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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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

Nicole Lampo..... Respondent,

v.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred by refusing to enforce the Parties written agreement to arbitrate claims that arise out of or relate to Respondent's employment?

STATEMENT OF THE CASE

Ms. Lampo formerly worked for Amedisys as a Physical Therapist. In August 2013, Ms. Lampo agreed to binding arbitration with Amedisys for any claim or dispute arising from or related to Ms. Lampo's employment. Notwithstanding her agreement, on December 7, 2018, Ms. Lampo filed a lawsuit in the Court situated in Georgetown County alleging: (1) wrongful discharge; (2) tortious interference; and (3) defamation. Thereafter, Amedisys notified Ms. Lampo that it intended to enforce her contractual agreement to arbitrate those claims, but Ms. Lampo refused to honor her obligation to arbitrate. Consequently, Amedisys and Ms. Neasbitt—Ms. Lampo's former supervisor named individually as a defendant—moved to compel arbitration, but the Trial Court denied the motion holding that "there is insufficient evidence of a valid acceptance to give rise to an enforceable contract under South Carolina contract law." As established below, Amedisys and Ms. Neasbitt respectfully believe the Circuit Court erred in its decision. Thus, Amedisys and Neasbitt now appeal.

RELEVANT BACKGROUND

I. Relevant Factual Background

Amedisys provides home health and hospice services to patients throughout the United States. R. p. 12. In July 2013, Amedisys hired Ms. Lampo to work as a Physical Therapist primarily out of its Horry and Georgetown County, South Carolina care centers. *See id.* Like all employees, Amedisys provided Ms. Lampo (at the time of hire) with a unique username and password permitting Ms. Lampo to log into Amedisys' computer-based system, known as "SharePoint." R. pp. 45-46. During that time, Amedisys also assigned Ms. Lampo a unique email accessible only to her via her unique username and password, which Ms. Lampo had the ability to change at her discretion. R. pp. 45-46.

On August 6, 2013, Amedisys emailed all employees, including Ms. Lampo, concerning the Company's written Dispute Resolution Agreement ("Arbitration Agreement"). R. pp. 46, 50. The email subject line stated, "Important Policy Change – Must Read." *Id.* The subject of the email stated: "[t]his e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." *Id.* Upon clicking on the email to open it in their inbox, each employee, including Ms. Lampo, was provided with an Acknowledgment Form, which stated:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

> By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**
>
> By clicking the "Acknowledge" button on this screen I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials."

R. pp. 43, 52. Once an employee clicked "Acknowledge" on the Acknowledgement Form, they were directed to a webpage that provided descriptions and links to all of the Amedisys' Arbitration Program materials, including a cover letter, the Arbitration Agreement, and a six-page fact sheet of FAQs explaining the Arbitration Agreement.[1] R. pp. 46, 52, 60-71. These three documents were the only documents located on the webpage. *See id.* Ms. Lampo clicked "Acknowledge" on August 6, 2013 at 1:55 p.m. R. pp. 55, 58. Thereafter, Ms. Lampo had unrestricted access to Amedisys' Arbitration Program materials and could read them, consult

[1] Included in the materials was information regarding a "hotline" Ms. Lampo (or any other employee) could call if she had questions about the Arbitration Agreement. R. p. 71.

with an attorney (or anyone else) about them if she chose (including a Company-provided Hotline), and then make a decision if she wanted to participate or opt out.

The Arbitration Agreement, which Ms. Lampo "Acknowledged" she was "required" to review (*see* R. p. 52) provides for mutual arbitration, and states:

> "This Dispute Resolution Agreement ("the "Agreement") is an agreement to resolve any and all legal disputes between you ("Employee") and Amedisys before an arbitrator, rather than in court." The Arbitration Agreement states it "is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above."

