

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) Case No. 2020-CP-10-05443

MARY AND JOHN DOE, Individually)
and as husband and wife)

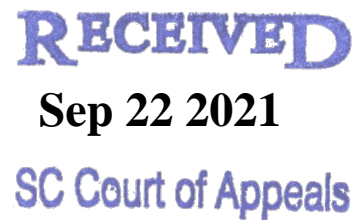
Plaintiffs,)

vs.)

MESSAGE ENVY FRANCHISING,)
LLC; JAXH, LLC D/B/A MESSAGE)
ENVY SPA (LONG GROVE DR.); and)
MICHAEL E. HUGHES)

Defendants.)

**Order Denying Massage Envy
Franchising, LLC’s Motion to Stay
Litigation and Compel Arbitration and
Motion to Dismiss**



Massage Envy Franchising, LLC (“MEF”) moved to send the claims of the Plaintiffs to arbitration or in the alternative to dismiss the claims pursuant to SCRPC 12(b)(6).¹ Plaintiffs contend no agreement to arbitrate was ever formed, the claim is outside the scope of any agreement, the arbitration terms are unconscionable and the alleged agreement is in violation of the South Carolina Uniform Electronic Transactions Act. Extensive briefs were filed and considered with a hearing held on July 20th, 2021. The Court denies MEF’s motions.

ARBITRATION MOTION

MEF contends that an unsigned arbitration provision found on page four of a document entitled “Terms and Conditions” compels arbitration. This document was only accessible by a hyperlink titled “Terms of Use” found at the end of a multipage document entitled “General Consent.” The General Consent was provided to Plaintiff on an iPad by the local franchisee on

¹ The local franchisee Defendant does not assert that an arbitration agreement exists between itself and Plaintiffs.

August 22, 2017.² Nowhere in the General Consent is MEF identified or is there any mention of additional terms or an arbitration agreement in the General Consent.

A check box and signature line were at the end of the General Consent, which itself instructed Plaintiff in the body of the consent language to “Please read and review in full to sign below.” Immediately below that instruction is a densely worded 40 line single-spaced block of text broken into four paragraphs entitled “ASSUMPTION OF RISK, RELEASE, WAIVER OF LIABILITY, AND INDEMNIFICATION.” In the middle of these four paragraphs is a single line of text that reads, once again, “Please read and review in full to sign below.”

In support of its motion, MEF only submitted the affidavit of J. Cryder, corporate counsel in Scottsdale Arizona who has no personal knowledge of the activities of the Plaintiff at the local franchise. Noticeably absent was any affidavit from persons dealing directly with the Plaintiff at the time she is alleged to have consented to arbitration. J. Cryder’s knowledge is limited to review of Ex. C of his affidavit which purports to be a screenshot of the date and time Plaintiff is alleged to have assented to arbitration. MEF’s memorandum and Cryder’s affidavit states that once a customer assents to the “Terms of Use” MEF’s computer system automatically records the date and time which becomes a part of the customers electronic file in Scottsdale Arizona.

Plaintiff’s appointment was on August 22, 2017 at 5:30 PM Eastern Standard Time as documented by the email from Defendants reminding her of her appointment, a copy is included in her affidavit. Scottsdale Arizona is located in the Mountain Time Zone or two hours behind Eastern Standard Time. The MEF records submitted in support of its motion recorded the time of Plaintiff’s alleged assent to arbitrate as 7:22 AM, as shown below in Ex. C.

² Plaintiff had previous messages where she signed in on an iPad but this instance was the first where there was an attempt to include assent to an arbitration clause.

	name	last_name	first_name	clinic_id	signing_date_time
1	General Consent	REDACTED	REDACTED	0255	2017-08-22 07:22:03 260

	name	last_name	first_name	accepted_on
1	Terms of Use	REDACTED	REDACTED	2017-08-22 07:22:02 6270000

EXHIBIT C

This is time recorded is problematic as MEF contends the date and time of assent is automatically recorded in its computer system and made a part of Plaintiff's file.

If 7:22 AM is to be understood as Mountain Time Zone where MEF's corporate offices and servers would be located, it would be 9:22 AM Eastern Standard Time, approximately eight hours before Plaintiff's appointment where it is alleged she assented to arbitration. A contention that Plaintiff assented at 7:22 AM Eastern Standard Time is even more problematic. There is no evidence in the record explaining this discrepancy between Cryder's affidavit of when he contends Plaintiff assented to arbitration and the time of Plaintiff's actual appointment.

