FILED
ALAMEDA COUNTY
MAY 23 2022
CLERK OF THE SUPERIOR COURT
By A. Mendoza Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JESSICA BARRAZA Plaintiff v. TESLA, INC. etc., et al., Defendants.	Case No. 21CV002714 **ORDER DENYING MOTION TO COMPEL ARBITRATION**

Defendant Tesla, Inc. ("Tesla") moves to compel arbitration of the individual claims pled by Plaintiff Jessica Barraza ("Barraza"). The motion is DENIED. Argument on the demurrer and motion to strike is set for June 8, 2022, 3 p.m., Department 19, the argument will be remote unless either party objects.

FACTUAL BACKGROUND

Barraza, who was employed elsewhere, applied for work at Tesla on or about July 31, 2018. (Barraza Dec. ¶2.)[1] In order to attend an on-site "assessment," she signed an Applicant Non-Disclosure Agreement and a Visitor Safety NDA. These agreements have no arbitration provision and state in effect that venue for any action will be Santa Clara County state courts or the Northern District of California. (Barraza Dec. ¶3, Exhs. A-C.)

[1] This factual summary omits details that are discussed below.

On approximately August 23, 2018, Barraza attended an interview at Tesla and was given an oral offer that she accepted. (Barraza Dec. ¶4.) On approximately September 19, 2018, in email exchange, Barraza was informed by a Tesla representative that she had "completed all pre-employment steps" and was asked when she could start work. Barraza replied that she would give two weeks' notice to her then employer, which she did shortly thereafter. (Barraza Dec. ¶5, Exh. D.) Barraza's start date was set for October 15, 2018 and then changed to October 22, 2018 (Barraza Dec. ¶5.)

On October 1, 2018, Barraza received instructions to log onto Tesla's Workday program and "**complete the Workday onboarding tasks prior to your start date**." (Barraza Dec. ¶7, Exh. E, emphasis in original.) Barraza was instructed to review several documents and "click the I Agree boxes for each document." (Barraza Dec. ¶7, Exh. F.) Barraza signed six documents including on entitled "Employee NDA (May 2018).pdf." (Barraza Dec. ¶7, Exh. E, F.)[2] Then, on approximately October 16, 2018, Tesla sent Barraza an email that "formally" offered her a Production Associate position and attached an "Offer Letter" for her to sign. (Sims Decl. ¶11, Exhs, A, B.) Barraza understood that she had to sign the Offer Letter to start the job, so she did so. (Barraza Dec. ¶8, Sims Decl. ¶12-13.)

The offer letter contained the arbitration clause at issue here. It reads:

> As a Tesla employee, you will be expected to abide by all Tesla policies and procedures, and, as a condition of your employment, you will sign and comply with Tesla's standard confidentiality agreement which prohibits unauthorized use or disclosure of Tesla confidential information or the confidential information of Tesla's clients.
>
> In addition, to ensure the rapid and economical resolution of disputes that may arise in connection with your employment with Tesla, you and Tesla

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[2] The Barraza Declaration states that this fact is in a declaration of Helen Sims submitted by Tesla. I have not been able to locate this in the Simms Declarations, but it has not been factually contested.

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 the Judicial Arbitration and Mediation Services/Endispute, Inc. ("JAMS"), or its successors, 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.

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. 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.

Arbitrable claims do not include, and this Agreement does not apply to or otherwise restrict, administrative claims you may bring before any government agency where, as a matter of law, the parties may not restrict your ability to file such claims (including discrimination and/or retaliation claims filed with the Equal Employment Opportunity Commission and unfair

> labor practice charges filed with the National Labor Relations Board). Otherwise, it is agreed that arbitration shall be the exclusive remedy for administrative claims. If one or more of the provisions in this arbitration agreement, or any portion thereof, are deemed invalid, unenforceable, or void under the Federal Arbitration Act or other applicable law, then the remaining provisions, or portions thereof, shall not thereby be affected and will continue in full force and effect, and shall be given full effect without regard to the invalid, unenforceable, or void provision, or portion thereof.

