STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Nicole Lampo, Plaintiff, v. Amedisys Holding, LLC, and Leisa Victoria Neasbitt, Defendants.	IN THE COURT OF COMMON PLEAS IN THE FIFTEENTH CIRCUIT CASE NO. 2018-CP-22-01001 **ORDER**

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

1. Introduction

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

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

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

2. Standard of Review

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

3. Discussion

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

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

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

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

4. Conclusion

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

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Benjamin H. Culbertson
Fifteenth Circuit Court Judge

March ____, 2019
Georgetown, South Carolina

Georgetown Common Pleas

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

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Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148