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Court of Appeal, Sixth District, California.

Jane DOE #1 (I.G.), Plaintiff and Respondent,
v.
MASSAGE ENVY FRANCHISING, LLC, et al., Defendants and Appellants.

H050069
|
Filed December 20, 2023

(Santa Clara County Super. Ct. No. 21CV382912)

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Opinion

LIE, J.

***1** Plaintiff Jane Doe #1 (I.G.) alleges that she was sexually assaulted by a massage therapist at a location franchised by Defendants Massage Envy Franchising, LLC, and ME SPE Franchising, LLC, (collectively, Massage Envy) and operated by Chaoju Investment, LLC. Contending that Doe accepted an arbitration agreement while using its website to create an online profile for scheduling a massage and again while checking in at the franchised location, Massage Envy moved to compel arbitration. Because the agreement Doe accepted in creating her online scheduling profile was a valid "clickwrap" agreement that included an agreement to arbitrate, we reverse the trial court's denial of the motion to compel.

I. BACKGROUND

Massage Envy is a franchisor that licenses a name, trademark, and standardized business operations. Massage Envy maintains a website, through which it allows customers to book appointments for massage services at independently owned and operated franchise locations.

To use Massage Envy's online booking service, customers must create an online user profile. On a single page titled "CREATE YOUR ONLINE SCHEDULING PROFILE," there are fields for the customer's first name, last name, email address, phone number, and for the creation of a password. Below that field, there is a check box to the left of text reading "I agree and assent to the Terms of Use Agreement." The words "I agree and assent to the" are in black and the words "Terms of Use Agreement" are a slightly different shade of purple. The words "Terms of Use Agreement" are a hyperlink, which if clicked will redirect the customer to that agreement. The box must be checked for a user to create a profile. However, a customer need not access the agreement to check the box or create a profile. [1] Below that line, there is a larger purple box with the words "CREATE PROFILE" in white. Below that, the text "Already have an account? Log in Here" appears. "Already have an account?" is written in black. "Log in Here" is written in purple.

When printed, the Terms of Use Agreement runs for more than 11 pages. Although the first page indicates that the agreement includes an arbitration provision, the arbitration provision appears on the fourth page and extends to the seventh page. As to scope, the arbitration agreement provides, "This Binding Individual Arbitration Section governs all Disputes between you and any ME Entity. The term 'Disputes' is to be given the broadest possible meaning that will be enforced and means any dispute, claim, or controversy of any kind between you and any of the ME Entities that arise out of or in any way relate to (1) your access to the Website and/or the Application(s); (2) your use of the Website and/or the Application(s); (3) the provision of content, services, and/or products on or through the Website, the Application(s) and/or the Service; (4) any product or service provided by or purchased from an independently owned and operated Massage Envy® franchised location; and/or (5) this Agreement, including the validity, enforceability or scope of this Binding Individual Arbitration Section (with the exception of the Class Action Waiver clause below), whether based in contract, statute, regulation, ordinance, tort (including, but not limited to, fraud, misrepresentation, fraudulent inducement, or negligence), or any other legal or equitable theory. The term 'Disputes' includes claims that arose or accrued before you assented to this Agreement." (Boldface omitted.)

***2** According to Massage Envy's business records, Doe clicked the box agreeing and assenting to the Terms of Use Agreement and created an online profile on April 28, 2019. [2] According to a declaration Doe filed in opposition to the motion to compel arbitration, she never saw, reviewed, or read the Terms of Use Agreement until being shown a copy by her attorney during this litigation.

On June 12, 2019, while Doe was checking in for a massage at a franchised location in San Jose, she completed a digital "Wellness Agreement" on a tablet given to her by staff. The Wellness Agreement was between Doe and the franchised location and did not contain an arbitration agreement. At the end of the Wellness Agreement, which followed several pages soliciting information about treatment instructions, Doe was presented with a checkbox adjacent to the text "I Agree and assent to the Terms of Use Agreement," presented in the same way as it had been on the profile creation screen and linking to the same Terms of Use Agreement. The check-in process was generally rushed and required Doe to provide treatment instructions for the therapist. Reading Doe's uncontradicted declaration in the context of Massage Envy's uncontradicted business records, Doe quickly completed the form, including checking the box, without realizing that the text "Terms of Use Agreement" was a hyperlink.

Doe declares that, on January 26, 2020, she was sexually assaulted during a massage at the San Jose franchised location. Doe filed the present lawsuit asserting claims against Massage Envy and Chaoju Investment arising out of the sexual assault.

