SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 11-19-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV419459 Hearing: Order of Examination	U.S. BANK EQUIPMENT FINANCE vs JOHN PHAM et al	Notice appearing proper, all parties are to appear in Department 16 at 9:00 AM. If all parties appear, the Court will administer the oath and the examination will take place off line. Plaintiff must make the arrangements for how the examination will proceed. If the debtor does not appear, a bench warrant may issue. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	23CV419459 Hearing: Order of Examination	U.S. BANK EQUIPMENT FINANCE vs JOHN PHAM et al	Notice appearing proper, all parties are to appear in Department 16 at 9:00 AM. If all parties appear, the Court will administer the oath and the examination will take place off line. Plaintiff must make the arrangements for how the examination will proceed. If the debtor does not appear, a bench warrant may issue. If there is no appearance by the moving party, the matter will be ordered off calendar.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 3	22CV400765 Hearing: Motion Summary Judgment	NAVID AHMADI et al vs STANLEY LIU, MD et al	Notice appearing proper and good cause appearing, the unopposed motion for summary judgment by Defendant Yoon is GRANTED and judgment is granted for Yoon. Defendant has made a prima facie case and plaintiff's failure to file a written opposition "'creates an inference that the motion or demurrer is meritorious.'" *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410. Defendant Yoon shall submit the final order.
LINE 7	22CV404795 Hearing: Demurrer	Masaki Kobayashi vs General Motors LLC	Off Calendar
LINE 8	22CV404795 Motion: Strike	Masaki Kobayashi vs General Motors LLC	Off Calendar
LINE 4	19CV354235 Motion: Protective Order	Orchard Yield Fund I, LP vs Double L. Ranches, LLC et al	See Tentative Ruling. Cout will prepare the final order.
LINE 5	22CV404915 Motion to Amend Complaint	Maylad Lalzad vs San Jose Police Department et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 6	24CV431327 Motion: Compel Arbitration	HENRY YU vs ANTHONY BLAGROVE et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 9			
LINE 10			

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 4
Case Name: *Orchard Yield Fund I, LP v. Double L Ranches, LLC, et al.*
Case No.: 19CV354235

McAfee Farms LLC ("McAfee Farms"), defendant Lapsley Farms LLC ("Lapsley Farms") and Lutz Farms LLC ("Lutz Farms") are managing members of defendant Double L Ranches ("DLR"). (See third amended complaint ("TAC"), ¶¶ 5, 21.) Aaron McAfee ("Aaron") is the managing member of Lapsley Farms and McAfee Farms, Mark McAfee ("Mark") is a managing member of McAfee Farms, Joshua Lutz ("Lutz") is a managing member of Lutz Farms. (See TAC, ¶¶ 11, 13, 15.) Orchard Yield Funds, LLC ("OYFLLC") is the managing member of Orchard Yield Fund I, L.P. ("OYF"), which was created for the purpose of purchasing securities for DLR. (See TAC, ¶¶ 1, 3.) Park Capital Management LLC ("PCM") was one of two managing members of OYFLLC. (See TAC, ¶ 3.) The other managing member of OYFLLC is Satya Chillara ("Chillara"). (See Chillara decl. in opposition to Adam and PCM's motion for protective order ("Chillara decl."), ¶ 2; see also Defs.' memorandum of points and authorities in support of motion for protective order, p.2:13-14 (stating "OYF LLC was owned 50% by Park Capital, which was managed by Adam, and 50% by Chillara").) Adam McAfee ("Adam") is the managing member of PCM and of McAfee Farms, and also owns a stake in Organic Pastures Dairy Company ("Organic Pastures"). (See TAC, ¶ 5.) Eric McAfee ("Eric") is the managing member of McAfee Farms; however, in 2006, the Securities and Exchange Commission ("SEC") filed fraud charges against Eric and he entered into a consent decree that prevented him from violating federal securities laws in the future including the offering of securities by DLR to OYF. (See TAC, ¶¶ 6-8.)

Adam, Eric and Mark are brothers (collectively, "Brothers"); Aaron is the son of Mark; Lutz is the son-in-law of Mark. (See TAC, ¶¶ 22-24.) Eric is the moving force behind the Brothers, Aaron and Lutz in connection with matters between OYF and DLR, and the others regarding making decisions on how to proceed in connection with any other issues, would follow Eric's advice either directly or through the entities they controlled. (See TAC, ¶ 25.)

By December 31, 2015, DLR was indebted to McAfee Farms in the amount of $698,561.23 and to Organic Pastures in the amount of $179,578.80, for a total amount of $878,139.73, thus requiring third party investment capital to meet its needs. (See TAC, ¶¶ 27-32.) Defendants (DLR, PCM, Lapsley Farms, McAfee Farms, Lutz Farms, Aaron, Adam, Eric, Mark and Lutz) solicited OYF for investment capital, and in a term sheet dated February 16, 2016 and in the Subscription Agreement, the Defendants represented that they would not use the investment proceeds for purposes not approved by the Investment Fund. (See TAC, ¶ 34.) In connection with Plaintiff raising funds to invest in DLR, Plaintiff drafted a private placement memorandum to secure third party investment. (See TAC, ¶ 35.) As a member of OYFLLC, PCM actively participated in drafting and approving all drafts of the PPM. (See TAC, ¶ 36.) As the managing member of PCM, Adam actively participated in drafting and approving drafts of the PPM including the final version and reviewed the subscription agreement; however, OYF did not know that Adam simultaneously served as a managing member of McAfee Farms. (See TAC, ¶¶ 37-39.) DLR, McAfee Farms, Lapsley Farms and Lutz Farms and Adam, Eric, Mark, Aaron and Lutz also participated in drafting and signing off on the final version of the PPM. (See TAC, ¶¶ 40-42.)

