Filed 3/19/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LEASA COMPTON Petioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; AMERICAN MANAGEMENT SERVICES, LLC et al., Real Parties in Interest.	B236669 (Los Angeles County Super. Ct. No. BC448343)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Johnson, Judge. Reversed and remanded with directions.

R. Rex Parris Law Firm, R. Rex Parris, Alexander R. Wheeler, Kitty Szeto and John M. Bickford; Lawyers for Justice and Edwin Aiwazian, for Petitioner.

No Appearance for Respondent.

Jackson Lewis, Thomas G. Mackey and Brian D. Fahy for Real Parties in Interest..

Leasa Compton appeals from the order granting the petition by her former employer, American Management Services, to compel arbitration of Compton's class action complaint for violations of Labor Code provisions governing the payment of wages. Treating her appeal from this nonappealable order as a petition for writ of mandate, we conclude that the arbitration agreement she signed as a condition of obtaining employment was unconscionable. We therefore reverse the trial court's order granting the petition to compel arbitration and direct the trial court to enter a new order denying the petition.

FACTS AND PROCEDURAL HISTORY

1. *Background Facts*

In February 2006, Leasa Compton applied for the job of property manager with American Management Services, California, Inc.[1] In order to have her application considered, Compton was required to, and did, sign an agreement that called for arbitration of various disputes that might arise between her and AMS, and that also barred arbitration of class claims. Compton was hired in March 2006 and worked for AMS until August 2009.

In October 2010 Compton filed a class action complaint against AMS in superior court, alleging that AMS violated various Labor Code provisions governing the payment of minimum and overtime wages, rest and meal breaks, and reimbursement of expenses. AMS removed the action to the federal district court in November 2010, and filed an answer in December 2010 that did not raise arbitration as an affirmative defense. AMS then propounded special interrogatories on Compton, which she never answered because the district court remanded the action to state court in February 2010.

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[1] American Management Services, California, Inc., is a Washington corporation and wholly owned subsidiary of American Management Services, LLC. The latter does business in several states as the Pinnacle Family of Companies. Because the relationships between these entities have no effect on the issues on appeal, for ease of reference we will refer to all three collectively as AMS.

After remand to the superior court, AMS propounded more discovery requests, including form and special interrogatories, document production requests, and requests for admission. Compton objected to nearly all these discovery requests and provided few substantive responses. On April 27, 2011, the United States Supreme Court issued its decision in *AT&T Mobility, LLC v. Concepcion* (2011) ___ U.S. ___, 131 S.Ct. 1740 (*Concepcion*), which overruled the California Supreme Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*). The *Discover Bank* court had held that provisions in certain consumer contracts of adhesion that barred arbitration or litigation of class-wide claims were unconscionable and therefore unenforceable. *Concepcion* held that for consumer contracts with arbitration provisions subject to the Federal Arbitration Act (9 U.S.C. § 1, et seq. (FAA)), the mere presence of a ban on class-wide claims did not render such provisions unenforceable.[2]

Five days after *Concepcion* was decided, counsel for AMS sent Compton's counsel a copy of the arbitration agreement Compton had signed. During May of 2011, counsel for AMS exchanged e-mails with Compton's lawyers, contending that *Concepcion* had changed the law in a way that removed the obstacles to arbitration that *Discover Bank* had erected. When Compton refused to submit her individual dispute, and not class claims, to arbitration, AMS filed a petition to compel arbitration in July 2011.

AMS's petition to compel arbitration was predicated on the theory that the California Supreme Court's decisions in *Discover Bank* and *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*) had previously barred class arbitration waivers like the one in Compton's arbitration agreement.[3] AMS contended that it could not seek to

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[2] The FAA applies to contracts involving interstate commerce. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1351.) The California counterpart to the FAA is the California Arbitration Act. (Code Civ. Proc., § 1280, et seq. (CAA).) There is no dispute that AMS was involved in interstate commerce for purposes of invoking the FAA. We discuss *Concepcion* in more detail in section 3.B.(i) of our DISCUSSION.

[3] *Gentry* held that where employment contracts were concerned, provisions in arbitration agreements barring class claims might be unconscionable in cases involving unwaivable statutory rights such as those in the Labor Code concerning overtime pay. It

enforce the arbitration agreement's ban on class action claims, and thereby require Compton to arbitrate only her individual claims, until after *Concepcion* was decided. Compton opposed the petition on two grounds. First, AMS waived its right to arbitrate by waiting too long to enforce it. Second, the provision was unconscionable because it was one-sided and allowed AMS to litigate in court claims that were important to it.

2. *The Arbitration Agreement and Rules*

Job applicants at AMS were provided with an eight-page arbitration agreement stating in short that no application would be considered until the applicant agreed to be bound by the company's arbitration program. The agreement said that AMS "has implemented an arbitration procedure to provide quick, fair, final and binding resolution of employment-related legal claims." Prospective employees signing the agreement had three days to withdraw their consent in writing by stating that they no longer sought employment with AMS. The agreement said that applicants had to read and sign the agreement, and that their signature would also acknowledge receipt of arbitration *rules*, which were provided in a separate document. The agreement stated that applicants should familiarize themselves with the rules, and that they were allowed to take the agreement and rules with them, and could then sign and return them at a later date if they wished.

The agreement also said that the applicant would submit to arbitration any and all claims arising out of his employment with AMS, and then listed by way of example claims arising under common law or federal, state, and local statutes, including age discrimination, civil rights, and disability protection statutes. AMS stated that it would also arbitrate such claims.

The arbitration rules specified which claims were, or were not, subject to arbitration: "Except as otherwise limited herein, any and all employment-related legal

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established a four-factor test that employees had to meet in order to show that a class proceeding was necessary to secure the nonwaivable statutory rights of potential class members. (*Gentry, supra*, 42 Cal.4th at pp. 462-463.)

disputes, controversies, or claims arising out of, or relating to, an Employee's application or candidacy for employment . . . with [AMS] shall be settled exclusively by final and binding arbitration before a neutral, third-party Arbitrator selected in accordance with these [rules]. Arbitration shall apply to any and all such disputes, controversies or claims whether asserted against [AMS] and/or against any employee, officer, alleged agent, director or affiliate in their capacity as such or otherwise. All employment-related claims that [AMS] may have against an Employee also must be resolved via the arbitration process described therein."

The next paragraph describes without limitation the types of claims that were subject to arbitration. These included claims under "the Age Discrimination in Employment Act (ADEA) . . . , Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans With Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), 42 U.S.C. [section] 1981, . . . the Employee Polygraph Protection Act, the Employee Retirement Income Security Act (ERISA), state discrimination statutes, and/or common law regulating employment termination. This also includes any claim you may have under contract or tort law; including, but not limited to, claims for malicious prosecution, sexual harassment, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/negligent infliction of emotional distress or defamation."

The next paragraph specifies those claims *not* covered by the arbitration agreement: "Claims by Employees for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) are not subject to arbitration. Claims still may be filed with administrative agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission or the appropriate state agency. However, participants in the [arbitration program] may not bring or participate in any lawsuit arising out of such a claim. Likewise, if the Equal Employment Opportunity Commission or some other administrative agency files a lawsuit in the courts against [AMS], the Employee cannot participate in the lawsuit as a party. Instead, as stated above, the Employee must pursue any and all personal claims

against [AMS] through arbitration. Statutory or common law claims raised by Employees alleging that [AMS] retaliated or discriminated against an Employee for filing an administrative claim or for participating in such a claim in any manner shall also be subject to arbitration.

"Not subject to arbitration are claims by [AMS] for injunctive and/or equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information. The Employee acknowledges and agrees that [AMS] may seek and obtain relief from a court of competent jurisdiction."

Unless all parties consent in writing, "the Arbitrator shall not consolidate claims of different employees into one proceeding. Each arbitration proceeding shall cover the claims of only one Employee. Unless the parties mutually agree, the . . . arbitrator has no authority to adjudicate a 'class action.' "

Under the arbitration rules, a request to arbitrate a dispute "shall be submitted not later than **one year** after the date on which the Employee knew, or through reasonable diligence should have known, of the facts giving rise to the Employee's claim(s)." (Original boldface.) The failure to do so constitutes a waiver of that dispute as to the employee. However, the one year time limit does "not affect tolling doctrines under applicable state laws or the employee's ability to arbitrate continuing violations." No such time limit is expressly prescribed for claims by AMS against an employee, however.[4] This is consistent with the arbitration agreement, which states that employees must file arbitration claims within one year of the date they learned, or should have learned, that their legal rights were violated. As with the arbitration rules, the arbitration agreement does not impose an express time limit on claims by AMS against an employee.

[4] Section 1 of the rules states that the rules apply equally to, and are binding on, AMS even though the terms and examples used throughout "contemplate a claim being brought by an Employee against [AMS]." In an apparent attempt to bolster its contention that the arbitration agreement is sufficiently bilateral, AMS takes the position that it is bound by the one-year time limit except for those claims excluded from the arbitration agreement. Although it is not clear from the record on what AMS bases this concession, it is ultimately irrelevant to our analysis, and for the purposes of this appeal only we accept it as true.

