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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KATHY PARK, Plaintiff and Respondent, v. CTBC BANK CORP., Defendant and Appellant.	B255809 (Los Angeles County Super. Ct. No. BC525384)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Bononi Law Group, William S. Waldo and Rafael N. Tumanyan for Plaintiff and Respondent.

Blank Rome, Mike B. Margolis, Howard M. Knee and Caroline P. Donelan for Defendant and Appellant.

Kathy Park filed a complaint against her former employer, CTBC Bank, alleging violations of the Fair Employment and Housing Act (FEHA), wrongful termination and various Labor Code violations. She also asserted a representative claim under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, §§ 2698 *et seq*.). CTBC filed a petition to compel arbitration arguing that all of Park's claims were subject to mandatory arbitration under an agreement she had signed as a condition of her employment. The trial court denied the petition, concluding that the arbitration agreement was unconscionable because it lacked mutuality. In support, the court cited a "carve-out" provision exempting from arbitration any claims for injunctive relief arising out of the unauthorized disclosure of trade secrets or confidential information.

CTBC appeals the order, contending the agreement does not contain any unconscionable or unlawful provisions. Alternatively, CTBC argues the court abused its discretion by invalidating the agreement as a whole, rather than severing the offending provisions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Kathy Park's Offer Letter and Arbitration Agreement

On December 31, 2010, plaintiff Kathy Park received a job offer letter from defendant CTBC Bank (formerly Chinatrust Bank) setting forth the proposed terms and conditions of her employment. The letter contained, among other things, Park's starting salary, the amount of her signing bonus, a summary of her benefits and a description of CTBCs' confidentiality policies. Park was instructed to sign and return the offer letter, which would be voided if "not received by close of business."

Among the information included in the letter was an eight paragraph arbitration agreement. Paragraph one stated: "You agree that . . . any employment-related disputes between you and the Bank and any of the Bank's agents and employees, whether initiated by you or the Bank, shall be resolved only by an Arbitrator through final and binding arbitration. Disputes subject to arbitration shall include without limitation disputes about compensation, termination, harassment, and contract claims, tort claims and claims based

on any federal, state or local law, constitution, statute, or regulation." Paragraph one further stated that Park would have "no right or authority [to bring] . . . any dispute . . . as a class action, private attorney general, or in a representative capacity on behalf of any other person or entity."

Paragraph five clarified that despite the broad language in paragraph one, "either party" was permitted to "seek injunctive relief in a court of competent jurisdiction for any claim or controversy arising out of or related to the unauthorized use, disclosure, or misappropriation of the trade secrets or confidential or proprietary information of either party."

The agreement also described the procedures that would govern the arbitration, explaining that the arbitrator would be required to "allow discovery authorized by the Federal Rules of Civil Procedure"; "apply the same substantive law, with the same statutes of limitations and remedies, that would apply if the claim were brought in a court of law"; and "issue a decision or award in writing, stating the essential findings of fact and conclusions of law." The arbitrator would also be authorized to "to consider and decide pre-hearing motions, including dispositive motions, as provided by the Federal Rules of Civil Procedure."

The agreement stated that any arbitration would "be conducted in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association [AAA]." It further directed that CTBC and Park would select the arbitrator through mutual agreement and that CTBC would "pay the [a]rbtirator's and arbitration fees" in "all cases required by law."

B. Park's Lawsuit

1. Summary of Park's claims

On October 28, 2013, Park filed a complaint[1] against CTBC for racial discrimination in violation of the Fair Employment and Housing Act (Gov. Code,

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1 Our summary of Park's complaint refers to the operative first amended complaint filed on December 4, 2013.

§§ 12940); retaliation for refusal to participate in illegal conduct (Labor Code, § 1102.5, subd. (c)); wrongful termination; failure to pay wages upon termination (Labor Code, §§ 201, 203, 227.3); forcing an employee to agree to an illegal condition of employment (Labor Cod, § 432.5); and unfair business practices (Bus. & Prof. Code, § 17200). The complaint also alleged a representative action under PAGA seeking to collect penalties "on behalf of other current and former 'aggrieved employees' who were employed by [CTBC] and against whom one or more of the Labor Code violations alleged in the foregoing causes of action was committed."

The complaint included allegations asserting that the arbitration provisions Park had agreed to as a condition of her employment were unenforceable under the doctrine of unconscionability. The complaint asserted the agreement was procedurally unconscionable because it had been presented as a non-negotiable condition of employment and because CTBC never provided a copy of the AAA rules that were to govern the arbitration. The complaint also alleged the agreement was "permeated" with "unlawful provisions," including a PAGA claim waiver and a carve-out provision that exempted claims for injunctive relief arising out of unauthorized use or disclosure of trade secrets or confidential information. Park asserted that the category of claims set forth in the carve-out provision were "typically brought by employers," thereby demonstrating the agreement "lack[ed] . . . mutuality."