On April 12, 2016, OYF and DLR entered into a subscription agreement to which OYF invested $2 million in DLR in consideration for which OYF received a 12% preferred member

interest in DLR and became a member of DLR. (See TAC, ¶ 47.) The subscription agreement concealed the fact that Adam was a managing member of McAfee Farms and had conflicting duties to both McAfee Farms and Plaintiff in connection with the offering. (See TAC, ¶ 52.) The Defendants and the subscription agreement also concealed that while the agreement indicated that the value of DLR was $20 million, the true value was approximately $3 million. (See TAC, ¶¶ 55-63.) Additionally, Defendants failed to disclose that they also lent All Pro over $900,000, and the soil on the farm was of poor grade. (See TAC, ¶¶64-71.)

On July 17, 2024, plaintiff OYF filed the TAC against DLR, PCM, Lapsley Farms, McAfee Farms, Lutz Farms, Aaron, Adam, Eric, Mark and Lutz (collectively, "Defendants"), asserting causes of action for:

1) Breach of contract (2016 Subscription Agreement, operating agreement, the amendment and the note) (against DLR);
2) Securities law violations (PPM, subscription agreement, operating agreement and amendment (against DLR);
3) Securities law violations (PPM, subscription agreement, operating agreement and amendment) (against Lapsley, McAfee Farms, Lutz Farms, PCM, Aaron, Adam, Eric Mark and Lutz);
4) Negligent representation (against DLR);
5) Fraud/intentional misrepresentation of fact re: subscription agreement, amendment and note;
6) Aiding and abeting fraud/ international misrepresentation of fact re subscription agreement, amendment and note (against DLR, PCM, Lapsley Farms, McAfee Farms, Lutz Farms, Aaron, Mark, Lutz and Eric);
7) Breach of fiduciary duty (against Adam and PCM);
8) Aiding and abetting breach of fiduciary duty (against DLR, Lapsley Farms, McAfee Farms, Lutz Farms, Aaron, Mark, Lutz and Eric);
9) Conspiracy to commit fraud (against DLR, Lapsley Frms, PCM, McAfee Farms, Lutz Farms,
10) Conspiracy to commit breach of the fiduciary duty (against DLR, Lapsley Farms, Lutz Farms, McAfee Farms, Aaron, Mark, Lutz, Eric, Adam and PCM).

Plaintiff propounded requests for admissions ("RFAs") on defendant PCM. RFA 3 stated:

> Attached hereto as Exhibit B here to is a true and correct copy of a financial statement of Adam and Julie McAfee dated March 29, 2017 showing ownership of a 19% interest in Organic Pastures Daily.
>
> If YOUR response to RFA 2 is admit, then ADMIT that by failing to disclose to OYF LLC that Adam McAfee had a 19% interest in Organic Orchards Dairy Company that YOU caused OYF, LLC to breach its fiduciary duty to the Plaintiff.

RFA 13 stated:

> Reference is made to Paragraph 50 of the ADAM DECLARATION which states in relevant part as follows:
>
> > Chillara's alleged valuation that Park Capital and I indirectly owned a value of Double L worth $2,565,000 is wrong…. Further, the alleged valuation figure is worthless. It was not prepared by a professional business appraiser and is not accurate.
>
> And to the Financial Statement Adam and Julie McAfee dated March 29, 2017 [] a true and correct copy of which is attached hereto as Exhibit B (the Financial Statement) which states a value of $2,098,246.
>
> ADMIT, that value of DLR as stated in the Financial Statement was not prepared by a professional business appraiser.

On April 26, 2024, PCM provided its verified responses. PCM's response to RFA 3 stated:

> … Responding Party objects to the request in that Mr. Adam McAfee has identified the document referenced in this request as privileged, private, and not subject to disclosure. Responding Party is informed that Mr. McAfee takes the position that the document is protected by the attorney-client privilege and that Satya Chillara unlawfully took and used the document; Responding Party is informed that Mr. McAfee has asserted that the document was prepared and used for legal consultation with lawyers and expected that it would remain confidential, rendering the Financial Statement privileged. See *Scripps Health v. Super. Ct*. (2003) 109 Cal.App.4th 529, 534-35; *Benge v. Super. Ct.* (1982) 131 Cal.App.3d 336, 347-48. Mr. McAfee made demand to immediately destroy the document, to inform counsel for Mr. McAfee of any other person or entity the document was shared with and to discontinue its use in any form or manner whatsoever….

(PCM's response to RFA 3, pp.5:13-23.)

PCM's response to RFA 13 likewise stated:

> … Responding Party objects to the request in that Mr. Adam McAfee has identified the document referenced in this request as privileged, private, and not subject to disclosure. Responding Party is informed that Mr. McAfee takes the position that the document is protected by the attorney-client privilege and that Satya Chillara unlawfully took and used the document; Responding Party is informed that Mr. McAfee has asserted that

> the document was prepared and used for legal consultation with lawyers and expected that it would remain confidential, rendering the Financial Statement privileged. See *Scripps Health v. Super. Ct.* (2003) 109 Cal.App.4th 529, 534-35; *Benge v. Super. Ct.* (1982) 131 Cal.App.3d 336, 347-48. Mr. McAfee made demand to immediately destroy the document, to inform counsel for Mr. McAfee of any other person or entity the document was shared with and to discontinue its use in any form or manner whatsoever….

