UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 16-1925-DMG (MRWx)** Date September 29, 2016

Title ***Thomas Atencio and Gian Caterine v. TuneCore, Inc.*** Page 1 of 27

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS - ORDER RE DEFENDANT TUNECORE'S MOTION TO DISMISS, MOTION TO COMPEL ARBITRATION, AND MOTION TO STRIKE; AND PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT [15, 26, 27, 28, 35]

I.
PROCEDURAL BACKGROUND

On June 13, 2016, Plaintiffs Thomas Atencio and Gian Caterine filed their First Amended Complaint ("FAC") against Defendant TuneCore, raising claims in connection with their working relationships and corresponding stock option agreements with TuneCore. [Doc. # 21.] In the FAC, Atencio and Caterina, together, allege the following: (1) violations of California Labor Code section 200 *et seq.*; (2) breach of contract; (3) fraud, intentional misrepresentation, and fraudulent inducement; (4) promissory estoppel; (5) appropriation of name and unjust enrichment; and (6) declaratory relief. *Id.* Catarine also separately alleges violations of Massachusetts Wage Payment Laws chapter 149, section 148. *Id.*

On June 30, 2016, TuneCore filed a motion to strike Atencio's right to publicity claim pursuant to California's Anti-Slapp Statute ("MTS"), a motion to dismiss ("MTD") Atencio's remaining claims, and a motion to compel arbitration ("MTC") as to all of Caterine's claims. [Doc. ## 26, 27, 28.] On August 8, 2016, Atencio and Caterine filed their oppositions to TuneCore's MTD ("MTD Opp."), MTC ("MTC Opp."), and MTS ("MTS Opp."). [Doc. ## 32, 33, 34.]

On August 12, 2016, Atencio and Caterine filed a motion for leave to file a Second Amended Complaint ("MLA"), seeking to add two claims for violations of the New York Labor Law, N.Y. Lab. Law § 190 *et seq.* (McKinney 2008), and the Delaware Wage Payment and Collection Law, Del. Code Tit. 19 § 1101 *et seq.* [Doc. # 35.] On August 26, 2016, TuneCore filed its opposition to the MLA ("MLA Opp."). [Doc. # 36.]

On August 29, 2016, TuneCore filed its reply to the MTD Opp. ("MTD Reply"), MTS Opp. ("MTS Reply"), and MTC Opp. ("MTC Reply"), as well as objections to support its MTC ("MTC Object."). [Doc. ## 37, 38, 39, 40.]

The Court held a hearing on the motions on Friday, September 16.

II.
FACTUAL BACKGROUND[1]

Because the parties' working relationships vary slightly, and because the motions before the Court relate to different aspects of that relationship, the Court addresses the facts separately as to each plaintiff.

A. Caterine

Several aspects of Caterine and TuneCore's work relationship are disputed, including its duration. Because the motions regarding Caterine currently before the Court only pertain to whether his claims should be resolved in arbitration, the Court need not delve into the parties' work relationship in detail. The Court sets forth only those facts that are relevant to the MTC.

Caterine is a well-known music industry executive living and working primarily in Malibu, California. FAC at ¶¶ 2, 6. He also resided in Massachusetts during times relevant to this action. *Id.* at ¶ 2. Your Tunes, which eventually became TuneCore, was touted to be "an artist-friendly company that would provide pro-artist licensing arrangements while simultaneously providing artists with" digital sale platforms, such as iTunes. *Id.* at ¶ 21. In September 2005, Caterine began working as a consultant for Your Tunes at a significantly reduced compensation rate in exchange for stock option compensation. *Id.* at ¶ 41. When Your Tunes transitioned into TuneCore, Inc. in December 2006, Caterine was asked to become CFO and forgo $300,000 in his normal annual compensation in return for additional stock options. *Id.* at ¶¶ 51–53. Caterine agreed and, throughout his relationship with TuneCore, worked in various capacities at TuneCore, including as Chief Financial Officer ("CFO") and a member of the Board of Directors. *See id.* at ¶¶ 53–54, 73, 89–91, 101. According to the FAC, Caterine

[1] The Court assumes that the material facts alleged in the FAC are true and construes them in the nonmovants' favors solely for the purpose of ruling on the MTD. The Court weighs the evidence in order to make a factual determination as to the MTC.

continued to work with and on behalf of TuneCore through the filing of this suit. *See id.* at ¶¶ 120–24, 127, 131.

Between 2006 and 2012, Caterine entered into seven stock option agreements with TuneCore. *See id.* at ¶¶ 107–11, 216; Exhibits H–N to Ackerman Decl. [Doc. ## 16-10–16-16.] Two of the agreements—one entered into on November 10, 2009 (the "2009 Agreement"), Exhibit M to Ackerman Decl., and one entered into on July 11, 2012 (the "2012 Agreement"), Exhibit N to Ackerman Decl.—contain arbitration provisions and are subject to a Stock Incentive Plan (the "Plan"), Exhibit O to Ackerman Decl. [Doc. ## 16-17.] The arbitration provisions in each agreement are identical and read, in pertinent part, as follows:

> Any controversy arising out of or relating to this Option Agreement (including these Terms), the Plan, and/or the Exercise Agreement, their enforcement or interpretation, or because of an alleged breach, default, or misrepresentation in connection with any of their provisions, or any other controversy arising out of or related to the Option, including, but not limited to, any state or federal statutory claims, shall be submitted to arbitration in New York City, New York, before a sole arbitrator selected from Judicial Arbitration and Mediation Services, Inc., New York City, New York, or its successor ("JAMS"). . . . The parties acknowledge and agree that they are hereby waiving any rights to trial by jury in any action, proceeding or counterclaim brought by either of the parties against the other in connection with any matter whatsoever arising out of or in any way connected with any of the matters referenced in the first sentence above.

2009 Agreement at ¶ 15.3; 2012 Agreement at ¶ 15.3.

The stock option agreements entered into prior to 2009 (the "Pre-2009 Agreements") do not contain arbitration provisions and are not expressly subject to the Plan. *See* Exhibits H–L to Ackerman Decl. Rather, some of them are subject to the 2006 Equity Compensation Plan (the "Prior Plan"). *See* Exhibits J–L to Ackerman Decl. at 1. The remaining Pre-2009 Agreements make no mention of any stock incentive plan. *See* Exhibits H–I to Ackerman Decl.

The Pre-2009 Agreements each contain a "Termination of Relationship" provision, which provides that if TuneCore and Caterine's working relationship ends, Caterine has 30 days (under some of the agreements) or three months (under the others) to exercise his option rights. *See* Exhibits H–L to Ackerman Decl. at ¶ 3. The 2009 and 2012 Agreements are subject to a similar termination provision provided in the Plan that gives Caterine up to three months to exercise his

option rights upon termination of his employment for any reason other than cause, death, or total disability. *See* 2009 Agreement at 2 n.2; 2012 Agreement at 2 n.2; Plan at ¶ 5.6.3.