Under the arbitration rules, AMS and the employee participate equally in the selection of a neutral arbitrator. The arbitration rules provide for discovery, limiting the parties to one set of 20 interrogatories, including subparts, and three depositions. The arbitrator has discretion to permit additional discovery upon a showing of substantial need, so long as the extra discovery is not overly burdensome or causes undue delay. The arbitrator must issue a written decision that briefly states the reasons for his award. AMS will advance the costs of arbitration, and the employee's share of the costs may not exceed $100. The arbitrator has the authority to award attorney's fees in accordance with applicable law. If no award is made, each party bears its own legal costs. The award is final and binding as to both parties, but either party may appeal the arbitrator's decision in accordance with the FAA.

The arbitration agreement and rules were formatted legibly, in an easy-to-read font size, with provisions separated into paragraphs and arranged by subheadings.

3. *Evidence Before the Trial Court*

As part of its petition to compel arbitration, AMS submitted the declaration of its lawyers, along with supporting evidence, concerning its contact with counsel for Compton reagrding arbitration in the days and weeks after *Concepcion* was decided. In order to support its claim that the arbitration agreement was covered under the FAA, an AMS vice president, along with the company's chief administrative officer, submitted declarations attesting to the company's nationwide presence and activities. The CAO's declaration also authenticated the arbitration agreement and rules, along with Compton's signed copy of the agreement. According to the CAO's declaration, "[a]s a prerequisite to a potential applicant filling out a job application with [AMS], [AMS] requires the applicant to carefully review [the arbitration agreement and the arbitration rules], which are incorporated by reference into the Agreement – and to sign the Agreement."

Compton submitted an opposition declaration that described how she was presented with the arbitration agreement and rules. According to Compton, when she applied for a job with AMS, she met with Paula Palento, who Compton believed was an

administrative assistant for the company. Palento provided Compton "with approximately twenty . . . standard employment forms to sign at that time. I was required to sign all of these forms in her presence, and was given no time to review any of these forms because she was in a hurry to have them signed and submitted to corporate. So, I could not take the time to read these forms, they were not explained to me, and I was not able to ask questions about any of these forms. I now understand that, among those many forms Ms. Palento put in front of me, was a document that [AMS] is now saying requires me to agree to arbitrate . . . ."

Compton declared that nobody at AMS either called her attention to the arbitration agreement or explained the agreement to her before requiring her to sign it. She was not told that she was free to reject the terms of the arbitration agreement, and was not allowed or given the chance to negotiate or change the terms before signing. She "felt compelled to sign the form because it was given to me along with all of the other required forms for employment with [AMS] and I felt that failing to sign the form might prevent me from getting the job at [AMS]." According to Compton's declaration, she was not fully aware of her legal rights should there ever be a dispute with AMS, and did not know she was waiving her right to sue AMS in court if need be. Had she known, Compton stated, she would not have signed the agreement.

In its reply points and authorities, AMS did not respond to Compton's declaration. Instead, it submitted only the declaration of counsel and supporting exhibits in connection with its argument that Compton had not been prejudiced by any delay in demanding arbitration because her discovery responses consisted of mostly objections and a few insufficient answers.

4. *The Trial Court's Decision*

After hearing argument and taking the matter under submission, the trial court issued a written ruling that granted AMS's petition to compel arbitration. The trial court first found that AMS had not waived its right to arbitrate because, until *Concepcion* was decided, *Discover Bank* and *Gentry* both held "that an arbitration agreement with a class

action waiver cannot be compelled into arbitration."[5] Because AMS acted promptly to assert its rights once *Concepcion* was decided, the trial court ruled that no waiver occurred. The trial court also found that Compton had not been prejudiced by any delay in seeking arbitration because AMS's discovery requests were propounded before *Concepcion*, and because Compton's discovery responses "were neither substantive nor revealing."

The trial court also found that the arbitration agreement was not unconscionable. Relying on *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105 (*Lagatree*), the trial court rejected Compton's contention that the agreement was procedurally unconscionable because it was presented on a "take it or leave it" basis. This finding also relied on provisions in the agreement that described the terms, gave her the opportunity to seek independent advice, and incorporate "standard arbitration rules and procedures . . . ." The trial court also rejected Compton's contention that the agreement was substantively unconscionable because its allowance for litigation by AMS in some circumstances was one-sided. According to the trial court, these concerns were "largely hypothetical, because none of the excluded areas have any bearing on her rights or claims in this case. To the extent [Compton] is concerned about some form of equitable or injunctive relief, it is permitted as an adjunct remedy under [Code of Civil Procedure section] 1281.8."

Compton contends that we should reverse the trial court's order for three reasons: (1) a recent decision of the National Labor Relations Board finds that the ability to bring class actions or arbitrations is a protected concerted activity under federal labor law, which takes precedence over *Concepcion* – which was a consumer contracts case – and

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5 The trial court misinterpreted *Gentry*, which did not bar enforcement of all class action waivers in employment contract arbitration provisions. Instead, the *Gentry* court held that such waivers would not be enforced in cases concerning statutory rights such as those related to wages if the evidence presented to the trial court concerning several factors demonstrated that a class proceeding was necessary to safeguard the nonwaivable statutory rights of other employees. As set forth in section 3.B.(i) of our DISCUSSION, *post*, the trial court's reliance on *Discover Bank* was also misplaced because that decision was inapplicable to the setting and facts of this case.

the FAA; (2) AMS waived its right to compel arbitration; and (3) the arbitration agreement is unenforceable because it is unconscionably one-sided. Because we affirm on this last ground, we do not discuss the other two raised by Compton.

STANDARD OF REVIEW

Under both the FAA and the CAA there is a strong public policy in favor of arbitration. (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 953-954.) Doubts regarding the validity of an arbitration agreement generally are resolved in favor of arbitration. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686.) Under the FAA, however, arbitration agreements may be invalidated under generally applicable contract defenses. (9 U.S.C. § 2.)

Because unconscionability is a contract defense, Compton bore the burden of proving the arbitration provision was unenforceable on that ground. (*Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708.) Unconscionability is a question of law that we review independently when there are no meaningful factual disputes in the evidence. We review the trial court's resolution of disputed facts under the substantial evidence standard. When the trial court does not make express findings, we infer that it made every factual finding necessary to support its order, and review those implied findings for substantial evidence. (*Ibid.*)

DISCUSSION

1. *Although the Order Compelling Arbitration Was Not Appealable, We Elect to Treat the Appeal As A Petition For Writ of Mandate*

An order compelling arbitration is not appealable. (*Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 19.) The parties argue over whether this matter is appealable under the "death knell" doctrine, which applies when an order effectively terminates a class action. Rather than parse the case law on that issue, we conclude that we have jurisdiction to treat this nonappealable order as a petition for writ of mandate in this unusual case because: (1) the unconscionability issue is one of law based on undisputed

facts and has been fully briefed; (2) the record is sufficient to consider the issue and it appears that the trial court would be only a nominal party; (3) if we were to dismiss the appeal, and the ultimate reversal of the order is inevitable, it would come in a post-arbitration award after the substantial time and expense of arbitrating the dispute; and (4) as a result, dismissing the appeal would require the parties to arbitrate nonarbitrable claims and would be costly and dilatory. (*Id.* at pp. 19-20; *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 767-768.)

2. General Principles of the Unconscionability Defense

A written agreement to submit a dispute to arbitration is valid, enforceable, and irrevocable, except "upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) When one party to a written arbitration agreement refuses to submit to arbitration a dispute covered by the agreement, the other party may petition the court to compel arbitration unless the court determines that the right to compel arbitration has been waived by the petitioner, or grounds exist for revocation of the agreement. (Code Civ. Proc., § 1281.2, subds. (a), (b).)

Unconscionability is a defense to the enforcement of an entire contract, or particular provisions of a contract, including agreements to arbitrate disputes. (Civ. Code, § 1670.5, subd. (a).)[6] Although Compton concedes that her employment contract is governed by the FAA, the unconscionability defense is still available under section 2 of that act.[7] (9 U.S.C. § 2; *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, 1150.)

The defense of unconscionability has two components – procedural unconscionability and substantive unconscionability. The procedural component

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[6] Civil Code section 1670.5 is a codification of this contract enforcement defense. (*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 766.)

[7] AMS contends that finding the arbitration agreement is unconscionable violates the *Concepcion* court's interpretation of section 2 of the FAA. As set forth in section 3.B.(i) of our DISCUSSION, *post*, we disagree.

generally occurs in adhesion contracts that were drafted by the party with superior bargaining strength and are presented on a take it or leave it basis. This inquiry focuses on oppression or surprise due to unequal bargaining power. The substantive component turns on whether the terms are overly harsh or one-sided. (*Gentry, supra,* 42 Cal.4th at pp. 468-469.) Both must be present, but not in the same degree. Instead, a sliding scale is employed, and the greater the presence of one component of unconscionability, the less of the other there need be in order to determine that a contract is not enforceable. (*Id.* at p. 469.)