(PCM's response to RFA 13, pp.15:14-24.)

Adam and PCM move for a protective order from needing to respond to any discovery requests[1] that Plaintiff has served on Defendants that reference and attach the privileged document on the ground that Plaintiff has obtained an attorney-client privileged communication that is privileged pursuant to Evidence Code § 954.

ADAM AND PCM'S MOTION FOR PROTECTIVE ORDER

"Under California law, an attorney-client communication is one 'between a client and his or her lawyer in the course of that relationship and in confidence.'" (*Uber Technologies, Inc. v. Google LLC* (2018) 27 Cal.App.5th 953, 966, quoting Evid. Code § 952.) "For purposes of the attorney-client privilege, 'client' is defined in relevant part as 'a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.'" (*Id.*, quoting Evid. Code § 951.) "'[C]onfidential communication' protected by the privilege refers to 'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence' by confidential means." (*Id.*, quoting Evid. Code § 952.) Evidence Code section 952 also states that the "confidential communication" is required to be disclosed "so far as the client is aware… to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code § 952.) "In assessing whether a communication is confidential and thus privileged, the initial focus of the inquiry is on the 'dominant purpose of the relationship' between attorney and client and not on the purpose served by the particular communication." (*Uber Technologies, supra*, 27 Cal.App.5th at p.966, quoting *Costco Wholesale Corp. v. Super. Ct. (Randall)* (2009) 47 Cal.4th 725, 739-740.).) "The privilege 'is to be strictly construed" in the interest of bringing to light relevant facts.'" (*Id.* at p.967, quoting *Greyhound Corp. v. Super. Ct. of Merced County* (1961) 56 Cal.2d 355, 396.) "The privilege is also to be strictly construed 'where the relationship is not clearly established.'" (*Id.*, quoting *People v. Velasquez* (1987) 192 Cal.App.3d 319, 327.) "When a party asserts the attorney-client privilege it is incumbent upon that party to prove the preliminary fact that a privilege exists." (*Id.*, quoting *State Farm Fire & Casualty Co. v. Super. Ct. (Taylor)* (1997) 54 Cal.App.4th 625, 639.)

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[1] The notice of motion also references requests for production of documents numbers 1-9, 41, 51-54, 58, 59 and 62, and requests for admission to Adam, numbers 46 and 48.

Adam and PCM's evidence

With regard to establishing the existence of the attorney-client privilege, Adam and PCM present Adam's declaration in support of the motion or protective order, which asserts that Adam and Chillara intended to establish multiple private investment vehicles, starting with OYF I. (See Adam's decl. in support of motion for protective order, ¶ 2.) Adam and Chillara split responsibilities involved in the business venture for OYF I, with Adam involved in the technical aspects of the business venture. (*Id*. at ¶ 3.) On March 25, 2016, OYF II was formed and Adam and Chillara decided to require the investors of OYF II to be verified "Accredited Investors" which provided an SEC reporting exemption. (*Id*. at ¶¶ 4-5.) In March 2017, Adam found a third-party source called verifyinvestors.com to facilitate the verification of the Accredited Investor status of any potential investors. (*Id*. at ¶ 6.) Adam does not attach a copy of verifyinvestors.com's verification process as it existed in March 2017; rather, Adam instead states his belief as to the process including an attorney opinion and includes website link of verifyinvestors.com's statement of its current process. (*Id*. at ¶ 9.)

Adam asserts that McAfee 2006 Living Trust Dated 12/29/06 is the sole member of PCM, and thus he needed to get verified "Accredited Investor" status for the McAfee Family Trust. (See Adam's decl. in support of motion for protective order, ¶ 11.) To obtain the verified accredited investor status, he states that he needed to submit financial information for him and his spouse to verifyinvestors.com. (*Id*. at ¶ 13.) To organize his information regarding OYF II, Adam created a subfolder in his personal Dropbox drive that contained documents relating to investor relations, the offering, and a sub-subfolder called Verify Investor Accredited Status that had information regarding Adam's own process to try to gain Accredited Investor status. (*Id*. at ¶¶ 14-17.) The other sub-subfolder in the OYF II folder was the "OYF II LP Investor Communications" folder that stored talking points for presenting information to investors, a spreadsheet of the record of communications that were with the potential investors, and copies of signed offering documents by investor. (*Id*. at ¶ 20.)

To obtain Accredited Investor status, Adam uploaded his financial information to verifyinvestor.com, which included his and his spouse's personal financial information, including their retirement account balances, securities balances, and the certification for the McAfee Family Trust. (*Id*. at ¶ 21.) After uploading the documents, Adam states that he received an email from the attorney working on the certification requesting further information to certify the Accredited Investor status of the McAfee Trust. (*Id*. at ¶ 22.) Adam then had several phone calls with the attorney at verifyinvestor.com to identify additional information necessary to verify McAfee Trust's Accredited Investor status. (*Id*. at ¶ 23.) Adam then prepared further documents purportedly demonstrating the total assets of the McAfee Trust, including a more detailed financial statement for McAfee Trust, as well as a personal financial statement entitled Adam and Julie Financial Statement 03-29-17 that contained the current balances of Adam's and his spouse's public and private securities investments, retirement accounts, personal properties, and current and long-term liabilities like their mortgage. (*Id*. at ¶ 24.) Adam purportedly uploaded the documents to verifyinvestor.com and received, on April 3, 2017, a letter explaining the attorney's review process and the attorney's conclusion regarding the Accredited Investor status of the McAfee Family Trust. (*Id*. at ¶¶ 25-26.)

