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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CONSTANTINE GUS CRISTO,
Plaintiff,
v.
THE CHARLES SCHWAB
CORPORATION; SCHWAB
HOLDINGS, INC.; CHARLES
SCHWAB & CO., INC.; CHARLES
SCHWAB BANK; and CHARLES
SCHWAB INVESTMENT
MANAGEMENT, INC.,
Defendants.

Case No.: 17-cv-1843-GPC-MDD

**ORDER GRANTING DEFENDANTS’
MOTION TO COMPEL
ARBITRATION AND STAYING
FIRST AMENDED COMPLAINT**

[Dkt. No. 24.]

Pending before the Court is Defendants The Charles Schwab Corporation, Schwab Holdings, Inc., Charles Schwab & Co., Inc., Charles Schwab Bank, and Charles Schwab Investment Management, Inc.’s (collectively “Defendants”) motion to compel arbitration and stay or dismiss proceedings. (Dkt. No. 24.) Plaintiff Constantine Gus Cristo (“Plaintiff”), proceeding pro se, filed an opposition to the motion. (Dkt. No. 28.) Defendants filed a reply. (Dkt. No. 29.) A hearing was held on April 6, 2018. (Dkt. No. 30.) Plaintiff Cristo appeared as well as defense counsel Jared Speier, Esq. (Id.) Based

1 on the reasoning below, the Court **GRANTS** Defendants’ motion to compel arbitration and
2 stays the case.

3 **Factual Background**

4 In 1995, Plaintiff, through his investment advisor, David Neff (“Neff”), opened a
5 Schwab IRA account and signed a Schwab IRA Application (“IRA Application”). (Dkt.
6 No. 24-2, Lundy Decl. ¶ 7; *id.*, Ex. A.) The Schwab IRA Application contained an
7 arbitration clause and provides in relevant part:

8 I agree to settle by arbitration any controversy between myself and Schwab
9 and/or any Schwab officers, directors, employees or agents relating to the IRA
10 Account Agreement, my Brokerage Account or account transactions, or in any
11 way arising from my relationship with Schwab as provided in Section 15 of
12 the IRA Account Agreement. The following disclosures are made pursuant to
13 applicable self-regulatory organization rules: (1) Arbitration is final and
14 binding on the parties; (2) The parties are waiving their right to seek remedies
15 in court, including the right to a jury trial; (3) Pre-arbitration discovery is
16 generally more limited than and different from court proceedings; (4) The
17 arbitrators’ award is not required to include factual findings or legal reasoning
18 and any party’s right to appeal or to seek modification of rulings by the
19 arbitrators is strictly limited; (5) The panel of arbitrators will typically
20 including a minority of arbitrators who were or are affiliated with the
21 securities industry.

18 (Dkt. No. 24-2, Lundy Decl, Ex. A at 5.) The IRA Application also incorporates by
19 reference the IRA Account Agreement which also includes an arbitration clause. (*Id.*)

20 In 1997, Plaintiff, himself, opened a Schwab One Brokerage Account and signed an
21 Account Application (“Schwab One Application”). (Dkt. No. 24-2, Lundy Decl. ¶ 8; *id.*,
22 Ex. B.) The Schwab One Application contained an arbitration clause and provides in
23 pertinent part:

24 I agree to settle by arbitration any controversy between myself and Schwab
25 and/or any Schwab officers, directors, employees or agents relating to the
26 Account Agreement, my Brokerage Account or account transactions, or in any
27 way arising from my relationship with Schwab as provided in Section 16,
28 pages 8-10 of the Brokerage Account Agreement and Section 23, pages 26-
29 of the Schwab One Account Agreement. The following disclosures are

1 made pursuant to applicable self-regulatory organization rules: (1) arbitration
2 is final and binding on the parties; (2) the parties are waiving their right to
3 seek remedies in court, including the right to a jury trial; (3) pre-arbitration
4 discovery is generally more limited than and different from court proceedings;
5 (4) the arbitrators' award is not required to include factual findings or legal
6 reasoning, and any party's right to appeal or to seek modification of rulings
7 by the arbitrators is strictly limited; (5) the panel of arbitrators will typically
8 include a minority of arbitrators who were or are affiliated with the securities
9 industry.