3. *The AMS Arbitration Agreement Was Substantively Unconscionable*

A. The Agreement Is Unconscionably One-Sided

(i) Overview of the Law Regarding Bilaterality

The element of substantive unconscionability involves an inquiry into whether the contract terms are unfairly one-sided. (*Gentry, supra,* 42 Cal.4th at p. 479.) The AMS arbitration agreement meets this test.

In *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519 (*Stirlen*), the Court of Appeal affirmed an order denying an employer's petition to compel arbitration of a former company top executive's action for wrongful termination in violation of public policy and other related claims. The arbitration provision was deemed unconscionably one-sided because it required the executive to arbitrate all disputes related to the termination of his employment, but excluded from arbitration all claims by the employer relating to protection of its intellectual property, along with enforcement of a covenant not to compete. The agreement also limited any award to the amount of actual damages for breach of contract, less mitigation of damages, and cut off employer liability for salary and benefits while the claims were arbitrated. (*Id.* at pp. 1528, 1533-1534.)

Stirlen was approved by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 Cal.4th 83 (*Armendariz*), which reversed the Court of Appeal and affirmed a trial court ruling denying an employer's petition to

compel arbitration of sex discrimination claims brought by two plaintiffs. The arbitration provision was deemed unilateral because it applied to claims only by employees. (*Id.* at pp. 115, 120-121.)

Armendariz was applied in *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167 (*Mercuro*), where the Court of Appeal reversed a trial court order compelling arbitration of a former employee's action for wrongful termination, fraud, and age and disability discrimination because the arbitration agreement was unconscionable. The arbitration provision in *Mercuro*, much like the one we consider here, required employees to arbitrate common law contract and tort claims, statutory discrimination claims, and claims for violation of any federal, state, or local statutes, ordinances, and regulations. Also very much like the agreement at issue here, the *Mercuro* arbitration agreement excluded employee workers compensation and unemployment benefits claims, and employer claims for injunctive and equitable relief for intellectual property violations, unfair competition, and the unauthorized use or disclosure of trade secrets or confidential information.

By compelling employees to arbitrate the claims they were most likely to bring, while retaining for itself the right to litigate those claims it was most likely to bring, the employer created an essentially unilateral arbitration agreement. (*Mercuro, supra*, 96 Cal.App.4th at pp. 175-176.) This was so even though the employer excluded from arbitration employee workers compensation and unemployment benefits claims, along with employee pension plan claims that were subject to a separate arbitration procedure. The *Mercuro* court said that those exceptions did not make the agreement bilateral because pension claims were exempt only if they were covered by some other arbitration agreement and because workers compensation and unemployment benefits claims were "governed by their own adjudicatory systems; neither is a proper subject matter for arbitration." (*Id.* at p. 176, footnote omitted.)

The same rationale was applied again in *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 724-726 (*Fitz*), where the arbitration provision excluded employee claims for workers compensation and unemployment benefits, along with employer

claims concerning confidentiality and noncompetition agreements or intellectual property rights. This court also adopted the *Armendariz* line of reasoning in *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114-115, holding that an arbitration provision very similar to the AMS arbitration agreement was unconscionably one-sided.

This line of reasoning was used most recently in *Samaniego v. Empire Today, LLC, supra*, 205 Cal.App.4th 1138 (*Samaniego*). The plaintiffs were carpet installers who brought a class action alleging that they had been misclassified as independent contractors instead of employees, and stated causes of action for multiple Labor Code violations, including the payment of minimum and overtime wages, meal break violations, and failure to pay employee expenses. The employer petitioned to compel arbitration based on an arbitration provision in an agreement that the installers were required to sign after being hired but before starting work.

The *Samaniego* court first determined that the arbitration provision was procedurally unconscionable because: the employment agreement was presented in English but the plaintiffs spoke only Spanish; the agreement was 11 pages of densely-worded, single-spaced text that lacked individual headings; the arbitration provision was the 36th of 37 provisions; although the arbitration provision stated that the rules of the American Arbitration Association applied, copies of those rules were not provided; and the agreement was an adhesion contract that the plaintiffs were required to sign as a condition of employment. (*Samaniego, supra,* 205 Cal.App.4th at pp. 1145-1146.)

Substantive unconscionability was strongly indicated, the *Samaniego* court held, because it included several one-sided provisions: (1) it imposed a six-month limitation period on demanding arbitration, while the Labor Code provided a three-year limitations period for those claims; (2) the agreement unilaterally required plaintiffs to pay any attorney's fees the employer might incur to enforce its rights; and (3) the agreement declared that all claims for declaratory relief or preliminary injunctive relief were excluded from arbitration, but such claims were typically brought by employers to protect their proprietary information or enforce non-competition provisions. (*Samaniego, supra,* 205 Cal.App.4th at pp. 1147-1148.)

(ii) *Application of* Armendariz *and Its Progeny*

The terms of the AMS arbitration agreement bring it within the rationale of these decisions. First, except for workers compensation, unemployment benefit, and disability claims arising under state law, all claims arising under the common law and state and federal statutory law must be arbitrated. These included by way of example: discrimination based on age, race, sex, or disability; federal labor standards law; laws regulating the use of polygraphs; federal pension protection law; malicious prosecution; false arrest; and defamation. Exempted from arbitration are claims by AMS for injunctive or equitable relief arising from alleged unfair competition and trade secret or confidential information disclosures.

Second, the one-year time limit to demand arbitration is substantially shorter than the statutory limitations period for many claims covered by the agreement. For instance, under the Fair Employment and Housing Act (Gov. Code, § 12900, et seq. (FEHA)) an administrative complaint alleging unlawful discrimination must be filed with the state's Department of Fair Employment and Housing within one year of the date of the alleged discriminatory action. (Gov. Code, § 12960, subd. (d).) If the Department decides not to pursue the matter, it must issue a right-to-sue letter no later than one year after a complaint is filed. (Gov. Code, § 12965, subd. (b).) The complainant then has one year from the date of that letter to file a civil action. (*Id.,* subd. (b)(2); *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 671, fn. 1.) Under the AMS arbitration agreement, however, even though employees may pursue an administrative claim, they still must demand arbitration within one year of the alleged discriminatory act, which is one-third the time potentially available under FEHA. The statute of limitations for pension and health benefit actions under ERISA is four years. (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 733-734.) Statutory wage claims pursuant to the Labor Code are subject to a three-year limitations period (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102-1103), and unfair competition claims based on such violations are governed

by a four-year limitations period (Bus. & Prof. Code, § 17208; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179). The statutory limitations period for fraud claims is three years from discovery. (Code Civ. Proc., § 338, subd. (d).) The limitation period for breach of contract claims is two years for oral contracts (Code Civ. Proc., § 339, subd. (1)), and four years for written contracts (Code Civ Proc., § 337, subd. (1)).

Third, while stripping its employees of these longer limitations periods, AMS retains for itself the four-year limitations period for unfair competition claims (Bus. & Prof. Code, § 17208) and the three-year limitations period for trade secret violations (Civ. Code, § 3426.6).[8]

Fourth, although an award of attorney's fees to plaintiffs prevailing in wage claim actions is mandatory under Labor Code section 1194, subdivision (a), the arbitration agreement simply states that the arbitrator has the authority to award attorney's fees in accordance with applicable law, but states in the next sentence that absent such an award, each party shall bear its own attorney's fees. This second sentence appears to contemplate the prospect that although fee awards may be authorized by law, the arbitrator might choose not to make such an award. In short, the agreement at least suggests that the arbitrator has discretion to award those fees even though they are mandatory under the Labor Code. The same is true for most discrimination actions under FEHA and federal anti-discrimination laws. Although the attorney's fee provisions in FEHA (Gov. Code, § 12965, subd. (b)) and Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)) state that the trial court has discretion to award attorney's fees to the prevailing party, those statutes have been interpreted to require an award of attorney's fees to a prevailing plaintiff unless special circumstances would make such an award unjust. However, a prevailing defendant is not entitled to attorney's fees in such

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8 This is one reason why, as stated in footnote 4, *ante*, we accept, but do not find significant, AMS's assertion that it is equally bound by the arbitration provision's one-year limitations period. When it comes to the claims most important to employers, AMS has held onto the longer, statutory limitations periods.

action unless the plaintiff's action is deemed unreasonable, frivolous, meritless, or vexatious. (*Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948-949.) Attorney's fees for prevailing plaintiffs are also mandatory in FLSA actions. (29 U.S.C. § 216(b).)

