

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 CHARLOTTE B. MILLINER, et al.,

5 Plaintiffs,

6 v.

7 BOCK EVANS FINANCIAL
8 COUNSEL, LTD.,

9 Defendant.

Case No. 15-cv-01763-TEH

**ORDER DENYING MOTION TO
DISMISS**

10 This matter is before the Court on Defendant Bock Evans Financial Counsel's
11 motion to dismiss the complaint of Plaintiffs Charlotte B. Milliner and Joanne Brem. The
12 Court has carefully considered the arguments of the parties in the papers submitted, and
13 finds this matter suitable for resolution without oral argument, pursuant to Civil Local Rule
14 7-1(b). Defendant's motion to dismiss is hereby DENIED, for the reasons set forth below.

15
16 **BACKGROUND**

17 Defendant is a Colorado-registered investment advisory firm with its primary place
18 of business in Denver, Colorado. Plaintiffs Milliner and Brem were clients of Defendant,
19 and each signed Investment Advisory Agreements, although at different times. Milliner
20 appears to have signed her most recent of these agreements on December 3, 2008
21 ("Milliner Agreement"). Ex. A to Evans Decl. Brem appears to have signed her most
22 recent of these agreements on August 23, 2011 ("Brem Agreement"). Ex. B to Evans
23 Decl.

24 Plaintiffs' Agreements contain arbitration provisions that provide for the resolution
25 of disputes arising out of the Parties' investment advisory relationship before the American
26 Arbitration Association (AAA). Specifically, both of Plaintiffs' Agreements provide, in
27 relevant part:

1 (A) Client agrees that if a dispute arises out of or relates
2 to this contract, or the breach thereof, concerning any
3 transaction or the construction of the performance of the
4 agreement, that the Client and Bock Evans agree to try to settle
5 the dispute through direct negotiation in good faith.

6 (B) If the dispute cannot be settled through good faith
7 negotiation, the parties agree first to try to settle the dispute by
8 mediation administered by the American Arbitration
9 Association under its Commercial Mediation Procedures
10 before resorting to arbitration

11 (C) If the dispute cannot be resolved through either
12 negotiation or mediation, the Client may pursue the dispute
13 through arbitration to the American Arbitration Association
14 under its Commercial Arbitration Rules.

15 Ex. A to Evans Decl. at 4; Ex. B to Evans Decl. at 4-5. The Brem Agreement also
16 contained the following provision: “The aforementioned arbitration clause is voluntary and
17 shall not constitute a waiver of Client’s rights pursuant to and under federal rules or similar
18 state statutes and rules.” Ex. B to Evans Decl. at 5.

19 Milliner filed an arbitration claim with the Financial Industry Regulatory Authority
20 (FINRA) against Defendant, as well as certain individuals affiliated with Defendant, on
21 December 22, 2014. That FINRA case alleges many of the same causes of action, arises
22 from the same facts, and requests much of the same relief, as this case. However,
23 Defendant is not a party to the FINRA action. *See* Ex. 1 to Sturgeon Decl. (FINRA letter
24 noting that Defendant was “not required to arbitrate in the FINRA arbitration forum”
25 because Defendant is not a member of FINRA, and that FINRA would “proceed with this
26 action without [Defendant’s] participation”); Ex. 2 to Sturgeon Decl. (Defendant
27 responding that it “is not subject to FINRA’s jurisdiction” and declining to submit to
28 FINRA arbitration).

On March 5, 2015, before the filing of this action on April 20, Defendant filed a
Petition to Compel Mediation and Arbitration against Plaintiff Milliner in Alameda County
Superior Court. That case was removed on April 29, 2015, and related to the present
action by this Court on June 22, 2015.

Defendant filed the instant motion to dismiss Plaintiffs’ complaint on May 12,
2015. (Docket No. 8). Plaintiffs responded, and Defendant timely replied. (Docket Nos.

1 12, 19). Pursuant to Civil Local Rule 7-1(b), the Court vacated oral argument and now
2 renders its decision on the motion.