In May 2017, Chillara requested access to investor communications and Adam provided Chillara a copy of the OYF II subfolder; however, Adam neglected to realize that this gave Chillara access to the Verify Investor Accredited Status sub-subfolder that included the

Adam and Julie Financial Statement 03-29-17 document. (*Id*. at ¶¶ 27-30.) Adam claims that he did not realize that he disclosed the Adam and Julie Financial Statement 03-29-17 to Chillara because he was busy working on closing the potential investors to OYF II and managing the technical operations of OYF I, communicating with OYF investors, the team at Double L Ranches, preparing tax filings and K-1s for OYF I, performing technicalities of setting up OYF II. (*Id*. at ¶¶ 31-32.) It was only six years later on May 16, 2023, when Chillara discussed the document in settlement negotiations, that Adam realized that he had given access to Chillara to the Adam and Julie Financial Statement 03-29-17 document. (*Id*. at ¶ 33.)

Adam and PCM also provide the declaration of their counsel, Jessica Nwasike, who comments about the May 2023 settlement negotiations, a proposed third amended complaint, discovery requests referencing the Adam and Julie Financial Statement 03-29-17 document, and a motion to compel responses to those discovery requests.

Adam and PCM fails to establish the preliminary fact that a privilege exists

As previously stated, "[f]or purposes of the attorney-client privilege, 'client' is defined in relevant part as 'a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.'" (*Uber Technologies, supra*, 27 Cal.App.5th at p.966, quoting Evid. Code § 952.) Adam fails to provide any authority that the submission of information to a nonlegal website that may have attorneys that may review information submitted to the website, demonstrates the consultation of an attorney for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity. "'[C]onfidential communication' protected by the privilege refers to 'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence' by confidential means." (*Id*., quoting Evid. Code § 952.) Adam also fails to provide verifyinvestor.com's statement of its practices regarding any confidentiality or attorney review as they existed when Adam received verifyinvestor.com's services. Moreover, Adam and PCM fail to provide the Adam and Julie Financial Statement 03-29-17 document already seen by Chillara or any communications between the purported attorney and Adam "with privilege concerns in mind," making it impossible to determine the existence of an attorney-client relationship. Adam and PCM, as the moving parties, were required to establish the existence of an attorney-client relationship, but failed to substantiate their assertions, despite claiming to have such evidence. To the extent that they had concerns regarding disclosure, they could have filed the evidence under seal as they had done previously. Therefore, Adam and PCM fail to establish the existence of a privilege and their motion for protective order is DENIED on this basis.

Even if Adam and PCM had an attorney-client relationship with the verifyinvestory.com attorney and had, in fact, provided those communications, Adam asserts that the financial statement that contained his and his wife's personal investments was a communication transmitted for the purpose of obtaining Accredited Investor status of the McAfee Family Trust. (See Adam decl., ¶¶ 22 (stating that an email was received "requesting further information in order to certify the Accredited Investor status of the McAfee Trust"); 23 (stating that had phone calls with verifyinvestor.com "to identify what additional information was necessary to verify McAfee Trust's Accredited Investor status"); 26 (receiving "conclusion regarding the Accredited Investor status of the McAfee Family Trust").) As previously stated, "[i]n assessing whether a communication is confidential and thus privileged,

the initial focus of the inquiry is on the 'dominant purpose of the relationship' between attorney and client and not on the purpose served by the particular communication." (*Uber Technologies, supra*, 27 Cal.App.5th at p.966, quoting *Costco Wholesale Corp. v. Super. Ct. (Randall)* (2009) 47 Cal.4th 725, 739-740.).) Here, Adam's statements state that the "dominant purpose of the relationship" between the purported attorney at verifyinvestor.com and the purported attorney's client was to determine whether the McAfee Family Trust should be accorded Accredited Investor status. Thus, accepting Adam's statements, the client was the trustee of the McAfee Family Trust, not Adam. The Adam and Julie Financial Statement 03-29-17 document does not concern the assets of the McAfee Family Trust but rather Adam and his spouse's individual assets. (See Adam decl., ¶ 24 (stating that Adam "prepared further documents to substantiate the balances evidencing the total assets of McAfee Trust" but noting that the Adam and Julie Financial Statement 03-29-17 "contained the current balances of my spouse and my public and private securities investments, retirement accounts, personal properties, and current and long-term liabilities, like our mortgage").) The assets of the Trust are distinct and separate from Adam and his wife's individual assets, and Adam and PCM do not explain how a purported communication regarding a non-client's private financial information that is not relevant to the purpose of the attorney-client relationship is privileged. (See *Uber Technologies, supra*, 27 Cal.App.5th at p.967 (stating that "[t]he privilege 'is to be strictly construed' in the interest of bringing to light relevant facts'… [t]he privilege is also to be strictly construed 'where the relationship is not clearly established'").) Thus, Adam and PCM fail to establish the existence of a privilege on this additional and separate basis, and their motion for protective order is DENIED.

Lastly, Adam and PCM contend that their providing of the Adam and Julie Financial Statement 03-29-17 document to Chillara was an inadvertent disclosure. There is nothing about a financial statement that indicates that it might be subject to an attorney-client privilege, and Adam does not state that the statement was marked as confidential or privileged. Chillara was not required to notify Adam about the financial statement that was voluntarily provided to him. As Adam and PCM fail to establish the existence of any privilege, the Court makes no determination regarding any implied waiver.

The Court will prepare the Order.