10 (Dkt. No. 24-2, Lundy Decl., Ex. B at 10.) This Application also incorporates by reference
11 the Brokerage Account Agreement and the Schwab One Account Agreement. (Id.)

12 On November 6, 2017, Plaintiff, proceeding pro se, filed a First Amended Complaint
13 ("FAC") alleging grievances relating to Plaintiff's Schwab accounts stemming from
14 Defendants' production of Plaintiff's financial records to the Internal Revenue Service
15 ("IRS"). (Dkt. No. 8.) The FAC alleges violations of the Right to Privacy Act, 12 U.S.C.
16 §§ 3403, 3404(c), 3405(2), 3407(2), 3410, 3412(b); violations of 18 U.S.C. § 1519;
17 violations of 18 U.S.C. § 241 & § 245(b)(1)(B); violations of 18 U.S.C. § 872; violations
18 of 18 U.S.C. § 1001(a); and violations of 18 U.S.C. § 1341. (Id.)

19 **Discussion**

20 Defendants move to compel arbitration and stay or dismiss proceedings arguing that
21 the arbitration clauses in the IRA Application and the Schwab One Application control
22 Plaintiff's Complaint. (Dkt. No. 24.) Plaintiff opposes.

23 **A. Motion to Compel Arbitration**

24 The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, espouses a general policy
25 favoring arbitration agreements and establishes that a written arbitration agreement is
26 "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA permits "a party aggrieved
27 by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement
28 for arbitration may petition any United States district court . . . for an order directing that .
. . . arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The

1 United States Supreme Court has stated that there is a federal policy favoring arbitration
2 agreements. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
3 Federal policy is “simply to ensure the enforceability, according to their terms, of private
4 agreements to arbitrate.” Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford
5 Jr. Univ., 489 U.S. 468, 476 (1989). Courts are also directed to resolve any “ambiguities
6 as to the scope of the arbitration clause itself . . . in favor of arbitration.” (Id.)

7 When considering a party’s request to compel arbitration, the court is limited to
8 determining (1) whether a valid arbitration agreement exists, and if so (2) whether the
9 arbitration agreement encompasses the dispute at issue. Cox v. Ocean View Hotel Corp.,
10 533 F.3d 1114, 1119 (9th Cir. 2008). If these conditions are satisfied, the court is without
11 discretion to deny the motion and must compel arbitration. 9 U.S.C. § 4; Dean Witter
12 Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (“By its terms, the [FAA] leaves no place
13 for the exercise of discretion by a district court, but instead mandates that district courts
14 shall direct the parties to proceed to arbitration.”).

15 In interpreting the validity and scope of an arbitration agreement, the courts apply
16 state law principles of contract formation and interpretation. Lowden v. T-Mobile USA,
17 Inc., 512 F.3d 1213, 1217 (9th Cir. 2008) (First Options of Chicago, Inc. v. Kaplan, 514
18 U.S. 938, 944 (1995)). Arbitration agreements, “[l]ike other contracts . . . may be
19 invalidated by ‘generally applicable contract defenses, such as fraud, duress, or
20 unconscionability.’” Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) (quoting
21 Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). The party opposing
22 arbitration bears the burden of showing that the agreement does not cover the claims at
23 issue. Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91-92 (2000).

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Discussion

A. Whether a Valid Arbitration Agreement Exists

Defendants contend that valid arbitration agreements exist because the arbitration provisions are “clear and unequivocal.” (Dkt. No. 24-1 at 10.¹) They assert the signature lines should have made it clear to Plaintiff what he was signing as the arbitration provisions were placed directly above the line where he signed the Agreements and he should have been alerted to it. Since Plaintiff signed the Agreements, he assented to the arbitration provisions contained in both documents. Plaintiff responds that he never agreed to binding arbitration as he did not “review, negotiate or agree to any agreements referenced within.”² (Dkt. No. 28 at 10.)