Massage Envy moved to compel arbitration. Massage Envy contended that Doe accepted an arbitration agreement in the Terms of Use Agreement when she created her profile in April 2019. In a footnote to its argument, Massage Envy stated that Doe had accepted the same Terms of Use Agreement a second time when she completed the digital Wellness Agreement at a franchised location. An accompanying declaration sworn by attorney Justin Cryder focused principally on the April 2019 profile creation process, although Cryder also asserted that Doe "assented to the Terms of Use Agreement a second time while signing a digital Wellness Agreement during a visit to [a franchised location] on June 12, 2019."

Doe's opposition to the motion focused on the June 2019 Wellness Agreement, without addressing Massage Envy's contentions relating to her April 2019 creation of a profile on its website. Doe submitted a declaration in support of her opposition which, like the opposition brief, skipped past issues relating to the April 2019 profile creation. Moreover, Doe's declaration misstated the contents of Cryder's declaration: (1) Doe described Exhibit A to the Cryder declaration as "screenshots of [her] purported interaction with the tablet [she] was given by staff at the Massage Envy [franchised location] in San Jose[,]" but Exhibit A to the Cryder declaration was a single screenshot of the profile creation screen—Cryder did not attach the screenshots of her purported interaction with the tablet to his declaration at all; (2) Doe described paragraph 10 of the Cryder declaration as "indicat[ing]" that she assented to the Terms of Use Agreement on a tablet while checking in for an appointment, but paragraph 10 of the Cryder declaration expressly addressed the "profile creation process" to access appointment scheduling services rather than the check-in process at a franchised location; and (3) Doe repeatedly described Exhibit B to the Cryder declaration as the Terms of Use Agreement, but the Terms of Use Agreement was Exhibit C.

***3** Noting the mismatch between Massage Envy's arguments and Doe's responses together with the inaccuracies in Doe's declaration, Massage Envy argued in reply that: "[Doe's] irrelevant, extended discussion of having provided her assent via an iPad with longer intake forms ... appears to have been largely copied and pasted from a brief submitted by [Doe's] counsel in a separate matter in which that separate plaintiff provided her assent through the iPad check-in process as opposed to through [Massage Envy's] website." [3]

The trial court denied Massage Envy's motion, ruling that a reasonable person in Doe's position would not have understood that she was entering a contract with an arbitration provision with Massage Envy. The trial court's analysis, like Doe's opposition, focused on the completion of the Wellness Agreement during the on-site check-in process.

Massage Envy timely appealed.

II. DISCUSSION

Based on the uncontradicted evidence presented in the trial court, Doe expressly assented to Massage Envy's Terms of Use Agreement when she created a profile on Massage Envy's website to access its scheduling service and affirmatively indicated her acceptance of the agreement, the terms of which included an arbitration clause. Because the arbitration agreement contains a clear and unmistakable delegation clause, Doe's unconscionability and scoping arguments are properly directed to the arbitrator. Accordingly, the trial court should have granted the motion to compel arbitration.

A. *Standard of Review*

" ' "There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard is employed." ' " (*Chambers v. Crown Asset Management, LLC* (2021) 71 Cal.App.5th 583, 591.)

"The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability. [Citation.] Where, as here, the evidence is

not in conflict, we review the trial court's denial of arbitration de novo." (*Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); see also *Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1196; *Massage Envy, supra*, 87 Cal.App.5th at p. 31 ["Where the facts are not in dispute and the trial court has denied a petition to compel arbitration based on its determination that there is no agreement to arbitrate, our review is de novo"]; *B.D. v. Blizzard Entertainment, Inc.* (2022) 76 Cal.App.5th 931, 949 (*B.D.*).)

At oral argument, Doe contended that the trial court's ruling depended on the resolution of a conflict between Massage Envy's evidence that Doe assented to the Terms of Use Agreement in creating a profile on its website and Doe's declaration that she could not recall creating such a profile.[4] But Doe misreads her own declaration: she did not make the statement she now attributes to herself. The only statement she made that could indirectly relate to her creation of a profile on Massage Envy's website was that she did not "see[ ], review[ ], or read the Terms of Use Agreement" until her attorney provided her a copy of the declaration Massage Envy filed with its moving papers. But Massage Envy did not adduce or rely on evidence that Doe actually saw, reviewed, or relied on the Terms of Use Agreement, only that she could have accessed the agreement by clicking a hyperlink before she manifested her assent to those terms and created an account on Massage Envy's website. If Doe wished to dispute these facts, she had the opportunity to do so in her own declaration.[5] Because she did not, there is no evidentiary conflict. Accordingly, we review de novo. (*Pinnacle, supra*, 55 Cal.4th at p. 236; see also *Barrera v. Apple American Group LLC* (2023) 95 Cal.App.5th 63, 77, fn. 4.)

