

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.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The underlying question before the Court 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? Specifically, can Respondents claim that Petitioner assented to Amedisys’ proposed contract to arbitrate by acknowledging she received access to it and by not affirmatively opting out thereafter?

Respondents reframe the facts and the issues on appeal with the ultimate end of asserting that Appellant’s acceptance of its Arbitration Agreement is shown by what Respondents call “the bedrock principle of implied consent.” (Resp. Brief p. 7). Respondents’ argument, however well phrased, is that by clicking an “Acknowledgement” that Petitioner received a contract, by not taking affirmative steps to “opt out” thereafter, and by “remaining employed” by Respondent Amedisys,¹ Petitioner agreed to a comprehensive arbitration agreement by “implied consent.” (Resp. Brief p. 7).

That is not how a contract is formed. The key facts in the record are such that: Petitioner never signed or e-signed an arbitration agreement (J.A. 62-69); she never clicked “Agree,” affirming that she agreed to be bound by an arbitration agreement (J.A. 60); and there is no indication that she even looked at Respondents’ proposed Arbitration Agreement. The sole evidence of assent in the record is that Petitioner clicked “Acknowledge” on a pop-up that neither described what arbitration was nor gave Petitioner an option to do anything but to click “Acknowledge.” (J.A. 60). The pop-up either came up automatically or after an employee clicked a link in an email that described its contents

¹ The Arbitration Agreement expressly provides that “[a]rbitration is not a mandatory condition of [] employment” its incompatible to suggest continued employment, on these facts, equates to “implied consent” for a broad sweeping arbitration and class action waiver agreement. (J.A. 67).

as a unilateral “Policy Change,” not a bilateral proposal to agree to binding arbitration. (J.A. 52).² “Acknowledged” and “Agree” are not the same.

A contract is not formed under South Carolina law without an acceptance. Irrespective of how Respondents frame the issues and the facts, and their legal arguments, there is no acceptance here. Put simply, you cannot form an enforceable contract with another by sending the other a contract and telling them to opt out or otherwise be bound.

ARGUMENT

Respondents make four distinct legal arguments: (1) the arbitration agreement is governed by the Federal Arbitration Act; (2) Petitioner received actual notice of the arbitration agreement; (3) Petitioner accepted the arbitration agreement; (4) there is no fact dispute that warrants a jury trial.³

I. NO PRESUMPTION, UNDER THE FAA OR OTHERWISE, OPERATES TO CREATE A CONTRACT ON THESE FACTS.

Whether the FAA “govern[s]” this arbitration act, is not a question that was posed or accepted for Certiorari in this case. *See*, Rule 267(i), SCACR (“[T]he parties shall brief addressing the question(s).”). Nonetheless, Respondents open the argument section of their brief with a one-page argument, that the FAA “govern[s]” this arbitration agreement and that “South Carolina shares the U.S. Supreme Court’s strong public policy favoring arbitration.” (Resp. Brief p. 8).

Respondents write: “[t]he parties agree that the Arbitration Agreement is governed by the FAA.” (Resp. Brief p. 8). Petitioner acknowledges that her arguments in this case have heretofore

² At J.A. 48 ¶ 5, Respondents say that the pop-up populated when an employee clicked on the hyperlink; however, in their brief to the circuit court, Respondents said that the pop-up populated when an employee opened the email found at J.A. 52. (J.A. 30) (“Upon clicking on the email to open it in their inbox, each employee, including Plaintiff, received a pop-up Acknowledgement Form.”).

³ Respondents’ arguments are ordered differently than the arguments made by Petitioner in her brief. Whether this agreement is covered by the FAA was not an issue upon which this Court granted Certiorari and Respondent’s flipped the order of discussion to address actual notice before acceptance. Petitioner, in her reply brief, address Respondents’ arguments in the order they presented them.

challenged the making of a contract; rather, than whether the FAA would govern this dispute, if Amedisys' contract was enforceable. (J.A. pp. 9 124-142, 211-241, 272-282).

Regardless, this Court held in 2023, in *Hicks Unlimited v. Unifirst Corporation*, that parties cannot invoke FAA coverage merely by “agreeing their transaction or relationship ‘contemplates’ interstate commerce[.]” 439 S.C. 623, 632, 889 S.E.2d 564, 568 (2023); Instead, in *Hicks*, the Court concluded:

We hold that a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce. Just as the parties may not prove the requisite connection to interstate commerce by agreeing their transaction or relationship “contemplates” interstate commerce, they may not make the connection by declaring or contemplating the FAA will govern. Instead, the party pushing arbitration must prove the contract involves ‘commerce in fact.’