Significantly, the 2009 and 2012 Agreements both state that TuneCore granted the options "to the Participant [Caterine] *in addition to, and not in lieu of*, any other form of compensation otherwise payable or to be paid to [him]." Exhibits M–N to Ackerman Decl. at 2 (emphasis added).

B. Atencio

Atencio began consulting for TuneCore in 2005. *Id.* at ¶ 26. In exchange for his work, TuneCore promised it would compensate him "either in cash and/or a combination of cash and stock options." *Id.* at ¶ 38. Atencio continued his affiliation and promotion of TuneCore up until filing this suit. *Id.* at ¶¶ 122–23.

By tying Atencio's name to the project, TuneCore established legitimacy and trust within the music industry. *Id.* at ¶ 32. Atencio further helped TuneCore by helping "package, promote, and market" the company. *Id.* at ¶ 33. For example, TuneCore issued a press release (the "Press Release") on March 6, 2007, which featured the following quotation attributed to Atencio:

> "The crack of dawn suffering a disconnect from both the consumer and the artistic community that is unparalleled in my 25 years as a label executive and artist manager. TuneCore provides the tools for artists to access their audience without penalty or compromise."
> - Tom Atencio, Manager, New Order

Id. at ¶¶ 57, 60; *see also* Exhibit A to Ackerman Decl. [Doc. # 16-3.] Although Atencio did not work "inside the business on a day-to-day basis," he was fully involved in TuneCore's "promotion, marketing, and delivery as a platform." FAC at ¶¶ 45–46.

In February and August 2006, Atencio entered into two stock option agreements as consideration for his ongoing work. *Id.* at ¶ 45; *see also* Exhibits C–D to Ackerman Decl. [Doc. ## 16-5, 16-6.] These option agreements were subject to a stock incentive plan (the "Long Term Incentive Plan") created by Your Tunes. *See* FAC at ¶ 127; Exhibit E to Ackerman Decl. [Doc. # 16-7.]; Ackerman Decl. at ¶ 17. Under these stock option agreements, Atencio received the option to purchase a total of 11,500 shares of TuneCore Common Stock, which carry a par value of $.01 per share. *See* Exhibits C–D to Ackerman Decl. Fifteen hundred of those shares were granted at the purchase price of $1.91 per share, while the remaining were granted at the purchase price of $1.52 per share. *Id.* Atencio could exercise his option rights for "up to and

including the date which is ten . . . years from the date" the option agreements were entered into, so long as his working relationship with TuneCore was still in effect. *See id.* at ¶ 1. If the working relationship ended, Atencio's option rights would terminate 30 days after the date of such termination. *Id.* at ¶ 3.

TuneCore's Chief Executive Officer ("CEO"), Jeff Price, was terminated in July 2012. FAC at ¶¶ 111, 113. Atencio exercised 10 options not long after Price's termination. *Id.* at ¶ 112. He paid $4.10 for those shares. Exhibit F to Ackerman Decl. [Doc. # 16-8.] Their value is unknown. In or about early June 2013, Gill Cogan, a TuneCore Board member and major TuneCore investor, told Atencio he had until 2016 to exercise his options, which was consistent with the language of the stock agreements themselves. FAC at ¶¶ 88, 114–15. Cogan then confirmed this promise in an email sent to Atencio on June 11, 2013, which stated that "Mr. Atencio's deadline to exercise the options underlying his [two] grants will not expire until 2016." *Id.* at ¶ 116–17.

In April 2015, TuneCore merged with Believe Digital Holdings, Inc. *Id.* at ¶ 133. On April 12, 2015, TuneCore's attorney sent Atencio a "Letter of Transmittal," which he was to duplicate and send to TuneCore's administrator. *Id.* at ¶¶ 136–39. The letter, in part, stated that "each Security of the Company owned by me was automatically cancelled and converted as of the effectiveness of the Merger into the right to receive a payment in cash with regard to such outstanding Securities." *Id.* at ¶ 138. Reading this, Atencio believed the letter notified him of a "cash out" transaction, so he filled out the required paperwork and mailed it to TuneCore. *Id.* at ¶¶ 146, 149. "After preparing and mailing in the paperwork, [Atencio] w[as] to be provided cash compensation in exchange for [his] securities," including stock and stock options. *Id.* at ¶ 140. Instead, TuneCore paid Atencio $11.51, allegedly for the 10 shares of stock Atencio cashed out after Price's termination, and nothing else. *Id.* at ¶¶ 159, 161.

On August 14, 2015, Atencio attempted to exercise his remaining stock options, but was told by TuneCore's attorney on September 9, 2015, that he would not be allowed to exercise his options. *Id.* at ¶¶ 164, 168.

III.
DISCUSSION

Because the outcome of TuneCore's MTC will impact the Court's treatment of Caterine's MTA, the Court first considers the MTC. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (dismissal of claims subject to arbitration clause is appropriate). The Court will then turn to TuneCore's MTS and MTD, and Plaintiffs' MTA—in that order.

A. TuneCore's Motion to Compel Arbitration as to Caterine's Claims

1. Legal Standard

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). "The basic role for courts under the FAA is to determine '(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

Federal law governs questions concerning the interpretation and enforceability of arbitration agreements, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22–24 (1983), but courts apply ordinary state law contract principles "[w]hen deciding whether the parties agreed to arbitrate a certain matter," *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," it must be enforced according to its terms. *Concepcion*, 563 U.S. at 343.

Under California law, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 842 (2014) (citing *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC*, 55 Cal. 4th 223, 236 (2012)). "The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence . . . to reach a final determination." *Id.* (citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (1997), *as modified* (July 30, 1997)).

2. Analysis

a. Scope of the Arbitration Clause

TuneCore contends that each of Caterine's causes of action are within the scope of the 2009 and 2012 Agreements' broad arbitration provisions, even though only the later Agreements contain an arbitration clause. Specifically, TuneCore argues that the arbitration agreement applies to the Pre-2009 Agreements (which themselves lack arbitration provisions) because the parties agreed to submit to arbitration "[a]ny controversy arising out of or relating to" the 2009 and 2012 Agreements, the arbitration provisions, and the Plan. 2009 Agreement at ¶ 15.3; 2012

Agreement at ¶ 15.3. According to TuneCore, "[a]ll seven of Caterine's causes of action," including those regarding the Pre-2009 Agreements, "relate to" the 2012 Agreement and the Plan. MTC at 13–14.

TuneCore is correct that the arbitration provisions are broad, but it incorrectly asserts that the Pre-2009 Agreement claims relate to the Plan or are otherwise arbitrable under the 2009 and 2012 Agreements. Although federal policy favors arbitration, it has long been established that "[a]rbitration is a matter of contract." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). Accordingly, "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Having reviewed the claims and evidence before it, the Court concludes that Caterine did not agree to arbitrate claims arising out of the Pre-2009 Agreements.

