]ecause Knight clicked the acknowledgment form to indicate that she received and understood the materials, and she did not opt out of the Agreement, [the plaintiff] manifested her assent to the Agreement, including the agreement to arbitrate.” 2016 WL 5661227 at *3.

South Carolina case law also compels enforcing the Arbitration Agreement here. In *Willard v. Dollar General Corporation*, the plaintiff sued her former employer alleging various causes of action stemming from an armed robbery that was committed while the plaintiff was working. 2017 WL 4551500, *1 (D.S.C. 2017) After the defendant removed the action on diversity grounds, it filed a motion to dismiss or, alternatively, to stay litigation and compel arbitration asserting that the plaintiff was required to arbitrate her claims because they were covered by a valid and enforceable arbitration agreement. *Id.* at *2. In its motion, the defendant established that on October 17, 2014, while employed by Dollar General, the plaintiff logged into her employee account and viewed the arbitration agreement. *Id.* at 1. Once logged in, the plaintiff was advised that she would be bound by the terms of the arbitration agreement if she did not opt out within 30 days of viewing the arbitration agreement. *Id.* Over the next 30 days, the plaintiff did not opt out and continued to work for Dollar General thereafter. *Id.* Although the plaintiff conceded the applicability and enforcement of the arbitration agreement, the District Court noted that following the expiration of the 30 day opt out period, the “parties became bound by [the agreement’s] terms,” thereby establishing a valid contract. *Id.* at *1-2.

A similar question was presented in *Brown v. Five Star Quality Care, Inc.* 2016 WL 8710474 (D.S.C. 2016). In *Brown*, the plaintiffs worked for Five Star, a for-profit corporation operating 260 senior living facilities in the United States, including in Charleston, South Carolina where the five plaintiffs worked. *Id.* at *2. According to the complaint, Five Star required the plaintiffs to work off the clock without compensation in violation of the Fair Labor

Standards Act and South Carolina Wage Payment and Collection Act. *Id.* In April 2012, Five Star introduced an arbitration agreement that provided for binding arbitration of all employment disputes. *Id.* Employees currently employed by Five Star in April 2012 were provided a copy of the arbitration agreement at the end of a staff meeting on May 30, 2012. *Id.* Employee's signed a "receipt and acknowledgment form" indicating they received the arbitration agreement. *Id.* Five Star permitted current employees an opportunity to opt out of the arbitration agreement, provided those employees contacted Five Star's Human Resources Department within 30 days to request and timely returned an "opt out form" to its Massachusetts-located Human Resources Department. *Id.* None of the plaintiff's opted out of the agreement and after the plaintiffs filed their lawsuit, Five Star sought to enforce the arbitration agreement. *Id.* In determining whether under South Carolina law the plaintiffs entered into the arbitration agreement, the Court held that it was "clear" they had. *Id.* at *4: Citing *Towles v. United HealthCare Corp.*, the Court determined that the plaintiffs each continued to work for Five Star after allegedly receiving the arbitration agreement—evidenced by virtue of their "acknowledgment"—and, thus, because "continuing in employment suffices to accept an arbitration agreement," the plaintiffs were bound by the agreement. *Id.* at *4 (citing *Towles*, 338 S.C. 29, 40, 524 S.E.2d 389, 845 (S.C. Ct. App. 1999) ("We find the 'Acknowledgment' constituted a specific communication of an offer which conditioned [plaintiff's] continued employment on his acceptance of the [arbitration agreement] as part of his employment contract . . . [Plaintiff] accepted the offer by continuing his employment.")). Thus, the Court granted the defendant's motion to compel arbitration. *Id.*

Here, this Honorable Court should find that Ms. Lampo is bound by the Arbitration Agreement just like the plaintiffs in *Knight*, *Langlois*, *Willard*, *Brown*, and *Towles*. First, on August 6, 2013, Amedisys tendered to Plaintiff an offer to participate in Amedisys' alternative

dispute resolution program. R. pp. 45-46, 50, 52, 55. Ms. Lampo does not dispute that Amedisys offered her the Arbitration Agreement; rather, only that she does not “remember receiving or reviewing” the August 6, 2013 email or “remember being presented with the . . . [Arbitration Agreement].” R. pp. 142-43.⁴ In any event, upon clicking on a hyperlink contained in the August 6, 2013 email, Ms. Lampo was presented with the “Acknowledgment,” which identified “The Amedisys Arbitration Program” and instructed her that she was “required to review” a Cover Letter, the Arbitration Agreement, and a list of frequently asked questions (FAQs). R. pp. 45-46, 50, 52, 55. The “Acknowledgment” also informed Ms. Lampo, in bold letters, that **“Unless you opt out of the [Arbitration] Agreement within 30 days of today’s date, you will be bound by it, which will affect your legal rights.”** R. p. 52 (bold in original). Thereafter, using her unique username and password, Ms. Lampo clicked “Acknowledge” at 1:55 p.m. on August 6, 2013—a fact that Ms. Lampo does not dispute (*see* R. pp. 142-43)—thereby confirming that Amedisys had offered Ms. Lampo an opportunity to mutually agree to arbitrate any dispute arising from her employment relationship. R. pp. 45, 52, 55, 58, 60-67.

This Court’s Opinion in *Towles* is instructive in this regard. 524 S.E.2d at 844-45. In *Towles*, the plaintiff signed an “Acknowledgment,” that referenced an “Employment Arbitration Policy” found in the Company’s Handbook. *Id.* After filing a lawsuit against his employer, the employer moved to compel arbitration. *Id.* The plaintiff argued that he never received the actual provisions of the arbitration agreement, which he claimed precluded him from assenting to arbitration. *Id.* This Honorable Court disagreed and held that after the plaintiff received and signed the “Acknowledgment,” the defendant had no legal duty to explain the “Employment Arbitration Policy” or its contents to the plaintiff when he could learn the contents by simply

⁴ Of course, as demonstrated above and established below, Ms. Lampo’s actions establish she did receive the offer and the Arbitration Agreement.

reading the document. *Id.* Thus, finding that the “Acknowledgment” constituted a specific communication of an offer that conditioned the plaintiff’s continued employment on his acceptance of the “Employment Arbitration Policy, this Honorable Court determined that the plaintiff had accepted the offer by continuing work and, thus, the “Acknowledgment” constituted a binding arbitration agreement.” *Id.* at 845.

In this case, Ms. Lampo’s decision to “Acknowledge” receipt of the Arbitration Agreement—and then not opt out and continue working for Amedisys—is no different than the plaintiff signing the “Acknowledgment” in *Towles*. Like *Towles*, the “Acknowledgment” in this case referenced the Arbitration Agreement and unequivocally instructed Ms. Lampo on the consequences of clicking “Acknowledge.” R. pp. 52, 55, 58. In addition, Amedisys provided Ms. Lampo with the ability to review the Arbitration Agreement at her leisure and she “Acknowledged” her understanding that she was required to do so. *See id.* Under these circumstances, there is no dispute that Ms. Lampo had notice of the Arbitration Agreement. Thus, the first requirement to contract formation is met.

Second, like the plaintiffs in *Knight*, *Langlois*, *Willard*, *Brown*, and *Towles*, Ms. Lampo accepted and agreed to be bound by the Arbitration Agreement. On August 6, 2013 at 1:55 p.m., Ms. Lampo clicked “Acknowledge,” using her unique username and password to which only she had access. R. pp. 44-46, 52, 54-56, 58. By doing so, Ms. Lampo unequivocally confirmed her understanding that she was required to review the Arbitration Agreement and that she was bound by the Arbitration Agreement if she failed to opt out in 30 days. *See id.* The fact that Ms. Lampo “does not recall” reading the Arbitration Agreement or chose not to read the Arbitration Agreement is immaterial. *See, e.g., Regions Bank v. Schmauch*, 354 S.C. 648, 662-63, 582 S.E.2d 432, 440 (Ct. App. 2003) (a person who agrees to a contract or other written document

cannot avoid the effect of the document by claiming he did not read it); *Towles*, 524 S.E. 839, 845. If that were the case, there would be an avalanche of contracts that would be unenforceable—a result that makes no sense and an argument that should be flatly rejected.

Moreover, the Arbitration Agreement made clear that: “Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee’s continuation of his or her employment with Company shall constitute Employee’s and Company’s mutual acceptance of the terms of this Agreement.” R. pp. 65-66. Like the plaintiffs in *Knight, Langlois, Willard, and Brown*, Ms. Lampo’s decision to not opt out of the Arbitration Agreement and, instead, to continue working for Amedisys, indisputably establishes her acceptance of the Arbitration Agreement. *See, e.g., Hightower v. GMRI, Inc.* 272 F.2d 239, 242 (4th Cir. 2001) (employee’s continued employment bound him to accept employer’s arbitration procedure); *Small v. Springs Indus., Inc.*, 292 S.C. 481, 483-84, 357 S.E.2d 452, 454 (1987) (finding an employee accepted employer’s offer by “performing the act on which the promise was impliedly or expressly based.”).

The Circuit Court’s erroneous belief that Ms. Lampo’s decision to not opt out of the agreement was insufficient to establish “mutual assent” is contrary to the record evidence and applicable case law. R. pp. 5-9, 147-78. First, the Circuit Court’s decision ignores the fact that Ms. Lampo clicked “Acknowledge” after being presented with a disclaimer making it abundantly clear to her that unless she opted out of the Arbitration Agreement, she would be bound by it. R. pp. 52, 55, 58. In other words, Ms. Lampo took affirmative action by clicking “Acknowledge” affirming her receipt of Amedisys’ offer to arbitrate and her understanding that she was bound by the Arbitration Agreement unless she opted out. *See id.* During oral argument, the Circuit

Court explained its rationale in denying Amedisys and Ms. Neasbitt's Motion by likening this case to the following scenario:

If I offer you to sell my house and . . . I say, "you don't contact me back and tell me you don't want to do it," then we've got a contract and you got to buy my house.

I just don't think that that's an adequate acceptance.

R. pp. 154, 177.

The Circuit Court's hypothetical is flawed for several reasons. First, the hypothetical disregards the fact that Ms. Lampo affirmatively clicked "Acknowledge" after receiving an email, clicking a hyperlink, and being presented with the Acknowledgment Form. R. pp. 44-46, 50, 52, 54-56, 58. There is no evidence in the record suggesting Ms. Lampo had to click on the hyperlink in the August 6, 2013 email or on the "Acknowledge" button thereafter. But, she chose to do so affirming that she had been provided the Arbitration Agreement and affirming her understanding that she was bound by the Arbitration Agreement if she continued working and unless she opted out. *See id.*; R. pp. 60-67. In the Circuit Court's example, unlike here, no affirmative act was undertaken by the potential buyer and, thus, he or she gave no indicia of assent.⁵

Second, the Circuit Court's hypothetical also minimizes the fact that Ms. Lampo not only clicked "Acknowledge" and then chose to not opt out of the Arbitration Agreement, but she continued to work for Amedisys—an act that the Arbitration Agreement itself makes clear

⁵ Amedisys notes that it employed Ms. Lampo and, thus, they had an ongoing relationship. Within the confines of that relationship, Amedisys could have required Ms. Lampo (and all of its employees) to agree to the Arbitration Agreement as a condition of her (their) continued employment. *See Towles*, 524 S.E.2d at 845. Just because Amedisys generously gave its employees the less restrictive option of allowing them to opt out of the Arbitration Agreement should not somehow invalidate Ms. Lampo's acquiescence to the Arbitration Agreement. This result is another concerning consequence of the Circuit Court's ruling.

constitutes acceptance. R. pp. 65-66. Thus, the Circuit Court's hypothetical has little resemblance to the record evidence here. Accordingly, for the reasons established above, it is clear that Ms. Lampo's actions evidence assent to the Arbitration Agreement and the Circuit Court erred in determining otherwise.

Finally, the Arbitration Agreement is supported by consideration, a conclusion unchallenged by Ms. Lampo before the Circuit Court. R. pp. 122-46. Under South Carolina law, "a mutual promise to arbitrate constitute[s] sufficient consideration to enforce an arbitration agreement." *Towles*, 524 S.E.2d at 845; *Adkins*, 303 F.3d at 501 ("[b]ecause no consideration is required above and beyond the agreement to be bound by the arbitration process for any claims brought by the employee, ... [Defendant's] promise to arbitrate its own claims is *a fortiori* adequate consideration for this agreement."); *see also Hamlin v. Dollar Tree Stores, Inc.*, 2017 WL 6034325, at *2 (D.S.C. 2017). In this case, the Arbitration Agreement makes clear that both Ms. Lampo and Amedisys agree to arbitrate any claims against the other "arising out of or relat[ing] to [Ms. Lampo's] employment . . ." R. p. 60. Thus, there is no question that the Arbitration Agreement is supported by adequate consideration.

For each of the foregoing reasons, it is clear that the Arbitration Agreement is a valid and enforceable contract requiring this matter to be heard exclusively in an arbitral forum. Thus, Amedisys respectfully requests that the Circuit Court erred in erroneously determining that Ms. Lampo did not agree to arbitrate her claims. Accordingly, Amedisys and Ms. Neasbitt respectfully request that this Honorable Court reverse the Circuit Court's decision, find that the Parties entered into a binding Arbitration Agreement, and order Ms. Lampo to file her Complaint in the arbitral forum provided for by the Arbitration Agreement.

III. The Arbitration Agreement Covers the Dispute.

As established above, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 23–24 (emphasis added). To that end, “the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960). Thus, the court may not deny a party’s request to arbitrate an issue “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute.” *Id.*; *Brumfield v. Kindred Healthcare Inc.*, 2018 WL 3222614, at *1 (D.S.C. 2018)

The Fourth Circuit has held that the language “arising out of or related to” constitutes a “broad arbitration clause[] capable of an expansive reach.” *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). The Fourth Circuit has further stated that a “broad arbitration clause ‘d[oes] not limit arbitration to the literal interpretation or performance of the contract, but embrace[s] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute.’” *Id.* (quoting *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)) (emphasis in original); *Webb v. Oaktree Med. Ctr., P.C.*, 2018 WL 3153614, at *3–4 (D.S.C. 2018).

In this case, the Arbitration Agreement makes clear that it applies to “any dispute arising out of or related to [Ms. Lampo’s] employment with Amedisys or termination or employment . . .” R. p. 60. A simple review of Ms. Lampo’s Complaint establishes that each and every one of her claims against Amedisys and Ms. Neasbitt “arise out of” or are “related to” Ms. Lampo’s

former employment with Amedisys and relationship with Ms. Neasbitt as her former Amedisys' supervisor. R. pp. 10-24. Any conclusion to the contrary is simply disingenuous. In fact, each cause of action contained in Ms. Lampo's Complaint arises directly out of decisions made by Amedisys and Ms. Neasbitt (as a supervisory employee of Amedisys) regarding Ms. Lampo's former work-relationship (and cessation thereof) with Amedisys and Ms. Neasbitt. *See id.* Under no circumstance can Ms. Lampo meet her burden establishing otherwise.

Furthermore, a non-signatory—in this case, Ms. Neasbitt—can compel arbitration if the claims against her are “intertwined” with the agreement to arbitrate. *See Carter v. MasTec Services Co., Inc.*, 2010 WL 500421, *4 (D.S.C. 2010); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005); *see also Arnold v. Arnold Corp.*, 920 F. 2d 1269, 1281 (6th Cir. 1990) (if a plaintiff “can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants in his complaint . . . the effect of the rule requiring arbitration would, in effect, be nullified.”). Under the “intertwined test,” Ms. Lampo is estopped from avoiding arbitration against a non-party if the “issues [Ms. Neasbitt] is seeking to resolve in arbitration are intertwined with the agreement” to which Ms. Lampo is bound. *See Wike v. Holiday Kamper Co. of Columbia, LLC*, 2014 WL 1234311, *2-3 (D.S.C. 2014) (granting motion to compel arbitration with an alleged non-party to the arbitration agreement at issue finding that the plaintiff's claims against the alleged non-party were “interdependent” of the claims with a party to the arbitration agreement).