(Simms Decl. Exh B, emphasis in original)

Barraza states that at the time she did not know what arbitration was or realize that she was giving up her right to a jury trial. (Barraza Decl. ¶9.) She also did not know other terms such as "representative action" and "PAGA action." (*Id.*)

Barraza has filed a complaint in this court alleging sexual harassment, failure to prevent sexual harassment, retaliation, declaratory relief and a PAGA claim that is based on alleged violations of Labor Code §§ 6400(a) and 6401, which require employers to provide safe and healthful workplaces. Tesla has brought a motion to compel arbitration of the non-PAGA causes of action based on the arbitration provision in the offer letter. Barraza contends that the arbitration provision should not be enforced because it is both procedurally and substantively unconscionable.

ANALYSIS

Arbitration agreements are favored and generally enforceable. (Code of Civ. Proc §1281; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707,

The seminal case concerning enforcement of employment arbitration agreements is *Armendariz v. Foundation Health Psycare Services, Inc.("Armendariz")* (2000) 24 Cal.4th 83. *Armendariz* affirmed that California law favors the enforcement of arbitration agreements (see also *Oto, L.L.C. v. Kho* ("Oto")(2019) 8 Cal 5th 111, 125) and that arbitration agreements apply to claims under California's Fair Employment and Housing Act ("FEHA") such as those involved here. (*Armendariz* at 91, 97.). However, citing Civil Code §1670.5, *Armendariz* also affirmed that a court could refuse to enforce an

unconscionable arbitration provision on the same basis as would apply to any other contractual provision. (*Id.* at 127-27; see also Code of Civ. Proc. §1281 applying general contract interpretation to arbitration agreements.) That is the crux of the issue here.

Armendariz held that both procedural and substantive unconscionability had to be found before an arbitration provision would not be enforced, but that they need not be present in the same degree. Rather a sliding scale is involved under which "the 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." (*Id.* at 114.) Procedural unconscionability essentially means "an absence of meaningful choice" on the part of one of the contracting parties and substantive unconscionability means terms that can be described as "overly harsh," "unduly oppressive," or "so one sided as to shock the conscience." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145 (citing cases).) "All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party." (*Ibid.*, internal punctuation and citations omitted.) " 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227; see also *A & M Produce Co.* (1982) 135 Cal.App.3d 473, 487.)" (*Armendariz* at 114, citation supplemented.)

California Supreme Court cases have instructed courts to be "particularly attuned to the danger of oppression and overreaching in employment cases. (*Oto* at 127, citing *Armendariz* at 115 and *Baltazar v. Forever 21, Inc. ("Baltazar")* (2016) 62, Cal.4th 1237, 1244.)

Procedural unconscionability. Procedural unconscionability refers to the manner in which a party's consent was obtained. Consent, of course, is the basis of contractual arbitration. (*Oto* at 129.)

> A procedural unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. 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. Arbitration contracts imposed as a condition of employment are typically adhesive, and the agreement here is no exception. The pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form.

(*Oto* at 126-27, internal punctuation and citations omitted.)

Generally, this issue involves whether the party with less bargaining strength truly has an opportunity to accept or reject the term or if as a practical matter, it is imposed on that party. (*Armendariz* at 113.) Courts look for surprise and oppression and have held that typical required take it or leave it arbitration agreements at the onset of employment, with nothing more, represent only minimal unconscionability. (see *Baltazar* at 1245 ("The adhesive nature of the employment contract requires us to be "particularly attuned" to her claim of unconscionability, but we do not subject the contract to the same degree of scrutiny as contracts of adhesion that involve surprise or other sharp practices."); *Davis v. Kozak* (2020) 53 Cal.App.5th 887, 907 ("By itself, however, adhesion establishes only a "low" degree of procedural unconscionability. [employee] did not attempt to show other sharp practices on the part of [employer], such as lying, manipulating, or placing him under duress.")

Oto lists circumstances relevant to oppression as including "(1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed

contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Id.* at 126-27.)