R. pp. 45, 60. The Arbitration Agreement reiterated that "Arbitration is not a mandatory condition of Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement." *See id.* The Arbitration Agreement states it is governed by the Federal Arbitration Act and applies to "any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates."[2] *See id.* Under the Arbitration Agreement, the employee and Amedisys may select an arbitrator by mutual agreement, and if they are unable to do so, the selection proceeds under American Arbitration Association ("AAA") rules. R. p. 62. Written discovery, depositions and dispositive motions are allowed. R. p. 63. Furthermore, the Arbitration Agreement states that Amedisys will pay the arbitrator's fees and any costs in accordance with AAA rules and Ms. Lampo is responsible for her own attorney's fees, witness fees, costs and expenses, just like she would if this matter were litigated in court. R. p. 65.

[2] As established below, because Ms. Lampo's claims against Ms. Neasbitt derive from her employment with Amedisys, her inclusion of Neasbitt as an individual defendant in this case is inconsequential for purposes of ordering this matter be arbitrated. *See infra.*

To ensure it was easy for employees to opt out of the Arbitration Agreement if they desired, Amedisys included a simple "Dispute Resolution Agreement Opt-Out Form" as Attachment "A" to the Arbitration Agreement. R. pp. 47, 67. Thus, to "opt-out" of the Arbitration Agreement, all an employee needed to do was sign, date, and return the Arbitration Agreement Opt-Out Form within 30 days of the employee's receipt of the same. *See id.* To make sure employees understood this, the cover letter provided to Ms. Lampo, which she "Acknowledged" she was required to review, explained:

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

The Arbitration Agreement itself also states, in relevant part:

> Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee's continuation of his or her employment with the Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement.

R. pp. 46-47, 65-66, 69-70.

Amedisys' Human Resources Department maintains a file containing the actual hard copy of all opt-out forms completed by any employee who chose to opt-out of the Arbitration Agreement. R. p. 47. Ms. Lampo does not allege she opted out of the Arbitration Agreement and Amedisys did not have an "opt out" form for her. R. pp. 47, 142-143. Rather, Ms. Lampo continued to work for Amedisys until March 2018 at which point Ms. Lampo alleges Amedisys terminated her employment. R. pp. 10-24.

II. Relevant Procedural Background

On December 7, 2018, Ms. Lampo filed a four-count complaint alleging Amedisys violated South Carolina common law by "wrongfully discharging" her from her employment with Amedisys (Count I), tortiously interfering with her "prospective contractual relations" (Count IV), and that Amedisys and Ms. Neasbitt defamed Ms. Lampo (Counts II and III). R. pp. 10-24. Specifically, Ms. Lampo alleges that Amedisys "wrongfully" terminated her employment in violation of public policy after she purportedly made compliance-related reports to Amedisys' corporate office. R. pp. 13-14, 17-18. Thereafter, Ms. Lampo alleges that Amedisys and Ms. Neasbitt "defamed" her by making false statements regarding Ms. Lampo that "lessened [Ms. Lampo's] standing in her profession." R. pp. 16, 18-21. Ms. Lampo also alleges that Amedisys tortiously interfered with her "prospective employment" when some unknown person made someone unknown statement(s) to some unknown prospective employer preventing Ms. Lampo from obtaining some unknown job. R. pp. 16-17, 21-22.

On February 4, 2019, Amedisys and Ms. Neasbitt filed their Motion establishing that Ms. Lampo's claims were preempted by the Federal Arbitration Act ("FAA") and relegated to mandatory arbitration, based upon Ms. Lampo's voluntary acceptance of the Arbitration Agreement. R. pp. 25-121. On February 26, 2019, Ms. Lampo filed her "Memorandum in Opposition." R. pp. 122-46.

On March 1, 2019, the Parties, through counsel, appeared before the Honorable Presiding Circuit Court Judge, Benjamin H. Culbertson, for a hearing on Amedisys and Ms. Lampo's Motion. R. pp. 147-78. At the conclusion of the hearing, Judge Culbertson denied Amedisys' Motion holding that failing to opt out of the Arbitration Agreement did not evince Ms. Lampo's

acceptance of the agreement. R. p. 175. Thereafter, on March 11, 2019, Judge Culbertson entered an Order prepared unilaterally by Ms. Lampo's counsel. R. pp. 5-9.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Proctor v. Steedley,* 398 S.C. 561, 573, 730 S.E.2d 357 (Ct. App. 2012). The "determination of whether a claim is subject to arbitration is subject to *de novo* review." *Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Where, as here, the material facts concerning the formation of a contract are not in dispute, the issue of contract *vel non* is a question of law. *W.E. Gilbert & Assocs. v. South Carolina Nat. Bank,* 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