B. *Mutual Assent*

***4** Massage Envy argues that Doe assented to the Terms of Use Agreement twice, first when she created a profile on Massage Envy's website and second when she completed the Wellness Agreement on the tablet at the franchised location. In her briefing, Doe ignored the former argument, responding only to the latter. As we will explain, Doe assented to Massage Envy's Terms of Use Agreement when she created a profile on Massage Envy's website.

We apply California law in deciding whether the parties have an agreement to arbitrate. (*Massage Envy, supra*, 87 Cal.App.5th at p. 30.)[6] " ' "Under 'both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate.' " ' [Citations.] 'This threshold inquiry stems from the " 'basic premise that arbitration is consensual in nature.' " ' " (*B.D., supra*, 76 Cal.App.5th at pp. 942-943.)

" ' "[G]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." ' [Citation.] 'Mutual assent, or consent, of the parties "is essential to the existence of a contract" [citations], and "[c]onsent is not mutual, unless the parties all agree upon the same thing in the same sense" [citation]. "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, not their unexpressed intentions or understandings." ' " (*B.D., supra*, 76 Cal.App.5th at p. 943.)

" 'In the world of paper contracting, the outward manifestation of assent to the *same thing* by both parties is often readily established by the offeree's receipt of the physical contract.' [Citation.] 'By contrast, when transactions occur over the internet, there is no face-to-face contact and the consumer typically is not provided a physical copy of the contractual terms. In that context, and in the absence of actual notice, a manifestation of assent may be inferred from the consumer's actions on the website — including, for example, checking boxes and clicking button—but any such action must indicate the parties' assent to the *same thing*, which occurs only when the website puts the consumer on constructive notice of the contractual terms.' [Citations.] 'Thus, in order to establish mutual assent for the valid formation of an internet contract, a provider must first establish the contractual terms were presented to the consumer in a manner that made it apparent the consumer was assenting to those very terms when checking a box or clicking a button.' " (*B.D., supra*, 76 Cal.App.5th at pp. 943-944.)

" 'A "*clickwrap*" agreement is one in which an internet user accepts a website's terms of use by clicking an "I agree" or "I accept" button, with a link to the agreement readily available.' " (*Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 463 (*Sellers*); see also *B.D., supra*, 76 Cal.App.5th at pp. 944-945 (*B.D.*); *Long v. Provide Commerce, Inc.* (2016) 245 Cal.App.4th 855, 858,

862 (*Long*); *Nguyen v. Barnes & Noble, Inc.* (9th Cir. 2014) 763 F.3d 1171, 1175-1176.) California and federal courts generally find clickwrap agreements enforceable. (See *B.D., supra*, 76 Cal.App.5th 931, 946, quoting *Sellers, supra*, 73 Cal.App.5th at p. 466; see also *Oberstein v. Live Nation Entertainment* (9th Cir. 2023) 60 F.4th 505, 513 ["Courts routinely find clickwrap agreements enforceable"]; *Zachman v. Hudson Valley Federal Credit Union* (2d Cir. 2022) 49 F.4th 95, 103; but see *Massage Envy, supra*, 87 Cal.App.5th at pp. 32-33.) [7]

***5** Here, Doe assented to the Terms of Use Agreement when she created a profile on Massage Envy's website to use Massage Envy's appointment booking service. Doe created her profile on a single page. To create a profile, Doe had to click a box manifesting her assent to the Terms of Service Agreement, which were provided by a hyperlink in the text adjacent to the box, which was indicated by a different color and underlining. In short, there was a clear and straightforward process by which Doe, with ready access the full text of the Terms of Use Agreement, expressly manifested her assent.

