

IN 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

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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

Nicole Lampo,..... Petitioner

v.

Amedisys Holding, LLC, and
Leisa Victoria Neasbitt Respondents

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I. COUNTER QUESTIONS PRESENTED FOR REVIEW

1. Whether an existing employee agrees to arbitrate employment-related disputes against the employer when the undisputed evidence establishes that the employee acknowledged receipt of an arbitration agreement, failed to “opt out” of that agreement (despite having the ability to do so), and continued to work for five years?

2. Whether an employee’s inability to recall any specifics regarding the employee’s acquiescence to an arbitration agreement can give rise to a material issue of fact when the undisputed evidence establishes that the employee acknowledged her receipt of the arbitration agreement and obligation to review it?

II. STATEMENT OF CASE

A. Relevant Factual Background

Amedisys provides home health and hospice services to patients throughout the United States. J.A. pp. 13-14. 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.* As with all its employees, Amedisys assigned Ms. Lampo (at the time of hire) with a unique username and password permitting Ms. Lampo to log into Amedisys' internal software system, known as "SharePoint." J.A. pp. 46-47. Amedisys also assigned Ms. Lampo a unique email account accessible only to her via her unique username and password, the latter of which Ms. Lampo had the ability to change at her discretion. *Id.*

On August 6, 2013, Amedisys emailed all current employees, including Ms. Lampo, information concerning the Company's written Dispute Resolution Agreement ("Arbitration Agreement"). J.A. pp. 47, 51. The email subject line stated, "Important Policy Change – Must Read." *Id.* The body 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.* (emphasis added). Upon clicking on the "here" hyperlink embedded in the email, 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.”

J.A. pp. 48, 54 (emphasis in original). Once an employee clicked “Acknowledge,” they were taken to a webpage that provided additional information and copies of Amedisys’ Arbitration Program materials, including a cover letter, the Arbitration Agreement, and a six-page fact sheet of FAQs explaining the Arbitration Agreement.¹ J.A. pp. 48, 54, 62-73. These three documents were the only documents located on the webpage. *See id.* On August 6, 2013 at 1:55 p.m., Ms. Lampo clicked “Acknowledge” on the “Acknowledgment Form.” J.A. 57, 60. Thereafter, Ms. Lampo had unrestricted access to Amedisys’ Arbitration Program materials and could read them, consult with an attorney (or anyone else) about them if she chose (including by calling a Company-provided Hotline), and then decide if she wanted to continue to participate or opt out of the Arbitration Agreement. *See id.*

The Arbitration Agreement, which Ms. Lampo “Acknowledged” and understood she was “required” to review (*see* J.A. p. 54), 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.”

J.A. pp. 48, 62. The Arbitration Agreement further states it “is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above.” J.A. pp. 48, 62, 68.

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. J.A. p. 73.

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 further stated 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.” *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. J.A. p. 64. Written discovery, depositions and dispositive motions are allowed. J.A. p. 65. 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 only for her own attorney’s fees, witness fees, costs and expenses, just like she would if the matter were litigated in court. J.A. p. 67

Amedisys provided its employees with a simple and transparent way to opt out of the Arbitration Agreement if they desired. Specifically, Amedisys included a straightforward “Dispute Resolution Agreement Opt-Out Form” as Attachment “A” to the Arbitration Agreement. J.A. pp. 49, 69. Thus, to “opt-out” of the Arbitration Agreement, all an employee needed to do was sign, date, and return the 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 again, she “Acknowledged” that she was required to review (and has not denied reviewing)—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.

J.A. pp. 48-49, 67-68, 71-72 (emphasis in original).

Amedisys' Human Resources Department maintains a file containing hard copies of all opt-out forms completed by any employee who chose to opt out of the Arbitration Agreement. J.A. p. 49. Ms. Lampo does not allege she opted out of the Arbitration Agreement and Amedisys does not have an "opt-out" form from her. J.A. pp. 49, 144-145. After introduction of the Arbitration Agreement, Ms. Lampo continued to work for Amedisys an additional four and a half years, until March 2018, at which point she alleges Amedisys terminated her employment. J.A. pp. 13-26.

