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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JESSICA BARRAZA,

Plaintiff,

vs.

TESLA, INC. WHICH WILL DO BUSINESS IN CALIFORNIA AS TESLA MOTORS, INC., a Delaware Corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No. 21CV002714

Assigned For All Purposes to
Judge Stephen Kaus
Department 19

PLAINTIFF'S OPPOSITION TO DEFENDANT'S AMENDED MOTION TO COMPEL ARBITRATION AND STAY ACTION

Date: March 9, 2022
Time: 3:00 p.m.
Place: Dept. 19
Judge: Honorable Stephen Kaus

Complaint Filed: November 18, 2022
Trial Date: None Set

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I. INTRODUCTION

Although the Supreme Court ruled *twenty-two years ago* that employers may not impose one-sided arbitration agreements that require employees to arbitrate all claims while allowing the employer to litigate in court, Tesla did just that. Its arbitration agreement, which it imposed on its low-level hourly factory workers, has a "carve-out" for any of the claims that Tesla might wish to bring to protect its broadly defined proprietary information, defend its intellectual property rights, ensure that employees return all materials when they are terminated, or prevent employees from encouraging co-workers to take a job with a competitor. While Tesla will enjoy the right to a jury trial, the full range of discovery, the right to make its case in public, and the right to appeal if it loses, Tesla seeks to impose on Ms. Barraza a "confidential" arbitration for her sexual harassment claims against Tesla, with no jury, no appeal, no public day in court, and only the discovery permitted by the discretion of the arbitrator.

California appellate courts, including the California Supreme Court have consistently ruled that this arrangement is plainly unlawful and further held that it may not be saved by the Court "severing" an offending provision: courts do not exercise their equitable powers to reward employers for imposing knowingly unlawful employees on their employees. Nor would severance alone cure the one-sidedness of this contractual arrangement – as demonstrated below, the entire structure of the agreements Tesla imposed on Ms. Barraza is designed to favor Tesla, and the courts would be forced to re-write the contractual scheme. Controlling authority prohibits Tesla from reserving access to the court for itself while seeking to prevent Ms. Barraza from bringing her claims against Tesla in court.

II. STATEMENT OF FACTS

A. Plaintiff's Lawsuit Details Egregious Sexual Harassment at Tesla

Plaintiff, a current Tesla employee who works the night shift building cars in Tesla's factory, alleges that male supervisors and colleagues routinely make sexually offensive comments to her almost every shift, such as "She's got fat titties," "She's got cakes!," "That bitch hella thick," and "She has a fat ass," and that male colleagues routinely make unwanted physical contact with her. (*See* First Amended Compl. ("FAC") ¶¶ 21-32.) Her complaints to managers and Human Resources did not stop the behavior (*id.* ¶¶ 33-42), so she filed this lawsuit seeking injunctive relief to put a stop to the

harassment, and seeking emotional distress and punitive damages for harassment, retaliation, and failure to prevent harassment under the Fair Employment and Housing Act ("FEHA"). (*Id.* ¶ 18.) She also seeks declaratory relief asking the Court to declare Tesla's arbitration agreement unenforceable. (*Id.* ¶¶ 82-84.) The FAC also asserts a representative action claim against Tesla under PAGA, alleging that Tesla failed to provide "safe and healthful" working conditions in violation of Labor Code §§ 6400-01. (*Id.* ¶¶ 85-90.)

B. Tesla Imposed Its Onboarding Documents on Ms. Barraza

Ms. Barraza applied to work at Tesla and then attended an on-site assessment on August 15, 2018. (Decl. of Jessica Barraza ISO Pl.'s Opposition to Mot. to Compel Arbitration ("Barraza Decl.") ¶ 3.) Before the assessment, she was required to electronically sign an Applicant Non-Disclosure Agreement ("Applicant NDA") and a Visitor Safety & Non-Disclosure Agreement ("Visitor NDA"). (*Ibid.*) On August 23, 2018, she attended an "onsite interview," at which she was given a verbal job offer, which she accepted on the spot. (Barraza Decl. ¶ 4; Decl. of Helen Sim ISO Tesla's Amended Mot. to Compel Arbitration ("Sim Decl.") Ex. 1.)