2. CTBC's motion to compel arbitration

On January 8, 2014, CTBC filed a petition to compel Park to "arbitrate all claims in [her] lawsuit." CTBC asserted that each of Park's claims arose from her employment at CTBC and was therefore subject to mandatory arbitration pursuant to her employment agreement. CTBC also argued that none of the grounds identified in Park's complaint were sufficient to "invalidate" the agreement. Although CTBC acknowledged the agreement had been presented as a condition of employment and that Park had not received a copy of the AAA rules, it asserted that any resulting procedural unconscionability was "at most, low." CTBC noted that, overall, the agreement provided

"fair procedures," including a neutral arbitrator, sufficient discovery, a written arbitration award, an agreement to pay all costs unique to arbitration and no limitation on forms of relief available under state law.

CTBC also argued that Park had failed to establish substantive unconscionability. CTBC contended that several state and federal courts had held that arbitration provisions "preclud[ing] . . . claims in a representative capacity under PAGA are enforceable under the [Federal Arbitration Act], which preempts contrary state law." CTBC also argued the carve-out provision could not be deemed unlawful or unconscionable: "While some cases have found a lack of mutuality when an employer exempts from arbitration certain *claims* more commonly asserted by employers, no court has declined to enforce an arbitration agreement based solely on a clause allowing either party to seek limited injunctive relief in court."

Park, however, argued that she had demonstrated both procedural and substantive unconscionability. Park asserted that CTBC's admission that the arbitration agreement had been presented as a condition of employment was, standing alone, sufficient to establish procedural unconscionability. Park also noted that CTBC had not merely failed to provide a copy of the applicable AAA rules, but identified them by the wrong name in the arbitration agreement. Although the agreement stated it was to be governed by the "National Rules for the Resolution of Employment Disputes of the American Arbitration Association," the AAA had changed the name of those rules in 2009, which was one year before Park had signed the agreement.

On the issue of substantive unconscionability, Park argued that numerous California courts had found similar carve-out provisions exempting equitable relief claims related to the unauthorized disclosure of proprietary information to be substantively unconscionable. Park also argued that multiple state court decisions had held that "arbitration provisions attempting to exempt employers from representative liability under PAGA are void."

Finally, Park argued that, rather than merely severing the offending provisions, the court should invalidate the agreement as a whole because: (1) the agreement contained

multiple unlawful provisions; and (2) CTBC's attempt to exempt from arbitration the very types of claims it was most likely to pursue against its employees demonstrated that the agreement was intended to impose an inferior forum on the employee.

After hearing argument, the court denied the motion to compel and issued a minute order explaining the basis for its ruling: "With regard to procedural unconscionability, an arbitration provision is procedurally unconscionable where consent is a condition of continued employment, there is no negotiation of terms, . . . and the employee is presented with a large amount of paperwork and pressured to sign the same day. . . There is sufficient evidence to show that plaintiff was in an unbalanced position of power and, therefore, felt forced to sign. With regard to substantive unconscionability, plaintiff claims the agreement is not mutual. Review of the document shows that typical employee claims must be arbitrated but not those an employer may bring. Similar provisions have been held to be unconscionable. Motion to compel arbitration is [DENIED]."

DISCUSSION

A. Summary of Applicable Legal Principles and Standard of Review

The parties' arbitration agreement is governed by the Federal Arbitration Act (9 U.S.C. § 1 *et seq*. (FAA), which preempts state laws that are inconsistent with the federal act's provisions and objectives. (*Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal.4th 348, 384 (*Iskanian*); *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, 131 S.Ct. 1740, 1748.) The "'contract defense[of] . . . unconscionability[] may be applied to invalidate [an] arbitration agreement[] without contravening' the FAA."[2] (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 Cal.4th 223, 246 (*Pinnacle*); *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 114 (*Armendariz*).) "'[U]nconscionability has both a "procedural" and a

[2] The parties do not dispute that their agreement is governed by the FAA or that unconscionability may be applied to invalidate an arbitration agreement without violating the FAA.

"substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results. [Citation.]" (*Armendariz, supra,* 24 Cal.4th at p. 114.) "Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' [Citation.] '[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.' [Citation.]" (*Pinnacle, supra*, 55 Cal.4th at p. 247.) "The party resisting arbitration bears the burden of proving unconscionability." (*Ibid*.)[3]

"If a court finds as a matter of law that a contract or any clause of a contract is unconscionable, the court may refuse to enforce the contract or clause, or it may limit the application of any unconscionable clause so as to avoid any unconscionable result." (*Carmona v. Lincoln Millennium Car Wash, Inc*. (2014) 226 Cal.App.4th 74, 83 (*Carmona*); Civil Code, § 1670.5) "A trial court has some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement." (*Armendariz, supra*, 24 Cal.4th at p. 122.) "The overarching inquiry is whether '"the interests of justice . . . would be furthered"' by severance." (*Id*. at p. 124.)