LEGAL ARGUMENTS

Due to the liberal policy favoring arbitration, the party challenging the validity of an arbitration agreement—here, Ms. Lampo—bears the burden showing the agreement at issue is unenforceable. *See Green Tree Fin. Corp., v. Randolph,* 531 U.S. 79, 92 (2000); *Rock v. Solar Rating & Cert. Corp.,* 2018 WL 3750617, *6 (D.S.C. 2018). To compel arbitration, four requirements must be met: (1) a dispute between the parties; (2) a valid, written agreement to arbitrate encompassing the dispute; (3) a transaction relating to interstate commerce; and (4) a refusal to arbitrate. *See American Gen. Life & Accident Ins., Co. v. Wood,* 429 F.3d 83, 87 (4th Cir. 2005).

Before the Circuit Court, Ms. Lampo did not challenge the first, third, or fourth requirements and, thus, has waived the ability to do so on appeal. R. pp. 122-46. *See Richland Cty. v. Caroline Chloride, Inc.* 382 S.C. 634, 656, 677 S.E.3d 892, 903 (Ct. App. 2009). Instead, Ms. Lampo challenged the second requirement arguing that her failure to opt out of the Arbitration Agreement did not evidence her acquiescence to the agreement. *See id.* As

established below, Ms. Lampo's argument, adopted by the Circuit Court, oversimplifies and contorts Ms. Lampo's actions, such that her decision to click "Acknowledge," not opt out of the Arbitration Agreement, and continue working for Amedisys evidences her unequivocal agreement to arbitrate. Thus, Amedisys and Ms. Neasbitt respectfully argue that the Circuit Court erred when it refused to enforce the Arbitration Agreement and did not order this case to be resolved in binding arbitration. Accordingly, this Honorable Court should reverse the Circuit Court's Order denying Amedisys and Ms. Neasbitt's Motion and mandate this case be decided pursuant to the Arbitration Agreement between the Parties.

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

Before the Circuit Court, Ms. Lampo did not challenge the applicability of the FAA to the Arbitration Agreement. To be sure, though, the FAA, 9 U.S.C. §§ 1-14, applies to written arbitration agreements between employers and employees in transactions involving interstate commerce. *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 112 (2001). "Involving commerce" is to be construed as broadly as possible, meaning that any arbitration agreement that affects commerce in any way is governed by the FAA. *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 273-281 (1995). In other words, the FAA applies to all arbitration agreements where a party to that agreement is involved in interstate commerce. *See id.* at 282.

Under the FAA, a provision in a written agreement to resolve controversies between the parties by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *AT&T Mobility, LLC v. Concepcion,* 131 S. Ct. 1740, 1751 (2011); 9 U.S.C. § 2. As the Supreme Court has repeatedly emphasized, the FAA "strongly favors the enforcement of agreements to arbitrate as a means of securing 'prompt, economical, and adequate solution of controversies.'" *Circuit City Stores, Inc.,* 532

U.S. at 132; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). Thus, the FAA establishes a "federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Therefore, a motion to compel arbitration should not be denied unless it may be said "with positive assurance" that the issues are outside the scope of the arbitration clause. *AT&T Techs., Inc. v. Commn's Workers of Am.*, 475 U.S. 643, 650 (1986). And, courts must interpret arbitration provisions liberally, resolving doubts in favor of arbitration. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 (1983); *see also AT&T Tech., Inc.* 475 U.S. at 650. South Carolina shares the Supreme Court's strong public policy favoring arbitration. *See, e.g., Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered . . .").