A. No Agreement Formed

MEF and Plaintiffs both agree in their supporting memorandums that before the Federal Arbitration Act applies, the Court must first determine whether Plaintiff assented and agreed to an arbitration contract. "[I]n a case where the validity and enforceability of an arbitration provision is disputed, general principles of state contract law must be applied to determine these threshold issues." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

It is well established that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Stevens & Wilkinson of S.C., Inc v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014) and *Sauner v. Pub. Serv. Auth. Of SC*, 354 S.C. 397, 581 S.E.2d 161 (2003) If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. It is essential that both parties assent to the same thing in the same sense.

Likewise, MEF concedes on page 17 of its memorandum that it is fundamental that Plaintiff must have fair notice of the binding arbitration provision. The initial question here is whether the arbitration clause presented was done so unfairly or with the design to conceal or deemphasize the provisions. The Court holds that it was for the reasons below.

The Court notes that while the denomination “MEF” is used in the General Consent, nowhere is it a defined term. However “you” and “your” are defined to be the buyer of services and “we,” “our,” and “us” are defined to mean the local franchisee. The lack of clarity in defined terms combined with the patent exclusion of any specific reference to the “Terms and Conditions” accessible only by hyperlink are but two of the fatal problems faced by MEF in this motion. The “General Consent” extracts a blanket waiver without actually telling the Plaintiff who MEF is and fails in the very same section to clearly direct Plaintiff to the “Terms and Conditions” document that identifies MEF and limits the Plaintiff’s right to prosecute a claim.

The Court agrees there is nothing controversial about the argument offered by MEF that under normal circumstances, a party’s failure to read a contract nonetheless binds the party when signed. That argument, however, oversimplifies what happened here. It is undisputed that Plaintiff did not open the electronic agreement reachable only by hyperlink. This is attributable not to disinterest or indifference, but rather to an objectively confusing and misleading design of the

website. As a result, Plaintiff's failure to know of or assent to arbitration cannot be ascribed to anything she did wrong.

By prominently displaying some, but not all, of the terms of use in the "General Consent" MEF has placed itself at a disadvantage. MEF seeks to bind Plaintiffs not only to the boldly presented "General Consent" terms but to 10 more pages of rules and requirements that are available only by hyperlink. While terms accessible by hyperlink is not per se a problem, the combination of the two sets (General Consent and "Terms of Use") in the manner done here, is. To present one set prominently above a signature line and check box, but allow access to the other set only by use of hyperlink adjacent to that checkbox, without any indication there were more rules, is at best fatally ambiguous and arguably deceptive.

Having scrolled through pages of legal language expressed in bold and capitalized text throughout the "General Consent" sections, it is unfair to expect that Plaintiff would not understand her signature thereunder, and adjacent checkbox affirmation, to relate to those very rules and nothing else. There is no "see more" or "additional material you must review" notation of any kind or hint that what one sees is only part of the terms of use. Adding further confusion is the repeated instruction in the midst of the "General Consent" to "Please read and review in full to sign below."

The Court has carefully reviewed the exhibits provided and cannot conclude that the Plaintiff was presented with the arbitration agreement in a fair and forthright manner as required by law. While MEF references other cases where courts compelled arbitration, most are unpublished, all are factually distinguishable and none are from a South Carolina state court. To approve the existing configuration, which does not provide fair notice to the Plaintiff that she must do more than agree to the rules and terms already displayed, would be to endorse a concept of assent that falls far short of the standard of fairness required in contract formation.

The Court likewise denies MEF's motion to compel arbitration on the grounds that the time alleged by MEF that Plaintiff allegedly checked the "I agree and assent," (7:22 AM) is incompatible with Cryder's affidavit and improbable considering the time of Plaintiff's appointment. MEF has the burden of establishing that an arbitration agreement was formed, and formed by Plaintiff and not a store employee who may have checked the assent on her behalf. Plaintiff's appointment was at 5:30 PM Eastern Standard Time. MEF alleges that Plaintiff assented to arbitration shortly before her appointment but then claims the assent occurred at 7:22 AM. This discrepancy cannot be reconciled with any evidence MEF presented, even upon consideration of the two time zones.

B. Sexual assault not covered by scope of arbitration

The Plaintiffs' claims involving sexual assault fall outside the scope of any purported arbitration agreement made with MEF. Plaintiff was assured by several direct emails from MEF immediately before her appointment that she would be safe from sexual assault. The General Consent further assured her that her genitalia would not be touched. To determine if a particular dispute is subject to arbitration, this Court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope.

South Carolina jurisprudence makes clear that not all claims will be covered by an arbitration agreement. Our Supreme Court held that "*applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable.*" *Aiken v. World Finance Corp.*, 373 S.C. 144, 464 S.E.2d 705 (S.C. 2007). See *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla.1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship

between the parties is insufficient by itself to transform a dispute into one arising out of or relating to the agreement."). See also *The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct.App.2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.").