First, the Pre-2009 Agreements do not themselves contain arbitration provisions. More importantly, however, the claims stemming from those agreements do not arise out of or otherwise relate to either the 2009 or 2012 Agreements, or the Plan. As an initial matter, neither the 2009 Agreement, the 2012 Agreement, nor the Plan incorporate by reference or otherwise cover any of the Pre-2009 Agreements. In fact, the Plan acknowledges the existence of stock option agreements preceding the 2009 and 2012 Agreements by explicitly referencing option grants through "the Prior Plan[]." *See* Plan at ¶ 4.2 (providing that the maximum number of shares of stock subject to the Plan will be "automatically increased" by the number of shares outstanding under the Prior Plan "if and to the extent any such options are cancelled after the date of adoption of this [P]lan"); *id.* at ¶ 4.3 (providing that outstanding options granted under the Prior Plan that have been cancelled or terminated may be available for subsequent option grants under the Plan). Yet, the Plan's drafters did not include any verbiage applying the Plan to those earlier option grants, or expressly superseding the Prior Plan.

Moreover, according to TuneCore's current CEO, the Plan was created in October 2008 in order to govern the 2009 and the 2012 Agreements—not to retroactively apply to prior agreements or otherwise make all previously granted options subject to a single cohesive plan. *See* Ackerman Decl. at ¶ 21; *see also Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374 (6th Cir. 1999) (arbitration clause in shipping agreement did not apply to conduct occurring under prior shipping agreements that lacked the same clause); *cf. TradeComet.com LLC v. Google, Inc.*, 435 F. App'x 31, 35 (2d Cir. 2011) (the district court did not impermissibly give retroactive effect to an arbitration provision applying to claims "arising out of or relating to th[e operative] agreement" when the later agreements "supersede[d] and replace[d]" the earlier agreements' terms). This lends further support to the Court's view that the Pre-2009 Agreements

and the 2009 and 2012 Agreements are, and were intended to be treated as, distinct option grants. Indeed, the Pre-2009 Agreements contain the same contractual language, which is distinct from the language of the 2009 and 2012 Agreements.

Furthermore, nothing appears to require the Court (or an arbitrator, for that matter) to interpret either of the 2009 or 2012 Agreements, the arbitration provisions, or the Plan to resolve Caterine's claims regarding the Pre-2009 Agreements. Just because Plaintiffs allege that TuneCore's actions simultaneously breached all seven of Caterine's stock option agreements does not mean that every claim relates to or arises out of the 2009 or 2012 Agreements, which are the only ones that contain an arbitration clause. Rather, each claim relates to or arises out of TuneCore's singular conduct as to each individual agreement.

At the motions hearing, counsel for TuneCore argued that Caterine's claims regarding the Pre-2009 Agreements relate to the 2012 Agreement, bringing those claims within the scope of the arbitration provisions. Specifically, TuneCore contends that the 2012 Agreement was offered to Caterine as a "replacement" option—given to him to recognize his prior service—because Caterine's rights under the previous option agreements had expired due to his 2011 resignation from TuneCore and his subsequent failure to exercise his option rights within the 30-day or three-month time limits. Ackerman Decl. at ¶ 20. Thus, according to TuneCore, all of Caterine's claims relate to the 2012 Agreement.

The Court has weighed the evidence submitted by the parties, as required when ruling on a motion to compel, and rejects this argument. Contrary to TuneCore's assertion, the 2012 Agreement plainly states that the options granted pursuant to it were given "in addition to, and not in lieu of" any other form of compensation payable to Caterine. 2012 Agreement at 2. Accordingly, Caterine's claims regarding the Pre-2009 Agreements are not related to the 2012 Agreement for arbitrability purposes.

Because the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement," TuneCore's MTC must be denied as to the disputes relating to the Pre-2009 Agreements. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.[2]

[2] That Caterine did not in his opposition papers dispute TuneCore's scope argument as to the Pre-2009 Agreements is of no moment. As stated, when ruling on a motion to compel, this Court must consider all of the evidence presented, and may not submit to arbitration those disputes not agreed upon by the parties to be so submitted. While Caterine may voluntarily agree at this juncture to submit all of his stock option disputes to arbitration, that result is not mandated by the language of the agreements or the Plan.

b. Unconscionability

Because the arbitration provisions plainly apply to those claims arising out of the 2009 and 2012 Agreements, the Court must determine whether arbitration is nonetheless inappropriate due to unconscionability. Caterine asserts that the arbitration clauses in the 2009 and 2012 Agreements are invalid because they are unconscionable. MTC Opp. at 7:16-24:05. In California, "a contract must be both procedurally and substantively unconscionable to be rendered invalid." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013). Procedural unconscionability measures "oppression or surprise due to unequal bargaining power," while substantive unconscionability focuses on "overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133 (2013). "California law utilizes a sliding scale to determine unconscionability—greater substantive unconscionability may compensate for lesser procedural unconscionability." *Chavarria*, 733 F.3d at 922. Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 851 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal. 4th 223, 247 (2012).

i. Procedural Unconscionability

Caterine contends that because both the 2009 and the 2012 Agreements were drafted by Tunecore on a "take-it-or-leave-it" basis that did not provide him the opportunity to negotiate terms, the arbitration agreement is procedurally unconscionable. MTC Opp. at 9:23-12:16.

"[T]he critical factor in [a] procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated . . . ." *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006). In assessing procedural unconscionability, courts have considered whether a contract is one of adhesion, "i.e., a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). Courts also consider the factors of oppression and surprise due to unequal bargaining power. *Ferguson v. Country-wide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002). "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation,'" whereas "[s]urprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party." *Chavarria*, 733 F.3d at 922.

It is undisputed that the 2009 and 2012 Agreements were offered to Caterine on a "take-it-or-leave-it" basis. Thus, they are contracts of adhesion. The analysis, however, does not end

there because "a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules . . . operate to render it otherwise." *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819–20 (1981).

Here, Caterine does not sufficiently allege oppression to maintain an unconscionability defense to arbitration. Caterine was TuneCore's CFO, served on the Board of Directors, hired staff, and oversaw day-to-day financial operations. Accordingly, he was in a position to affect high-level company decisions, such that he was not in a significantly disadvantaged bargaining position. In addition, Caterine's employment was not conditioned on his agreement to arbitrate. Moreover, because Caterine's "reputation[] in the music industry would be critical to obtaining success for [TuneCore]," he likely had substantial leverage to seek other opportunities had he been dissatisfied with the terms of the agreement. *See, e.g.*, *Cleveland v. Oracle Corp.*, 2007 WL 915414, at *8 (N.D. Cal. Mar. 23, 2007) (concluding there was no oppression where a company offered its senior executives a non-negotiable benefits plan because the executives were "sophisticated businesspersons with ample professional opportunities").