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Calendar Line 5
Case Name: Maylad Lalzad vs San Jose Police Department et al
Case No.: 22CV404915

LEGAL STANDARD

Leave to amend is permitted under Code of Civil Procedure section 473, subdivision (a) and section 576. Motions for leave to amend are directed to the discretion of the court. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . ." (Code Civ. Proc. § 473(a)(1).) The law generally favors amendments on the basis that cases should include all disputed matters between parties and be decided on their merits. As a general rule, courts liberally allow amendments. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) Indeed, "[i]f the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Super. Ct.* (1959) 172 Cal.App.2d 527, 530.) However, if the party seeking amendment has been dilatory and the delay prejudices the opposing party, the judge has discretion to deny leave to amend. (See *Hirsa v. Sup. Ct.* (1981) 118 Cal.App.3d 486, 490.) Absent prejudice, delay alone is not considered grounds for denial. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting in loss of critical evidence or added costs of preparation, and increased burden of discovery. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.) Nevertheless, even if some prejudice is shown, the court may still permit the amendment, but can impose conditions. (See *Fuller v. Vista Del Arroyo Hotel* (1941) 42 Cal.App.2d 400, 404-405 (*Fuller*).) For instance, the court may continue the trial date (if requested by the opposing party); limit discovery; and/or order the party seeking the amendment to pay the costs and fees incurred by the opposing party in conducting discovery and preparing for trial on a newly added claim. (*Ibid*.) The court is authorized to grant leave "on such terms as may be proper…" (See Code Civ. Proc. §§ 473, subd. (a)(1), 576.)

Under California Rules of Court, rule 3.1324, a motion to amend a pleading before trial must (1) include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments; (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph and line number, the deleted allegations are located; and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rules of Court, rule 3.1324(a).) A separate supporting declaration specifying (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reason why the request for amendment was not made earlier must accompany the motion. Rule 3.1324(b).

DISCUSSION

Here, Plaintiff wants to make two different kinds of changes to the complaint. First, he wants to correct the complaint to properly assert his claim for property damages and to amend, to a lesser amount, his claim for damages. Such corrections to the complaint will not prejudice

Defendant. It is not clear whether his corrections related to property damage would even require further discovery. Even if it did, discovery related to the property damage from the accident is limited and narrow in scope. This is particularly true given Plaintiff also seeks to lower the total amount of damages sought from $100,000 to $60,000.

Secondly, Plaintiff wants to add a claim for intentional negligence and punitive damages. While the standard for amending a complaint is liberal, Plaintiff has not asserted any new facts to support his new theory of intentional conduct, nor indicated when he learned such new facts, as required under CRC 3.1324(b)(2) and (3). Given the failure to explain what facts make the amendment necessary or when such facts were learned, the Court does not find that Plaintiff has met his burden under the Rules of Court to amend the complaint to add a new cause of action based on intentional conduct or to add punitive damages. This is particularly so given that the first amended complaint was filed approximately two years ago and indicates that the Defendant lied about his conduct the day of the incident, the parties represented at the trial setting conference that discovery had been done and that they were ready for trial, and a trial date has been set. Moreover, adding this new cause of action and a claim for punitive damages would prejudice Defendant by driving up the costs of litigation, as it likely will require additional discovery, additional experts, and continuation of the trial date, and because the new complaint would likely to be the subject both of a demurrer and a motion for summary adjudication.

Accordingly, Plaintiff's motion is GRANTED IN PART and DENIED IN PART. Plaintiff may amend his complaint to:

(1) check the Motor Vehicle box and Property Damage box in the COMPLAINT;
(2) on line 11, check box E for property Damage; and
(3) on line Line 14 A.2 change the amount sought from $100,000 to $60,000.

All other changes are DENIED. Defendant shall submit the final order. Plaintiff is ordered to file the amended complaint within 10 days of receipt of the final order.

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Calendar Line 6
Case Name: *Yu v. Blagrove, et al.*
Case No.: 24CV431327

I. BACKGROUND

According to allegations of the first amended complaint ("FAC"), Henry Yu, individually and as trustee of the Henry Yu Trust ("Plaintiff"), is a "long time self-directed investor" who began investing his assets "over thirty-five years ago" and built a "self-managed investment portfolio" with substantial value. (FAC, ¶ 7.) However, Plaintiff needed assistance managing large company stock from one of his former employers. (FAC, ¶ 8.) After spending approximately 18 months vetting financial advisors, Plaintiff entered into an investment management agreement ("Agreement") with United Capital Financial Advisors, LLC, dba Goldman Sachs Personal Management ("UCFA"), and Anthony L. Blagrove ("Blagrove"), a certified financial planner of UCFA (collectively, "Defendants"), on September 20, 2019[2], to manage "a portion of his investment assets." (See FAC, ¶¶ 2, 4-6, 10-11, Defendants' Request for Judicial Notice ("Def.RFJN"), p. 2, Exh. A - Agreement.)

Between January and February 2020, Blagrove and Plaintiff agreed to reallocate Plaintiff's investment accounts into a "different investment mix." (FAC, ¶ 14.) On March 3, 2020, Plaintiff transferred all of his Defendant-managed assets from his trust account (valued at approximately $1,746,783) into a new account managed by Defendants. (FAC, ¶ 15.) To Plaintiff's dismay, he determined that Blagrove sold all of Plaintiff's stocks in the investment accounts that Defendants were not supposed to be managing in late March 2020. (FAC, ¶ 21.) Blagrove admitted he should not have liquidated all of Plaintiff's assets and apologized to Plaintiff. (FAC, ¶ 22.) Despite Defendant UCFA's repurchase of Plaintiff's former employer stock, Blagrove failed to recoup Plaintiff's monetary loss. (*Ibid.*)

On January 6, 2021, Plaintiff sent a detailed email to Blagrove and his associate about the unauthorized sale of investment stock. (FAC, ¶ 23.) Additionally, throughout January and February of 2021, Plaintiff communicated with Defendant UCFA's managing director about the same, but the director denied any wrongdoing. (FAC, ¶¶ 24-25.)