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” AT & T Tech., Inc. v. Commc’n Workers of Am., 475 U.S. 643, 648 (1986); Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (“it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration.”) “Every contract requires mutual assent or consent (Civ. Code, §§ 1550³, 1565⁴), and ordinarily one who

¹ Page numbers are based on the CM/ECF pagination.

² Plaintiff contends that his claims are ineligible for arbitration because six or more years have passed from the events giving rise to the claim. As Defendants note, an issue concerning eligibility is one for the arbitrator, as this Court is limited to determining whether an arbitration clause exists, and the scope of the arbitration provision. See Esquer v. Education Mgmt. Corp., --F. Supp. 3d--, 2017 WL 5194635, at *2 & (S.D. Cal. 2017) (a district court may not review the merits of a case in assessing whether a party should be compelled to arbitration).

³It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. A sufficient cause or consideration.

Cal. Civil Code § 1550.

⁴ The consent of the parties to a contract must be:

1. Free;
2. Mutual; and,
3. Communicated by each to the other.

Cal. Civil Code § 1565.

1 signs an instrument which on its face is a contract is deemed to assent to all its terms. A
2 party cannot avoid the terms of a contract on the ground that he or she failed to read it
3 before signing.” Marin Storage & Trucking, Inc. v. Benco Contracting and Eng’g, Inc., 89
4 Cal. App. 4th 1042, 1049 (2001); Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309,
5 1318-19 (1986) (abrogated on other grounds by Sandquist v. Lebo Automotive, Inc., 1 Cal.
6 5th 233, 250 (2016)) (“one who assents to a contract cannot avoid its terms on the ground
7 he failed to read it before signing it.”) Parties who sign a contract are responsible for the
8 entirety of the agreement. Norcia v. Samsung Telecommunications America, LLC, 845
9 F.3d 1279, 1284 (9th Cir. 2017). No contract exists if the “writing does not appear to be a
10 contract and the terms are not called to the attention of the recipient.” Marin Storage &
11 Trucking, 89 Cal. App. 4th at 1049-50. Moreover, “[a]n actual negotiation regarding every
12 term has never been required for the formation of a contract. The existence of mutual assent
13 is determined by objective criteria, not by one party’s subjective intent. The test is whether
14 a reasonable person would, from the conduct of the parties, conclude that there was a
15 mutual agreement.” Id. at 1050.

16 Here, Plaintiff does not dispute that he signed the IRA Application in 1995 and the
17 Schwab One Application in 1997. Instead, as to the IRA Application⁵, he asserts he merely
18 signed where his investment advisor told him to sign or initial, (Dkt. No. 28-1, Cristo Decl.
19 ¶ 2), and claims that he did not know what he signed. As to the Schwab One Application,
20 he contends he visited a Schwab branch office to open a Schwab One brokerage account,
21 was interviewed by a staff who typed his information on the Application and once
22 completed, the staffer asked him to sign the application. (Id. ¶ 3.) No other contract or
23 agreement was offered for him to sign. (Id.) However, failure to read or negotiate the
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28 ⁵ Plaintiff argues that he has never seen pages 3 or 4 of the IRA application until 22 years later. (Dkt. No. 28-1, Cristo Decl. ¶ 2; Dkt. No. 24-2, Lundy Decl., Ex. A at 6-7.) However, while there is an arbitration provision on page 3, there is also an arbitration provision with Plaintiff’s signature on page 2 which he does not dispute.

1 Agreements prior to signing does not negate the offer⁶ or assent required for a binding
2 contract. See Marin Storage & Trucking, 89 Cal. App. 4th at 1049.