Furthermore, Caterine does not sufficiently allege surprise arising from unequal bargaining power. The arbitration provisions are clearly stated and conspicuous, labeled with the heading, "Arbitration," printed in bold text. *See Fouts v. Milgard Mfg., Inc.*, 2012 WL 1438817, at *6 (N.D. Cal. Apr. 25, 2012) ("[A]lthough the Agreement was a contract of adhesion that [plaintiff] had no opportunity to modify, the arbitration clauses are not hidden in the text but are written in the same typeface as the rest of the agreement, with clear headings to explain each section."). Furthermore, TuneCore's failure to provide Caterine the JAMS rules does not constitute surprise. *Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932–33 (N.D. Cal. 2012) ("Under general California rules of contract interpretation, matters like the AAA rules can be incorporated into a contract by reference provided the incorporation is clear and the incorporated rules are readily available.").

Indeed, Caterine's own allegations contradict his assertion of procedural unconscionability. He contends that there is a dispute as to whether the option grants in the 2012 Agreement were "replacement" options, and that the express language of the 2012 Agreement supports his belief that the options were not replacements. FAC at ¶¶ 108–10. The Court need not determine the correct interpretation of the contract's language regarding the cumulative or superseding nature of the options. Rather, Caterine's articulation of the alleged dispute reveals a level of meaningful negotiation and review of the Agreements that belies his contention that he was "surprised" by the express language of the arbitration provisions in the same agreements. Thus, Caterine's contention that he was unaware of the arbitration provisions is unavailing. *See also Employee Painters' Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir. 1996) ("A party

who signs a written agreement is bound by its terms, even though the party neither reads the agreement nor considers the legal consequences of signing it.").

Because the 2009 and 2012 Agreements are contracts of adhesion and were presented on a "take-it-or-leave-it" basis, some measure of procedural unconscionability is present. Nonetheless, the terms of the arbitration provision are clear and unambiguous. Caterine's factual allegations do not suggest the presence of oppression or surprise. Therefore, the level of procedural unconscionability is "minimal." *See Nagrampa*, 469 F.3d at 1284.

ii. Substantive Unconscionability

Caterine contends that the arbitration agreements are substantively unconscionable because they (1) "eliminate the recovery of attorneys' fees in wage cases,"[3] and (2) "contain a hidden, undisclosed confidentiality clause."[4] MTC Opp. at 12:19–24:05.

Caterine's first argument is not persuasive. Eliminating the recovery of attorney's fees in an arbitration provision is neither uncommon nor unconscionable. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("Unlike Britain where counsel fees are regularly awarded to the prevailing party, it is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees."); *DiGiacomo v. Ex'pression Ctr. for New Media Inc.*, 2008 WL 4239830, at *6 (N.D. Cal. Sept. 15, 2008) (upholding an arbitration provision's waiver of attorney's fees because it applied to both parties bilaterally and "[t]he Supreme Court has repeatedly held that the express terms of an arbitration agreement are controlling over considerations of expediency in the dispute resolution process").

Caterine mistakenly relies on *Armendariz v. Found. Health Psychare Services, Inc.*, 24 Cal. 4th 83 (2000), for the proposition that the waiver of attorney's fees for the arbitration of an employee's wage claims is substantively unconscionable. MTC Opp. at 14:02–05, 21:03–25. In *Armendariz*, the court held that

[3] The 2009 and 2012 arbitration provisions provide the following: "The parties further agree that in any proceeding with respect to such matters, each party shall bear its own attorney's fees and costs (other than forum costs associated with the arbitration) incurred by it or him or her in connection with the resolution of the dispute." 2009 Agreement at ¶ 15.3; 2012 Agreement at ¶ 15.3.

[4] Caterine alleges that TuneCore improperly failed to disclose JAMS Rule 26, which states, "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the hearing . . . ." MTC. Opp. at 22:03–16.

> when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.

24 Cal. 4th at 110–11. Caterine's claims do not arise from an employment agreement. On the contrary, his claims arise from various stock option incentive agreements. These agreements provide additional benefits to Caterine's $90-an-hour employment agreement and do not condition his continued employment on his acceptance of their terms.

As for Caterine's contention that the stock option incentives should be considered wages, the Court's response is simple: "[S]tock options are not 'wages.'" *IBM v. Bajorek*, 191 F.3d 1033, 1039 (9th Cir. 1999) (construing California Labor Code section 200(a)), *disapproved in part on other grounds by Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 949–50 (2008); *see also Roche v. Morgan Collection, Inc.*, 882 F. sup. 2d 247, 253–58 (D. Mass. 2012) (compensation triggered by contingencies is not "wages" under the Massachusetts Wage Act, and citing cases); *Baptista v. Abbey Healthcare Grp., Inc.*, 1996 WL 33340740, at *4 (D. Mass. Apr. 10, 1996) (declining to extend the Act's protections to stock options); *cf. Weems v. Citigroup Inc.*, 453 Mass. 147, 157 (2009) (declining to recognize claim under Wage Act in connection with forfeiture of unvested restricted stock, reasoning "[i]t is only after the stock has actually been awarded to the employee . . . that the cash used for the purchase (and the stock itself) can be 'forfeited'").

Caterine's second argument is equally unpersuasive. To start, Caterine misconstrues JAMS Rule 26, which plainly states that "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding," *not* that the parties to the arbitration must maintain confidentiality. Furthermore, it is well established that incorporating JAMS rules by reference is not substantively unconscionable. *See Ulbrich*, 887 F. Supp. 2d at 932–33.

The arbitration agreement is not substantively unconscionable, and it raises only minimal concerns of procedural unconscionability. Arbitration will therefore not be invalidated on the basis of unconscionability. As such, Caterine's claims arising out of the 2009 and 2012 Agreements shall be addressed in arbitration.

B. TuneCore's Motion to Strike

California prohibits "Strategic Lawsuits Against Public Participation" (the "anti-SLAPP" statute). Cal. Civ. Proc. Code § 425.16. This law "permits a defendant to pursue early dismissal of meritless lawsuits arising from conduct by the defendant in furtherance of the right of petition or free speech." *Greater L.A. Agency on Deafness, Inc. v. Cable News Network*, 742 F.3d 414, 419 (9th Cir. 2014). TuneCore contends that the law precludes Atencio's appropriation of name claim, and that the claim should be stricken because (1) Atencio is well-known in the music industry, making TuneCore's use of his name in the Press Release a matter of public interest; (2) the claim is time-barred; and (3) the claim fails on the merits. MTS at 1–2. Atencio responds that TuneCore's use of his name in the Press Release qualifies as commercial speech not protected by the anti-SLAPP law. MTS Opp. at 9.

1. Legal Standard

"The anti-SLAPP statute allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances." *Flatley v. Mauro*, 39 Cal. 4th 299, 311–12 (2006) (citing § 425.16(b)(1)). Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 733 (2003).

TuneCore first must show that Atencio's appropriation of name claim arises from TuneCore's exercise of its constitutional right to free speech. Under section 425.16, such constitutionally protected speech activity includes "any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest" and "any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(2)–(3). The California legislature directs that the statute "shall be construed broadly." *Id.* at § 425.16(a). Moreover, California courts have held that "a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary." *City of Los Angeles v. Animal Def. League*, 135 Cal. App. 4th 606, 621 (2006), *disapproved of on other grounds by City of Montebello v. Vasquez*, 1 Cal. 5th 409 (2016); *accord Governor Gray Davis Comm. v. Am. Taxpayers All.*, 102 Cal. App. 4th 449, 458 (2002).