In this case, the Arbitration Agreement makes clear that it is governed by the FAA. R. p. 60. Furthermore, as of date Amedisys filed its Motion, Amedisys and its affiliated companies employ in excess of 16,000 people in thirty-four (34) states. R. p. 44. Amedisys orders supplies and receives payments for services across state lines, including from the federal government. *See id.* There simply is not (and cannot be) any dispute that Amedisys is a nationwide company that operates facilities and conducts transactions in interstate commerce. *See e.g., Lesneski v. Ross Stores, Inc.*, 2017 WL 2919014, *2 (W.D.N.C. 2017); *Circuit City Stores, Inc.*, 532 U.S. at 123 (holding that the FAA was applicable to arbitration agreement between a sales associate and her multistate employer). Thus, the Arbitration Agreement is governed by the FAA, and according to both long-established legal precedent and Congressional intent, and any doubts concerning arbitrability must be resolved in favor of arbitration.

II. The Arbitration Agreement is a Valid and Enforceable Contract.

"Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002). Thus, where a valid arbitration agreement exists and covers the claims at issue, the Court has "no choice but to grant a motion to compel arbitration." *Id.* at 500. For a valid contract to exist under South Carolina law, such as the case here, the three elements of offer, acceptance, and consideration must be present, and none of the recognized defenses to contract formation, such as fraud, duress, or unconscionability, should apply. *See, e.g.*, *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003); *Young v. AMISUB of South Carolina, Inc.*, 2018 WL 5668619, *3 (D.S.C. 2018). In this case, all three elements are present, and no defenses to the Arbitration Agreement exist.

On two different occasions, federal district courts in Kentucky and Louisiana have enforced the exact same Arbitration Agreement at issue in this case. *See Knight v. Amedisys Holding, LLC,* 2016 WL 5661227 (W.D. Ky. 2016); *Langlois v. Amedisys, Inc.*, 2016 WL 4059670 (M.D. La. 2016).[3] While neither *Knight,* nor *Langlois* is binding on this Honorable Court, they are persuasive in one critical context. Like South Carolina, both Kentucky and Louisiana require, among other things, evidence of "acceptance" to contract. *See, e.g.*, *Collins v. Ky. Lottery Corp.*, 399 S.W. 3d 449, 455 (Ky. App. 2012) (the elements of a contract include, among other things, "acceptance"); La. Civ. Code, arts. 1918, 1927, 1971, 2029 cmt. B (1991) (a valid contract must have, *inter alia,* "consent"). In *Langlois,* the District Court found that the plaintiff accepted the offer to arbitrate by clicking "Acknowledge," failing to opt out, and continuing to work for Amedisys. In *Knight,* the District Court explicitly found as much,

[3] And, in the *Knight* matter, against the plaintiff's non-signatory former supervisor. 2016 WL 5661227.

holding: "[b]ecause Knight clicked the acknowledgment form to indicate that she received and understood the materials, and she did not opt out of the Agreement, [the plaintiff] manifested her assent to the Agreement, including the agreement to arbitrate." 2016 WL 5661227 at *3.

South Carolina case law also compels enforcing the Arbitration Agreement here. In *Willard v. Dollar General Corporation,* the plaintiff sued her former employer alleging various causes of action stemming from an armed robbery that was committed while the plaintiff was working. 2017 WL 4551500, *1 (D.S.C. 2017) After the defendant removed the action on diversity grounds, it filed a motion to dismiss or, alternatively, to stay litigation and compel arbitration asserting that the plaintiff was required to arbitrate her claims because they were covered by a valid and enforceable arbitration agreement. *Id.* at *2. In its motion, the defendant established that on October 17, 2014, while employed by Dollar General, the plaintiff logged into her employee account and viewed the arbitration agreement. *Id.* at 1. Once logged in, the plaintiff was advised that she would be bound by the terms of the arbitration agreement if she did not opt out within 30 days of viewing the arbitration agreement. *Id.* Over the next 30 days, the plaintiff did not opt out and continued to work for Dollar General thereafter. *Id.* Although the plaintiff conceded the applicability and enforcement of the arbitration agreement, the District Court noted that following the expiration of the 30 day opt out period, the "parties became bound by [the agreement's] terms," thereby establishing a valid contract. *Id.* at *1-2.