3 Next, Plaintiff claims he was not a party to the IRA Application in 1995 since it was
4 between Defendants and Neff, his investment advisor and the person who filled out the
5 application, and he was merely a third party beneficiary. He contends that pages 3 and 4
6 of the IRA Application demonstrate that Neff and Defendants entered into a binding
7 contract. (Dkt. No. 28 at 18.) Page 4 of the IRA Application is an agreement between
8 Neff, Plaintiff's investment advisor and Schwab authorizing Neff to open an account and
9 trade on behalf of Plaintiff, his client. However, Plaintiff's signature is on both
10 Applications and no indication that he is merely a third party beneficiary.

11 Also, Plaintiff argues that the Applications are not binding contracts but are merely
12 applications. The two documents are applications to open up an account at Schwab.
13 Defendants reference them as "Applications." Despite the use of the word "application"
14 on the documents, the course of dealings by the parties reveal that the parties entered into
15 a binding contract.

16 In Marin Storage & Trucking, the court of appeal looked to the parties' course of
17 conduct to determine whether the parties entered into a binding contract. Marin Storage &
18 Trucking, 89 Cal. App. 4th at 1051-52. In Marin Storage & Trucking, the trial court held
19 there was no mutual assent to establish a binding contract between a company that rented
20 cranes and a crane operator, and a contractor as the "Work Authorization and Contract"
21 appeared to merely be an invoice and served to acknowledge the hours logged by the crane
22 operator, and further, the contract terms were never negotiated by the parties. Id. at 1050.
23 The parties had a history of past dealings where the contractor telephoned the crane owner
24 requesting a crane and crane operator for an hourly rate. Id. at 1046. At the end of the day,
25 the crane operator filled out a form, "Work Authorization and Contract", indicating the
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27 ⁶ As discussed later, filling out Defendants' account applications constitute offers to transfer assets in
28 exchange for brokerage services. See Lopez v. Charles Schwab & Co., Inc., 118 Cal. App. 4th 1224,
1230 (2004).

1 number of hours he worked at the site. Id. The form would be verified and signed by the
2 contractor’s supervising employee at the site. Id. at 1047. The crane operator would give
3 one copy to the contractor and the other copy to his office. Id. The crane provider would
4 then mail the copy of the “Work Authorization and Contract” and an invoice to the
5 contractor for payment. Id. Upon receipt, the contractor would send a check. Id. The
6 question for the court was whether there was a binding contract that required the contractor
7 to indemnify the crane provider as provided on the back page of the “Work Authorization
8 and Contract.” Id. The court of appeal held that the trial court erred and that the parties’
9 conduct of signing the “Work Authorization and Contract” and then paying the invoice
10 were “outward manifestations of assent by” the contractor confirming its acceptance of the
11 contractual terms. Id. at 1052.

12 In Lopez, involving a similar type of account application as in this case, the court of
13 appeal first concluded that filling out an application form to open a Schwab Account did
14 not create a contract but “an offer to transfer assets to Schwab in exchange for brokerage
15 services.” Lopez v. Charles Schwab & Co., Inc., 118 Cal. App. 4th 1224, 1230 (2004)
16 (noting that “I hereby request that [Schwab] open a brokerage account. . . . I agree to read
17 and be bound by the terms of the applicable Account Agreement” was an offer.) The court
18 of appeal then held that because Schwab rejected the plaintiff’s application for brokerage
19 services and did not fund that account, no contract to arbitrate existed. Id. at 1232; see also
20 Rubio v. Capital One Bank, 613 F.3d 1195, 1205 (9th Cir. 2010) (relying on Lopez and
21 holding that a credit card solicitation was not an offer).