The anti-SLAPP law does not, however, "apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services . . . arising from any statement or conduct by that person" if both "(1) [t]he statement or conduct consists of

representations of fact about that person's . . . business operations, goods, or services, that is made for the purpose of . . . promoting . . . the person's goods or services" and "(2) [t]he intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer." Cal. Civ. Proc. Code § 425.17(c). This is known as the commercial speech exemption, and, as a statutory exception to the anti-SLAPP law, it "should be narrowly construed." *Simpson Strong-Tie Co. v. Gore*, 49 Cal. 4th 12, 22 (2010) (quoting *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309, 316 (2008)). The burden of proof as to whether the Press Release constitutes commercial speech subject to the exemption falls on Atencio. *See id.* at 26; *see also Colonial Ins. Co. v. Indus. Accidnet Comm'n*, 27 Cal. 2d 437, 441 (1945) ("[I]t has been declared that where the statute has eemptions, exceptions or matters which will avoid the statute the burden is on the claimant to show that he falls within that category.").

If—and only if—TuneCore shows that the challenged cause of action arises from its protected activity, does the Court decide whether Atencio has demonstrated a probability of prevailing on the claim. *Jarrow*, 31 Cal. 4th at 733. To establish a probability of prevailing on a claim, Atencio must meet a standard "comparable to that used on a motion for judgment as a matter of law." *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir.2010). Thus, he "must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.* (quoting *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir.2001)). If he fails to present a sufficient legal basis for the claims or if the evidence offered is insufficiently substantial to support a judgment in his favor, then TuneCore's anti-SLAPP motion should be granted. *Id.*.

In considering the MTS, the Court "consider[s] the pleadings, and the supporting and opposing affidavits stating the facts upon which the liability or defense is based." Cal. Civ. Proc. Code § 425.16(b)(2).

2. Analysis

a. Prong One: Protected Activity and Commercial Speech

TuneCore argues that the cause of action arises from a furtherance of free speech because the Press Release is "communicative," which the Ninth Circuit in *Hilton v. Hallmark Cards*, 599 F.3d 894, 903–04 (9th Cir. 2010), deemed sufficient to meet the first step's threshold. MTS at 7. Atencio counters that TuneCore's use of his name in the Press Release was not made in furtherance of its free speech rights, but rather, is commercial speech which falls outside section 425.16's protection. MTS Opp. at 9. In its Reply, TuneCore contends that because commercial speech is entitled to First Amendment protections and not categorically exempted from anti-

SLAPP protections, Atencio's argument fails. MTS Reply at 4–5. TuneCore also argues that the Press Release expresses Atencio's *opinion* about TuneCore's services, and therefore fails to satisfy section 425.17(c)'s requirement that the statement or conduct consist of "*representations of fact* about" TuneCore's business or services. *Id.* at 15–17 (emphasis added) (quoting § 425.17(c)(1)).

It is undisputed that TuneCore is "primarily engaged in the business of selling . . . services," the Press Release was "made for the purpose of . . . promoting" TuneCore's services, and the Press Release's intended audience was "an actual or potential . . . customer, or a person likely to repeat the statement to or otherwise influence, an actual or potential . . . customer." Cal. Civ. Proc. Code § 425.17(c); *see also Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 814 F. Supp. 2d 1033, 1038 (S.D. Cal. 2011) (company's press release was made to promote the business's goods, and the intended audience was actual or potential customers or someone likely to influence them). The main question before the Court, then, is whether the statement at issue—the quotation attributed to Atencio and the attribution itself—qualifies as a "representation[] of fact" about TuneCore's operations or services.

To this question, TuneCore contends that because the statement reflects Atencio's opinion, its use in the Press Release disqualifies the appropriation claim from the section 425.17(c) exemption. Although the Court agrees that the quotation itself is Atencio's opinion and not a statement of fact by TuneCore about TuneCore's services, TuneCore's argument erroneously focuses on the nature of the quotation, rather than on the message communicated by Tunecore in attributing the statement to Atencio in the Press Release. The latter is the conduct out of which Atencio's appropriation claim arises.

In repeating Atencio's statement and attributing the statement to him, TuneCore's communication is not the content of Atencio's statement, but rather, that Atencio made the statement in the first place. In other words, TuneCore's factual representation about its business is that Atencio, a well-known and respected figure in the industry, endorses TuneCore's operations and services. *See, e.g.*, *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 676–77 (2010) (rejecting plaintiff musicians' argument that magazine's placement of their names next to Camel cigarette ads "consist[ed] of 'representations of fact about the business operations, goods, or services' of Rolling Stone" because "the representation at the center of th[e] lawsuit [wa]s the representation that plaintiffs and their fellow musicians endorse the sale and use of Camel cigarettes"); *Rezec v. Sony Pictures Entm't, Inc.*, 116 Cal. App. 4th 135, 141 (2004) (Sony movie posters featuring a quotation and attribution contained "factual content" that "represented to the public that someone named David Manning had commented favorably on [Sony's] films"). Viewed in this light, TuneCore's use of Atencio's name in the Press Release constitutes a

representation of fact about TuneCore's services, bringing the conduct well within section 425.17(c) exemption's purview.

Because the Press Release is not protected by the anti-SLAPP law, the Court need not consider the second prong of the anti-SLAPP analysis. *See JAMS, Inc. v. Superior Court*, 1 Cal. App. 5th 984, 993 (2016) ("Under the two-pronged test of section 425.16, whether a section 425.17 exemption applies is a first prong determination." (quoting *Demetriades v. Yelp, Inc.*, 228 Cal.App.4th 294, 308 (2014))). TuneCore's anti-SLAPP motion is **DENIED**.

C. TuneCore's Motion to Dismiss

As an initial matter, the Court notes that TuneCore moved to strike Atencio's appropriation of name claim under California's anti-SLAPP statute, and moved to dismiss Atencio's remaining claims. Having reviewed both sides' arguments regarding the claim, the Court concludes that the appropriation of name claim should be resolved under the motion-to-dismiss standard. *See United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984) ("The moving party's label for its motion is not controlling. Rather, the court will construe it, however styled, to be the type proper for [the] relief requested."). Accordingly, the Court construes the MTS' merits arguments regarding the appropriation claim as part of TuneCore's MTD.

1. Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). On a motion to dismiss, a court can consider documents attached to the complaint, documents incorporated by reference in a complaint, or documents subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

To survive a Rule 12(b)(6) motion, a complaint must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). Although a pleading need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009).

In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id*.

Should a court dismiss certain claims, it must also decide whether to grant leave to amend. Federal Rule of Civil Procedure 15(a) provides that a party may amend a pleading with the court's leave, and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Moss v. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (leave to amend should be granted with "extreme liberality"). "Leave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)).