Throughout these proceedings, Ms. Lampo has never disputed that she: (1) received a unique username and password and an unique email account to which only she had access; (2) 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) clicked the hyperlink contained in the August 6, 2013 email; (4) received and reviewed the "Acknowledgment Form" after clicking the hyperlink; (5) 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) did not opt out of the Arbitration Agreement, despite having an unfettered ability

to do so; and (7) continued to work for Amedisys until March 26, 2018. J.A. pp. 47-50, 52-60. Nor has Ms. Lampo denied reading or reviewing the Arbitration Agreement or understanding its intended effect. *See id.*

B. 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 interfered with her “prospective contractual relations” (Count IV), and that Amedisys and, her former supervisor, Defendant Ms. Leisa Neasbitt defamed Ms. Lampo (Counts II and III). J.A. pp. 12-26. 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. J.A. pp. 15-18. 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.” J.A. pp. 18-23. Ms. Lampo also alleges that Amedisys tortiously interfered with her “prospective employment” when some unknown person made some unknown statement(s) to some unknown prospective employer preventing Ms. Lampo from obtaining some unknown job. J.A. pp. 18-19, 23-24.

On March 11, 2019, the Circuit Court denied Amedisys and Ms. Neasbitt’s motion to compel arbitration holding that failing to opt out of the Arbitration Agreement did not evince Ms. Lampo’s acceptance of the Arbitration Agreement. J.A. pp. 7-11. On August 10, 2022, the Court of Appeals (J. Hill) unanimously reversed the Circuit Court’s decision holding that, after having actual notice of Amedisys’ offer to enter into an Arbitration Agreement, Ms. Lampo accepted the Arbitration Agreement by acknowledging receipt of the Agreement, failing to opt out, and continuing to work for the Company for four and a half years. J.A. 263-270. And, after the Court

of Appeals denied Ms. Lampo’s Petition for Rehearing (J.A. 284), this Court granted Ms. Lampo’s *writ of certiorari* on February 7, 2024.

III. STANDARD

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).

IV. LEGAL ARGUMENT

The Court of Appeals correctly applied South Carolina law in reversing the circuit court’s denial of Amedisys and Ms. Neasbitt’s motion to compel arbitration. It is undisputed that Ms. Lampo received Amedisys’ August 6, 2013 email and affirmatively clicked the “Acknowledgment” advising Ms. Lampo that she would be “bound by [the Arbitration Agreement]” if she failed to “opt out” within “30 days.” It is similarly undisputed that Ms. Lampo had access to the Arbitration Agreement, a Cover Letter and FAQs each of which advised her of the intended effects of her decision to not opt out of the Arbitration Agreement. Despite this, Ms. Lampo did not opt out and voluntarily accepted Amedisys’ offer by remaining employed for almost five additional years. South Carolina law recognizes the bedrock principle of implied consent, and the Court of Appeals correctly ruled that a valid arbitration agreement was formed between Ms. Lampo and Amedisys. The order compelling arbitration should be affirmed.²

² Ms. Lampo’s appeal to this Court does not challenge and, therefore, waives any challenge to the Court of Appeals finding that: (1) the Arbitration Agreement is not unconscionable as a matter of law; (2) Ms. Neasbitt can join in Amedisys’ motion to compel arbitration; and (3) the Arbitration Agreement covers all causes of action contained in her Complaint. *See, e.g., Biales v. Young*, 415 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (“Failure to argue is an abandonment of the issue and precludes consideration on appeal.”).

