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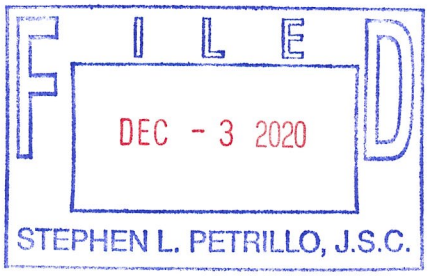
THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION,CIVIL PART
DOCKET NO. ESX-L-3263-19

C.D.,

Plaintiff,

v.



MASSAGE ENVY FRANCHISING, LLC, MASSAGE ENVY SPA SHORT HILLS, LLC, MALCOLM CUDJOE, JOHN DOES #1-5 (fictitious names representing unknown Defendants), ABC CORPS. #1-5 (fictitious unknown entities)

Defendants.

Kristen Jones of Piro, Zinna, Cifelli, Paris & Genitempo, LLC, representing plaintiff C.D.

Michelle B. Cappuccio of Reilly, McDevitt & Henrich, P.C., representing defendant Massage Envy Franchising, LLC

Joseph DeDonato of Morgan Melhuish Abrutyn, LLP, representing defendant Short Hill ME, LLC, d/b/a Massage Envy i/p/a Massage Envy Spa Short Hills, LLC, and defendant Malcolm Cudjoe

PETRILLO, J.S.C.

INTRODUCTION

This matter comes before the court by way of a motion brought by defendant

Massage Envy Franchising, LLC, ("defendant" or "MEF" hereinafter) to stay litigation and compel arbitration or, alternatively, to enforce a forum selection clause requiring that the claim be litigated in Arizona. Plaintiff C.D.[1] has filed an opposition, to which MEF filed a reply. Plaintiff also filed an unauthorized sur-reply (which was nonetheless considered). MEF did not respond to the unauthorized submission by plaintiff. This matter has an upcoming discovery end date of June 28, 2021, and neither trial nor arbitration are scheduled.

The defendants here include MEF, Massage Envy Spa Short Hills, L.L.C. ("Short Hills"), massage therapist Malcolm Cudjoe ("Cudjoe"), and other, fictitious, parties. Plaintiff alleges that Cudjoe committed both assault and battery upon her by engaging in non-consensual and unauthorized touching of intimate parts of her body during a massage on April 10, 2018.[2] In allegedly doing so, plaintiff contends that, among other things, the defendants breached the contract between the parties because the contract states that the massage therapist would not touch female patrons in the chest area nor any patron in the genital area.[3] Without conceding the alleged conduct of the massage therapist, MEF argues that the claim, valid or not, implicates the contract between the parties and, as such, argues that the claim against it must

[1] Plaintiff has been identified by her initials only since the complaint was filed. All parties are aware of the plaintiff's actual identity (as is the court). No permission was sought or granted to plead anonymously. There has been no objection as to allowing the plaintiff to proceed.
[2] Plaintiff's complaint graphically describes the alleged contact as involving at least four extremely intimate parts of her body throughout the course of the massage.
[3] The existence of these terms is undisputed.

be submitted to arbitration thereunder for disposition of all issues, including arbitrability in the first instance. Thus, MEF argues, this case must be stayed pending that outcome. Alternatively, MEF maintains that the contract's forum selection clause requires that the case against it be litigated in Arizona.

The court disagrees with MEF on both arguments.

I

A. The agreement between the parties

MEF argues that plaintiff assented to an arbitration agreement on January 21, 2018, by clicking "agree" on a check box at the very bottom of an electronic consent form. The form is one of two that each client is presented with upon arrival for a service. The form relevant for this motion is the one entitled "General Consent" which is described in detail *infra*. The other form is entitled "My Massage." This form solicits answers to questions presented to massage clients in advance of a client receiving services.

When a client appears for a service, both forms are presented for electronic review by use of an iPad or similar tablet device. A "WELCOME (CLIENT NAME)" screen greets the client following the client's sign in on a "BEFORE WE GET STARTED" page where a client identifies herself and updates her information. It is on the "WELCOME (CLIENT NAME)" screen where the client is presented

with the two forms to review and, where appropriate, fill out or otherwise acknowledge the terms.