Here, Barraza has established a timetable that is considerably more oppressive that the typical "take it or leave it" arbitration agreement as a condition of employment as well as involving surprise. On August 23, Barraza was given a verbal job offer, which she accepted. (Barraza Decl. ¶4; Sim 12/17/2021 Decl. Exh. 1 (offer).) As recounted above, a Tesla representative emailed Barraza on September 19, 2018 that she had "completed all employment steps" and asked when she could start work (Barraza Decl. ¶5, Exh. D.) Barraza responded that she could start on October 8th and could put in her two week notice the next morning, which she did. (*Ibid.*) At this point, in reliance on the email, Barraza had quit her job as a sales associate in a home décor store and was relying on the job offer from Tesla. On September 25, 2018, she was given a start date of October 15, 2018, which Tesla then delayed to October 22, 2028. (Barraza Decl. ¶6.) On October 1, 2018, as instructed, Barraza logged into Tesla's Workday site and electronically signed six documents, including an Employee NDA. (Barraza Decl. ¶7, Exhs. E, F) Although the October 1, 2018 email from Tesla referred to Baraza as a "member of our team," discussed benefits such as a 401(k) and an Employee Stock Purchase Plan, and attached several documents including a "Workday Onboarding Guide," it said nothing about needing to sign the formal offer letter containing the arbitration agreement with which Barraza was presented on October 16th or 17th. (Barraza Decl. ¶8; Sims 12/6//2022 Decl. Exh. B) None of Tesla's prior communications with Barraza mentioned the arbitration agreement with which she was presented after she had quit her job as she told her Tesla contact she would, reasonably thought she was hired at Tesla, and had signed all necessary papers.

Additionally, *Oto* mentioned "the education and experience of the party" as a factor in determining the degree of oppression. Ms. Barraza states that she essentially has a high school education, was unfamiliar with the concept of arbitration, and was not aware that she was signing away her right to a jury trial. Although some cases find that this factor as well as the failure to negotiate or ask for time to consult an attorney are not the fault of the employer, a fair reading of *Oto* indicated that these are factors to be considered. Additionally, in *Oto*, while acknowledging that the employee did not attempt to negotiate, the court states that "a complaining party need not show it tried to negotiate standardized contract terms to establish procedural unconscionability. (citation) By its conduct, [the employer] conveyed the impression that negotiation efforts would be futile." (*Oto* at 127.)

In language that has often been quoted, *Armendariz* cautions that "[g]iven the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we 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* at 115.)

The amount of procedural unconscionability here is considerable. Having left her previous employment, the pressure on Barraza to sign the offer letter was more significant than that found to be minimal in other cases. Although Barraza states in ¶8 of her declaration, as Tesla points out at 1:18-19 of its Reply, that she nominally was given the option to sign or not sign the Offer Letter, in the absence of a showing by Tesla that it offered jobs to applicants who did not sign the Offer Letter, it is obvious that signing was a condition of employment. Surprise means that the employee was surprised to have to arbitrate his wage claim because the language in the adhesive agreement was opaque. (*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 214.) The question is whether a "reasonable person would have been surprised by the arbitration provision." (*Ibid.*) That

is less of a problem here than, for example, in *Oto* because the language is clearer and Barraza at least speaks the language in which the agreement was written. However, Barraza points out that the jury trial waiver was not explicitly stated as it is in many other arbitration agreements that have been reviewed by this court and the fact is that even with a high school education, Barraza credibly states that she did not understand which rights she was forgoing.

Tesla either orchestrated this sequence of events on purpose or was unacceptably indifferent to the situation in which this placed Barraza. Basically, Barraza was ambushed. She had gone through extensive pre-employment activities, had been offered a job, signed multiple forms and had left her previous employment in reliance on that offer, all without Tesla giving any indication that she would have to agree to arbitrate employment claims and give up her right to a jury trial. (See *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 631-33 ("more than baseline adhesion contract" and procedural unconscionability where normal adhesion is exacerbated by fact that Plaintiff would lose both her job and her unemployment benefits if she did not sign arbitration agreement without seeing additional Dispute Resolution Policy or AAA Rules).)

Substantive unconscionability The concept of substantive unconscionability is well described in *Oto*:

> Substantive unconscionability examines the fairness of a contract's terms. This analysis "ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as "overly harsh," "unduly oppressive," "so one-sided as to 'shock the conscience," or 'unfairly one-sided." All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party. Unconscionable terms impair the integrity of the bargaining process or otherwise contravene the public interest or public policy or attempt to impermissibly alter fundamental legal duties. They may include fine-print terms, unreasonably or unexpectedly harsh terms regarding price

> or other central aspects of the transaction, and terms that undermine the nondrafting party's reasonable expectations. These examples are illustrative, not exhaustive.
>
> Substantive terms that, in the abstract, might not support an unconscionability finding take on greater weight when imposed by a procedure that is demonstrably oppressive. Although procedural unconscionability alone does not invalidate a contract, its existence requires courts to closely scrutinize the substantive terms to ensure they are not manifestly unfair or one-sided.

(*Oto* at 129-30, internal citations and some internal punctuation omitted.)