A. The Arbitration Agreement is Governed by the Federal Arbitration Act.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14, applies to written arbitration agreements between employers and employees in transactions involving interstate commerce. 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 United States 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. v. Adams*, 532 U.S. 105, 132 (2001); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). Consequently, the FAA establishes a “federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24. Thus, 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 U.S. 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 . . .”). The parties agree that the Arbitration Agreement is governed by the FAA, and according to both long-established legal precedent and Congressional intent, any doubts concerning arbitrability must be resolved in favor of arbitration.

B. Ms. Lampo Received Actual Notice of the Arbitration Agreement.

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)). There is no dispute here that a party cannot assent to something she 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.”).

This Honorable 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). In South Carolina, 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. *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 39-40, 524 S.E.2d 839, 845 (S.C. Ct. App. 1999). This is true even if the employee has electronically signed the acknowledgment form. *See* S.C. Code Ann. § 26-6-70 (2007).

In *Towles*, the plaintiff signed an “Acknowledgment” that referenced an “Employment Arbitration Policy” found in the Company’s Handbook.³ 338 S.C. at 40, 524 S.E.2d at 844-45. After the plaintiff filed a lawsuit against his employer, the employer moved to compel arbitration. *Id.* In opposition to the motion, the plaintiff argued that he never received “actual notice” of the arbitration agreement, which he argued precluded him from assenting to arbitration. *Id.* The Court of Appeals disagreed, holding 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 reading the document. *Id.* In assessing whether the plaintiff received “actual notice” of the “Employment Arbitration Policy,” the Court of Appeals held that because the plaintiff had “receiv[ed] and sign[ed] the “Acknowledgment,” he “cannot legitimately claim [the defendant] 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.” *Id.* at 39; citing *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) (holding that “in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: ‘But I did not read the whole agreement.’”).

In this case, while attempting to argue that she did not receive actual notice of the Arbitration Agreement, Ms. Lampo’s Opening Brief fails to recognize—or even discuss—the undisputed facts upon which the Court of Appeals relied.⁴ After all, it is undisputed that: (1) on

³ Plaintiff’s Opening Brief spends a great deal of effort drawing a distinction between the language contained in the *Towles* acknowledgment and the language contained in Amedisys’ Acknowledgment. Ms. Lampo’s distinction is without a difference when assessing whether she received “actual notice” of the Arbitration Agreement. The point of *Towles*, at least insofar as assessing “actual notice” is concerned, is that by signing an “Acknowledgment” that *Towles* received the “Employment Arbitration Policy,” he cannot later deny “actual notice” of it.

⁴ Ms. Lampo’s Opening Brief continues to claim—as she did before the Court of Appeals—that this case presents “unique technological” aspects. See Opening Brief, pp. 11-12. It is not clear what those “unique technological”

August 6, 2013, while employed by Amedisys, Ms. Lampo received an offer to participate in Amedisys' alternative dispute resolution program (J.A. pp. 47-48, 52, 54, 57, 144-45); (2) Ms. Lampo clicked the hyperlink contained in the August 6, 2013 email⁵ (J.A., pp. 47-48, 52, 54, 57); (3) Ms. Lampo received and reviewed the "Acknowledgment" that 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 (J.A. pp. 47-48, 52, 54, 57); (4) the "Acknowledgment" stated, 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**" (J.A. p. 54 (bold in original)); and (5) after reading the August 6, 2013 email and "Acknowledgment," Ms. Lampo clicked "Acknowledge" at 1:55 p.m. on August 6, 2013 (J.A. pp. 144-45). Thereafter, Ms. Lampo does not squarely dispute she accessed (and even read) the Arbitration Agreement or its corresponding materials. J.A. pp. 47-50, 52-60.

