

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

BRIEF OF PETITIONER

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ISSUES ON APPEAL

1. Is a contract to arbitrate formed under South Carolina law where an employee clicks “acknowledge” on a pop-up that does not describe the terms of the proposed arbitration agreement; the employee never electronically signs or affirmatively “agrees” to the underlying arbitration agreement; but the employee does not take an affirmative step to “opt-out” of the alleged arbitration agreement?
2. Should a jury resolve the question of acceptance where the evidence of acceptance is a pop-up acknowledgement that does not define the terms of the underlying arbitration agreement?
3. Should a jury decide the question of actual notice of a proposed arbitration agreement that was sent inconspicuously via email, with a nondescript pop-up acknowledgement, where there is no evidence that the offeree ever saw the underlying arbitration agreement, and where the terms of the arbitration agreement are not described within the four corners of the pop-up?

INTRODUCTION

This case is not about the enforceability of electronic agreements and e-signatures. Petitioner respectfully contends technological issues obscured the Court of Appeals' focus from more basic problems with the enforceability of the Respondent Amedisys' proposed arbitration agreement.

Instead, the main issue in this case is whether you can make a contract in South Carolina by imposing on an offeree an obligation to "opt out" of a proposed contract or otherwise be bound. That is, can Respondents claim that the Petitioner assented to Amedisys' proposed contract to arbitrate when she acknowledged she received it and she did nothing thereafter?

Petitioner respectfully contends that contracts are not formed this way under South Carolina law. Put simply, an offer **and an acceptance** are still required to form a contract.

STATEMENT OF THE CASE

Petitioner filed this lawsuit in Georgetown County on December 7, 2018. (J.A. 12). The Complaint alleges wrongful discharge and post-termination tort claims of defamation and tortious interference with contract. (*Id.*).

Respondents filed a Motion to Compel Arbitration on February 4, 2019. (J.A. 27). The parties filed lengthy memoranda with some evidentiary exhibits. (J.A. 29-148).

The Circuit Court denied Respondents motion on March 11, 2019. (J.A. 3-11). The Circuit Court held in this case, where Petitioner did not sign or e-sign Respondent Amedisys' proposed arbitration agreement, that: "there is no competent record evidence of acceptance, mutual assent, or a meeting of the minds to warrant declaring the arbitration agreement enforceable." (J.A. 10).

The Court of Appeals reversed and remanded the Circuit Court's order on August 10, 2022, and subsequently denied Petitioner's Petition for Rehearing on August 30, 2022. (J.A. 263-270-284).

The Supreme Court of South Carolina granted Petitioner's Petition for Writ of Certiorari on February 7, 2024.

STATEMENT OF THE FACTS

Petitioner, Nicole Lampo, was a Physical Therapist at Respondent Amedisys Holding, LLC. (J.A. p. 12, Complaint ¶ 12). She was hired on July 8, 2013. (*Id.*). Respondent Leisa Neasbitt was her final supervisor. (Compl. ¶¶ 20-22, 48). Petitioner alleges she was wrongfully terminated on March 26, 2018, after she made internal complaints about patient care and safety issues. (Compl. ¶¶ 48, 57-62). After she was terminated, Petitioner alleges that Respondent Neasbitt spread false and pretextual reasons for her termination to unprivileged former coworkers and that Respondent Amedisys prevented Petitioner's reemployment at a third-party facility that wanted to hire her as Facility Director. (Compl. ¶¶ 63-92). Petitioner alleges wrongful termination based on her separation of employment from Respondent Amedisys and defamation and tortious interference with contract claims based on post-termination occurrences.

Petitioner never signed an arbitration agreement, and she did not know a purported arbitration agreement "even existed" until discussions prior to this lawsuit. (J.A. 144, ¶ 5).

Petitioner received a company-wide email from Amedisys on August 6, 2013. (J.A., 52). The email had the subject line "Important Policy Change – Must Read;" and the body of the email contained a hyperlink that 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 body did not mention "arbitration" and implied a unilateral policy change, rather than a proposed bilateral agreement. (*Id.*). The email looked like many other company-wide emails that Petitioner received from Amedisys throughout her tenure. (J.A. 144).