On September 19, 2018, Tesla emailed her that she had "completed all pre-employment steps" and asked when she could start work. (Barraza Decl. ¶ 5.) Ms. Barraza replied that she would give her two weeks' notice to her employer the following day, which she did, and that she could start on October 8, 2018. (*Ibid.*) Tesla pushed the start-date to October 22, 2018. (*Id.* ¶ 6.)

On October 9, 2018, Tesla had Ms. Barraza electronically sign six additional onboarding documents, one of which was the "Employee NDA (May 2018).pdf." (*Id.* ¶ 7.) This document's formal title is Tesla, Inc. Employee Non-Disclosure and Inventions Assignment Agreement (as discussed below, it is referred to herein as the "PIIA"). Ms. Barraza was told in writing: "Please review all documents and click the I Agree boxes for each document. Once you have agreed to all documents, click Submit and then Done." (*Ibid.*) There was no opportunity for negotiation or even explanation of the documents. (*Ibid.*)

On October 16, 2018 at 11:26 p.m., four business days before her start date, Tesla emailed Ms. Barraza another document that it required her to sign to receive employment: an Offer Letter containing an arbitration agreement. (Sim Decl. ¶ 11.) As before, she could not edit or negotiate the

document. (Barraza Decl. ¶ 8.) As Tesla states: "Barraza, like all other applicants, clicked on the offer letter link … After clicking on the secure link, Barraza would have been presented with the offer letter and the ability to accept or decline the offer letter." (Sim Decl. ¶ 12.)

At the time Ms. Barraza signed the Offer Letter, she did not know what "arbitration" was. (Barraza Decl. ¶ 9.) She does not recall having ever heard that word, and she still does not know how to pronounce it. (*Ibid.*) She did not realize that agreeing to arbitration meant she was giving up her right to a jury, and no one explained this to her. (*Ibid.*)

Ms. Barraza also did not understand how the various legal agreements Tesla required her to sign interacted with each other. (*Id.* ¶ 10.) She had never negotiated a legal document, and even she if she had known what the agreements meant, she would not have had any idea how to attempt to negotiate them with Tesla. (*Ibid.*) Ms. Barraza is an hourly worker with a high school education who depended on her hourly wage to support her two children and survive. (Barraza Decl. ¶¶ 11-12.) She did not have the money to hire a lawyer to explain the Offer Letter to her, even if Tesla had given her more than four business days. (*Id.* ¶ 10.)

1. The Applicant NDA and Visitor Safety & NDA

The Applicant NDA and Visitor NDA both contain broad, differing protections of Tesla's information. (Barraza Decl. Exs. B & C.) Both state that Tesla (not Ms. Barraza) would recover attorneys' fees if it prevailed in an action, that such actions would be brought in court in Tesla's home turf of Santa Clara County, and that Tesla would be entitled to preliminary injunctive relief with no evidentiary showing. (*Ibid.*) Both Agreements were to survive indefinitely. (*Id.* at Ex. B § 11 & Ex. C § 16.) No modification of the Applicant NDA was effective unless signed by Ms. Barraza and "a Tesla employee who is Director-level or higher." (*Id.* at Ex. B § 9.)

2. The PIIA

The PIIA that Ms. Barraza was required to electronically sign is a four-page, two-columned, single-spaced document replete with obligations Ms. Barraza undertook for the benefit of Tesla. (*See* Decl. of Ally N. Girouard ISO Pl.'s Opposition to Mot. to Compel Arbitration ("Girouard Decl.") Ex. A.) These include:

First, "at all times," Ms. Barraza agreed to "hold in the strictest confidence" "all information,

in whatever form and format, to which [she] has access by virtue of and in the course of [her] employment by the Company." (*Id.* at § 1.) The only exception is "information that is or lawfully becomes part of the public domain," with Ms. Barraza to "bear the burden of proving by clear and convincing evidence the applicability of this exclusion." (*Ibid.*)

Second, Tesla required Ms. Barraza to agree "that during the term of [her] employment and for twelve (12) months thereafter, [she] will not … solicit … any Company employee or contractor …. , nor will [she] … in any way induce or attempt to induce any such individual to terminate his or her employment by … the Company." (*Id.* at § 9.2.1.) Nor could she *ever* "directly or indirectly hire or otherwise take away any of the Company's employees … if, in doing so, I use … the non-public names … of the Company's employees and/or … their skills [or] experience." (*Id.* at § 9.2.2.)