As a result of Defendants' breach of their fiduciary duties, Plaintiff suffered losses exceeding $1,000,000. (FAC, ¶¶ 26-27.)

On February 16, 2024, Plaintiff filed his initial complaint against Defendants UCFA and Blagrove, asserting a single cause of action for breach of fiduciary duty. On February 28, 2024, Plaintiff filed his FAC alleging the same. Defendants move to compel arbitration and to

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[2] While the FAC indicates Plaintiff signed the Agreement on September 2, 2019, the Agreement attached to both Plaintiff's declaration and Defendants' RFJN reflect an execution date of September 20, 2019. (See Def.RFJN, Exh. A – Agreement; see also Declaration of Henry Yu in Opposition to Defendants' Motion to Compel Arbitration ("Yu Decl."), ¶ 3, Exh. 1.) Courts may disregard allegations in the FAC that are "contradicted or negated" by judicially noticed facts. (See *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 741 ["Relevant matters that are properly the subject of judicial notice may be treated as having been pled"].) Thus, this Court will assume the Agreement between the parties was executed on September 20, 2019.

stay the action pending arbitration. Plaintiff opposed the motion on November 5, 2024. On November 12, 2024, Defendants filed a reply.

II. REQUEST FOR JUDICIAL NOTICE

Defendants request this Court to take judicial notice of the Agreement at issue. (See Def.RFJN, p. 2, Exh. A – Agreement.) Plaintiff objects to this request on grounds that the interpretation of a contract between private parties cannot be established by judicial notice. (See Plaintiff's Objections to Def.RFJN, p. 2:1-10; see also Evid. Code, § 452, subd. (h) [facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy are an appropriate subject of judicial notice].)

Here, Defendants attached a copy of the Agreement bearing the opposing party's wet signature. And, notably, while defense counsel does not attach the Agreement to her declaration, Plaintiff's declaration attaches the Agreement as an exhibit. (See Yu Decl., ¶ 3 ["Mr. Blagrove presented me with the UCFA Investment Management Agreement, which is attached hereto as Exhibit 1…in September 2019, and instructed me to sign it"], Exh. 1 – Agreement.) The Agreement forms the basis of the allegations in the FAC and therefore the request for judicial notice is proper. (See *Ingram v. Flippo* (1990) 74 Cal.App.4th 1280, 1285, fn. 3 [appellate court took judicial notice of letter and media release which form the basis of allegations in the complaint under Evidence Code, § 452, subdivision (h)]; see also *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 956, fn. 6 [appellate court took judicial notice of settlement agreement to plaintiff's complaint].) Still, Plaintiff correctly urges that judicial notice does not extend to interpreting the agreement or relying on it to resolve disputed facts. (See *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038 ["given the wide latitude of parol evidence admissible in interpreting a contract," judicial notice of the existence of a document does not properly extend "to an interpretation of its meaning"].) Here, the Court need only take judicial notice of the Agreement's existence and contents.

Accordingly, Defendants' request for judicial notice of Exhibit A is GRANTED.

III. DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO STAY ACTION PENDING ARBITRATION

Defendants move to compel arbitration under both the Federal Arbitration Act ("FAA") (9 U.S.C. § 1, *et seq*) and the California Arbitration Act ("CAA") (Code Civ. Proc. § 1281, *et seq*). (See Defendants' Notice of Motion and Memorandum of Points and Authorities in Support of Motion to Compel Arbitration ("MPA.ARB"), p. 2:1-10.)

A. Legal Standard

A heavy presumption weighs the scales in favor of arbitrability. (*Cione v. Foresters Equity Servs., Inc.* (1997) 58 Ca1.App.4th 625, 642.) Courts will indulge every intendment to give effect to arbitration proceedings. (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109.)

In ruling on a petition to compel arbitration, the Court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howsan v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84.) "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.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks omitted.)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle, supra*, 55 Cal.4th at p. 236.)

B. Analysis

Plaintiff does not dispute that he signed the Agreement containing the arbitration clause or that the dispute is within the scope of the arbitration provision. Instead, he argues that the Agreement is unenforceable because it is procedurally and substantively unconscionable. Accordingly, the Court will discuss unconscionability next.

1. Unconscionability

"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. [Citation.]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125.) Unconscionability has both procedural and substantive elements. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539.) Both must appear for a court to invalidate a contract or one of its individual terms, (*Armendariz, supra*, 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114).

a. Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided results." (*Armendariz, supra*, 24 Cal.4th at p. 114, internal citation and quotations omitted), that is, whether they reallocate risks in an objectively unreasonable or unexpected manner, (*Jones, supra*, 112 Cal.App.4th at p.

1539). "In assessing substantive unconscionability, the paramount consideration is mutuality." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 241, internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (*Armendariz, supra*, 24 Cal.4th at p. 117.)

i. AAA Commercial Rules Provision

Under substantive unconscionability, Plaintiff argues the provision of the Agreement indicating that the AAA Commercial Rules will govern arbitration, imposes "exorbitant and unreasonable costs" creating a financial hardship for Plaintiff. (Memorandum of Points and Authorities in Opposition to MPA.ARB ("Opp."), pp. 6-8.) Plaintiff cites *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554 (*Parada*) in support of this proposition. (Opp., pp. 6-8.) In reply, Defendants argue that Plaintiff fails to demonstrate that the provision is burdensome given that he is a "Software Architect." (Defendants' Reply in Support of MPA.ARB ("Reply"), p. 4:1-3.)