Id.

This is an arbitration contract applying to a physical therapist who treated patients for Amedisys at Georgetown and Horry County Skilled Nursing and Long-Term Care Facilities. (J.A. 14). The record does not contain a showing by Respondents that the parties' relationship “‘contemplates’ interstate commerce.” Instead, Amedisys made a one paragraph argument to the Circuit Court that interstate commerce was implicated generally because Amedisys employs “16,000 people in thirty-four (34) states” and “order supplies and receive payments for services across state lines.” (J.A. 36); (*Citing*, J.A. 46 ¶ 1). It is unclear from the Court's decision in *Hicks* whether this limited showing by affidavit is enough to establish interstate commerce. *See, Hicks Unlimited, Inc.*, 889 S.E.2d at 570 (“At any rate, the points [(that uniforms/product was shipped across state lines, and the Respondent Amedisys had its headquarters in another state where it handled deposits and payments)] came from assertions made by UniFirst's counsel. They are not mentioned in the pleadings, not apparent from

the language of the contract, nor supported by affidavits or other evidence. It was error to rely on them in deciding whether the contract involves interstate commerce.”⁴

Regardless, there is not special presumption under the FAA that would allow this agreement to be treated like a contract when it does not satisfy the elements of an enforceable contract:

But the FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules. [Internal citation to *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)]. **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.’ *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) []. **Or in another formulation: The policy is to make ‘arbitration agreements as enforceable as other contracts, but not more so.’** *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. **The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.** See *ibid.*; *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (C.A.D.C. 1987) (“The Supreme Court has made clear” that the FAA’s policy ‘is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism”).

Morgan v. Sundance, Inc., 596 U.S. 411, 418–19, 142 S. Ct. 1708, 1713–14, 212 L. Ed. 2d 753 (2022) (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). Put

⁴ If the FAA does not apply, then this agreement fails “because it did not comply with the notice requirements of South Carolina’s Arbitration Act[.]” *Hicks Unlimited, Inc.* 889 S.E.2d at 566-67; *citing*, S.C. Code Ann. §§ 15-48-10 to 240.

another way, whether or not the arbitration agreement in this case amounts to a contract is a question of South Carolina contract law.

II. PETITIONER DID NOT RECEIVE ACTUAL NOTICE OF THE ARBITRATION AGREEMENT.

Respondents open their discussion on actual notice with reliance on secondary authority about when an “offeror invites performance as acceptance.” (Resp. Brief p. 9) (*citing*, Restatement (Second) of Contracts § 53 (1981)). (“His rendering of the invited performance with knowledge of the offer is a sufficient manifestation of assent, and inquiry into his motives is unnecessary.”) This is misplaced. In this case the offeror did not “invite performance as acceptance[,]” instead Amedisys required affirmative conduct by an offeree to reject an offer and assumed acceptance in the absence thereof. That is not how a contract is formed by “implied consent” or otherwise. (Resp. Brief p. 7) (Stating this contract to arbitrate was formed by “implied consent.”).

Against this backdrop, the importance of the distinctions between the facts in *Towles v. United HealthCare Corp.* (which Respondents and the Court of Appeals relied on) is highlighted. *Towles*, 338 S.C. 29, 524 S.E.2d 839 (S.C. Ct. App. 1999). There are three critical distinctions between this case and *Towles*: (1) the acknowledgement in *Towles* specifically described the terms of an arbitration agreement, (2) the assent to the agreement was a term of continued employment, and (3) *Towles* received and signed the acknowledgement which included the terms of an arbitration agreement within its four corners. *Towles*, 524 S.E.2d at 842, 845. In *Towles* the signed “Employee Handbook Acknowledgement Form” read:

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 language, 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 Towles’ continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract.” *Towles*, 524 S.E.2d 845.

The acknowledgement in this case does not compare:

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); *see also*, *Hubner v. Cuttbroat Commc’ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); (“[t]he arbitration agreements in each of these cases [distinguishing *Towles* and other 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.”).

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 expressed 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).

Actual notice is not established, as a matter of law, by the acknowledgement in this case. Unlike the acknowledgement in *Tomles*, this acknowledgement does not describe or constitute an agreement to arbitrate.