Assuming for discussion's sake that the attorney's fee provision is not discretionary, under *Stirlen*, *Mercuro*, *Fitz*, and *Samaniego*, the combined result of the other terms is an arbitration provision that imparts a veneer of bilaterality by excluding from arbitration workers compensation, disability, and unemployment benefits claims, which have their own adjudicatory systems and are not proper subjects of arbitration. Once that veneer is stripped away, what remains is a one-sided provision that requires employees to arbitrate those claims most important to them within a much-shortened limitations period, while leaving AMS free to litigate those claims most important to employers within the far longer statutory limitations periods.[9]

B. AMS's Unconscionability Counter Arguments Are Not Persuasive

AMS contends that its arbitration agreement is not substantively unconscionable because: (1) the bilaterality principle employed in *Armendariz* and its progeny imposes standards for arbitration agreements more rigorous than those applicable to contracts in general, and therefore violates *Concepcion, supra*, 131 S.Ct. 1740; (2) *Mercuro* cited no authority for its conclusion that an arbitration agreement's purported exemption for workers compensation, disability, and unemployment claims does not make the agreement bilateral because those claims are subject to separate adjudicatory systems; (3) although AMS carved out for itself the right to litigate claims for injunctive and equitable relief for trade secrets and unfair competition law violations, those remedies are available anyway under the California Arbitration Act; (4) *Mercuro* was based in part on the existence of extreme procedural unconscionability, which is absent here; (5) the

[9] The dissent incorrectly contends in section 3.B. of its analysis that our one-sidedness argument is based on Compton's possible exposure to attorney fees. As just stated, we assume, as the dissent contends, that the attorneys' fee provision is not discretionary, and base our holding on the other three factors mentioned above.

retention by AMS of the right to litigate injunctive and equitable relief claims under the trade secrets and unfair competition laws is justified under the "business realities" exception allowed in *Stirlen* and *Armendariz* because, as a practical matter, such claims require the addition of a new party – the former employee's new employer – who is not subject to the arbitration agreement, thereby posing a risk of duplicative actions; (6) employees are afforded a one-year limitations period under the AMS arbitration agreement, while the decisions which have found shortened limitations periods substantively unconscionable involved contractual six-month limitations periods and relied on other indicia of one-sidedness not present here – the imposition of costs on employees they would not have to bear in a court action; and (7) the exemption for AMS's injunctive and equitable relief claims can be severed, thereby eliminating any unconscionability.[10] We take each in turn.

(i) Concepcion *Does Not Abrogate the* Armendariz *One-Sidedness Rule*

As discussed earlier, *Discover Bank, supra,* 36 Cal.4th 148, held that class action waivers in *a limited class of consumer contracts* of adhesion were per se unconscionable in settings involving a scheme to defraud large numbers of consumers out of individually small sums of money because such waivers had the practical effect of exempting the wrongful party from responsibility for its willful misconduct. (*Id.* at p. 162.) *Discover Bank* was expressly overruled by *Concepcion, supra,* 131 S.Ct. on the ground that it conflicted with the FAA. Even though *Discover Bank* involved the application of a standard contract defense that was ordinarily permitted under section 2 of the FAA, the *Concepcion* court concluded that, as applied, it had the effect of disfavoring arbitration and was therefore contrary to the FAA's animating philosophy of encouraging arbitration. (*Concepcion* at pp. 1746-1748.)

State courts may not rely on the uniqueness of an agreement to arbitrate as a basis for holding that the agreement is unconscionable because that would allow the courts to

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10 We asked for, and received, supplemental letter briefs on these issues.

do what the state legislatures cannot. (*Concepcion, supra,* 131 S.Ct. at p. 1747.) Examples of such rulings, the *Concepcion* court said, would be cases finding a consumer arbitration agreement unconscionable because it did not provide for judicially monitored discovery, did not apply the rules of evidence, or did not allow for a jury to decide the case. (*Ibid.*) Such holdings would "have a disproportionate impact on arbitration agreements" even though they seemingly fell under the savings clause of FAA section 2 as part of the generally applicable state law defense of unconscionability. (*Ibid.*)

The *Discover Bank* rule regarding class actions similarly interfered with arbitration, the *Concepcion* court held. While the rule did not require class wide arbitration, it allowed any party to a consumer contract to demand it after the fact. (*Concepcion, supra,* 131 S.Ct. at p. 1750.) Although parties to an arbitration agreement are free to provide for class wide proceedings, such proceedings are generally unsuited to arbitration because they make it more time consuming, expensive, and formal. Imposing them on the parties when not provided for by their arbitration agreement was therefore inconsistent with the FAA's policy of enforcing arbitration agreements according to their terms. (*Id.* at pp. 1750-1753.)

AMS contends that the rule of one-sidedness as applied by *Armendariz, Mercuro, Samaniego,* and the other decisions we have discussed violates *Concepcion* because a lack of perfect mutuality of obligation is not generally grounds to invalidate a contract under California law. As a result, AMS argues, those decisions impose on arbitration agreements a degree of mutuality above and beyond what is ordinarily required for contracts generally, and hence do not come within the FAA section 2 savings clause.

The *Armendariz* court considered and rejected this precise contention. After adopting the "modicum of bilaterality" rule enunciated in *Stirlen, supra,* 51 Cal.App.4th at page 1541, the *Armendariz* court distinguished the concept that a lack of mutuality does not render a contract illusory from the principles of unconscionability. "We conclude . . . that in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable. Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, *Stirlen* and

Kinney[**11**] are correct that the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." (*Armendariz, supra,* 24 Cal.4th at p. 118.)

Armendariz then rejected the notion that enforcing this bilaterality rule singled out arbitration agreements for suspect status in contravention of the FAA. Agreeing with the court in *Stirlen, supra,* 51 Cal.App.4th at page 1551, the *Armendariz* court said, "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context. One such form is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. The application of this principle to arbitration does not disfavor arbitration." (*Armendariz, supra,* 24 Cal.4th at p. 119.)

According to *Armendariz, supra,* 24 Cal.4th at page 119, the judicial forum affords plaintiffs the advantages of discovery and the fact that judges and juries are more likely to follow the law instead of splitting the difference as arbitrators often do, thereby reducing damage awards. "An employer may accordingly consider a court to be a forum superior to arbitration when it comes to vindicating its own contractual and statutory rights, or may consider it advantageous to have a choice of arbitration or litigation when determining how best to pursue a claim against an employee. It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense. On the contrary, a unilateral arbitration agreement imposed by the employer without reasonable justification reflects the very mistrust of arbitration that has been repudiated by the United States Supreme Court in *Doctors' Associates, Inc. v. Casarotto* [(1996)] 517 U.S. 681, and other cases." (*Armendariz* at pp. 119-120.)

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11 *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322.

Post-*Concepcion* decisions are in accord. *Natalini v. Import Motors, Inc.* (2013) 213 Cal.App.4th 587, involved an arbitration provision in a *consumer* contract of adhesion. Pointing to decisions by both the federal district courts and the California appellate courts, the *Natalini* court held that *Armendariz's* bilaterality analysis was a generally applicable doctrine of contract law that was not affected by *Concepcion*. (*Id.* at p. ___; *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 506 [finding an adhesive arbitration provision unconscionable because it is overly one-sided does not disfavor arbitration]; see *Coneff v. AT&T Corp.* (9th Cir. 2012) 673 F.3d 1155, 1161 [quoting *Concepcion, supra,* 131 S.Ct. at p. 1746, for the proposition that generally applicable contract defenses such as unconscionability are allowed under the FAA so long as they are not applied in a manner that disfavors arbitration].)

Concepcion did not discuss the modicum of bilaterality standard adopted by *Armendariz,* which is not a class action case. And *Concepcion* did not overrule *Armendariz.* We both agree with and are therefore bound to follow our Supreme Court and apply *Armendariz* to this case. (*Truly Nolen of America v. Superior Court, supra,* 208 Cal.App.4th at p. 507.) Accordingly, we conclude that *Concepcion* does not apply to invalidate *Armendariz's* modicum of bilaterality rule, at least in this context.

As noted, *Discover Bank* announced a per se rule of unconscionability as to class action waivers in consumer adhesion contracts where it was alleged the seller had cheated many consumers out of small sums of money. *Concepcion* held that the *Discover Bank* rule was inimical to arbitration, and was therefore inconsistent with the FAA, because it required parties to an arbitration agreement to arbitrate class claims even when the agreement specifically excluded such claims. That is not remotely analogous to the issue raised here. If anything, the rule of bilaterality as we apply it here promotes arbitration because its chief complaint is that the party with superior bargaining strength has excluded certain claims from the arbitration process. Furthermore, our holding is based on other forms of one-sidedness: AMS's requirement that employees arbitrate virtually all meaningful claims while excluding from arbitration the claims most significant to AMS; the shortened limitations period applicable to employee's claims; and AMS's

retention of the longer limitations periods for its claims that are excluded from arbitration.

We therefore reject AMS's contention that we will violate *Concepcion* by concluding that its arbitration agreement was unconscionable on this ground.[12]

(ii) The Exclusion of Workers Compensation, Unemployment Benefit, and Disability Insurance Claims Does Not Make the Agreement Bilateral

AMS contends that *Mercuro's* holding that allowing workers compensation, state unemployment compensation, and state unemployment disability insurance claims to be adjudicated in their own statutory systems does not defeat any claim of one-sidedness is unsupported by authority and therefore should not be followed. We disagree.

Mercuro cited Labor Code section 5300 and Unemployment Insurance Code section 1951 as general support for its statement that workers compensation and unemployment benefits claims were not proper subject matters for arbitration. (*Mercuro, supra,* 96 Cal.App.4th at p. 176, fn. 12.) Labor Code section 5300 provides that exclusive jurisdiction of workers compensation claims rests with the Workers Compensation Appeals Board. Unemployment Insurance Code section 1951 states that hearings on unemployment compensation and disability claims must be held in accordance with rules prescribed by the Unemployment Compensation appeals board. While *Mercuro* did cite statutory authority for this statement, however, we do not consider this authority conclusive.