Code of Civil Procedure section 1284.2 provides that unless the arbitration agreement states otherwise, each party to the arbitration must pay his or her *pro rata* share of arbitration costs. Where the parties agree to arbitrate under the AAA Commercial Arbitration Rules and Mediation Procedures, the arbitrator is permitted or required to allocate such fees. (Code Civ. Proc., § 1284.5.) Here, even assuming that Plaintiff has provided evidence of "unreasonably high fees" (the court notes that his evidence of fees is highly speculative), he has not demonstrated the type of financial hardship discussed in *Gutierrez* and its ilk, to render the provision substantively unconscionable. (See, e.g., *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 92 (*Gutierrez*) ["A family in search of a job confronts a very different set of burdens…Consumers, who face significantly less economic pressure[,] would seem to require measurably less protection."]; see also *Sanchez v. Valencia Holding Co*. (2015) 61 Cal.4th 899, 920.) Here, as noted in Defendants' reply, Plaintiff is a software architect (Reply, pp. 3:23-28, 4:1-3), and Plaintiff's counsel concedes that Plaintiff does not "fall below the poverty line" to warrant any "relief or reduction from" a one-time filing fee for arbitration. (See Declaration of Melinda Jane Steuer ("Steuer Decl."), ¶ 5.) Also of importance is that the record is largely incomplete as to Plaintiff's financial situation. Thus, Plaintiff fails to present evidence showing that the AAA Commercial Rules provision is burdensome and substantively unconscionable.

ii. Orange County Venue Provision

Next, Plaintiff claims a venue provision that requires "the weaker party" to travel a great distance to litigate in the "stronger party's backyard" is substantively unconscionable. (Opp., p. 9:1-13.) Plaintiff cites multiple cases holding that venue provisions that require plaintiffs to travel *out of state* to arbitrate their disputes are unconscionable. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 797-798, 804; see *also Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 852.) But, these cases are distinguishable given that Plaintiff lives in Palo Alto, California, and the venue provision requires him to travel to Orange County, California. (Opp., p. 9:14-28.) Although the court in *Pinedo v. Premium Tobacco Stores* (2000) 85 Cal.App.4th 774, 781 (*Pinedo*)), the case relied on by Plaintiff, mentioned in laying out why the agreement in that case was one-sided, that the employee was "disadvantaged" by having to arbitrate in the location chosen by the employer, the location provision was not discussed in the opinion and was not necessary to the court's opinion. More

recent California Court of Appeal cases have further made it clear that "neither inconvenience nor the additional expense of litigating in the selected forum is a factor to be considered." (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1067; see also *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 199; see *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1305 [*Armendariz* does not preclude forum selection clauses so long as employee has adequate remedy for discrimination claims in selected forum].) Here, like in *Ramos,* Plaintiff's complaint is that arbitration in Orange County would be inconvenient and more expensive for him and would "unfairly benefit" Defendants. (Opp., p. 9:15-28; see also *Ramos, supra,* 28 Cal.App.5th at p. 1067.) But, unlike in *Ramos*, where the plaintiff's dispute involved a Fair Employment and Housing Act retaliation claim against her employer, here, the bargaining position of the parties is more equal. Plaintiff is not unsophisticated and had the option of investing his money elsewhere. Notably, Plaintiff does not argue his claims could not be resolved in Orange County or that he would not receive substantial justice in that forum.

Accordingly, this Court concludes that the provision requiring that the arbitration take place in Orange County, California, is not substantively unconscionable.

iii. Limitation of Liability Provision

Finally, Plaintiff contends that the Agreement unfairly limits recoverable damages and is substantively unconscionable. (Opp., p. 11:14-23.) Specifically, Plaintiff argues Defendants would be "exculpated from liability for its breach of fiduciary duty unless [Plaintiff] met the onerous standard of proving intentional misconduct or gross negligence." (Opp., p. 11:19-23.) The limitation of liability provision is not part of the arbitration clause, but rather part of the Agreement, as a whole. As Defendants aptly state, in reply, the limitation of liability provision is "collateral to the main purpose of the Arbitration" provision. (Reply, pp. 3-4, fn.1; see also *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 92.) Even if the arbitration provision were not enforced, the limitation of liability provision would remain. As such, this provision is not relevant to the question of enforceability of the arbitration clause and does not render it unconscionable.

While Plaintiff needs to demonstrate both substantive and procedural unconscionability under *Armendariz, supra,* 24 Cal.4th at p. 114, to warrant a denial, this Court will address the procedural unconscionability claims in an abundance of caution.

b. Procedural Unconscionability

Procedural unconscionability focuses on the elements of oppression and surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party is a superior bargaining position." (*Davis v. TWC Dealer Group, Inc*. (2019) 41 Cal.App.5th 662, 671 (*Davis*), internal citation and quotation marks omitted.)

