2023 WL 7548421 (Cal.Super.) (Trial Order)
Superior Court of California.
San Francisco County

BAMA COMMERCIAL LEASING, LLC, Plaintiff,
v.
UBER TECHNOLOGIES, INC., and Does 1-20, inclusive, Defendants.

No. CGC-19-579763.
November 9, 2023.

***1** Action Filed: October 3, 2019
Trial Date: March 11, 2024

Notice of Entry of Order

Patrick M. Ryan (SBN 203215), Oliver Q. Dunlap (SBN 225566), Sean R. McTigue (SBN 286839), Elizabeth T. Ferguson (SBN 318934), Bartko Zankel Bunzel & Miller, A Professional Law Corporation, One Embarcadero Center, Suite 800, San Francisco, California 94111, Telephone: (415) 956-1900, Facsimile: (415) 956-1152, pryan@bzbm.com, odunlap@bzbm.com, smctigue@bzbm.com, eferguson@bzbm.com, for defendant Uber Technologies, Inc.

Hon. Ethan P. Schulman, Judge.

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 7, 2023, the Court entered the following "Order re Defendant Uber Technologies, Inc.'s Motion for Summary Adjudication on Issues of Duty Pursuant to Code of Civil Procedure § 437c(f)." A true and correct copy of the Order is attached hereto as Exhibit "A".

DATED: November 9, 2023

BARTKO ZANKEL BUNZEL & MILLER

A Professional Law Corporation

By: */s/Sean R. McTigue*

Sean R. McTigue

Attorneys for Defendant Uber Technologies, Inc.

ORDER RE DEFENDANT UBER TECHNOLOGIES, INC.'S MOTION FOR SUMMARY ADJUDICATION ON ISSUES OF DUTY PURSUANT TO CODE OF CIVIL PROCEDURE § 437c(f)

Defendant Uber Technologies, Inc.'s Motion for Summary Adjudication on Issues of Duty Pursuant to Code of Civil Procedure § 437c(f) came on for hearing on November 3, 2023. The parties appeared through their counsel of record. Having

considered the pleadings and papers on file in the action, and the arguments of counsel presented at the hearing, the Court hereby grants the motion in part and denies it in part.

BACKGROUND

On October 12, 2022, BAMA Commercial Leasing, LLC ("BAMA") filed the operative Fourth Amended Complaint ("4AC") against Defendant Uber Technologies, Inc. ("Uber"). BAMA alleges as follows.[1] BAMA is a car financing company that offered leases for late model cars to persons who would not ordinarily qualify to lease such a car, allowed those leases to be paid on a weekly basis, allowed the leases to be transferred, and allowed for termination on two weeks' notice. (4AC ¶¶ 1, 10.) On June 16, 2015, BAMA and Uber executed a Vehicle Financing Agreement ("VFA"). (UMF 1.)[2] BAMA alleges that under the VFA, Uber agreed to refer "Leads" to BAMA for the prospective purchase of vehicles through the vehicle financing program. (4AC ¶ 11.) BAMA alleges the VFA also contains provisions addressing confidential information and marketing. (*Id.* ¶¶ 12-13.) BAMA alleges that prior to executing the VFA, Uber initiated plans to create its own vehicle leasing company, Xchange. (*Id.* ¶ 15.) BAMA alleges Uber decided to use Xchange to enter the car leasing market by "providing a product that copied BAMA's short term transferrable leasing program." (*Id.* ¶ 17.) BAMA alleges that beginning in the Spring of 2016, Uber began to delay Leads to BAMA and limit marketing of BAMA's product to prospective Uber drivers. (*Id.* ¶¶ 41-44.)

BAMA has two remaining causes of action, for breach of contract and breach of the covenant of good faith and fair dealing.[3]

Uber now moves for summary adjudication of issues of duty. (Motion, 2; Opening Brief, 5-6.) In particular, Uber seeks summary adjudication of nine issues of duty under the VFA: (1) Uber did not owe BAMA a duty to refer a specific quantity of Leads; (2) Uber did not owe BAMA a duty to refer a specific quality of Leads; (3) Uber did not owe BAMA a duty to refer Leads on a specific timeline; (4) Uber did not owe BAMA a duty to affirmatively market BAMA; (5) Uber did not owe BAMA a duty to handle information pursuant to restrictions laid out in Article 7.2 if that information did not meet the definition of "Confidential Information" under Article 7.1; (6) Uber did not owe BAMA a duty to compensate BAMA for consequential damages, including lost profits or diminution in value, caused by a breach of any obligation to refer Leads; (7) Uber did not owe BAMA a duty to compensate BAMA for consequential damages, including lost profits or diminution in value, caused by a breach of any obligation to market BAMA; (8) Uber did not owe BAMA a duty to compensate BAMA for consequential damages, including lost profits or diminution in value, caused by a breach of any obligation to remit Uber Partner payments under the VFA; and (9) Uber did not owe BAMA any duties not specifically set forth in the VFA. (*Id.*) BAMA opposes the motion.[4]

LEGAL STANDARD

"A party may move for summary adjudication as to … one or more issues of duty, if the party contends… that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of… an issue of duty." (Code Civ. Proc. § 437c(f)(1).)