The check box at issue was at the very end of a multi-page "General Consent" form and to the left of the following words: "I agree and assent to the Terms of Use Agreement." The underlined text was, in fact, a hyperlink[4] that, if tapped, would open a new screen and take the user to a 10-page agreement which, on page 4, included a provision entitled "BINDING INDIVIDUAL ARBITRATION." This arbitration section could be found under section number 5 of 15 enumerated sections. The 10 page agreement is entitled "Terms and Conditions" (in boldface type) and in capital, boldface type immediately below the title the following text appears: "THIS TERMS OF USE AGREEMENT ("AGREEMENT") CONTAINS A BINDING ARBITRATION PROVISION AND A CLASS ACTION WAIVER. PLEASE READ IT CAREFULLY BECAUSE IT AFFECTS YOUR LEGAL RIGHTS AS DETAILED IN THE BINDING INDIVIDUAL ARBITRATION SECTION BELOW."

[4] A hyperlink is defined by dictionary.com as a connection between documents or applications which enables material from one source to be incorporated into another, in particular a facility which automatically updates material in a document when an alteration is made to the document from which it originated. It is a "live" link which is usually highlighted or underscored in some fashion and, if tapped or clicked, will transport the user to a different web page or domain where a new page, source, or document will be displayed.

Immediately below the check box, without any separation or distinction, was a signature line where the client was expected to sign her name and then tap a box that said "CONTINUE" and which appeared below the signature line. Once tapped, a "THANKS (CLIENT NAME)" message screen was generated and the process was completed. This last screen instructed the client to await the therapist's arrival.

The check box and signature line are at the end of the "General Consent" form which is entitled "MY CONSENT" (in boldface type) and follows its title with a sub-section captioned "General Consent" and which instructs the user to "Please read and review in full to sign below."[5] Immediately below that instruction, begins 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 boldface type). 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." The court will refer to this section, as section one.

Following this section there appears the following, in all capitals, boldface type:

> YOU ACKNOWLEDGE AND AGREE THAT YOUR CONSENT TO THIS ASSUMPTION OF RISK, RELEASE, WAIVER OF LIABILITY AND INDEMNIFICATION IS GIVEN IN EXCHANGE FOR OUR RENDERING OF SERVICES, AND AGREE THAT THIS ASSUMPTION OF RISK, RELEASE, WAIVER OF LIABILITY, AND INDEMNIFICATION SHALL APPLY AT EACH VISIT TO ANY MASSAGE ENVY LOCATION. YOU

[5] The grammatical imprecision in that instruction further lends to its lack of clarity.

ACKNOWLEDGE AND AGREE THAT EACH MASSAGE ENVY LOCATION. YOU ACKNOWLEDGE AND AGREE THAT EACH MASSAGE ENVY LOCATION IS INDEPENDENTLY OWNED AND OPERATED AND YOUR SERVICES WILL BE RENDERED US (SIC) AND NOT BY MEF OR ANY OF ITS AFFILIATES. YOU UNDERSTAND AND AGREE THAT OUR THERAPISTS AND ESTHETICIANS ARE OUR EMPLOYEES AND ARE NOT EMPLOYED BY AND ARE NOT EMPLOYEES OF MEF OR ANY OF ITS AFFILIATES. YOU ACKNOWLEDGE AND AGREE THAT AT NO TIME SHALL YOU HAVE A RIGHT TO, NOR SHALL YOU, ASSERT OR BRING ANY CLAIM, DEMAND, OR LEGAL ACTION AGAINST MEF OR ANY OF ITS AFFILIATES RELATING TO THIS AGREEMENT OR THE SERVICES PROVIDED BY US. YOU FURTHER ACKNOWLEDGE AND AGREE THAT NEITHER MEF NOR ANY OF ITS AFFILIATES SHALL HAVE ANY LIABILITY FOR (i) ANY OBLIGATIONS OR LIABILITIES RELATING TO OR ARISING FROM OUR RENDERING OF SERVICES TO YOU; (ii) ANY CLAIM BASED ON, IN RESPECT OF, OR BY REASON OF THE RELATIONSHIP BETWEEN YOU AND US; OR (iii) ANY CLAIM BASED UPON ANY ALLEGED UNLAWFUL ACT OR OMISSION BY US OR ANY OTHER MASSAGE ENVY LOCATION.

No title introduces this section. The court will refer to this section as section two.

B. <u>The particulars of the "General Consent"</u>

In support of its motion, MEF submits a declaration of Justin Cryder who identifies himself as MEF's Vice President, Corporate Counsel – Franchise Compliance. Mr. Cryder declares that he is familiar with MEF's records and in his position is responsible for maintaining records of user assent to the "Terms of Use Agreement." This court has thus relied on exhibit A-1 to Mr. Cryder's declaration which purports to be a facsimile of the "General Consent" form presented to plaintiff. Indeed, the court's description above is based on that very exhibit.

Turning to that exhibit to begin the analysis, the court notes that while the denomination "MEF" is used in the "General Consent" nowhere is it a defined term. In section one, "you" and "your" are defined to be the buyer of the service and signatory to the agreement (the plaintiff in this case); the words "we," "our," and "us" are defined to mean the local franchisee. The moving party, Mr. Cryder's employer, is not mentioned by name anywhere.