A similar question was presented in *Brown v. Five Star Quality Care, Inc.* 2016 WL 8710474 (D.S.C. 2016). In *Brown,* the plaintiffs worked for Five Star, a for-profit corporation operating 260 senior living facilities in the United States, including in Charleston, South Carolina where the five plaintiffs worked. *Id.* at *2. According to the complaint, Five Star required the plaintiffs to work off the clock without compensation in violation of the Fair Labor

Standards Act and South Carolina Wage Payment and Collection Act. *Id.* In April 2012, Five Star introduced an arbitration agreement that provided for binding arbitration of all employment disputes. *Id.* Employees currently employed by Five Star in April 2012 were provided a copy of the arbitration agreement at the end of a staff meeting on May 30, 2012. *Id.* Employee's signed a "receipt and acknowledgment form" indicating they received the arbitration agreement. *Id.* Five Star permitted current employees an opportunity to opt out of the arbitration agreement, provided those employees contacted Five Star's Human Resources Department within 30 days to request and timely returned an "opt out form" to its Massachusetts-located Human Resources Department. *Id.* None of the plaintiff's opted out of the agreement and after the plaintiffs filed their lawsuit, Five Star sought to enforce the arbitration agreement. *Id.* In determining whether under South Carolina law the plaintiffs entered into the arbitration agreement, the Court held that it was "clear" they had. *Id.* at *4. Citing *Towles v. United HealthCare Corp.,* the Court determined that the plaintiffs each continued to work for Five Star after allegedly receiving the arbitration agreement—evidenced by virtue of their "acknowledgment"—and, thus, because "continuing in employment suffices to accept an arbitration agreement," the plaintiffs were bound by the agreement. *Id.* at *4 (citing *Towles,* 338 S.C. 29, 40, 524 S.E.2d 389, 845 (S.C. Ct. App. 1999) ("We find the 'Acknowledgment' constituted a specific communication of an offer which conditioned [plaintiff's] continued employment on his acceptance of the [arbitration agreement] as part of his employment contract . . . [Plaintiff] accepted the offer by continuing his employment."). Thus, the Court granted the defendant's motion to compel arbitration. *Id.*

Here, this Honorable Court should find that Ms. Lampo is bound by the Arbitration Agreement just like the plaintiffs in *Knight, Langlois, Willard, Brown,* and *Towles.* First, on August 6, 2013, Amedisys tendered to Plaintiff an offer to participate in Amedisys' alternative

dispute resolution program. R. pp. 45-46, 50, 52, 55. Ms. Lampo does not dispute that Amedisys offered her the Arbitration Agreement; rather, only that she does not "remember receiving or reviewing" the August 6, 2013 email or "remember being presented with the . . . [Arbitration Agreement]." R. pp. 142-43.[4] In any event, upon clicking on a hyperlink contained in the August 6, 2013 email, Ms. Lampo was presented with the "Acknowledgment," which identified "The Amedisys Arbitration Program" and instructed her that she was "required to review" a Cover Letter, the Arbitration Agreement, and a list of frequently asked questions (FAQs). R. pp. 45-46, 50, 52, 55. The "Acknowledgment" also informed Ms. Lampo, in bold letters, that "**Unless you opt out of the [Arbitration] Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights**." R. p. 52 (bold in original). Thereafter, using her unique username and password, Ms. Lampo clicked "Acknowledge" at 1:55 p.m. on August 6, 2013—a fact that Ms. Lampo does not dispute (*see* R. pp. 142-43)—thereby confirming that Amedisys had offered Ms. Lampo an opportunity to mutually agree to arbitrate any dispute arising from her employment relationship. R. pp. 45, 52, 55, 58, 60-67.