"A contract must be interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code § 1636.) "The interpretation of a contract is a judicial function… Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms." (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 432, quoting *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126 (cleaned up).) Interpretation of a contract is a judicial function "when it is based on the words of the contract alone [or] when there is no conflict in the extrinsic evidence." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) In addition, courts interpret a contract as a matter of law "even when conflicting inferences may be drawn from the undisputed extrinsic evidence." (*Wolf*, 162 Cal.App.4th at 1126.)

DISCUSSION

I. BAMA's Procedural Arguments Are Not Dispositive.

BAMA opposes Uber's motion on two procedural grounds. The Court addresses each in turn.

First, BAMA contends Uber's motion must be denied because each duty Uber seeks to summarily adjudicate must be specifically stated in the separate statement of material facts pursuant to California Rules of Court, rule 3.1350. (Opposition, 11-12.) "The Separate Statement of Undisputed Material Facts in support of a motion must separately identify: (A) Each … issue of duty … and (B) Each supporting material fact claimed to be without dispute with respect to the… issue of duty." (Cal. Rules of Court, rule 3.1350(d)(1).) "[R]ules dictating the content and format for separate statements are to permit trial courts to expeditiously review complex motions for summary judgment to determine quickly and efficiently whether material facts are disputed." (*Rush v. White Corp.* (2017) 13 Cal.App.5th 1086, 1097-1098 (cleaned up).) "The failure to Comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion." (Code Civ. Proc. § 437c(b)(1); see *id.* § 437c(f)(2) [a motion for summary adjudication "shall proceed in all procedural respects as a motion for summary judgment."].)

Here, Uber remedied its separate statement on reply. BAMA argues Uber's defective separate statement prevented it "from connecting the supposed undisputed facts with any particular issue of duty." (Opposition, 11.) However, BAMA responded to each material fact. Uber also relied on many of the same material facts for each issue of duty. "Moreover, even if some additional headings had been required, the court's power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350 is discretionary, not mandatory." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118 ["The facts critical to the ruling were adequately identified, and Plaintiffs have not alleged how any alleged deficiency in [the] Separate Statement of Material Facts impaired Plaintiffs' ability to marshal evidence to show that material facts were in dispute as to the proper application of the statute of limitations."]; see also, e.g., *Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003, 1020 [opposing party "failed to provide any specific explanation in his briefing as to how the alleged deficiency in the [defendant's] separate statement impaired his ability to demonstrate material facts were in dispute, thereby, failing, in turn, to demonstrate the trial court abused its discretion."].) The Court declines to exercise its discretion to deny Uber's motion on this ground.

Second, BAMA argues Uber's motion fails to completely dispose of any issue of duty. (Opposition, 12-13.) The Court disagrees. A party "may seek summary adjudication on the existence or nonexistence of a contractual duty." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 244; see *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 519 ["if, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the nature of a contractual obligation, it may properly do so by a ruling on that issue presented by a motion for summary adjudication."].)

II. Uber Did Not Owe BAMA A Duty To Refer A Specific Quantity Or Quality Of Leads Or To Refer Leads On A Specific Timeline.

Uber seeks summary adjudication of three issues of duty pertaining to Leads. In particular, Uber seeks a ruling that Uber did not owe BAMA a duty under the VFA to refer BAMA a specific quantity of Leads, quality of Leads, or to refer Leads on a specific timeline. (Motion, 2; Opening Brief, 5, 9, 11.) Uber contends the VFA "requires Uber to refer Leads, but does not provide requirements with respect to the number of Leads, the timing of Leads, [or] the quality of Leads." (Opening Brief, 9; see *id.* at 10.) [5] The Court agrees.

The VFA's provision regarding Uber's referral of Leads to BAMA states in pertinent part: "Subject to the terms and conditions of this Agreement and conditioned upon the express consent of the applicable Uber Partner, Uber agrees to refer Leads to BAMA for the prospective purchase of their vehicles under the Program." (McTigue Decl. Ex. C, Art. 3.2; AMF 3-4, 19-20, 35-36.) [6] As its plain language makes clear, and as the Court has previously observed, Article 3.2 is silent as to the quantity or quality of Leads to be referred by Uber to BAMA. (See Jan. 20, 2023 Order on Demurrer to Fourth Amended Complaint, 12 ["Nothing in the Agreement required Uber to refer Leads exclusively to BAMA, nor did it require Uber to refer a particular number or type of Leads to BAMA"]; see also *id.* at 13 ["BAMA does not allege that Uber made *any* express promises to it, such as promising to refer all Leads to it, to refer the 'best' Leads to it, [or] to refer a particular number or percentage of Leads"].)