The Court in *Aiken* stated "Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, South Carolina courts will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealing... We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties... Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes."

The sexual assault at issue here was an outrageous, intentional, assaultive act committed against Plaintiff. Such attack, by its very nature, cannot be covered by the alleged arbitration agreement and indeed is not covered as "disputes" according to the plain language of the alleged agreement at issue here.

Further, this sort of attack was unfathomable by Plaintiff, such that she could not contemplate or expect it as a potential dispute between herself and MEF. Simply put, the Plaintiff's claims bear no relation to the underlying agreement. Accordingly, because the Plaintiff's claims are outside the scope of any purported arbitration agreements, the Court denies MEF's motion to compel arbitration.

C. Arbitration agreement is unconscionable

MEF's "arbitration agreement" is unenforceable as procedurally and substantively unconscionable. Just as state law determines whether an agreement to arbitrate existed under the FAA, courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and **unconscionability**." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (S.C. App. 2013).

South Carolina jurisprudence holds unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. at 24–25, 644 S.E.2d at 668 (2007) Unconscionability is "due to both an absence of meaningful choice and oppressive, one-sided terms." *Id.* at 25, 644 S.E.2d at 669.

While courts analyze both prongs, they invite similar proof and often overlap, and "if more of one [prong] is present, then less of the other is required." *Doe v. TCSC, LLC*, 430 S.C.602, 846 S.E.2d 874 (S.C. App. 2020) See also Farnsworth on Contracts § 29.4 at 4-212 (2020-1 Supp.); see Corbin on Contracts § 29.4 at 388 (2002 ed.) (Noting "most cases do not fall neatly" into categorical boxes).

1. The Agreement is Procedurally Unconscionable.

"In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* As our supreme court noted in *Simpson*, the

“loss of the right to a jury trial” and foregoing statutorily provided remedies are also relevant to this determination.

MEF provided Plaintiff with no meaningful choice as whether to sign the agreements or not. Plaintiff could not use MEF services without agreeing to the hidden arbitration terms. Further, Plaintiff had no opportunity to bargain over the terms of the agreement to arbitrate since the “agreement” and its terms were hidden from Plaintiff.

MEF claims the “opt out option” given to Plaintiff made the agreement fair and not coercive. However, what MEF neglects to focus on is that the alleged “opt out option” was so far hidden that no reasonable person could be expected to find the hidden language. Moreover, the “opt out option” is multi layered requiring the Plaintiffs to spend more money to send mail to another state with detailed and difficult directions to ensure that MEF would in fact let them out of their arbitration agreement.

The bargaining inequality between the Plaintiffs and MEF is stark: MEF as a national corporation controlled all aspects of the arbitration and manipulated Plaintiff’s agreement decisions by hiding arbitration language. Procedural unconscionability is therefore established as to MEF’s arbitration agreement process.

2. The Agreement is Substantively Unconscionable.

MEF’s arbitration “agreement” is also substantively unconscionable, as the terms are harsh, one-sided, and oppressive. MEF’s arbitration agreement, a 10-page, single-spaced agreement includes an extraordinary “Limitation of Liability” paragraph, which states that to the maximum extent permitted by law, Massage Envy “*shall not be liable for any damages whatsoever*, and in particular, . . . shall not be liable for any special, indirect, consequential, punitive, or incidental

damages . . . arising out of or related to. . . any service, whether such damages arise in contract, warranty, negligence, tort, under statute, in equity, at law, or otherwise.”

The next paragraph requires Plaintiff to “indemnify” Massage Envy and “hold [it] harmless from any claims, demands, liabilities, damages, losses, and expenses, including, without limitation reasonable attorneys’ fees and costs, made by any third party due to or arising out of or connected in any way with . . . any service or product provided by [a Massage Envy franchise]” – i.e., to pay the franchisors fees, damages, and costs if the member sues a franchise that files a cross-claim against the franchisor

It imposes sweeping confidentiality restrictions, precluding Plaintiff from disclosing not only the end result of arbitration, but even “[t]he fact that an arbitration exists or is proceeding, the nature of the Dispute, all documents exchanged in connection with the arbitration, [and] all testimony . . . given in the arbitration proceeding,” This forces each new assault victim to start from scratch, without being able to gather evidence or share information with others, while Massage Envy would have complete knowledge of everything that transpired in every prior arbitration.

