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IN THE
SUPREME COURT OF CALIFORNIA

MARIBEL BALTAZAR,

Plaintiff,

vs.

FOREVER 21, INC., FOREVER 21 LOGISTICS, LLC, HERBER CORLETO, and, DARLENE YU,

Defendants.

After a Decision By the Court of Appeal,

Second Appellate District, Division One

Case No. B237173 (Los Angeles County Super. Ct. No. VC059254)

PETITION FOR REVIEW

The Law Offices of Mark Joseph Valencia, ALC
Mark Joseph Valencia, State Bar No: 239876
Izabela Cywinska Valencia, State Bar No: 287721
633 W. 5th Street, 26th Floor
Los Angeles, CA 90071
Telephone: 213-627-9944; Facsimile: 213-627-9955
mvalencia@mjvattorneys.com; icywinska@mjvattorneys.com

Attorneys for Plaintiff and Petitioner,
Maribel Baltazar

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Telephone: 213-627-9944; Facsimile: 213-627-9955
mvalencia@mjvattorneys.com; icywinska@mjvattorneys.com

Attorneys for Plaintiff and Petitioner,
Maribel Baltazar

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ISSUES PRESENTED

Does any substantive unconscionability exist in an arbitration agreement when the arbitration agreement allows both the employer and the employee to seek injunctive relief pursuant to *California Code of Civil Procedure* §1281.8, notwithstanding the *Trivedi* Court holding that such agreements favor employers because employers are more likely to seek injunctive relief than an employee? (*Trivedi v. Curexo Technology Corp.*, (2010) 189 Cal.App.4th 387, 397).

Is an arbitration agreement inherently one-sided, and accordingly, substantively unconscionable, as stated by the *Pinedo Court*, when it only enumerates employee-initiated disputes as arbitrable, and does not list examples of employer-initiated disputes as arbitrable? (*Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 781).

Does any substantive unconscionability exist when an arbitration agreement requires both the employer and the employee to agree that the employer, not the employee, has valuable confidential information, and further requires both parties in the course of arbitration proceedings to take "all necessary steps" to protect such information from the public?

WHY REVIEW SHOULD BE GRANTED

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. (Cal Rules of Court, Rule 8.500(b).) Here, the Court of Appeal in *Baltazar,* without question, criticized the *Trivedi* Court of Appeal; the *Baltazar* Court further ignored the *Pinedo* Court of Appeal in its legal analysis. (*Baltazar v. Forever 21, Inc.*, (2012) 212 Cal.App.4th 221, 238; *Trivedi v. Curexo Technology Corp.*, (2010) 189 Cal.App.4th 387, 397; *Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 781).) Consequently, there is now a split in appellate authority in relation to determining whether or not an arbitration agreement is substantively unconscionable.

Specifically, the *Trivedi* Court held that a provision in an arbitration agreement allowing the parties to seek injunctive relief in court, unfairly favored employers. (*Trivedi v. Curexo Technology Corp.*, (2010) 189 Cal.App.4th 387, 397.) The *Trivedi* Court reasoned that it would be much

more likely that employers would benefit from this provision, as opposed to employees, since "it is far more likely that employers will invoke the court's equitable jurisdiction in order to stop employee competition and protect intellectual property." (*Ibid.*) The *Baltazar* Court, however, criticized the *Trivedi* Court, holding that even if such a provision existed in an arbitration agreement, there is still no degree of *any* substantive unconscionability, arguing that employees are just as likely to seek injunctive relief as employers are. (*Baltazar v. Forever 21, Inc.*, (2012) 212 Cal.App.4th 221, 238-239.)

In addition to criticizing the *Trivedi* Court, the *Baltazar* Court ignored the *Pinedo* Court. The *Pinedo* Court held that when an arbitration agreement only itemizes employee-initiated disputes as arbitrable (i.e., disputes arising from changes in position, conditions of employment or pay, or end of employment), such an itemization is "inherently unfair" and substantively unconscionable because it specifically requires employee-initiated claims to be arbitrated. (*Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 781) Consequently, such an itemization leaves no doubt that such listed employee-initiated claims are arbitrable, but yet leaves ambiguity as to which specific employer-initiated claims are arbitrable, since those claims are *not readily listed or enumerated.*

The *Baltazar* Court, however, ignored this rationale, and held that even if an arbitration agreement solely enumerates employee-initiated claims, there is no degree of substantive unconscionability, as long as the language preceding the enumeration stated: "including but not limited to." (*Baltazar v. Forever 21, Inc.*, (2012) 212 Cal.App.4th 221, 234.) This argument, however, lacks complete mutuality, because, the fact remains, employee-initiated claims are itemized, and employer-initiated claims are not itemized, leaving much room for argument by employers as to which of their claims are subject to the arbitration agreement.