As applied to Doe's creation of a profile to use Massage Envy's scheduling services through its website, *Massage Envy* does not help Doe. [8] There, the moving defendant relied exclusively on assent by way of the tablet-based check-in process at the franchised location. (*Massage Envy, supra*, 87 Cal.App.5th at p. 26.) The Court of Appeal rejected the analogy to clickwrap agreements because the in-person check-in process was "nothing like the typical transactions in which clickwrap agreements are used" and, in particular, the plaintiff "was not informed that she was signing up for a new service with [the franchisor] or setting up an account with [the franchisor]." (*Id.* at pp. 33, 35.) In the context of the tablet-based check-in process with the franchisee, "the statement that plaintiff was agreeing to terms of use appeared to refer to the terms that had already been presented to her over the course of several screens, and clicking the check-box appeared to be just an extra confirmation of her agreement before she signed the General Consent document. Having reviewed the General Consent, as instructed, plaintiff had no reason to look for any other agreement to review, and she was not on notice that clicking the check-box implicated any terms of agreement beyond those she had just reviewed. Particularly not any agreement with [the franchisor], in view of the fact that the 'General Consent' [was] clear that the agreement was *only* between plaintiff and the [franchise.]" (*Id.* at p. 34.) Here, in contrast, the Terms of Use Agreement was the only contract Massage Envy presented to Doe, on a single page and hyperlinked adjacent to the check box in which she manifested her assent, when she created a profile to access Massage Envy's appointment scheduling services through its website.

Doe's evidence that she did not, in fact, "see[ ], review[ ], or read" the Terms of Use Agreement is immaterial. " '[T]o establish mutual assent for the valid formation of an internet contract, a provider must first establish the contractual terms were presented to the consumer in a manner that made it apparent the consumer was assenting to those very terms when clicking a box or clicking on a button' " (*B.D., supra*, 76 Cal.App.5th at p. 944; see also *Sellers, supra*, 73 Cal.App.5th at pp. 461, 474)—not that the consumer actually read each provision (see *Long, supra*, 245 Cal.App.4th at p. 863 [validity of browsewrap agreement turns on inquiry notice]; see also *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 383 [that party either chose not to read or take the time to understand provisions setting forth arbitration agreement was "irrelevant"]; see also Rest., Consumer Contracts (Tent. Draft No. 2, June 2022) § 2, reporter's notes [explaining that although consumers rarely read standard contract terms no matter how those terms are disclosed, practical considerations support enforcement of such terms where consumers are given reasonable notice of the terms and a meaningful opportunity to review them]).

***6** This does not mean that consumers have no protection against overreaching contract terms—"the rules that strike down unconscionable terms and other standard contract terms that undermine the consumers' benefit of the bargain" provide the primary protection against unfairness. (Rest., Consumer Contracts (Tent. Draft No. 2, *supra*) § 2, com. 14; see also *Mills v. Facility Solutions Group, Inc.* (2022) 84 Cal.App.5th 1035, 1050 [" 'A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party.' "].) Having determined that there was mutual assent, we turn to the delegation clause to assess whether the scope of the arbitration agreement in relation to Doe's claims and whether the agreement is unconscionable are within our purview.

C. *Delegation*

Because the trial court ruled that there was no arbitration agreement between the parties, it went no further.[9] Massage Envy asks us to direct the trial court to enforce the delegation clause in the arbitration agreement so as to require the arbitrator to decide whether Doe's claims in this litigation are within the scope of the arbitration agreement and whether, as Doe contends, the arbitration is unconscionable. Doe contends that we should decide the scoping and unconscionability issues (in her favor) and affirm the trial court's ruling on either basis, rather than compel those issues to arbitration. We conclude that the delegation clause is enforceable and reserves for the arbitrator whether the arbitration agreement is unconscionable and whether Doe's claim is within its scope.

" '[P]arties may agree to have an arbitrator decide not only the merits of a particular dispute but also " 'gateway' questions of 'arbitrability,' such as whether ... their agreement covers a particular controversy." ' (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. ___, 139 S.Ct. 524, 529 [(*Henry Schein*)] ....) But '[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]' evidence that they did so.' " (*Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 772 (*Mendoza*).) " 'But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.' (*Henry Schein*, at p. 530.)" (*Trinity v. Life Ins. Co. of North America* (2022) 78 Cal.App.5th 1111, 1122.) "[I]n the absence of a *specific* challenge to the delegation clause (as opposed to challenges to the entirety of the arbitration agreement), we may only determine whether [the arbitration agreement] was entered into." (*Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 889 (*Najarro*).)