The "General Consent" appears to attempt to be a broad waiver of claims against Massage Envy Franchising, LLC, though it is not readily apparent to a reader that is so since the words "Massage Envy Franchising, LLC" do not appear anywhere in the "General Consent" and the term "MEF" is not defined anywhere in sections one or two though it is referenced in both sections.

Putting aside the actual effect of sections one and two as waivers (as same is not at issue), it is worthy of note that while both sections purport to explicitly insulate MEF from claims of any kind, type, or sort, arising out of services rendered at a franchise location, both are utterly devoid of any reference whatsoever to the supposedly operative agreement that defines, among other things, the very process by which an aggrieved party might seek redress from MEF. The *sina qua non* of the buyer's right of recourse as against MEF, the document around which this entire motion turns, does not even merit a mention in the expansive waiver of rights and

disclaimer of liability that the "General Consent" purports to be. This document could only be seen if plaintiff had clicked on the hyperlink adjacent to the check box.

The lack of clarity in defined terms combined with the patent exclusion of any specific reference to the "Terms and Conditions" that set forth the contours of how a claim might be presented against MEF (despite bold language stating that no such claim can even be made) are but two of the fatal problems faced by MEF in this motion. In essence, the "General Consent" extracts a supposed blanket waiver from the buyer without actually telling the buyer who MEF is (by name, status, or function) and fails in that very same section to clearly direct the buyer to the "Terms and Conditions" document that identifies MEF, that limits the buyer's right to prosecute a claim anywhere but Arizona, and that limits the buyer to arbitration absent affirmative opt-out. MEF does not even refer to such an agreement as existing. The "General Consent," at least for MEF's purposes, is self-serving, unhelpful, outright unclear, and arguably misleading.

II

A. MEF's legal argument in support of its motion

MEF argues that "courts routinely find an electronic 'click' to be a sufficient manifestation of assent." As such, it argues that this court should stay litigation and order plaintiff to arbitrate her claims under N.J.S.A. § 2A:23B-1, et seq. and the Federal Arbitration Act, 9 U.S.C. §§ 2-3. MEF relies on a series of unpublished cases

in support of its argument. In the alternative, MEF requests that this court dismiss the plaintiff's complaint and order that she refile same in Arizona, according to R. 4:6-2(a) & (b). Defendant posits that plaintiff had 30 days to opt-out of the arbitration provision but failed to do so and thus, is subject to the arbitration in Arizona.[6]

MEF asserts that federal law requires the enforcement of arbitration so long as there has been assent and the claim at issue falls within the scope of the agreement. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). In describing how the court's function is limited to those two issues, MEF notes that as to the first, assent, the court must find that the parties objectively manifested their assent to be bound by the arbitration contract. MEF correctly notes that a court has no discretion and must direct the parties to arbitrate if the court answers the questions of assent and scope in the affirmative. Ibid. MEF offers further argument on the light burden of establishing assent and the application of ordinary contract principles a court should utilize in considering the question. Coup v. Scottsdale Plaza Resorts, LLC, 823 F. Supp. 2d 931, 941 (D. Ariz. 2011).

MEF further argues that New Jersey law authorizes staying this case per N.J.S.A. § 2A:23B-7 and that this kind of "click agreement" is recognized as an

[6] Section 5 in the "Terms and Conditions" (the unmentioned document accessible by use of the hyper link only) gives the buyer thirty days to opt out of the arbitration provision and provides a process for doing so. Section 6 of the same document is entitled "GOVERNING LAW AND JURISDICTION" and provides that any claim deemed not arbitrable must be litigated in the state of federal courts of Arizona and is subject to laws and rules of that state.

"objective manifestation of assent." MEF characterizes this as "settled law" arguing that "click agreements are fully enforceable because the 'click' constitutes an objective manifestation of the user's assent to the contract terms." MEF cites Singh v. Uber Technologies, Inc., for the proposition that hyperlinked agreements with *reasonable notice* bind a party even if the party did not review the terms and conditions of the hyperlinked agreement. 235 F. Supp 3d 656 (D.N. J. 2017), rev'd 939 F.3d 210 (3rd Cir. 2019) (emphasis added). MEF cites numerous cases, many unpublished, most factually distinguishable, and none from any New Jersey state court.[7]

Finally, asserting that forum selection clauses are presumptively valid in New Jersey, MEF argues that venue should be properly laid in Arizona. Here, MEF relies, for different legal principles, on Caspi v. Microsoft Network, 323 N.J. Super. 118 (App. Div.), cert. denied 162 N.J. 199 (1999). MEF argues that plaintiff cannot establish that litigating her case in Arizona would be "gravely difficult" or deprive her of her day in court, and thus, maintains that the forum selection clause is reasonable and enforceable.