Third, Tesla required Ms. Barraza to agree in advance that "violation of this Agreement by me may cause the Company irreparable harm and that the Company *shall* therefore have the right to enforce this Agreement and any of its provisions *by injunction*, specific performance, or other equitable relief, *without bond*…." (*Id.* at § 6 (emphasis added).)

Fourth, Tesla required Ms. Barraza to agree as follows: "I agree to submit to the jurisdiction of, and the exclusive jurisdiction over and venue for any action arising out of or relating to this Agreement shall lie, in the state and federal courts located in the county and state in which you are primarily assigned to work in by Company." (*Id.* at § 11.1.) No reciprocal obligation of submitting to jurisdiction or venue is imposed on Tesla.

Fifth, Tesla provided that the PIIA would "be binding upon [Ms. Barraza's] heirs, executors, administrators and other legal representatives and will be for the benefit of the Company, its successors, and its assigns." (*Id.* at § 11.3.)

The PIIA does not impose any obligations on Tesla. (*Ibid.*)

3. <u>The Offer Letter</u>

The Offer Letter that Tesla required Ms. Barraza to sign states: "[A]s a condition of your employment, you will sign and comply with Tesla's standard confidentiality agreement [the PIIA] which prohibits unauthorized use or disclosure of Tesla confidential information." (Sim Decl. Ex. B at 2.) The Offer Letter contains the following arbitration provision:

> [Y]ou and Tesla agree that any and all disputes, claims, or causes of action, in law or equity, arising from or relating to your employment, or the termination of your employment, will be resolved, to the fullest extent permitted by law by final, binding and **confidential** arbitration in your city and state of employment conducted by [JAMS] under the then current rules of JAMS for employment disputes, provided that:
>
> a. Any claim, dispute, or cause of action must be brought in a party's individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding; and
>
> b. The arbitrator shall have the authority to compel adequate discovery for the resolution of the dispute and to award such relief as would otherwise be permitted by law; and
>
> c. The arbitrator shall not have the authority to consolidate the claims of other employees and shall not have the authority to fashion a proceeding as a class **or collective action or to award relief to a group or class of employees in one arbitration proceeding**; and
>
> d. The arbitrator shall issue a written arbitration decision including the arbitrator's essential findings and conclusions and a statement of the award; and
>
> e. Both you and Tesla shall be entitled to all rights and remedies that you or Tesla would be entitled to pursue in a court of law; and
>
> f. Tesla shall pay all fees in excess of those which would be required if the dispute was decided in a court of law.

(*Ibid.* (emphasis added).)

The clause goes on to add the following **carve-out**: "Notwithstanding the foregoing, you and Tesla each have the right to resolve any issue or dispute arising under the Proprietary Information and Inventions Agreement by Court action instead of arbitration." (*Ibid.*) The "Proprietary Information and Inventions Agreement" or "PIIA" is presumably the Employee Non-Disclosure and Inventions Assignment Agreement.

The Offer Letter also permits injunctive relief claims to be brought in court: "Nothing in this agreement is intended to prevent either you or Tesla from obtaining injunctive relief in court to prevent irreparable harm pending the conclusion of any such arbitration." (*Ibid.*)

III. LEGAL ARGUMENT

Tesla's one-sided carve-out for claims under the PIIA is substantively unconscionable, as are its confidentiality and no-representative-actions clauses. When Tesla imposed its one-sided carve-out on Ms. Barraza, it had been *eighteen years* since *Armendariz* forbade such tactics. Simply severing the unconscionable provisions would reward Tesla's bad faith in knowingly subjecting employees to illegal terms. Moreover, the central purpose of the combination of agreements is to create a one-sided relationship that cannot be cured through severance. A high degree of procedural

unconscionability is also demonstrated by the way Tesla imposed the agreements on Ms. Barraza.

Both the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) provide that an arbitration provision should not be enforced if grounds exist for revocation of the Agreement. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125.) This includes unconscionability. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1171.) "[U]nconscionability has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." (*Armendariz v. Found. Health Psychcare Servs.* (2000) 24 Cal.4th 83, 114.) Both elements must be present for a court to refuse to enforce a clause as unconscionable, "[b]ut they need not be present in the same degree." (*Ibid.*) Courts employ a sliding scale: "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid.*)[1]

A. The Arbitration Provision Is Procedurally Unconscionable.

It is procedurally unconscionable to force a low-wage, unsophisticated worker to sign an adhesion contract relinquishing the right to go to court after she had already quit her job in reliance on Tesla's verbal job offer and had already signed three documents stating that disputes would be decided in court. Procedural unconscionability is present when the way an agreement is negotiated involves (i) oppression and/or (ii) surprise. (*Armendariz*, 24 Cal.4th at 114.) "[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. … Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.)