"'On appeal from the denial of a motion to compel arbitration, "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law."' [Citation.] Thus, unconscionability is a question of law we review de novo. [Citation.] To the extent the trial court's determination on the issue turned on the resolution of contested facts, we . . . review the court's factual determinations for substantial evidence. [Citation.] . . . [¶] We review the

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[3] In *Armendariz*, our Supreme Court also held that an employment agreement that requires the arbitration of nonwaivable statutory claims (including claims under FEHA) must meet certain minimum requirements that permit the employee to "vindicate his or her statutory rights." (*Armendariz, supra,* 24 Cal.4th at p. 90.) These minimum requirements "include[e] neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." (*Id*. at p. 91.) Park concedes all of these requirements are met here.

court's decision whether to sever portions of the arbitration agreement for abuse of discretion. [Citation.]" (*Carmona, supra*, 226 Cal.App.4th at pp. 82-83.)

B. Park Established Procedural Unconscionability

We first address the procedural element of unconscionability, "which addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Pinnacle, supra*, 55 Cal.4th at p. 246.) "Oppression generally 'takes the form of a contract of adhesion, "'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'"' [Citation.]" (*Carmona*, *supra*, 226 Cal.App.4th at p. 84.) "'"Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms' [Citation]" (*Aron v. U–Haul Co. of California* (2006) 143 Cal.App.4th 796, 808.)

CTBC does not dispute that it presented the arbitration provisions to Park in an offer letter that she was required to sign as a condition of employment, without opportunity to negotiate. The adhesive nature of the agreement is, standing alone, sufficient to "establish[] some degree of procedural unconscionability." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796 ["The finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, by itself, some degree of procedural unconscionability"]; *Carmona*, *supra*, 226 Cal.App.4th at p. 84; *Dotson v. Amgen, Inc*. (2010) 181 Cal.App.4th 975, 981 ["procedural unconscionability is present . . . because the offer was presented on a take-it or leave-it basis"]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470 ["adhesion contracts in the employment context typically contain some measure of procedural unconscionability"].)

Park argues that a finding of procedural unconscionability is additionally supported by CTBC's failure to provide a copy of the governing AAA rules that were referenced in the arbitration agreement. "Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound, support[s]

a finding of procedural unconscionability." (*Trivedi v. Curexo Technology Corp*. (2010) 189 Cal.App.4th 387, 393 (*Trivedi*); *Carmona, supra*, 226 Cal.App.4th at p. 84 [employer's failure to "provide those rules . . . is another factor that supports procedural unconscionability"]; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1146 (*Samaniego*).) Such conduct "contributes to oppression because the employee 'is forced to go to another source to find out the full import of what he or she is about to sign – and must go to that effort prior to signing.' [Citation.]" (*Carmona, supra*, 226 Cal.App.4th at p. 84.)

In this case, the oppressive nature of CTBC's conduct was heightened because the title of the AAA rules set forth in the agreement was incorrect. (See *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 486, fn. 3 (*Zullo*) [fact that "AAA does not publish rules under the title to which the arbitration agreement refers . . . add[s] to the oppressive nature of the agreement"].) Although the agreement stated that the arbitration was to be governed by "the National Rules for the Resolution of Employment Disputes of the [AAA]," the AAA had actually changed the title of those rules (effective November 1, 2009) to "the Employment Arbitration Rules and Mediate Procedures." This title change occurred more than a year before Park signed the agreement.

CTBC argues that we should discount its failure to provide a copy of the governing rules, noting that multiple court have concluded "the failure to attach a copy of the AAA rules did not render the agreement procedurally unconscionable." (*Lane v. Francis Capital Management* (2014) 224 Cal.App.4th 676, 691 (*Lane*); *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472.) These cases reasoned that such conduct was not, in itself, enough to establish procedural unconscionability because the plaintiffs had failed to explain why they could not obtain a copy of the applicable AAA rules from the internet. (*Lane, supra,* 224 Cal.App.4th at p. 691.) In this case, however, Park has provided a reason why she would have had difficulty identifying the applicable rules: the wrong name of the rules was set forth in the arbitration agreement. According to a supporting declaration from Park's attorney, the AAA website does not currently list

any set of rules, even in its archive, under the name "the National Rules for the Resolution of Employment Disputes."[4]