BAMA relies on Article 3.1 of the VFA to support its argument that Uber "had a duty under the plain terms of the VFA to provide a specific quantity and quality of Leads." (Opposition, 17.) Article 3.1 states:

> During the term of this Agreement, with respect to each Uber Partner who expressly consents to the sharing of such information, Uber shall provide BAMA with information regarding each such Uber Partner for the purpose of:
>
> 3.1.1 Referring Leads received by Uber on its Uber Platform to BAMA for underwriting and credit decisioning under the Program via an application programming interface ("API").

(McTigue Decl. Ex. C, Art. 3.1; AMF 1, 17, 33.) BAMA contends that this provision "required Uber to send *all* Leads (who consented to their information being shared) to BAMA immediately." (Opposition, 18 (emphasis original).) The language of the VFA is not reasonably susceptible to that interpretation, particularly in light of the undisputed facts that the VFA did not restrict Uber's ability to refer Leads to other third-party companies, that BAMA was well aware of Uber's relationship with such companies when it entered into the VFA, and that nothing in the VFA required Uber to refer Leads exclusively to BAMA. (See UMF 8 [undisputed that the VFA's exclusivity provision "restricted BAMA from entering into a business relationship with Uber's competitors but did not similarly restrict Uber"]; Jan. 20, 2023 Order, 8-9 & fn. 3, 12; McTigue Decl. Ex. C, Art. 13.1.) Had the parties intended to bind Uber to refer *all* Leads to BAMA notwithstanding the non-exclusive nature of their relationship and Uber's preexisting relationships with other automobile finance companies, they would have said so. A court "cannot insert in the contract language [a term] which one of the parties now wishes were there." (*Estate of Jones* (2022) 82 Cal.App.5th 948, 953 (cleaned up); Code Civ. Proc. § 1858 [when construing contracts, courts should "not… insert what has been omitted"].) Nor can the implied covenant provide a basis for implying such an obligation. The implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; accord, *Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1184 ["The covenant of good faith and fair dealing does not operate to supply a term that the express contract does not otherwise contain."].) That principle applies with particular force here in light of the provision of the VFA which states that "any duties and obligations that a party hereto may have to the other party shall be limited to those duties and obligations *specifically* stated herein." (McTigue Decl. Ex. C, Art. 2.2(iii) (emphasis added).)

Article 3.2 of the VFA is also silent as to the specific timeframe within which Uber is required to refer Leads to BAMA, as the Court has also previously ruled. (Jan. 20, 2023 Order, 12 ["Nothing in the Agreement required Uber… to refer Leads within any particular timeframe."]; *id.* at 13 [no allegation that Uber promised to refer Leads within a particular period of time]; Oct. 19, 2020 Order re Uber's Motion for Judgment on the Pleadings, 15 ["The plain language of Article 3.2 does not address… the time for Uber's performance."].) BAMA concedes as much. (See, e.g., Opposition, 17 ["Article 3 of the VFA omits any specific timeframe to provide BAMA's Leads."].)

Uber relies on the preamble of the VFA to establish that it was only required to refer Leads to BAMA "from time to time" rather than on a specific timeline. (Opening Brief, 9-10.) The preamble states that: "by entering into this vehicle financing program… with BAMA, pursuant to which, from time to time during the term of this Agreement, Uber will identify and refer an Uber Partner's interest in financing the purchase of a vehicle ('Lead') to BAMA." (McTigue Decl. Ex. C, 1.)

> The essential feature of a contract is a promise, and whenever the court can collect from the instrument an engagement on one side to do or not to do a certain thing, it amounts to a covenant, whether it be contained in the recital or in any other part of the instrument. While general or limited terms may be restrained by particular recitals, each contract, of necessity, must be construed according to its meaning, and no rigid rules of construction can be applied that will do violence to the intention of the parties … The problem is not what the separate parts of the contract may mean, but rather what the contract means as a whole.

(*Hunt v. United Bank & Trust Co.* (1930) 210 Cal. 108, 115 [finding the defendant's argument that recitals or preambles prefixed to a contract are not binding or obligatory lacked merit].) Accordingly, the plain language of "from time to time" in the preamble sets forth a general rather than a specific timeframe in which Uber was to refer Leads to BAMA.