Courts "must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." (*Armendariz*, 24 Cal.4th at 115.) Where an adhesive contract is oppressive, surprise need not be

[1] Tesla cites the FAA and CAA. Regardless of which applies, state law governs whether grounds exist for revocation. (*Perry v. Thomas* (1987) 482 U.S. 483, 492 n. 9.) The Offer Letter provides that it is to be construed and interpreted by California law. (Sim Decl. Ex. B at 3.) The CAA governs agreements that purport to be governed by California law, unless they expressly state otherwise. (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263-64.)

shown. (*Bakersfield Coll. v. Cal. Cmty. Coll. Athletic Ass'n* (2019) 41 Cal.App.5th 753, 764.) To avoid a finding of procedural unconscionability, an employer must provide a "meaningful" opportunity to negotiate or reject contractual terms. (*Id.* at 762.)

1. Oppression.

"Oppression arises from an inequality of bargaining power that results in no real negotiations and an absence of meaningful choice." (*Flores v. Transamerica HomeFirst* (2001) 93 Cal.App.4th 846, 853.) "An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.'" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 (quoting *Baltazar*, 62 Cal.4th at 1245).) "A finding of a contract of adhesion is essentially a finding of procedural unconscionability." (*Flores*, 93 Cal.App.4th at 853; *see also Bakersfield Coll.*, 41 Cal.App.5th at 761.) "[E]conomic pressure on low-wage employees to agree to preemployment arbitration agreements is indicative of oppression." (*Armendariz*, 24 Cal.4th at 115.) "[T]he education and experience of the party" and whether the party had an attorney are "relevant to establishing oppression." (*OTO, L.L.C.*, 8 Cal.5th at 126.)

Here, Tesla's requirement that Ms. Barraza agree to the arbitration clause in the Offer Letter was "oppressive" for multiple reasons. It was a boilerplate contract imposed on Ms. Barraza on a "take-it-or-leave-it" basis. (Barraza Decl. ¶¶ 8-9.) In the words of Tesla's own declarant, Ms. Barraza, like all other low-wage workers who are sent a link to an Offer Letter, had "the ability to accept or decline the offer letter" – not the ability to propose revisions. (Sim Decl. ¶ 12.) Ms. Barraza was never told the arbitration provision was negotiable, was never offered an opportunity to negotiate it, and reasonably believed that it was impossible to negotiate it. (Barraza Decl. ¶¶ 8-9.) Ms. Barraza does not recall having ever heard of arbitration before, did not know what it was, and did not understand that she was being asked to sign away her right to a jury trial. (*Id.* ¶ 9.) (*See OTO, L.L.C.*, 8 Cal.5th at 126-27 (procedural unconscionability where arbitration agreement was condition of continued employment and non-negotiable); *Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 447 (when employment agreement is adhesive, there is procedural unconscionability); *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 907–10 (same).)

Tesla, a large and powerful corporation with an in-house legal department, was in a superior

bargaining position. Tesla increased its leverage by not telling Ms. Barraza about the arbitration provision until she had already accepted a verbal offer and quit her other job. (Barraza Decl. ¶ 8.) At that point, with a family to support and bills to pay, she had no real choice but to sign. (*Id.* ¶¶ 8, 12.) The agreement is thus "oppressive."

2. Surprise.

Unfair surprise "results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice." (*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 214.) Here, the Offer Letter's "carve-out" for claims under the PIIA states that "*you and Tesla each* have the right" to sue in court for a violation of the PIIA, when in fact, only *Tesla* had enforceable rights under the PIIA. (Sim Decl. Ex. B at 2; Girouard Decl. Ex. A.) It was a "sharp practice" to intentionally make the carve-out sound mutual when Tesla knew that it was the only party with rights under the PIIA.