The impact of *Baltazar* will continue to perpetuate confusion amongst employers, employees, attorneys, trial courts, and appellate courts alike, and therefore, Maribel Baltazar respectfully requests the Supreme Court to grant her petition so that authority may be uniformed.

PROCEDURAL BACKGROUND

On August 4, 2011, Maribel Baltazar, as Jane Doe, sued Forever 21, Inc., Forever 21 Logistics, L.L.C., Herber Corleto, Raul Martinez, and Darlene Yu. On September 8, 2011, Forever 21, Inc., Forever 21 Logistics, L.L.C., Herber Corleto, and Darlene Yu filed a motion to compel arbitration. On October 7, 2011, Los Angeles Superior Court Judge Raul Sahagun denied the motion to compel arbitration holding that the arbitration agreement was both procedurally and substantively unconscionable, and therefore, unenforceable. (I CT 234-235.) Defendants, thereafter, filed a notice of appeal on November 3, 2011. (I CT 236.) The Second Appellate District, Division One, reversed the trial court's ruling on December 20, 2012, finding that even though the arbitration agreement was procedurally unconscionable, the arbitration agreement was not, in any way, substantively unconscionable. The Appellate Court consequently ordered the case to arbitration.

FACTUAL BACKGROUND - LAWSUIT

Defendant Forever 21 is an international clothing retail merchandizer. (I CT 3-4.) Plaintiff Maribel Baltazar, a woman of Mexican ancestry, was hired as an associate at Forever 21's Distribution Warehouse, which is located in downtown Los Angeles. (*Id.*) As an associate in the Distribution Warehouse, Mrs. Baltazar would assist in receiving and organizing new merchandize, so that the new merchandize may be appropriately delivered to specific Forever 21 retail locations, which would then be sold to the public. (*Id.*)

With regards to racial harassment and discrimination, Mrs. Baltazar alleges that her managers and co-employees, over the course of her employment, would often make highly inappropriate comments about her race. (I CT 5-7.) Specifically, Mrs. Baltazar alleges that her manager, Mr. Jeff Shin ("Mr. Shin"), who is of Korean descent, would often make statements to Mrs. Baltazar saying, "Korean people are better in every way," "all Hispanics are poor and ignorant, and lack an education," and that "Koreans are the best." (*Id.*) Mrs. Baltazar further alleges that Mr. Shin would often tell Mrs. Baltazar that he "was amazed that a Hispanic girl could keep track of all the movement in the warehouse." (*Id.*)

Mrs. Baltazar further alleges that Mr. Shin would randomly tell Mrs. Baltazar that African Americans were "lazy," and by way of example, explained to Mrs. Baltazar that Forever 21 had an African American employee who would often "fall asleep." (*Id.*) Mrs. Baltazar, at all times, found these comments unwelcomed, highly offensive, and inflammatory. (*Id.*) Mrs. Baltazar also alleges that her co-employee Darlene Yu ("Ms. Yu") would also make racial remarks towards her. (I CT 7, ln 9-25.) Mrs. Baltazar specifically alleges that Ms. Yu told Mrs. Baltazar that she better change the ink in the printers or that she would "kick" Mrs. Baltazar's "ass." (*Id.*) Mrs. Baltazar further alleges that Ms. Yu would refer to Mrs. Baltazar as "all you Mexicans" and complain about the way "Mexicans" write. (*Id.*) Mrs. Baltazar also alleges that Ms. Yu physically intimidated Mrs. Baltazar, by using her shoulder to shove Mrs. Baltazar. (*Id.*) In addition to the inappropriate comments and physical intimidation, Mrs. Baltazar further alleges that Hispanic associates were paid less than non-Hispanic associates. (I CT 6-7.)