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4 **DISCUSSION**

5 **I. Dismissal for Improper Venue - Fed. R. Civ. P. 12(b)(3)**

6 Instead of requesting that this Court compel arbitration, Defendant took the
7 unconventional approach of arguing that venue is improper under Rule 12(b)(3) because
8 Plaintiffs agreed to arbitrate any disputes with Defendant. Mot. at 4. Complicating the
9 matter, Defendant’s argument relies heavily on cases that analyzed motions to compel
10 arbitration under the Federal Arbitration Act (“FAA”). *Id.* at 4-5. Plaintiffs respond by
11 characterizing Defendant’s Rule 12(b)(3) argument as a motion to compel arbitration, and
12 cite FAA cases in support of their claim that the arbitration provisions were neither
13 mandatory nor enforceable. Opp’n at 2-7. Defendant’s reply insisted that it is not moving
14 to compel arbitration. Reply at 1-2.

15 As an initial matter, Defendant improperly seeks dismissal of Plaintiffs’ complaint
16 under Rule 12(b)(3) for improper venue on the basis of an arbitration provision. In
17 *Atlantic Marine Construction Company, Inc. v. United States District Court for the*
18 *Western District of Texas*, 134 S. Ct. 568 (2013), the Supreme Court clarified that Rule
19 12(b)(3) allows for dismissal only when venue is “wrong” or “improper.” *Id.* at 577. A
20 venue is only “wrong” or “improper” if the court in which the case was brought fails to
21 satisfy the requirements of federal venue laws, and the existence of a forum selection
22 clause, such as the arbitration provision in this case, does not render venue “wrong” or
23 “improper” under those requirements. *See id.* at 578-79. Instead, forum selection clauses
24 should be analyzed under the federal transfer statute, 28 U.S.C.A 1404(a), unless the
25 moving party seeks a non-federal forum, in which case *forum non conveniens* is the
26 appropriate doctrinal analysis. *Id.* at 579-80.

27 An arbitration provision can be construed as a forum selection clause. *Polimaster*
28 *Ltd. v. RAE Systems, Inc.*, 623 F.3d 832, 837 (9th Cir. 2010) (“The requirement of

1 arbitration at the defendant’s site is effectively a forum selection clause, in which the
2 parties agreed to arbitrate at the location of a defendant’s principal place of business.”).
3 “[A] valid forum-selection clause should be given controlling weight in all but the most
4 exceptional cases.” *Atl. Marine Const. Co., Inc.*, 134 S.Ct. at 581 (internal quotations and
5 alterations removed). However, district courts must first “consider arguments that the
6 clause is invalid.” *Russel v. De Los Suenos*, No. 13-2081-BEN, 2014 WL 1028882, at *6
7 (S.D. Cal. Mar. 17, 2014).

8 “A forum selection clause is presumptively valid; the party seeking to avoid a
9 forum selection clause bears a ‘heavy burden’ to establish a ground upon which [the court]
10 will conclude the clause is unenforceable.” *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th
11 Cir. 2009) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)). “[A]
12 forum selection clause is unenforceable ‘if enforcement would contravene a strong public
13 policy of the forum in which suit is brought, whether declared by statute or by judicial
14 decision’” *Doe 1*, 552 F.3d at 1083 (quoting *Bremen*, 407 U.S. at 15). Additionally, a
15 “party may attempt to make a showing that would warrant setting aside the forum-
16 selection clause - that the agreement was affected by fraud, undue influence, or
17 overweening bargaining power; that enforcement would be unreasonable and unjust; or
18 that proceedings in the contractual forum will be so gravely difficult and inconvenient that
19 the resisting party will for all practical purposes be deprived of his day in court.”
20 *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1287 (9th Cir. 2006) (internal quotation and
21 citation omitted).

