**Motion Practice Complete Memorandum**

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

 Case Type: Other Civil

 Civil No. 11-25252

RUBY JONES,

Plaintiff,

 **DEFENDANT’S MEMORANDUM**

vs. **SUPPORTING**

**SUMMARY JUDGMENT**

WORLD TRANSFORMATIONAL TOURS, INC.,

Defendant.

**SUMMARY**

World Transformational Tours Inc., Defendant, respectfully submits the following memorandum of law in support of its Motion for Summary Judgment.

Plaintiff and Defendant agree that Plaintiff, a Ph.D. candidate in political science at the University of Minnesota, reviewed, accepted and signed an exculpatory clause relieving Defendant of liability for any losses, damages, or injuries sustained on the tour to Namibia that Plaintiff purchased from Defendant. Miller Aff. ¶ ¶ 3-5; *see also* Jones Aff. ¶ 13. Defendant presented this exculpatory clause to Plaintiff before she paid for the tour and offered her as much time as she wanted to review the clause.

Summary judgment is warranted based on the existence of a valid and enforceable exculpatory agreement between Plaintiff and Defendant. The exculpatory clause Plaintiff signed is not ambiguous or overbroad, and it did not purport to release Defendant from willful, wanton, intentional, or reckless behavior. Furthermore, the exculpatory clause does not contravene public policy because there was no disparity in bargaining power and the services offered were not public or essential in nature. Therefore, there is no issue of material fact regarding the exculpatory clause, the exculpatory clause should be upheld as a matter of law, and summary judgment in favor of Defendant should be granted.

**FACTS**

World Transformational Tours, Inc. is a Minnesota Corporation headquartered and doing business in the state of Minnesota since 1970 as a travel agency. Compl. ¶ 3. On July 27, 2011, Plaintiff visited Defendant’s office to make reservations for Defendant’s "Namibia Politics and Society Tour 2011." Compl. ¶ 7. The tour was unique. It included activities that would allow participants time to interact with Namibians from different political, economic, and social backgrounds. Jones Aff. ¶ 5. The tour appeared to be the only one of its kind offered by any Upper Midwest travel agency. *Id.*

Plaintiff met with Robert Miller, employee of Defendant, to discuss the particulars of the tour, including travel to and from Namibia. Jones Aff. ¶ 5. During the meeting, Plaintiff told Mr. Miller that she was a Ph.D. candidate at the University of Minnesota and that her doctoral dissertation committee had “highly recommended” she visit Namibia “to gain more knowledge of the political, economic, and social conditions in Namibia.” Jones Aff. ¶2. Plaintiff told Mr. Miller that this would be her first trip to that country, Miller Aff. ¶ 2, however, Mr. Miller could tell from World Transformational Tours company records that Plaintiff was an experienced traveler to countries posing risks to American travelers, having traveled to Ethiopia and Somalia in 1997 on another of Defendant's tours, Miller Aff. ¶ 6.

Plaintiff and Mr. Miller discussed Plaintiff’s security concerns, Compl. ¶ 8, including those related to the seven-hour layover in Nigeria, Compl. ¶ 11. Mr. Miller told Plaintiff that she "was probably safer in flying and going to Namibia then spending a week in New York City.” Miller Aff. ¶ 2. He then disclosed factual information regarding Defendant’s safety record, including that three prior customers had reported being robbed at gunpoint and that Defendant had "never lost a customer." *Id.* Finally, Mr. Miller told Plaintiff that there is “no telling what can happen anywhere in the world, nowadays." *Id.*

Following this conversation, Mr. Miller provided Plaintiff a sixteen-page brochure, which contained information relevant to the tour and travel arrangements. Compl. ¶ 8. The cover page of the brochure contained a statement that explained some of the extra steps Defendant travel agency has implemented in an effort to minimize travel-related risks to their customers. The precautions listed included carefully selecting guides and operators abroad, employing a former senior FBI agent to head its Consumer Safety and Security Division, and hiring security personnel to protect travelers when necessary. Jones Aff. Ex. A ¶ 1.