Instead, we agree with *Mercuro's* general proposition concerning the unsuitability of such claims for arbitration, at least in the sense that by allowing its employees to

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12 The presence of the class waiver plays no part in our analysis, which is instead based on the generally applicable contract defense of unconscionability in light of the very one-sided nature of the arbitration provision.

pursue those claims through their separate, statutorily-established adjudicatory agencies, AMS has given up nothing of value for purposes of bilaterality.[13]

Nothing in the record shows that AMS has relinquished any advantage by allowing its employees to pursue their workers and unemployment compensation claims through their applicable adjudicatory agencies. Eligibility and benefits under these statutory regimes depends on the application of administrative criteria and expertise. Liability is limited by formulas established by statute or administrative regulations, and is covered by employer-funded insurance, either alone or in combination with employee-funded contributions to each program.[14] Parties to these proceedings are not liable for the costs of holding those hearings.

Because most arbitrators presumably lack the expertise required to conduct such hearings, arbitration would not necessarily make those proceedings more efficient or lead to improved outcomes. Thus, maintaining separate adjudicatory systems in place benefits both the employee and the employer. Furthermore, by leaving its employees free to pursue those remedies through their respective adjudicatory agencies, AMS avoids bearing the vast majority of the costs of conducting arbitration on those issues, as required by the arbitration rules. In short, AMS not only gave nothing away, arguably it gained relief by excluding these claims from the scope of its arbitration agreement.

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13 For purposes of our analysis on this point, we assume that arbitration of workers compensation, unemployment compensation, and disability benefits claims could be compelled under the FAA. (Cf. *Preston v. Ferrer* (2006) 552 U.S. 346 [labor commissioner proceedings].) We express no opinion on that issue.

14 See *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024-1025 [the Employment Development Department makes an initial, informal administrative determination of a claimant's eligibility request for unemployment benefits in accordance with authorized regulations of the department's director; if the claimant is dissatisfied with that determination, he may then appeal and obtain a hearing before an administrative law judge].

(iii) Although Some Injunctive Relief May Be Available Under the CAA, Broad Equitable Relief Is Not

AMS contends that its exemption from arbitration of trade secrets and unfair competition injunctive and equitable relief claims is essentially meaningless because those remedies would be available to it even if those employer claims were subject to arbitration. We disagree.

Parties to arbitration agreements may file an application in superior court seeking certain provisional remedies: receivers, writs of possession, temporary restraining orders, preliminary injunctions, and writs of attachment and protective orders issued under title 6.5 of part 2 of the Code of Civil Procedure, beginning with section 481.010. (Code Civ. Proc., § 1281.8, subd. (a)(1)-(4).) These provisional remedies are available only if the applicant shows that the arbitration award to which he may be entitled may be rendered ineffectual without such relief. (*Id.* at subd. (b).)

The injunctive relief authorized under this section is designed to provide only interim relief by preserving the status quo pending the outcome of the arbitration. (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 446-447.) Only those remedies specifically mentioned are allowed under Code of Civil Procedure section 1281.8. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1054.) Therefore, the only injunctive relief AMS could seek under this provision is an interim order to maintain the status quo until the arbitrator decided the matter. However, the AMS arbitration provision is not limited to interim injunctive relief. Instead, it permits AMS to seek injunctive relief without restriction, including final injunctive relief.[15]

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15 As Witkin observes, "A permanent injunction is very different from a preliminary injunction." (6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 288, p. 228.) "A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646; see *Benasra v. Mitchell, Silberberg & Knupp* (2002) 96 Cal.App.4th 96, 110.)

The arbitration agreement also allows AMS to sue for "equitable relief," a remedy not provided by Code of Civil Procedure section 1281.8. Defendants in trade secret actions may be liable for both actual damages and unjust enrichment. (Civ. Code, § 3426.3, subd. (a).) Unjust enrichment in this context is measured by a defendant's profits from the misappropriation, and is synonymous with restitution. (*Ajaxo, Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305.) The remedy of unjust enrichment is a form of equitable relief. (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 195.) Therefore, the arbitration agreement allows AMS to litigate its right to this form of equitable relief, which is not permitted under Code of Civil Procedure section 1281.8. The same is true of unfair competition claims, which permits both injunctive relief and equitable relief in the form of restitution on money obtained through an unfair business practice. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 317.)

AMS is therefore wrong when it contends that its ability to litigate claims for injunctive and equitable relief for violations of the trade secrets or unfair competition laws is essentially meaningless in regard to our bilaterality analysis because it could do so even if those claims were covered by its arbitration agreement.[16]

(iv) Mercuro *And "Extreme" Unconscionability*

AMS contends that *Mercuro, supra*, 96 Cal.App.4th 167 is not applicable because in that case the arbitration agreement involved extreme procedural and substantive unconscionability, including a threat to the employee's livelihood and the failure to provide for a neutral arbitrator. Among the reasons the *Mercuro* court found the arbitration agreement procedurally unconscionable was the fact that the plaintiff was told that if he did not sign, he would be stripped of his sales accounts and forced out of the company. (*Id.* at pp. 174-175.) While less torque was applied to Compton in this case, as we discuss in section 4., *post,* there was ample evidence that significant procedural unconscionability was employed to obtain her signature on the arbitration agreement.

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[16] AMS's argument on this point also overlooks the fact that its exemption for these claims allows it to employ the longer limitations period applicable to them.

While the arbitration agreement's failure to provide for a neutral arbitrator formed part of the basis for *Mercuro's* conclusion that the agreement was also substantively unconscionable, as we have already discussed, there are other indicia of substantive unconscionability in this case that were not present in *Mercuro*, including the disparity in limitations periods applicable to AMS's arbitration-exempt claims and the greatly-reduced limitations period for employee claims. Each case turns on its own unique circumstances, and the circumstances present here convince us that the arbitration agreement is unconscionable.

(v) AMS Has Not Shown That the Business Realities Exception Applies

The court in *Stirlen*, *supra*, 51 Cal.App.4th 1519 held that not all disparities in an arbitration agreement rendered it unconscionable. Instead, contracts could provide a "margin of safety" that granted extra protection to the party with superior bargaining power if there was a legitimate commercial need for doing so. Unless the "business realities" that give rise to that special need were explained in the contract itself, they must be factually established. (*Id.* at p. 1536, citing Civ. Code, § 1670.5, subd. (b) [when unconscionability defense is raised, parties must have opportunity to present evidence as to contract's commercial setting, purpose, and effect].)

AMS contends in its supplemental appellate brief that it qualifies for this business realities exception. According to AMS, in order to achieve complete and effective relief for any trade secrets or unfair competition law violations, it might have to proceed against not just its former employee, but that person's new employer as well. Because the new employer would not be a signatory to the arbitration agreement (see *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1512-1514), it would not be subject to arbitration, compelling AMS to seek twin-track relief – one by way of arbitration against its former employee, the other by suing the new employer in court. The result would be a waste of time and money with the potential for inconsistent outcomes, AMS contends.

However, this business reality is not spelled out in the arbitration agreement and was not raised as an issue before the trial court by way of either argument or evidence. We therefore reject the contention. (*Stirlen, supra,* 51 Cal.App.4th at pp. 1536-1537.)

(vi) The Shortened Limitations Period For Employee Claims Is One-Sided

AMS contends that the one-year limitations period in its arbitration agreement is not sufficient grounds for deeming the agreement unconscionable because in decisions such as *Samaniego, supra,* 205 Cal.App.4th 1138, *Martinez, supra,* 118 Cal.App.4th at page 114, and *Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242 (*Wherry*), substantive unconscionability was deemed present where the arbitration provisions had an even shorter limitation period of six months and also shifted to employees costs not ordinarily borne in judicial proceedings.

These differences do not preclude us from concluding that a one-year limitations period contributes to the unconscionability of the AMS arbitration agreement. In *Martinez, supra,* 118 Cal.App.4th at page 117, we held that a contractual six-month limitation period in the arbitration provision was substantively unconscionable because the statutes under which the plaintiff sought relief – in particular FEHA – provided a "significantly longer" limitations period. As discussed earlier, there is effectively a two-year limitations period on FEHA claims, while many of the other claims that AMS employees must arbitrate are subject to limitations periods of three or four years. Although a six-month limitation period is clearly more draconian than the one year allowed in the AMS agreement, one year is clearly a significantly shorter period than the three or four years allowed by statute for many of the claims covered by the agreement.

While the AMS agreement obligates employees to bear no more than $100 of the costs of arbitration, as set forth above, the arbitration agreement contains several one-sided provisions. In short, the absence here of the kinds of cost-shifting present in other decisions does not preclude our determination that the arbitration agreement as a whole is substantively unconscionable when other factors – such as the employer's exemption of

the claims most important to it, and the attempt to make discretionary certain mandatory attorney's fee provisions – are also present.