In many respects, this arbitration provision is designed to meet the requirements of *Armendariz*. It is nominally mutual, provides for "adequate discovery," specifies the rules to be followed, sets an appropriate venue, calls for a written decision, does not curtail remedies and states that Tesla will pay any costs that exceed what Barraza would incur in court. However, Barraza complains of three items of substantive unconscionability: the lack of mutuality, the requirement of confidentiality and the ban on representative actions.

Lack of Mutuality Barraza argues that the arbitration provisions in the Offer Letter require Barraza to arbitrate the employment-related claims she is likely to make and allow Tesla access to court for the intellectual property and NDA violations it is likely to make. The arbitration provision states, "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." Barraza points out that only Tesla has enforceable rights under the Proprietary Information and Inventions Agreement ("PIIA")(Girouard Decl. Exh. A.)[3] Other provisions of the PIIA

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[3] It seems to be agreed that the Tesla Inc. Employee Non-disclosure and Invention Assignment Agreement (Girouard Opp. Decl. Exh. A) is the Proprietary Information and Inventions Agreement referred to in the Offer Letter.

also favor Tesla and lower the burden it normally would face in court. [4] Barraza is correct that the Offer Letter and the PIIA must be looked at together given that the Offer Letter refers to the PIIA and both documents state conditions of employment. (Civil 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."); *Lange v. Monster Energy Company* (2020) 46 Cal.App.5th 436, 449-50.)

Barraza also points out that she was required to sign an Applicant Non-Disclosure Agreement and Visitor Safety & Non-Disclosure Agreement, both of which chiefly require Barraza to not disclose information she learned during the visit, when she visited the Tesla facility. These agreements, which impose obligations on Barraza and give rights

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[4] Barraza cites the following provisions: (1.) Ms. Barraza agreed to hold "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" in strictest confidence. 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." (*Id.* at § 1.);
(2.) Ms. Barraza agreed that during the term of her employment and for twelve months thereafter, she will not solicit any Company employee or contractor or induce or attempt to induce any such individual to terminate their employment. On a permanent basis, she could not "directly or indirectly" lure away any of the Company's employees using non-public information." (Id. at § 9.2.2.); (3.) Barraza agreed in advance that a violation by her of the PIIA "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.); (4.) Barraza agreed "exclusive jurisdiction" and venue for any action arising out of or relating to the PIIA, in the state and federal courts in the county and state in which she is primarily assigned to work." (Id. at § 11.1.) Tesla made no such agreement; (5.) The PIIA is binding upon 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.) There is no reciprocal clause relating to Tesla; (6.) Although the definition of Proprietary Information excludes material in the public domain, Barraza has the burden of proving this by clear and convincing evidence.

to Tesla, are enforceable in Santa Clara County courts. Barraza's obligations survive the end dates of the agreements and the Applicant Non-Disclosure Agreement does not appear to have terminated by its own terms. Arguably, these agreements are superseded by the PIIA, which has an integration clause (¶11.5).

Tesla responds that (1) either party must arbitrate employment cases and go to court to resolve issues under the PIIA; (2) this action does not involve the PIIA; and (3) California courts generally enforce agreements that exclude trade secret claims based on business justifications. Tesla also advocates severing the PIIA exemption in the Offer Letter if necessary.

Although the agreement here is not unilateral as to employment claims, as in *Armendariz*, *Farrar v. Direct Commerce, Inc. ("Farrar")* (2017) 9 Cal.App.5th 1257, 1273 establishes that there is some degree of substantive unconscionability for a complete exclusion of intellectual property and trade secret related claims from arbitration, as here, as opposed to only providing for provisional remedies can be sought in court.[5] (It also found that the trial court was required to sever the clause, which will be discussed below.)

Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1540-41, relied on extensively in *Armendariz*, stands for the proposition that a court should examine apparently mutual arbitration clauses to determine if the claims to be arbitrated are those likely to be brought by the employee while the employer's likely claims will be decided in court. That said, the *Stirlen* opinion allows the employer "a 'margin of safety' that

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[5] "We therefore conclude substantive unconscionability is present in the case at hand, given that the carve-out is not limited to provisional judicial remedies …, but instead is a wholesale exception for "any claim based on or related to the and Assignment of Inventions & Confidentiality Agreement between you and Direct Commerce." (*Farrar* at 1273.)

provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen* at 1536.) However, Stirlen requires that the "business realities" creating the special need for such an advantage be explained in the contract itself or "factually established." (*Ibid.*) (See also *Davis v. Kozak*, *supra*, 53 Cal.App.5th at 915-17 (carve-out for confidentiality claims without showing of legitimate commercial need substantively unconscionable); *Carlson v. Home Team Pest Defense, Inc., supra,* 239 Cal.App.4th at 634-35 (carve out allowing employer to litigate competition and intellectual property claims substantively unconscionable); *Fitz v. NCR Group* (2004) 118 Cal.App.4th 702 (unconscionable lack of mutuality where arbitration agreement did not apply to and was not to be used "to resolve disputes over confidentiality/non-compete agreements or intellectual property rights.").)

Although Tesla's memorandum cites federal cases enforcing arbitration agreements that exclude trade secret claims, here there is no factual showing of business reasons justifying the wholesale exemption of PIIA claims and other NDA claims from the arbitration agreement. If the justification is that third parties not subject to contractual arbitration may be involved, then the agreement could have provided a limited arbitration exception for such claims, an exception that is contemplated by Code of Civil Procedure §1281.2.

The federal cases cited by Tesla are not particularly persuasive here. The agreement in *Steele v. Am. Mort. Mgmt. Servs.* (2012 E.D. Cal.) 2012 WL 6173651 only excluded "injunctive relief for unfair competition and/or disclosure of trade secrets," arguably a statutory requirement under Code of Civ. Proc. §1281.8, from mandatory arbitration. *Correa v. Firestone Complete Auto Care* (2013) 2013 WL 6173651 relied on *Steele* without further discussion to find that what appears to be a general exclusion from arbitration for trade secret and non-compete claims to be minimal substantive unconscionability. *Delmore v. Rich Americas Corp.* (2009) 667 F.Supp.2d. 1159, 1138

finds that the agreement is sufficiently bilateral if both parties must submit employment claims to arbitration, a finding at odds with the later decided *Farrar* case as well as other cases such as *Carlson*, *supra*, and *Davis v. Kozak*, *supra*. 53 Cal.App.5th at 914-17.

Here Tesla has reserved its right to go to court for the claims it is likely to have and has relegated Barraza to arbitration for her likely claims. Tesla has also handicapped Barraza in any litigation over confidentiality by the provisions listed above at footnote 4, including presuming irreparably harm and requiring Barraza to prove that any information was already public by clear and convincing evidence. (see generally *Lange v. Monster Energy Company*, *supra* (provision that employers did not have to show irreparable harm and waiver of bond unconscionable).) Because under §1670 a contract must be evaluated "at the time it is made," it cannot be the answer that this case does not involve one of the claims excluded from the arbitration agreement. (*Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365, 384 ("the unconscionability analysis evaluates whether the agreement is bilateral "at the time it was made" rather than as applied to specific plaintiff).)

On this basis, the agreement is substantively unconscionable for lack of mutuality.

Confidentiality Barraza's next claim of substantive unconscionability is the requirement that the arbitration be "confidential." Baraza cites *Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1066-67, which held that an arbitration agreement provision that stated "[e]xcept to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence" was substantively unconscionable because the plaintiff "would be in violation if she attempted to informally contact or interview any witnesses outside the formal discovery process," thus requiring depositions instead of interviews and defeating

the purpose of arbitration as a "simpler, more time-effective forum for resolving disputes." (*Id.* at 1066.)

Tesla responds that arbitration agreements generally call for confidentiality and that such a requirement is not, by itself, substantively unconscionable, citing *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1078-79. This reads *Davis* a bit too broadly. In *Davis*, as in *Ramos* for that matter, the confidentiality clause was broad and was found to be unconscionable. The clause precluded mention to anyone not directly involved in the mediation or arbitration about the content of the pleadings, papers, orders, hearings, trials, or awards in the arbitration' or even the existence of a controversy and the fact that there is a mediation or an arbitration proceeding. In saying that confidentiality provisions are not *per se* unconscionable, the *Davis* court mentioned that "[t]he parties to any particular arbitration, especially in an employment dispute, can always agree to limit availability of sensitive employee information (e.g., social security numbers or other personal identifier information) or other issue-specific matters, if necessary" and found the clause at issue to be "written too broadly." (*Id.* at 1079.) The language in this case calls for a "confidential arbitration" without any further specificity, which is more similar to the broad language *Davis* struck down than the narrow provisions that were seen as acceptable. If something narrow was intended, Tesla had the power to make that clear.