[7] One exception is Caspi v Microsoft Network, which enforced a forum selection cause that does not appear to have been reachable only by a hyperlink but rather appears to have been buried in an electronic document that the aggrieved party may not have reviewed with enough attention. 323 N.J. Super. at 118.

B. Plaintiff's opposition to MEF's motion.

In opposition, plaintiff asserts that MEF's arbitration provision was an unenforceable, hidden contract of adhesion; that plaintiff's claims are outside of the scope of the arbitration agreement; and that enforcing this arbitration agreement would be contrary to public policy. Plaintiff contends that she never clicked on the hyperlink to view the hidden arbitration agreement and forum selection clause at issue upon her initial visit to Massage Envy in Warren, NJ on January 21, 2018.[8] As such, plaintiff states that she never saw any language about arbitrating her claims or litigating in Arizona and that if she had seen such language she would have "opted-out" of the agreement.

Plaintiff's characterization of this agreement as a contract of adhesion relies on Rudbart v. New Jersey District Water Supply Company, 127 N.J. 344, 353 (1992). Plaintiff further argues that this contract is unconscionable citing Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30 (App. Div. 2010). In this case, plaintiff was never given a copy of the arbitration agreement, like the plaintiff in Moore. Plaintiff argues that being given a copy of the agreement has been found "essential to the exercise of the contractual right." Id. at 45. In Moore, the appellate division held that the failure to provide the plaintiff with a copy of the

[8] Although the incident is alleged to have occurred at a Short Hills, New Jersey franchise location, plaintiff first joined as a client at a franchise location elsewhere in New Jersey owned and operated by a different franchisee.

contract "render[ed] [the contract] ineffective and g[ave] rise to an inference of additional inequality in the parties' respective bargaining positions." Ibid. Plaintiff further argues that this agreement cannot be enforced because she never actually opened the "Terms and Conditions" (reachable only by clicking the hyperlink) and therefore it was hidden from her view. Plaintiff asserts that based on the totality of the circumstances this agreement is unenforceable as unconscionable.

Plaintiff stresses that the preference for adhering to arbitration agreements is not limitless, countering MEF's "light burden" argument, arguing that here MEF's motion must be denied because MEF cannot establish that plaintiff entered a valid arbitration agreement and further that the dispute at issue is within the scope of such arbitration agreement. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs. P.A., 168 N.J. 124, 132 (2001); see also Dean Witter Reynolds, Inc. v. Boyd, 470 U.S. 213 (1985). Here, plaintiff argues that defendant has failed to establish, by a preponderance of the evidence, no less by undisputed facts, a showing that plaintiff assented to the arbitration agreement at issue. Midland Funding LLC v. Bordeaux, 447 N.J. Super. 330, 336 (App. Div. 2016).

Plaintiff distinguishes this case from Singh v. Uber Technologies, Inc., on the basis that in that case the plaintiff had knowledge of the agreement and elected not to read it, whereas here plaintiff never saw the words "arbitration" or "Arizona" prior

to signing the agreement and was not required to see the pop-up page before continuing to the next screen. 235 F. Supp. 3d at 656.

Plaintiff maintains that, even if the arbitration agreement is found enforceable, that her sexual assault claims are not covered by such agreement.

While plaintiff recognizes that New Jersey courts generally enforce forum selection agreements, plaintiff argues that "for all of the same reasons the arbitration agreement cannot be enforced" neither can the forum selection clause. Plaintiff highlights that "[a] contractual choice of forum clause shall be held unenforceable if enforcement will contravene a strong public policy or if the forum in which suit is brought, whether the public policy is declared by statute or judicial decision." Kubis & Perszky Assocs. v. Sun Microsystems, 146 N.J. 176, 188 (1996). Plaintiff maintains that because the parties, other than MEF, reside in or are formed in New Jersey and that is where the cause of action occurred, that public policy favors litigating in New Jersey. Furthermore, because Arizona "is more than 2,000 miles from where plaintiff resides and is 2,000 [miles] [*sic*] from where the incident occurred," it would seriously inconvenience plaintiff to litigate there. Plaintiff highlights that all of the witnesses reside in New Jersey and that is where the cause of action accrued. Accordingly, plaintiff argues that enforcing the forum selection clause would be extremely prejudicial to her.