In addition, the Offer Letter does not explain that Ms. Barraza was giving up the right to a jury trial, while all three of the prior agreements she was required to sign indicated that disputes would be resolved in court. (*Ibid.* (PIIA); Barraza Decl. Ex. B (Applicant NDA) and Ex. C (Visitor Safety NDA).) One of them, the Applicant NDA, states that it could only be modified by signature of a Director-level employee, which never occurred. (Barraza Decl. Ex. B.) Although there is no requirement that an arbitration agreement explicitly explain that agreeing to arbitration means that the employee is losing the right to a jury trial, the Offer Letter's silence on that point, combined with the three prior agreements with court forum-selection clauses and Tesla's knowledge that its factory workers are unsophisticated legal actors who may have no idea what arbitration is, suggests that Ms. Barraza did not make an "informed choice" to waive her right to a jury trial. (*Id.* ¶¶ 9-10.)

The oppression and surprise create a high degree of procedural unconscionability.

B. The Arbitration Provision Is Substantively Unconscionable.

Tesla's arbitration provision is substantively unconscionable because, particularly when read with the PIIA, it creates a one-sided framework that provides Tesla with all the advantages of suing in court while limiting Ms. Barraza to suing in confidential arbitration. Substantive unconscionability turns on whether terms are overly harsh, unduly oppressive, or unfairly one-sided. (*Sonic*, 57 Cal.4th

at 1145.) Tesla's one-sided agreement is substantively unconscionable.

1. The Arbitration Provision Lacks Mutuality, the Paramount Consideration for Substantive Unconscionability.

Lack of mutuality is a hallmark of unconscionability in arbitration agreements and a well-established basis for voiding them. Tesla's arbitration provision provides a carve-out for the intellectual property, confidentiality, and anti-competition claims that only Tesla has the right to bring.[2] This renders alone the arbitration clause unconscionable. (*See Armendariz*, 24 Cal.4th at 117 ("[I]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee" but preserve the judicial system for itself); *Bakersfield Coll.*, 41 Cal.App.5th at 765 ("the paramount consideration in assessing substantive unconscionability is mutuality"); *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 657 ("[T]he key factor [for substantive unconscionability] is lack of mutuality.").)

Even when the carve-out is drafted on its face to apply to claims brought by the employee and the employer, the agreement is unfairly non-mutual if the carved-out claims are, in reality, those that only the employer would want to bring. (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1540-41 (carve-out worded in mutual terms is unconscionable if the claims subject to arbitration are those "which are virtually certain to be filed against, not by, [the employer]").). Multiple subsequent courts have held that a one-sided carve-out from arbitration for the employer's claims, as in Tesla's arbitration provision here, is unconscionable. (*See Armendariz*, 24 Cal.4th at 117-18; *Carlson v. Home Team Pest Defense, Inc*. (2015) 239 Cal.App.4th 619, 634-35; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 914-17.) Here, although the Offer Letter says that both the employee and employer may sue in court to enforce the PIIA, only Tesla has enforceable rights under the PIIA.[3]

[2] And as to those claims, Tesla gives itself even more advantages in the PIIA than simply access to court – stacking the deck by giving itself an automatic right to injunctive relief and imposing a heightened burden of proof on Ms. Barraza in defending accusations of breach.

[3] The PIIA and Offer Letter must be looked at together to analyze the one-sided effect of Tesla's arbitration agreement, as courts often do when deciding motions to compel arbitration. (*See, e.g.*, *Lange*, 46 Cal.App.5th at 449-50; *Davis*, 53 Cal.App.5th at 915 n.8; *see also* Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together.").)

Further stacking the deck in its favor, in the PIIA, Tesla has given itself (and only itself) the automatic right to injunctive relief in court, has purported to impose on Ms. Barraza a heightened burden of proof – "clear and convincing evidence" – to demonstrate that any confidential information Tesla might accuse her of stealing was already in the public domain, has required Ms. Barraza (but not Tesla) to submit to court venue and jurisdiction, and has given itself (but not Ms. Barraza) the right to assign these privileges to anyone. (Girouard Decl. Ex. A § 6 ("the Company shall therefore have the right to enforce this Agreement and any of its provisions by injunction … without bond"); § 1 ("I agree that, in any dispute related to this Agreement, I will bear the burden of proving by clear and convincing evidence" that information alleged to have been misused "is or lawfully bec[ame] part of the public domain"); § 11.1 (jurisdiction); § 11.3 (assignability).) Two of these one-sided advantages – the one-sided injunctive relief provision and the heightened burden of proof – are, in and of themselves, substantively unconscionable. (*See Lange*, 46 Cal.App.5th at 451 (relieving employer of elements for obtaining an injunction is unconscionable); *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, at 89 (same); Girouard Decl. Ex. B (*Hollocks v. Tesla, Inc.*, Case No. 20STCP00884, at 4-6 (L.A. Cty. Super. Ct. Oct. 28, 2020) (Tesla's equitable remedies provision and imposition of heightened burden on employee in PIIA were unconscionably one-sided; denying motion to compel arbitration)).)[4]