22 In this case, on the Schwab One Application similarly states, “I hereby request that
23 [Schwab] open a Brokerage Account . . .” and constitutes an offer. (Dkt. No. 24-2, Lundy
24 Decl., Ex. B at 10.) The IRA Application to open an account also constitutes an offer. See
25 Rubio, 613 F.3d at 1205. Unlike Lopez, Schwab approved Plaintiff’s applications as
26 indicated in the approval section of both applications. (Dkt. No. 24-2, Lundy Decl., Ex. A
27 at 4; Dkt. No. 24-2, Lundy Decl., Ex. B, at 9.) Moreover, there is no indication that
28 Defendants rejected Plaintiff’s applications and the FAC alleges certain transactions

1 between Plaintiff and Schwab regarding his accounts and in fact, Plaintiff states he is a
2 client of Schwab. (Dkt. No. 8, FAC ¶¶ 28-33.) Defendants’ opening of the accounts
3 confirms their acceptance of Plaintiff’s offer to open an account. Based on the course of
4 dealings between Plaintiff and Defendants, the Court concludes that binding contracts
5 exist, including a valid arbitration agreement.

6 **B. Scope of the Arbitration Provision**

7 Defendants argue that all grievances stemming from the FAC arise out of
8 transactions covered by the arbitration agreements. Plaintiff argues that his allegations are
9 not subject to arbitration as they do not stem from his account relationship with Schwab,
10 but rather concern Schwab’s allegedly unlawful acts in responding to IRS summonses.

11 (Id.)

12 Both arbitration provisions state that it covers “any controversy between [Plaintiff
13 and Defendants] relating to [Applications] . . . or in any way arising from my relationship
14 with Schwab. . . .” (Dkt. No. 24-2, Lundy Decl., Exs. A, B.) A provision that includes
15 “any controversy” “relating to” or “in any way arising from [a] relationship with” are
16 construed broadly. See Simula Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999) (the
17 phrase “arising out of or relating to” in an arbitration agreement are construed broadly, and
18 the factual allegations at issue “need only touch matters’ covered by the contract containing
19 the arbitration clause and all doubts are to be resolved in favor of arbitration.”); Larkin v.
20 Williams, Woolley, Cogswell, Nakazawa Russell, 76 Cal. App. 4th 227, 230 (1999) (the
21 phrase “[a]ny controversy or claim arising out of or relating to any provision of this
22 [agreement] . . .” construed very broad.).

23 The FAC alleges claims concerning Defendants’ disclosure of Plaintiff’s account
24 records beyond the scope that was requested by the IRS in a third-party summons seeking
25 financial records for the 2002 tax period. (Dkt. No. 8, FAC ¶¶ 41, 50.) Instead of releasing
26 financial records for the 2002 tax year, Defendants released financial records from 1995
27 through June 30, 2006. (Id.) The FAC allegations concern a dispute between Plaintiff and
28 Defendants relating to Plaintiff’s Schwab accounts and arise out of the relationship

1 between the two parties. Accordingly, the Court concludes that Plaintiff's claims fall
2 within the arbitration provisions.

3 **C. Unconscionability**

4 Plaintiff argues that even if there is a contract to arbitrate, it is procedurally and
5 substantively unconscionable. Defendants disagree.

6 In California, a contract must be both procedurally and substantively unconscionable
7 to be rendered invalid. Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 922 (9th Cir. 2013).
8 The procedural component focuses on oppression, and surprise due to unequal bargaining
9 power. Armendariz v. Fdn. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). The
10 substantive element focuses on "overly harsh" or "one-sided" results. (Id.) Courts apply
11 a sliding scale where procedural and substantive unconscionability need not be present in
12 the same degree such that a showing of greater substantive unconscionability will require
13 less evidence of procedural unconscionability. Armendariz, 24 Cal. 4th at 114. However,
14 both procedural and substantive unconscionability must be present "in order for the court
15 to exercise its discretion to refuse to enforce a contract or clause under the doctrine of
16 unconscionability." Stirlen v. Supercuts, 51 Cal. App. 4th 1519, 1533 (1997). The party
17 opposing arbitration bears the burden to demonstrate unconscionability. Sonic-Calabasas
18 A, Inc. v. Moreno, 57 Cal. 4th 1109, 1148 (2013); Pinnacle Museum Tower Ass'n v.
19 Pinnacle Market Dev. (US), LLC, 55 Cal. 4th 223, 247 (2012).