Here, by virtue of Ms. Neasbitt's relationship with Amedisys and Ms. Lampo (and her claims against Amedisys and Ms. Neasbitt), there is little dispute that she has standing to compel arbitration on those claims brought individually against her. In fact, every allegation lodged against Ms. Neasbitt derives from her employment relationship with Amedisys and her role as

Ms. Lampo's former supervisor. R. pp. 20-21. Thus, Ms. Lampo's claims against Ms. Neasbitt in this case are interdependent with her claims against Amedisys and for which must be arbitrated pursuant to Ms. Lampo's agreement to do so. Moreover, the clear intent of the language in the Arbitration Agreement is to provide a single arbitral forum to resolve all disputes. R. pp. 60-61. And, because "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, it is clear that Ms. Lampo claims brought individually against Ms. Neasbitt should be relegated to an arbitral forum. *Moses H. Cone Hosp.*, 460 U.S. at 24-25; see also *Gadberry v. Rental Services Corp.*, 2011 WL 766991 (D.S.C. 2011) (granting non-signatory's motion to compel arbitration and forcing former employee to arbitrate based upon the "intertwined claims doctrine").

CONCLUSION

For the reasons established above, Ms. Lampo's claims should be heard and adjudicated exclusively in an arbitral forum pursuant to her agreement to do so. Thus, Amedisys and Ms. Neasbitt respectfully request that this Honorable Court reverse the Circuit Court's Order denying their motion to compel arbitration and to grant other relief deemed fair and just.

Respectfully submitted,

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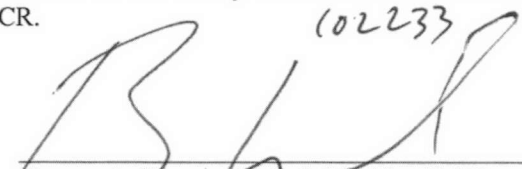
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Dated this 12th day of August 2019

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The undersigned certifies that to the best of his ability that this Final Initial Brief of Appellants complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-22-01001
Appellate Case No. 2019-000451

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SC Court of Appeals

Nicole Lampo Respondent,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, ... Appellants.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS.....	3
STANDARD OF REVIEW	7
ARGUMENT	8
I. APPELLANTS' PROPOSED ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE THERE IS NO EVIDENCE OF A VALID ACCEPTANCE.....	10
II. ADDITIONAL SUSTAINING GROUNDS EXIST FOR THE COURT TO AFFIRM THE LOWER COURT'S RULING.	17
A. Respondent never received actual notice of the proposed arbitration agreement.	18
B. Severe restrictions on discovery cause a one-sided disadvantage to the Respondent and render Appellant Amedisys' proposed arbitration agreement unconscionable.	19
C. Respondent's post-termination tort claims are not covered by Amedisys' unsigned arbitration agreement.	21
D. Appellant Neasbitt, who is not a party to the proposed arbitration agreement, cannot enforce the arbitration agreement as to the claims personally alleged against her.	22
III. ALTERNATIVELY, SHOULD THE COURT REVERSE, THE APPROPRIATE REMEDY UNDER THE FEDERAL ARBITRATION ACT WOULD BE INSTRUCTIONS REQUIRING A JURY TRIAL ON ARBITRABILITY AND LIMITED JURISDICTIONAL PRE-TRIAL DISCOVERY.....	24

TABLE OF AUTHORITIES

Cases

<i>Adams v. Square D. Co.</i> , 775 F. Supp. 869 (D.S.C. 1991).....	15
<i>Aggarao v. MOL Ship Mgmt. Co.</i> , 675 F.3d 355 (4th Cir. 2012)	8
<i>American Recovery Corp. v. Computerized Thermal Imaging, Inc.</i> , 96 F.3d 88 (4th Cir. 1996).	22
<i>AT & T Techs., Inc. v. Communications Workers of Am.</i> , 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)	10
<i>Brown v. Five Star Quality Care, Inc.</i> , No. 2:15-CV-4105-RMG, 2016 WL 8710474 (D.S.C. Jan. 8, 2016)	13, 14
<i>Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.</i> , 313 S.C. 215, 437 S.E.2d 122 (Ct.App.1993). 11	
<i>Carter v. MasTec Services Co., Inc.</i> , C.A. 2:09-2721-PMD, 2010 WL 500421, (D.S.C. 2010).....	23
<i>Chassereau v. Glob. Sun Pools, Inc.</i> , 373 S.C. 168, 644 S.E.2d 718 (2007).....	11, 17
<i>Chassereau v. Glob.-Sun Pools, Inc.</i> , 363 S.C. 628 611 S.E.2d 305 (Ct. App. 2005).....	11, 12, 17, 18
<i>El Hoss Eng'g & Transp. Co. v. Am. Indep. Oil Co.</i> , 289 F.2d 346 (2d Cir. 1961).....	25
<i>Ferguson v. Countrywide Credit Indus., Inc.</i> , 298 F.3d 778 (9th Cir. 2002)	20
<i>Fitz v. NCR Corp.</i> , 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88 (2004).....	20
<i>Fleming v. Borden, Inc.</i> , 316 S.C. 452, 450 S.E.2d 589 (1994)	18, 25
<i>Gaskins v. Blue Cross—Blue Shield of South Carolina</i> , 271 S.C. 101, 245 S.E.2d 598 (1978)	11
<i>Hightower v. GMRI, Inc.</i> , 272 F.3d 239 (4th Cir. 2001)	18, 19
<i>Holroyd v. Requa</i> , 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004)	8
<i>Hooters of America, Inc. v. Phillips</i> , 173 F.3d 933 (4th Cir. 1999).....	10
<i>Howard v. Ferrellgas Partners, L.P.</i> , 748 F.3d 975 (10th Cir. 2014)	8, 24
<i>Knight v. Amedisys Holding, LLC</i> , No. 3:16-CV-39-DJH, 2016 WL 5661227 (W.D. Ky. 2016).....	12, 13
<i>Lackey v. Green Tree Fin. Corp.</i> , 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).....	22
<i>Langlois v. Amedisys Holding, LLC</i> , No. CV 15-835-SDD-RLB 2016 WL 4059670 (MD. La. 2016)...	12

<i>Mazone v. Dolgencorp, LLC</i> , No. 3:17-1088-JFA-PJG (D.S.C. Nov. 29, 2017)	14
<i>Munoz v. Green Tree Financial Corp.</i> , 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001)	8, 10
<i>Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.</i> , 636 F.2d 51 (3d Cir. 1980)	25
<i>Reese v. Commercial Credit Corp.</i> , 955 F.Supp. 567 (D.S.C. 1997)	8, 18
<i>Rich v. KIS Cal., Inc.</i> , 121 F.R.D. 254 (M.D.N.C.1988)	26
<i>Roberts v. Gaskins</i> , 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997)	11
<i>S. Atl. Fin. Servs., Inc. v. Middleton</i> , 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002)	22
<i>Sadighi v. Daghighfekr</i> , 66 F.Supp.2d 752 (D.S.C. 1999)	11
<i>Sauner v. Pub. Serv. Auth. of S.C.</i> , 354 S.C. 397, 581 S.E.2d 161 (2003)	11
<i>Shelton v. Oscar Mayer Foods Corp.</i> , 319 S.C. 81, 459 S.E.2d 851 (S.C. Ct. App. 1995)	18, 19
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007)	8, 19
<i>Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia</i> , 409 S.C. 568, 762 S.E.2d 696 (S.C. 2014)	11
<i>Strother v. Lexington County Recreation Com'n</i> , 332 S.C. 54, 504 S.E.2d 117, (S.C. 1998)	18
<i>Sullivan v. Hawker Beechcraft Corp.</i> , 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012)	26
<i>Thornton v. Trident Med. Ctr., L.L.C.</i> , 357 S.C. 91, 592 S.E.2d 50 (Ct.App.2003)	8
<i>Towles v. United HealthCare Corp.</i> , 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999)	14, 15, 19
<i>Vessell v. DPS Associates of Charleston, Inc.</i> , 148 F.3d 407 (4th Cir. 1998)	11
<i>Wellman, Inc. v. Square D Co.</i> , 366 S.C. 61, 620 S.E.2d 86 (Ct.App.2005)	8
<i>Willard v. Dollar Gen. Corp.</i> , No. 3:17-CV-00675-JMC, 2017 WL 4551500, (D.S.C. Oct. 12, 2017)	13, 14
<i>Wilson v. Willis</i> , 426 S.C. 326, 827 S.E.2d 167 (2019)	8, 23, 24

Statutes

9 U.S.C. § 2.....8, 11

9 U.S.C. § 4..... 2, 10, 24

Rules

Rule 12(b)(3), SCRCF 7

Rule 220(c), SCACR.....10, 17

Other Authorities

1 *Corbin on Contracts* § 1.4 (rev. ed. 1993).....22

STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT PROPERLY HOLD THAT APPELLANTS' UNSIGNED ARBITRATION AGREEMENT WAS UNENFORCEABLE BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF A VALID ACCEPTANCE?
- II. AND AS ADDITIONAL SUSTAINING GROUNDS:
 - A. WAS APPELLANTS' MOTION TO COMPEL ARBITRATION PROPERLY DENIED WHERE THERE WAS NO REASONABLE EVIDENCE THAT RESPONDENT HAD ACTUAL NOTICE OF APPELLANT'S UNSIGNED ARBITRATION AGREEMENT?
 - B. IS APPELLANT AMEDISYS' ARBITRATION AGREEMENT UNCONSCIONABLE BECAUSE IT LIMITS THE PARTIES TO ONLY ONE FACT WITNESS DEPOSITION?
 - C. IS APPELLANT AMEDISYS' ARBITRATION AGREEMENT IN THIS ACTION ONLY RELATED TO EMPLOYMENT LAW CAUSES OF ACTION SUCH THAT RESPONDENT'S POST-TERMINATION CLAIMS ARE NOT SUBJECT TO ARBITRATION?
 - D. CAN APPELLANT LESIA NESBITT, WHO IS NOT A PARTY TO APPELLANT AMEDISYS' ARBITRATION AGREEMENT, COMPEL ARBITRATION ON THE SOLE CLAIM ALLEGED AGAINST HER?

STATEMENT OF THE CASE

In this case, Appellants are asking the Court of Appeals to enforce an electronic arbitration agreement that Respondent did not sign, does not remember receiving, and did not electronically, or otherwise, affirm. Respondent, Nicole Lampo, filed this lawsuit on December 7, 2018. She alleges: (1) wrongful termination against her former employer Appellant Amedisys Holding, LLC; (2) separate defamation claims against Amedisys and her former supervisor Leisa Neasbitt; and (3) tortious interference with prospective contractual relations against Amedisys. (R. pp. 10-24). The defamation and tortious interference claims concern acts and occurrences after Ms. Lampo's termination.

Appellants filed a Rule 12(b)(3), SCRCF Motion to Compel Arbitration on February 4, 2019. (R. pp. 25-26). That Motion was fully briefed. (R. pp. 27-146). Respondent Lampo opposed Appellants' motion arguing:

- 1) That Lampo did not receive actual notice of Appellant Amedisys' Arbitration agreement;
- 2) That the unsigned arbitration agreement was not premised on mutual assent;
- 3) That the agreement was unconscionable because it limited the parties to only one fact witness deposition;
- 4) That the scope of the arbitration agreement did not cover Respondent's post-employment tort claims;
- 5) That Appellant Neasbitt does not have standing to enforce Respondent Amedisys' arbitration agreement; and,
- 6) That Respondent, to the extent she was not entitled to the denial of Appellants' motion as a matter of law, was entitled to a jury trial and discovery on the fact issues underlying actual notice pursuant to 9 U.S.C. § 4 of the Federal Arbitration Act.

Oral argument was held before the Honorable Benjamin H. Culbertson on March 1, 2019. Judge Culbertson denied Appellants' Motion to Compel Arbitration. The Court acknowledged Respondent Lampo's several arguments and held, as a threshold matter, "that there is insufficient evidence of an acceptance to justify compelling arbitration." (R. pp. 5-9).

STATEMENT OF THE FACTS

Nicole Lampo was a Physical Therapist at Amedisys Holding, LLC. (R. p. 12 ¶ 12). Appellant Leisa Neasbit was her final supervisor. (R. pp. 13, 16 ¶¶ 20-22, 48). Ms. Lampo was terminated on March 26, 2018 after she made internal complaints about patient care and safety issues. (R. pp. 16-18 ¶¶ 48, 57-62). After she was fired, Ms. Lampo alleges that Appellant Neasbit spread false and pretextual reasons for her termination to unprivileged former coworkers and Appellant Amedisys prevented Ms. Lampo's reemployment at a third-party facility that wanted to hire Ms. Lampo as Facility Director. (R. pp. 18-22 ¶¶ 63-92). Ms. Lampo's wrongful termination claim is based on her separation of employment from Amedisys, and her defamation and tortious interference with contract claims are based on acts and occurrences thereafter.

Ms. Lampo never signed an arbitration agreement, and she "had no clue the unsigned arbitration clause at issue even existed until presuit talks preceding this legal action." (R. p. 142 ¶ 5). Ms. Lampo was not given an arbitration agreement prior to her hire, upon her hire, or as a part of her onboarding. (R. p. 142 ¶ 8). Ms. Lampo regularly attended in-service meetings at Amedisys where Amedisys would circulate documentation to inform Ms. Lampo and other employees about important changes to policies and procedures. (R. p. 143 ¶ 11). Amedisys never discussed its arbitration agreement at those in-person meetings even though it had ample opportunity to do so. (R. p. 143 ¶ 12). Ms. Lampo has absolutely no recollection of ever receiving Amedisys' unsigned arbitration agreement in person or electronically. (R. pp. 142-143 ¶¶ 5, 10, 13-14). Furthermore, there is no record

evidence that Ms. Lampo reviewed, electronically signed, electronically affirmed, clicked on, or scrolled through the unsigned electronic arbitration agreement at issue in this case.

Ms. Lampo, by way of her affidavit, affirmed the following allegations about arbitration in the Complaint:

FURTHER ALLEGATIONS REGARDING JURISDICTION

93. Plaintiff realleges the foregoing where consistent.

94. Plaintiff requests a jury trial on these claims and all incidents regarding the same including whether Plaintiff had actual notice of any arbitration provision that Defendant Amedisys Holding [claims exists] and any fact issues regarding the arbitrability of this action in general.

95. Plaintiff was not presented any sort of Arbitration Agreement upon her hire.

96. Defendant Amedisys Holding, LLC has expressed a belief that this action is subject to an arbitration agreement it claims was entered between Amedisys, Inc. and Plaintiff.

97. Defendant Amedisys Holding, LLC was not a party to that agreement.

98. The entity asserting to be a party to that agreement, Amedisys, Inc. is not registered entity licensed to practice business in South Carolina and did not employ the Plaintiff.

99. Defendant Amedisys Holding, LLC has not presented Plaintiff with an agreement signed by her or any official with the authority to bind Amedisys Holding, LLC or Amedisys, Inc. for that matter.

100. Plaintiff did not sign any arbitration agreement.

101. Plaintiff was never informed by Defendant Amedisys Holding, LLC that it desired to enter an arbitration agreement even though Defendant Amedisys Holding, LLC had ample opportunities to express a desire to enter into such an agreement at weekly meetings and prior to her hire.

102. Defendant Amedisys Holding, LLC is expected to attempt to enforce an e-mailed, inconspicuous, click-wrap style arbitration agreement with an auto[opt-]in and manual opt-out provision.

103. Plaintiff has no recollection of receiving an optout arbitration agreement from the Defendant Amedisys Holding, LLC via email or otherwise.

104. Plaintiff did not receive actual notice of any arbitration agreement from Defendant Amedisys Holding, LLC.

105. Defendant Neasbitt is not a party to any agreement to arbitrate disputes with the Plaintiff.

106. The arbitration agreement Defendant Amedisys Holding, LLC is expected to attempt to enforce is not supported by consideration, deprives the Plaintiff of substantial legal rights in adhesive fashion absent notice, and is otherwise unenforceable under South Carolina Law.