Plaintiff asserts that the three provisions of the Agreement discussed above, and the arbitration provision itself, are oppressive and a surprise. (Opp., p. 13:6-11.) Specifically, Plaintiff argues that the provisions are oppressive because they are contained in a "standardized pre-printed client agreement" prepared by Defendants and Plaintiff was purportedly required to

sign the Agreement before Defendants would manage Plaintiff's investment accounts. (*Ibid;* see also *24 Hour Fitness, Inc. v. Super. Ct. (Munshaw)* (1998) 66 Cal.App.4th 1199, 1212-1213 ["…The procedural element focuses on the unequal bargaining positions and hidden terms common in the context of adhesion contracts…"].) Additionally, Plaintiff contends the "exorbitant" cost of arbitration under the AAA commercial rules, was a surprise to Plaintiff, and these fees were neither indicated in the Agreement nor disclosed by Defendant Blagrove. (Opp., p. 13:12-16; Yu Decl., ¶¶ 4, 7; see also Steuer Decl., ¶ 2; Exhs. 1-2.)

The court in *Serafin v. Balco Properties Ltd*., LLC (2015) 235 Cal.App.4th 165, 179 (*Serafin*) held that oppression exists in adhesion contracts when the stronger party drafts the contract and presents it to the weaker party on a "take-it-or-leave-it basis." Here, Plaintiff claims that this was the case and that there was no opportunity for negotiation or revision of the Agreement terms. (See Opp., p. 13:8-11; see also Yu Decl., ¶ 3.)

Plaintiff concedes that he failed to read the Agreement prior to signing it given his familiarity with investment contracts. (Yu Decl., ¶ 4 ["I admittedly did not read the pre-printed material on the UCFA agreement before I signed it because I have had many investment accounts with a variety of financial institutions in the past"]; FAC, ¶ 5.) That is not Defendants' doing and as noted in Defendants' reply, Plaintiff cites nothing to suggest that Defendants did not allow Plaintiff time to fully review the Agreement or anything else that would excuse Plaintiff from the clear and unambiguous language of the Agreement. (Reply, p. 2:7-13.) Defendants further assert in reply that Plaintiff was "given time to review the agreement…and was not pressured in any way." (Reply, p. 2:17-20; see also FAC ¶¶ 9-10.)

Also, Plaintiff, here is not the typical "weaker party" in the bargaining process. (See *Davis, supra*, 41 Cal.App.5th at p. 671.) As noted multiple times in both his FAC and declaration, Plaintiff is stock market savvy, has "over [35] years" of experience as a "self-directed investor," and has reviewed similar investment management agreements in the past with various investment firms. (FAC, ¶ 7, Yu Decl., ¶ 4.) Finally, Plaintiff admits he spent 18 months vetting Defendants before deciding to hire them. (See FAC, ¶ 9.) Evidence of the experience and sophistication of the party claiming that the agreement is unconscionable is relevant to the court's determination. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 507.) In reply, Defendants contend Plaintiff signed the Agreement "months after Defendants were engaged to provide services," which bolstered Plaintiff's bargaining power. (Reply, p. 2:19-22; FAC ¶¶ 9-10.) Thus, the above facts demonstrate that Plaintiff's claim of unfair surprise and oppression as to the limitation of liability, venue, AAA fee schedule, and arbitration provisions, lack merit. Plaintiff is well-versed in investment matters and the Agreement adequately explains how arbitration works. The provisions are not in small print, are not hidden in the Agreement, and are written in clear language. There is no unfair surprise here. The fact is, Plaintiff did not read the Agreement and, therefore, cannot complain about surprise as to its terms.

Finally, Plaintiff cites multiple authorities for the proposition that a failure to provide an AAA fee schedule with an arbitration agreement renders an Agreement procedurally unconscionable. (See *Gostev v. Skillz Platform* (2023) 88 Cal.App.5th 1035, 1062; see also *Penilla v. Westmont Corp*. (2016) 3 Cal.App.5th 205, 217 (*Penilla*) [mobilehome park owner unfairly surprised Spanish-speaking residents when the owners failed to provide a Spanish copy of the leases or advise the residents of the arbitration provision in the leases].) But, again, Plaintiff did not read the Agreement before signing it. Thus, even if the AAA rules were

attached to the Agreement, it would not have mattered because Plaintiff "admittedly did not read the pre-printed material" on the Agreement. (See Yu Decl., ¶ 4.) Additionally, Plaintiff concedes he is experienced in reviewing investment management agreements and arbitration provisions. (Yu Decl., ¶¶ 4-5.) Plaintiff does not assert a language barrier like in *Penilla*, *supra*, and the instant arbitration provision does not contain any confusing or contradictory language. The arbitration provision clearly references which applicable rules apply, and Plaintiff could have looked up the AAA fee schedule or inquired about the fee schedule during contract review. There is no evidence that he attempted to do either of those things, or that he was not given the opportunity to do so or that he was forced to agree to the arbitration provision. Thus, any surprise caused by the lack of an AAA fee schedule, is minimally procedurally unconscionable, at best, especially given Plaintiff's familiarity with contracts of this nature.

Accordingly, Plaintiff has not shown that the Agreement is procedurally unconscionable for not including an AAA fee schedule.

Given that the Court has not found portions of the Agreement unconscionable, it need not turn to the issue of severability.

c. Delegation to Arbitration

Although Plaintiff raises the issue of delegation in its opposition, Defendants do not argue that it is for the arbitrator to decide issues of arbitrability in their motion to compel arbitration. Consequently, this Court need not address the issue of delegation.

IV. CONCLUSION

Because Plaintiff cannot show both procedural and substantive unconscionability, the motion to compel arbitration is GRANTED, and this case is stayed pending the outcome of the arbitration. Defendants, as the prevailing parties, shall prepare the final order in accordance with California Rules of Court, rule 3.1312.

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