Confusingly, despite these undisputed facts, Ms. Lampo continues to argue that whether she received "actual notice" is, at least, a "jury issue." *See* Opening Brief, p. 12. As the Court of Appeals correctly decided, however, the August 6, 2013 email Ms. Lampo received alerted her that she "must read" the Arbitration Agreement (and its corresponding materials) and the Acknowledgment itself twice notified her that she was required to read the entire Arbitration Agreement. J.A. 52, 54. Thus, while a jury may be required to decide whether "actual notice" is present when there are genuine factual disputes, there are none here because Ms. Lampo admits to

aspects are because there is nothing "unique" about asking an employee to electronically "acknowledge" receipt of important documents during their employment. Nor is there anything unique about an employer requiring employees to read or acknowledge policies and procedures or even agreements (i.e., health insurance coverage, bonus agreements, pay raises, sick leave usages, etc.) electronically.

⁵ Ms. Lampo does not dispute that she clicked the hyperlink after receiving the August 6, 2013 email, which had as the subject, "Important Policy Change – Must Read" and contained language stating that "[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." J.A. 52.

having been notified of the Arbitration Agreement vis-à-vis her Acknowledgment and, thereafter, had access to the Arbitration Agreement. J.A. 54, 56-60; 144-45; *see Small v. Springs Indus. Inc.*, 292 S.C. 481, 483, 357 S.E. 2d 452, 454 (1987) (noting “a trial court should submit to the jury the issue of existence of a contract when its existence is questioned, and the evidence is either conflicting or admits of more than one inference”); *Towles*, 338 S.C. at 38, 524 S.E.2d at 844 (“Although a jury normally decides whether a contract exists when there is conflicting evidence, in the present case, we find the evidence leaves room for only one inference: that the Acknowledgment constituted a binding arbitration agreement.”).

Ms. Lampo doesn’t even squarely deny reviewing or reading the Arbitration Agreement. Nor does she present any record evidence that after clicking “Acknowledge,” she was somehow hindered or prevented in accessing or reading the Arbitration Agreement.⁶ As such, the undisputed evidence here leaves room for only one permissible inference: that Ms. Lampo received actual notice of the Arbitration Agreement. *See Towles*, 338 S.C. at 39, 524 S.E.2d at 845 (an employee who receives and acknowledges an agreement cannot legitimately claim the employer failed to provide actual notice of an arbitration provision). Accordingly, for each of these reasons, this Honorable Court should affirm the decision of the Court of Appeals as it relates to actual notice.

C. Ms. Lampo Accepted the Arbitration Agreement.

Having established that Ms. Lampo received “actual notice” of the Arbitration Agreement, the only remaining question is whether her actions manifest an assent to that Arbitration Agreement.⁷ The answer is unequivocally, yes. 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

⁶ Indeed, if an employee clicked an “Acknowledgment” confirming their understanding that they were “required to review” a document that affected their “legal rights” but were somehow precluded or hindered from doing so, common sense dictates there would be some record of that.

⁷ Ms. Lampo does not challenge that the Arbitration Agreement is supported by adequate consideration.

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 the employment context, most employment contracts are unilateral. *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 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*, 292 S.C. at 488, S.E.2d at 454).

In *Gupta v. Stanley*, the Seventh Circuit recently analyzed—and rejected—the exact same arguments being advanced by Ms. Lampo here under a strikingly similar factual scenario. 934 F.3d 705 (7th Cir. 2019). In *Gupta*, the defendant-employer emailed the plaintiff-employee a new arbitration agreement approximately two years into his employment. *Id.* at 708-709. The email’s subject line read “Expansion of CARE Arbitration Program,” and the body of the email explained that “final and binding arbitration” would be “mandatory for all employees” unless an employee individually elected to opt out of the program. *Id.* The email included links to the new arbitration agreement and simply encouraged employees to “read and understand” the documents. *Id.* The final section of the company’s email to the plaintiff, entitled “Next Steps,” attached a link to the arbitration agreement opt-out form, explained instructions for submitting that form, and again notified the plaintiff that he had 30 days to opt out. *Id.* The email made clear that if the employee did not opt out, continued employment would reflect that the employee “consented and agreed to the terms” of the arbitration. *Id.* The deadline to opt out came and went and the plaintiff did not

submit an opt-out form, respond to the defendant’s email, or otherwise communicate with human resources about the mandatory arbitration program. *Id.* Rather, he continued to work for the defendant for two more years until, he alleges, the company forced him to resign because of imminent military leave, which gave rise to his lawsuit. *Id.*