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A. Waiver of the Right to a Jury Trial

Because this suit was brought in a federal court sitting in California, the Court first
considers whether enforcing the arbitration provision “would contravene a strong public

1 policy” in the state of California.¹ *Doe 1*, 552 F.3d at 1083 (quoting *Bremen*, 407 U.S. at
 2 15). California places great importance on a litigant’s right to a trial by jury, which is
 3 codified in the state’s Constitution at Article I, section 16.² “The right to a trial by jury is a
 4 basic and fundamental part of our system of jurisprudence. As such, it should be zealously
 5 guarded by the courts. In case of doubt, therefore, the issue should be resolved in favor of
 6 preserving a litigant’s right to a trial by jury.” *Titan Group v. Sonoma Valley Cnty.*
 7 *Sanitation Dist.*, 164 Cal. App. 3d 1122, 1127-28 (1985) (internal quotation marks and
 8 citations omitted). Consequently, “any waiver thereof should appear in clear and
 9 unmistakable form. We cannot elevate judicial expediency over access to the courts and
 10 the right to jury trial in the absence of clear waiver.” *Id.* at 1129.

11 The waiver of a jury trial, in the form of an arbitration agreement, was not “clear
 12 and unmistakable” in this case. The Agreements in dispute were poorly constructed, and
 13 contain language that might lead a reasonable person to believe that the arbitration
 14 provision was optional. The clause provides that “the client may pursue the dispute
 15 through arbitration.” Ex. A at 4; Ex. B at 4. The use of the word “may” suggests a
 16 permissive dispute resolution process, rather than a mandatory one. *See, e.g. Common*
 17 *Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 443 (1989) (the word “may” “is ordinarily
 18 construed as permissive”). Furthermore, the Brem Agreement also provided: “The
 19 aforementioned arbitration clause is voluntary and shall not constitute a waiver of Client’s
 20 rights pursuant to and under federal rules or similar state statutes and rules.” Ex. B to
 21 Evans Decl. at 5. This language further calls into question the mandatory nature of the
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24 ¹ The choice-of-law provision is without consequence to this analysis, as the operative
 25 question is whether the forum selection provision violates a strong public policy
 26 established by the forum in which the suit was brought. Accordingly, the Court looks to
 27 California law to identify any such policy. However, the Court notes that the outcome of
 28 this analysis would be the same under Colorado law.

² The right to a jury trial in most civil cases is also provided by the U.S. Constitution. U.S.
 Const. Amend. VII. Colorado law similarly provides for such a right, although it is not
 codified in the state constitution. *Snow Basin, Ltd. v. Boettcher & Co.*, 805 P.2d 1151,
 1154 (Colo. App. 1990).

1 arbitration provision, and no explanation for the additional language in the Brem
2 Agreement is provided by Defendant.

3 Defendant responds by pointing out that the word “may” was also used in the
4 arbitration clause found enforceable by the Supreme Court in *AT&T Mobility LLC v.*
5 *Concepcion*, 131 S.Ct. 1740 (2011). However, Defendant overlooks the important fact
6 that the arbitration clause in *Concepcion* actually provided that arbitration *was voluntary*,
7 and allowed either party to “bring a claim in small claims court in lieu of arbitration.” *Id.*
8 at 1744. Defendant provides no other reason to find that the permissive language used in
9 Plaintiffs’ Agreements should be interpreted as mandating arbitration. Consequently, this
10 Court declines to find that Plaintiffs agreed to a clear and unmistakable waiver of their
11 right to a jury trial, rendering the arbitration provision unenforceable as a forum selection
12 clause. Similarly, because there is not a clear agreement to engage in mandatory
13 arbitration, it is also unenforceable within the context of a motion to compel arbitration.