Massage Envy’s arbitration agreement additionally purports to apply to all disputes between the parties to that agreement, *except* for claims in small claims court and “claims regarding the infringement, protection or validity of . . . trade secrets, copyright, trademark or patent rights.” It requires all disputes to be resolved under Arizona law, regardless of where the member lived, obtained massages, or signed Massage Envy’s membership agreement. It prohibits all class actions, group actions, and other non-individual actions in arbitration or elsewhere. Although the agreement is binding on Plaintiff, it gives Massage Envy the right at any time, to modify, alter, or update [any term of that agreement] without prior notice.

Because the arbitration agreement is both procedurally and substantively unconscionable, the arbitration agreement cannot be enforced, and MEF's motion must be denied.

D. Violation of South Carolina Uniform Electronic Transactions Act

The South Carolina Uniform Electronic Transactions Act (SCUETA) applies to electronic records and electronic signatures relating to a transaction. The alleged arbitration agreement at issue here is an agreement requiring electronic signature that is stored by electronic means.

In order to legally conduct transactions or create valid agreements electronically, the parties each must "agree to conduct transactions by electronic means." SCUETA § 26-6-50 (B). MEF has presented no evidence Plaintiff agreed to conduct any transaction electronically. Nothing about the "Terms of Use" click box indicates anything other than it being applied to the check-in process for the single pre-scheduled massage planned by Plaintiff. Likewise, nothing about the "Terms of Use" click box suggests that the individual clicking the box would be entering an entirely separate arbitration agreement, contained on an entirely separate website that operates to forfeit important legal and constitutional rights. The only evidence is the affidavit of Plaintiff that she intended only to check-in for her previously scheduled massage. Therefore, MEF's motion is denied on this ground.

12(b)(6) MOTION

A. Negligence Causes of Action

MEF contends that Plaintiffs failed to allege sufficient control over the operations of the franchisee so that no duty of care arose and that there was no causal nexus between any breach of duty and Plaintiffs' injuries. The Court, viewing the pleadings in the light most favorable to Plaintiffs, finds that sufficient allegations of control are alleged in the complaint, more than "that

necessary to ensure uniformity of appearance and quality of service among its franchisees.”
Jamison v. Morris, 385 S.C. 215, 684 S.E. 2d168 (2009)

As enumerated in Plaintiff’s memorandum, the complaint thoroughly alleges MEF was aware of the problem of hundreds of sexual assaults on a nationwide scale. While aware of the problem, the complaint alleges MEF instructed and aided local franchisees to conceal the known dangers, while at the same time luring the Plaintiff by making false assurances of safety. (See Plaintiffs’ Memorandum pgs. 1-7)

The complaint specifically includes two direct emails sent by MEF to Plaintiff days before the assault assuring her safety and claiming that appropriate steps had been taken. Likewise, the complaint includes the actual social media posts of Plaintiff’s assailant, publicly available on the web, which objectively call into question his fitness, especially in light of MEF’s knowledge of the problem of sexual assaults.

As pled, MEF, by its very nature, is a business that invites women to its location who will be disrobed and vulnerable in the presence of a masseuse performing skin on skin contact in a closed room. MEF specifically targeted Plaintiff with two separate emails assuring her of her safety in the use of MEF’s services. MEF specifically instructed its franchisee to make assurances to Plaintiff that she would not be sexually assaulted which they knew were false. These allegations of MEF’s control far exceeds the ordinary franchisor-franchisee relationship of control “necessary to ensure uniformity of appearance and quality of services among its franchisees.” The complaint sufficiently alleges the required control over MEF Franchisees to create a duty to Plaintiff.

Plaintiffs also specifically allege a duty existed as Plaintiff, at the time of the assault, was under the care of MEF. She was contacted by MEF twice by email and assured that MEF

services were safe and that steps had been taken to prevent assaults. When she checked in for her massage she was specifically instructed in the Consent iPad app that neither her genitalia nor breasts would be touched. She was then directed to a small room where she disrobed, all while unaware of the seriousness of the problems of sexual assault at MEF when a male therapist began skin on skin contact with her lying on a table with the door to the room closed.

Plaintiffs allege MEF owed Plaintiff a duty to aid and/or protect her and to control the actions of third parties, as set forth in the Restatement (Second) of Torts Sec 314A(4) “*One who voluntarily takes the custody of another under circumstances such as to deprive the other of her normal opportunities for protection is under a similar duty to the other.*” And Section 315 (*duty exist to control the conduct of a third person as to prevent him from causing physical harm to another person when a special relation exists between the actor and the other which gives the other a right to protection*).