Appealing the District Court’s order compelling arbitration, the plaintiff argued—as Ms. Lampo does here—that an “employer cannot form a contract by an employee’s silence simply by proving email delivery of an offer and a failure to opt out.” *Id.* at 712-713. The Seventh Circuit disagreed and held that when “the relationship between parties may justify the offeror expecting a reply . . . silence is assent to [the] proposal.” *See id.*, at 713; citing 2 *Williston on Contracts* § 6:50 (4th Ed. 2007); 1 *Corbin on Contracts* § 3:18 (rev. ed. 2018) (“Often . . . silence coupled with . . . expectations engendered by a prior relationship can reasonably be understood by the offeror as an acceptance.”); *see also Rivera-Colon v. AT&T Mobility Puerto Rico, Inc.*, 913 F.3d 200, 213–14 (1st Cir. 2019) (holding employee’s silence operated as acceptance of employer’s arbitration agreement transmitted by email).

The Seventh Circuit’s decision in *Gupta* is particularly persuasive here because it is consistent with the rationale and legal foundation of this Court’s precedent in interpreting South Carolina law.⁸ For example, in *Allstate Insurance v. State Farm Mut. Ins., Co.*, this Court made clear that implied consent can be inferred “from a course of conduct or relationship between the

⁸ *Gupta* applied Illinois law in reaching its decision, however, the elements (and defenses to contract) in Illinois and South Carolina are the same. *Compare Gupta*, at 712-713 and *Sauner*, 354 S.C. at 406. Moreover, like Illinois, South Carolina evaluates contract formation under an objective theory. *See, e.g., N. Am. Rescue Prods., Inc. v. Richardson*, 769 S.E. 2d 237, 240-41 (S.C. 2015). Under such theory, “a contract is an obligation attached by the mere force of law to certain acts of the parties . . . which ordinarily accompany and represent a known intent.” *See Hotchkiss v. Natl’s City Bank of NY*, 200 F. 287, 293 (S.D.N.Y. 1922) (J. Hand); *see also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 858 (1992) (explaining that the “objective theory of assent” holds persons to the reasonable or normal meaning that their conduct conveys to others).

parties, in which there is mutual acquiescence *or a lack of objection* under circumstances signifying assent.” 260 S.C. 350, 354 (S.C. 1973) (citing *Crenshaw v. Harleysville Mut. Cas. Co.*, 246 S.C. 549, 144 S.E. 2d 810 (1965)).

Thus, because this Court has previously observed that a “lack of objection” can, in certain circumstances, signify assent, *Towles* is again persuasive. In *Towles*, the plaintiff signed an “Acknowledgment” that referenced an “Employment Arbitration Policy” found in the Company’s Handbook. 338 S.C. 29, 40, 524 S.E.2d 839, 844-45 (S.C. Ct. App. 1999). After determining that the plaintiff received and signed the “Acknowledgment,” the Court of Appeals held that 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 reading the document. *Id.* 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,” the Court of Appeals determined that the plaintiff had accepted the offer by continuing to work thereafter and, thus, was bound to arbitrate his claims. *Id.* at 845.