Likewise, when a party seeks leave to amend his complaint, a court should not deny such leave except in the presence of bad faith, undue delay, undue prejudice to the opposing party, and/or futility of amendment. *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 n.8 (9th Cir. 2009). Futility of amendment alone warrants denial of leave to amend, but the party opposing amendment must show that no set of facts can be pled or proved that would give rise to a valid claim or defense. *Ahlmeyer v. Nevada System of Higher Educ.*, 555 F.3d 1051, 1055 (9th Cir. 2009). "[T]his determination should be performed with all inferences in favor of granting the motion." *Id*.

2. Analysis

a. Appropriation of Name

California recognizes "the right of a person whose identity has commercial value—most often a celebrity—to control the commercial use of that identity." *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183 (9th Cir. 2001) (*quoting Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992)). To sustain a common law claim for commercial misappropriation, a plaintiff must prove "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of [the] plaintiff's name or likeness to [the] defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Stewart*, 181 Cal. App. 4th at 679 (*quoting Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983)).

Atencio fails to state a claim for appropriation of name because he pleads in the FAC that TuneCore had his consent to use his name in promoting the business. *See* FAC at ¶ 300 (TuneCore "was using and permitted to use [his name] in connection with their business and in promoting it"). Moreover, Atencio admits that he did not withdraw his consent until he filed this claim on March 21, 2016. MTS Opp. at 15. Atencio cannot withdraw his consent *after* the use of his name and state a claim for retroactive wrongful appropriation of name before such withdrawal. *See Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994).

At the motions hearing, Atencio responded to the Court's concerns regarding consent, arguing that any consent he provided TuneCore cannot operate to bar his appropriation claim because the consent was based in fraud. But TuneCore's alleged fraudulent activity began in 2013, six years *after* Atencio permitted TuneCore to use his name in the Press Release. Atencio does not allege that TuneCore used his name in any other instance, let alone after TuneCore's alleged fraudulent scheme began to keep Atencio in its employ.

In fact, the only actionable use of Atencio's name alleged was the Press Release. All other alleged uses of his name in support of the misappropriation claim stemmed from Atencio's own use of his name to promote TuneCore. *See* MTS Opp. at 12. To adequately state a claim, it must be the *defendant* that improperly uses the plaintiff's identity. Atencio's use of his own name to promote TuneCore cannot form the basis for a misappropriation claim. Therefore, the Court **GRANTS** the MTD as to the misappropriation of name claim.

b. Violations of the California Labor Code

Atencio alleges TuneCore violated California Labor Code section 216 by withholding his wages. FAC at ¶ 207–11. As noted above, however, stock options are not wages. *Bajorek*, 191 F.3d at 1039–40. In support of his claim, Atencio relies on *Schachter v. Citigroup, Inc.*, 47 Cal. 4th 610 (2009), which states in *dicta* that the plaintiff's shares of restricted stock constituted a wage under the Code—a point that the parties did not dispute. *Id.* at 618–19. Restricted stocks are fundamentally different from stock options because options are not fixed amounts. *Bajorek*, 191 F.3d at 1040; *see also Drumm v. Morningstar, Inc.*, 695 F. Supp. 2d 1014, 1020–21 (N.D. Cal. 2010) (doubting that stock options constitute wages under the Code and distinguishing *Schachter*). Attencio's allegation that TuneCore withheld stock options owed for his services does not support a claim under California Labor Code section 216.

c. Breach of Contract

A successful breach of contract claim requires a plaintiff to demonstrate (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damage to plaintiff. *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011) (citing *Reichert v. Gen. Ins. Co.*, 68 Cal. 2d 822, 830 (1968)). For a valid breach of contract claim, the plaintiff must allege the existence of a contract and that defendant violated a contract. *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011).

i. Stock Option Agreement

Viewing all facts in the light most favorable to Plaintiff, Atencio has sufficiently pleaded breach of contract as to the stock option agreements. Atencio alleges that he and TuneCore agreed to a business arrangement under which TuneCore could use Atencio's name to promote the business, as well as his time and energy in promoting the company himself, in exchange for stock options. In fact, Atencio was provided with and signed two stock option agreements in 2006, each of which provides that he has ten years from the date of the agreements to exercise his stock options so long as his employment relationship with TuneCore continues. This sufficiently alleges the existence of a contract. *See Steiner v. Thexton*, 48 Cal. 4th 411, 418 (2010). Next, although the parties dispute the ongoing nature of the work relationship, Atencio states that his status as a consultant and promoter continued until he filed the instant lawsuit. This adequately alleges Atencio's performance of the contract. Moreover, according to him, Atencio's options were not terminated due to the disassociation of the parties' work relationship and should have been available until February and August 2016 under the respective agreements. But when Atencio tried to exercise his options in the fall of 2015, after receiving only a pittance upon following the Letter of Transmittal's directions, he was told that he could no longer exercise the options. Taking all material facts alleged in the FAC as true, Atencio has alleged sufficient facts to state a claim for contractual breach.

ii. Agreement for "a [C]ombination of [C]ash and [S]tock [O]ptions"

At the hearing, Atencio clarified that in addition to asserting a breach claim as to the stock option agreements, he also intended to raise a claim for breach of the oral agreement entered into in 2005. Regarding this agreement, the FAC states that "[i]t was promised that in return for their time, energy and hard work along with use of their names being associated on an ongoing basis with the business, Plaintiffs would be compensated either in cash and/or a combination of cash and stock options." FAC at ¶ 38; *see also id.* at ¶ 242 ("In exchange for

everything that both Atencio and Caterine brought to the table and promised to do, they were both promised that they would be compensated . . . ."). This oral contract claim fails.

As discussed above, a claim for breach of contract begins with the existence of the contract. Contract formation under California law requires "that the parties' reach mutual assent or consent on definite or complete terms." *Netbula, LLC v. BindView Development Corp.*, 516 F. Supp. 2d 1137, 1155 (N.D. Cal. 2007) (citing *Merced Cty. Sheriff's Emps. Ass'n v. Merced County*, 188 Cal. App. 3d 662, 670 (1987)). The contract's terms must be sufficiently definite in all aspects necessary to its enforcement. *See Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1037–38 (9th Cir. 2011); *Netbula*, 516 F. Supp. 2d at 1155 (citing *Magna Dev. Co. v. Reed*, 228 Cal. App. 2d 230 (1964)). Here, the arrangement alleged is insufficiently definite for the Court to determine "even generally[,] what the terms of the contract . . . were" because "cash" is too vague a term. *See, e.g., Langan v. United Servs. Auto. Ass'n*, 69 F. Supp. 3d 965, 979–80 (N.D. Cal. 2014) (dismissing claim for breach for failure to allege contract's material terms wherein the plaintiff alleged the defendants promised to provide the plaintiff credit for "a monthly fee"). Because the "scope of the duty and limits of acceptable performance" are not "sufficiently defined to provide a rational basis for the assessment of damages in the case of breach," the Court concludes that the oral contract—if one was ever formed—is void and unenforceable for lack of material terms.

