

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

AUG 5 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SCOTT RICKES, an individual, on behalf
of himself, all others similarly situated, and
all other aggrieved employees,

Plaintiff - Appellee,

v.

THERMO FISHER SCIENTIFIC, INC., a
Delaware corporation,

Defendant - Appellant,

and

DOES, 1-20,

Defendant.

No. 25-5138

D.C. No.

3:25-cv-00690-GPC-JLB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, Senior District Judge, Presiding

Argued and Submitted June 22, 2026
Pasadena, California

Before: Kim McLane Wardlaw, John B. Owens, and Ana de Alba, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Scott Rickes brought this employment action against Thermo Fisher Scientific, Inc. alleging age discrimination and related claims under California law. Thermo Fisher moved to compel arbitration pursuant to its Mutual Dispute Resolution Agreement (“MDRA”), which the company distributed to employees by email in 2019. The district court concluded that Thermo Fisher failed to establish the existence of an agreement to arbitrate and denied the motion. We have jurisdiction under 9 U.S.C. § 16, and we affirm.

We review de novo a district court’s denial of a motion to compel arbitration. *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1091 (9th Cir. 2014). Because the material facts are undisputed, whether the parties formed an agreement to arbitrate is likewise reviewed de novo. *Id.* The party seeking to compel arbitration bears the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence. *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). Whether an arbitration agreement was formed is determined by applying ordinary state-law principles of contract formation. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Here, the parties agree that California law governs.

The district court correctly denied Thermo Fisher’s motion to compel arbitration because Thermo Fisher failed to establish that Rickes assented to the MDRA. Under California law, contract formation requires both notice of the

proposed agreement and mutual assent. *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 512–13 (9th Cir. 2023). Mutual assent is determined objectively from the parties’ outward manifestations and, in appropriate circumstances, may be inferred from conduct. *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 208 (2006). However, as we explained in *Norcia v. Samsung Telecomms. America, LLC*, “California courts have . . . made clear that silence alone does not constitute assent.” 845 F.3d 1279, 1290 (9th Cir. 2017).

The undisputed evidence demonstrates that Rickes did not assent to the MDRA. Thermo Fisher established that it sent Rickes four emails regarding the MDRA to his work email address. However, its electronic records do not show that Rickes viewed the emails, clicked the hyperlink to the agreement, or otherwise interacted with the arbitration materials. Rickes, for his part, submitted a declaration stating that he received a high volume of work emails, did not recall receiving any communication regarding the MDRA, and had never seen the agreement before this litigation.

Thermo Fisher nevertheless contends that Rickes accepted the MDRA by merely continuing his employment after failing to opt out within forty-five days. Under California law, that is not enough to establish mutual assent. *See Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 461 (2021) (explaining that assent in electronic transactions is ordinarily inferred through affirmative conduct such as

“clicking buttons,” “checking boxes,” or otherwise interacting with the contractual terms).

Thermo Fisher’s authorities do not demand a different result. Each involved objective evidence of assent that is absent here, whether through a signed acknowledgment, undisputed receipt and review of the agreement, or prior acceptance of arbitration as a condition of employment. *See, e.g., Cir. City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (employee signed a written acknowledgment confirming receipt of the arbitration agreement); *see also Cir. City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (same); *Gupta v. Morgan Stanley Smith Barney, LLC*, 934 F.3d 705, 708 (7th Cir. 2019) (employee “signed an employment agreement containing an arbitration clause” and authorizing future modifications to the employer’s dispute resolution program); *Davis*, 755 F.3d at 1093 (employee accepted employment subject to an employee handbook expressly providing that arbitration was a condition of employment).

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

Name of party/parties requesting costs to be taxed:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED			
	(each column must be completed)			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			\$	\$
Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)			\$	\$
Reply Brief / Cross-Appeal Reply Brief			\$	\$
Supplemental Brief(s)			\$	\$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee/Appeal from District Court filing portion of fee (\$5)				\$
TOTAL:				\$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.