Although the adhesive nature of the agreement and CTBC's failure to identify or provide the applicable AAA rules demonstrate "oppression" in the contract negotiation and formation process, Park has presented no evidence of procedural unconscionability's other hallmark: "surprise." Her arbitration agreement was not "'"hidden with a prolix printed form."' [Citation.]" (*Pinnacle, supra*, 55 Cal.4th at p. 247.) Rather, it was contained in a four-page offer letter setting out the proposed terms of her employment. CTBC could reasonably expect Park would read the letter carefully given that it listed important information related to her employment, including her salary, the amount of her signing bonus and her benefits. She was also given a full day to review the letter, thereby giving her sufficient time to consider its terms. The arbitration provisions were written in clear language and included a stand-alone paragraph in capital letters emphasizing that, by agreeing to arbitration, Park was waiving her rights to bring her employment disputes in civil court and her right to a jury trial. Moreover, while CTBC's conduct may have made it difficult for Park to identify the AAA rules that would govern the arbitration, she has not alleged that any of the terms within the AAA rules were surprising or would otherwise interfere with her ability to secure a fair and full arbitration.

Considering all of the factors above, we conclude that Park has established a moderate level of unconscionability. Our Supreme Court has repeatedly emphasized the oppressive nature of employment arbitration agreements presented as a condition of employment: "[I]n the case of preemployment arbitration contracts, the economic

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[4] CTBC contends that the incorrect title set forth in the arbitration agreement should not have hindered Park's ability to find the correct rules because "the AAA immediately placed [a notice] online regarding the name change." The only document CTBC cites in support of this argument is a paragraph within the newly-named AAA rules noting that the name had been changed from "the National Rules for the Resolution of Employment Disputes" to the "Employment Arbitration Rules and Mediate Procedures." CTBC does not explain how Park should have been expected to find and read a paragraph in the newly-named rules given that her arbitration agreement made no reference to the new title.

pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Little v. Auto Stiegler* (2003) 29 Cal.4th 1064, 1071 [citing and quoting *Armendariz, supra*, 24 Cal.4th at p. 115.) The adhesive nature of the agreement was accompanied by CTBC's failure to identify the correct title of the applicable AAA rules or to provide a copy of those rules. However, given the absence of evidence demonstrating Park was "surprised" by the terms of the arbitration agreement, we conclude the degree of procedural unconscionability was only moderate.

C. The Agreement Contains Multiple Unlawful Provisions

1. The carve-out provision is substantively unconscionable

a. The carve-out provision is unfairly one-sided

The trial court found that the agreement was substantively unconscionable based on the "carve-out" provision exempting from arbitration any claims seeking injunctive relief pertaining to the disclosure of trade secrets or confidential information. The court concluded this provision demonstrated a lack of mutuality because it effectively exempted the employer from arbitrating the types of claims it was most likely to assert against an employee.

As noted by the trial court, several decisions have found "similar provisions . . . [to be] unconscionable." For example, in *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638 (*Abramson*), an employment arbitration agreement contained a "'a trade secret carve-out'" (*id*. at p. 665) that permitted the employer to seek "injunctive relief from any court . . . with respect to any disputes or claims relating to or arising out of the misuse or appropriation of the Company's trade secrets or confidential and proprietary information." (*Id*. at p. 665, fn. 3.) The court concluded that the clause was unconscionable because: (1) it "explicitly exclude[d] all claims that the employer would be likely to assert against the employee"; and (2) was "explicitly unilateral," applying only to the employer's right to seek injunctive relief in court. (*Id*. at p. 665.)

In *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167 (*Mercuro*), this court examined a similar claim and found unconscionable a carve-out provision that excluded "claims for injunctive [or] other equitable relief for intellectual property violations, unfair competition and/or the use of unauthorized disclosure of trade secrets or confidential information." (*Id.* at p. 176.) We found, as had the *Abramson* court, that "the agreement compel[led] arbitration of the claims employees [we]re most likely to bring" while "exempt[ing] from arbitration the claims [the employer] [wa]s most likely to bring against its employees." (*Ibid*.) We rejected the employer's contention that the provision was "not unconscionable because the exception . . . applie[d equally] to it and its employees," explaining that, despite its facial mutuality, the provision was limited to a category of claims and a type of relief that the employer was most likely to pursue. (*Ibid*.) Finally, and importantly for this case, we provided an example of how this seemingly bilateral provision would, in practice, operate in a unilateral manner: "An employee terminated for stealing trade secrets, for example, must arbitrate his wrongful termination claim under the agreement but [the employer] can avoid a corresponding obligation to arbitrate its trade secrets claim against the employee by the simple expedient of requesting injunctive or declaratory relief." (*Id*. at p. 177.)

In *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519 (*Stirlen*), an arbitration agreement contained a carve-out provision exempting employer claims for injunctive or other equitable relief "pertaining to . . . improper use of confidential information and competition." (*Id*. at p. 1536.) The court concluded that, in the absence of evidence justifying the need for this explicitly one-sided provision, the provision was substantively unconscionable. The California Supreme Court discussed *Stirlen* at length in *Armendariz*, ultimately approving its conclusion that the carve-out provision lacked even a "'modicum of bilaterality." (*Armendariz, supra*, 24 Cal.4th at p 116.)