Here—considering the relationship between the parties—Ms. Lampo’s actions (and lack of objection) objectively evince her assent to be bound by the Arbitration Agreement. To reiterate, it is undisputed that on August 6, 2013, while employed by Amedisys, Ms. Lampo received an offer to participate in the Arbitration Agreement. J.A. pp. 47-48, 52, 54, 57, 144-45. She does not dispute that upon clicking on a hyperlink contained in the August 6, 2013 email, Ms. Lampo received an “Acknowledgment,” that 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). J.A. pp. 47-48, 52, 54, 57. The “Acknowledgment” informed Ms. Lampo 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.” J.A. p. 54 (bold in original). Thereafter, going one step further than the plaintiff did in *Gupta*, on August 6, 2013 at 1:55 p.m., Ms. Lampo clicked “Acknowledge”—a fact that Ms. Lampo does not dispute (*see* J.A. pp. 144-45). After Ms. Lampo did so, it is undisputed that she had unrestricted access to Amedisys’ Arbitration Program materials and could read them, consult with an attorney (or anyone else) about them if she chose (including by calling a Company-provided Hotline), and then decide if she wanted to opt out of the program. J.A. pp. 47, 54, 57, 60, 62-69. Indeed, even one step further than the plaintiff in *Gupta*, Ms. Lampo does not deny clicking Acknowledge or reading any of the materials. Of course, it would not matter if she didn’t. *See Mid-Continent Refrigerator Co., v. Dean*, 256 S.C. 99, 180 S.E.2d 892 (1971) (holding that the decision not to read a written contract is no excuse for enforcement of contractual provisions). In any event, after being presented with the Arbitration Program materials, Ms. Lampo did not opt out of the Arbitration Agreement, despite having an unfettered ability to do so and, thereafter, continued to work for Amedisys for five more years, until March 26, 2018. J.A. pp. 30-31, 47-50, 52-58.

The Acknowledgment Form received by Ms. Lampo clearly advised her that her failure to “opt out” of the “Dispute Resolution Agreement” within thirty (30) days will result in her being “bound by [the Agreement], which will affect your legal rights.” J.A. pp. 48, 54. The Arbitration Agreement, which Ms. Lampo again does not deny accessing or reading, made clear that it “is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above.” J.A. pp. 48, 62, 68. The Cover Letter that accompanied the Arbitration Agreement again advised Ms. Lampo that if she did “**not want to be covered by the . . . [Arbitration Agreement] and instead desire[d] to preserve [her] right to bring disputes before a court, [she] must notify Amedisys within 30 days . . .**” J.A. 69 (bold in original). That

same letter contained a specific FAQ explaining to Ms. Lampo that if she did not wish to arbitrate, she needed to complete the “Opt-Out Form” and return it to Amedisys within 30 days. J.A. 70. That same FAQ advised Ms. Lampo that if she did not “opt out within this period, or if you do nothing, you and Amedisys will be bound by the [Arbitration Agreement].” J.A. 70. Amedisys provided Ms. Lampo with an “Opt-Out Form” (J.A. 67) and advised her that Amedisys “will not tolerate retaliation” against her if she chose to opt-out. J.A. 70. Each of these actions objectively manifest Amedisys’ expectations of a response if Ms. Lampo chose to opt-out of the Arbitration Agreement.⁹ And, her lack of objection—or, in this case, decision not to “opt-out” and continue working—clearly signifies her assent given the parties’ relationship.

Ms. Lampo’s Opening Brief suggests that this Court should simply ignore the relationship between the parties. *See* Opening Brief, pp. 5-6. She again relies on a hypothetical posed by the trial court involving an unsolicited offer from one stranger forcing another stranger to purchase his house if he did not “opt out.” *See id.* As the Seventh Circuit observed in *Gupta*, such a situation is “rare, if not baseless.” 943 F. 3d at 713. This case, like *Gupta*, does not present an unsolicited offer from a stranger. Rather, the offer was made in the context of Ms. Lampo’s established employment relationship, where there is an inherent understanding that employees will act with diligence in following an employer’s instructions and responding to requests, whether transmitted by email or another reasonable mode of communication. Indeed, Ms. Lampo presents no evidence, policy, or prior course of dealing that objectively establish she was free as an employee to ignore Amedisys’ communications without repercussion. *See id.*

⁹ Again, Ms. Lampo worked for Amedisys for almost five years. That employment included regular email communication, and justified Amedisys’ expectation of a reply, and its assumption that Ms. Lampo’s silence indicated her acceptance of her agreement to arbitrate.