BAMA argues the Court (J. Massullo) previously rejected such an interpretation because the phrase "time to time" does not specify a time for performance. (Opposition, 18.) However, the Court's prior ruling on a pleading motion did not squarely address the preamble. (See RFJN Exs. 2-3; see, e.g., RFJN Ex. 2, 10-15 ["Article 3.2 contains Uber's agreement to refer Leads to BAMA. The plain language of Article 3.2 does not address the… time for Uber's performance. This does not necessarily mean, as Uber suggests, that Uber had no continuing obligation to timely forward leads under Article 3.2. BAMA's contention that Uber breached its contractual obligations to forward leads is premised on a reasonable construction of the contract and supported by BAMA's factual allegations."].) In any event, nothing in the Court's prior ruling supports BAMA's position that "timely" signified "immediate."

BAMA asserts that when no time for performance is specified, "a reasonable time will be implied." (Opposition, 17; citing Civ. Code § 1657.) "[I]t is a well-established principle of contract law that 'if no time is specified for performance of an act required to be performed, a reasonable time is allowed.'" (*The McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1351, quoting Civ. Code § 1657.) The Court agrees. However, the Court rejects BAMA's further argument that "the implied time is immediate." (Opposition, 17; see also *id.* at 16 [asserting that "Uber had a duty to refer Leads immediately".].) Again, if the parties had intended to impose such a duty, they would have done so explicitly, and the Court will not read such an obligation into the Agreement, particularly in light of Article 2.2(iii). (See also, e.g., *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 809 ["The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.… [Plaintiff] was free to accept or reject the bargain offered and cannot look to the courts to amend the terms that prove unsatisfactory." (cleaned up)].) [7]

BAMA also relies on Article 5.2 of the VFA, which states: "During the term of this Agreement and notwithstanding the transfer of Uber Partner Data in Section 3.2 as well as the notification requirements from Uber to BAMA in Section 4.3, Uber shall maintain complete and accurate records, and shall provide the information in documented form as identified in substance and frequency as set forth below." (McTigue Decl. Ex. C, Art. 5.2; see Opposition, 16-17.) Article 5.2.1 goes on to state that "[t]he API that is created and maintained by Uber shall allow BAMA to obtain the following information at any time, after the applicable Uber Partner has expressly consented to the transfer and collection of such information by BAMA: (i) Uber Partner Data… (ii) amounts of the weekly partial Partner Payments … and (iii) an Uber Partner's status with Uber." (McTigue Decl. Ex. C, Art. 5.2.1.) Although BAMA was to have access to Uber Partner Data "at any time, after the applicable Uber Partner has expressly consented to the transfer and collection of such information by BAMA," Article 5.2 does not set forth any specific timeline for the referral of Leads. Nor does Article 5.2 support BAMA's own interpretation of the contract, that Uber was required to refer Leads "instantaneously." (Opposition, 7-8, 17, 19.)

BAMA's proffered evidence does not raise a triable issue of material fact. At most, that evidence establishes that Uber believed it had an obligation to refer Leads to BAMA, which says nothing about the quantity or quality of those Leads, or that Uber understood before April 2016, when it began to delay the transmission of Leads to BAMA, that BAMA had previously believed that it had been doing so "instantaneously." (See, e.g., AMF 9, 12, 25, 28; Opposition, 19.) [8] However, a party's uncommunicated

subjective intent is irrelevant. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 802, fn. 9 ["Although the intent of the parties determines the meaning of a contract, the relevant intent is objective—that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent."], quoting *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54-55 (cleaned up).) There is no evidence in the record of any contemporaneous communications between the parties in which they agreed that it imposed any of the obligations that BAMA now asserts, even though the Agreement was silent on those topics. Moreover, that in January 2017, Uber sent BAMA a proposed amendment to the VFA, which that would have amended the provision regarding Lead referrals to require Uber to refer Leads to BAMA "within a reasonable period of time after consent of the applicable Uber Partner (which for the avoidance of doubt, shall be no longer than ten (10) days after such consent)" supports Uber's position rather than BAMA's. (Nissly Decl. Ex. H.)[9] It establishes, at most, that Uber understood that the Agreement required it to transmit Leads within a reasonable time, and felt it desirable to clarify what constituted a reasonable time.[10]

Furthermore, based on the record before the Court, changes to the initial drafts of the VFA were made "to address BAMA's concerns that Uber would not be required to refer Leads to BAMA" rather than the timing of such Leads. (Breneman Decl. ¶ 7; see also *id.* ¶ 9.)

Accordingly, Uber's motion is granted as to the three issues it raises as to its duty to refer Leads to BAMA.[11]

III. Uber Did Not Owe BAMA A Duty To Affirmatively Market BAMA.

Uber seeks summary adjudication that it did not owe BAMA a duty to affirmatively market BAMA. (Motion, 2; Opening Brief, 5, 12-13; see also Reply, 12.) BAMA opposes the motion, arguing that it is not supported by the language of the VFA, that Uber fails to define what it means to "affirmatively market," and that the evidence shows that Uber believed it had a duty to market BAMA. (Opposition, 19-20.) The Court disagrees.