Similarly, in *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702 (*Fitz*), the court found unconscionable a provision exempting "disputes over confidentiality/non-compete agreements or intellectual property rights." (*Id*. at p. 709.) The court noted that although

bilateral on its face, the provision was nonetheless "unfairly one-sided" because "it is far more often the case that employers, not employees, will file such claims." (*Id*. at p. 725.)

In *Martinez v. Master Protection Corp*. (2004) 118 Cal.App.4th 107 (*Martinez*), the court found unconscionable an agreement that exempted "from its terms any 'claims by [employer] for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information.'" (*Id*. at p. 115.) The court explained that, as a result of the exemption, the agreement effectively "require[d] employees to arbitrate the claims they are most likely to assert against [the employer], while simultaneously permitting [the employer] to litigate in court the claims it is most likely to assert against its employees. Claims for unpaid wages, wrongful termination, employment discrimination and the like invariably are brought by employees, while claims involving trade secrets, misuse or disclosure of confidential information, and unfair competition typically are asserted only by employers." (*Ibid*.)

Most recently, in *Samaniego, supra*, 205 Cal.App.4th 1138, the court found unconscionable an arbitration provision that "exempt[ed] . . . claims typically brought by employers—namely, those seeking declaratory and preliminary injunctive relief to protect [the employer's] proprietary information and non-competition/non-solicitation provisions—while restricting to arbitration any and all claims plaintiffs might bring." (*Id*. at p. 1148.)

CTBC attempts to differentiate all these cases, asserting that none of them addressed a carve-out provision containing the exact provision here, which: (1) explicitly applies to both parties; and (2) is limited solely to claims seeking "injunctive relief" related to the disclosure of proprietary information. CTBC contends that in each of the cases above, the disputed provision was either explicitly unilateral (see *Abramson, supra,* 115 Cal.App.4th at p. 638 [provision limited to employer]; *Martinez, supra,* 118 Cal.App.4th at p. 115; *Stirlen*, *supra*, 51 Cal.App.4th at p. 1536); exempted entire categories of unlawful disclosure claims rather than claims seeking injunctive relief (*Fitz, supra,* 118 Cal.App.4th at p. 709); or exempted disclosure claims accompanied by any form of equitable relief, rather than just injunctive relief. (*Mercuro, supra*, 96

Cal.App.4th at p. 176; *Stirlen*, *supra*, 51 Cal.App.4th at p. 1536; *Martinez, supra,* 118 Cal.App.4th at p. 115.)[5]

Focusing on nuanced distinctions from the provisions addressed in each of the cases above, CTBC essentially ignores the broader principle the cases set forth: an arbitration agreement "is unfairly one-sided [if] it compels arbitration of . . . claims more likely to be brought by [the employee], the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by [the employer], the stronger party." (*Fitz, supra,* 118 Cal.App.4th at p. 709.) In this case the carve-out provision targets a specific category of claims—unauthorized disclosure of trade secrets and other confidential information—that are "typically . . . asserted only by employers." (*Martinez, supra,* 118 Cal.App.4th at p. 115; *Fitz, supra*, 118 Cal.App.4th at p. 725 ["it is far more often the case that employers, not employees, will file such claims"].) The exemption is further circumscribed by requiring that the claim seek a specific type of remedy—"injunctive relief"—that an employer is more likely to seek. (*Trivedi, supra*, 189 Cal.App.4th at p. 397 ["it is far more likely that employers will invoke the court's equitable jurisdiction in order to stop employee competition or to protect intellectual property"]; *Mercuro, supra,* 96 Cal.App.4th at p. 176 ["exception for intellectual property claims [that] only applies if the claim is accompanied by a request for injunctive or other equitable relief" more likely to be invoked by employer].)

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[5] CTBC also argues that at least one decision, *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, upheld the use of a similar carve-out provision. The provision in *McManus*, however, exempted from arbitration any claims by either party seeking injunctive relief. (*Id*. at p. 100.) Thus, unlike in this case, the exemption was not limited to a category of claims that the employer was more likely to pursue. *McManus* specifically differentiated *Mercuro, supra*, 96 Cal.App.4th 167, on that basis, noting that the exemption for injunctive relief *Mercuro* was limited to "injunctive relief claims involving intellectual property violations, unfair competition, or unauthorized disclosure of trade secrets or confidential information." (*McManus, supra,* 109 Cal.App.4th at p. 101.) *McManus* concluded that, in the absence of such a limitation, a provision merely exempting all types of claims for injunctive relief did not render "the agreement substantively unconscionable." (*Ibid*.)