107. Plaintiff's actions for defamation and tortious interference with prospective contractual relations are not reasonably read to be within the terms of the subject arbitration agreement since they are not directly related to a period within which Plaintiff was an "employee" of Defendant Amedisys Holding, LLC as she is referred to in the subject agreement.

108. Triable issues of fact underly the enforceability of the subject arbitration agreement and should the Defendants attempt to enforce the agreement Plaintiff requests a jury trial with respect to the same.

(R. p. 142 ¶ 4; R. pp. 22-23 ¶¶ 93-108).

An Amedisys employee sent a company-wide email to "Undisclosed Recipients" on August 6, 2013 that bore the subject line "Important Policy Change – Must Read." (R. p. 50). The email included an importance designation as "Normal." (R. p. 50). The text of the email read: "This email contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." (*Id.*) The email did not mention the words "arbitration" or "agreement". (*Id.*) The email also did not describe a proposed bilateral arbitration agreement; instead, the email's subject line referenced a unilateral "policy change." (*Id.*) The email was not designated as "Important" or "Urgent"; but rather bore the designation "Normal". "Amedisys was an extremely fast-paced work environment." (R. p. 142 ¶ 7). The August 6 email looked like many other generic corporate-wide emails that Ms. Lampo received from Appellant Amedisys on a regular basis

throughout her tenure. (R. p. 142 ¶ 9). Ms. Lampo does not recall even receiving the email. (R. p. 143 ¶ 10).

Appellants' brief to the Trial Court stated that "upon clicking on the email to open it in [their inbox], each employee, including [Lampo], received a pop-up Acknowledgement form. (R. p. 28). The pop-up read:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

By clicking "Acknowledge" below, you will be given access to Amedisys Arbitration program materials which includes a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button on this screen I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials."

(R. p. 52) (Emphasis Original). The pop-up gave no option other than to click "Acknowledge." (R. p. 58). The pop-up did not describe what arbitration was, and it did not describe the sort of legal rights at issue. (*Id.*). According to a self-serving affidavit purporting to authenticate electronic records regarding Appellant Amedisys' arbitration program, Lampo, though she has no recollection of the experience, clicked the compulsory "Acknowledge" button shortly after the email was sent. (R. pp. 54-58); (*See also*, R. p. 143 ¶ 10). The pop-up required employees to click "Acknowledge" and then led them to a web page containing hyperlinks to the subject unsigned arbitration agreement, a cover letter, and FAQs. (R. pp. 50-52).

There is no record evidence of how long Lampo was on the web page, if she clicked any links, if the webpage even used the word "Arbitration", or if Lampo even scrolled through the purported

unsigned arbitration agreement. There is also no evidence that Lampo electronically signed or otherwise affirmed the unsigned arbitration agreement.

The agreement itself is inconspicuously termed a "Dispute Resolution Agreement" and the word "Arbitration" is not mentioned until the bottom of the first page. (R. pp. 60-67). The agreement restricts itself to disputes "arising out of or related to [an] Employee's employment with Amedisys or termination of employment." (R. p. 60). The agreement also severely narrows the scope of discovery providing "each party shall have the right to take the deposition of one individual and any expert witness designated by another party." (R. p. 63). Thus, in a case such as this, Appellants will be able to gather information from and prepare witness testimony and affidavits for its many active employees; meanwhile, Ms. Lampo, a terminated employee, can only depose one named witness to conduct discovery and prepare for arbitration. Appellants have already proffered affidavits from two witnesses in support of their memorandum to compel arbitration before the lower court. If this arbitration agreement were enforced, Lampo could only depose one of those affiants and would do so at the expense of deposing all other listed fact witnesses.

There is no place on the agreement to affirm or electronically sign the agreement. (R. pp. 60-67). The agreement contains an opt-out provision beginning at page 6 of the agreement which provides that an employee must print out an attachment to the agreement, sign it, and mail it to Appellant Amedisys' corporate headquarters in Louisiana within 30 days of their clicking the previously discussed compulsory pop-up. (R. p. 67). Appellant Amedisys, even though it used a nondescript e-mail to distribute the unsigned arbitration agreement to employees, did not allow employees to communicate a desire to opt-out of the agreement electronically. (*Id.*).

STANDARD OF REVIEW

Rule 12(b)(3), SCRCF allows a party to move for dismissal on the basis of "improper venue." "A motion for a change of venue is addressed to the sound discretion of the trial judge and will not

be disturbed absent an abuse of discretion.” *Holroyd v. Requa*, 361 S.C. 43, 65, 603 S.E.2d 417, 428 (Ct. App. 2004). Furthermore, while the Court may view evidence outside of the pleadings on a 12(b)(3) motion, the evidence before the Court must be viewed most favorably toward the non-moving plaintiff. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012) (“In assessing whether there has been a prima facie venue showing, we view the facts in the light most favorable to the plaintiff.”). “Arbitrability determinations are subject to de novo review.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); citing, *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App.2005). “Nevertheless, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.2003).

ARGUMENT

“Everyone knows the Federal Arbitration Act favors arbitration. But before the Act’s heavy hand in favor of arbitration swings into play, the parties themselves must agree to have their disputes arbitrated.” *Howard v. Ferrelgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014); see also, *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019) (“Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts.”). “[T]he court can only compel arbitration if the parties have agreed to arbitrate.” *Reese v. Commercial Credit Corp.*, 955 F.Supp. 567, 569 (D.S.C. 1997). The “[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA.” *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001). That is, an arbitration agreement, in order to be enforceable, must satisfy the basic elements of an enforceable contract in the first instance. See, 9 U.S.C. § 2 (Arbitration agreements are generally valid “save upon such grounds as exist at law or in equity for the revocation of any contract.”).

The Circuit Court held that Appellant Amedisys' unsigned arbitration agreement was not an enforceable contract under South Carolina law because there was "insufficient evidence of a valid acceptance." (R. p. 5). The Court analogized Amedisys' arbitration agreement to a hypothetical wherein a homeowner might send another a letter that purports to be an agreement to sell the homeowner's property to the other stating only "if you do not opt out of this agreement within 30 days you have agreed to buy my home." (R. pp-147-178, *Specifically* 154:3-13; 175-176:23-1; 177:1-13). The Court reasoned that the same might amount to an offer; but that failure to opt-out of a proposed agreement, without more, would not equate to "an adequate acceptance." (*Id.*).

The Circuit Court reached its conclusion that there was no acceptance after discussing the "pop-up" nature of the "acknowledgement"; the lack of record evidence that Ms. Lampo even accessed the arbitration agreement; the lack of record evidence that Ms. Lampo signed (electronically or otherwise) the arbitration agreement; and Ms. Lampo's affidavit affirming that she had no notice or recollection of the unsigned arbitration agreement. (R. pp. 5-6). The Circuit Court acknowledged Ms. Lampo's several arguments against the arbitration agreement and its enforceability. (R. p. 7) ("Plaintiff counter argues that she did not have requisite actual notice of the agreement, that there is no evidence of mutual assent or a meeting of the minds, that the agreement is unconscionable, and that the agreement does not encompass the entire scope of this dispute."). The Court then "question[ed] whether enough evidence of actual notice is in the record to create a fact issue in favor of arbitrability." (*Id.*) (*See also*, R. p. 175:20-21). The Court, however determined that it "d[id] not need to delve into that issue or the myriad of other arguments raised by [Lampo] because [] there is no competent record evidence of acceptance, mutual assent, or a meeting of the minds to warrant declaring the arbitration agreement enforceable." (R. pp. 7-8).

The Circuit Court's order should be affirmed and the Court's threshold determination that Amedisys' unsigned arbitration agreement did not qualify as an enforceable contract was correct. Ms.

Lampo additionally raises four additional sustaining grounds pursuant to Rule 220(c), SCACR. Those grounds are: (1) lack of actual notice; (2) unconscionability; (3) that the scope of the agreement does not cover post-employment torts; and (4) that Appellant Neasbit is not a party to the agreement. Last, assuming arguendo the Court were to reverse without regard to the additional sustaining grounds, Ms. Lampo requests that the Court issue instructions pursuant to 9 U.S.C. § 4 ordering a jury trial on the fact issues underlying arbitrability and limited jurisdictional discovery. Ms. Lampo, as set forth below, respectfully asks this Court to affirm the reasoned decision of the Circuit Court that Appellants' unsigned arbitration agreement is unenforceable.

I. APPELLANTS' PROPOSED ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE THERE IS NO EVIDENCE OF A VALID ACCEPTANCE.¹

"It [i]s for the court, not the arbitrator, to decide in the first instance whether the dispute [i]s to be resolved through arbitration." *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 651, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). "General contract principles of state law apply to arbitration clauses governed by the FAA." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001). In deciding a motion regarding arbitration, the court must use a limited, two-part test to ensure that the dispute is arbitrable. *See, Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937-38 (4th Cir. 1999). The two-part inquiry consists of: (1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the specific dispute is within the scope of the agreement. *Id.* at 938. The court may look for contractual defects and may investigate any grounds that may exist to revoke a contract in law or equity. *Id.* (noting the defect of lack of mutual assent and the availability

¹ Appellants, after acknowledging that Appellant has not contested the applicability of the FAA to this case, discuss the FAA's general presumption in favor of arbitrability at pp. 8-10 of their brief. This is largely irrelevant to the instant appeal. The FAA's presumption in favor of arbitrability does not "kick in" unless and until there is an actual enforceable contract to arbitrate. *See, Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014). ("Everyone knows the Federal Arbitration Act favors arbitration. But before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must agree to have their disputes arbitrated.")

of other equitable grounds to revoke arbitration contracts pursuant to 9 U.S.C. § 2). The Circuit Court properly held Appellant Amedisys' unsigned agreement is not valid under state contract law due to a lack of mutual assent.

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit." *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff'd sub nom. Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007). "The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). *See also, Vessell v. DPS Associates of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998). (The formation of a binding contract requires "the parties [to] have a meeting of the minds with regard 'to all essential and material terms of the agreement.'"). "A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" *Sauner*, 581 S.E.2d at 166; *quoting, Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct.App.1993).

There is no meeting of the minds when terms are left for future agreement since parties must mutually understand "all essential and material terms of the agreement." *Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (S.C. 2014). A meeting of the minds is "an objective manifestation of the parties' mutual assent to the essential and material terms of the contract." *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 760 (D.S.C. 1999). "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); *Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978).

The Appellants' argument that Ms. Lampo accepted its unsigned arbitration agreement hinges on the compulsory pop-up acknowledgement that Lampo does not remember and a handful of distinguishable and non-governing cases. (Appellants' Brief pp. 10-18). Inherently, there is an obvious

distinction between affirming “I agree” regarding the terms of an agreement and clicking “I acknowledge.” Furthermore, the compulsory pop-up *acknowledgement* Appellant’s rely on did not contain the terms of the arbitration agreement at issue but merely led to another webpage where Appellant could supposedly access the agreement. There is no record evidence that Ms. Lampo accessed the arbitration agreement, scrolled through it, electronically signed it, or otherwise affirmed it. The Circuit Court appropriately held that this absence of cogent evidence of an acceptance was fatal to the arbitration agreement at issue. At bottom, the only manifestation of assent that the Appellants can point to is that Ms. Lampo continued working (which she was already doing) and that she did not opt out of an agreement that she did not know existed. This is not enough to establish an enforceable contract. *See, Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (S.C. Ct. App. 2005) (“A party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.”).

Appellants first cite to two District Court opinions in other states where this particular agreement was enforced. (Appellants Brief pp. 10-11); *citing, Knight v. Amedisys Holding, LLC*, No. 3:16-CV-39-DJH, 2016 WL 5661227 (W.D. Ky. 2016), *and, Langlois v. Amedisys Holding, LLC*, No. CV 15-835-SDD-RLB 2016 WL 4059670 (M.D. La. 2016). Appellants overstate the application of these cases. As a threshold matter, neither case involved the application of South Carolina contract law, but, even more importantly, neither case involved the exact same arguments at issue here. The *Langlois* case involved wholly different arguments that did not touch on state contract law principals but were premised on a state forum selection statute that was preempted by the FAA. *Langlois*, 2016 WL 4059670, at *4 (“Accordingly, the Court finds that the FAA preempts La. R.S. 23:921 and the Court shall grant Amedisys’ *Motion to Compel Arbitration*.”). That is, the issues and decision in *Langlois* have nothing to do with this case. The *Knight* case, cited by Appellants, is more superficially applicable, but does not ultimately translate to the entirety of Ms. Lampo’s argument on acceptance. The employee

in *Knight* primarily challenged arbitrability based on the Whistleblower/False Claims Act exception within the arbitration agreement which the Court held did not apply to her case. *Knight*, 2016 WL 5661227, at *4. On acceptance, the employee appears to have only argued that not signing the arbitration agreement rendered it unenforceable; the Court, in response summarily recognized that a party can assent to a contract by conduct and determined that the employee's acknowledgement and failure to opt-out manifested assent. *Knight*, 2016 WL 5661227, at *3. The record here evidences a more full-throated challenge to both the agreement and the acknowledgement as the record shows: (1) the acknowledgement was compulsory; (2) Ms. Lampo has certified she does not remember receiving the pop-up acknowledgement; (3) Ms. Lampo has homed in on the distinction between an "acknowledgement" and an "agreement;" (4) Ms. Lampo has pointed out that the pop-up acknowledgement does not describe arbitration or the terms of the proposed arbitration agreement; and (5) Ms. Lampo has pointed to the lack of record evidence that she scrolled through or even clicked the link to the actual arbitration agreement at issue. The failure of the employee in the *Knight* case to challenge Amedisys' arbitration agreement and acknowledgement with more specificity and breadth does not bind this Court or affect Ms. Lampo's challenges to arbitrability.

Appellants next cite to two South Carolina District Court opinions on employee arbitration agreements which are similarly distinguishable based on those cases' record and the arguments at issue. (Appellant Brief pp. 11-13); *citing*, *Willard v. Dollar Gen. Corp.*, No. 3:17-CV-00675-JMC, 2017 WL 4551500, at *1 (D.S.C. Oct. 12, 2017); *and*, *Brown v. Five Star Quality Care, Inc.*, No. 2:15-CV-4105-RMG, 2016 WL 8710474, at *1 (D.S.C. Jan. 8, 2016). The employee in *Willard*, the first South Carolina District Court case cited by Appellants', did not challenge her acceptance of the agreement and the record established that the plaintiff/employee had reviewed the opt-out agreement at issue. *Willard*, No. 32017 WL 4551500, at *1 (D.S.C. Oct. 12, 2017) ("Plaintiff logged into her employee account and viewed the Agreement."); ("Plaintiff does not dispute the fact that all of her claims are subject to

arbitration. [] Indeed, in her Response, Plaintiff now concedes that arbitration of all her claims is proper.”)² The second South Carolina District Court case cited by Appellants, *Brown v. Five Star Quality Care, Inc.*, involved an opt-out agreement that was physically presented, in person, to the employee/plaintiffs and the employee/plaintiffs hand-signed an acknowledgement of receipt. *Brown v. Five Star Quality Care, Inc.*, No. 2:15-CV-4105-RMG, 2016 WL 8710474, at *2 (D.S.C. Jan. 8, 2016). (“Five Star distributed the Arbitration Agreement to Ashley River Plantation employees at the end of a staff meeting on May 30, 2012, immediately after introducing a new paid time off policy. Employees signed a ‘receipt and acknowledgement form’ with operative language: ‘I acknowledge receipt of the Mutual Agreement to Resolve Disputes and Arbitrate Claims.’”). Moreover, in *Brown* the employee/plaintiffs did not challenge the contractual sufficiency of their opt-out arbitration agreement. (“[T]hey do not dispute the fact that the parties entered into the Arbitration Agreement.”). *Brown*, 2016 WL 8710474, at *5. There were no contract formation arguments raised in *Willard* or *Brown*. More compellingly, the record evidence present in *Willard* and *Brown* that the employees were given and actually reviewed their opt-out arbitration agreements is strikingly absent in this case. If anything, *Willard* and *Brown* hurt, rather than help, Appellants’ cause.