III. PETITIONER DID NOT ACCEPT THE ARBITRATION AGREEMENT BECAUSE CONTINUED EMPLOYMENT WAS ACCEPTING THAT THE AGREEMENT WAS NOT A CONDITION OF CONTINUED EMPLOYMENT WITH AMEDISYS.

Respondents, based on their position that the record establishes “actual notice,” next argue that Petitioner’s “actions manifest an assent” to its Arbitration Agreement. (Resp. Brief p. 12). In their argument Respondents write Petitioner’s “lack of objection” shows “implied consent.” (Resp. Brief pp. 14-15). And Respondents write Portioner’s “silence” equated to “acceptance.” (Resp. Brief p. 18).

Respondents, in support of its argument on acceptance, again rely on *Tomles v. United HealthCare Corp.* 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999). *Tomles* is particularly distinguishable on acceptance, because the agreeing to arbitration was a condition of continued employment in *Tomles*. *Id.* Agreeing to arbitration in this case was “not a mandatory condition of [] employment” such that Plaintiff’s continued work for Respondent Amedisys without “objection” does not equate to “implied consent” or “acceptance[.]” (Resp. Brief pp. 14-15, 18).

Respondents also rely, at length, on a 7th Circuit Court of Appeals opinion where an employee, upon hire in 2013, “signed an employment agreement containing an arbitration clause ‘agree[ing] to arbitrate any dispute, claim, or controversy that may arise between you and Morgan Stanley . . . that is required to be arbitrated . . . pursuant to any arbitration agreement to which you are a party.’” *Gupta v. Morgan Stanley Smith Barney, LLC*, 934 F.3d 705, 708 (7th Cir. 2019); (*Compare to* J.A. 144) (Affidavit of Petitioner at ¶ 8) (“I was not given an arbitration agreement prior to my hire, upon my hire, or as part of regular onboarding.”). Two years later, the employer in *Gupta*, Morgan Stanley, publicized an amendment to its employee dispute resolution program in 2015 that included mandatory arbitration. (*Id.*). Morgan Stanley notified employees about the amendment to its handbook similar to how Amedisys did in this case and gave employees an opportunity to opt-out including “by email” within “thirty days.” *Gupta*, 934 F.3d at 708-709, 713. The similarities between *Gupta* and this case on distribution end there, in *Gupta*:

The pre-2015 CARE program explicitly stated its terms were subject to change after an ‘announce[ment] in advance,’ so Gupta had to keep abreast of the company’s dispute resolution policies upon announcement. Morgan Stanley emailed the arbitration policy changes to Gupta personally, granted him thirty days to review the new arbitration agreement, circulated an opt-out form, **conspicuously displayed the deadline to opt out, posted a continual company intranet reminder of the new arbitration policy and opt-out date, and repeatedly informed that it would construe silence as acceptance of mandatory arbitration.** All of these actions bolstered the company's expectation of a response.

Gupta, 934 F.3d at 713. (Emphasis added).

The Seventh Circuit further opined, in *Gupta*, that “regular email communication” and a lack of “evidence” about a different “course of dealings” between the parties rendered email communication a suitable way for Morgan Stanley to impose a duty to respond or otherwise be bound on *Gupta*. *Id.* at 714. Here, by contrast, Petitioner’s testimony was that the email in this case looked like a “generic corporate-wide email” and that important “changes to policies and procedures” at

Amedisys occurred in in-person in-service meetings and which were documented. (J.A. 144-145 ¶¶ 9, 11). Notably, the email conveying the proposal to arbitrate in this case had the importance categorization of “Normal” and the subject line said it was about a “Policy Change”. Arbitration was no mentioned in the email. (J.A. 52). The Seventh Circuit in *Gupta* actually distinguishes an email notification similar email to this one as not being detailed enough:

[U]nlike in *Campbell [v. Gen. Dynamics Gov't Sys. Corp.]*, 407 F.3d 546 (1st Cir. 2005)], Morgan Stanley’s September 2 email to Gupta mentioned the new “arbitration agreement” eight times; explained that arbitration would become the exclusive forum for covered claims; informed that he was free to opt out without consequence; instructed if he did not elect to opt out that continued employment would be construed as acceptance; and, in the agreement itself, explained in bold and capitalized words that the parties were “giving up [their] right to a jury trial in any forum.”