Even if "cash" were a sufficiently definite term for the Court to determine whether a breach occurred, *see Facebook*, 640 F.3d at 1038, the contract fails under the statute of frauds. The statute of frauds renders invalid an oral "agreement that by its terms is not to be performed within a year from the making thereof." Cal. Civ. Code § 1624(a)(1). By Atencio's own allegations, his working relationship with TuneCore was not to be performed within one year of the agreement's formation, so it should have been reduced to writing or otherwise memorialized to survive the statute of frauds.[5]

[5] By the same token, the oral agreement fails under the two-year statute of limitations. *See* Cal. Civ. Proc. Code § 339. As TuneCore argues in its Reply, any oral agreement between Atencio and TuneCore would have been negotiated by Price (on behalf of TuneCore) before his termination, meaning that the agreement must have been entered into in July 2012 at the latest. MTD Reply at 7–8. If the oral agreement were valid under the statute of frauds, it must have been performed by July 2013, and Atencio must have filed suit by July 2015. Atencio filed suit in March 2016, after the limitations period expired.

d. Quantum Meruit

When asked at the hearing about the breach of oral contract claim, Atencio argued that "cash" was not an indefinite a term because he need only allege a claim for the reasonable value of services rendered. Atencio confuses a claim for breach of contract with a claim for quantum meruit. *See Jogani v. Superior Court*, 165 Cal. App. 4th 901, 909 (2008) ("[A] quantum meruit claim . . . is a quasi-contract claim for the reasonable value of services rendered."). Such claims are actionable even in the absence of a contract. *See Maglica v. Maglica*, 66 Cal. App. 4th 442, 449 (1998), *as modified on denial of reh'g* Sept. 28, 1998, *rev. denied* Dec. 16, 1998. Because a court "should not dismiss a complaint if it states a claim under any legal theory, even if a plaintiff erroneously relies on a different theory," the Court concludes that Atencio's allegations regarding the oral agreement are better understood as a claim for quantum meruit. *Daghlian v. DeVry Univ., Inc.*, 461 F. Supp. 2d 1121, 1125 (C.D. Cal. 2006) (citing *Haddock v. Board of Dental Examiners*, 777 f.2d 462, 464 (9th Cir. 1985)). Nevertheless, because Atencio has not alleged the specific services provided, their reasonable value, and when TuneCore failed to issue payment for those services (as opposed to TuneCore's refusal to permit Atencio to exercise his options), he has failed to sufficiently allege a claim for quantum meruit on which relief may be granted. *See Cedars Sinai Med. Ctr. v. Mid-W. Nat'l Life Ins. Co.*, 118 F. Supp. 2d 1002, 1013 (C.D. Cal. 2000).

e. Fraud, Intentional Misrepresentation, and Fraud in the Inducement

The FAC raises two separate causes of action for fraud: one in 2013 and one in 2015.[6] To plead fraud, a plaintiff must allege "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638 (1996) (quoting Witkin, Summary of Cal. Law, Torts § 676 (9th ed. 1988)).

Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard on a party alleging fraud. *See* Fed. R. Civ. P. 9(b) (requiring party to "state with particularity the circumstances constituting fraud or mistake"). Rule 9(b) requires that averments of fraud be specific enough to give the opposing party notice of the particular misconduct in order to allow the opposing party to defend against the charge and not just deny that it has done anything

[6] TuneCore breaks Atencio's claim into three causes of action, adding a "between 2005 and 2006" claim, but, having reviewed the FAC and the briefs, the Court does not believe Atencio claims that Jeff Price's statement was a misrepresentation. *See* Reply to MTD at 16–17.

wrong. *See Vess v. CIBA–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.") (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

i. Fraud in 2013

Atencio bases the 2013 fraud claim on Cogan's email advising him that he had until 2016 to exercise his stock options. He has pled sufficient facts to meet the particularity requirements of Rule 9(b). Specifically, Atencio alleges that when Cogan told him in June 2013 that he would have until 2016 to exercise his options, Cogan had no intention of permitting the options to remain exercisable for that long. *See* FAC at ¶¶ 260–61. Rather, Cogan sought to ensure Atencio's continued promotion of TuneCore and to "avoid any potential problems that would be caused with attempting to sell the business to a third-party" while "there was an ongoing dispute with the founders of the company" over stock options. *Id.* at ¶ 261. These allegations satisfy the first three elements of a fraud claim.

As to the final two elements, Atencio argues that he relied on Cogan's statement and, in turn, continued to promote TuneCore, and that when Atencio attempted to exercise his options on August 14, 2015, TuneCore refused to issue the true value, or the entirety, of those options. The Court concludes these facts plausibly allege justifiable reliance and harm: Atencio's reliance on Cogan's statement was justifiable given that the statement reflects the plain language of the stock option agreements, which each state that "[w]hile the Option Holder continues to be an employee, consultant, officer or director of the Company, such rights may be exercised up to and including the date which is [10] years from the date this Option is granted." Exhibit C to Ackerman Decl. at ¶ 1; Exhibit D to Ackerman Decl. at ¶ 1; MTD Reply at 18.

TuneCore argues that any reliance on Cogan's 2013 statement was not justifiable because the stock option agreements also provide that Atencio would have only 30 days after the termination of his employment relationship with TuneCore to exercise his options. MTD Reply at 18–19. Surely, if Atencio's employ had ended before July 14, 2015—over 30 days before he attempted to exercise his stock options—reliance on a 2013 representation that directly contradicts the option agreements would be unreasonable. The FAC, however, alleges that Atencio's work relationship with TuneCore continued up until the filing of this lawsuit. Because the Court takes the allegations as true when ruling on a motion to dismiss, these allegations plausibly state a claim for fraud.

ii. Fraud in 2015

Atencio bases the 2015 fraud claim on the "Letter of Transmittal" sent to him by TuneCore's attorney on April 12, 2015. As with the 2013 claim for fraud, the FAC sufficiently states a claim here. The Letter of Transmittal states that Atencio's securities were "automatically cancelled and converted . . . into a right to receive a payment in cash with regard to such outstanding Securities." *Id.* at ¶ 138. Atencio alleges that "TuneCore had no intention of honoring the representations" regarding the letter "[it] made to [Atencio] . . . but instead needed a scheme that would cause [him], and possibly others, to surrender their stock to TuneCore." *Id.* at ¶ 274. These allegations satisfy the misrepresentation and scienter elements of a fraud claim.

Moreover, Atencio alleges that he relied on the Letter's promise and followed the company's directions to cash in his outstanding stock options. Although TuneCore paid Atencio $11.51 for the ten shares of stocks derived from the options he exercised in 2012, the company refused to pay him for his other outstanding stock options. Stock options are securities under California law, *see, e.g.*, Cal. Corp. Code § 25019 (West 2001); *Haddad v. Electronic Prod. & Dev., Inc.*, 219 Cal. App. 2d 137, 141 (1963), so the value of any outstanding stock options should have been converted into cash pursuant to the Letter. Because TuneCore did not provide Atencio with a cash payment for these outstanding options, TuneCore's fraud harmed him.