Amedisys reasonably construed Ms. Lampo's silence as acceptance of the Arbitration Agreement after she received a clear offer, a reasonable opportunity to opt-out, and multiple forms of communication that silence and continued employment reflected acceptance. After all, the parties' employment relationship made it reasonable to expect Ms. Lampo would notify Amedisys if she intended to decline its offer, and that her silence and decision to continue working would convey acceptance.¹⁰ And when, as here, "inaction is indistinguishable from overt acceptance," the only objective inference is that the parties agreed to arbitrate. Such a conclusion is consistent with *Towles* and dozens of decisions from other jurisdictions, including *Langlois v. Amedisys* and *Knight v. Amedisys*, which each analyzed and upheld the exact agreement at issue here. See *Knight v. Amedisys Holding, LLC*, 2016 WL 5661227 (W.D. Ky. 2016) (finding that the plaintiff accepted Amedisys' offer to arbitrate by clicking "Acknowledge," failing to opt out and continuing to work for Amedisys); *Langlois v. Amedisys, Inc.*, 2016 WL 4059670 (M.D. La. 2016) (same); *Towles*, 338 S.C. at 39 (holding employee accepted arbitration offer by continued employment); see also, 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); *Boerstler v. UHS of Delaware, Inc.*, 2022 WL 18802, at *2 (D.S.C. Jan. 3, 2022) (failure to opt out and continue working demonstrates assent); *Rivera-Colon*, 913 F.3d at 213-14 (plaintiff's failure to opt out constituted implicit consent); *Tillman v. Macy's Inc.*, 735 F.3d 453, 460 (6th Cir. 2013) (failing to return an opt-out form and continuing to work constituted acceptance because it "mirrors that called for in the offer"); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 675 n.2 (5th Cir. 2006) (valid arbitration agreement existed where parties did not dispute notice to employee of arbitration policy and opportunity to opt out, and employee continued to work for several years after policy

¹⁰ Ms. Lampo could have also declined the Arbitration Agreement by resigning her employment within the thirty (30) day period. She chose not to do that either.

was implemented); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1375 (11th Cir. 2005) (employees' continued employment manifested their assent to arbitrate); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (court inferred assent from employee's conduct where employer clearly communicated in writing the significance of employee's failure to opt out of the voluntary arbitration program after review period, and employee remained employed without opting out). Thus, for all these reasons, this Honorable Court should affirm the Court of Appeals in determining that Ms. Lampo accepted the Arbitration Agreement.

D. There Is No Fact Dispute Warranting a Jury Trial.

While Section 4 of the FAA permits a court to convene a jury trial when factual disputes are present, “[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.* “The party resisting arbitration bears the burden of showing an entitlement to a jury trial under the FAA and must produce some evidence to substantiate the allegations that the prevailing law would release h[er] from a contractual obligation to arbitrate.” *Towles*, 338 S.C. 29, 39, n.3.

Ms. Lampo's Opening Brief does not identify any fact disputes, let alone the kind of fact dispute warranting a jury trial. In fact, Ms. Lampo admits she has no recollection of any pertinent events and is unable to deny that she received, or reviewed, the Arbitration Agreement. J.A. 144-45, ¶ 13 (“I do not remember ever being presented with the [Arbitration Agreement].” Therefore, 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 as a matter of law. *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”). Thus, because there remain no fact disputes warranting a jury trial under § 4 of the FAA, this Court should affirm the Court of Appeals and relegate this matter, once and for all, to arbitration consistent with the parties’ agreement to do so.¹¹

V. CONCLUSION

For the reasons set forth above, Amedisys and Ms. Neasbitt respectfully request this Court affirm the Court of Appeals decision reversing the circuit court’s denial of Amedisys’ and Ms. Neasbitt’s motion to compel arbitration.

Respectfully submitted,



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Dated this 29th day of April 2024

¹¹ 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.