The exculpatory clause was printed on page fifteen of the brochure in ten-point font, Miller Aff. Ex. 5, at 2 ¶ 3, and was prepared by Defendant's attorneys, Miller Aff. ¶ 4. The clause specifically exculpated Defendant from liability for “injury, damage, loss, delay to person or property, additional expenses or inconvenience caused directly or indirectly by any Service Provider or by ‘*force majeure*’ or other events beyond the Travel Agency’s control, including, but not limited to war, civil disturbance,…Acts of God, [and] Acts of Government….” The agreement further provided that the “Travel Agency is not responsible for any acts beyond its control.” Miller Aff. Ex. 5, at 2 ¶ 4. Finally, the agreement relieved Defendant from liability for "dissatisfaction based on personal opinion… [and] any claims of negligence with respect to the operation and conduct of [the] tour." *Id.* ¶ 5.

The final two sentences of the exculpatory agreement warned of the dangers of traveling abroad and directed the reader to the United States Department of State travel warning website for additional country-specific information. Miller Aff. Ex. 5, at 2 ¶ 6. The brochure also contained an online copy of the May 17, 2011 United States Department of State Country Specific Information sheet on Namibia, but not Nigeria, Miller Aff. Ex. 4, according to Defendant’s policy to provide travel warnings and country conditions information only with respect to destination countries. Miller Aff. ¶ 2. The printout contained a URL directing the reader to the Department of State’s website. *Id.*

Mr. Miller told Plaintiff to take as much time as needed to review the brochure, even suggesting she take the brochure home. Miller Aff. ¶ 3. Plaintiff chose to review the packet in Defendant's office and spent thirty minutes reviewing the documents, including the exculpatory clause, before making a deposit and booking her reservation. *Id. ¶* 3. After reviewing the clause, Plaintiff asked why the layover in Nigeria was seven hours long. Compl. ¶ 11. Plaintiff did not ask any further questions about security or the exculpatory agreement, nor did she attempt to negotiate any terms of the contract or the travel itinerary, Miller Aff. ¶ 3.

On September 12, 2011, three days prior to Plaintiff’s scheduled departure, Defendant delivered a one-page addendum to the brochure to Plaintiff, Jones Aff. Ex. B, which Mr. Miller had forgotten to provide at the July 27 meeting, Miller Aff. ¶ 5. Plaintiff signed and returned the addendum. *Id.* Plaintiff alleges that she was too rushed to reread the brochure when she signed the form on September 12, 2011. According to the record, she did not attempt to discuss or negotiate any of the terms of the exculpatory agreement with Defendant before or after signing it. Jones Aff. ¶ 13.

Plaintiff sued Defendant on November 30, 2011 alleging that Defendant negligently failed to warn of the dangers of traveling to Namibia, and demanding judgment in an amount exceeding $50,000 for personal injuries sustained when her flight was unexpectedly hijacked by the Nigerian Resistance Army while on layover in Lagos, Nigeria. Compl. ¶ ¶ 13-16. Defendant answered, denying liability based on the exculpatory clause signed by Plaintiff. Answer ¶ 13. Defendant filed a Motion for Summary Judgment on February 14, 2012 on grounds that the disclaimer clause bars liability. Def.’s Mot. Summ. J. ¶ 1.

**ARGUMENT**

“Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn.R.Civ.P. 56.03; *Fabio v. Bellomo,* 504 N.W. 2d 758, 761 (Minn. 1993). *DHL, Inc. v. Russ,* 566 N.W.2d 60, 70 (Minn. 1997). To prevent summary judgment, the nonmoving party may not rely solely on unverified or conclusory allegations, but must establish specific facts that give rise to a genuine issue of material fact. *W.J.L. V. Bugge,* 573 N.W.2d 677,680 (Minn. 1998); *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

In this case, the law and facts demand summary judgment. There is no issue of material fact as to the existence of and agreement to the exculpatory clause. The exculpatory clause is enforceable as a matter of law because it is not ambiguous or overbroad and it does not attempt to exculpate Defendant from willful, wanton, intentional or reckless acts. Furthermore, the exculpatory clause does not contravene public policy because there was no disparity in bargaining power and the services provided were not public or essential in nature. Summary judgment must be granted.