C. MEF's reply to plaintiff's opposition

In its reply, MEF argues that the issue is simple and straightforward: plaintiff clicked the box at the end of the "General Consent" and as such she assented to the "Terms and Conditions" whether she read the "Terms of Use Agreement" hyperlink document or not. By not having done so, when she should have, MEF argues that plaintiff proceeded at her own peril. Citing a federal court decision, Park Inn International, L.C.C. v. Mody Enterprises, MEF argues that a party should be bound to an agreement, regardless if they read it or not. 105 F. Supp. 2d 370, 374 (D.N.J. 2000). MEF asserts that plaintiff had sufficient notice of the "Terms and Conditions" because plaintiff's click of the check box at the end of the "General Consent" afforded her the opportunity to click the adjacent hyperlink - an opportunity which plaintiff ignored.

Additionally, MEF claims that plaintiff conceded that she chose not to read the "Terms and Conditions" because she didn't click the "Terms of Use Agreement" hyperlink.[9] Had she clicked that hyperlink plaintiff would have found the arbitration clause. MEF rejects the idea that the clause was hidden, not to mention the entire document in which the clause was contained, and that any argument by plaintiff to the contrary is unavailing. MEF posits that the rest of plaintiff's arguments are

[9] MEF cites plaintiff's declarations and opposition brief for this assertion; however, plaintiff never states that she explicitly chose not to read the arbitration clause. Plaintiff does state that she never saw it in the first place. Defendant mischaracterizes the facts and admissions on this point.

irrelevant because the arguments as to arbitrability, i.e. the substantive arguments as to the agreement itself, must be submitted to the arbitrator. These include unconscionability, public policy, scope, validity, and enforceability. A delegation clause, under the proper circumstances, is enforceable under New Jersey law. Goffe v. Foulke Management Corp., 238 N.J. 191 (2019).

III

In the recent case of Skuse v. Pfizer, Inc., the Supreme Court ruled that a former Pfizer employee's discrimination claim must be resolved through arbitration. 244 N.J. 30, 37 (2020). In upholding the trial court, the majority reversed the appellate division and determined that the plaintiff's claim was indisputably included in the broad language of her employer's arbitration agreement. Id. at 38. Just a few weeks later, in Flanzman v. Jenny Craig, Inc., the Court held that an arbitration agreement between a weight loss company and an employee was enforceable despite lacking any sort of detail as to how to choose an arbitrator or designating any particular arbitration forum or rules. 244 N.J. 119, 124-25 (2020). It is therefore obvious that our Supreme Court, in very recent days, has evinced a clear commitment to the enforceability of arbitration agreements. None of the Court's recent decisions alter the essence of its holdings in the seminal cases of Atalese v. U.S. Legal Service Group or Leodori v. Cigna Corporation, which provide that for an arbitration clause to be enforceable, it must explicitly state in plain

language that a plaintiff is forfeiting her right to sue, to pursue statutory claims in court, and to have a jury resolve the dispute. 219 N.J. 430, 435-36 (2014); 175 N.J. 293, 295 (2003). In addition, the Supreme Court reaffirmed in Skuse, citing Atalese and Garfinkel v. Morristown, that for a waiver of rights provision to be effective, the waiver must be clear and unmistakable. Skuse, 244 N.J. at 48. All of this makes clear that a single and unavoidable truth has emerged from our Supreme Court's jurisprudence: properly drafted arbitration agreements will be enforced.[10]

But the devil is in the details.

In Skuse, the plaintiff filed suit asserting claims under the Law Against Discrimination. Id. at 36. The plaintiff argued she never checked off a box in a work email she received from Pfizer, her employer, more than a year before, which was delivered via an email "training module," which asked that she "acknowledge" the company's arbitration agreement. Id. at 37. Absent an affirmative acknowledgement, the plaintiff maintained there was no consent to arbitrate. Id. at

[10] This court is aware of the appellate division's very recent decision in Knight v. Vivint Solar Developer, LLC, __ N.J. Super. ___, A-2258-19T1 (App. Div. 2020). This opinion was approved for publication on December 2, 2020. However, after reading that decision, this court is not persuaded Knight changes the court's analysis or conclusion in this matter. There, the appellate division reversed the trial court based on its concern over the undeveloped issue of mutual assent to the terms of an arbitration agreement. The appellate division directed the trial court to engage in an evaluation of that issue on remand. This court focuses precisely on the issue of assent in this opinion. Ruling, as a matter of law for the reasons explained, that presentation of the agreement was fundamentally unfair pursuant to appellate precedent and that, as such, there was no mutual assent. This case and Knight are surely branches from the same root, but they are sufficiently distinct so as not to implicate this new appellate authority here. Indeed, this court has engaged in the very "mutual assent" analysis that Knight appears to mandate.