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15 **B. Unconscionability**

16 California also has a strong public policy against the enforcement of
17 unconscionable contract provisions. Cal. Civ. Code § 1670.5(a).³ Consequently, if the
18 “place and manner” restrictions of the forum selection provision are “unduly oppressive,”
19 *see Bolter v. Superior Court*, 87 Cal. App. 4th 900, 909–10 (2001), or have the effect of
20 shielding the stronger party from liability, *see Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165,
21 1177 (N.D. Cal. 2002), then the forum selection provision is unconscionable and will not
22 be enforced. *Nagrampa*, 469 F.3d at 1287. A finding of unconscionability requires “a
23 ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’
24 due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”
25 *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000);

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27 _____
28 ³ Colorado law similarly discourages courts from enforcing unconscionable contract
provisions. *See Lincoln Gen. Ins. Co. v. Bailey*, 224 P.3d 336, 341 (Colo. App. 2009)
aff’d, 255 P.3d 1039 (Colo. 2011) (“Courts will not enforce an unconscionable contract.”).

1 *accord, Discover Bank*, 36 Cal.4th 148, 159–161. Procedural and substantive
2 unconscionability are evaluated on a sliding scale, as “the more substantively oppressive
3 the contract term, the less evidence of procedural unconscionability is required to come to
4 the conclusion that the term is unenforceable, and vice versa.” *Armendariz*, 24 Cal.4th at
5 114.

7 **1. Procedural Unconscionability**

8 Defendant’s arbitration provision is procedurally unconscionable for multiple
9 reasons. First, the provision as it appears in the Milliner and Brem Agreements contains
10 nearly identical boilerplate terms that were drafted by Defendant and imposed upon
11 Plaintiffs, and there is no evidence that the provisions were negotiable. *Compare* Ex. A to
12 Evans Decl. at 4, *with* Ex. B to Evans Decl. at 4-5. California and Ninth Circuit case law
13 have consistently found that “take it or leave it” contracts implicate procedural
14 unconscionability. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir.
15 2003) (following the reasoning in *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (2002),
16 in which the California Court of Appeal held that the availability of other options does not
17 bear on whether a contract is procedurally unconscionable.) *See also, Ferguson v.*
18 *Countrywide Credit Industries, Inc.*, 298 F.3d 778, 784 (9th Cir. 2002) (“[W]hether the
19 plaintiff had an opportunity to decline the defendant's contract and instead enter into a
20 contract with another party that does not include the offending terms is not the relevant test
21 for procedural unconscionability.”) Defendant argues that a grant of further discovery will
22 produce evidence that “will show that plaintiffs were sophisticated, savvy individuals who
23 had equal bargaining power as Defendant.” Reply at 7. However, “the sophistication of a
24 party, alone, cannot defeat a procedural unconscionability claim.” *Nagrampa*, 469 F.3d at
25 1283; *see also A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489-90 (1982)
26 (noting that California’s Supreme Court is among courts that have “begun to recognize
27 that experienced but legally unsophisticated businessmen may be unfairly surprised by
28

1 unconscionable contract terms”). Moreover, such arguments should have been made in the
2 submitted briefs.

3 Second, the language of the arbitration provision is confusing and conflicting,
4 which calls into question the level of notice provided to Plaintiffs and the resulting
5 procedurally unconscionable element of surprise. *See Lou v. Ma Laboratories, Inc.*, No.
6 12-05409-WHA, 2013 WL 2147459 (N.D. Cal. May 15, 2013) (finding clause
7 procedurally unconscionable because it contained confusing language). As discussed
8 above, the language of the disputed Agreements are confusing, providing that the parties
9 “may” arbitrate and stating that the provision was “voluntary.”

10 Third, the arbitration provision is only one section in a seven page long, single
11 spaced, small-font document. In the Milliner Agreement, the provision was buried as the
12 twenty-first of thirty-six sections, while in the Brem Agreement it was the twentieth of
13 thirty-seven sections. And while the section is headlined “Negotiation, Mediation,
14 Arbitration Agreement,” it does not stand out from other sections in the agreement that
15 utilize identical headlines and font. Additionally, there is no place for the non-drafting
16 party to initial near the section. Courts have found such characteristics unconscionable.
17 *See, e.g., Samaniego v. Empire Today, LLC*, 205 Cal. App. 4th 1138, 1146 (2012)
18 (agreement “was comprised of 11 pages of densely worded, single-spaced text printed in
19 small typeface. The arbitration clause is the penultimate of 37 sections which . . . were
20 neither flagged by individual headings nor required to be initialed”); *Gutierrez v. Autowest,*
21 *Inc.*, 114 Cal. App. 4th 77, 89 (2003) (arbitration clause printed in eight-point typeface on
22 opposite side of signature page and consumer “never informed that the lease contained an
23 arbitration clause”).