Under the VFA, Uber agreed "to provide reasonable support to BAMA's marketing activities to Uber Partners when requested by BAMA, subject to applicable law and BAMA's receipt of any necessary consents from the Uber Partner." (McTigue Decl. Ex. C, Art. 6.1; UMF 90.) Thus, pursuant to the plain language of the VFA, Uber did not have an affirmative duty to market BAMA's services. Rather, any duty it had with respect to marketing BAMA was conditioned upon a request by BAMA, which constituted a condition precedent to any such obligation.[12] For example, as Uber suggests, absent such a request, "Uber was not required under the Agreement to proactively and unprompted place BAMA's logo on its website, send emails to potential drivers about BAMA's program, or otherwise advertise BAMA's services." (Opening Brief, 12.) If BAMA did, in fact, request Uber's support for its marketing activities, and Uber refused to do so, there would be a factual question for trial as to whether the support requested was "reasonable" and whether Uber's refusal to provide such support therefore breached the Agreement. However, Uber had no affirmative duty to market BAMA absent such a request, and its motion therefore must be granted.

IV. Uber Is Entitled To Summary Adjudication Regarding Its Duty To Handle Confidential Information.

Uber seeks summary adjudication that it did not owe BAMA a duty to handle information pursuant to the restrictions laid out in Article 7.2 if that information did not meet the definition of "Confidential Information" under Article 7.1. (Motion, 2; Opening Brief, 5, 13-16; see also Reply, 12-13.) BAMA opposes the motion, arguing that Uber has misconstrued the VFA and that at best, Uber's contention creates questions of fact as to which records the parties intended to treat as confidential under the VFA. (Opposition, 20-22.) The Court disagrees in part with both parties' positions.

The VFA contains two Articles that relate to the parties' use of confidential information. Article 1.2.1 of the VFA, which is found in Article I of that Agreement ("Definitions"), defines the term "Confidential Information." (McTigue Decl. Ex.

C, Art. 1.2.1.)[13] Article 7 of the VFA, entitled "Confidentiality," contains four separate subparagraphs. Article 7.1, entitled "Confidential Information," provides:

In order that BAMA and Uber may effectively work together, each party may disclose to the other party certain propriety and highly confidential information related to the business, customers and accounts (including without limitation about the Application and Contracts) of the disclosing party, which information either has been prominently marked "confidential", "proprietary" or "secret", or has otherwise been identified as being such or which a reasonable person should know is confidential by its nature. Such information disclosed will also be considered Confidential Information subject to the provisions of this Article 7 (Confidential).

(McTigue Decl. Ex. C, Art. 7.1.) Article 7.2, entitled "Duty to Maintain Confidentiality," generally requires the receiving party to protect and safeguard the confidentiality of the disclosing party's Confidential Information, and prohibits the receiving party from using the disclosing party's Confidential Information "for any purpose other than to exercise its rights or perform its obligations under this Agreement" and from disclosing such Confidential Information to any person or entity, except to the extent necessary to exercise its rights or perform its obligations under the Agreement. (*Id.*, Art. 7.2.) Article 7.3, which is not at issue here, relates to the parties' compliance with certain consumer privacy laws in connection with their handling of customer and other similar information. Finally, Article 7.4 provides, "The rights and obligations of the parties under this Article shall expire five (5) years after the last transaction between the parties pursuant to this Agreement." (*Id.*, Art. 7.4.)

Although not a model of clarity in drafting, the purpose and effect of these provisions is clear when, as required, they are construed together and in the context of the VFA as a whole. (See Civ. Code § 1641; Code Civ. Proc. § 1858; *La Jolla Beach & Tennis Club v. Industrial Indemnity* (1994) 9 Cal.4th 27, 37 ["language in a contract must be construed in the context of that instrument as a whole" (cleaned up)].) Article 1.2.1 supplies the definition of Confidential Information that is utilized throughout the Agreement, including in Article 7. It also specifies the alternative ways in which such Confidential Information must be identified. Article 7.2, in turn, places certain substantive restrictions on the parties' use of Confidential Information that has been disclosed and so identified.

Contrary to Uber's position, Article 7.1 does not supply or modify the contractual definition of Confidential Information. (Opening Brief, 15.) As BAMA correctly observes, the definition of Confidential Information is provided in Article 1.2.1. (Opposition, 20.) Nor does Article 7.1 "define a subset of Confidential Information to which the protections of Article 7.2 apply." (Reply, 12.) The protections of Article 7.2, by its plain language, apply to *all* Confidential Information. BAMA's inconsistent contention that "the confidential information described in Article 7.1 is additive to that described in Article 1.2.1" (Opposition, 21) is equally unpersuasive. Article 7.1 merely acknowledges that the parties may disclose certain specified categories of Confidential Information to each other, which it describes in non-exhaustive terms ("certain proprietary and highly confidential information related to the business, customers and accounts … of the disclosing party").[14] It does not alter the definition of Confidential Information found in Article 1.2.1. To the contrary, it merely provides examples of the type of information that the parties anticipated might be exchanged, which it made clear would constitute Confidential Information. (See McTigue Decl. Ex. C, Art. 7.1 ["Such information disclosed will also be considered Confidential Information subject to the provisions of this Article 7 (Confidentiality)."].)