20 **a. Procedural Unconscionability**

21 Plaintiff argues the arbitration clauses are procedurally unconscionable because they
22 are contracts of adhesion and "Defendants intentionally reduced font size to be unreadable
23 by Plaintiff – or most anyone else over 50 years old." (Dkt. No. 28 at 26.) Defendants
24 argue that the applications are not contracts of adhesion because Plaintiff was free to obtain
25 brokerage services from anywhere and nobody forced Plaintiff to seek Defendants'
26 services. (Dkt. No. 29 at 6.) Defendants posit that even if the agreements were contracts
27 of adhesion, Plaintiff did not express any concern over the agreements when Plaintiff
28

1 signed the Account Applications. (Id. at 7.) Defendants also argue there were no surprises
2 here because the the arbitration clauses are in bold and right above the signature lines. (Id.)

3 Procedural unconscionability “addresses the circumstances of contract negotiation
4 and formation, focusing on oppression or surprise due to unequal bargaining power.”
5 Pinnacle Museum Tower Ass’n, 55 Cal. 4th at 246 (citing Armendariz, 24 Cal. 4th at 114).
6 “Oppression arises from an inequality of bargaining power which results in no real
7 negotiation and an absence of meaningful choice,” while “[s]urprise involves the extent to
8 which the terms of the bargain are hidden in a ‘prolix printed form’ drafted by a party in a
9 superior bargaining position.” Serpa v. California Surety Investigations, Inc., 215 Cal.
10 App. 4th 695, 703 (2013) (citations and quotations omitted); see also Mercurio v. Superior
11 Court, 96 Cal. App. 4th 167, 174 (2002) (“procedural unconscionability focuses on the
12 oppressiveness of the stronger party’s conduct”).

13 In analyzing procedural unconscionability, the court first focuses on whether the
14 contract was one of adhesion or whether there was oppression. See Armendariz, 24 Cal.
15 4th at 114; Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 582 (2007) (“Whether
16 the challenged provision is within a contract of adhesion pertains to the oppression aspect
17 of procedural unconscionability.”). A contract of adhesion is “a standardized contract,
18 which, imposed and drafted by the party of superior bargaining strength, relegates to the
19 subscribing party only the opportunity to adhere to the contract or reject it.” Armendariz,
20 24 Cal. 4th at 113. Under California law, a contract of adhesion has an element of
21 procedural unconscionability because it is “presented on a take-it-or-leave-it basis and [is]
22 oppressive due to ‘an inequality of bargaining power that result[ed] in no real negotiation
23 and an absence of meaningful choice.’” Nagrampa v. MailCoups Inc., 469 F.3d 1257, 1281
24 (9th Cir. 2006).

25 Here, the Applications are standard form documents presented to all consumers and
26 are presented on a take-it-or-leave-it basis”; however, on the other hand, Plaintiff was free
27 to seek brokerage services from any institution, and willingly sought out Defendants and
28 agreed to Defendants’ applications without any pressure by Defendants. Therefore, there

1 is some procedural unconscionability due to the adhesive nature of the form applications
2 but, an adhesive contract, alone, is not sufficient to render the arbitration clauses to be
3 invalid. See Esquer v. Education Mgmt. Corp., --F. Supp. 3d--, 2017 WL 5194635, at *2
4 & (S.D. Cal. 2017) (“use of an adhesion contract establishes only some degree of
5 procedural unconscionability and is not itself a ground for finding that a contract, or one
6 of its provisions, is unenforceable.”).