With regards to sexual harassment, Mrs. Baltazar alleges that defendants Mr. Corleto and Mr. Martinez, both co-employees of Mrs. Baltazar, sexually harassed Mrs. Baltazar, with the knowledge and

ratification of Mrs. Baltazar's supervisors. (I CT 4-11.) Specifically, Mrs. Baltazar alleges that Mr. Corleto would sexually harass Mrs. Baltazar by telling her, "woman when do you want to sleep with me," "when do you want me to sleep with you," "you look so good," "you have a good looking butt," "your breasts are too big," "your breasts are getting bigger," [Mrs. Baltazar was pregnant when Mr. Corleto made this comment], and numerous other graphic and highly-vulgar comments that can be found in detail in Mrs. Baltazar's complaint. [I CT 8, ln.1 -9].

With regards to the sexual harassment by Raul Martinez, Mrs. Baltazar's Forever 21 co-employee, Mrs. Baltazar asserts that he would also verbally abuse Mrs. Baltazar, by telling Mrs. Baltazar, "damn baby, are you going to let me hit it or what," "hurry up you f—ing b—, give me my papers," "stupid b—," and "hey stupid b—, when will you let me hit it." (I CT 8, ln. 18-25.) Mrs. Baltazar further asserts that Mr. Martinez further sexually harassed Mrs. Baltazar by coming behind Mrs. Baltazar, as she was bending down and drinking water from a Forever 21 drinking fountain, and rubbing his genitalia against Mrs. Baltazar's genitalia. (I CT 9, ln. 1-9.)

With regards to constructive discharge and retaliation, Mrs. Baltazar asserts that she reported the conduct of Mr. Shin, Mr. Corleto, Mr. Martinez, and Ms. Yu to Forever 21's most senior Human Resources director, Ms. Lisa Kim ("Ms. Kim"). (I CT 10, ln 5-14.) Mrs. Baltazar further asserts that Mrs. Baltazar even wrote a letter to Ms. Kim stating that a Forever 21 employee was "always touching his most intimate parts," as well as other specific instances of harassment. (*Id.*) Mrs. Baltazar, in her letter to Ms. Kim, further requested that the harassment, touching, and groping stop, as Mrs. Baltazar, "can't take it anymore." (*Id.*)

Mrs. Baltazar asserts that a Forever 21 Human Resources representative thereafter contacted Mrs. Baltazar, and told Mrs. Baltazar, "I

have a lot of work. There are a lot of people who have problems," and that it would take some time for an investigation. (I CT 10.) Meanwhile during the pending investigation, Mr. Corleto and Mr. Martinez continued to sexually harass Mrs. Baltazar. (I CT 10, ln 15-22.) Thereafter, Human Resources contacted Mrs. Baltazar and allegedly told her, "Nothing came up. Everyone is covering up. I guess you still need witnesses even though you are telling the truth." (I CT 10, ln 23-26.) In January 2011, Mrs. Baltazar resigned from Forever 21. (I CT 4-10.)

FACTUAL BACKGROUND – ARBITRATION AGREEMENT

On November 13, 2007, Forever 21 interviewed Mrs. Baltazar Maribel Baltazar for employment. (I CT 206, ln 9-20.) When Mrs. Baltazar arrived, she was greeted by a man who introduced himself as Mr. Ted Chung ("Mr. Chung"). (*Id.*) Mr. Chung thereafter provided Mrs. Baltazar with a comprehensive employment application, which contained numerous signature lines that were already highlighted in yellow for Mrs. Baltazar to sign. (I CT 206-219.)

While filling out the application, Mrs. Baltazar noticed on pages eight and nine of the employment application, that there was an "arbitration agreement." (I CT 206, ln. 21-26, 210-219.) On page nine, there was a signature block that was highlighted in yellow for Mrs. Baltazar to sign. (*Id.*) Mrs. Baltazar did not sign it, but instead continued filling out the rest of the employment application, and signed all other portions that were highlighted in yellow. (*Id.*) Mrs. Baltazar thereafter presented her employment application to Mr. Chung. (*Id.*)

Mrs. Baltazar saw Mr. Chung sit down and review Mrs. Baltazar's employment application. (I CT 207, ln. 1-16.) Mrs. Baltazar noticed that when Mr. Chung reviewed the unsigned arbitration section, Mr. Chung gave Mrs. Baltazar back her entire employment application and told her to sign the arbitration agreement. (*Id.*) Mrs. Baltazar specifically conveyed to