While the parties' arguments that Article 7.1 somehow modified the contractual definition of Confidential Information are unpersuasive, Uber correctly contends that it has no duty to handle Confidential Information pursuant to the restrictions set forth in Article 7.2 unless such information is identified as Confidential Information. Article 7.1 specifies three ways in which the parties may identify such information: (1) by prominently marking it as "confidential," "proprietary," or "secret"; (2) by "otherwise" identifying it (such as, for example, by an accompanying cover letter or email); or (3) if "a reasonable person should know [it] is confidential by its nature." It goes on to provide, "Such information disclosed will also be considered Confidential Information subject to the provisions of this Article 7 (Confidentiality)." While the meaning of the word "also" in that sentence is unclear, it appears to refer to Confidential Information that is identified in any of the specified ways. Thus, unless information

was identified as Confidential Information in one of these three ways, the obligations imposed in Article 7.2 did not apply. Indeed, any other interpretation would result in absurd consequences, since neither party could understand that it had received Confidential Information, and therefore was constrained in its use and disclosure, unless it was identified as such or its status was obvious on its face. (See *West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1186 [court should avoid an interpretation which would result in an absurdity].) Accordingly, Uber's motion for summary adjudication is granted on this basis.

V. BAMA's Claims For Consequential Damages Are Not A Proper Subject For Summary Adjudication.

Uber seeks summary adjudication that Uber did not owe BAMA a duty to compensate BAMA for consequential damages, including lost profits or diminution in value, caused by a breach of any of three alleged obligations under the VFA: (1) to refer Leads, (2) to market BAMA, and (3) to remit Uber Partner payments. (Motion, 2; Opening Brief, 5-6, 16-19.) Its motion is based on Article 14.2 of the VFA, entitled "Limits of Liability," which provides in all capital letters as follows:

> EXCEPT FOR A PARTY'S BREACH OF THE CONFIDENTIALITY PROVISIONS SET FORTH IN ARTICLE 7 AND THE REGULATORY EXAMINATIONS AND LITIGATION PROVISIONS SET FORTH IN ARTICLE 11, IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY WHATSOEVER FOR ANY INDIRECT, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, SPECIAL OR PUNITIVE DAMAGES, INCLUDING, WITHOUT LIMITATION, LOST PROFITS, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

(McTigue Decl. Ex. C, Art. 14.2.) BAMA opposes the motion on the grounds that it does not address any issue of duty and does not completely dispose of any cause of action; that Uber has failed to articulate any particular damages allegedly suffered by BAMA; and that if Uber interprets the VFA to preclude it from recovering any damages resulting from Uber's breaches of the VFA, such an interpretation would be disfavored as a matter of law. (Opposition, 13-14, 22.)

Uber's motion fails on procedural grounds. Code of Civil Procedure section 437c, subdivision (f) provides:

> A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit as to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

As the reference to Civil Code section 3294 makes clear, the statutory phrase "one or more claims for damages" is limited to claims for punitive damages. (*DeCastro West Chodorow & Burns v. Superior Court* (1996) 47 Cal.App.4th 410, 421.) "Code of Civil Procedure section 437c, subdivision (f)(1), does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action." (*Id.* at 422 [affirming order denying motion for summary adjudication that plaintiffs were not entitled to "lost opportunity" damages in legal malpractice action]; see also *Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247, 264 [reversing summary adjudication where, although one claim for damages was too speculative to be presented to a jury, it did not completely dispose of the challenged cause of action for professional negligence because plaintiff sought other categories of damages].) But that is precisely what Uber is seeking here. Uber cannot evade this rule by recharacterizing BAMA's prayers for damages in its breach of contract and implied covenant causes of action as attempting to impose a "duty" on Uber to pay certain types of damages. "Summary

adjudication must completely dispose of the cause of action to which it is directed." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 251.)

BAMA's further argument that the Court should not read Article 14.2 to preclude it from recovering damages for breach of contract because "[t]he law abhors a forfeiture" (Opposition, 22-23) is meritless. Limitation of liability clauses "have long been recognized as valid in California. With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126 (cleaned up).) In *Food Safety*, the court affirmed summary judgment on cross-complainant's breach of contract, bad faith, and negligence claims on the basis of a contractual limitation of liability clause that contained substantially identical wording to Article 14.2. (*Id.* at 1122-1126 ["IN NO EVENT SHALL [FOOD SAFETY] BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING (BUT NOT LIMITED TO) DAMAGES FOR LOSS OF PROFIT OR GOODWILL REGARDLESS OF … WHETHER [FOOD SAFETY] HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES."]; see also *Lewis v. Youtube, LLC* (2015) 244 Cal.App.4th 118, 124-125 [holding that trial court properly sustained demurrer without leave to amend to claim for breach of contract where plaintiff could not establish damages as result of limitation of liability clause].)