7 Next, as to surprise, Plaintiff claims that he was unable to read the tiny font size of
8 the arbitration provisions. The font size of the arbitration provisions is tiny but is similar
9 to the font size as to other terms and conditions in the applications. The arbitration
10 provisions are in bold and are not embedded in the contract and hidden in a “prolix printed
11 form”, see Serpa, 215 Cal. App. 4th at 703, but are located right above the signature lines
12 of the applications. See Molina v. Scandinavian Designs, Inc., No. 13cv4256 NC, 2014
13 WL 1615177, at *7 (N.D. Cal. Apr. 21, 2014) (amount of procedural unconscionability is
14 limited by the fact that the arbitration agreement was not buried in a lengthy contract but
15 was rather presented as a separate two page document). To the extent the tiny font size
16 rendered the arbitration a surprise, it establishes some procedural unconscionability.

17 Therefore, Plaintiff has demonstrated some “oppression or surprise” in the
18 application process. When there is a “low level” of procedural unconscionability, Plaintiff
19 must demonstrate a substantial amount of substantive unconscionability. See Marin
20 Storage & Trucking, 89 Cal. App. 4th at 1056 (“[i]n light of the low level of procedural
21 unfairness . . . a greater degree of substantive unfairness than has been shown here was
22 required before the contract could be found substantively unconscionable.”); Woodside
23 Homes of Cal., Inc. v. Superior Court, 107 Cal. App. 4th 723, 730 (2003) (because plaintiff
24 home buyers were not unsophisticated or lacking in choice, they established only a “low
25 level” of procedural unconscionability and were obligated to establish “a high level of
26 substantive unconscionability.”)

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1 **b. Substantive Unconscionability**

2 Substantive unconscionability focuses on the actual terms of the agreement and
3 evaluates whether they create an “overly harsh” or “one-sided” result. Armendariz, 24 Cal.
4 4th at 114; see also Little v. Auto Stiegler, Inc., 29 Cal. 4th 1064, 1071 (2003). “[T]he
5 paramount consideration in assessing conscionability is mutuality.” Abramson v. Juniper
6 Networks, Inc., 115 Cal. App. 4th 638, 657 (2004). “A contract is not substantively
7 unconscionable when it merely gives one side a greater benefit; rather, the term must be
8 “so one-sided as to ‘shock the conscience.’” Pinnacle, 55 Cal. 4th at 246.

9 Plaintiff argues that Defendants’ arbitration provision is substantively
10 unconscionable because it allegedly restricts Plaintiff’s right to discovery. (Dkt. No. 28 at
11 28.) Plaintiff also contends that Defendants’ arbitration provision is substantively
12 unconscionable because the provision allegedly demands Plaintiff bear the arbitration fees
13 and costs. (Id.) Plaintiff posits that Defendants are much better equipped to pay these
14 costs. (Id.) Defendants argue that the arbitration agreements here “are not one-sided” as
15 the arbitration gives Plaintiff and Defendants the same set of arbitration rules. (Dkt. No.
16 29 at 7.) Defendants assert the arbitration rules have also been approved by the Securities
17 and Exchange Commission (“SEC”). (Id.)

18 Here, Plaintiff has not demonstrated that the arbitration provisions do not apply to
19 both Plaintiff and Defendants equally or that the provisions are “overly harsh” or “one-
20 sided.” See Stirlen, 51 Cal. App. 4th at 1537-42 (employee was subject to inherent
21 shortcomings of arbitration-limited discovery, limited judicial review, limited procedural
22 protections and significant damage limitations while employer was not subject to these
23 disadvantageous limitations and had written in the agreement special advantages); Kinney
24 v. United HealthCare Servs., Inc., 70 Cal. App. 4th 1322, 1332 (1999) (arbitration to
25 compel the employee but not the employer to submit claims to arbitration was
26 unconscionable). The arbitration agreements subject both parties to the same set of rules.

1 Moreover, contrary to Plaintiff's argument, discovery is available under the FINRA⁷ rules
2 such as document production, depositions, and written requests. See FINRA, Code of
3 Arbitration Procedure, Part V, Rules 12505-12514.