24 Finally, the arbitration provision provides that the arbitration would be subject to
25 the American Arbitration Association’s Commercial Arbitration Rules, but fails to specify
26 which version of those rules would be utilized (*e.g.*, the version in effect at the time the
27 Agreement was signed or the version in effect at the time arbitration commences), neglects
28 to provide the rules, and does not otherwise indicate where Plaintiffs can find them.

1 “Numerous cases have held that the failure to provide a copy of the arbitration rules to
2 which the [plaintiff] would be bound, supported a finding of procedural unconscionability.
3 *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 393-94 (2010); *accord Sparks v.*
4 *Vista Del Mar Child & Family Services*, 207 Cal. App. 4th 1511, 1523 (2012); *Harper v.*
5 *Ultimo*, 113 Cal. App. 4th 1402, 1406 (2003).

6 7 **2. Substantive Unconscionability**

8 The arbitration provision is also substantively unconscionable. “An arbitration
9 provision is substantively unconscionable if it is ‘overly harsh’ or generates ‘one-sided’
10 results.” *Nagrampa*, 469 F.3d at 1280. The provision’s mediation venue clause, arbitrator
11 selection clause, and one-sided evidentiary and disclosure requirements result in
12 substantive unconscionability.

13 First, the mediation venue clause is unduly oppressive. While Defendant is correct
14 that the ADR provision selects a venue for mediation, and not arbitration, this does not
15 make the process of arbitration any less burdensome for Plaintiffs, as it still requires them
16 to engage in mediation in a distant forum before (and as a part of the process of) pursuing
17 arbitrable relief. *See* Ex. A to Evans Decl. at 4; Ex. B to Evans Decl. at 4 (“If the dispute
18 cannot be settled through good faith negotiation, the parties agree first to try to settle the
19 dispute by mediation . . . before resorting to arbitration. . . . the mediation will take place in
20 Denver, Colorado”). The Court can conceive of no reason for this venue selection “other
21 than [to] maximize[e] an advantage” for Defendant. *Nagrampa*, 469 F.3d at 1287.
22 Plaintiffs, both in their sixties, each reside in California; Defendant does business and
23 resides in California; and the “accounts at issue in this matter are maintained in
24 California.” Compl. ¶¶ 7-9, 11. In fact, this case’s only connection to Denver is that
25 Defendant’s principle place of business is there. *Id.* ¶ 9. The Court finds that the
26 Agreements’ venue selection serves no purpose other than to erect an unconscionable
27 barrier to relief for non-drafting parties. *See, e.g., Comb v. PayPal, Inc.*, 218 F. Supp. 2d
28 1165, 1177 (N.D. Cal. 2002) (“Limiting venue to [the defendant’s] backyard appears to be

1 yet one more means by which the arbitration clause serves to shield [the defendant] from
2 liability instead of providing a neutral forum in which to arbitrate disputes.”).