Mr. Chung that she did not want to sign the arbitration agreement. (*Id.*) Mr. Chung told Mrs. Baltazar that she had to sign it. (*Id.*) Mrs. Baltazar then shook her head without saying a word. (*Id.*) Mr. Chung then approached a Forever 21 manager by the name of Mr. Jeff Shin ("Mr. Shin"), and they, in front of Mrs. Baltazar, conversed in Korean, which Mrs. Baltazar did not understand. (*Id.*)

Mr. Shin then specifically told Mrs. Baltazar, "sign it or no job." Mrs. Baltazar did not want to sign it, but since she was in need of a position and was in need of income since she had just separated from her husband (whom she later reconciled with), and had to immediately support her children, she reluctantly signed the arbitration agreement. (*Id.*) After Mrs. Baltazar signed the arbitration agreement, Forever 21 immediately hired her, and she started work that day. (*Id.*)

Three months later in February 2008, Forever 21 tasked Mrs. Baltazar with processing new hire applications. (I CT 207, ln. 17-26.) After interacting with some of the new hires, Mrs. Baltazar realized that some of the new hires exclusively spoke Spanish. (*Id.*) Mrs. Baltazar thereafter approached Mr. Chung and asked if it was possible for the entire employment application to be in Spanish. (*Id.*) Mr. Chung informed Mrs. Baltazar that he would talk to Human Resources. (*Id.*) Mrs. Baltazar and Mr. Chung then discussed the necessity of the arbitration agreement and Mr. Chung informed Mrs. Baltazar that Forever 21 wants to arbitrate because it does not want to be bothered with a jury trial. (*Id.*) He further informed Mrs. Baltazar that "Human Resources wants everything signed." (*Id.*)

Thereafter in June 2008, Mrs. Baltazar processed the employment application of a prospective Forever 21 employee. (I CT 208, ln 1-11.) The prospective employee informed Mrs. Baltazar that she also did not want to sign the arbitration agreement. (*Id.*) Mrs. Baltazar and the prospective

employees walked together to the main warehouse office. (*Id.*) Mrs. Baltazar informed Mr. Chung that the prospective employee did not want to sign the arbitration agreement. (*Id.*) Mr. Chung again confirmed to Mrs. Baltazar that all employees must sign the arbitration agreement. (*Id.*) The prospective employee then signed the arbitration agreement and departed from the main warehouse. (*Id.*) At this point, Mrs. Baltazar was in the office with both Mr. Jeff Shin and Mr. Chung. (*Id.*) Mrs. Baltazar again asked about the arbitration agreement. (*Id.*) Mr. Shin explained to Mrs. Baltazar that all the employees have to sign the arbitration agreement, and then told Mrs. Baltazar, "We Koreans have to be smart." (*Id.*)

With regards to the actual arbitration agreement that Mrs. Baltazar signed with Forever 21, the arbitration agreement lists only employee-initiated disputes subject to arbitration, not employer-initiated disputes. (1 CT 216.) Specifically, the arbitration agreement lists the following types of disputes, all of which are employee-initiated:

> "claims for wages or other compensation due; claims for breach of any employment contract or covenant (express or implied); claims for unlawful discrimination, retaliation or harassment (including, but not limited to, claims based on employment benefits (except where an Employee's benefit or pension plan contains a claims procedure which expressly provides for a final and binding arbitration procedure different from this one)), and Disputes arising out of or relation to the termination of the employment relationship between the parties, whether based on common law or statute, regulation, or ordinance." (I CT 216.)

Additional provisions within the arbitration agreement include:

> "Pursuant to California Code of Civil Procedure §1281.8 either party hereto may apply to a California Court for any provisional remedy, including a temporary restraining order or preliminary injunction. (I CT 216.)
>
> ***
>
> "Both parties agree that the Company has valuable trade secrets and proprietary and confidential information. Both parties agree that in the course of any arbitration proceeding all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information." (I CT 216.)

LEGAL DISCUSSION

I.