The *Brown* case and Appellants both also cite to this Court’s decision in *Towles v. United Health Corp.* (Appellants’ Brief pp. 12-14) (*citing*, *Brown*, 2016 WL 8710474 at *4); (*citing*, *Towles*, 338 S.C. 29, 524 S.E.2d 839 (1999)). *Towles* is the only substantive governing authority cited by the Appellants on the issue of acceptance. The difference between *Towles* and this case is straight-forward. In *Towles*, the record established that the employee had received and signed a handbook and arbitration

² Coincidentally, Exhibit 2 to Ms. Lampo’s Memorandum in Opposition to Arbitration was an unpublished order by Judge Joseph F. Anderson, after *Willard*, that held that a jury trial on the issue of actual notice was necessary to determine arbitrability under the same arbitration agreement at issue in *Willard*. (R. pp. 145-146) (*Mazone v. Dolgencorp, LLC*, No. 3:17-1088-JFA-PJG (D.S.C. Nov. 29, 2017))

acknowledgement that actually described the arbitration process the employee was agreeing to. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999) (“After receiving and signing the Acknowledgment, Towles cannot legitimately claim United failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document’s contents to an individual when the individual can learn the contents from simply reading the document.”). Here, in addition to the actual notice questions discussed below, the record is absent evidence that Ms. Lampo reviewed, was given, or signed off on the arbitration agreement at issue or even an acknowledgment that actually described the nature of the arbitration agreement between the parties. Thus, *Towles* is not comparable to this case.

Instead, Ms. Lampo testified that when Appellant Amedisys had something important to share with its employees it did so in-person at regularly scheduled in-service meetings. (R. p. 143). Nevertheless, Appellant Amedisys, in attempting to form an arbitration agreement with its employees, chose to use a non-descript compulsory pop-up acknowledgment, delivered via an inconspicuous and misleading email³, which purportedly led to a webpage where an employee could access its optout arbitration agreement. (R. pp. 50-58). Furthermore, the agreement did not require or allow for the Respondent to electronically sign, acknowledge, or agree to its terms within the body of the agreement itself; meanwhile, it required employees to print, fill out, and mail in a form within 30 days in order to opt-out of the agreement. (R. pp. 60-67). Appellants cannot establish that Ms. Lampo reviewed or even accessed the arbitration agreement itself. Where Ms. Lampo has no recollection of even receiving

³ The email’s subject line, as pointed out in the Statement of Facts, described the subject matter as an “Important Policy Change.” A unilateral policy change by an employer is legally distinct from a proposed bilateral agreement. *See, Adams v. Square D. Co.*, 775 F. Supp. 869, 873 (D.S.C. 1991) (“We hold that for ... [an amendment] to become legally effective, reasonable notice must be uniformly given to affected employees.”).

the pop-up acknowledgment much less the arbitration agreement, Appellants are hard-pressed to establish adequate acceptance as a prerequisite to a properly formed contract.

At base, Appellants must rely on a strained connection in the record between its compulsory pop-up acknowledgement and the fact that Ms. Lampo continued working thereafter in order to establish acceptance. This is not enough. Although Appellants claim that the several cases discussed above satisfy acceptance on this record, the existence of hard evidence of acceptance and assent in those cases which is not present here has the opposite effect. Continued employment, by itself, cannot substantiate reasonable evidence of assent to an arbitration agreement when there is not enough evidence that Ms. Lampo ever knew about the arbitration agreement in the first place. (*See*, R. p. 143 ¶¶ 10, 13-14). The problem with Appellants' position on this point was explored by the Court at oral argument in the following exchange:

THE COURT: So you're saying by not opting out she accepted.

MR. REEVES: That is exactly what I was leading into is that by, by acknowledging it, and which we can show through the system that she acknowledged, and -

THE COURT: But I mean, is that contract law? If I offer you to sell my house and you tell - and I say, "You don't contact me back and tell me you don't want to do it." Then we've got a contract and you got to buy my house?

MR. REEVES: Continued employment, Your Honor as well.

THE COURT: Okay.

MR. REEVES: That, that from that point on her not accepting it did not lead to her termination. This was not a take it or leave it.

THE COURT: Well, I thought I read in here where it was not a condition of employment.

MR. REEVES: It was not a condition of employment, but she, but she continued - she, she had the right to opt out. She didn't opt out and then continued to work for the company.

THE COURT: But I mean, how is continuing to work for the company acceptance?

MR. REEVES: Well, or the –

THE COURT: She was – I mean, even if she opted out she was going to continue to work for the company.

MR. REEVES: Correct, but I believe, Your Honor, the fact that she, she acknowledged – she received and acknowledged this arbitration agreement and did not opt out that would be the acceptance, but not opting out of it.

THE COURT: So the legal question is whether or not rejection of an offer or failure to reject an offer is acceptance[?]

MR. REEVES: Correct, Your Honor.

(R. pp. 153:23-155:4). Indeed, the ultimate question on this issue is not only whether failure to reject an offer amounts to acceptance, but also, especially in light of the below argument on actual notice, the question in this case more precisely is whether failure to reject an offer an offeree did not know was even made amounts to an acceptance.

Ultimately, “a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.” *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff’d sub nom. Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007). The record before the Court does not demonstrate that the Respondent agreed to submit this dispute to arbitration and, therefore, the Circuit Court’s ruling denying arbitration because there was no acceptance should be affirmed.

II. ADDITIONAL SUSTAINING GROUNDS EXIST FOR THE COURT TO AFFIRM THE LOWER COURT’S RULING.

Respondent, pursuant to Rule 220(c), SCACR raises four additional sustaining grounds upon which this Court can affirm the Lower’ Court’s decision. Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on

Appeal). Each of the following arguments were specifically made to the Circuit Court and were acknowledged by the Circuit Court in its Order. (R. pp. 122-146); (R. pp. 5-9).

A. Respondent never received actual notice of the proposed arbitration agreement.

"It is not too much to ask an employer to provide actual notice to its employees before significantly restricting rights created by decades of state and federal legislation." *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997). The record reflects that Ms. Lampo did not receive actual notice of the unsigned arbitration agreement at issue; therefore, she cannot be made to arbitrate this dispute. *Id.*, 955 F. Supp. 567, 570 (D.S.C. 1997); ("The court believes that the South Carolina Supreme Court would apply the same actual notice requirement to an employer's implementation of an arbitration agreement."); *see also, Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (S.C. Ct. App. 2005). The law, to modify even a unilateral employment contract, imposes a "reasonable notice requirement for modification [that] requires actual notice to the employee." *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994). "Whether the employer has provided actual notice of a modification of the employment contract created by an employee handbook in most cases will be for the jury to determine." *Fleming*, 316 S.C. 452, 463, 450 S.E.2d at 596.

Actual notice can be express or implied. *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 63, 504 S.E.2d 117, 122 (S.C. 1998). Express actual notice has been found in employment cases when plaintiffs have received, read, understood, and signed new agreements. *See, Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 89-90, 459 S.E.2d 851, 856-57 (S.C. Ct. App. 1995). However, the South Carolina Supreme Court has declined to find actual notice where "there [wa]s no evidence that [the plaintiff] had read and understood" an updated handbook. *Id.* 319 S.C. at 90. Actual notice can also be implied through act, such as attending a meeting, personally disseminating information to others, or filing a claim through mediation. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (applying North Carolina law).

Here, the Appellants rely on a generic, company-wide email and a compulsory electronic pop-up to establish notice. (R. pp. 50-58). Lampo has no recollection of receiving the arbitration agreement or acknowledgement pop-up at issue, there is no signed arbitration agreement, and the Appellants have produced no record evidence that Lampo even reviewed the subject unsigned agreement. (See, R. pp. 142-143 ¶¶ 5, 9-10, 13-14). This Court has recognized actual notice of an arbitration agreement within a handbook where an employee physically received and signed a handbook acknowledgement that included the arbitration clause at issue. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). This Court has also required evidence that an employee received, read, understood, and signed a new agreement to establish express actual notice in other employment contexts. See *Shelton*, 459 S.E.2d at 857. Last, persuasively, the Fourth Circuit has recognized implied actual notice through meetings and evidence that information was personally disseminated to others. See, *Hightower*, 272 F.3d at 242 (4th Cir. 2001) (applying North Carolina law). The record here, however, is devoid of ample evidence as delineated above to even create a fact issue for the Appellants on arbitrability where all Appellants can point to is an abbreviated pop-up that Ms. Lampo does not even remember receiving.

The record before this Court lacks the sort of evidence required to establish actual notice of a bilateral agreement under South Carolina law. Therefore, Amedisys' proposed arbitration agreement is unenforceable for want of actual notice as a matter of law and the Court, if necessary, should affirm the Circuit Court's ruling based on this additional sustaining ground.

B. Severe restrictions on discovery cause a one-sided disadvantage to the Respondent and render Appellant Amedisys' proposed arbitration agreement unconscionable.

Even if Lampo had notice or assented to the unsigned arbitration agreement at issue, South Carolina has invalidated arbitration agreements where terms are one-sided or oppressive. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32, 644 S.E.2d 663, 672 (2007) ("However, we find that the provision in the arbitration clause dictating that the dealer's judicial remedies supersede the

consumer's arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum.") (clause carved out certain remedies for car dealer from arbitration clause). Here, the unsigned agreement incorporates American Arbitration Association Rules "except as provided in [the] Agreement."

The AAA rules have been found to be fair in response to unconscionability challenges; however, here, Appellant Amedisys makes one major deviation from those rules by providing: "each party shall have the right to take the deposition of one individual and any expert witness designated by another party." (R. p. 63). Restricting an employee/plaintiff in an employment case to deposing one fact witness, where the defendant/employer employs many of the conceivable fact witnesses is one-sided and oppressive. *See, Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 718, 13 Cal. Rptr. 3d 88, 98 (2004) ("Certainly, a dramatic disparity of information between employer and employee may constitute a 'compelling' reason to exceed the discovery limit in the [Employer] policy, but when employees are only allowed to depose two witnesses in an attempt to establish that need, they are not given sufficient opportunity to vindicate their statutory claims."); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 787 (9th Cir. 2002) ("We follow *Mercurio* in holding that the discovery provisions alone are not unconscionable, but in the context of an arbitration agreement which unduly favors [the Employer] at every turn, we find that their inclusion reaffirms our belief that the arbitration agreement as a whole is substantively unconscionable.").

Here, the limitation on fact witness depositions contained in Amedisys' agreement is one-sided against Respondent, a former employee, where the majority of her witnesses conceivably remain employed by Amedisys. Therefore, in addition to the contract formation grounds above, unconscionability is an additional ground upon which this Court can and should affirm the Circuit Court's ruling.

C. Respondent's post-termination tort claims are not covered by Amedisys' unsigned arbitration agreement.

The following narrow language is contained on the first page of Appellant Amedisys' arbitration agreement:

This agreement applies to any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates.

(R. p. 60). Respondent's discharge claim is the only claim encompassed by the scope of the arbitration agreement. Lampo's tortious interference with contract and defamation claims are post-termination torts which are not covered by the unsigned agreement. Specifically, Lampo's defamation claim refers to defamatory publications of the pretextual reason for Lampo's termination to unprivileged coworkers and a former customer, and Lampo's tortious interference claim refers to interference with her ability to gain post-termination employment. (R. pp. 18-19, 21 ¶¶ 64-67, 89-90). None of these claims involve conduct that was incidental or necessary to the parties' former employment relationship; therefore, they are not implicated by Appellant Amedisys' unsigned arbitration agreement. Furthermore, contract interpretation principles dictate that the scope of the above provision be limited to its word's ordinary meaning.

Appellants, apparently predicting that this argument would be re-raised on appeal, argue in a conclusory fashion that because these claims "arise directly out of decisions made by Amedisys and Ms. Neasbitt [] regarding Ms. Lampo's former work relationship" they fall within the scope of the arbitration agreement. (Appellants' Brief pp. 18-19). However, Appellants provide no explanation of how making defamatory statements about a former employee or intentionally interfering with a former

employee's ability to acquire new employment is incidental to an ordinary employer-employee relationship. That is, the post-termination torts alleged do not arise out of or relate to employment.⁴

"It is well settled that ambiguities arising within a contract must be construed against the drafter." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). "This rule applies with particular force in cases involving a contract of adhesion." *Id.*; *See also, Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998); *citing*, 1 *Corbin on Contracts* § 1.4 (rev. ed. 1993) ("recognizing adhesion contracts as agreements in which one party has virtually no voice in the formulation of their terms and language"). Here, Appellant Amedisys' unsigned arbitration agreement only applies to disputes arising out of or related to employment. Ms. Lampo's defamation and tortious interference claims are not the natural result of an employment relationship. The stated scope of the unsigned arbitration clause must be construed against the Appellants. When the scope is appropriately construed, the lion-share of Ms. Lampo's complaint is not subject to arbitration.

Therefore, as an additional sustaining ground, the Lower Court should be affirmed as to Lampo's claims of defamation and tortious interference with contract because they are not covered by the unsigned arbitration agreement at issue.

D. Appellant Neasbitt, who is not a party to the proposed arbitration agreement, cannot enforce the arbitration agreement as to the claims personally alleged against her.

⁴ Earlier, before the lower Court, Appellants cited to Fourth Circuit opinion for the suggested premise that the language "arising out of or related to" suggests a broadly applied arbitration clause, but the case cited was wholly distinguishable *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). The *American Recovery Corp.* case considered whether claims that involved the breach of a consulting agreement which contained an arbitration clause were arbitrable. *American Recovery Corp.*, 96 F.3d at 92. There, the Fourth Circuit held that the district court erred in finding the claims alleged were not within the scope of the consulting agreement's arbitration clause because each claim concerned the consulting agreement itself. *Id. American Recovery Corp.* is inapplicable to this argument because this argument is premised on the plain language of the unsigned arbitration clause which limits its scope to "any dispute arising out of or related to the Employee's employment with Amedisys or termination of employment." (R. p. 60).

Ms. Lampo maintains that neither her tortious interference with contract nor her defamation claim is covered by the proposed arbitration agreement. However, even if these claims were within the scope of the proposed agreement, Appellant Neasbitt, Lampo's former supervisor, is not a party to the arbitration agreement at issue, and she cannot enforce it against Lampo for post-termination conduct. Appellants argue that Appellant Neasbitt may compel arbitration of the defamation claim against her as a non-signatory under an "intertwined claims" test. (Appellants' Brief pp. 20-21). Appellants primarily cite to a district court opinion for its discussion of this test. *Carter v. MasTec Services Co., Inc.*, C.A. 2:09-2721-PMD 2010 WL 500421, at *4 (D.S.C. 2010).

Applying the "intertwined claims" test discussed in *Carter* to the facts in the instant case makes clear that the claim against Appellant Neasbitt is not "intertwined" with the proposed arbitration agreement. The "intertwined claims" test is based on the doctrine of equitable estoppel and allows a non-signatory to compel arbitration in two instances: (1) where the plaintiff/signatory to a written agreement must rely on the terms of that agreement for its claims against the non-signatory or (2) where the plaintiff/signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Carter*, 2010 WL 500421, at *5. The first scenario is inapplicable because there is no agreement between Lampo and Appellant Amedisys which substantiates the basis for Lampo's defamation claim against Appellant Neasbitt. *Wilson*, 827 S.E.2d 167, 177 (2019) ("Petitioners have not attempted to procure any direct benefit from the Agency Agreement itself while attempting to avoid its arbitration provision."). The second scenario is also inapplicable because Lampo's defamation claim is not dependent on her other claims against Appellant Amedisys. Therefore, neither avenue under the "intertwined claims" test is applicable in this case, and Appellant Neasbitt is precluded from compelling arbitration.

“Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 827 S.E.2d at 177 (2019) (Rejecting use of equitable estoppel to compel arbitration against a non-signatory.) Here, there is neither sufficient record evidence nor an indication from the claims and procedural posture of this case to justify the use of equitable estoppel to allow non-signatory Neasbitt to enforce Amedisys’ arbitration agreement against Ms. Lampo.

III. ALTERNATIVELY, SHOULD THE COURT REVERSE, THE APPROPRIATE REMEDY UNDER THE FEDERAL ARBITRATION ACT WOULD BE INSTRUCTIONS REQUIRING A JURY TRIAL ON ARBITRABILITY AND LIMITED JURISDICTIONAL PRE-TRIAL DISCOVERY.

Respondent maintains that the Circuit Court was correct on the issue of acceptance and that the additional sustaining grounds cited above also counsel conclusively in favor of affirming the Lower Court’s ruling. Ms. Lampo properly preserved and requested below, in the alternative to her legal arguments, a jury trial on the issue of actual notice. (R. pp. 128-129, 138-139). Respondent believes she is entitled to denial of Appellants’ motion as a matter of law, but, assuming arguendo that dispositive issues of fact exist, Section 4 of the Arbitration Act is explicit that fact issues on arbitrability must be tried before arbitration is compelled. 9 U.S.C. § 4.

“What happens when it’s just not clear whether the parties opted for or against arbitration? The FAA tells district courts to ‘proceed summarily to the trial’ of the relevant facts.” *Howard*, 748 F.3d at 977 (citing 9 U.S.C. § 4). Respondent requested a jury trial regarding the fact issues underlying the enforcement of the instant, unsigned arbitration clause. (R. p. 22). Under the FAA, if the party opposing arbitration does not demand a jury trial “then court shall hear and determine” arbitrability. 9 U.S.C. § 4. However, where a party opposing arbitration does make a jury demand, as Respondent Lampo has, then “the court shall make an order referring the issue or issues to a jury.” *Id.* Here, fact issues abound particularly with respect to the concept of actual notice and those fact issues, if the Circuit Court is not affirmed, must be heard by a jury. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636

F.2d 51, 54 (3d Cir. 1980) ("Moreover, the party who is contesting the making of the agreement has the right to have the issue presented to a jury.") *El Hoss Eng'g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) ("These issues should not be determined on affidavits, but rather a full trial should be had.").

Notice is a fact-controlled concept. *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994). "Whether the employer has provided actual notice of a modification of the employment contract created by an employee handbook in most cases will be for the jury to determine." *Fleming*, 450 S.E.2d at 596. Here there are, at worst, issues of fact concerning whether Ms. Lampo received actual notice of the subject unsigned arbitration agreement and assented to it. Those issues, if Respondent is not entitled to judgment as a matter of law, must be heard by a jury.

In conjunction with Respondent Lampo's request for a jury trial, should the Court find fact issues on arbitrability exist, Respondent Lampo also asked for pre-trial jurisdictional discovery to discern the following:

1. How many, if any, employees actually went through the process of opting-out of the so-called agreement?
2. If any, what proportion of employees opted out?
3. Why Amedisys emailed out a link to the arbitration agreement, but required employees to mail opt-out forms back?
4. Why Amedisys did not include a place to sign, e-sign, or opt-out of the arbitration agreement?
5. Why Amedisys did not send the arbitration agreement within or as an attachment to the email?
6. Why Amedisys did not include the word "arbitration" in the email it sent to all employees?
7. Why Amedisys did not simply present, via a meeting or in writing, the arbitration agreement to its employees, and if it claims cost was the reason it did not:
 - a. How much it estimates those distribution costs would have been, and
 - b. How much it spent on the sophisticated mass email, pop-up, and tracking system it did use?
8. Whether Amedisys has sued any of its employees in state or federal court since distributing the arbitration agreement; thus, undermining its purported bilateral nature.
9. Why Amedisys restricted the parties to one fact witness deposition?
10. Whether Amedisys can verify that Plaintiff clicked the link to review the subject agreement?
11. If not, why Amedisys did not at least use available scroll-wrap technology to verify that Plaintiff reviewed the agreement? And,

12. Why Amedisys decided to circulate the arbitration agreement in the first place? (R. pp. 128-129). "When [the] plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous." *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 151, 723 S.E.2d 835, 839 (Ct. App. 2012); *quoting, Rich v. KIS Cal, Inc.*, 121 F.R.D. 254, 259 (M.D.N.C.1988).

Here the record and governing law establish that Appellant Amedisys' unsigned arbitration agreement is wholly unenforceable, and Ms. Lampo respectfully requests that the Lower Court's ruling be affirmed. However, in the alternative, should the Court determine that reversal is appropriate the Lower Court should be instructed to hold a jury trial with limited jurisdictional pre-trial discovery as set forth above.

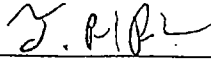
CONCLUSION

Respondent Nicole Lampo, because the Appellants' unsigned electronic arbitration agreement is unenforceable, respectfully asks this Court to Affirm the holding of the Circuit Court and Remand this case so that Ms. Lampo can proceed to discovery with her case in the Georgetown County Court of Common Pleas.

(Signature Page Follows)

Respectfully Submitted,

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August 9, 2019
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-22-01001
Appellate Case No. 2019-00451

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SC Court of Appeals

Nicole Lampo Respondent,

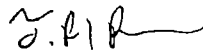
v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, ... Appellants.

CERTIFICATE OF COUNSEL

I, the undersigned attorney of Cromer Babb Porter & Hicks, LLC, certify that Respondent's
Final Brief complies with Rule 211(b).

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August 9, 2019
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IN THE STATE OF SOUTH CAROLINA
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RECEIVED

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APPEAL FROM GEORGETOWN COUNTY
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The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2018-CP-2201001
Appellate Case No.: 2019-000451

Nicole Lampo..... Respondent,

v.

Amedisys Holding, LLC, and
Leisa Victoria Neasbitt Appellants.

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENTS IN REPLY.....	2
	A. The Arbitration Agreement in a Binding and Enforceable Contract	2
	B. The Arbitration Agreement Is Not Unconscionable	8
	C. The Arbitration Agreement Covers the Dispute	10
	D. No Genuine Issues of Fact Exist Requiring a Jury Trial	13
III.	CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>Arnold v. Arnold Corp.</i> , 920 F. 2d 1269 (6th Cir. 1990)	12
<i>AT&T Mobility, LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	9
<i>Brantley v. Republic Mortg. Ins. Co.</i> , 424 F.3d 392 (4th Cir. 2005)	12
<i>Brown v. Five Star Quality Care, Inc.</i> , 2016 WL 8710474 (D.S.C. Jan. 8, 2016)	7
<i>Carter v. MasTec Services Co., Inc.</i> , 2010 WL 500421 (D.S.C. 2010)	12
<i>Chorley Enterprises, Inc., v. Dickey's BBQ Rest., Inc.</i> , 807 F.3d 553 (4th Cir. 2015)	13
<i>In re Cotton Yarn Antitrust Litig.</i> , 505 F.3d 274 (4th Cir. 2007)	9
<i>Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.</i> , 53 F.3d 55 (4th Cir. 1995)	4
<i>Gadberry v. Rental Servs. Corp.</i> , 2011 WL 766991 (D.S.C. Feb. 24, 2011)	2
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	10
<i>Green Tree Fin. Corp., v. Randolph</i> , 531 U.S. 79 (2000)	9
<i>Hamlin v. Dollar Tree Stores, Inc.</i> , 2017 WL 6034325 (D.S.C. Dec. 6, 2017)	2, 14
<i>Herron v. Century BMW</i> , 395 S.C. 461, 465, 719 S.E.2d 640 (2011)	4
<i>Hightower v. GMRI, Inc.</i> , 272 F.2d 239 (4th Cir. 2001)	8
<i>Hinson v. Jusco Co.</i> , 868 F. Supp. 145 (D.S.C. 1994)	11
<i>Hoard ex. rel Hoard v. Roper Hosp, Inc.</i> , 387 S.C. 539, 694 S.E.2d 1 (2010)	4
<i>Knight v. Amedisys Holding, LLC</i> , 2016 WL 5661227 (W.D. Ky. 2016)	6, 7
<i>Langlois v. Amedisys Holding, LLC</i> , 2016 WL 4059670 (M.D. La. 2016)	6
<i>Lucey v. Meyer</i> , 401 S.C. 122, 736 S.E.2d 274.	9
<i>Mid-Continent Refrigerator Co., v. Dean</i> , 256 S.C. 99, 180 S.E. 892 (1971)	5
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	1, 13

<i>Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.</i> , 867 F.2d 809 (4th Cir. 1989).....	10
<i>Prescott v. Farmers Tel. Coop., Inc.</i> , 335 S.C. 330, 516 S.E.2d 923 (1999).....	3
<i>Prosper v. American Credit Acceptance, LLC</i> , 2015 WL 13310148 (D.S.C. Aug. 17, 2015).....	10
<i>Reese v. Commercial Credit Corp.</i> , 955 F. Supp. 567 (D.S.C. 1997)	3
<i>Regions Bank v. Schmauch</i> , 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)	5
<i>Rock v. Solar Rating & Cert. Corp.</i> , 2018 WL 3750617 (D.S.C. 2018)	9
<i>S.C. Pub. Serv. Auth. v. Great W. Coal</i> , 312 S.C. 559, 437 S.E.2d 22 (1993)	11
<i>Sauner v. Pub. Serv. Auth. of S.C.</i> , 354 S.C. 397 581 S.E.2d 161 (S.C. 2003)	3
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007)	8
<i>Small v. Springs Indus., Inc.</i> , 292 S.C. 481, 357 S.E.2d 452 (1987)	3, 8
<i>Towles v. United HealthCare Corp.</i> , 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999)	5
<i>United Steelworkers of Am. v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960)	10
<i>Wike v. Holiday Kamper Company of Columbia, LLC</i> , 2014 WL 1234311 (D.S.C. 2014)	12
<i>Willard v. Dollar Gen. Corp.</i> , 2017 WL 4551500 (D.S.C. Oct. 12, 2017).....	7

I. INTRODUCTION

Conceding she cannot recall any of the pertinent events surrounding her agreement to arbitrate, Ms. Lampo's brief instead offers a myriad of hypothetical scenarios and suggestions as to how Amedisys could have—or, in Ms. Lampo's view, should have—transmitted the Company's arbitration program to the approximately 13,000 employees working for Amedisys. Ms. Lampo's creative hypotheticals and suggestions, while perhaps intellectually interesting, are intended to divert this Court's (and the Trial Court's) attention away from the undisputed record evidence establishing that Ms. Lampo agreed to arbitrate the claims in her lawsuit. Faced with the possibility that Ms. Lampo will be required to honor the agreement she made with Amedisys and adjudicate her claims in an arbitral forum, she conveniently disclaims any recollection of her actions and, instead, offers a handful of foreclosed defenses against enforcing the Arbitration Agreement. In doing so, Ms. Lampo argues this Court should invalidate her agreement to arbitrate by applying an overly-restrictive interpretation of the Arbitration Agreement inconsistent with the remedial purpose of the Federal Arbitration Act ("FAA"). Ms. Lampo's arguments are contrary to existing law and run afoul of well-established public policy compelling this Court to resolve any "doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-24 (1983). Thus, for the reasons established in Appellants' opening brief, and expanded upon below, this Court should reverse the Circuit Court's March 11, 2019 Order and mandate Ms. Lampo adjudicate her claims in an arbitral forum pursuant to her agreement.

II. ARGUMENTS IN REPLY

A. The Arbitration Agreement is a Binding and Enforceable Contract.

In the first sentence of Ms. Lampo's brief, she reaffirms her sworn affidavit and concedes that she "does not remember receiving" Amedisys' Arbitration Agreement. Resp. Brief, p. 2; R. pp. 142-43. But, importantly, she does not deny receiving it. Later on in her brief, Ms. Lampo further concedes that she has no recollection of receiving Amedisys' August 6, 2013 email or acknowledging that Amedisys provided her with the Arbitration Agreement. Resp. Brief, p. 6. Critically, Ms. Lampo also concedes that she has no memory of reviewing the Arbitration Agreement, which unequivocally informed her that she would be bound by its provisions if she failed to opt out of it and continued to work for Amedisys. Resp. Brief, pp. 3, 6. Ms. Lampo's inability to recall certain events, including whether she received or reviewed the Arbitration Agreement, renders her unable to question the undisputed evidence establishing she did receive and agree to the Arbitration Agreement. See *Hamlin v. Dollar Tree Stores, Inc.*, 2017 WL 6034325, at *1 (D.S.C. Dec. 6, 2017) (finding the "failure to recall signing the agreement is insufficient to create an issue of fact as to the validity of the arbitration agreement"); *Gadberry v. Rental Servs. Corp.*, 2011 WL 766991, at *2 (D.S.C. Feb. 24, 2011).

In light of Ms. Lampo's admissions, it is undisputed—and, simply cannot be disputed because Ms. Lampo has "no recollection"—that: (1) Amedisys assigned Ms. Lampo a unique username and password and a unique email account to which only she had access; (2) Ms. Lampo received—using her unique user name and password and email—the August 6, 2013 email advising employees they "must read" the email's contents; (3) Ms. Lampo clicked the hyperlink contained in the August 6, 2013 email; (4) Ms. Lampo received and reviewed the "Acknowledgment Form" after clicking the hyperlink; (5) Ms. Lampo clicked "Acknowledge"

after being presented with the “Acknowledgment Form,” confirming her understanding that she was being provided access to and required to review the Arbitration Agreement and would be bound by its terms if she continued to work and did not opt out of it; (6) Ms. Lampo chose to not opt out of the Arbitration Agreement, despite having an unfettered ability to do so; and (7) Ms. Lampo continued to work for Amedisys until March 26, 2018. R. pp.¹ 28-29, 45-48, 50-56. These undisputed facts render Ms. Lampo unable to challenge that she received the Arbitration Agreement and failed to opt out of its provisions, which as Appellants cited in their opening brief, constitutes valid acceptance.

For a valid contract to exist under South Carolina law the three elements of offer, acceptance, and consideration must be present, and none of the recognized defenses to contract formation, such as fraud, duress, or unconscionability, should apply. *See, e.g., Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003). Importantly, most employment contracts are unilateral.² *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999). “A unilateral contract has the following three elements: (1) a specific offer; (2) communication of the offer to the employee; and (3) performance of job duties in reliance on the offer.” *Id.* at 336, 516 S.E.2d at 926. Thus, an employee who receives actual notice of an arbitration policy and continues to work is bound by the agreement. *See Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997) (citing *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452, 454 (S.C. 1987)).

¹ Appellants cite to the record using the same defined terms as their initial brief.

² During oral argument before the Trial Court, Judge Culbertson offered a hypothetical scenario relied on by Ms. Lampo, *see* Resp. Brief, pp. 16-17, to question whether she truly agreed to the Arbitration Agreement. Judge Culbertson’s example, however, involved a bilateral real estate contract, which is inapplicable to this case because the Arbitration Agreement is a unilateral contract accepted by Ms. Lampo through her actions. Thus, the Trial Court’s hypothetical and Ms. Lampo’s reliance on it is of limited applicability here.