Respondents' brief to the lower court said that when an employee clicked to open the email, a pop-up Acknowledgement Form appeared. (J.A. 30).¹ The pop-up read:

¹ However, a supporting affidavit to Respondents' brief claimed that the pop-up appeared after the employee clicked on the hyperlink in their email. (J.A. 48).

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.

(J.A. 54). There is no printout in the record that shows the "Acknowledge" button, but according to Respondent, employees were "required" to click the "Acknowledge" button. (J.A. 48, ¶ 5). After clicking "Acknowledge" an employee was transported to a landing page where there were "links" to a cover letter, an Arbitration Agreement, and FAQs. (*Id.* at ¶ 6). There is not a copy of the landing page in the record.

Petitioner supposedly clicked Acknowledge. (J.A. 60). There is no record evidence of how long she was on the web page, if she clicked any links, if the webpage even used the word "Arbitration," or if Petitioner even scrolled through the purported unsigned arbitration agreement.

The arbitration agreement is titled "Dispute Resolution Agreement." (J.A. 62). According to the agreement, agreeing to arbitration "is not a mandatory condition of [an] Employee's employment." (J.A. 67) There is no place on the agreement to affirm or electronically sign it. (J.A. 62-68). To "opt out" of the agreement, an employee must print out a particular form that is an attachment to the agreement, sign it, and mail it to Amedisys corporate headquarters in Louisiana. (J.A. 69). The employee is required to do this within 30 days of clicking "Acknowledge" on the pop-up shown above. (*Id.*). Petitioner has admitted she was unaware of the arbitration agreement. (J.A. 144-145). Thus, she did not submit an opt-out form.

Amedisys conducted regular meetings called “in-services”, where employees were told about new directives or important policy changes. Pertinent documents were often circulated to employees by hand, from Amedisys during those meetings. The proposed arbitration agreement was never discussed or circulated at one of those meetings. (J.A. 145 ¶¶ 11-13).

ARGUMENT

The initial question before the Court is whether a contract can be formed, as a matter of law, where there is no affirmative acceptance to an agreement, but also no affirmative rejection? The second and third questions posed in this case ask if underlying fact questions on acceptance and actual notice should be decided by a jury before arbitration is compelled.

The Court of Appeals, reversing the Circuit Court, focused its determination, in the first instance, on whether Petitioner had actual notice of Respondent Amedisys’ offer to arbitrate and then determined, as a secondary consideration, that Petitioner accepted that offer merely by continuing to work for Amedisys 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 own 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 from this case with respect to the “Acknowledgement” in *Towles* and the circumstances in *Towles*.

Clicking “Acknowledge” on the pop-up in this case and continuing to work thereafter was not enough to form a contract under established South Carolina law.

I. A VALID ACCEPTANCE IS REQUIRED FOR A CONTRACT TO BE FORMED UNDER SOUTH CAROLINA LAW. THERE IS NO VALID ACCEPTANCE IN THIS CASE AS A MATTER OF LAW.

The Court of Appeals opinion makes it possible in South Carolina to form a contract by showing an individual a proposed contract and imposing a duty on them to reject the proposal. That does not satisfy the elements of a valid contract.

“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 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) (emphasis added).

“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); see also, *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713, 212 L. Ed. 2d 753 (2022)(“[T]he FAA's ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules. [] 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.”).

The Court of Appeals focused too narrowly on the intricate technological details of this case and not the threshold question: does not rejecting an offer equal acceptance? See, (J.A. pp. 157:1-4) (“**Circuit Court:** So, the legal question is whether or not rejection of an offer or failure to reject an offer is acceptance[?] **Counsel for Respondents:** Correct, your honor.”). That question does not require a discussion of technological complexities, but instead can be answered with basic contract law.²

² The Circuit Court at (J.A. 155:23-156:6), showed this with the following analogy:

THE COURT: So, you’re saying by not opting out, she accepted.