In some circumstances, a non-mutual agreement may be substantively conscionable if the employer demonstrates a "reasonable business justification for the disparity," but here, the only apparent reason is Tesla's "desire to maximize its advantage based on the perceived superiority of the judicial forum," which does not suffice. (*Armendariz*, 24 Cal.4th at 120.) Absent a specific reason justifying a one-sided arbitration obligation, courts "must assume" unconscionability. (*Ibid.*) Courts

[4] Unlike *Hollocks*, which struck down the same version of Tesla's arbitration agreement at issue here (*see* Girouard Decl. ¶¶ 6-7, Ex. D), based on the same non-mutuality argument briefed herein, nearly all of the many prior court decisions Tesla presents to the Court have no relevance here because either (i) those courts were not called upon to analyze unconscionability or mutuality, or (ii) because those cases involved later versions of the agreement in which Tesla had removed the key unconscionable provisions at issue here (thus, Tesla's claims that the agreements in those cases were "nearly identical" (MPA at v) and "substantially similar" (*id.* at xi) are misleading). In a rare opinion that actually went Tesla's way and mentioned the PIIA carve-out, the court noted that the plaintiff had failed to provide additional briefing on a key issue. (*See* Tesla's RJN, Ex. 7 at 2 (*Agarwal*).)

applying this principle from *Armendariz* to arbitration intellectual-property-related carve-outs similar to Tesla's have held that no reasonable justification for the disparity exists. (*See Davis*, 53 Cal.App.5th at 914-17 (no justification for employer confidentiality agreement exempted from arbitration); *Carlson*, 239 Cal.App.4th at 634-35 (same); (*Stirlen*, 51 Cal.App.4th at 1536-37 (same).)

Confirming that Tesla has no business need for such a carve-out, and tacitly admitting that the carve-out is improper, recent versions of Tesla's arbitration agreement omit it (*see* Girouard Decl. ¶ 2), yet Tesla left the carve-out in place for Ms. Barraza. Tesla's violation of the "paramount" consideration of mutuality constitutes substantive unconscionability.

2. Requiring Arbitration to Be "Confidential" Is Unconscionable.

Tesla's requirement that arbitration be "confidential" creates a barrier for Ms. Barraza in gathering evidence, making the provision unconscionable. (*See Ramos v. Super. Ct.* (2018) 28 Cal.App.5th 1042, 1066-67 (confidentiality clause unconscionable because it would impair plaintiff's ability to engage in informal discovery and unnecessarily increase plaintiff's costs by requiring formal discovery.) If Ms. Barraza cannot divulge to others that she is pursuing claims of sexual harassment, it restricts her ability to investigate her claims and speak with potential witnesses, which is particularly problematic for fact-driven hostile work environment claims involving "me-too" evidence. (*See id.* at 1065 ("It is hard to see how [plaintiff] could engage in informal discovery or contact witnesses without violating the [confidentiality provision]."); *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 92 (evidence of similar harassment suffered by other female workers is admissible); *cf. Sanchez v. Carmax Auto Superstores Cal. LLC* (2014) 224 Cal.App.4th 398, 408 (upholding provision requiring only arbitration "hearing" to be confidential, not addressing obstacles to building case).)

Tesla, on the other hand, has the advantage of being able to contact any of its thousands of employees "confidentially." In addition, Tesla is a repeat player with access to the records and witnesses in prior arbitrations and litigations for similar claims against the Company.