These allegations, too, plausibly state a claim for fraud.

f. Promissory Estoppel

To state a claim for promissory estoppel under California law, a plaintiff must allege: (1) a promise that is clear and unambiguous in its terms; (2) reliance on that promise; (3) that the reliance was both reasonable and foreseeable; and (4) damages resulting from Plaintiffs' reliance. *Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co., Inc.*, 688 F. Supp. 2d 940, 953 (N.D. Cal. 2010) (citing *Ecology, Inc. v. State of Cal.*, 129 Cal. App. 4th 887, 901–02, 904 (2005)).

Atencio fails to state a claim for promissory estoppel. He alleges that the stock options constitute consideration for his work on behalf of TuneCore. Under California law, a bargained-for exchange fails to give rise to a promissory estoppel claim. *Walker v. KFC Corp.*, 728 F.2d 1215, 1220 (1984) (*citing Youngman v. Nevada Irrigation District*, 70 Cal. 2d 240, 250 (1969)).

Therefore, TuneCore's motion to dismiss the promissory estoppel claim is **GRANTED**.

g. Declaratory Relief

Under California and federal law, courts have the discretion to determine whether declaratory relief is necessary or proper. *See* Cal. Civ. Proc. Code §§ 1060, 1061; 28 U.S.C. § 2201; *Huth v. Hartford Ins. Co.*, 298 F.3d 800, 802 (9th Cir. 2002) ("The exercise of jurisdiction under the Federal Declaratory Judgment Act . . . is committed to the sound discretion of the federal district courts."). To invoke the Declaratory Judgment Act, the dispute should be

> "definite and concrete, touching the legal relations of parties having adverse legal interests"[] and . . . "be real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (third alteration in original) (quoting *Aetna Life Ins. Co v. Haworth*, 300 U.S. 227, 240–41 (1937)).

Atencio seeks declaratory relief from the Court regarding the following: (1) his employment status with TuneCore (employee, independent contractor, or otherwise), (2) "that TuneCore no longer has authority or consent to use" his name, and (3) "that TuneCore does not have a first amendment right to use Atencio's name." FAC at ¶¶ 346a–c.

i. Employment Status

It appears that this claim for relief is tied to Atencio's California Labor Code violation claim, for which he failed to state a claim. The Court therefore sees no reason to grant declaratory relief as to Atencio's employment status. Moreover, Atencio's status as an employee or independent contractor is irrelevant to his rights to enforce the stock option agreements. As such, there is no substantial controversy between the parties regarding Atencio's employment status, and declaratory relief is not appropriate.

ii. Consent for Use of Atencio's Name

To award declaratory relief, there must be a present controversy for which the plaintiff has alleged "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Vega v. JPMorgan Chase Bank*, 654 F. Supp. 2d 1104, 1120 (E.D. Cal. 2009) (citation omitted). Atencio has not sufficiently alleged that Tunecore has used—or plans to continue using—his name since he withdrew his consent. Moreover, at the motions hearing, Atencio stated on the record that there has been no ongoing use of his name. Therefore, no declaratory relief is warranted as to TuneCore's consent to use Atencio's name.

iii. First Amendment Right

As with the preceding claim, Atencio has not alleged a "real and immediate threat of injury necessary to make out a case or controversy" regarding TuneCore's First Amendment rights to use his name, and "past wrongs do not in themselves amount to" such a threat. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Conceivably, there may be instances in which TuneCore *may* use Atencio's name within the company's First Amendment rights, such that it would be inappropriate to grant declaratory relief. Nonetheless, Atencio has not alleged any facts indicating that TuneCorp's use of his name is currently of such immediacy and reality that it gives rise to a need for declaratory relief.

To the extent that this claim for declaratory relief relates to any past misappropriation of Atencio's name, the Court has already determined that the claim should be dismissed. Accordingly, any declaratory relief in that regard is unwarranted.

D. Plaintiffs' Motion to Amend

Because some of Caterine's claims will remain before this Court, it now considers Plaintiffs' MTA.[7] Their MTA seeks leave to file an amended complaint to add two claims for violations of (1) the New York Labor Law, and (2) the Delaware Wage Payment and Collection Law, Del. Code Tit. 19 § 1101 *et seq*. As part of their motion, they have submitted a proposed second amended complaint ("SAC").

The SAC includes wage claims under both New York and Delaware law. Plaintiffs fail to allege, however, that they worked in either New York or Delaware during the relevant period. Under both New York and Delaware law, a plaintiff cannot bring a wage claim under the law of those States if he or she did not perform work there. *See O'Neill v. Mermaid Touring Inc.*, 968 F. Supp. 2d 572, 578–79 (S.D.N.Y. 2013); *Klig v. Deloitte LLP*, 36 A.3d 785, 797–98 (Del. Ch. 2011).

[7] The Court does not consider the MTA as it relates to Caterine's claims arising out of the 2009 and 2012 Agreements as those will be subject to arbitration.

In any event, stock options are not wages under the New York Labor Law.[8] *See Gilman v. Marsh & McLennan Cos., Inc.*, 868 F. Supp. 2d 118, 135 (S.D.N.Y. 2012); *Guiry v. Goldman, Sachs & Co.*, 818 N.Y.S.2d 617, 619 (2006). Plaintiffs have made clear that their compensation claims pertain to the stock options. Thus, any amendment adding the wage claims would be futile as a matter of law and the Court **DENIES** leave to amend as to these proposed claims.

IV.
CONCLUSION

In light of the foregoing, the Court orders as follows:

1. TuneCore's MTC is **GRANTED** as to Caterine's claims relating to or arising out of the 2009 and 2012 Agreements, and those claims are dismissed without prejudice. The MTC is **DENIED** as to Caterine's claims relating to or arising out of the Pre-2009 Agreements.

2. TuneCore's MTD is **GRANTED**, without leave to amend, as to the following claims:

    a. appropriation of name,
    b. California Labor Code violations,
    c. breach of the oral agreement,
    d. promissory estoppel, and
    e. declaratory relief.

3. The MTD is **GRANTED**, with leave to amend, as to the quantum meruit claim.

4. The MTD is **DENIED** as to the following claims:

    a. breach of the stock option agreements,
    b. fraud in 2013, and
    c. fraud in 2015.

5. Plaintiffs' motion for leave to file a Second Amended Complaint to assert wage claims under New York and Delaware law is **DENIED**.

[8] Delaware law is not clear on this question, but it is clear that a plaintiff cannot state a wage claim without having worked in the state.

6. Plaintiffs shall file their Second Amended Complaint, consistent with this Order, by October 14, 2016. TuneCore shall file its response within 15 days after service and filing of the Second Amended Complaint.

IT IS SO ORDERED.