45. Pfizer successfully argued that an affirmative act of acknowledgement was not required for consent and highlighted that the five page "Mutual Arbitration and Class Waiver Agreement" informed the plaintiff that as long as she remained an employee for more than 60 days from receipt of the agreement, she was deemed to "assent to it" automatically. Id. at 61.

Writing for the court, Justice Patterson's majority opinion held "[those] communications clearly and unmistakably explained the rights that Skuse would waive by agreeing to arbitration, thus complying with waiver of rights case law, and Pfizer's delivery of the agreement by email did not warrant its invalidation." Id. at 37. Having first satisfied itself that the language of the agreement was as required by law to be enforceable, the majority spent a meaningful portion of its analysis considering the "method" of Pfizer's delivery of the arbitration agreement. Id. at 53-61.

In reversing the appellate division, the Court pointedly stated that "as a general rule 'one who does not read a contract before signing it cannot later relieve himself of its burdens.' The onus was on plaintiff to obtain a copy of the contract in a timely manner to ascertain what rights it waived by beginning the arbitration process." Id. at 54, citing Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 238 (App. Div. 2008). The court further stated that contracts, including arbitration agreements that are transmitted electronically, such as by email, are not

presumptively problematic. Skuse, 244 N.J. at 55-56. Citing Caspi v. Microsoft Network, the Skuse Court categorically rejected the argument that the presentation or placement of a contract provision in an electronic format which was available for review by scrolling prior to agreement at its end was any different than including a similar provision in the fine print of a paper document. Id. at 56, citing Caspi, 323 N.J. Super. at 125-26.

In Caspi v. Microsoft Network, the plaintiffs challenged the enforceability of a forum selection clause contained within an online subscriber agreement. 323 N.J. Super. at 120. The appellate division affirmed the trial court's decision to dismiss the case because of the clause's requirement that matter be litigated in Washington. Ibid. The presentation of the operative clause was within a membership agreement when one signed up for the Microsoft product offered by the defendant. Id. at 121. Software prompted the prospective customer to view a series of screens with membership information, which included the clause at issue. Id. at 122. Adjacent to the screen being viewed (or, as may have been the case, ignored or rushed through) was a separate screen in which appeared the choices "I Agree" or "I Don't Agree" in the form of a box to be clicked; either box could be clicked at any time during the review. Ibid. Membership was not effective and no charges were assessed until the review was completed and the prospective customer clicked "I Agree." Ibid.

As with the Skuse Court much more recently, the Caspi court considered the substance of the clause at issue first, and the policy reasons offered in support of its enforcement as a contract term, concluding that there was no impediment in either of those categories precluding that the clause be enforced. Id. at 123-24. The court then took to an examination of the mode of presentation of the clause, ultimately concluding that that presentation in an on-screen fashion, capable of review by the prospective customer if the customer were so inclined to invest the time, was substantially the same as review of a paper document. Id. at 125-26.

This court's take away from the holding in Caspi, as cited approvingly in Skuse, is simple and unremarkable: electronic contracts, be they arbitration provisions or forum selection clauses, are not invalid merely because they are electronically transmitted or contained in an online or internet based medium.

In endorsing the Caspi holding, however, the Skuse Court qualified its approving citation to note that there could be an exception to enforcement of an electronic agreement if a disputed contract clause was "concealed." Skuse, 244 N.J. at 55-56, citing Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 611 (App. Div. 2011). In Hoffman, the appellate division was again faced with a question of enforcing a forum selection clause. Id. at 598. The plaintiffs in that case were purchasers of a nutrition supplement from an internet vendor and the claims sounded in fraud. Ibid. The court reversed the trial court's decision giving effect to

the clause and remanded the matter. Ibid. Central to the court's holding, as set forth at the very outset of its opinion, was its conclusion that the clause was "presumptively unenforceable" because the structure of the defendant's website was "unfair" as the clause at issue was "submerged" in such a way so as not to be readily apparent or easily accessible. Ibid.

In looking to its own decision in Caspi for guidance as to how to address the presentation of the clause to the Hoffman plaintiffs, the court discussed the "critical consideration" of "whether or not the plaintiff was provided with fair notice of the forum selection clause." Id. at 607. Citing its opinion in Caspi, the court restated the standard for such a determination. "If a forum selection clause is clear in its purport and has been presented to the party to be bound in a *fair and forthright* fashion, no consumer fraud policies or principles have been violated." Ibid., citing Caspi, 323 N.J. Super. at 124 (emphasis in original).