Here, section 5 of the Terms of Use Agreement—titled "BINDING INDIVIDUAL ARBITRATION"—is followed by an advisement that the section "MAY SIGNIFICANTLY AFFECT YOUR RIGHTS[.]" (Boldface omitted.) The next paragraph provides that the arbitration agreement "governs all Disputes between you and any ME Entity,"[10] that " 'Disputes' is to be given the broadest possible meaning that will be enforced" and "includ[es] the validity, enforceability, or scope of this [arbitration provision] ...." (Boldface omitted.)

***7** By its plain terms, the arbitration agreement here clearly and unmistakably delegates disputes concerning "the validity, enforceability or scope" of the arbitration agreement to the arbitrator. (See *Najarro, supra*, 70 Cal.App.5th at p. 888 [provision that, as relevant here, " 'the arbitrator shall have the exclusive power to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this [a]greement' " constituted a "clear and unmistakable" delegation clause]; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242 (*Tiri*) [agreement providing that the " 'Arbitrator, not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement' " was "clear and unmistakable" delegation clause].)

Doe argues only that the delegation clause here is not clear and unmistakable because the court in *Dennison v. Rosland Capital LLC* (2020) 47 Cal.App.5th 204 (*Dennison*) found the "same language" insufficient. But Doe misreads *Dennison*. The arbitration agreement in *Dennison* lacked clarity due to an apparent internal contradiction: although the delegation provision purported to delegate to the arbitrator " '*the determination of the scope or applicability of [the] agreement to arbitrate*[,]' " a separate severability provision assumed that " '*a court of competent jurisdiction*' " could determine that provisions of the arbitration agreement were " '*void, invalid, or unenforceable*[.]' " (*Dennison, supra*, 47 Cal.App.5th at p. 209.) *Dennison* is one of several cases holding that where an arbitration agreement contains a severability clause that is in apparent tension with the delegation clause, the agreement does not clearly and unmistakably delegate arbitrability to the arbitrator. (*Id.* at pp. 209-210; see also *Najarro, supra*, 70 Cal.App.5th at p. 880.) But the arbitration agreement here presents no similar issue.

Doe raises several unconscionability arguments, all directed to the unconscionability of the arbitration agreement as a whole and not the delegation clause in particular. Doe argues that even if the delegation clause clearly and unmistakably delegates arbitrability, we may reach her unconscionability arguments because the delegation clause is unconscionable for the same reasons that the arbitration agreement as a whole is unconscionable, including because the contract is adhesive. (See *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1289 [a contract of adhesion is a standardized contract imposed and drafted by the party of superior bargaining strength on a take-it-or-leave-it basis].) Whether a contract term is so fundamentally unfair or unreasonably one-sided that it is unconscionable requires evaluation of both the procedure by which the term was adopted as well as its

substance. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125-137 (*OTO*); see also Rest., Consumer Contracts (Tent. Draft No. 2, *supra*), § 6, com. 2 [noting that the unconscionability doctrine applies a "sliding-scale approach"].) The use of standardized terms presented " 'on a take-it-or-leave-it basis' " and the difficulty in understanding those terms—while not preventing the formation of mutual assent—are factors to be considered in assessing the procedural aspect of unconscionability. (*OTO, supra*, 8 Cal.5th at p. 126.) Substantive unconscionability, in turn, "examines the fairness of the contracts terms" to assess whether that are " ' "unreasonably more favorable to the more powerful party." ' " (*Id.* at pp. 129-130.) "Unconscionable terms" may include "unreasonably or unexpectedly harsh terms regarding ... central aspects of the transaction[ ] and terms that undermine the nondrafting parties' reasonable expectations." (*Id.* at p. 130.) Given the unambiguous delegation clause and the absence of any challenge directed specifically thereto, we express no opinion on the procedural or substantive unconscionability of the arbitration agreement as a whole. We hold only that Doe's general unconscionability arguments are properly left for the arbitrator. (See *Nickson v. Shemran, Inc.* (2023) 90 Cal.App.5th 121, 132; *Najarro, supra*, 70 Cal.App.5th at p. 889; *Tiri, supra*, 226 Cal.App.4th at p. 240; see also *Mendoza, supra*, 75 Cal.App.5th at p. 767.)

***8** Similarly, it is for the arbitrator to evaluate Doe's contention that her substantive claims in this litigation, arising as they do from an alleged sexual assault at a franchised massage location during the provision of massage services, [11] are beyond the scope of the arbitration provision in the Terms of Use Agreement she accepted to use the appointment scheduling service on Massage Envy's website. (See *Henry Schein, supra*, 139 S.Ct. at p. 527 [parties may delegate question of whether arbitration agreement applies to a particular dispute to an arbitrator].) We therefore do not reach Doe's arguments pertaining to scoping and unconscionability.