The Court of Appeals focused its analysis, in the first instance, on whether Petitioner had actual notice of Respondent Amedisys’ offer to arbitrate. It determined that she did, as a matter of law. Consequent to that determination, the Court held that because Petitioner continued her employment, she accepted the offer to arbitrate. *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 of Appeals relied on their prior ruling in *Towles* to reach its conclusion. 524 S.E.2d 839 (Ct. App. 1999). There are many distinctions between the facts of *Towles* and the facts in this case. In *Towles*, an employee signed an “Employee Handbook Acknowledgement Form” that specifically referenced and described that the handbook included a contractual arbitration agreement and described what that meant. The Form read:

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.**

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?

Towles, 524 S.E.2d at 845. (Emphasis added). The *Towles* Court found that the acknowledgment, that specifically described the material terms of the parties' arbitration agreement and advised Towles that he would be bound to arbitrate, "constitute[d] a specific communication of an offer which conditioned Towle's continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract." *Towles*, 524 S.E.2d 845.

The acknowledgment in *Towles* is critically different from the acknowledgment in this case. First, the "Acknowledgement" Petitioner received from Respondent Amedisys was a non-descript pop-up that did not describe the material terms of the parties purported arbitration agreement. (J.A. 54); (*Supra* at p. 3 reprinted in full). In comparison, the Acknowledgment in *Towles* specifically described arbitration and said: "I agree to submit all employment related disputes based on a legal claim to arbitration[.]" *Towles*, 524 S.E.2d at 845. Next, the arbitration offer in *Towles* "conditioned Towles' continued employment on his acceptance of the Employment Arbitration policy" which "Towles [therefore] accepted [] by continuing in his employment." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 40, 524 S.E.2d 839, 845 (Ct. App. 1999). Here, continued employment "[was] not a mandatory condition of Petitioner's employment[.]" (J.A. 67) ("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."). Last, in *Towles* the acknowledgement was printed, physically presented to the employee, and signed. 524 S.E.2d 839, 842 (Ct. App. 1999).³

³ The Montana Supreme Court has directly declined to extend *Towles* to an acknowledgment like the one in this case because of non-specificity within the four corners of the acknowledgment. The acknowledgment in that case did not "contain unambiguous language of consent to binding

The Court of Appeals' analysis focused in isolation on the third distinction, how the acknowledgements were presented, and decided the difference in presentation was not enough to stray from its holding in *Towles*. This overlooked the other distinctions from *Towles*: The descriptiveness of the acknowledgment and whether it was a condition of continued employment; these distinctions are more critical to the question of acceptance. Here, the material terms of the arbitration agreement were not adequately described within the four corners of the pop-up acknowledgment and agreeing to arbitration was not a term of continued employment. In this regard, failing to "opt-out" or reject Amedisys' offer to contract does not amount to acceptance.

"A valid offer 'identifies the bargained for exchange and creates a **power of acceptance** in the offeree.'" *Sauner*, 581 S.E.2d at 166. (emphasis added). That did not happen here; therefore, there is no contract to arbitrate.

II. THE QUESTION OF ACCEPTANCE IS A FACT QUESTION FOR THE JURY, ESPECIALLY HERE WHERE THE ONLY AFFIRMATION OF THE PURPORTED AGREEMENT IS A POP-UP "ACKNOWLEDGEMENT" THAT DOES NOT DEFINE THE TERMS OF THE AGREEMENT.

If the Supreme Court does not find that there is not an acceptance in this case as a matter of law, then Petitioner would still be entitled to a fact finding on acceptance and actual notice.

"What happens when it's just not clear whether the parties opted for or against arbitration? The FAA tells [] courts to 'proceed summarily to the trial' of the relevant facts." *Howard v. Ferrellgas*

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 [in *Towles*] 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.").