(vii) Because the Arbitration Agreement Is Permeated With Unconscionability, It Is Not Severable

AMS contends that even if we conclude that its self-exemption from arbitration of trade secrets and unfair competition injunctive and equitable relief claims is unconscionable, we may sever that part of the arbitration agreement and enforce the rest. (Civ. Code § 1670.5, subd. (a); *Armendariz, supra,* 24 Cal.4th at pp. 121-124.) Our main task is to determine whether the interests of justice would be served by doing so. (*Martinez, supra,* 118 Cal.App.4th at p. 119.) If the central purpose of a contractual provision is tainted with illegality, then the provision as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and can be severed or restricted from the rest, then those steps are appropriate. (*Ibid.,* quoting *Armendariz* at p. 124.)

In *Martinez,* we held that severance was not proper because the arbitration agreement included several serious defects, including the shortened limitations period, cost-shifting provisions that burdened employees, and the exemption from arbitration of the employer's claims for injunctive and equitable relief in trade secrets cases. These multiple defects showed a systematic effort to impose arbitration on employees as an inferior forum that worked to the employer's advantage. As a result, the agreement was permeated by unconscionability and severance was not possible. (*Martinez, supra,* 118 Cal.App.4th at p. 119.) The same is true here. The AMS arbitration agreement suffers from similar multiple defects, and we therefore conclude that severance is not appropriate.

4. *The AMS Arbitration Agreement Was Procedurally Unconscionable*

Despite Compton's contention that the AMS arbitration agreement was presented on a take it or leave it basis, the trial court found the agreement was not procedurally

unconscionable for two reasons: First, relying on *Lagatree, supra,* 74 Cal.App.4th at page 1127, the court said that argument had been rejected by the courts; second, the employment application "prominently described the arbitration provisions, gave her the opportunity to seek independent advice, and incorporated standard arbitration rules and procedures." We believe the trial court misread *Lagatree,* ignored the effect of Compton's undisputed declaration concerning the manner in which the agreement and rules were presented to her, and overlooked certain portions of both the agreement and the rules.

The plaintiff in *Lagatree* sued his former employers for wrongful termination in violation of public policy when he was fired for refusing to sign an agreement to arbitrate most employment-related disputes. The plaintiff contended that the employers' conduct violated the public policy embodied in the constitutional rights to have a jury trial in court. The trial court sustained without leave to amend demurrers to the complaint on the ground that firing an employee who refused to sign such an agreement did not violate a public policy.

The Court of Appeal affirmed. As part of its analysis, the *Lagatree* court considered whether an arbitration agreement that was presented to an employee as a condition of employment would be enforceable under both the FAA and the California Arbitration Act (Code Civ. Proc., §§ 1280-1294.2). If so, then an employee's constitutional rights to a jury trial in a judicial forum could be bargained away. As a result, those waiveable rights were not rooted in a substantial public policy for purposes of wrongful termination law. (*Lagatree, supra,* 74 Cal.App.4th at pp. 1121-1122.) In resolving this issue, the *Lagatree* court examined federal and California appellate decisions which held that the mere fact that an employee was required to sign an adhesive arbitration agreement was not enough to invalidate that agreement. Instead, the agreement had to also be substantively unconscionable. (*Id.* at pp. 1122-1127, and cases cited therein.)

None of the decisions cited by the *Lagatree* court contained other indicia of procedural unconscionability, and none involved provisions that were substantively

unconscionable. It was in this context that the *Lagatree* court said that "the cases uniformly agree that a compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a 'take it or leave it' basis." (*Lagatree, supra,* 74 Cal.App.4th at p. 1127.) Nor does anything in *Lagatree* suggest that there were any other indicia of procedural unconscionability in that case. As a result, the holding of *Lagatree* is necessarily limited to cases where the sole basis for an unconscionability defense is the fact that the contract was one of adhesion. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796 [where only indication of procedural unconscionability is the use of an adhesion contract offered on a take it or leave it basis, the degree of substantive unconscionability required is high].) As set forth next, the record before the trial court in this case contained multiple other indicators of procedural unconscionability.

We begin with Compton's declaration concerning the circumstances under which she was presented with, and required to sign, the arbitration agreement. Because AMS never submitted a declaration or other evidence disputing Compton's description, we accept her version of events. (*Wherry, supra,* 192 Cal.App.4th at p. 1247.) According to Compton, the arbitration agreement was one of 20 form documents she was given by administrative assistant Paula Palento when she applied at AMS. Compton was not told that one of those was an arbitration agreement, nobody explained any of the forms to her, she was told to sign the forms in Palento's presence, and she was not given time to read any of the forms because Palento was in a hurry to have them signed. In short, no matter how conspicuous the arbitration agreement's terms and advisements, AMS's conduct when presenting the agreement to Compton rendered them nearly meaningless. These circumstances show strong evidence of procedural unconscionability by way of oppression. (*Wherry, supra,* 192 Cal.App.4th at pp. 1246-1248.)

Next, *Gentry* held that the employer's failure to adequately describe and fairly portray the shortcomings of its arbitration agreement also showed procedural unconscionability. Although the arbitration handbook that was provided to employees noted certain disadvantages to arbitration, including loss of the right to a jury trial and the

allowance of limited discovery, the handbook was still "markedly one-sided." (*Gentry, supra,* 42 Cal.4th at p. 470.)

Apart from alluding to some shortcomings of arbitration in a general sense, it failed to mention any of the "additional significant disadvantages that *this particular arbitration agreement* had compared to litigation." (*Gentry, supra,* 42 Cal.4th at p. 470, original italics.) These included: the one-year limitations period for demanding arbitration of covered claims, as opposed to the three and four year limitations period available for Labor Code wage violations and unfair competitions claims; the loss of punitive damage awards; and the provision for discretionary attorney's fees when such fees were mandatory for Labor Code wage violation claims. (*Id.* at pp. 470-471.) The handbook was also misleading by stating that arbitration was much less expensive and that the arbitrator could award money damages as compensation. (*Id.* at p. 471.) Although an employee who read the whole document would have seen those provisions, "only a legally sophisticated party would have understood that these rules and procedures are considerably less favorable to an employee than those operating in a judicial forum." (*Ibid.*) This was true even though the handbook stated the employee could consult with an attorney because "it is unrealistic to expect anyone other than higher echelon employees to hire an attorney to review what appears to be a routine personnel document." (*Gentry, supra,* 42 Cal.4th at p. 471.)

Likewise here, the AMS arbitration agreement and rules were misleading and provided a one-sided picture of the arbitration process. No mention was made of the longer limitations periods applicable to many of the claims covered by the agreement. Nor did the agreement or rules advise prospective employees that AMS still had the longer statutory limitations periods available should it sue for injunctive or equitable relief. Instead, Rule 1 states that the arbitration program "applies equally to, and is binding on, both [AMS] and to Employees." Therefore, just as in *Gentry,* the misleading nature of the agreement and rules provides yet another indicia of procedural unconscionability.

Finally, the employer's failure to provide the employee with a copy of the arbitration rules to which the employee would be bound supports a finding of procedural unconscionability. (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393.) It is true that Compton received a copy of AMS's arbitration rules. However, Rule 5 of those rules states that an arbitrator will be selected from either the American Arbitration Association or from Judicial Arbitration and Mediation Services and that "the Arbitration shall go forward in accordance with the rules of [the applicable agency] except as otherwise defined herein." AMS does not contend, and the record does not show, that the rules of either agency were provided to Compton.[17] As a result, Compton was not fully apprised of the rules that would apply to any arbitration proceeding involving AMS, thus contributing to the procedural unconscionability of the agreement. (*Ibid; Fitz, supra,* 118 Cal.App.4th at p. 721; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 84, 89.)[18]

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[17] The dissent contends that the "issue" of the missing JAMS rules was not raised by the parties below or on appeal and that, as a result, there is no way to tell for sure whether those rules were in fact provided to Compton. We disagree. First, procedural unconscionability has always been at issue, both here and in the trial court. Second, the declaration of Compton's CAO described and authenticated the materials that job applicants were shown and required to indicate they had read: the arbitration agreement and the arbitration rules. The JAMS rules were never mentioned and never appeared as an exhibit in support of AMS's motion or anywhere else in the record. Had those rules been presented to applicants such as Compton, we presume they would have been mentioned somewhere in AMS's points and authorities and supporting materials.

[18] AMS suggests in its respondent's brief that there could have been no surprise because Compton signed the agreement before applying for her job. However, there is no dispute that her signature on the arbitration agreement was part of the application process and was a condition of employment. Even if Compton could have sought work elsewhere, that just means she must show additional procedural unconscionability or greater substantive unconscionability. (*Wherry, supra,* 192 Cal.App.4th at p. 1248.) We believe she has shown ample indicia of both.

DISPOSITION

For the reasons set forth above, we treat this purported appeal as a petition for writ of mandate. We grant that writ, and direct the trial court to reverse its order compelling arbitration of Compton's action, and to enter a new and different order denying that petition. Compton shall recover her appellate costs.

RUBIN, J.

I CONCUR:

FLIER, J.

BIGELOW, P.J. Dissenting:

I respectfully dissent.