The court then explained how its application of the quoted standard of review to the facts in Caspi yielded the outcome that it did. Hoffman, 419 N.J. Super. at 607. The court observed, as Caspi had held, that in that case there was "nothing extraordinary about the size or placement of the forum selection clause text," Ibid., and that the clause was "presented in exactly the same format as most other provisions of the contract." Id. at 608. These circumstances of placement, explained the court, satisfied it when deciding Caspi "that nothing about *the style or mode of*

presentation or the placement of the provision...was proffered *unfairly or with a design to conceal or de-emphasize its provisions.*" Ibid., citing Caspi, 323 N.J. Super. at 125-26 (emphasis added in Hoffman).

Turning back to the facts of the case before it, Judge Sabatino, writing for the Hoffman court, looked to "an instructive contrast" to the Caspi holding, citing Specht v. Netscape Communications Corp., where the United States Court of Appeals for the Second Circuit had invalidated an online arbitration clause. Hoffman, 419 N.J. Super. at 608. In Specht, the court was called upon to consider the application of California law to the enforceability of an arbitration provision contained within the defendant's licensing agreement. Specht v. Netscape Comm'ns Corp., 306 F.3d 17 (2d Cir. 2002). The court held that the mandatory arbitration was "unenforceable because the plaintiffs had not been provided with reasonable existence of its notice." Hoffman, 419 N.J. Super. at 609, citing Specht, 306 F.3d at 31-32.

In considering the applicability of Specht to the case before it, Hoffman stated that New Jersey, like California, required "reasonable notice as a predicate to enforceability" of the arbitration provision and agreed with the rationale expressed by Specht that "*reasonably conspicuous notice* of the existence of the contract terms and *unambiguous manifestation* of assent to those terms by consumers are *essential*

if electronic bargaining is to have integrity and credibility." Hoffman, 419 N.J. Super. at 609, citing Specht, 306 F.3d at 35 (emphasis added in Hoffman).

In Specht, the arbitration provision at issue was "submerged." Specht, 306 F.3d at 31-32. This is described as a form of placement that would not be seen by a user unless the user scrolled further down the webpage beyond the verbiage shown on the screen where the user would then come upon it. Ibid. The Specht court specifically rejected the argument that since a user could have come upon the provision simply by scrolling through the screen to points below, a reasonable user should have done so. Hoffman, 419 N.J. Super. at 609-610. Hoffman embraced this logic, and proceeded to assess the placement of the clause in that case "under these fundamental standards of reasonable notice" noting, as it had said in Caspi, that "the issue of reasonable notice...is a question of law for the court to determine." Id. at 611.

Having laid out the roadmap of precedent to which the court was looking, both its own and that of the federal courts, Judge Sabatino made short order of the defendants' arguments that the trial court's decision should be upheld and the contract provision enforced. Concluding that the defendants had provided "nothing" that could contradict the plaintiffs' arguments regarding the "submerged" nature of the clause, the Hoffman court held the clause to be unenforceable. Id. at 612. Finding that the clause was "unreasonably masked," disapproving of "its circuitous mode of

presentation," and determining that, as such, it was "unlikely that consumers would ever see it at all on their computer screen," the court ruled the provision was, as stated at the outset, "presumptively unenforceable." Id. at 611-12.

It is within the realm between Caspi and Hoffman where the question presented by this case resides and it is against that dichotomy, mindful not of substance but of method of presentation, that this question must be decided.

IV

From this recitation of authority, precedential and persuasive, the enduring refrain that emerges is that a contract provision "cannot be proffered unfairly with a design to conceal or de-emphasize its provisions." Caspi, 323 N.J. Super. at 126. To do so is fatal to its enforceability. Thus, the only question to be answered on this motion is whether or not the arbitration clause presented here was done so "unfairly" or "with a design to conceal or de-emphasize its provisions." The court holds that it was.[11]

A category of electronic presentation not present in the facts of Caspi or Hoffman, but acknowledged by Hoffman and Skuse as a relevant category in general when considering electronic communications and the placement therein of

[11] In so holding, the court does not rule that "design" as used here should be construed, on this record, to suggest, an intent, a plan, or a state of mind. Rather the use of the word "design" in this context, at least for present purposes, is taken to mean arrangement, or format, or layout.

arbitration and forum selection clauses, is the "clickwrap agreement."[12] In Hoffman, the court cited a series of cases (none from New Jersey) that had addressed other forms of electronic communications in which arbitration and forum selection clauses had been at issue. Hoffman, 419 N.J. Super. at 610. The opinion described a "clickwrap agreement" as one "in which the consumer manifests his or her assent by clicking an icon displayed on the screen." Ibid. Elsewhere in the opinion, Hoffman, which was decided in 2011, noted that case law was "divided" as to the broad enforceability of such agreements and whether particular features of a "clickwrap" made it more or less enforceable. Id. at 612. Hoffman avoided reaching the issue of "clickwrap" enforceability in part because it was not directly implicated in the case but also because it was able to base its decision "on more fundamental grounds: the absence of reasonable notice to consumers and the manifestly unfair manner in which defendants' website was structured." Ibid. For the reasons explained, the court finds that conclusion, the holding that flowed from it, and all of its logical underpinning, are applicable to the fact pattern presented here in all respects.