Ms. Lampo does not challenge that Amedisys made a specific offer to Ms. Lampo to participate in the Arbitration Agreement or that the agreement is supported by adequate consideration. Consequently, Ms. Lampo has waived any argument as to those elements. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (finding arguments not made are waived). Stripping away Ms. Lampo's hyperbole and self-serving hypothetical beliefs as to how Amedisys should have provided the Arbitration Agreement at issue to her, what remains is Ms. Lampo's after-the-fact contention that she did not "accept" the Arbitration Agreement. Resp. Brief, pp. 10-17. Ms. Lampo's admitted inability to contest the record evidence, however, leads to the opposite conclusion.³

In this case, after being prompted, Ms. Lampo—on her own volition—clicked "Acknowledge," affirming: (1) Amedisys provided her access to the Arbitration Agreement; (2) she understood that Amedisys "required" her to review, *inter alia*, the Arbitration Agreement; (3) she understood—from both the Acknowledgment and Arbitration Agreement to which she had access—that she would be bound by the Arbitration Agreement if she did not opt out of it "within 30 days." R. pp. 43-46, 52, 54-56, 60-67. By virtue of her memory lapse, Ms. Lampo has not challenged any of these undisputed facts. Furthermore, the Arbitration Agreement, which Ms. Lampo acknowledged—and has not disputed—she had been provided access to and was required to review, explicitly stated, in relevant part:

³ Throughout Ms. Lampo's Brief and within an entire subsection (Section II(A)), Ms. Lampo denies receiving "actual" notice of the Arbitration Agreement. Resp. Brief, pp. 10-19. Ms. Lampo's affirmative denial defies logic because she has made clear that she has no recollection one way or another of having received or reviewed the Arbitration Agreement. R. p. 142-143. It goes without saying that denying "notice" of the Arbitration Agreement and being unable to recall receiving "notice" of the Arbitration Agreement are two vastly different things. And this Court should not allow Ms. Lampo to create a dispute of the facts by making inconsistent statements. *See, e.g., Hoard ex. rel Hoard v. Roper Hosp, Inc.*, 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (noting a party cannot create a genuine issue of material fact by simply asserting that a jury may disbelieve uncontradicted evidence."); *see also Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) (finding the non-moving party cannot create a genuine issue of material fact by presenting his or her own conflicting versions of events.)

“Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee’s continuation of his or her employment with Company shall constitute Employee’s and Company’s mutual acceptance of the terms of this Agreement.”

R. pp. 65-66. It is irrelevant whether Ms. Lampo chose to ignore her acknowledged obligation to review the Arbitration Agreement or did not “scroll[] through or . . . click[] the link to the actual arbitration agreement” as she cannot recall doing one way or another. Resp. Brief, pp. 6-7; R. pp. 142-43; *Mid-Continent Refrigerator Co., v. Dean*, 256 S.C. 99, 180 S.E.2d 892 (1971) (holding that decision not to read written contract no excuse for enforcement of contracts provisions); *Regions Bank v. Schmauch*, 354 S.C. 648, 662-63, 582 S.E.2d 432, 440 (Ct. App. 2003) (finding a person who agrees to a contract or other written document cannot avoid the effect of the document by claiming he did not read it). Rather, what matters is that the record evidence establishes—and Ms. Lampo cannot deny—that she received actual notice of the Arbitration Agreement, did not opt out of the agreement, and continued to work for Amedisys for almost five years. R. pp. 44-48, 52, 54-56, 65-66. Thus, Ms. Lampo’s actions established she agreed to the Arbitration Agreement and should be bound by her agreement. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 40, 524 S.E.2d 839, 845 (Ct. App. 1999).

In a strained attempt to overcome her inability to recall—and, therefore, contest—that she received and agreed to the Arbitration Agreement, Ms. Lampo argues that because she was required to click “Acknowledge,” she did not voluntarily “agree” to the Arbitration Agreement. Resp. Brief, p. 13. Other than concluding the “acknowledgement” was “compulsory,” Ms. Lampo makes no effort to explain why or how such a fact supports her conclusion that she did not agree to arbitrate. *See id.* Tellingly, Ms. Lampo cites no authority suggesting it is improper for an employer to require its employee to acknowledge receipt of important company documents. Nor

did Appellants' research yield any support for Ms. Lampo's novel position. Yet, even if Amedisys did require Ms. Lampo to "acknowledge" receipt of the Arbitration Agreement, among other things, *see* R. p. 52, Ms. Lampo still had the ability to opt out of the Arbitration Agreement or quit working if she did not wish to be bound by its terms. R. pp. 60-67. Ms. Lampo chose to do neither. Thus, the alleged "compulsory" nature of the Acknowledgment Form is simply a fabrication and, in any event, of no legal consequence and does not invalidate the undisputed evidence establishing Ms. Lampo's receipt and acceptance of the Arbitration Agreement.

Next, while failing to cite any factual authority supporting her conclusions, Ms. Lampo instead attempts to distinguish certain of the cases relied on by Appellants in their opening brief. Resp. Brief, pp. 10-14. First, Ms. Lampo downplays the significance of *Knight v. Amedisys Holding, LLC* and *Langlois v. Amedisys Holding, LLC*, in which two separate federal district courts upheld and enforced the exact same arbitration agreement at issue in this case. 2016 WL 5661227 (W.D. Ky. 2016); 2016 WL 4059670 (M.D. La. 2016). Observing that neither *Knight*, nor *Langlois* involved "application of South Carolina contract law," Ms. Lampo argues that Appellants "overstate the application" of *Knight* and *Langlois* because neither case involved the issue of "acceptance." Resp. Brief, pp. 12-13. Ms. Lampo's contention is misleading. While the plaintiffs in *Knight* and *Langlois* aptly decided against directly challenging whether they "accepted" the Arbitration Agreement, the respective District Courts both upheld the Arbitration Agreement, and did so without questioning whether a valid contract existed. And, contrary to Ms. Lampo's contention, the District Court in *Knight* did make a factual finding, specifically holding that: "[b]ecause Knight clicked the acknowledgment form to indicate that she received and understood the materials, and she did not opt out of the Agreement, [*Knight*] manifested her assent to the Agreement, including the agreement to arbitrate." 2016 WL 5661227 at *3.

Ms. Lampo also misses the point in her attempt to distinguish *Willard v. Dollar Gen. Corp.*, and *Brown v. Five Star Quality Care, Inc.* Resp. Brief, pp. 13-15. Appellants cited both *Willard* and *Brown* for the legal proposition that failing to opt out of an agreement and continue working, such as the case here, can be evidence of assent. *See Willard*, 2017 WL 4551500, *1-2 (D.S.C. Oct. 12, 2017) (finding that, following the expiration of the 30 day opt out period, the “parties became bound by [the agreement’s] terms,” thereby establishing a valid contract); *Brown v. Five Star Quality Care, Inc.*, 2016 WL 8710474, *4 (D.S.C. Jan. 8, 2016) (finding the plaintiffs each continued to work for Five Star after allegedly receiving the arbitration agreement—evidenced by virtue of their “acknowledgment”—and, thus, because “continuing in employment suffices to accept an arbitration agreement,” the plaintiffs were bound by the agreement). Ms. Lampo, on the other hand, maintains that *Willard* and *Brown* “hurt” Appellants’ case because the plaintiffs in those cases received the arbitration agreement at issue before executing an acknowledgment. Resp. Brief, p. 14. Ms. Lampo’s distinction of *Willard* and *Brown* is illusory.

In this case, just like *Willard* and *Brown*, Ms. Lampo acknowledged being provided access to, among other documents, the Arbitration Agreement. R. pp. 45-46, 52. Ms. Lampo has not and cannot deny that she received or reviewed the Arbitration Agreement. R. pp. 142-43. The Arbitration Agreement here, like the arbitration agreements in *Willard* and *Brown*, made clear that if Ms. Lampo continued working and elected to not opt out of the Arbitration Agreement within 30-days, she will be deemed to have accepted the of the Arbitration Agreement. R. pp. 65-66. It is undisputed that Ms. Lampo continued working for Amedisys and never opted out of the Arbitration Agreement. R. pp. 47, 65-66. Thus, her conduct is squarely in line with the plaintiffs in *Willard* and *Brown*. *See, e.g., Hightower v. GMRI, Inc.* 272 F.2d 239, 242 (4th Cir. 2001) (finding employee’s continued employment bound him to accept employer’s arbitration

procedure); *Small*, 292 S.C. at 483-84, 357 S.E.2d at 454 (finding an employee accepted employer's offer by "performing the act on which the promise was impliedly or expressly based").

In sum, the undisputed record evidence establishes that Ms. Lampo is bound by the Arbitration Agreement, which is a valid and enforceable contract under South Carolina law. Accordingly, this Court should reverse the Trial Court's Order denying Appellants' motion to compel arbitration and order Ms. Lampo to arbitrate her claims pursuant to her agreement.

B. The Arbitration Agreement Is Not Unconscionable.

Ms. Lampo alternatively argues that even if the Arbitration Agreement is an enforceable contract, which it is, this Court should nonetheless invalidate the agreement because it is "unconscionable."⁴ Resp. Brief, pp. 19-20. Specifically, Ms. Lampo argues that the Arbitration Agreement is "unconscionable" because it purportedly limits the nature and scope of available discovery to Ms. Lampo and Amedisys.⁵ *See id.* Ms. Lampo bears the burden of establishing that the Arbitration Agreement is unconscionable. *See Green Tree Fin. Corp., v. Randolph*, 531 U.S. 79, 92 (2000); *Rock v. Solar Rating & Cert. Corp.*, 2018 WL 3750617, *6 (D.S.C. 2018). This burden is a "substantial one" and cannot be satisfied by a mere listing of ways that the arbitration will differ from a court proceeding, or by speculation about difficulties that might arise in arbitration. *See Green Tree*, 531 U.S. at 92; *In re Cotton Yarn Antitrust Litig.* 505 F.3d 274, 286 (4th Cir. 2007).

⁴ Ms. Lampo fails to articulate what is required to establish "unconscionability" under South Carolina law. To do so, Ms. Lampo must establish an absence of meaningful choice as well as oppressive, one-sided terms such that no reasonable person would make them and no fair and honest person would accept them. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

⁵ Amedisys notes that the Arbitration Agreement plainly states that "additional discovery may be had by mutual agreement of the parties or where the Arbitrator selected so orders pursuant to a request by either party." R. pp. 63-64. Because Ms. Lampo has not yet made a request for "additional discovery" in arbitration from Amedisys or an arbitrator, her contention that the Arbitration Agreement is "unconscionable" is not yet ripe.

Appellants need not belabor the point that the United States Supreme Court has already considered and rejected Ms. Lampo's unconscionability argument. *See AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011). The Supreme Court decided *Concepcion* well after both of the California cases relied on by Ms. Lampo and, thus, they have no persuasive value to the case at bar. Resp. Brief, p. 20. Thus, the mere fact that the Arbitration Agreement provides for—unless otherwise agreed to by the parties or ordered by the arbitrator—limited mutual discovery, is insufficient as a matter of law to invalidate the Arbitration Agreement on unconscionability grounds.

Moreover, Ms. Lampo's failure to cite *Lucey v. Meyer* is peculiar. 401 S.C. 122, 142, 736 S.E.2d 274. In *Lucey*, this Court upheld an arbitration agreement that permitted the parties to be the only two witnesses who could be called in person as witnesses at the arbitration hearing. *Id.* Citing *In re Cotton Yarn*, this Court observed that the limited discovery provisions applied equally to both parties and did not restrict the introduction of depositions of witnesses into the arbitration proceedings. *Id.* Thus, this Court reversed the trial court finding that the arbitration clause was neither one-sided, nor oppressive such that it was unconscionable. *Id.*

In this case, the limited discovery provisions contained in the Arbitration Agreement also apply to Appellants. R. pp. 60-67. While the Arbitration Agreement does purport to limit discovery absent agreement or leave from the arbitrator, there is no limitation restricting the evidence or witnesses Ms. Lampo may present at any hearing, where credibility is often of critical importance. Put simply, because Ms. Lampo lacks any evidentiary or legal support establishing an absence of meaningful choice and oppressive, one-sided terms, she has not met her "substantial" burden establishing unconscionability. *See Prosper v. American Credit Acceptance, LLC*, 2015 WL 13310148, at *4 (D.S.C. Aug. 17, 2015) (rejecting contention that because both sides to the

arbitration agreed to limited discovery, the plaintiffs allegations of being unable to effectively vindicate her claims are too speculative to satisfy her burden of establishing “unconscionable discovery limitations.”); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (rejecting argument that the arbitration agreement at issue was invalid because it did not permit the same discovery as permitted in federal courts, which the Supreme Court noted: “by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”).

C. The Arbitration Agreement Covers the Dispute.

Ms. Lampo next argues that the Arbitration Agreement does not apply to her defamation or tortious interference claim because those claims, according to Ms. Lampo, are “post-termination” torts. Resp. Brief, pp. 20-22. Ms. Lampo’s “post-termination” torts exception is undermined by the plain language of the Arbitration Agreement. But, even if there were a question as to whether Ms. Lampo’s post-termination torts exception factually or legally existed, this Court “must decide the question in favor of arbitration.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989). To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Hinson v. Jusco Co.*, 868 F. Supp. 145 (D.S.C. 1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993)).

Here, Ms. Lampo’s Arbitration Agreement makes clear that it applies to “any dispute arising out of or related to [her] employment with Amedisys or termination or employment regardless of its date of accrual and survives after the employment relationship terminates.” R. p.

60. The Arbitration Agreement then goes on to state that it encompasses, without limitation, all disputes relating to [Ms. Lampo's] "termination," and "all other state statutory and common law claims." *See id.* Thus, the plain language of the Arbitration Agreement make clear that it has no temporal restriction and applies to all "statutory and common law claims," which indisputably encompass Ms. Lampo's post-termination torts. Thus, Ms. Lampo's argument should be rejected for this simple reason alone.

Moreover, Ms. Lampo's own brief implicitly concedes her post-termination torts are "related to [her] employment with Amedisys . . ." and, thus, relegated to arbitration. For example, Ms. Lampo characterizes her defamation claims as "refer[ing] to defamatory publications of the pretextual reason for Lampo's *termination to unprivileged coworkers and a former customer.*" Resp. Brief, p. 21 (emphasis added). Clearly, such alleged publications are "related to" her termination from Amedisys. Furthermore, Ms. Lampo's tortious interference claim alleges, in wholly conclusory fashion, that some unknown person from Amedisys told some unknown prospective employer that Ms. Lampo was "ineligible for rehire," which allegedly prevented Ms. Lampo from obtaining "prospective" employment. R. pp. 16-17, 21-22. Whether Ms. Lampo was eligible or "ineligible for rehire" is a fact incumbent on and interdependent with the reasons Amedisys terminated Ms. Lampo's employment in the first place. Put simply, Ms. Lampo's claims are grounded in factual assertions that arise from and out of her former employment with Amedisys (and her relationship with her former supervisor, Ms. Neasbitt). In any event, if there were any doubts, it is for the arbitrator to decide those claims arbitrability.

Ms. Lampo also argues that Ms. Neasbitt is precluded from enforcing the Arbitration Agreement because she was not a party to the agreement. Resp. Brief, pp. 22-24. Ms. Lampo's opportunistic argument is not only contrary to the law, but it would also flip the FAA and its

remedial purpose on its head, incentivizing plaintiffs to name individuals as defendants for the sole purpose of carving out otherwise arbitrable claims. See *Arnold v. Arnold Corp.*, 920 F. 2d 1269, 1281 (6th Cir. 1990) (noting if a plaintiff “can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants in his complaint . . . the effect of the rule requiring arbitration would, in effect, be nullified.”). Such is not the law.

A non-signatory can compel arbitration if the claims against her are “intertwined” with an arbitration agreement. See *Carter v. MasTec Services Co., Inc.*, 2010 WL 500421, *4 (D.S.C. 2010); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005). Under the “intertwined test,” Ms. Lampo is estopped from avoiding arbitration against a non-party if the issues [Ms. Neasbitt] is seeking to resolve in arbitration are interdependent or intertwined with the claims against Amedisys. See *Wike v. Holiday Kamper Company of Columbia, LLC*, 2014 WL 1234311, *2-3 (D.S.C. 2014) (granting motion to compel arbitration with an alleged non-party to the arbitration agreement at issue finding that the plaintiff’s claims against the alleged non-party were “interdependent” of the claims with a party to the arbitration agreement).