THE *BALTAZAR* COURT CRITICIZED THE *TRIVEDI* COURT, AND NOW THE LAW IS UNSETTLED AS TO WHETHER OR NOT AN ARBITRATION AGREEMENT THAT ALLOWS THE PARTIES TO SEEK INJUNCTIVE RELIEF IS SUBSTANTIVELY UNCONSCIONABLE, ESPECIALLY IN LIGHT OF THE *TRIVEDI* COURT ASSERTING THAT EMPLOYERS ARE MUCH MORE LIKELY THAN EMPLOYEES TO SEEK SUCH RELIEF.

The *Trivedi* Court, in its 2010 opinion, held that the arbitration agreement at issue was both procedurally and substantively unconscionable, and therefore unenforceable. (*Trivedi v. Curexo Technology Corp.*, (2010) 189 Cal.App.4th 387.) Particularly, the *Trivedi* Court noted that the arbitration agreement was substantively unconscionable because it included a provision allowing the parties to seek

injunctive relief - relief very similar in scope to *California Code of Civil Procedure* §1281.8. (*Id.* at p. 396-397.) The Court reasoned that the provision in the arbitration agreement was one-sided because such a provision favored employers because employers were more likely to seek such relief. Specifically, the *Trivedi* Court held:

> "However, we are convinced by the trial court's other observation that allowing the parties access to the courts only for injunctive relief favors Curexo, because it is 'more likely that [Curexo], as the employer, would seek injunctive relief.' While the trial judge did not cite authority supporting this conclusion, it is not a novel or unsupportable proposition. This same comment was made by the *Fitz* court, which observed that it is far more likely that employers will invoke the court's equitable jurisdiction in order to stop employee competition or to protect intellectual property. (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 725.) This same point was made by the court in *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 176)." (*Id.* at p. 396-397.)

The *Baltazar* Court, however, stated that it did not agree "with the analysis of mutuality in *Trivedi.*" (*Baltazar v. Forever 21, Inc.,* (2012) 212 Cal.App.4th 221, 238.) The *Baltazar* Court, argued, that it could not say that Forever 21 is more likely to seek injunctive relief than an employee, because in the present case, Mrs. Baltazar asserts six causes of action pursuant to the Fair Employment and Housing Act ("FEHA"), which, pursuant to *Cal. Govt. Code* §12965(c), authorizes an employee to seek injunctive relief. (*Id.* at p. 239.) This argument does not distinguish between potential and actual relief that Mrs. Baltazar is seeking. It is true that Mrs. Baltazar sues for six causes of action pursuant to the FEHA, however, she does not sue for any type of injunctive relief pursuant to *California Govt. Code* §12965, as the *Baltazar* Court opines. Rather, Mrs.

Baltazar, sues for Hostile Work Environment pursuant to *Cal. Govt. Code* §12940(j), Failure to Prevent Harassment pursuant to *Cal. Govt. Code* §12940(k), Discrimination based on Race pursuant to *Cal. Govt. Code* §12940(a), and Retaliation pursuant to *Cal. Govt. Code* §12940(h). (I CT 3-4.) Accordingly, when the Court asserts that the injunctive relief provision in the arbitration agreement does not favor employers more so than employees, it incorrectly presumes that Mrs. Baltazar is seeking injunctive relief at the outset, when in reality, her causes of action in her complaint seek monetary relief, and she does not seek injunctive relief pursuant to *Cal. Govt. Code* §12965.

The other arguments offered by the *Baltazar* court are also unavailing. The *Baltazar* Court states that the cases cited by the *Trivedi* court do not support the proposition of the *Trivedi* rationale – that is, the *Mercuro* and *Fitz* cases, as relied upon by the *Trivedi* Court, do not suggest that the incorporation of section 1281.8 into an arbitration agreement is unconscionable. (*Baltazar v. Forever 21 Inc.,* (2012) 212 Cal.App.4th 221, 238 citing *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167 and *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 709.) However, when one carefully reviews the *Trivedi* rationale, the *Trivedi* Court did not cite *Mercuro* and *Fitz* to support the argument that the insertion of *California Civil Procedure* §1281.8 into an arbitration agreement is unconscionable, but rather, it cited *Mercuro* and *Fitz* to support the proposition that employers are more likely to *invoke* injunctive relief "in order to stop employee competition or to protect intellectual property." (*Trivedi v. Curexo Technology Corporation, supra,* 189 Cal.App.4th at p. 397.) This interpretation by the *Trivedi* Court supports its opinion and rationale that employers are more likely to benefit from injunctive relief in an arbitration agreement. The *Baltazar* Court, however, fails to clash with this proposition.