CTBC nonetheless emphasizes that several of the cases above addressed arbitration exemptions for unlawful disclosure claims accompanied by a request for "injunctive relief [or] other form of equitable relief" (*Mercuro, supra,* 96 Cal.App.4th at p. 176), whereas the provision here is limited to unlawful disclosure claims seeking only injunctive relief. CTBC fails, however, to articulate any reason why narrowing the exemption to claims for injunctive relief rather than all forms of equitable relief makes the provision any more bilateral or any less unconscionable. In either case, the employer is clearly attempting to preserve its ability to litigate, rather than arbitrate, a category of employer-related claims that it deems most important to its business interests.[6] CTBC also ignores *Abramson, supra*, 115 Cal.App.4th 638, in which the carve-out provision, specifically limited to claims for "injunctive relief . . . with respect to any disputes . . . arising out of the misuse or appropriation of the Company's trade secrets or confidential and proprietary information" (*id*. at p. 665, fn. 3), is essentially identical to the carve-out provision here.

b. CTBC has failed to establish any business justification for the carve-out provision

CTBC alternatively argues that the carve-out provision cannot be deemed unconscionable because it serves "legitimate commercial needs," explaining that "protection [of CTBC's] trade secrets as well as the personal information of its customers [and employees] is . . . one of the bank's fundamental responsibilities."

Our Supreme Court has recognized that one-sided arbitration provisions may be justified by "'"business realities" that create a special need for the advantage.'" (*Armendariz, supra*, 24 Cal.4th at p. 117.) A party asserting such a defense, however, must "factually establish[]" that the business need justifies the one-sided provision.

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6 CTBC's briefing confirms that the true intent of the carve-out provision is to avoid having to arbitrate a category of claims that it deems "essential" to protecting its business interests. As discussed in more detail below, CTBC argues it has "legitimate commercial needs" to pursue the types of claims described in the carve-out provision, asserting that the exemption "is essential to providing . . . a swift method to safeguard highly sensitive, highly valuable and highly transferrable information."

(*Ibid*.; *Stirlen, supra*, 51 Cal.App.4th at p. 117.) CTBC has not made this evidentiary showing. Although CTBC's brief asserts that protecting trade secrets and confidential customer information are fundamental to its business interests, it has not proved those assertions through any factual showing nor has it made any showing that those interests cannot be adequately protected in arbitration.

Even if CTBC had made the requisite evidentiary showing, it has failed to explain why Code of Civil Procedure section 1281.8 is insufficient to protect its purported business interests. Subdivision (b) of that section permits "[a] party to an arbitration agreement" to "file in . . . court . . . an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." (*Ibid*.) Numerous decisions have cited section 1281.8 in rejecting the exact "business realities" justification that CTBC raises here.

For example, in *Stirlen, supra,* 51 Cal.App.4th 1519, the employer argued that a carve-out provision was not unconscionable because an employee's disclosure of the confidential information would "pose 'an immediate threat to business operations' and therefore require immediate access to the courts, which alone can provide meaningful 'emergency relief.'" (*Id*. at p. 1536.) The court explained that even if the employer could prove that disclosure would present an immediate threat of harm, the employer had failed to justify the need for the carve-out provision because "[t]he forms of emergency judicial relief [the employer] asserts it must have are available to a party" under section 1281.8. (*Id.* at p. 1537.)

Mercuro, supra, 96 Cal.App.4th 167, reached the same conclusion in rejecting the employer's assertion that it had "a reasonable business justification for not arbitrating claims for injunctive or other equitable relief in cases involving . . . unauthorized disclosure of trade secrets or confidential information." (*Id*. at p. 177.) The employer argued that "[m]onetary damages for the misappropriation of intellectual property assets are often difficult to calculate. . . . Therefore, speedy and effective relief from the misappropriation of intellectual property assets can only be had in the court system."

(*Ibid*.) The court noted that *Stirlen* had rejected "this same argument," explaining that the employer's business needs could not justify the carve-out provision given the availability of provisional relief under section 1281.8

Similarly, in *Fitz, supra*, 118 Cal.App.4th 725, the employer argued it had a sufficient "business justification for excepting trade secret . . . and intellectual property disputes from [arbitration]," asserting that "[a]rbitration . . . does not provide the 'swift and effective relief' necessary when trade secrets, unfair competition and intellectual property issues are in dispute." (*Id.* at 726.) The court concluded that the employer's argument "ignore[d] Code of Civil Procedure section 1281.8, which permits parties to an arbitration agreement to seek provisional relief, such as temporary restraining orders, when the award the party seeks 'may be rendered ineffectual' without it." (*Ibid*.)