In this case, the only claim brought against Ms. Neasbitt is for defamation. R. pp. 20-21. Each and every allegation lodged against Ms. Neasbitt derives from her employment relationship with Amedisys and her role as Ms. Lampo’s former supervisor. R. pp. 20-21. Furthermore, Ms. Lampo’s defamation claim against Amedisys, see R. pp. 18-20, seeks to hold Amedisys vicariously liable for Ms. Neasbitt’s alleged defamatory statements—the same statements comprising Ms. Lampo’s individual claim against Ms. Neasbitt. Clearly, Ms. Lampo’s claims against Ms. Neasbitt in this case are intertwined with her claims against Amedisys. Moreover, the clear intent of the language in the Arbitration Agreement is to provide a single arbitral forum to resolve all disputes. R. pp. 60-61. Because “any doubts concerning the scope of arbitral issues should be resolved in

favor of arbitration, Ms. Lampo's claims brought individually against Ms. Neasbitt should be relegated to an arbitral forum. *Moses H. Cone Hosp.*, 460 U.S. at 24-25; *see also Gadberry*, 2011 WL 766991 (granting non-signatory's motion to compel arbitration and forcing former employee to arbitrate based upon the "intertwined claims doctrine").

D. No Genuine Issues of Fact Exist Requiring a Jury Trial.

In a last ditch effort to stave off arbitration, Ms. Lampo argues that this Court should remand and order the Circuit Court to impanel a jury to determine whether Ms. Lampo agreed to arbitrate her claims. Resp. Brief, pp. 24-26. While Section 4 of the FAA permits a court to convene a jury trial, "[n]ot just any factual dispute will do." *See Chorley Enterprises, Inc., v. Dickey's BBQ Rest., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015). Rather, the party requesting a jury trial under Section 4 must provide "sufficient evidence in support of its claims such that a reasonable jury could return a favorable verdict under applicable law." *Id.*

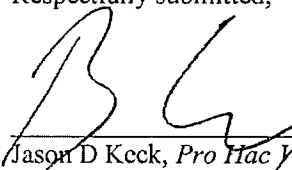
In this case, and as repeatedly established above, Ms. Lampo has no recollection of any pertinent events and is unable to deny that she received, or reviewed, the Arbitration Agreement. R. pp. 142-43. Because Ms. Lampo lacks any memory of the relevant issues, the facts are not in dispute and, thus, whether Ms. Lampo agreed to arbitrate her claims, which she did, is precisely the type of issue that can—and should—be decided by this Court as a matter of law. *See Hamlin*, 2017 WL 6034325, at *1 (finding the "failure to recall signing the agreement is insufficient to create an issue of fact as to the validity of the arbitration agreement"). Furthermore, none of Ms. Lampo's proposed inquiries, Resp. Brief, p. 25, into the Arbitration Agreement speak to whether Ms. Lampo agreed to arbitrate her employment disputes with Amedisys. Indeed, whether 386 or 1,211 employees opted out of the Arbitration Agreement is of no significance when compared to Ms. Lampo's failure to do so. Thus, because Amedisys has met its burden establishing that Ms.

Lampo agreed to arbitrate her claims, a jury trial on the issue is superfluous and should be denied by this Court.⁶

CONCLUSION

For the reasons established in Appellant's initial brief and above, Ms. Lampo's claims should be heard and adjudicated exclusively in an arbitral forum pursuant to her agreement to do so. Thus, Amedisys and Ms. Neasbitt respectfully request that this Court reverse the Circuit Court's Order denying their motion to compel arbitration and to grant any other relief deemed fair and just.

Respectfully submitted,


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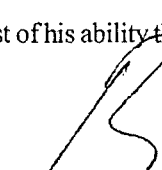
**ATTORNEYS FOR APPELLANTS AMEDISYS
HOLDING, LLC AND LEISA VICTORIA
NEASBITT**

Dated this 12th day of August 2019

⁶ If parties could request and receive jury trial merely by advancing disputes based upon not remembering whether they agreed to a contract without any supporting extrinsic evidence, it would frustrate the very policies that the FAA is meant to promote—the swift and inexpensive alternative resolution of disputes outside of the judicial forum.

CERTIFICATE OF COUNSEL FOR APPELLANTS

The undersigned certifies that to the best of his ability that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.


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Dated this 12th day of August 2019

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nicole Lampo, Respondent,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt,
Appellants.

Appellate Case No. 2019-000451

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5934
Heard February 9, 2022 – Filed August 10, 2022

REVERSED AND REMANDED

George A. Reeves, III, of Columbia, and Jason D. Keck,
of Chicago IL, both of Fisher & Phillips, LLP, for
Appellants.

James Paul Porter, of Cromer Babb Porter & Hicks, LLC
of Columbia, for Respondent.

HILL, J.: This appeal of an order denying a motion to compel arbitration turns on whether Nicole Lampo agreed to arbitrate disputes arising out of her employment with Amedisys Holding, LLC (Amedisys). The key question is whether, under the specific circumstances of this case, Lampo accepted the arbitration agreement by acknowledging receipt of the agreement and continuing to work at Amedisys. We conclude she did because she had actual notice of Amedisys' offer to modify her

employment agreement to include the arbitration provision. Accordingly, we reverse the denial of Amedisys' motion to compel arbitration.

I. FACTS

Lampo worked as a physical therapist at Amedisys from July 2013 until March 2018, when she was fired. In December 2018, Lampo sued Amedisys and Appellant Leisa V. Neasbitt, her former supervisor, alleging wrongful discharge, interference with prospective contractual relations, and defamation. In response, Amedisys moved to compel arbitration, asserting Lampo's claims against both Amedisys and Neasbitt were subject to an arbitration agreement Lampo had accepted a month after she began her employment.

In support of the motion, Amedisys included affidavits and exhibits demonstrating that on August 26, 2013, it sent an email to its employees with the subject line, "Important Policy Change – Must Read." The message contained a hyperlink, stating, "This e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." Upon clicking the link, the following pop-up message filled the employee's screen:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

(Emphasis in original). Upon clicking "Acknowledge," employees were automatically directed to a webpage providing descriptions and links entitled: "Arbitration Agreement," "Cover Letter," and "Frequently Asked Questions."

The arbitration agreement stated it was governed by the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. (2018) (FAA) and applied "to any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates." The arbitration agreement also limited the parties' discovery to "the right to take the deposition of one individual and any expert witness designated by another party."

The agreement stated acceptance of the agreement was not a mandatory condition of employment and employees could opt out of the agreement by printing an attached opt-out form and mailing it to an address in Louisiana. The form was required to be postmarked within thirty days of "Employee's acknowledgment of receipt of this [arbitration agreement]" and "[s]hould Employee fail to opt out of this [arbitration agreement] within the 30-day period in the manner provided above, Employee's continuation of his or her employment with [Amedisys] shall constitute Employee's and [Amedisys'] mutual acceptance of the terms of this [arbitration agreement]."

Amedisys attached electronic records to its motion to compel arbitration that indicated Lampo had used her unique username and login to both open the email and click the "Acknowledge" button on the pop-up acknowledgment form on August 6, 2013, at 1:55 pm. However, Amedisys did not provide any evidence demonstrating Lampo scrolled or read through the Arbitration Agreement, Cover Letter, or Frequently Asked Questions links and documents. In her pleadings, Lampo alleged she had no actual notice of the alleged arbitration agreement because she did not recall receiving the August 26, 2013 email or reading the linked documents.

After a hearing, the circuit court denied Amedisys' motion to compel arbitration, ruling "there is no competent record evidence of acceptance, mutual assent, or a meeting of the minds to warrant declaring the arbitration agreement enforceable." The circuit court did not separately address the issue of notice.

On appeal, Amedisys argues Lampo accepted the arbitration agreement by continuing to work at Amedisys after declining to opt-out of the arbitration agreement within thirty days.

Lampo argues the circuit court correctly found she did not accept the agreement and presents three other sustaining grounds to affirm the denial of the motion to compel arbitration. First, Lampo asserts she received no actual notice of the terms of the

agreement, or alternatively, she is entitled to a jury trial on the notice issue. Second, Lampo claims the arbitration agreement's restrictions on discovery render the entire arbitration agreement unconscionable and, consequently, unenforceable. Third, Lampo asserts the scope of the arbitration agreement does not cover disposition of her post-termination claims or her claims against Neasbitt.

II. DISCUSSION

A. Actual Notice and Continued Employment as Acceptance

We review a trial court's ruling on a motion to compel arbitration de novo, but we will not reverse factual findings of the trial court that are reasonably supported by the record. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). The FAA requires that courts treat arbitration agreements the same as all other contracts—no more, no less. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). "Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Because the core of the FAA is consent, arbitration may be compelled only when the parties have agreed to it. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Because arbitration under the FAA rests entirely upon consent, it is always up to the court to determine if the parties have an agreement to arbitrate. *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 296 (2010). Whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019).

The familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration. *See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004) ("The necessary elements of a contract are offer, acceptance, and valuable consideration."); *id.* at 369, 593 S.E.2d at 173 ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." (quoting Restatement (Second) of Contracts § 50 (1981))). A party cannot assent to something he does not know about, so the law in general requires that for an offer to be effective, the responding party must have reasonable notice of the offer's terms. *See* Restatement (Second) of Contracts § 53 cmt. c (1981) (stating that when the offeror invites performance as acceptance, "[t]he offeree's conduct ordinarily constitutes an acceptance in such cases only if he knows

of the offer"); *id* ("[The offeree's] rendering of the invited performance with knowledge of the offer is a sufficient manifestation of assent."). In South Carolina, our supreme court has equated reasonable notice of an offer to modify employment contracts with actual notice. *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 595–96 (1994). *Fleming* held actual notice was required when an employer attempted to modify an employment contract with a subsequent handbook. *Id.* Yet, just as in *Towles v. United HealthCare Corp.*, we do not need to address whether *Fleming's* actual notice rule extends beyond the handbook context to all employment contract modification scenarios because, as explained below, we conclude Lampo received actual notice. 338 S.C. 29, 37–38, 524 S.E.2d 839, 844 (Ct. App. 1999).

Usually, the question of whether an employee has received actual notice is for the jury; however, an employer may conclusively prove an employee has actual notice of the terms of the employment agreement if the employee signed an acknowledgment form stating she received the agreement and promised to review it. *Id.* at 39–40, 524 S.E.2d at 845. This is true even if the employee has electronically signed the acknowledgment form. *See* S.C. Code Ann. § 26-6-70 (2007) (providing an electronic signature has the same force and effect as a signature in writing).

We find Amedisys' email—combined with the links to the arbitration agreement, FAQs, and cover letter—was effective to communicate the offer of the arbitration agreement to Lampo. Only one rational inference may be drawn from the undisputed fact that Lampo clicked "Acknowledge" on the pop-up acknowledgement form while logged into her unique employee username: Lampo had actual notice of the offer. *See Towles*, 338 S.C. at 39, 524 S.E.2d at 845 (finding "[a]fter receiving and signing the Acknowledgment, [the employee] cannot legitimately claim [the employer] failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document"). After all, the email subject heading alerted Lampo that she "must read" the content and the form twice notified her she was required to read the entire agreement. The language of the offer also makes clear that acceptance would not be accomplished by the employee's signature (electronic or otherwise) but instead by the employee's continued performance of job duties after declining to opt-out of the agreement. Finally, there is no dispute that Lampo declined to opt out of the agreement and continued working at Amedisys. Accordingly, we find her conduct demonstrates as a matter of law that she had actual notice of the arbitration agreement and accepted it. *Id.* at 40, 524 S.E.2d at 845 (holding employee accepted arbitration offer by continued employment). We therefore reverse the circuit court's denial of Amedisys' motion to compel arbitration.

Courts judge online transactions by the same law that has long governed contracts memorialized by ink and paper. Today, terms such as "click wrap" and "browse wrap" seem less exotic to our so-called modern ears than "foolscap," the standard term for legal paper a century ago. For many good reasons, the law in most instances lags behind technology, and the challenge for courts is how to apply old law to new circumstances. *See, e.g., Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034 (7th Cir. 2016) (applying general principles of state contract formation and the rule that a person has notice of the terms of the paper he or she is signing to online contracting). The "old" law controlling here includes *Towles*, and we have no difficulty transplanting the principles of that well-reasoned decision to the new circumstances of this case, even if the legally binding agreement was formed in cyberspace rather than face to face across a conference table. *See generally Sarchi v. Uber Techs., Inc.*, 268 A.3d 258, 270–74 (Me.2022) (collecting and synthesizing cases concerning electronic assent to online arbitration agreements in consumer transactions). As fewer contracts are presented on paper and in person, the risk rises that the frontiers of online transactions may cross borders established by traditional contract principles. *See, e.g., Berkson v. Gogo LLC*, 97 F. Supp.3d 359, 385–86 (E.D.N.Y. 2015) (cataloging ten unique differences between online "wrap" contracts and traditional contract practice and doctrine). Still, "[c]ourts are not licensed to ignore the old chestnuts—cases that remind us that (1) certain formalities are required for a contract to be formed . . . and (2) when the formalities are met, a contract it does make" *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 260 (4th Cir. 2021) ("The electronic age has not made the formalities of contract less crucial, but more so . . .").

We caution that the arbitration agreement designed by Amedisys may well be at the outer limits of what constitutes a valid offer to modify the terms an employment agreement to add an arbitration agreement. To be sure, Amedisys did not mandate arbitration as a condition of employment. However, Amedisys is a sophisticated, multi-state corporation employing over sixteen thousand people, whose offer to arbitrate all employee-related claims was designed with specific choice architecture: it was sent by email (rather than presented in person, on paper), with barriers to opting out of the modification (having to print a form and send it in the mail to an out-of-state address), and no barriers to accepting the modification (just keep showing up to the job the employee has already agreed to do). The acknowledgement form did not require Lampo to confirm she read the arbitration agreement but only to promise she would read it. We understand why the circuit court was hesitant to find Lampo agreed to this modification of her employment

contract. Nevertheless, we must conclude Lampo received actual notice of the arbitration agreement and accepted it by her continued employment.

We also find Lampo agreed to arbitrate her claim against Neasbitt. While the agreement did not name Neasbitt, it did state that, as used in the agreement, the term "Amedisys" included reference to and was synonymous with its employees and agents. Because Neasbitt is an employee and agent of Amedisys, the arbitration agreement is directly enforceable by Neasbitt against Lampo. *Cf. Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."). In light of this disposition, we need not analyze whether Neasbitt may enforce it derivatively.

B. Unconscionable Terms

Having found the parties formed an agreement to arbitrate, we move to the next issue: whether the agreement is valid. Parties may delegate the issue of whether their arbitration agreement is valid to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). They did not do so here, so we must decide it.

To prove the arbitration agreement is unconscionable, Lampo must show (1) she lacked a meaningful choice as to whether to arbitrate because the agreement's provisions were one-sided and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007).

Although the arbitration agreement allows each party to take the deposition of only one witness and any expert witness designated by another party, the parties are equally limited by this term and both parties retain the right to additional discovery by mutual agreement or by order of the arbitrator upon request. *See Lucey v. Meyer*, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012) ("While the arbitration clause here does limit discovery by allowing the parties to be the only witnesses called in person, this cannot, standing alone, be a reason to invalidate an arbitration agreement."); *see also Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 983–85 (2010) (rejecting claim that arbitration provision limiting discovery to one deposition per party and the deposition of experts was unconscionable, especially where arbitrator could order additional discovery).

One of arbitration's main benefits is that it allows parties to agree to an alternative, informal forum to resolve their disputes by streamlined process. Limiting formal

discovery is essential to the mission of arbitration, provided the limits do not deprive parties of a "fair opportunity to present their claims." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Lampo lodges a general argument that most of her potential witnesses remain employed by Amedisys and limiting her to deposing only one fact witness cripples her ability to fully develop her case. Lampo has not provided any concrete evidence specific to her case showing the limitation is actually unfair; though, as her case progresses, the arbitration agreement allows her the opportunity to persuade the arbitrator to enlarge her discovery rights. We therefore find the arbitration agreement is not unconscionable.

C. Scope of the Arbitration Agreement

Lampo's final contention is that the scope of the arbitration agreement does not cover any causes of action that arose after she was fired. Because the arbitration agreement delegates issues concerning its "interpretation or application" to the arbitrator, the question of whether the arbitration agreement encompasses Lampo's post-termination claims must be decided by the arbitrator, not the court.