The fact that Ms. Barraza will have access to whatever formal discovery the arbitrator decides to permit does not cure the unconscionability. Ms. Barraza would be subjected to delays and increased expense by having to rely solely on formal discovery devices, and would have a

disadvantage going into the formal discovery process without the prior knowledge of witness accounts. (*Id.* at 1066.) A confidentiality restriction "unreasonably favors the employer to the detriment of employees seeking to vindicate unwaivable statutory rights," and it "may discourage potential plaintiffs" from seeking to enforce their rights under FEHA. (*Ibid.*) Again, tacitly admitting the unconscionability of this provision, Tesla removed it from its more recent form arbitration agreements (Girouard Decl. ¶ 2) but it left the provision in place for Ms. Barraza.

3. <u>The Ban on Representative Actions Is Unconscionable.</u>

As Tesla concedes, its requirement that Plaintiff may only bring claims as an individual and not "as a plaintiff … in any … representative proceeding," is yet another unlawful term. (*See* MPA at xv n.5 (citing *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 382-83 (holding that predispute arbitration agreements may not deprive employees of the right to bring a representative PAGA claim)); *see also Najarro v. Super. Ct.* (2021) 70 Cal.App.5th 871, 882-83 (finding unconscionable requirement that covered disputes "must be arbitrated in [an] individual capacity and not as a claimant or member of [a] … representative action").) This additional unlawful provision further contributes to the one-sidedness of the arbitration agreement and results in an arbitral scheme permeated with unconscionability, *i.e.*, one that cannot be cured, as discussed below.

C. The Arbitration Clause Cannot Be Cured Through Severance.

When a court determines that a provision is unconscionable, "the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code § 1670.5(a); *Armendariz*, 24 Cal.4th at 121-22.)

Courts do not rescue arbitration agreements for employers by severing provisions that were unlawful at the time they were included by the employer: doing so would reward employers for imposing unlawful terms on employees. (*Armendariz*, 24 Cal.4th at 123-25 & n.13 ("An employer will not be deterred from routinely inserting … a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter); *Parada v. Super. Ct.* (2009) 176 Cal.App.4th 1554, 1586 (declining to reward employer by severing clauses that were "reasonably

clear[ly] unlawful under existing case law at the time imposed on the employee).)

In 2018 when Tesla drafted the arbitration clause, it had been *eighteen years* since *Armendariz* held that employers could not impose one-sided carve-outs to excuse themselves from arbitrating. (*Armendariz*, 24 Cal.4th at 117-18; *see also Pinedo v. Premium Tobacco Stores* (2000) 85 Cal.App.4th 774, 781; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1536-42.) Tesla knew or should have known that this provision was unlawful at the time it imposed the Agreement on Ms. Barraza, and therefore the agreement was imposed in bad faith. (*See Parada*, 176 Cal.App.4th at 1586.)

In addition, Tesla later removed this provision from its standard agreements, but it left it in place for Ms. Barraza, continuing to give itself the benefit of a one-sided agreement even after apparently concluding that such a practice was not defensible. The Court should not reward Tesla by severing a provision that Tesla included in bad faith.

Severance is also not proper here because the one-sided nature of the arbitration provision is central to the purpose of the agreement: to force employees into a disadvantaged forum while preserving for the employer access to court and the other advantages Tesla gave itself in the PIIA. (*Armendariz*, 24 Cal.4th at 124 (courts do not rescue an arbitration through severance if "the central purpose of the contract is tainted with illegality"); (*Davis*, 53 Cal.App.5th at 918 (affirming decision not to sever a provision that made an arbitration agreement one-sided); *Carlson*, 239 Cal.App.4th at 639-40) (affirming decision not to sever provision requiring the employee to arbitrate her claims while the employer "enjoyed unfettered access to the courts").)

Here, the one-sided nature of the relationship arises not merely from the carve-out for claims under the PIIA, but also from (i) Tesla giving itself the right to injunctive relief without needing to establish the legal prerequisites; (ii) subjecting Ms. Barraza to a heightened "clear and convincing" standard of proof; (iii) requiring Ms. Barraza to submit to a particular venue and jurisdiction while not submitting itself; and (iv) making Ms. Barraza's claims "confidential" while allowing its own claims to be public. In addition, the initial confidentiality agreements that Tesla made Ms. Barraza sign give only Tesla a right to prevailing-party attorneys' fees and remain in effect unless superseded by a writing signed by a director-level employee.