4 As to the arbitration fees and costs, Plaintiff speculatively argues that the arbitration
5 provisions may require him to pay arbitration fees and costs as they are silent as to who
6 pays what. However, speculation as to the costs of arbitration is not sufficient to render an
7 arbitration provision unenforceable. See Green Tree Fin. Corp.-Alabama, 531 U.S. at 91
8 (“we lack . . . information about how claimants fare under Green Tree's arbitration clause.”
9 The record reveals only the arbitration agreement's silence on the subject, and that fact
10 alone is plainly insufficient to render it unenforceable. The “risk” that Randolph will be
11 saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration
12 agreement.). Accordingly, the Court concludes that Plaintiff has not demonstrated
13 substantive unconscionability.

14 Since Plaintiff has failed to meet his burden demonstrating both procedural and
15 substantive unconscionability, the arbitration provisions are enforceable. See Stirlen, 51
16 Cal. App. 4th at 1533.

17 **C. Motion to Stay**

18 Section 3 of the FAA provides that, where a dispute is subject to arbitration under
19 the terms of a written agreement, the district court shall “stay the trial of the action until
20 such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. §
21 3. Accordingly, the Court stays the case until the completion of arbitration.

22 **D. Attorney's Fees and Costs**

23 Defendants also seek attorney's fees and costs for Plaintiff's refusal to dismiss the
24 FAC and submit the claims to arbitration because it was clear that Plaintiff was bound by
25 the arbitration agreements. Plaintiff disagrees that he refused to dismiss the case but
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28 ⁷ The parties do not dispute that they are subject to arbitration before the Financial Industry Regulatory
Authority (“FINRA”).

1 informed counsel that he did not have sufficient time to review the documents received by
2 defense counsel before his imposed deadline.

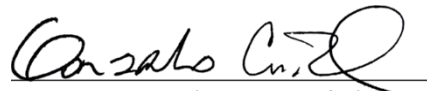
3 Defendants rely on Gonick v. Drexel Burnham Lambert, Inc., 711 F. Supp. 981, 987
4 (N.D. Cal. 1988) which involved a federal securities case where the defendant sought
5 sanctions under Rule 11 because the plaintiff failed to accept defendant's offer to proceed
6 to arbitration, even though the defendant provided legal authorities to plaintiff and tried to
7 avoid filing the motion to compel arbitration. Id. at 987. In Gonick, there was recent
8 settled law that an arbitration provision on Securities Exchange Act claims was
9 enforceable. Id. at 987. Here, Defendants only argue that because Plaintiff was bound by
10 the arbitration provisions and refused to voluntarily submit his claims to arbitration, they
11 are entitled to fees under Gonick. However, unlike Gonick, Defendants have not
12 demonstrated that they complied with Rule 11 or that there was clear, established law that
13 Plaintiff's claims would be subject to arbitration. In his opposition, Plaintiff has presented
14 plausible arguments why the arbitration provisions are not binding or enforceable. Thus,
15 the Court DENIES Defendants' request for sanctions as unsupported.

16 **Conclusion**

17 Based on the above, the Court GRANTS Defendants' motion to compel arbitration
18 and STAYS the case pending arbitration.⁸ The parties shall submit a joint status report
19 within five (5) days of a decision by the arbitrator.

20 IT IS SO ORDERED.

21
22 Dated: April 11, 2018

23 
24 Hon. Gonzalo P. Curiel
25 United States District Judge

26 ⁸ At the hearing, Plaintiff objected to the supplemental declaration that was attached to Defendant's
27 reply. (Dkt. No. 29-1.) The supplement declaration includes copies of the 1997 Schwab One Account
28 Agreement and the current version of the Schwab One Account Agreement; however, the Court did not
consider those documents in ruling on the motion to compel arbitration. Therefore, the Court overrules
Plaintiff's objection.