This court does not hold that "clickwrap agreements" are unenforceable. That question need not be answered because the case at bar presents a more obvious and

[12] In Skuse, the majority commented on "clickwrap agreements" in footnote 2 of its opinion neither expressly approving of them nor disapproving. 244 N.J. at 55, n.2. No New Jersey case law was cited as having addressed "clickwrap agreements" and none could be found by this court.

less trailblazing path to disposition, one guided by the well settled principles of fundamental fairness laid out so thoughtfully in Hoffman. To be clear, the court rules here that this particular arbitration provision cannot be enforced not because it is part of a "clickwrap agreement," but because its placement, within a lengthy electronic document reached only by a hyperlink, which was accessible only adjacent to a signature line, which signature line followed a lengthy list of rules and disclaimers contained on an extended series of screens through which the user was required to scroll, was not under any fair analysis placed in such a way so as to give the plaintiff notice that there was more to consider in agreeing to the defendants' membership rules.

The unfairness in the presentation of the arbitration provision and forum selection clause moots the question of the quality of their drafting. The presentation of the agreement is a threshold matter, notwithstanding the qualitative features of the agreement. Thus, the court need not reach the question of whether the contract provisions are compliant in substance with New Jersey law because, as a matter of form, i.e. mode of presentation, the contract cannot be enforced.

V

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. Recent case law makes that point clear. See Skuse, 244 N.J. at 54,

citing Skuse v. Pfizer, Inc., 457 N.J. Super. 539 (App. Div. 2019), and quoting Riverside Chiropractic Group, 404 N.J. Super. at 238. That argument, however, oversimplifies what happened here. While it is undisputed that plaintiff did not read the electronic agreement reachable only by hyperlink, that is attributable, in this court's opinion, not to laziness, disinterest, or blithe indifference, but rather to an objectively confusing, nay misleading, design of the website. As a result, plaintiff's ignorance of the document's terms cannot fairly be ascribed to anything she did wrong.

Similarly, the delegation argument is a red herring. Allowing an arbitrator to resolve the questions presented by this motion would turn the court's analysis and the cited precedent upside down. It would make no sense to hold, as this court has, that the mode of presentation of an arbitration clause is legally defective but then nevertheless yield the decision of arbitrability or enforcement of the forum selection clause to an arbitrator.

The essential problem here is, as stated, the equivocal presentation of the terms of membership. By prominently displaying some, but not all, of the terms of membership in the "General Consent" (which itself is hardly a paragon of forthrightness) MEF has put itself at a consequential disadvantage. A member is bound 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 access

by hyperlink is not per se a problem, the combination of the two sets of rules, 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 that there were more rules, is at best ambiguous and at worst deceptive.

Having scrolled through pages of somber and serious rules expressed in strong language and in bold and capitalized text throughout the "General Consent" sections one and two, it is unfair to expect that a user would not understand her signature thereunder, and adjacent check box affirmation, to relate to those very rules and nothing else. There is no "see more" or "read on" or "additional material you must review" notation of any kind; there is no hint that what one sees is only part of the terms of membership. The labeling and titling only lend further confusion as does the repeated instruction in the midst of it all, as described earlier, to "Please read and review in full to sign below."

To countenance the existing configuration, which does not provide fair notice to the user that she must do more than agree to the rules and terms already displayed to her, would be to endorse a paradigm of assent that falls far short of the standard of fairness set forth by the Hoffman court.

Admittedly the hyperlink is entitled "Terms of Use Agreement" and the on-screen document is entitled "General Consent" but the court is not of the mind that

is a difference with a distinction for extant purposes. For one, the 10 page document to which the user is transported by hyperlink if clicked is not itself entitled "Terms of Use Agreement" but "Terms and Conditions" (despite an internal reference to calling it "Terms of Use Agreement"); moreover, the placement of the signature line and check box are at a point well past where the user could see the title of the on-screen document just scrolled through (the "General Consent") such that the user could reasonably think that, in checking the box and signing her name, she was agreeing to the only mandatory terms of membership to which she would be bound.

In having carefully reviewed the exemplar provided, the court cannot conclude that the user was presented with the arbitration or the forum selection clause in a fair and forthright manner as required by law. MEF's motion is denied.