Rather than simply strike a single term, the Court would have to fundamentally re-arrange the contractual relationship to eliminate the foregoing unconscionable provisions. (*See Armendariz* at 124-25 (courts do not have authority to reform, or rewrite, the agreement to make it lawful, and courts should instead "refuse arbitration if grounds for revocation exist."); Civ. Code § 1670.5 (authorizing removal of unconscionable clauses, not rewriting of the contract).)

Severance is also not proper because of the presence of multiple unlawful provisions, which "indicate[s] of a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Armendariz* at 124.) In addition to all of the foregoing "one-sided" provisions, the Offer Letter also includes an unconscionable "confidentiality" requirement and ban on representative actions.

D. Plaintiff's Injunctive Relief and PAGA Claims Are Not Subject to Arbitration and Should Not Be Stayed If the Court Orders Plaintiff's Individual Damages Claims to Arbitration.

The Offer Letter gives Ms. Barraza the right to seek "injunctive relief in court to prevent irreparable harm pending the conclusion of any such arbitration." (Sim Decl. Ex. B.) Thus, even if the Court grants Tesla's motion with respect to Ms. Barraza's individual claims for damages, the arbitration agreement *expressly permits* her to pursue her claims for injunctive relief in court. Ms. Barraza, a current employee, seeks a "temporary, preliminary, and permanent injunction enjoining Tesla from continuing to engage in the violations of [FEHA] described herein, including by requiring Tesla to adopt training, monitoring, reporting, and enforcement policies reasonably calculated to immediately end such unlawful practices." (FAC at 18.) Tesla drafted the agreement and is bound by this provision if the arbitration agreement is enforced.

In addition, as stated above, arbitration agreements cannot deprive employees of a forum to bring representative PAGA claims, and that claim should not be stayed. Pursuant to the CAA and FAA, a party who has successfully compelled arbitration is only entitled to a stay "as to arbitrable claims or issues." (*Winfrey v. Kmart Corp.* (9th Cir. 2017) 692 Fed.Appx. 356, 357; Code of Civ. Proc. § 1281.4.)

As to non-arbitrable claims and issues, federal authority persuasively holds that district courts have discretion whether to stay the litigation pending arbitration. (*Winfrey*, 692 Fed.Appx. at 357;

Code of Civ. Proc. § 1281.4.) Indeed, the Ninth Circuit has "note[d] a preference for proceeding with the non-arbitrable claims when feasible." (*United Comms. Hub v. Qwest Comms.* (9th Cir. 2002) 46 Fed.Appx. 412, 415 ("Expanding the stay, so as to encompass all of the nonarbitrable claims in the case, is only appropriate where the arbitrable claims predominate, or where the outcome of the nonarbitrable claims will depend upon the arbitrator's decision.").)

Staying the PAGA claim would frustrate the purpose and nature of PAGA. Even if Ms. Barraza's individual damages claims were compelled to arbitration, her representative PAGA claim purports to represent a large group of women currently subjected to allegedly unsafe work practices. It would make little sense to delay the Labor Code claims of this group simply to allow Ms. Barraza's individual FEHA claims to proceed in arbitration. PAGA claims belong to the state of California, are representative in nature, and cannot be subjected to private arbitration.

The rationale against compelling PAGA claims to arbitration applies with equal force against *staying* them. (*See, e.g., Williams v. Super. Ct.* (2015) 237 Cal.App.4th 642; *Martinez v. Check 'N' Go of Cal.* (S.D. Cal. Oct. 5, 2015) 2015 WL 12672702, at *6 (staying non-PAGA claims but declining to stay PAGA claim pending outcome of related arbitration); *Mathias v. Rent-a-Center, Inc.* (E.D. Cal. Oct. 28, 2010) 2010 WL 4386695, at *3 ("[T]he court cannot find that it would stay litigation of the PAGA claims pending arbitration of plaintiff's individual claim.").)

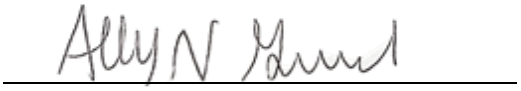
IV. CONCLUSION

Tesla's Motion should be denied. If, however, the Court grants the Motion, it should retain jurisdiction of Plaintiff's injunctive relief and PAGA claims, which should not be stayed.

DATED: February 24, 2022

Respectfully submitted,

THE JHAVERI-WEEKS FIRM, P.C.

By: 

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