CTBC's opening brief makes no reference to Code of Civil Procedure section 1281.8, nor does it attempt to distinguish *Stirlen*, *Mercuro* and *Fitz's* analysis of the "business realities" justification. In its reply brief, however, CTBC argues that the availability of provisional relief under section 1281.8 only serves to illustrate why the carve-out provision is not unconscionable: "a[n] [arbitration] provision which is consistent with and sanctioned by California law [cannot be] be considered so severely unconscionable as to invalidate an otherwise enforceable contract."

There are two problems with this argument. First, CTBC did not defend the carve-out provision on these grounds in its opening brief, which does not even reference section 1281.8.[7] By raising section 1281.8 as a defense for the first time in its reply brief, CTBC has denied Park a meaningful opportunity to respond to the argument. (See *Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1274 ["To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it"].) CTBC has therefore forfeited the argument. (*Ibid.* [argument in reply brief forfeited on appeal where appellant failed to present the issue in opening brief].)

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[7] CTBC did raise this issue in its briefing to the trial court. However, it subsequently abandoned the argument in its opening appellant brief.

Second, even if it had preserved the argument, CTBC ignores the differences between the carve-out provision and section 1281.8. The statute does not automatically permit a party to an arbitration agreement to proceed with an injunctive relief claim in court. Rather, it requires the party applying for provisional relief to demonstrate "that 'the [arbitration] award to which the applicant may be entitled may be rendered ineffectual without provisional relief.' (Code Civ. Proc., § 1281.8, subd. (b).)" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1162.) Presumably, this would require the moving party to show that the arbitrator was incapable of providing provisional relief and that any arbitration award would be incapable of making the employer whole. "In addition to the requirement of ineffectual relief, the applicant must also satisfy the statutory or common law requirements that pertain to the provisional remedy it seeks." (*California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 856.) Simply put, the carve-out provision does not merely duplicate the procedures set forth in section 1278.1. Instead, it allows CTBC to litigate a specific category of claims seeking a specific form of relief without requiring any preliminary showing of necessity.[8]

2. The Agreement's PAGA Waiver Violates Public Policy

The arbitration agreement precludes Park from bringing any "any dispute . . . as a . . . private attorney general, or in a representative capacity." CTBC does not dispute that this language categorically prohibits Park from pursuing a PAGA claim in any forum. In *Iskanian, supra,* 59 Cal.4th 348, the California Supreme Court held that "an

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[8] In *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, the court considered whether Code of Civil Procedure section 1281.8 was applicable to arbitration agreements governed by the FAA. The court explained that although state procedural rules generally govern arbitration proceedings covered by the FAA, it was unclear whether section 1281.8 was procedural or substantive. The court ultimately concluded it "need not decide whether [section 1281.8]" applied because federal authorities had recognized that the FAA permitted courts to grant provisional relief under the factual circumstances presented in that case. Neither party has questioned whether section 1281.8 applies to the arbitration agreement at issue here (which is governed by the FAA). We will therefore assume for the purposes of this appeal that it does.

employee's right to bring a PAGA action is unwaivable" (*id*. at p. 383) and that "an employment agreement compel[ling] the waiver of representative claims under the PAGA . . . is contrary to public policy and unenforceable as a matter of state law." (*Id. at* p. 384.) The Court further held that these state law policies are not preempted by the FAA.[9]

Under *Iskanian*, the PAGA waiver provisions in the parties' arbitration agreement are unlawful in two ways. First, the provisions are unlawful in that they specifically prohibit Park from pursuing a PAGA claim in any forum. This categorical waiver of an unwaivable statutory claim is unlawful and unenforceable under California law. (*Iskanian, supra*, 59 Cal.4th at p. 383; *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ___, 133 S.Ct. 2304, 2310 [FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights"].) Moreover, even if the agreement did not expressly prohibit PAGA claims, its prohibition on "representative actions" is unlawful and unenforceable in so far it applies to PAGA claims. (*Iskanian, supra*, 59 Cal.4th at p. 378 [arbitration agreement's waiver of representative actions . . . covers representative actions brought under the Labor Code Private Attorneys General Act" and is unenforceable as contrary to public policy].)

D. CTBC has Failed to Demonstrate the Trial Court Abused its Discretion by Invalidating the Agreement Rather than Severing the Offending Provisions

CTBC contends that even if the carve-out provision and PAGA claim waiver are unconscionable or otherwise unlawful, the trial court should have severed those provisions rather than invalidating the agreement as a whole. The determination of whether to sever an invalid contract provision is committed to the discretion of the trial court. (*Armendariz*, *supra*, 24 Cal.4th at p. 122.) We therefore "review the court's

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9 In its reply brief, CTBC argued *Iskanian* was not yet "'settled'" because a petition for writ of certiorari was then pending in the United States Supreme Court. However, on January 20, 2015, the United States Supreme Court denied that petition. (See *CLS Transp. Los Angeles v. Iskanian* (2015) ___ S.Ct. ___, 2015 WL 231976.) *Iskanian* is therefore now final.

decision whether to sever portions of the arbitration agreement for abuse of discretion." (*Carmona, supra*, 226 Cal.App.4th at p. 83.)