At the hearing, Tesla argued that the reference, after the phrase "final, binding and confidential arbitration," that the arbitration would be "conducted … under the then current rules of JAMS for employment disputes" somehow mitigated the generality of the term "confidential." However, nothing in JAMS rules of which I take judicial notice

defines a confidential arbitration or serves to otherwise narrow or explain the terms of the Offer Letter.[6]

Barraza identifies Tesla as a "repeat player" to make the point that Tesla has access to material from previous arbitrations that are unavailable to her, thus causing the confidentiality clause to favor Tesla. This is not what was discussed in *Armendariz*, cited by Tesla, where the court was concerned with whether an employer is favored in arbitration by its ability to provide repeat business to the arbitrator. (Id. at 111.) The *Davis* case cited by Tesla makes this distinction, quoting the following passage from *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1151-52, where the confidentiality provision held to be unconscionable required "any arbitration [to] remain confidential.":

> Confidentiality provisions usually favor companies over individuals. In *Cole v. Burns Int'l Sec. Servs.* (D.C.Cir.1997) 105 F.3d 1465, the D.C. Circuit recognized that because companies continually arbitrate the same claims, the arbitration process tends to favor the company. (Id. at 1476.) Yet because of plaintiffs' lawyers and arbitration appointing agencies like the American Arbitration Association, who can scrutinize arbitration awards and accumulate a body of knowledge on a particular company, the court discounted the likelihood of any harm occurring from the "repeat player" effect. We conclude, however, that if the company succeeds in

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[6] Rule 26, **"Confidentiality and Privacy,"** provides as follows:
(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

(Tesla's Request for Judicial Notice, Exh. 1.)

> imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player.

(*Davis* at 1078.)

Ting, which involved a consumer contract rather than an employment contract, pointed out that even a provision that only required the results of an arbitration to be secret would still favor the party imposing the requirement:

> AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T. For these reasons, we hold that the district court did not err in finding the secrecy provision unconscionable.

(*Ting v. AT&T*, *supra*, 319 F.2d at 1152.)

The simple provision for a "confidential arbitration" without any qualification is effectively just as broad as the clauses struck down in *Ramos*, *Davis*, and *Ting*. Both give Tesla an advantage in knowing the contents and results of every employment arbitration and to hamper the employee's ability to investigate and prepare. In this respect, Tesla drafted the contract to provide itself with an advantage. Again, if Tesla meant to limit confidentiality, it could have so provided.

Ban on Representative Actions The Offer Letter states that "[a]ny 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...." Barraza claims that this clause is unconscionable because claims under California's Private Attorney General Act (PAGA) cannot be contractually so restricted because " "an employee's right to bring a PAGA action is unwaivable" (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 383; *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871,

882-83.) At the time the contract was presented, it nominally had Barraza waive a right that the California Supreme Court had held to not be waivable.

Severance Whether the motion to compel arbitration is to be granted depends on whether the offending terms, lack of mutuality and forced confidentiality, can and should be severed and the remaining provisions enforced.

The seminal authority here is *Armendariz*, which starts by discussing Civil Code §1670.5, which gives courts the statutory authority to sever unconscionable terms when the agreement is not "permeated" with unconscionability:

> … Civil Code section 1670.5, subdivision (a) provides that "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made 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." Comment 2 of the Legislative Committee comment on section 1670.5, incorporating the comments from the Uniform Commercial Code, states: "Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results." (Legis. Com. com., 9 West's Ann. Civ. Code (1985 ed.) foll. § 1670.5, p. 494 (Legislative Committee comment).)

(*Armendariz* at 121-22.)

In *Armendariz*, as here, there were two unconscionable provisions. The court stated that "[s]uch multiple defects indicate 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.) The *Armendariz* court also found that the lack of mutuality there, where employees had to arbitrate employment disputes but the employer didn't, would require the court to reform the contract. Moreover, the court held that even if the employer would "allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, [that] does not change the fact that

the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness 'can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.' (*Stirlen*, *supra*, 51 Cal.App.4th at 1535-1536, fn omitted.)" (*Armendariz* at 125.)