Thus, Uber's motion for summary adjudication with respect to BAMA's ability to recover consequential damages for alleged breaches of the VFA must be denied on the ground that it is does not completely dispose of a cause of action, as required by section 437c, subdivision (f). However, that does not preclude Uber from raising the issue before trial by an appropriate vehicle, such as a motion to strike or a motion *in limine*. (See *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1312 [although defendant was not entitled on remand to summary adjudication, the trial court and defendants "are not without procedural devices, including, for example, a motion in limine, to deal with the … claim when this matter is returned for trial"].)

VI. Uber Is Not Entitled To Summary Adjudication As To Unspecified Contractual Duties.

Uber seeks summary adjudication that Uber did not owe BAMA any duties not specifically set forth in the VFA. (Motion, 2; Opening Brief, 18-19.) It relies upon Article 2.2(iii) of the VFA, which states, "any duties and obligations that a party hereto may have to the other party shall be limited to those duties and obligations specifically stated herein." Uber contends that this provision "prevents BAMA from attempting to impose implied substantive duties to the Agreement… that were not already written in the contract." (Opening Brief, 18.) BAMA opposes the motion, observing that Uber fails to identify any particular duty that it seeks to adjudicate and that Uber concedes it is not seeking summary adjudication as to BAMA's cause of action for breach of the implied covenant. (Opposition, 23.)

Although Uber contends that "BAMA's entire case is based on purported breaches that are untethered to and inconsistent with the language of the VFA," it concedes that its motion does not completely dispose of BAMA's cause of action for breach of the implied covenant of good faith and fair dealing. (Opening Brief, 18 ["Article 2.2(iii) "limits the application of the covenant of good faith and fair dealing to its most narrow possible application"].) As BAMA correctly argues, the implied covenant is read into every contract:

> The implied covenant of good faith and fair dealing is implied by law in every contract. The contract is read into contracts and functions as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract. The covenant also requires each party to do everything the contract presupposes the party will do to accomplish the agreement's purposes.

(*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 (cleaned up).) The parties are not free to contract out of the implied covenant. (See *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 86, 91 [parties "may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured." (cleaned up)].) Thus, the implied covenant necessarily retains some vitality as applied to the VFA, even if its application may be narrowed by virtue of Article 2.2(iii). Because Uber has not specified the purported contractual duties asserted by BAMA as to which it seeks summary adjudication, but rather seeks summary adjudication in the abstract of "any" duties not specified in the VFA, it has not met its initial burden, and its motion must be denied. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849-850 [defendant failed to meet her burden to affirmatively negate the existence of a duty].)

CONCLUSION

For the foregoing reasons, Uber's motion for summary adjudication is granted in part and denied in part as set forth above.

IT IS SO ORDERED.

Dated: November 7, 2023

<<signature>>

Ethan P. Schulman

Judge of the Superior Court

Footnotes

1 The Court relies on the factual allegations in the Fourth Amended Complaint to provide factual background as the parties' undisputed facts provide little, if any, context for this case and the instant motion.

2 "UMF" refers to Uber's Reply Separate Statement filed October 13, 2023.

3 On January 20, 2023, the Court sustained Uber's Demurrer to Fourth Amended Complaint as to the third, fourth, fifth, and sixth causes of action for intentional misrepresentation, concealment, promissory fraud, and negligent misrepresentation without leave to amend. (Jan. 20, 2023 Order, 1, 20.)

4 BAMA's Request for Judicial Notice is granted pursuant to Evidence Code § 452(d)(1). Uber's objection to BAMA's Request for Judicial Notice is overruled as the request was filed with the Court.

On October 6, 2023, BAMA filed its Response to Uber's Separate Statement of Undisputed Material Facts and Appendix of Evidence conditionally under seal. On October 13, 2023, Uber filed its reply brief, Reply Separate Statement of Undisputed Material Facts, and the Supplemental Declaration of Sean R. McTigue conditionally under seal. The information that is conditionally sealed is not covered by the Court's August 30, 2023 sealing order. Additionally, neither BAMA nor Uber filed a corresponding motion to seal. (See Cal. Rules of Court, rules 2.551(b)(1) ["A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record."], 2.551(b)(3)(A)(iii) ["A party that files or intends to file with the court, for the purposes of adjudication or to use at trial, records produced

in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must: Give written notice to the party that produced the records that the records and other documents lodged [] will be placed in the public court file unless that party files a timely motion or application to seal the records under the rule."].) Therefore, the Court directs the Clerk to transfer the documents filed conditionally under seal to the public file. (See Cal. Rules of Court, rule 2.551(a) ["A record must not be filed under seal without a court order."].)