III. DISPOSITION

The order denying Massage Envy's motion to compel arbitration is reversed. Massage Envy shall recover its costs on appeal.

Bromberg, J., concurring.

I agree that the judgment should be reversed and that the motion to compel arbitration should be granted. I write separately to emphasize the importance of the fact that the arbitration provision in that agreement concerned a secondary aspect of plaintiff Doe's relationship with defendant Massage Envy Franchising, LLC (MEF). As a result, even if she did not understand or assent to the arbitration provision, Doe may have formed a binding contract with MEF. However, where a consumer has not understood or assented to a provision, that provision should be carefully scrutinized under the unconscionability doctrine and other protections against unfairness and overreaching.

The trial court found that there was "no meeting of the minds that the claims at issue (sexual assault, etc.) would be subject to arbitration" and that "[a] reasonable person in Plaintiff's position would not understand that she assented to an arbitration provision with Defendant in the Terms of Use Agreement ...." The court had ample grounds for this finding. Doe stated in a declaration that she never read or even saw the Terms of Use Agreement and that she never intended to agree to arbitrate claims against MEF. And while MEF presented evidence that Doe clicked the button to indicate that she agreed to the Terms of Use Agreement, it presented no evidence that she clicked on the hyperlink to the terms, much less reviewed and understood them.

In addition, a reasonable consumer might have been surprised to learn that the Terms of Use Agreement required arbitration of the sexual assault claims in this case. The MEF website merely provides an online booking service. Consequently, a reasonable consumer would not have expected the terms for using the service to require arbitration of claims for sexual assault arising out of massages at MEF franchisees whether or not scheduled through the service.

Indeed, even if a consumer were to review all 12 pages of the Terms of Use Agreement, it is unclear that he or she would have understood the agreement's arbitration provision to cover the sexual assault claims brought here. The arbitration provision is three-pages long, and the scope of the provision is described in a 15 line sentence that is, to put it kindly, difficult to digest: "The

term 'Disputes' is to be given the broadest possible meaning that will be enforced and means any dispute, claim, or controversy of any kind between you and any of the ME Entities that arise out of or in any way relate to (1) your access to the Website and/or the Application(s); (2) your use of the Website and/or Application(s); (3) the provisions of content, services, and/or products on or through the Website, the Application(s) and/or the Service; (4) any product or service provided by or purchased from an independently owned and operated Massage Envy® franchised location; and/or (5) this Agreement, including the validity, enforceability or scope of this Binding Individual Arbitration Section (with the exception of the Class Action Waiver clause below), whether based in contract, statute, regulation, ordinance, tort (including, but not limited to, fraud, misrepresentation, fraudulent inducement, or negligence), or any other legal or equitable theory."

***9** Only the most assiduous lawyer could be expected to wade through this sentence and recognize that, while the first three parts of it concerns matters relating to MEF and "the Website," "the Application," and "this Agreement" the fourth part extends to any and all services provided by MEF *franchisees.*

It is also unclear whether sexual assault claims "arise out of or in any way relate to" such services. At least one trial court interpreting the arbitration provision in MEF's Terms of Use Agreement has concluded that they do not. (*Doe v. Massage Envy Franchising LLC* 87 Cal.App.5th 23, 30 [noting trial court's determination that "the claims asserted against MEF were not within the scope of the arbitration provision in the Terms and Conditions"].) While MEF represented at oral argument that another court found otherwise, it offered no reason why reasonable consumers would understand the arbitration provision that way. Consequently, as the trial court found, even a reasonable person who read the Terms of Use Agreement might not have understood the arbitration provision in it to cover sexual assault claims.