3 Second, the provision’s process for selecting an arbitrator is substantively
4 unconscionable because it gives Defendant significantly unequal power in the selection the
5 arbitrator. Ex. A to Evans Decl. at 4; Ex. B to Evans Decl. at 4-5. The provision allows
6 Defendant to provide a list of three arbitrators from which Plaintiffs can choose; otherwise,
7 Defendant will appoint an arbitrator unilaterally. A neutral arbitrator “is essential to
8 ensuring the integrity of the arbitration process.” *Armendariz*, 24 Cal.4th at 103.
9 Allowing one party to designate the arbitrator lacks mutuality and “gives rise to a
10 significant risk of financial interdependence between [the defendant] and the arbitrator,
11 and an opportunity for [the defendant] to gain an advantage through its knowledge of and
12 experience with the arbitrator.” *Sanchez v. Western Pizza Enterprises, Inc.*, 172 Cal. App.
13 4th 154, 177 (2009). It is cold comfort that Plaintiffs may “choose” from the three
14 arbitrators handpicked by Defendant. *See Murray v. UFCW Int’l, Local 400*, 289 F.3d
15 297, 303 (4th Cir. 2002) (allowing employee to strike arbitrators from list compiled by
16 employer still unconscionable); *accord McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th
17 Cir. 2004).

18 Third, the provision is unconscionable because it imposes one-sided disclosure
19 obligations on Plaintiffs and erects an unreasonable evidentiary bar that lacks mutuality.
20 The arbitration provision requires Plaintiffs to “provide Bock Evans and its legal counsel
21 copies of all documents” that it intends to present at the arbitration hearing, “as well as
22 complete federal tax returns for the term of the investment advisory arrangement including
23 three (3) years prior to enter into the Agreement,” as well as tax returns filed after the term
24 of the Agreement and leading up to the hearing. Ex. A to Evans Decl. at 4; Ex. B to Evans
25 Decl. at 5. Plaintiffs also have to provide “all investment advisory agreements, supporting
26 documentation, portfolio holdings, transaction history and performance reports entered
27 into or provided by any other investment advisor prior to, during the term of or entered
28 into after this Agreement, client documentation or changes thereto, all client transactions

1 and account statements . . . a list of all witnesses . . . or any statement affidavit,” and the
2 list goes on. *Id.* Plaintiffs are barred from using any of the above information unless it is
3 provided to Defendant “at least 90 days’ prior to any hearing.” *Id.* This evidentiary bar
4 and disclosure requirement does not apply to Defendant, and represents a substantial
5 obstacle for clients seeking relief through arbitration. Defendant’s response to Plaintiffs’
6 argument on this point is inexplicable - Defendant argues that Plaintiffs agreed to this
7 draconian restriction and that “the choice is Plaintiffs’, not Defendant’s, on whether to
8 maintain” the records identified. Reply at 7. In other words, Defendant contends that the
9 unconscionability of a provision is forgiven by a party’s signature, and that this particular
10 provision is acceptable because Plaintiffs have the option of just not putting on any
11 evidence at the hearing. The Court rejects this flawed reasoning and finds the lack of
12 mutuality unconscionable.

13 Accordingly, the Court finds that the forum selection clause is procedurally and
14 substantively unconscionable, and therefore unenforceable.⁴ As a result, the Court
15 DENIES Defendant’s motion with respect to the arbitration provision.

16
17 **II. Dismissal Pursuant to FINRA Rule 12209**

18 Defendant next contends that this action should be dismissed because it is barred
19 under FINRA Rule 12209. Mot. at 6-7. Rule 12209 of the FINRA Manual provides:
20 “During an arbitration, no **party** may bring any suit, legal action, or proceeding against
21 any **other party** that concerns or that would resolve any of the matters raised in the
22 arbitration.” (emphasis added).

23 Plaintiff Milliner filed an arbitration claim with FINRA against Defendant, as well
24 as certain individuals affiliated with Defendant, on December 22, 2014. Evans Decl. ¶ 5.
25 The FINRA claim alleges many of the same causes of action, arises from the same facts,
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⁴ This finding of unconscionability would similarly defeat a motion to compel arbitration under the FAA.

1 and requests much of the same relief, as this case. *Id.* Plaintiff Brem is not involved in the
2 FINRA action.