This Court's Opinion in *Towles* is instructive in this regard. 524 S.E.2d at 844-45. In *Towles*, the plaintiff signed an "Acknowledgment," that referenced an "Employment Arbitration Policy" found in the Company's Handbook. *Id.* After filing a lawsuit against his employer, the employer moved to compel arbitration. *Id.* The plaintiff argued that he never received the actual provisions of the arbitration agreement, which he claimed precluded him from assenting to arbitration. *Id.* This Honorable Court disagreed and held that after the plaintiff received and signed the "Acknowledgment," the defendant had no legal duty to explain the "Employment Arbitration Policy" or its contents to the plaintiff when he could learn the contents by simply

[4] Of course, as demonstrated above and established below, Ms. Lampo's actions establish she did receive the offer and the Arbitration Agreement.

reading the document. *Id.* Thus, finding that the "Acknowledgment" constituted a specific communication of an offer that conditioned the plaintiff's continued employment on his acceptance of the "Employment Arbitration Policy, this Honorable Court determined that the plaintiff had accepted the offer by continuing work and, thus, the "'Acknowledgment' constituted a binding arbitration agreement." *Id.* at 845.

In this case, Ms. Lampo's decision to "Acknowledge" receipt of the Arbitration Agreement—and then not opt out and continue working for Amedisys—is no different than the plaintiff signing the "Acknowledgment" in *Towles.* Like *Towles,* the "Acknowledgment" in this case referenced the Arbitration Agreement and unequivocally instructed Ms. Lampo on the consequences of clicking "Acknowledge." R. pp. 52, 55, 58. In addition, Amedisys provided Ms. Lampo with the ability to review the Arbitration Agreement at her leisure and she "Acknowledged" her understanding that she was required to do so. *See id.* Under these circumstances, there is no dispute that Ms. Lampo had notice of the Arbitration Agreement. Thus, the first requirement to contract formation is met.

Second, like the plaintiffs in *Knight, Langlois, Willard, Brown,* and *Towles,* Ms. Lampo accepted and agreed to be bound by the Arbitration Agreement. On August 6, 2013 at 1:55 p.m., Ms. Lampo clicked "Acknowledge," using her unique username and password to which only she had access. R. pp. 44-46, 52, 54-56, 58. By doing so, Ms. Lampo unequivocally confirmed her understanding that she was required to review the Arbitration Agreement and that she was bound by the Arbitration Agreement if she failed to opt out in 30 days. *See id.* The fact that Ms. Lampo "does not recall" reading the Arbitration Agreement or chose not to read the Arbitration Agreement is immaterial. *See, e.g., Regions Bank v. Schmauch,* 354 S.C. 648, 662-63, 582 S.E.2d 432, 440 (Ct. App. 2003) (a person who agrees to a contract or other written document

cannot avoid the effect of the document by claiming he did not read it); *Towles*, 524 S.E. 839, 845. If that were the case, there would be an avalanche of contracts that would be unenforceable—a result that makes no sense and an argument that should be flatly rejected.

Moreover, the Arbitration Agreement made clear that: "Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee's continuation of his or her employment with Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement." R. pp. 65-66. Like the plaintiffs in *Knight, Langlois, Willard,* and *Brown,* Ms. Lampo's decision to not opt out of the Arbitration Agreement and, instead, to continue working for Amedisys, indisputably establishes her acceptance of the Arbitration Agreement. *See, e.g., Hightower v. GMRI, Inc.* 272 F.2d 239, 242 (4th Cir. 2001) (employee's continued employment bound him to accept employer's arbitration procedure); *Small v. Springs Indus., Inc.,* 292 S.C. 481, 483-84, 357 S.E.2d 452, 454 (1987) (finding an employee accepted employer's offer by "performing the act on which the promise was impliedly or expressly based.").

The Circuit Court's erroneous belief that Ms. Lampo's decision to not opt out of the agreement was insufficient to establish "mutual assent" is contrary to the record evidence and applicable case law. R. pp. 5-9, 147-78. First, the Circuit Court's decision ignores the fact that Ms. Lampo clicked "Acknowledge" after being presented with a disclaimer making it abundantly clear to her that unless she opted out of the Arbitration Agreement, she would be bound by it. R. pp. 52, 55, 58. In other words, Ms. Lampo took affirmative action by clicking "Acknowledge" affirming her receipt of Amedisys' offer to arbitrate and her understanding that she was bound by the Arbitration Agreement unless she opted out. *See id.* During oral argument, the Circuit

Court explained its rationale in denying Amedisys and Ms. Neasbitt's Motion by likening this case to the following scenario:

> If I offer you to sell my house and . . . I say, "you don't contact me back and tell me you don't want to do it," then we've got a contract and you got to buy my house.
>
> ***
>
> I just don't think that that's an adequate acceptance.