It does not follow, however, that no contract was formed. While a meeting of minds is needed to form a contract (see, e.g., *Cheema v. L.S. Trucking, Inc.* (2019) 39 Cal.App.5th 1142, 1149), that meeting need not cover all terms of a contract. To the contrary, to form a contract, a meeting of minds need only be upon " 'the essential features' " of the agreement. (*Ibid.*; see also *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 359 ["the failure to reach a meeting of minds on all material points prevents the formation of a contract"].) The meeting of minds need not extend to ancillary or secondary terms contained in the "fine print," the standard terms included at the end of the agreement. Indeed, as the most recent draft of the new Restatement of the Law of Consumer Contracts recognizes, "credible empirical evidence, as well as common sense and experience, suggests that consumers rarely read standard contract terms no matter how those terms are disclosed. [Citations.]" (Rest., Consumer Contracts (Tent. Draft No. 2, June 2022) § 2, reporter's notes.) As a consequence, "[i]nformed consent to the standard contract terms is, by and large, absent in the typical consumer contract." (*Ibid.*)

Nonetheless, standardized contract terms are routinely enforced as long as certain minimum requirements are met because standardized terms are both efficient and beneficial. (Rest., Consumer Contracts (Tent. Draft No. 2, *supra*) § 2, reporter's notes.) If consumers had to read, understand, and decide whether to assent to every term in a typical consumer contract, sales would take much longer to complete; indeed, rather than putting in the required time and effort, many consumers probably would decide to forgo many otherwise beneficial purchases. And if sellers were not to include standardized terms, there would be significant uncertainty whenever an issue not covered by a contract's core terms arises, and parties would have to negotiate or litigate the proper term, which would be inefficient and costly. As a consequence, standardized contract terms "support[ ] efficient production and distribution, resulting in lower prices and lower transaction costs, and the introduction of new forms [and] products," and therefore courts routinely enforce them "even in the absence of informed consent to those terms" as long as certain minimum requirements are met. (*Ibid.*)

***10** In fact, as the majority points out, courts in this state have held that " 'inquiry notice' " provides sufficient notice of secondary, standardized terms. (See *Long v. Provide Commerce, Inc.* (2016) 245 Cal.App.4th 855, 863 ["absent actual notice, 'the validity of [a] browsewrap agreement turns on whether the website puts a reasonably prudent user on *inquiry notice* of the terms of the contract,' " italics added]; see also *B.D. v. Blizzard Entertainment, Inc.* (2022) 76 Cal.App.5th 931, 944 [" 'in the absence of actual notice, a manifestation of assent may be inferred ... when the website puts the consumer on constructive notice of the contractual claims.' "].) Here, MEF's website provided such notice by requiring Doe to click on button indicating

that she agreed to the Terms of Use Agreement and providing a clear hyperlink to the agreement giving her the opportunity to review the terms. As a consequence, even though there is no evidence of a meeting of minds over the arbitration provision in the agreement, and a reasonable consumer might not have understood it to extend to the sexual assault claims here, a binding contract was formed.

In such situations, however, the absence of informed consent creates a significant danger of unfairness and overreaching. Consequently, as the Restatement recognizes, "[i]f, despite reasonably communicated disclosures, consumers are not expected to scrutinize the legal terms up front, courts should scrutinize them ex post" and "uproot terms that are so one-sided that they would be unlikely to survive in an environment of meaningful assent or that peel off the value that consumers bargained for." (Rest., Consumer Contracts (Tent. Draft No. 2, *supra*) § 2, com. 14.) Accordingly, unconscionability and other doctrines protecting against one-sided and unfair contract terms should be carefully applied to non-core standardized terms to which consumers did not assent and may not be expected to have understood. (*Ibid.*)

There appears to be a substantial unconscionability question here. In determining whether a contract term is unconscionable, courts apply a "slidingscale" approach considering the procedure by which the term was adopted as well as its substantive fairness. (*Armendariz v. Foundation Health Psychcare Serv., Inc.* (2000) 24 Cal.4th 83, 114.) Here, there are several indicia of procedural unconscionability, including the absence of meaningful choice concerning a term that another party has drafted and the potential for unfair surprise from the unexpected extension of the Term of Use Agreement's arbitration provision to sexual assault claim here. (*Id.* at p. 113.) There are also indicia of substantive unconscionability, including the agreement's limitation of liability provision, which states that MEF "shall not be liable for any damages whatsoever." (*Id.* at p. 121; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 825.)

Here, such issues should be considered by the arbitrator because, as the majority finds, the agreement's arbitration provision clearly delegates to the arbitrator questions concerning the scope and validity of the arbitration provision. As a consequence, if the trial court finds the arbitration provision in the Terms of Use Agreement applicable, it will be up to the arbitrator to provide the careful ex post scrutiny demanded where a party seeks to enforce a secondary term to which a consumer may not have assented and about which the consumer may not even have been aware. Modern consumer transactions may require that binding contracts be formed with the click of a button, but that does not mean that consumers must be subjected to onerous and unfair terms to which they did not knowingly consent.