3 Rule 12209, by its very terms, applies only to the parties of a FINRA arbitration. It
4 therefore does not apply to Defendant, which is not a party to the FINRA action.⁵ *See* Ex.
5 1 to Sturgeon Decl. (FINRA letter noting that Defendant was “not required to arbitrate in
6 the FINRA arbitration forum” because Defendant is not a member of FINRA, and that
7 FINRA would “proceed with this action without [Defendant’s] participation”); Ex. 2 to
8 Sturgeon Decl. (Defendant responding that it “is not subject to FINRA’s jurisdiction” and
9 declining to submit to FINRA arbitration). Despite Defendant’s claim that this is
10 “irrelevant,” Reply at 8, the fact that Plaintiffs cannot find relief against Defendant in
11 FINRA’s forum is precisely why they must seek relief in this one. Ultimately, Defendant
12 cannot have it both ways - opting out of FINRA arbitration while also claiming that its
13 involvement in FINRA arbitration bars it from suit in federal court. Because FINRA Rule
14 12209 only applies to parties to the arbitration, it is inapplicable here and Defendant’s
15 motion to dismiss on this basis is DENIED.

16
17 **III. Dismissal for Failure to State a Claim - Fed. R. Civ. P. 12(b)(6)**

18 Defendant next argues that Plaintiffs fail to state a claim upon which relief can be
19 granted, requiring dismissal under Federal Rule of Civil Procedure 12(b)(6). To survive
20 dismissal under Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief
21 that is plausible on its face,” with sufficient specificity to “give the defendant fair notice of
22 what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*
23 *Twombly*, 550 U.S. 544, 545, 570 (2007). Plausibility does not equate to probability, but it
24 does require “more than a sheer possibility that a defendant has acted unlawfully.”
25 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). “A claim has facial
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28 ⁵ Plaintiff Brem is also not a party in the FINRA action, further militating against the application of Rule 12209 in this case.

1 plausibility when the plaintiff pleads factual content that allows the court to draw the
2 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

3 In ruling on a motion to dismiss, a court must “accept all material allegations of fact
4 as true and construe the complaint in a light most favorable to the non-moving party.”
5 *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). Courts are not,
6 however, “bound to accept as true a legal conclusion couched as a factual allegation.”
7 *Iqbal*, 556 U.S. at 678. Rather, it must “examine whether conclusory allegations follow
8 from the description of facts as alleged.” *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th
9 Cir. 1992) (citation omitted).

10 Defendant argues that “Plaintiffs fail to demonstrate with adequate specificity how
11 or why Defendant’s alleged conduct caused the decrease in [portfolio] value.” Mot. at 9.
12 It further claims, “There is no allegation of when Plaintiffs made any investments, what
13 specific investments were made and why, or how Defendant’s conduct caused Plaintiffs’
14 damages or fell below a cognizable standard of care.” *Id.* In opposition, Plaintiffs point to
15 the portions of their Complaint that properly address the necessary elements of their causes
16 of action and establish a claim for relief. Opp’n at 19-20.

17 The Court finds that Plaintiffs sufficiently allege their cause of action. The duties,
18 Compl. ¶¶ 12-35, and breaches, *id.* ¶¶ 38-43, 46-52, are exhaustively listed in the
19 Complaint. Those breaches are also sufficiently casually linked to the decrease in
20 Plaintiffs’ portfolios to raise Plaintiffs’ right to relief “above the speculative level,” and
21 result in a “reasonable inference that discovery will reveal evidence” of the claimed
22 violations. *Twombly*, 550 U.S. at 555-56. For example, among other allegations, the
23 Complaint alleges that the securities selected by Defendant for Plaintiffs and the Class had
24 “a continuous downward trend year, after year,” and that “[a]s a result of [Defendant’s]
25 failure to properly monitor the markets, and failure to properly adjust its clients’ portfolios
26 pursuant to its discretionary authority, Plaintiffs and the Class lost tens of millions of
27 dollars in the midst of a powerful bull market.” *Id.* ¶¶ 6, 24. The Complaint also specifies
28 the amount lost as a result of Defendant’s breach, *id.* ¶¶ 42, 48, and juxtaposes those losses

1 against the rising market, *id.* ¶ 42. As another of many possible examples, the Complaint
2 alleges that Defendant “represented in writing to all of its clients that the Firm is ‘guided
3 by the Client’s designated investment objective, risk tolerance and other factors,’” and
4 would “make investments based upon [clients’] individual investment needs,” yet applied a
5 “one size fits all” approach of purchasing “high risk and highly speculative mining stocks
6 for all of its clients.” *Id.* ¶¶ 33-35.