Similarly here, where unlike *Armendariz* there is substantial procedural unconscionability and two substantively unconscionable provisions, the inescapable conclusion is that Tesla created substantial pressure that effectively negated Barraza's free will, inserted two unconscionable provisions and attempted to enforce the agreement as is. Under those circumstances, even though the Offer Letter has a severance clause, severance is inappropriate and the agreement should not be enforced.

Farrar v. Direct Commerce Inc. supra reversed a judge of this court who found a similar provision excluding confidentiality claims, likely to be made by the employer, from arbitration to be unconscionable and invalidated the agreement on that basis. While agreeing that a complete carve-out for confidentiality claims is so one-sided to be substantively unconscionable, the *Farrar* court found that to be the only substantively unconscionable term and held that the trial court should have severed the term instead of invalidating the agreement. *Farrar*, a case involving a $100,000 a year Vice-President for Business Development who negotiated aspects of her contract other than the arbitration clause, not a $19 per hour[7] assembly line worker, also states that there was no record of oppression or sharp practices by the employer so heightened scrutiny of the arbitration provision was not warranted. (*Id.* at 1269.)

Following *Farrar*, *Lange v. Monster Energy Company*, *supra*, discussed severability, held that in a case involving a low level of procedural

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[7] Sim Decl., Exh. B.

unconscionability, the trial court was incorrect that the fact that more than one provision was substantively unconscionable precluded severance. However, the trial court's second reason, that one of the unconscionable terms so permeated the contract that "no reasonable means of severance … would remedy the unconscionability" was apparently not contested, so the severance was upheld. (*Id* at 455.)

The allocation of the resolution of various issues is central to the bargain as struck. That this dispute involved an employment claim and not one of the issues that could be litigated in court is irrelevant to the fairness of the bargain when it was made. The central purpose of the Offer Letter and PIIA was to force Barraza into arbitration for her likely claims and to allow Tesla to go to court for its likely claims. Moreover, the unconscionability of the challenged terms should have been clear to Tesla when the Offer Letter was presented to Barraza. Much of the authority supporting their invalidity predates 2018.

Tesla's position that the problem is solved by severance means that the lack of mutuality under which Barraza's likely claims would be arbitrated and Tesla's likely claims litigated would never be addressed. If Tesla has a claim under the PIIA, it would file in court and except for possible disputes over the provisions involving irreparable harm, burden of proof and a bond, the Offer Letter would not be involved. However, if Plaintiff has a claim, Tesla would get the benefit of its bargain. Severance ignores the issue that can only have been deliberately created by Tesla. It also would involve ignoring the oppression that led to this "agreement" in the first place. While these substantive defects could be ignored in a matter of minimal procedural unconscionability, as in *Farrar*, no case requires such a result in a matter with great procedural unconscionability and to do so would be unjust.

If the "sliding scale" language in *Armendariz* and other cases is to actually be followed, only a low degree of substantive unconscionability should be required here. Therefore, the motion to compel arbitration is denied.

Tesla's requests for Judicial Notice

Tesla has requested judicial notice of several documents and a number of trial court opinions. The motion is granted as to Exhibits 1 and 2. The motion is granted as to the remaining exhibits and for the request in support of the reply, but only as to the fact that other court have enforced some version of Tesla's arbitration agreement. They are not judicially noticed for any other purpose because judicial notice of the reasoning in other trial court orders does not appear to be allowed and because, in any event, relevance has not been established because there is no foundation that the same documents are involved, they largely do not determine the same issues as are advanced here and none of them discuss the same type of procedural unconscionability.

Tesla's Objections

Tesla's objections to the declaration of Jessica Barraza are overruled. The statements are not legal conclusions, are not offered for the truth and have adequate foundations.

Tesla's objections to the Declaration of Ally N. Girouard are sustained on the ground of relevance, given the various motivations Tesla may have had for altering its Offer Letter, such as minimizing litigation costs.

DATED: May 23, 2022

Stephen Kaus
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp **FILED** Superior Court of California County of Alameda 05/23/2022 Chad Finke, Executive Officer / Clerk of the Court By: _____ Deputy A. Mendola
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	
PLAINTIFF/PETITIONER: Jessica Barraza	
DEFENDANT/RESPONDENT: Tesla, Inc.	
CERTIFICATE OF MAILING	CASE NUMBER: 21CV002714

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Order re: Ruling on Submitted Matter upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

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Chad Finke, Executive Officer / Clerk of the Court

Dated: 05/24/2022

By:

A. Mendola, Deputy Clerk

CERTIFICATE OF MAILING