Partners, L.P., 748 F.3d 975, 977 (10th Cir. 2014). Petitioner requested a jury trial on fact issues regarding the making of this arbitration agreement. (J.A. 24-25). Under the FAA, if the party opposing arbitration does not demand a jury trial, then “the court shall hear and determine” arbitrability. 9 U.S.C. § 4. However, where a party opposing arbitration does make a jury demand, “the court shall make an order referring the issue or issues to a jury.” *Id.* Here, fact issues abound particularly with respect to the concepts of acceptance and actual notice and those fact issues 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.”).

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.”).

In this case, there is no evidence that Petitioner (1) signed or e-signed the arbitration agreement, (2) scrolled through it, or (3) even accessed it. *See, Wilson v. Willis*, 426 S.C. 326, 337–38, 827 S.E.2d 167, 173 (2019) (“[A] presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.”). The acknowledgement that Respondents say Petitioner clicked does not define the terms of the arbitration agreement alleged. *See, Hubner v. Cutthroat Commc’ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); *distinguishing Tomles*, 524 S.E. 2d 839 (“[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.”). Further, 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)⁴; *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.”).

The Court of Appeals found that a contract was formed in this case as a matter of law, but then later opined 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.” *Lampo v. Amedisys Holding, LLC, Op. NO. 5934* (S.C. Ct. App. filed Aug 10, 2022) (Howard

⁴ 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).

Adv. Sh. No. 28 at 72). This relative language – “*may well be at the outer limits*” – shows there are underlying jury issues. *See, 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.”).

Petitioner contends there is no acceptance in this case as a matter of law; alternatively, there are, at worst, material facts in dispute about whether Petitioner accepted Amedisys’ offer to arbitrate. Under 9 U.S.C. § 4, those fact issues are for a jury.

III. THE QUESTION OF ACTUAL NOTICE IS A FACT QUESTION FOR THE JURY; HERE, WHERE THE ARBITRATION AGREEMENT WAS NEVER AFFIRMATIVELY AGREED TO AND WHERE THE CIRCUMSTANCES OF THE AGREEMENT’S DISTRIBUTION WERE INCONSPICUOUS BY DESIGN.

The Court of Appeals correctly acknowledged that “[u]sually, 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). But then, the Court of Appeals, held that Respondents had “conclusively prove[n]” actual notice as a matter of law. (*Id.*).

The Court of Appeals held that there was actual notice in this case irrespective of the inconspicuous technological means by which this arbitration agreement was distributed. The technological means of distribution for this agreement was the main focus of the Court of Appeals’ analysis.⁵ The Court of Appeals, with that particular focus, overlooked distinctions between this case and *Towles* to conclude that actual notice was conclusively proven based on its prior decision in *Towles*. *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh.

⁵ 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. This was not in dispute. 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 to agree to arbitrate based on the face of this particular acknowledgment. Petitioner respectfully asserts, perhaps due to her counsel’s own focus on many of the unique technological aspects of this case, that the Court of Appeals overlooked that an underlying contract still was not formed (or at least not formed *as a matter of law*) by this acknowledgment under traditional contract law principles.

No. 28 at 71); *citing, Towles* 524 S.E.2d at 845. The descriptiveness of the acknowledgement in this case in comparison to *Towles* and the inconspicuous means of distribution of this agreement show the existence of a fact question on actual notice.

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; *see also, Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997) (“[T]he court believes that the South Carolina Supreme Court would apply the same actual notice requirement to an employer’s implementation of an 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.”). 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). 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). None of those circumstances are present here.

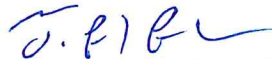
The facts of this case, including the nondescript pop-up used and automatic opt-in thereafter, give rise to a jury issue on actual notice under 9 U.S.C. § 4. The Court of Appeals should not have decided actual notice in favor of the Respondents as a matter of law.

CONCLUSION

Petitioner respectfully asks this Honorable Court to reverse the holding of the Court of Appeals and remand this case to proceed to discovery in the Court of Common Pleas or *alternatively* to proceed to a jury trial on the issues of acceptance and actual notices.

Respectfully Submitted,

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