Gupta, 934 F.3d at 714 (7th Cir. 2019).

Moreover, in *Gupta*, there was a preexisting employment agreement with an “arbitration clause [that] require[d] Gupta to honor any arbitration agreement with Morgan Stanley.” *Gupta*, 934 F.3d at 715. Ultimately, in *Gupta*, the Seventh Circuit held that the employee’s silence and continuing to work, on the specific facts of his employment history the Morgan Stanley documents and rollout, allowed silence by the employee to equate to acceptance under Illinois law. *Id.* at 714. The decision in *Gupta* is not binding on this Court, but even if it were, the facts in this case are sufficiently distinct on acceptance such that *Gupta* is not persuasive in favor of the Respondents.

Respondents next cite to an insurance case about whether a driver was a permissive user of an automobile to support its contention that the Court can find acceptance on these facts based on “Implied consent[,]” “mutual acquiescence,” and “lack of objection.” (Resp. Brief pp. 14-15); *citing*, *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 350, 354, 195 S.E.2d 711, 713 (1973) (“Implied consent involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or a lack of objection under circumstances signifying assent . . . **we cannot say that reasonable men could not disagree as to whether Mitchell was operating**

the Pontiac with consent at the time of the collision[.]” (emphasis added). That case was not about contract formation and Respondents’ reliance on it is not credible.

Finally, Respondents’ reliance on District Court opinions in other states where this particular agreement was enforced is also misplaced. (Respondent Brief pp. 18-19); *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). Neither case involved the application of South Carolina contract law, and, 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.*”). The *Knight* case, cited by Appellants, is more superficially applicable, but does not ultimately translate to the entirety of Petitioner’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 in *Knight* 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. There was not an in-depth contest over acceptance in *Knight*, as there is here. 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.

A valid acceptance is required for a contract to be formed under South Carolina. In South Carolina, “A valid offer ‘identifies the bargain for exchange and creates a power of acceptance in the offeree.’” *Sauner v. Public Service Authority of South Carolina*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003); 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). Under South Carolina law, “[s]ilence ordinarily does not constitute acceptance.” *H. A. Sack Co. v. Forest Beach Pub. Serv. Dist.*, 272 S.C. 235, 237, 250 S.E.2d 340, 341 (1978). Petitioner’s silence, under these circumstances and South Carolina law, does not equate to an acceptance. *Florence City-Cnty. Airport Comm’n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)(“One receiving an offer to change a contract to which he is a party is held to be under no obligation to respond to it, and his silence cannot be construed as an acceptance where nothing else is shown.”); citing, *H.A. Sack Co. v. Forest Beach Public Service District*, 272 S.C. 235, 250 S.E.2d 340 (1978); *Raysor v. Berkeley Co. Ry. & Lumber Co.*, 26 S.C. 610, 2 S.E. 119 (1887). The cases Respondents cite to, and their argument generally does not overcome the fact that there is no acceptance, as a matter of South Carolina law, on this record.

IV. THE EXISTENCE OF ACCEPTANCE AND ACTUAL NOTICE IN THIS CASE ARE, AT WORST, DISPUTES OF FACT.

Respondents close by suggesting that Petitioner has not identified any factual disputes, warranting a jury trial. (Resp. Brief p. 19) ([Petitioner] does not identify any factual disputes, let alone the kind of fact dispute warranting a jury trial”). This strong statement is undermined by the record. There is no signed arbitration agreement in this case. (J.A. 62-69). The pop-up which Respondent relies on to for actual notice about its arbitration agreement is vague and wanting. (J.A. 54).

Against this record, whether there was an acceptance or whether Petitioner had actual notice of an agreement to arbitrate are (*at worst*) questions for a jury. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) (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[.]”); *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.”); *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.”); *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.”).

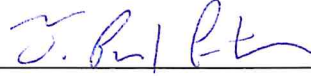
Where a party opposing arbitration does make a jury demand, “the court shall make an order referring the issue or issues to a jury.” 9 U.S.C. § 4; *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (“Moreover, the party who is contesting the making of the agreement has 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.”). Here, there are, at worst, fact issues on acceptance and actual notice. Thus, if the Court is not convinced that there is no contract formed on these facts, as a matter of law, then a jury trial as to whether a contract has been formed is the appropriate alternative.

CONCLUSION

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

Respectfully Submitted,

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