We therefore reverse the circuit court's denial of Amedisys' motion to compel arbitration.

REVERSED AND REMANDED.

GEATHERS, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson., Circuit Court Judge

RECEIVED

AUG 25 2022

SC Court of Appeals

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed Aug. 10, 2022)

Nicole Lampo Respondent,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, ... Appellants.

RESPONDENT'S PETITION FOR REHEARING

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This is an employment case involving an electronic, automatic opt in arbitration agreement. The overarching issue in this case is whether a click-wrap "acknowledgement" pop up formed an arbitration agreement, as a matter of law, where Respondent did not affirmatively accept the underlying arbitration agreement, but also did not take any action to opt out of it.

Respondent, in this Petition for Rehearing, argues:

1. The Court, regardless of its decision on actual notice, overlooked that a contract was never formed in this case to begin with.
2. The Court should have referred the fact questions of actual notice and contract formation to the jury under 9 U.S.C. § 4.

In light of the above, Respondent, Nicole Lampo, respectfully requests that this Court reconsider its order and either (1) find no contract exists in this case as a matter of law, or (2) remand to the Circuit Court with instructions to conduct a fact finding under 9 U.S.C. § 4 on whether a valid contract to arbitrate has been formed.

1. THE COURT OVERLOOKED THAT THERE IS NO ACCEPTANCE IN THIS CASE.

The Circuit Court in this case found that "there is insufficient evidence of an acceptance to justify compelling arbitration." (R. pp. 4). In oral argument, the Circuit Judge recognized the fundamental problem in Appellants' argument that its offer to arbitrate was accepted by default (based on Respondent's failure to affirmatively opt out of it) by making the following analogy:

THE COURT: So you're saying by not opting out she accepted.

MR. REEVES: That is exactly what I was leading into is that by, by acknowledging it, and which we can show through the system that she acknowledged, and –

THE COURT: But I mean, is that contract law? If I offer you to sell my house and you tell – and I say, "You don't contact me back and tell me you don't want to do it." Then we've got a contract and you got to buy my house?

(R. pp. 153:23-154:6). Next, the Court pointed out that continued employment was not a condition of the arbitration agreement in this case. This point is important to a distinction between this case and the authority relied on in the Court of Appeals' decision which Respondent claims was overlooked:

MR. REEVES: Continued employment, Your Honor as well.

THE COURT: Okay.

MR. REEVES: That, that from that point on her not accepting it did not lead to her termination. This was not a take it or leave it.

THE COURT: Well, I thought I read in here where it was not a condition of employment.

MR. REEVES: It was not a condition of employment, but she, but she continued – she, she had the right to opt out. She didn't opt out and then continued to work for the company.

THE COURT: But I mean, how is continuing to work for the company acceptance?

MR. REEVES: Well, or the –

THE COURT: She was – I mean, even if she opted out she was going to continue to work for the company.

MR. REEVES: Correct, but I believe, Your Honor, the fact that she, she acknowledged – she received and acknowledged this arbitration agreement and did not opt out that would be the acceptance, but not opting out of it.

(R. p. 154:7-25). Finally, the Circuit Court succinctly crystalized the base question in this case as follows:

THE COURT: So the legal question is whether or not rejection of an offer or failure to reject an offer is acceptance[?]

MR. REEVES: Correct, Your Honor.

(R. pp. 155:1-4). (Emphasis added). The answer to that simple question should be "no."

Respectfully, Respondent contends that, by focusing first on the more complex, technological aspects of this case,¹ the Court of Appeals overlooked the simpler threshold question in this case that can be answered with basic contract law. Not rejecting an offer does not equate to acceptance.

This Court, focusing first on actual notice (discussed below), overlooked the threshold question posed by the Circuit Court of “whether or not . . . failure to reject an offer is acceptance[?].” Fundamentally, both an offer and an acceptance are required to form a contract under South Carolina law, and there is no acceptance here. *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004) (“The necessary elements of a contract are offer, acceptance, and valuable consideration.”). There is no legal basis to allow an offeror to manufacture acceptance on the part of an offeree simply by writing into their offer a duty to reject.

“General contract principles of state law apply to arbitration clauses governed by the FAA.” *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001).² “Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.” *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff’d sub nom. Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007).

¹ Those aspects include: clickwrap acknowledgment, electronically distributed agreement, automatic opt in, manual opt out.

² Much of Appellants’ argument was premised on the oft-misstated principle that the FAA “favors arbitration.” This Court correctly recognized that “favoring arbitration agreements” pursuant to the FAA means treating them with the same deference as other contracts and not disfavoring arbitration agreements, as they were at common law prior to the FAA. The Supreme Court very recently addressed this in the employment law context in *Morgan v. Sundance*. “[T]he FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules. [internal citation omitted] Our frequent use of that phrase connotes something different. ‘Th[e] policy,’ we have explained, ‘is merely an acknowledgment of the FAA’s commitment to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.’” *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713, 212 L. Ed. 2d 753 (2022).

As this Court acknowledged: “Because the core of the FAA is consent, arbitration may be compelled only when the parties have agreed to it.” *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 70). *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

This Court focused its determination, in the first instance, on whether Respondent had actual notice of Amedisys’ offer to arbitrate and then determined, as a secondary consideration, that Respondent accepted that offer merely by continuing to work and failing to opt out. *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71). The Court made its holding on acceptance based on its prior decision in *Towles v. United HealthCare Corp.* 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999). The Court overlooked marked distinctions both with respect to the substance of the “Acknowledgement” in *Towles* and the circumstances in *Towles*.

In *Towles*, an employee signed “a code of Conduct and Employee Handbook Acknowledgement Form” that stated “the provisions in this Handbook are guidelines, and **except for the provisions of the Employment Arbitration policy**, do not establish a contract or any particular terms or a condition of employment between myself and [United].” *Towles*, 524 S.E. 2d 839, 842 (Emphasis added). The Employee Arbitration Policy was “summarized in the acknowledgement.” (*Id.*) *Towles* “signed the Acknowledgment which provided in pertinent part:

I acknowledge that I have received a copy of the United HealthCare Corporation (UHC) code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.

...

At-Will Employment

I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and [United].

...

I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy.

Towles, 524 S.E.2d at 845. (Emphasis added). The *Towles* Court found that the above acknowledgment, that specifically described arbitration and said that *Towles* would be bound to arbitrate, "constituted a specific communication of an offer which conditioned *Towles*'s continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract." *Towles*, 524 S.E.2d 845.

The Court of Appeals' opinion, in this case, overlooks serious differences between *Towles* and this case. First, the "Acknowledgement" in this case was an undetailed pop-up that read:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGMENT FORM

By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**

By clicking the "Acknowledge" button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

(R. p. 52). Whereas, the acknowledgement in *Towles* specifically said:

I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy.

Towles, 524 S.E.2d 845. (Emphasis added). **Second**, the offer in *Towles* “conditioned *Towles*’ continued employment on his acceptance of the Employment Arbitration policy” which “*Towles* [therefore] accepted [] by continuing in his employment.” Yet here, the agreement was explicitly not a condition of employment. (R. p. 65) (“Arbitration is not a mandatory condition of Employee’s employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement.”); *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72) (“To be sure, Amedisys did not mandate arbitration as a condition of employment.”). **Third**, *Towles* also differs from this case in the way the acknowledgments were presented. In *Towles*, the acknowledgement was physically presented to and signed by the employee; whereas here a nondescript pop-up led to a landing page with “links to all of the Amedisys’ Arbitration materials.” (R. p. 46, ¶ 6). (R. p. 52).

This Court’s analysis focused on the third distinction (how the agreements were presented/in-person vs. electronic) and found that distinction was not enough to differ from the holding in *Towles*. However, the Court of Appeals’ opinion overlooked the significance of the first two distinctions discussed above (the content of the acknowledgment and assent as a condition of employment) in applying *Towles* holding to this case. Those distinctions were material to the holding in *Towles*. The reasoning in favor of arbitration in *Towles* does not transfer to this case where the acknowledgement in this case:

- 1) Did not describe the material terms of the arbitration agreement within its four corners and say “I agree to submit all employment related disputes . . . to arbitration[.]” and
- 2) Did not condition continued employment on assenting to the arbitration agreement.

The Montana Supreme Court has directly declined to extend *Towles* to a similar acknowledgment for lack of specificity within the four corners of the acknowledgment. The arbitration agreement in that case, similar to this case, did not “contain unambiguous language of consent to

binding arbitration.” *Hubner v. Cutthroat Commc’ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); *distinguishing Towles*, 524 S.E. 2d 839 (“Unlike Cutthroat’s language, this language made clear to the signing employee what they were agreeing to by signing the handbook.”). The Montana Supreme Court, addressing *Towles* and another case, held that “[t]he arbitration agreements in each of these cases are of no help to [the Employer] because, unlike the language at issue here, each contains unambiguous language that clearly indicated the employee was agreeing to binding arbitration.” *See also, Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 533, 135 P.3d 129, 142 (2006), *as corrected* (May 30, 2006) (Distinguishing *Towles* because the acknowledgement in *Towles* specifically stated that all provisions in the Handbook were merely guidelines “except for the provisions” of the “arbitration policy.”).

In this case, there is no record evidence that Respondent e-signed the arbitration agreement, scrolled through it, or even accessed it. The Circuit Court appropriately held that this absence of evidence of an acceptance was fatal to the arbitration agreement at issue. This Court’s opinion applied *Towles* to find assent based on Respondent clicking “I Acknowledge” on a nondescript pop-up and continuing to work without opting out. Considering that critical distinctions between this case and *Towles* were overlooked, the above should not be enough to form a contract. Inherently, there is an obvious difference between affirming “I agree” regarding the terms of an agreement and clicking “I acknowledge.” *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 533, 135 P.3d 129, 142 (2006), *as corrected* (May 30, 2006) (“Here, Douglass merely acknowledged his receipt and understanding of the items presented to him.”) Continuing to work pursuant to a separate at-will contractual agreement is also not enough to manifest assent on its own; especially here, where unlike in *Towles*, agreeing to arbitration was not a condition of continued employment. *See, Shaffer v. ACS Gov’t Servs., Inc.*, 321 F. Supp. 2d 682, 688 (D. Md. 2004) (finding continued employment, “particularly” where the employee did not sign a “explicit consent or acknowledgement form” was not enough to create an agreement

to arbitrate)³; *see also*, *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 380, 548 S.E.2d 207, 208 (2001) (Continued at-will employment is not sufficient consideration to support a noncompete agreement); and *Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 85, 866 S.E.2d 337, 341 (2021) (“All at-will employment relationships . . . are contractual relationships.”).

This Court relied on its prior decision in *Towles* to reverse the Circuit Court’s decision that no arbitration agreement was formed in this case due to lack of acceptance by the Respondent. This Court should reconsider its decision because there are distinctions between *Towles* and the facts of this case which were overlooked and which were not addressed by the Court of Appeals in its opinion.

2. FACT ISSUES ON ACTUAL NOTICE AND THE MAKING OF A CONTRACT IN THIS CASE SHOULD HAVE BEEN REFERRED TO A JURY.

If the Court finds that Respondent has not established that she did not accept Amedisys’s arbitration agreement as a matter of law; then the appropriate result would be to direct a jury trial be held to determine whether a contract to arbitrate has been formed.

This is consistent with 9 U.S.C. § 4 which states that if the making of a contract to arbitrate is at issue and a jury trial has been demanded (*See*, R. pp. 11, 22-23 (¶¶ 93-108) then a jury trial should be ordered.

This Court acknowledged that “Usually, the question of whether an employee has received actual notice is for the jury[.]” *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71) (However, the sentence continues by finding the Court

³ The relevant language from that decision is persuasive:

The decision to forfeit one’s right to a judicial forum is significant and requires a more affirmative action than simply continued employment. The Court is not convinced that Plaintiff bound himself to an arbitration agreement—particularly, where he has not signed an explicit consent or acknowledgment form—simply because he did not quit his job by a certain date.

Shaffer v. ACS Gov’t Servs., Inc., 321 F. Supp. 2d 682, 688 (D. Md. 2004).

could decide actual notice was “conclusively prove[n]” here). Further, issues of offer, acceptance, and contract formation should also be submitted to the jury “if the evidence is conflicting or raises more than one reasonable inference[.]” *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003); *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“A trial court should submit to the jury the issue involving the existence of a contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference.”).

This Court, with its focus on the interplay between *Towles* and Respondent clicking “acknowledge” on the pop-up in this case, held that Appellants had “conclusively prove[n]” actual notice as a matter of law. *See, Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71).⁴ As discussed above, the Court’s focus on *Towles* overlooked two other key distinctions with *Towles*. The first distinction, that the content of this acknowledgment is far less descriptive than the acknowledgement in *Towles*, undercuts the suggestion that actual notice (and assent more generally) has been “conclusively prove[n]” on these facts. Given that there is more to distinguish *Towles* from this case than the electronic vs. nonelectronic presentation of the acknowledgements, which was the principal focus of this Court’s analysis, the decision that a contract was formed in this case should have been left to the jury.

It appears incompatible for this Court to find that a contract was formed as a matter of law on the one hand and then later opine that “the arbitration agreement designed by Amedisys may well be at the outer limits of what constitutes a valid offer to modify the terms an employment agreement

⁴ The opinion’s technology-heavy focus is particularly pronounced on this issue. By way of example, the opinion discusses how an e-signature has the same force and effect as a written signature pursuant to S.C. Code Ann. § 26-6-70. Yet the Court does not consider (at least not to the same degree of depth) whether clicking “Acknowledge” amounted to an e-signature establishing assent or acceptance to arbitrate based on the face of this acknowledgment. Respondent respectfully asserts, perhaps due to her counsel’s own focus on many of the technological aspects of this case, that this Court overlooked that an underlying contract still was not formed (or at least not formed *as a matter of law*) under basic contract law principles.

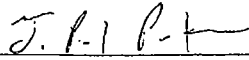
to add an arbitration agreement.” *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72). Seemingly, this relative language – “may well be at the outer limits” – indicates that there are underlying jury issues. *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (“What happens when it’s just not clear whether the parties opted for or against arbitration? The FAA tells district courts to ‘proceed summarily to the trial’ of the relevant facts.”) (Citing, 9 U.S.C. § 4). *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (“Moreover, the party who is contesting the making of the agreement has the right to have the issue presented to a jury.”) *El Hoss Eng’g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) (“These issues should not be determined on affidavits, but rather a full trial should be had.”). This relative language about “outer limits,” alongside the other distinctions with *Towles* that were overlooked, justifies reassessing whether the issues of contract formation in this case should be decided by a jury. Respondent respectfully argues that reconsideration of this Court’s decision to decide a contract was formed, as a matter of law, is warranted.

CONCLUSION

Respondent respectfully requests this Court reconsider this matter based on the arguments made above and find either (1) that an agreement to arbitrate has not been formed as a matter of law, or (2) that a jury trial must be held to determine the fact issues underlying contract formation in this case.

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Columbia, South Carolina
August 25, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

AUG 25 2022

SC Court of Appeals

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-22-01001
Appellate Case No. 2019-00451

Nicole Lampo Respondent,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, ... Appellants.

PROOF OF SERVICE

I do hereby certify that I have served the **Respondent's Petition for Rehearing** by electronic mail and by depositing a copy of the documents in the United States Mail, postage pre-paid, addressed to Appellant's attorneys of record, at the following addresses:

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J. Paul Porter

Columbia, South Carolina
August 25, 2022

The South Carolina Court of Appeals

Nicole Lampo, Respondent,

v.

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Appellants.

Appellate Case No. 2019-000451

ORDER

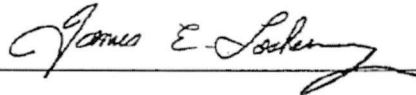
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

cc:

James Paul Porter, Esquire
George A. Reeves, III, Esquire
Jason D. Keck, Esquire
The Honorable Benjamin H. Culbertson

FILED
Aug 30 2022