1. Appealability

I would not treat Compton's appeal as a petition for writ of mandate, but would address the appeal under the so-called "death knell doctrine." Compton challenges an order that compels her to arbitrate her individual wage claims, and enforces a waiver of class claims in arbitration in accord with the provisions of the arbitration agreement that she signed. The trial court ruled the arbitration agreement, including the waiver of class claims in arbitration, was not unconscionable. Thus, class claims are not arbitrable because the trial court enforced the class claim waiver as to Compton, and any employee who tries to pursue class claims in court will likewise be limited to individual arbitration. The order effectively terminates class claims and sounds the death knell for such claims, allowing an appeal. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 758.)

2. Unconscionability

The majority concludes that the arbitration agreement between Compton and American Management Services is so "tainted with illegality" as to render it wholly unenforceable. In coming to this conclusion, the majority discusses a number of cases in which arbitration agreements in the context of the employee-employer relationship were ruled unenforceable due to unconscionability, including *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, (*Armendariz*), *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, *Martinez v. Master Protection Corp*. (2004) 118 Cal.App.4th 107, and *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702.

In *Armendariz,* the California Supreme Court ruled that an employment arbitration agreement could not be enforced because it was unconscionable. In reaching its conclusion, the Supreme Court noted that four elements must be included in an

employment arbitration agreement to assure it is not unconscionable: (1) the agreement may not limit statutorily available remedies; (2) the agreement must allow for adequate discovery; (3) the agreement must provide for a written award and judicial review; and (4) the employee may not be compelled to pay unreasonable costs and fees. (*Armendariz, supra,* 24 Cal.4th at pp. 103-113.) The Supreme Court found the arbitration agreement at issue in *Armendariz* did not satisfy these requirements. (*Id*. at pp. 113-127.)

The majority discounts that the United States Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*) affects the unconscionability analysis. In my view, our state's unconscionability jurisprudence must now be viewed through the lens of *Concepcion*. In *Concepcion*, the United States Supreme Court identified two situations in which the Federal Arbitration Act will preempt state arbitration law. The first situation is easily identified — when state law openly prohibits arbitration of a particular type of claim outright, the state law is preempted by the Federal Arbitration Act. (*Concepcion, supra,* 131 S.Ct. at p. 1747.) The second concerns whether the Federal Arbitration Act preempts generally applicable state contract law doctrines. Specifically, the issue in *Concepcion* and in Compton's current case is whether the Federal Arbitration Act allows a state's law concerning unconscionability to be applied. (*Ibid*.) In the situation implicating a state's general contract law, a state court may not rely upon "the uniqueness of an agreement to arbitrate" as a basis for ruling that an agreement is unconscionable, and thus unenforceable. In other words, the Federal Arbitration Act abides a state's "generally applicable contract defenses," provided a defense does not "stand as an obstacle" to the accomplishment of the objectives of the Act. (*Id*. at p. 1748.)

The majority cites two post-*Concepcion* cases in support of its conclusion that the arbitration agreement here between Compton and American Management Services is wholly unenforceable because it is unconscionable: *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487 (*Truly Nolen*) and *Natalini v. Import Motors, Inc.* (2013) 213 Cal.App.4th 587 (*Natalini*).

The following passage from *Natalini* sums up the principles to be taken away from the cases cited by the majority: "[The party seeking to compel arbitration] contends that *Concepcion* broadly restricts the application of the unconscionability doctrine to arbitration provisions. However, '*Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved. Rather, the [c]ourt reaffirmed that the [Federal Arbitration Act's] savings clause preserves generally applicable contract defenses such as unconscionability, so long as those doctrines are not "applied in a fashion that disfavors arbitration." ' [Citations.] [The party seeking to compel arbitration] argues that an unconscionability analysis that focuses on the lack of mutuality or bilaterality in an arbitration provision is 'an example of applying a generally applicable contract defense in a manner which disfavors arbitration.' Recent California and federal district court decisions addressing arbitration provisions very similar to that in the present case and in the identical [consumer] purchase context have not read *Concepcion* so broadly. [Citations.] A conclusion that an adhesive arbitration provision is unconscionable because it is crafted overly in favor of the drafter does not rely on any 'judicial policy judgment' disfavoring arbitration. (*Truly Nolen, supra*, 208 Cal.App.4th at p. 506.)" (*Natalini, supra*, 213 Cal.App.4th at pp. 594-595, fn. omitted.)

Even without consideration of whether *Concepcion* changes the *Armendariz* unconscionability analysis in California, I do not see any traditional unconscionability issues in the agreement apart from the potential implications of the waiver of class claims in arbitration. As to the waiver of class claims, I would find this is a case to follow *Concepcion* and find the waiver enforceable.

3. Substantive Unconscionability

A. One-Sidedness/Lack of Bilaterality

I disagree with the majority's conclusion that the arbitration agreement between Compton and American Management Services is so "tainted with illegality" as to render it wholly unenforceable. Compton filed a complaint against American Management Services seeking damages for alleged violations of statutory laws governing minimum

and overtime wages (see Lab. Code, §§ 201 et seq.; 1194 et seq.), rest and meal breaks, compliance with wage statements requirements, reimbursement of expenses, and violation the Unfair Competition Law based on the underlying wage claims (UCL; Bus. & Prof. Code, § 17200 et seq.). American Management Services sought to compel Compton to arbitrate her claims under an arbitration agreement that she signed when she started work with the company. The majority concludes the arbitration agreement between Compton and American Management Services is "unconscionably one-sided" because it requires "employees to arbitrate the claims they are most likely to bring, while retaining for [American Management Services] the right to litigate those claims it is most likely to bring," such as injunctive claims to stop alleged misappropriation of American Management Services' trade secrets.

The arbitration agreement between American Management Services and Compton binds them equally with regard to the type of wage claims Compton has alleged. To the extent the injunctive relief "carve-out" in the arbitration agreement for trade secrets litigation may be one-sided, it could be easily severed from the remainder of the arbitration agreement, as I describe below. For these reasons, I disagree with the majority's finding that the "central purpose" of the arbitration agreement between Compton and American Management Services is so "tainted with illegality" due to a lack of bilaterality that it makes the agreement wholly void and unenforceable.

B. Attorney Fees

Though not raised by appellant, the majority's fourth reason for finding the agreement unconscionable is based on Compton's possible exposure to attorney fees. I disagree. An award of attorney fees in favor of a prevailing plaintiff is mandatory in a wage case under Labor Code section 1194. The arbitration agreement between Compton and American Management Services reads: "The Arbitrator is authorized to award attorneys' fees *in accordance with applicable law*. In the absence of an award, each Party shall be responsible for its own attorney fees." (Italics added.) The majority reads the attorney fee provision in the arbitration agreement to mean that the arbitrator has discretion not to award attorney fees even though they are mandatory under the Labor

Code. I do not read the attorney fees provision in the arbitration agreement the same way. The provision states the arbitrator has the power to award fees "in accordance with applicable law." Thus, when a plaintiff prevails in a Labor Code section 1194 action, it is mandatory for the arbitrator to award such fees. The agreement *authorizes* the arbitrator to make a lawful award of attorney fees; it does not state that an arbitrator has discretion to disregard applicable law.

C. The Statute of Limitations

This issue also was not raised by the parties, but is used by the majority to find the agreement unconscionable. I would not rule the arbitration agreement void based on the agreement's "statute of limitations." The arbitration agreement provides that an employee must submit an "'Arbitration Request Form'" no later than one year after the date on which the employee knows, or should know, of the facts giving rise to his or her claim. The arbitration agreement further provides that "[t]he failure of an Employee to initiate an arbitration within the one year time limit shall constitute a waiver with respect to that claim." Thus, an employee may only seek a maximum of one-year's worth of wrongly unpaid wages under the arbitration agreement. In contrast, a three-year statute of limitations ordinarily applies to statutory wage claims. (Code Civ. Proc., § 338, subd. (a).) In *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 167, 178-179, our Supreme Court ruled that the four-year statute of limitations prescribed in Business & Professions Code section 17208 applies to claims under the UCL based on underlying statutory wage claims. Accordingly, I agree with majority's view that there is an issue in the shortening a worker's claims window, effectively cutting off his or her right to seek three or four years of unpaid wages, and limiting recovery to one year of unpaid wages. But unlike the majority, I would not invalidate the entire arbitration agreement.

Instead, I would remand with directions to the trial court to sever the limitations provision, allowing Compton to pursue her claims in arbitration to the same extent as in a judicial action. The doctrine of severance attempts to preserve a contractual relationship if to do so would not condone an illegality. (See *Armendariz, supra,* 24 Cal.4th 83.)

A court has discretion to sever an offending provision unless the "central purpose" of the contract is tainted with illegality. (*Ibid*.) In short, where the good can be separated from the bad, the court may sever the unconscionable provision. (*Ibid*.) I would find this to be appropriate here.