**I. Summary judgment must be granted as a matter of law in favor of Defendant because Plaintiff signed an exculpatory clause relieving Defendant from liability for any losses, damages, or injuries and there is no issue of material fact.**

**A. Because both parties admit that the exculpatory clause was reviewed and signed by Plaintiff there is no issue of material fact.** Plaintiff does not assert any specific facts disputing the existence of the exculpatory clause. Plaintiff admits that she reviewed the clause and accepted its terms. Plaintiff also admits that she signed an acknowledgment of the clause before she began her travels.

**B. The exculpatory clause is enforceable as a matter of law even though it was not signed at the time it was initially reviewed.** Plaintiff contends that her agreement to the terms of the exculpatory clause should be invalidated because she was rushed when she signed the acknowledgment. The Minnesota Court of Appeals has held that exculpatory clauses may be enforced even when they are not part of a signed contract, or when they are received after part of the purchase price has been paid. *Powell v. Trans Global Tours Inc.,* 594 N.W.2d 252 (Minn. Ct. App. 1999) (citing *Wilson v. American Trans Air, Inc.*, 874 F.2d 386, 388 (7th Cir.1989) (upheld clause found “in the advertising newsletter that [the tour operator] distributed to potential customers,” no mention of contract or signature); *Connolly v. Samuelson,* 671 F.Supp. 1312, 1317 (D.Kan. 1987) (upheld clause in brochure; no mention of contract or signature); *McDermott v. Travellers Air Servs.,* 462 F.Supp. 1335, 1341 (M.D.Pa. 1978) (upheld clause in brochure that purchaser of trip did not read before he signed the booking form)).

The *Powell* court rejected the argument that "failure to sign a statement that the purchaser has read and agrees to the contract prior to purchase voids the exculpatory clause." *Powell,* 594 N.W.2d at 255. The persuasive authority cited by the court in *Powell* suggests that the court considers clauses presented as part of a brochure or not signed at all to be valid. Defendant provided Plaintiff with the clause before she paid any consideration and requested her signature several days before she departed. Defendant’s conduct was well within the boundaries set forth in the *Powell* court’s discussion. Thus, the clause is enforceable even though it was not signed the day Plaintiff initially reviewed the clause.

Additionally, Plaintiff points out that she has no legal training. Jones Aff. ¶ 13. However, none of the Minnesota authorities on validity of exculpatory clauses suggest that either party must be legally trained in order for the clause to be valid.

**II. The exculpatory clause signed by Plaintiff must be upheld as a matter of law because it is not ambiguous or overbroad, it does not purport to release the Defendant from liability for intentional, willful, reckless, or wanton acts, and it does not contravene public policy.** *Scholbohm v. Spa Petite, Inc.,* 326 N.W.2d 920, 923 (Minn. 1982) (holding that exculpatory clauses are enforceable in Minnesota as long as the clause (1) is not ambiguous, (2) does not release intentional, willful, or wanton acts, and (3) does not violate public policy).

**A. The exculpatory clause is not ambiguous because it is not susceptible to more than one reasonable interpretation.**

“An exculpatory clause is ambiguous if it is susceptible to more than one reasonable construction.” *Beehner v. Cragun Corp.,* 636 N.W.2d 821, 827 (Minn. Ct. App. 2001). The wording of the exculpatory clause Plaintiff accepted is not susceptible to more than one reasonable interpretation. The clauseexplicitly releases Defendant from liability for negligence and injury to person caused “by *force majeure* or other events beyond Travel Agency’s control, including…civil disturbance…[and] Acts of Government….” (Jones Aff. Ex. A, 2 ¶ 4).The wording of the clause is clear and explicit. Plaintiff does not assert that she did not understand the contents or wording of the exculpatory clause nor does she offer any alternative interpretation for the court to evaluate for reasonableness.

Plaintiff's contention that the context in which the exculpatory clause was presented created ambiguity is without merit.The exculpatory clause was appropriately presented as part of the relevant travel brochure in legible, ten-point font. Plaintiff admits that she read the entire brochure and relied on the statements in other sections of the brochure. Jones Aff. ¶ ¶ 6, 7. Plaintiff asks the court to disregard only the exculpatory section of the brochure. Plaintiff also asks the court to ignore references in the brochure to government websites and instructions for obtaining additional country-specific information. Jones Aff. Ex. A, 2 ¶ 6.The fact that Plaintiff selectively chose to disregard part of the document should not invalidate the exculpatory clause.