"[T]he doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. [Citations] The overarching inquiry is whether '"the interests of justice . . . would be furthered"' by severance." (*Armendariz*, *supra*, 24 Cal.4th at p. 124.) "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Ibid*.)

"One relevant factor in assessing severability is whether the agreement contains more than one objectionable term." (*Abramson, supra*, 115 Cal.App.4th at p. 666.) "Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term will be severed and the rest of the arbitration agreement enforced." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 466 [overruled on other grounds in *Iskanian, supra*, 59 Cal.4th at p. 366.) However, "'[a]n arbitration agreement can be considered permeated by unconscionability if it "contains more than one unlawful provision. . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [employer's] advantage." [Citations.]' [Citation.]" (*Samaniego, supra*, 205 Cal.App.4th at p. 1149 [citing and quoting *Armendariz, supra*, 24 Cal.4th at p. 124.)

In this case, several factors support the trial court's decision to invalidate the agreement. First, the agreement contains two different unlawful provisions: the carve-out provision and the PAGA claim waiver. The first provision exempts the very type of claims CTBC is most likely to assert against its employees, while the second operates as a waiver of unwaivable statutory rights. (*Iskanian, supra*, 59 Cal.4th at p. 383 ["an employee's right to bring a PAGA action is unwaivable"; "an employment agreement [that] compels the waiver of representative claims under the PAGA . . . is contrary to public policy and unenforceable"].) The presence of multiple unlawful provisions, both

of which clearly favor the employer, supports the court's decision to invalidate the agreement.

Second, the presence of the carve-out provision demonstrates a "lack of mutuality" in the agreement as a whole, suggesting that CTBC has attempted to utilize arbitration "less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage." (*Armendariz, supra*, 24 Cal.4th at p. 118.) Given that the agreement forces employees to arbitrate all of the claims they are most likely to pursue against their employer, while preserving the employer's ability to litigate the types of claims it deems most important to its own business interests, the trial court could reasonably conclude that the "central purpose" of the agreement was "tainted with illegality." (*Id.* at p. 124.)

Third, severing the carve-out provision would essentially reformulate the contract in a manner CTBC might not have agreed to at the time the parties signed the agreement. In its briefing CTBC repeatedly argues that the carve-out provision is "essential" to its business and enables it to carry out its "fundamental responsibilities." Given CTBC's own representations about the importance of the carve-out provision, the trial court could reasonably conclude CTBC would not have agreed to the arbitration agreement without it.

Fourth, because the parties' business relationship is now over, the trial court could reasonably conclude that severing the unconscionable provisions would not serve the interests of justice. As explained by one court analyzing whether severance of a similar carve-out provision was appropriate: "[W]ith the employment relationship now at an end, no employer claim is likely to arise in the future. The employee, meanwhile, is still trying to prosecute his claims against the employer. In effect, selective severance would relegate only the employee to the arbitration forum. Severance thus would promote—not prevent—both an undeserved benefit to the employer and an undeserved detriment to the employee. Clearly then, in this case, severance would not serve the interests of justice, which is the 'overarching' consideration in the severability determination." (*Abramson, supra*, 115 Cal.App.4th at p. 667.)

In its briefing, CTBC does not explain how the trial court abused its discretion in choosing to invalidate the agreement. Instead, it argues only that the "[c]ourt could easily strike [the carve-out provision and PAGA waiver] in order to remove any 'unconscionable taint.' Thus, severance is the appropriate action." CTBC may be correct that the court "could" have severed the provisions, rather than invalidating the agreement as a whole. The question, however, is whether the court abused its discretion in electing not to do so. CTBC has cited no case suggesting that it is an abuse of discretion to invalidate an agreement with multiple unlawful provisions, one of which demonstrates a lack of mutuality in the agreement as a whole.[10]

DISPOSITION

The trial court's order denying CTBC's motion to compel arbitration is affirmed. Park shall recover her costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J. FEUER, J.*

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[10] CTBC also argues that severance, rather than invalidation, was proper because the FAA and California Arbitration Act both embody a "strong public policy favoring arbitration." CTBC asserts that "applying these [federal and California] principles, the Court should sever any offending terms and otherwise compel [Park] to arbitrate all claims in this lawsuit pursuant to the Agreement." CTBC has cited no case suggesting that the policies set forth in the FAA or CAA are determinative or even relevant to the issue of severance. Rather, our courts have recognized that *Armendariz*, 24 Cal.4th 83, sets forth the relevant "principles regarding the severance of illegal terms from an arbitration agreement." (*Little, supra,* 29 Cal.4th at p. 1074.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.