R. pp. 154, 177.

The Circuit Court's hypothetical is flawed for several reasons. First, the hypothetical disregards the fact that Ms. Lampo affirmatively clicked "Acknowledge" after receiving an email, clicking a hyperlink, and being presented with the Acknowledgment Form. R. pp. 44-46, 50, 52, 54-56, 58. There is no evidence in the record suggesting Ms. Lampo had to click on the hyperlink in the August 6, 2013 email or on the "Acknowledgment" button thereafter. But, she chose to do so affirming that she had been provided the Arbitration Agreement and affirming her understanding that she was bound by the Arbitration Agreement if she continued working and unless she opted out. *See id.*; R. pp. 60-67. In the Circuit Court's example, unlike here, no affirmative act was undertaken by the potential buyer and, thus, he or she gave no indicia of assent.[5]

Second, the Circuit Court's hypothetical also minimizes the fact that Ms. Lampo not only clicked "Acknowledge" and then chose to not opt out of the Arbitration Agreement, but she continued to work for Amedisys—an act that the Arbitration Agreement itself makes clear

[5] Amedisys notes that it employed Ms. Lampo and, thus, they had an ongoing relationship. Within the confines of that relationship, Amedisys could have required Ms. Lampo (and all of its employees) to agree to the Arbitration Agreement as a condition of her (their) continued employment. *See Towles*, 524 S.E.2d at 845. Just because Amedisys generously gave its employees the less restrictive option of allowing them to opt out of the Arbitration Agreement should not somehow invalidate Ms. Lampo's acquiescence to the Arbitration Agreement. This result is another concerning consequence of the Circuit Court's ruling.

constitutes acceptance. R. pp. 65-66. Thus, the Circuit Court's hypothetical has little resemblance to the record evidence here. Accordingly, for the reasons established above, it is clear that Ms. Lampo's actions evidence assent to the Arbitration Agreement and the Circuit Court erred in determining otherwise.

Finally, the Arbitration Agreement is supported by consideration, a conclusion unchallenged by Ms. Lampo before the Circuit Court. R. pp. 122-46. Under South Carolina law, "a mutual promise to arbitrate constitute[s] sufficient consideration to enforce an arbitration agreement." *Towles*, 524 S.E.2d at 845; *Adkins,* 303 F.3d at 501 ("[b]ecause no consideration is required above and beyond the agreement to be bound by the arbitration process for any claims brought by the employee, ... [Defendant's] promise to arbitrate its own claims is *a fortiori* adequate consideration for this agreement."); *see also Hamlin v. Dollar Tree Stores, Inc.,* 2017 WL 6034325, at *2 (D.S.C. 2017). In this case, the Arbitration Agreement makes clear that both Ms. Lampo and Amedisys agree to arbitrate any claims against the other "arising out of or relat[ing] to [Ms. Lampo's] employment . . ." R. p. 60. Thus, there is no question that the Arbitration Agreement is supported by adequate consideration.

For each of the foregoing reasons, it is clear that the Arbitration Agreement is a valid and enforceable contract requiring this matter to be heard exclusively in an arbitral forum. Thus, Amedisys respectfully requests that the Circuit Court erred in erroneously determining that Ms. Lampo did not agree to arbitrate her claims. Accordingly, Amedisys and Ms. Neasbitt respectfully request that this Honorable Court reverse the Circuit Court's decision, find that the Parties entered into a binding Arbitration Agreement, and order Ms. Lampo to file her Complaint in the arbitral forum provided for by the Arbitration Agreement.