5 Uber's moving papers rely on the plain language of the VFA. However, on reply, Uber included new evidence, the Private Placement Memorandum ("PPM"). (Suppl. McTigue Decl. Ex. T.) The Court granted BAMA leave to file a supplemental brief to respond to the new evidence addressed for the first time in Uber's reply papers. (Oct. 18, 2023 Order, 1-2.) The Court finds Uber's reliance on the PPM misplaced. First, the PPM does not include any reference to the timing or quality of Leads. (*Id.*) Second, the PPM, which is dated approximately one month prior to the execution of the VFA, apparently referred to an earlier draft of the VFA. (Suppl. Brief, 2-4; Breneman Decl. ¶¶ 3-4, 5 [PPM "was revised to confirm that the PPM only referred to a draft of the VFA being circulated at the time."], 7.) As the Court does not rely on the PPM in its analysis, BAMA's objection to the PPM is overruled.

6 "AMF" refers to BAMA's additional undisputed material facts in Uber's Reply Separate Statement filed October 13, 2023.

7 BAMA misplaces its reliance upon the second sentence of Civil Code section 1657, which provides, "If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained." (Opposition, 17.) Consistent with its express language, that provision has been applied only to the obligation to pay money. (See, e.g., *Leonard v. Gallagher* (1965) 235 Cal.App.3d 362, 375 [absent evidence that loans and notes had time fixed for payment, they were payable on demand].) In other cases, the general "reasonable time" rule applies. (E.g., *Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 198 [in contract for sale of automobile that did not specify a delivery date, a reasonable time was permitted under § 1657].)

8 BAMA's further argument that "the post-formation conduct of the Parties" supports its interpretation lacks merit. (Opposition, 6.) That Uber was technologically able to transmit Leads immediately upon receiving drivers' consent to do so does not establish that it believed it was contractually obligated to do so. Uber's delay in transmitting Leads also took place before any controversy arose between the parties regarding the meaning of the VFA. (See *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 543-544 ["practical construction" placed upon a contract by the parties before a controversy has arisen as to its meaning requires "repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other." (cleaned up)].)

9 Uber's objections to the Nissly Declaration in its entirety and to Exhibit H of the Nissly Declaration are overruled.

10 BAMA misrepresents the extrinsic evidence upon which it relies. For example, Uber's representative Matthew Marra testified that he had "moral qualms" about delaying the transmission of Leads to BAMA not because, as BAMA implies, he believed it breached Uber's obligations under the VFA, but because he was aware that after two to three weeks, Uber drivers' interest in accepting vehicle leases offered to them by any provider "went to near zero." (Nissly Decl. Ex. E, 104:18-105:6.) In any event, BAMA does not show that Marra was involved in negotiating the VFA or even that he ever saw that agreement.

11 Although no specific timeframe for referring Leads is set forth in the VFA, under the implied covenant of good faith and fair dealing and Civil Code section 1657, the trier of fact could conclude that Uber breached its duty to refer Leads within a reasonable time. However, this presents a question of fact that cannot be resolved on this motion. (See *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 30 ["what constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case."],

quoting *Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836 (cleaned up); *The McCaffrey Group, Inc.*, 224 Cal.App.4th at 1351 [same].)

12 "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." (Civ. Code § 1436; *Pittman v. Canham* (1992) 2 Cal.App.4th 556, 559 ["the condition precedent must be performed before another duty arises"].)

13 Article 1.2.1 provides broadly that Confidential Information "shall mean information that the disclosing party considers to be confidential and/or a trade secret. Confidential Information includes, without limitation, trade secrets, technology, technical expertise, technical specifications, software code, information and manners of conducting business and operations, strategic business plans, systems, results of testing, financial information, customer lists and other customer information, product information, concepts and compilations of data." (McTigue Decl. Ex. C, Art. 1.2.1.) As is routine in similar such agreements, the VFA excludes from the definition of Confidential Information "information that is or becomes generally available to the public other than as a result of a disclosure by the receiving party in breach hereof, was known to the receiving party prior to disclosure by the disclosing party, was lawfully received from a third party through no breach of any obligation of confidentiality owed to the other party or is created by the receiving party independently of and without use of or reference to the other party's Confidential Information." (*Id.*)

14 There is no meaningful difference between this phrase and the general definition of Confidential Information in Article 1.2.1. Likewise, there is no apparent significance to the use of the adjective "highly" before the term "confidential" in this phrase, particularly because Article 7.1 indicates that such information may be marked "confidential" rather than "highly confidential."

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