WE CONCUR:

GROVER, ACTING P.J.

BROMBERG, J.

All Citations

Not Reported in Cal.Rptr., 2023 WL 8801517

Footnotes

1 A user who does click the hyperlink would see, at the top of the agreement, a bolded and capitalized paragraph providing the reader with an "important notice" that the agreement contains a "binding arbitration provision and class action waiver" and encouraging the reader to "read it carefully because it affects your legal rights." (Boldface & capitalization omitted.)

2 Doe submitted a declaration stating that she "usually made appointments in advance" but did not address how she did so. Doe did not submit any evidence contradicting Massage Envy's contention that she created an online profile on April 28, 2019, in the manner described by Massage Envy to use Massage Envy's website to schedule appointments.

3 One firm representing Doe in this case also represented the plaintiff in *Doe v. Massage Envy Franchising, LLC* (2022) 87 Cal.App.5th 23, 31 (*Massage Envy*). In opposition to the motion to compel arbitration in this case, Doe attached as exhibits two declarations filed in the otherwise unrelated *Massage Envy* case. The screenshots of the iPad check-in process presented by Doe in this case on their face related to a franchised location operated by a non-party in "Mission Viejo."

4 In her briefing, Doe argued for substantial evidence review, without identifying any disputed facts. Rather, relying exclusively on *Massage Envy*, she contended that the trial court's ultimate determination that she did not assent to an arbitration agreement presents a question of fact rather than a question of law. Doe misreads *Massage Envy*, where the court reviewed de novo because the facts were undisputed.

5 Doe alternatively contended that she had no ability to dispute Massage Envy's showing because the trial court denied Massage Envy's motion before ruling on what Doe represented was her request to conduct discovery. But nothing in the record suggests that Doe requested an opportunity to conduct discovery in connection with the arbitration issue, alternatively or otherwise.

6 Although the Terms of Use Agreement contains an Arizona choice of law provision, the parties have briefed the issues relevant to this appeal under California law.

7 *B.D.* and *Sellers* identified four categories of online "-wrap" agreements: (1) clickwrap; (2) scrollwrap, which "is like a 'clickwrap,' but the user is presented with the entire agreement and must ... scroll to the bottom ... to find the 'I agree' or 'I accept' button[;]" (3) browsewrap, where " ' "an internet user accepts a website's terms of use merely by browsing the site[;]" ' " and (4) sign-in wrap, which " 'blend[s]' " attributes of browsewrap and clickwrap agreements by notifying the user that they are accepting terms of use by signing up for the service without requiring them to check a box indicating that they have read and accept the terms of use. (See *B.D., supra*, 76 Cal.App.5th at pp. 945-946, citing *Sellers, supra*, 73 Cal.App.5th at pp. 463-464.) Like clickwrap agreements, scrollwrap agreements are generally found enforceable. (*Id.* at p. 946, quoting *Sellers, supra*, 73 Cal.App.5th at p. 466.) Browsewrap agreements are generally found unenforceable. (*Ibid.*; see also *Oberstein, supra*, 60 F.4th at pp. 513, 517 [encouraging the use of clickwrap agreements to ensure that online agreements pass muster].)

8 On appeal as in the trial court, Doe did not in her briefing identify any deficiency in this initial manifestation of assent. She focused on whether she later manifested assent to the Terms of Use Agreement during the check-in process at the franchised location, and in that context relies heavily on *Massage Envy.* To the extent her counsel at oral argument asserted deficiencies that are unsupported by the record, these assertions do nothing to support her position.

9 Doe appears to suggest that the trial court resolved in her favor whether the claims at issue in this litigation are within the scope of the arbitration agreement but concedes that the trial court did not address whether the arbitration agreement is unconscionable. We do not read the trial court's order as addressing either issue.

10 ME Entity is defined in the Terms of Use Agreement as Massage Envy Franchising, LLC, and its past, present, or future affiliates or subsidiaries and various associated entities.

11 As Doe notes, in March 2022 President Joseph R. Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (9 U.S.C. § 400 et seq.). (See *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, 1230 (*Murrey*).) But Doe does not contend that the act applies to this case, filed in 2021: " 'This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.' (Pub.L. No. 117-90 (Mar. 3, 2022) 136 Stat. 26, § 3 ....)" (*Murrey, supra*, at p. 1235.)

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