Likewise, proximate cause is also properly pled. The complaint sets forth MEF employed strategies in concealing and downplaying the risks of sexual assaults. MEF lured the Plaintiff with direct email contacts assuring her of her safety. While discovery has not commenced, the complaint does include allegations of Coyle’s (the assailant) unfitness with actual social media postings. Plaintiff pled the allegations above and asserted numerous failures to investigate, supervise and control. MEF’s contends that while all the allegations of the complaint deal with sexual assault, it was somehow unforeseeable to MEF that Plaintiff would be sexually assaulted. Taken in the light most favorable to Plaintiff, the Court holds otherwise and denies the motion to dismiss.

B. Respondeat Superior Claim

The complaint properly alleges, for the reasons noted above, that MEF controls every aspect of day-to-day operations, especially as they apply to sexual assaults and is thus vicariously liable for the acts of the franchisee and Coyle. (Complaint paragraph 60) Moreover, MEF failed to take reasonable steps and failed to implement reasonable safeguards to avoid acts of prevalent unlawful sexual conduct, including but not limited to, preventing or avoiding placement of Coyle in functions or environments in which contact with female customers in vulnerable positions was an inherent part of those functions. (Comp. 61)

The facts allege a consistent failure on the part of MEF to even acknowledge the widespread problem of sexual abuse suffered by its customers, to timely reprimand and sanction the conduct and to take the steps necessary to prevent the reoccurrence. Plaintiffs specifically plead MEF created the conditions for assaults, condoned, approved or in the alternative ratified these actions making it vicariously liable.

MEF contends that Coyle's assault upon Plaintiff was outside the course and scope of his employment. If this case were a single instance of a therapist sexually assaulting a customer this argument might have merit. However, this sexual assault was not an isolated, unforeseeable incident.

As alleged, MEF's problems with hundreds of sexual assaults was known by MEF by way of their internal reporting system. MEF only acknowledged the problem when forced to do so after the publication of numerous national news stories. These allegations are corroborated by the emails inserted into the complaint by the CEO of MEF, sent directly to Plaintiff, wherein he claimed "to be sickened and so disheartened by the stories that have recently been published about sexual misconduct at Massage Envy franchise locations." (Comp. 37) The

complaint alleges that instead of taking corrective action MEF opted to conceal the extent of the problem and instructed franchises to both conceal the extent of the problem and falsely warrant the safety of their services to the Plaintiff. The cause of action for *Respondeat Superior* is sufficiently pled, at this stage of the litigation, with allegations that MEF's actions condoned, approved, effectively authorized and/or ratified the assault. *Murphy v. Jefferson Pilot Communications Co, WCSC Inc.*, 613 S.E2d 808 (Ct. App 2005) (noting ratification of acts outside scope of employment may establish vicarious liability; but issue not preserved for review.)

C. Reckless Infliction of Distress

Plaintiffs have pled in the alternative Reckless Infliction of Emotional Distress. The essence of the allegations in this cause of action center around MEF and the franchisee explicitly and implicitly representing to Plaintiff that they had a "zero tolerance" for sexual assault and that its massage therapists were psychologically fit and could be entrusted with the safety and well-being of female customers which they knew to be false and actively hid from her. (Comp. 103-104)

As previously alleged in the complaint, MEF was aware through its own internal website of hundreds of sexual assaults while attempting to conceal this information from the police and the public and failing to warn of the potential risk. The complaint alleges Coyle was objectively unfit by reference to his public postings and comments on social media which MEF either knew or should have known. These postings, shown in the complaint, included sexual objectification of women, rape, acting on impulse when seeing women's panties and psychological instability by his publicly posting "In one of those fuck it, I don't care anymore type of moods. More and more frequently keep ending up here."

MEF incorrectly contends in its memorandum to dismiss that this cause of action fails “because it is based entirely on Coyle’s alleged misconduct, which was committed outside the course and scope of his employment.” As explained in the preceding paragraphs this is not the case.

MEF also contends that the complaint is defective by not alleging “how, when, or where such representations were made to Plaintiff Mary Doe in particular.” MEF and the Court were directed to the specific emails sent to Mary Doe by the CEO of MEF found in the complaint at paragraph 37. In addition, Plaintiff was advised in the General Consent section during her appointment that her genitalia would not be touched and that inappropriate or illegal behavior by staff would not be tolerated in any manner.” (Comp.19) Viewed in the light most favorable to Plaintiffs, the motion to dismiss this cause of action is denied.

AND IT IS SO ORDERED!

August ____, 2021
Charleston, South Carolina

The Honorable R. Ferrell Cothran, Jr.



Charleston Common Pleas

Case Caption: Mary Doe , plaintiff, et al VS Massage Envy Franchising Llc ,
defendant, et al
Case Number: 2020CP1005443
Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144