7 These factual allegations are sufficient under prevailing law. Indeed, it is unclear
8 how Plaintiffs could be any more factually specific before engaging in discovery.
9 Accordingly, Defendant’s Rule 12(b)(6) motion is DENIED.

10 11 **IV. Statute of Limitations Defense**

12 Finally Defendant argues that Plaintiffs’ claims are barred by Colorado’s statutes of
13 limitation. Mot. at 9-10. “When the running of the statute is apparent from the face of the
14 complaint . . . then the defense may be raised by a motion to dismiss.” *Conerly v.*
15 *Westinghouse Electric Corp.*, 623 F.2d 117, 119 (9th Cir. 1980). However, a cause of
16 action should only be dismissed if “it is clear from the face of the complaint that the statute
17 has run and that no tolling is possible.” *Brocade Commc’ns Sys., Inc. v. A10 Networks,*
18 *Inc.*, 2011 WL 1044899, at *3 (N.D. Cal. Mar. 23, 2011); *see also Jablon v. Dean Witter &*
19 *Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (“When a motion to dismiss is based on the running
20 of a statute of limitations, it can be granted only if the assertions of the complaint, read
21 with the required liberality, would not permit the plaintiff to prove that the statute was
22 tolled.”).

23 Defendant states that the statutes of limitation are as follows: breach of fiduciary
24 duty: three years; negligence: two years; fraud by misrepresentation or omission /
25 constructive fraud: three years. *Id.* at 9. Importantly, Defendant’s motion acknowledges
26 that the Complaint does not provide specific dates of relevant investments or breaches,
27 requiring Defendant to base its statute of limitations defense instead on the portfolio
28 graphs provided in the Complaint, which begin in 2010 for Milliner and 2011 for Brem.

1 *Id.* at 9-10 (citing Compl. at 2-3, 15). Defendant reasons that because the graphs start in
2 2010 and 2011, and the Complaint was filed on December 22, 2015, the “investments at
3 issue” were made beyond the relevant statutory bars. *Id.* at 10. This does not necessarily
4 follow.

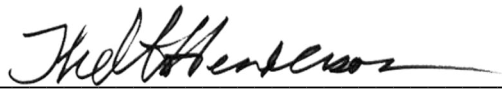
5 Nowhere in the Complaint do Plaintiffs allege that the graphs represent the accrual
6 of their claims. Consequently, various breaches could have occurred at any period within
7 those graphs, including within the statutory periods. Furthermore, Plaintiffs’ claims are
8 based upon the continuing legal obligations of an investment advisor, which could have
9 been violated each time Defendant failed to appropriately monitor and make adjustments
10 to Plaintiffs’ portfolios. This ongoing nature of Defendant’s enterprise is acknowledged
11 throughout the Complaint. *See, e.g.*, Compl. ¶¶ 22, 60, 65. Because it is not clear on the
12 face of this Complaint that the statutes have run, Defendant’s motion to dismiss on that
13 basis must be DENIED at this early stage of the proceedings. *See Conerly*, 623 F.2d at
14 119 (statute of limitation defense may be raised by a motion to dismiss only where the
15 defense “is apparent from the face of the complaint”).

16
17 **CONCLUSION**

18 For the foregoing reasons, Defendant’s motion to dismiss is hereby DENIED.

19
20 **IT IS SO ORDERED.**

21
22 Dated: 07/06/15

23 
24 _____
25 THELTON E. HENDERSON
26 United States District Judge
27
28