III. The Arbitration Agreement Covers the Dispute.

As established above, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 23–24 (emphasis added). To that end, "the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960). Thus, the court may not deny a party's request to arbitrate an issue "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute." *Id; Brumfield v. Kindred Healthcare Inc.*, 2018 WL 3222614, at *1 (D.S.C. 2018)

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

In this case, the Arbitration Agreement makes clear that it applies to "any dispute arising out of or related to [Ms. Lampo's] employment with Amedisys or termination or employment . . ." R. p. 60. A simple review of Ms. Lampo's Complaint establishes that each and every one of her claims against Amedisys and Ms. Neasbitt "arise out of" or are "related to" Ms. Lampo's

former employment with Amedisys and relationship with Ms. Neasbitt as her former Amedisys' supervisor. R. pp. 10-24. Any conclusion to the contrary is simply disingenuous. In fact, each cause of action contained in Ms. Lampo's Complaint arises directly out of decisions made by Amedisys and Ms. Neasbitt (as a supervisory employee of Amedisys) regarding Ms. Lampo's former work-relationship (and cessation thereof) with Amedisys and Ms. Neasbitt. *See id.* Under no circumstance can Ms. Lampo meet her burden establishing otherwise.

Furthermore, a non-signatory—in this case, Ms. Neasbitt—can compel arbitration if the claims against her are "intertwined" with the agreement to arbitrate. *See Carter v. MasTec Services Co., Inc.,* 2010 WL 500421, *4 (D.S.C. 2010); *Brantley v. Republic Mortg. Ins. Co.,* 424 F.3d 392, 396 (4th Cir. 2005); *see also Arnold v. Arnold Corp.*, 920 F. 2d 1269, 1281 (6th Cir. 1990) (if a plaintiff "can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants in his complaint . . . the effect of the rule requiring arbitration would, in effect, be nullified."). Under the "intertwined test," Ms. Lampo is estopped from avoiding arbitration against a non-party if the "issues [Ms. Neasbitt] is seeking to resolve in arbitration are intertwined with the agreement" to which Ms. Lampo is bound. *See Wike v. Holiday Kamper Co. of Columbia, LLC,* 2014 WL 1234311, *2-3 (D.S.C. 2014) (granting motion to compel arbitration with an alleged non-party to the arbitration agreement at issue finding that the plaintiff's claims against the alleged non-party were "interdependent" of the claims with a party to the arbitration agreement).

Here, by virtue of Ms. Neasbitt's relationship with Amedisys and Ms. Lampo (and her claims against Amedisys and Ms. Neasbitt), there is little dispute that she has standing to compel arbitration on those claims brought individually against her. In fact, every allegation lodged against Ms. Neasbitt derives from her employment relationship with Amedisys and her role as

Ms. Lampo's former supervisor. R. pp. 20-21. Thus, Ms. Lampo's claims against Ms. Neasbitt in this case are interdependent with her claims against Amedisys and for which must be arbitrated pursuant to Ms. Lampo's agreement to do so. Moreover, the clear intent of the language in the Arbitration Agreement is to provide a single arbitral forum to resolve all disputes. R. pp. 60-61. And, because "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, it is clear that Ms. Lampo claims brought individually against Ms. Neasbitt should be relegated to an arbitral forum. *Moses H. Cone Hosp.*, 460 U.S. at 24-25; *see also Gadberry v. Rental Services Corp.*, 2011 WL 766991 (D.S.C. 2011) (granting non-signatory's motion to compel arbitration and forcing former employee to arbitrate based upon the "intertwined claims doctrine").

CONCLUSION

For the reasons established above, Ms. Lampo's claims should be heard and adjudicated exclusively in an arbitral forum pursuant to her agreement to do so. Thus, Amedisys and Ms. Neasbitt respectfully request that this Honorable Court reverse the Circuit Court's Order denying their motion to compel arbitration and to grant other relief deemed fair and just.

Respectfully submitted,

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Dated this 12th day of August 2019

CERTIFICATE OF COUNSEL FOR APPELLANTS

The undersigned certifies that to the best of his ability that this Final Initial Brief of Appellants complies with Rule 211(b), SCACR.

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