D. The Waiver of Class Claims in Arbitration

This leaves what I believe is the true issue at the heart of Compton's appeal, namely, whether an arbitration agreement's waiver of class claims is unconscionable in the employment context. Indeed, this is the first argument in Compton's opening brief on appeal. In the trial court, American Management Services argued that, under the result and reasoning of *Concepcion, supra,* 131 S.Ct. 1740, such a waiver is enforceable, even in the employment context. In opposing arbitration, Compton did not even acknowledge *Concepcion*; she argued the arbitration agreement, overall, was unconscionable. The trial court found *Concepcion* "changed the governing law" regarding arbitration of class wage and hour disputes. On appeal, Compton and American Management Services have both addressed *Concepcion*. The issue of whether a waiver of class claims in an arbitration agreement in the employment context is enforceable is pending in our Supreme Court.[1]

The majority focuses on the lack of bilaterality, attorney fees and the statute of limitations as components of unconscionability, avoiding a discussion of the effect of the waiver of class claims in arbitration involved in the current case. Because I do not view the arbitration agreement here to be so "tainted" with illegality based on the elements discussed by the majority, I also address whether the waiver of class claims is enough to make the agreement unconscionable. This is a matter involving *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), and *Concepcion, supra*, 131 S.Ct. 1740.

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[1] See *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, rev. granted Sept. 19, 2012, S204032 (*Iskanian*). In *Iskanian*, Division Two of our court ruled that *Concepcion* applies to an arbitration agreement with equal force in an employment contract as to an arbitration agreement in a consumer contract.

In *Gentry, supra*, 42 Cal.4th 443, the California Supreme Court ruled that a waiver of class claims in arbitration should be taken into account in the unconscionability analysis, and found class action waivers in an employment case involving overtime and minimum wage laws unenforceable. In reaching this conclusion, the Supreme Court discussed its earlier decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*). In *Discover Bank*, the Supreme Court held that an "adhesion" consumer contract which includes an arbitration agreement waiving class claims in arbitration is generally unconscionable. Specifically, *Discover Bank* held that, "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party [with superior bargaining power] 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' [Citation.] Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163.)

In *Discover Bank*, our Supreme Court addressed and rejected an argument that the Federal Arbitration Act preempted California law on the subject of unconscionability. (*Discover Bank, supra*, 36 Cal.4th at pp. 163-173.) In that context, our Supreme Court observed that the United States Supreme Court had not yet addressed whether a state court could, consistent with the Federal Arbitration Act, hold a class action waiver in an adhesion contract for arbitration to be unconscionable. (*Id.* at p. 171.) Our Supreme Court found no language in the Federal Arbitration Act, and nothing in the legislative history of the Act, to find such preemption.

In *Concepcion, supra,* 131 S.Ct. 1740, the United States Supreme Court ruled that the Federal Arbitration Act preempted California's unconscionability principles as articulated by our state Supreme Court in *Discover Bank, supra,* 36 Cal.4th 148.

Specifically, the United States Supreme Court ruled that the judicially-declared state law precluding enforcement of a waiver of class wide claims in arbitration in a consumer contract in *Discover Bank* was preempted because it interfered with and was inconsistent with the Federal Arbitration Act. (*Concepcion, supra,* 131 S.Ct. at p. 1748.)[2]

The current case squarely implicates *Gentry, supra,* 42 Cal.4th 443, and the continuing validity of waivers of class claims in arbitration in the employment context after *Concepcion*. I am bound to follow the United States Supreme Court's guidance on this issue because it involves determining the effect of a federal law – the Federal Arbitration Act – on a state rule. (*Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 56; *Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034.) This leads me to the conclusion that after *Concepcion,* a waiver of class claims in an employment contract should be enforced according to its terms.

4. Procedural Unconscionability

I agree with the trial court that the arbitration agreement between Compton and American Management Services is not unenforceable because it was presented to Compton in a "take-it-or-leave-it" employment application context. An arbitration agreement that is presented to an employee as a condition of employment is enforceable under both federal and state arbitration law. (See *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1122-1127.)

In any event, I am not offended by the procedural path to arbitration here. American Management Services' employment application prominently displayed the company's position that it required arbitration of an employee's claims. American Management Services provided Compton with a copy of the agreement to review, and Compton signed the agreement, expressly acknowledging that she read and understood its terms, and expressly acknowledging that she had a three-day window to review the arbitration agreement and to seek independent advice. Further, by signing she expressly acknowledged she understood that she could withdraw her name from consideration for a

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[2] Compton does not argue on appeal that her employment contract only involves intrastate commerce, making the Federal Arbitration Act inapplicable.

job in the event she did not want to arbitrate employment claims. Absent some rule of law that absolutely bars making arbitration a part of an employee's employment package, I would not find procedural unconscionability.

The majority concludes that because American Management Services did not submit a declaration disputing Compton's description of the circumstances under which the arbitration contract was signed, it is required to accept her version of those events as set forth in her declaration. (Maj. Opn. at p. 30.) As a result, the majority states, we must find that Compton was not told she was signing an arbitration agreement, did not understand the forms, and was hurried to sign the forms. The majority concludes: "In short, no matter how conspicuous the arbitration agreement's terms and advisements, American Management Services' conduct when presenting the agreement to Compton rendered them nearly meaningless." (Maj. Opn. at p. 30.) This is simply wrong. Compton affixed her signature to the employment application indicating she read and understood its terms, and understood she had three days to review the arbitration agreement and was welcome to seek independent advice about it. Compton does not deny she signed the contract. She is bound by the terms of the arbitration agreement whether she read it or not. (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1675.) Her subsequent contradictory self-serving declaration, prepared for use in the current litigation, does not convince me to find she was rushed, hurried, or otherwise ill-advised regarding the arbitration agreement. In any event, it certainly does not amount to "strong evidence of procedural unconscionability," as the majority claims.

The majority's reliance on *Wherry v. Award, Inc*. (2011) 192 Cal.App.4th 1242, 1246-1247 (*Wherry*) is misplaced. In *Wherry*, the court found procedural unconscionability where "[n]o one described the agreement's contents and plaintiffs were given but a few minutes to review and sign it, without any time to ask questions." (*Id*. at p. 1247.) The court found that even though the plaintiffs initialed and signed the document, that did "not vitiate plaintiffs' lack of time to review the agreement or have a lawyer look at it." (*Ibid*.) The facts here are quite different. Here, Compton acknowledged she was given three days to review the agreement and to seek independent

advice. In addition, there is no indication in *Wherry* that plaintiffs signed a comprehensive acknowledgment like the one Compton signed.[3]

I am compelled to follow the law which incorporates a strong public policy in favor of arbitration, requiring that *any* doubts about the validity of an arbitration agreement be resolved in favor of arbitration. (See *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686.) In my view, no other result can be reached if I adhere to those principles.

5. Federal Regulation and Waiver

This leaves two additional issues raised by Compton, and not addressed in the majority opinion: (1) the recent decision in *In re D. R. Horton, Inc*. (2012) 357 NLRB No. 184 (*Horton*) supports the proposition that federal labor law controls in the employment labor context over *Concepcion*, and federal labor law permits employees to pursue class actions in court or in arbitration because such actions are a protected activity by employees; and (2) American Management Services waived its contractual right to compel arbitration. I would not overturn the trial court's order compelling arbitration on either ground.

As to *Horton*, I would not find it trumps *Concepcion*. *Horton* involves collective bargaining issues, and the effect that arbitration agreements waiving class claims in arbitration may have in that context. I would not apply the NLRB's ruling, which effectively reads into federal labor law concerning collective bargaining rights a prohibition against class action waivers in arbitration. The NLRB ruling in *Horton* is particularly inapt here, where collective bargaining matters are not at issue.

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[3] In the last paragraph of the opinion, the majority again raises an issue not addressed by the parties. While acknowledging that Compton received a copy of American Management Services' arbitration rules, it finds that the rules of the designated arbitrators – the American Arbitration Association or Judicial Arbitration and Mediation Services – should also have been provided. Since this issue was never raised as a basis for finding procedural unconscionability on appeal, we have no way of knowing how, whether or if the two sets of rules varied. As a result, I would not use this as a basis for finding procedural unconscionability.

In any event, there is an appeal of the NLRB's decision in *Horton* currently pending in the Fifth Circuit. (*D.R. Horton, Inc. v. NLRB*, No. 12–60031 (5th Cir. filed Jan. 13, 2012).) In addition, in *Owen v. Bristol Care, Inc*. (8th Cir. 2013) 702 F.3d 1050 (*Owen*), the United States Court of Appeals, Eighth Circuit, declined to follow *Horton*, noting that the court was not obligated to defer to NLRB rulings interpreting Supreme Court precedent, and finding *Horton*'s reasoning unpersuasive. In *Owen*, the court further noted that "nearly all" of the federal district courts to consider *Horton* "have declined to follow it." (*Id*. at p. 1054.) In *Owen*, the court ruled that arbitration agreements containing class waivers are enforceable in cases involving the Federal Labor Standards Act.

Nor do I believe American Management Services waived its right to arbitrate. Under both federal and state arbitration law, a finding of waiver of arbitration is disfavored. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195.) Here, American Management Services asserted its contractual arbitration rights as soon as practicable after *Concepcion* opened the door for it to do so.

6. Conclusion

I view the majority opinion's unconscionability analysis flawed. I also believe the waiver of class claims in an employment agreement to be wholly enforceable after *Concepcion*. I would affirm the judgment and remand with directions to the trial court to sever the statute of limitations provision.

BIGELOW, P.J.