Finally, the *Baltazar* court stated that "because the Agreement is subject to the CAA, not the FAA, section 1281.8 would apply even if it were not expressly mention[ed] in the Agreement." (*Baltazar v. Forever 21 Inc., supra,* 212 Cal.App.4th at p. 239.) It should be well noted that the California Arbitration Act applies only *after* the arbitration agreement is deemed enforceable and conscionable, hence not unconscionable. If the contract, however, is deemed unconscionable and unenforceable, the California Arbitration Act [including all of its provisions, including section 1281.8] is inapplicable since there is no enforceable arbitration agreement to begin with. Therefore, to argue, that a provision of the California Arbitration Act would apply to a conscionable and enforceable agreement, *before even making a determination as to whether or not that same arbitration agreement is unconscionable,* is counter-intuitive and illogical, because the inquiry is whether or not the arbitration agreement, *as it is presently written*, is one-sided. Accordingly, the insertion of the injunctive relief language is indeed one sided because as the *Trivedi* Court asserted, employers are more likely to invoke injunctive relief than employees.

II.

THE *BALTAZAR* COURT IGNORED THE *PINEDO* COURT AND AS A RESULT, THERE IS NOW A CONFLICT OF LAW AS TO WHETHER OR NOT AN ARBITRATION AGREEMENT THAT ONLY LISTS EMPLOYEE-INITIATED DISPUTES IS SUBSTANTIVELY UNCONSCIONABILE.

The *Baltazar* Court ignored the *Pinedo* Court, and now there is even more conflict into the assessment of whether an arbitration agreement is

substantively unconscionable. In *Pinedo*, the arbitration agreement listed disputes subject to the arbitration as:

> "Any controversy or dispute arising out of or relating to this Agreement or relating to Employee's employment by employer including any changes in position, conditions of employment or pay, or the end of employment thereof . . . shall be settled by arbitration. . . ." (*Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 775.)

The *Pinedo* Court finding that the arbitration agreement was unconscionable ruled:

> "The agreement is also inherently one-sided: it addresses only claims involving terms of employment described as claims based on 'changes in position, conditions of employment or pay, or the end of employment.' These are claims which would normally be brought by the employee against the employer. . . ." (*Pinedo v. Premium Tobacco Stores, Inc., supra,* 85 Cal.App.4th at p. 781.)

In *Baltazar*, the arbitration agreement only enumerated and listed disputes that were typically asserted by employees. Hence, the Forever 21 arbitration agreement read:

> "For purposes of this Agreement, the term 'Disputes' means and includes any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee. The potential Disputes which the parties agree to arbitrate, pursuant to this Agreement, include but are not limited to: claims for wages or other compensation due; claims for breach of any employment contract or covenant (express or implied); claims for unlawful discrimination, retaliation or harassment (including, but not limited to, claims based on employment

> benefits (except where an Employee's benefit or pension plan contains a claims procedure which expressly provides for a final and binding arbitration procedure different from this one)), and Disputes arising out of or relating to the termination of the employment relationship between the parties, whether based on common law or statute, regulation, or ordinance. (I CT 216.)

If one were to assess the language in the Forever 21 arbitration agreement in light of *Pinedo,* one would conclude that the listing and enumeration of employee-initiated disputes is substantively unconscionable, as the *Pinedo* court stated that such a listing is "inherently unfair." (*Pinedo v. Premium Tobacco Stores, Inc., supra,* 85 Cal.App.4th at p. 781.) The *Baltazar* court, however, ignored the *Pinedo* Court, and now, there will be confusion among appellate courts, and trial courts alike, as to whether an arbitration agreement is substantively unconscionable if it only lists and enumerates disputes that are likely to be asserted by employees, and fails to list and enumerate disputes that are likely to be asserted by employers. It should be well noted that the *Baltazar* Court emphasized the "include but are not limited to" language in the Forever 21 arbitration agreement and argued that even though the enumerated claims were employee-initiated, it did not matter because all disputes were subject to the arbitration agreement. (*Baltazar v. Forever 21 Inc., supra,* 212 Cal.App.4th at p. 234.) The arbitration agreement in *Pinedo*, however, like in Forever 21's arbitration agreement, also included similar language, that is "any controversy or dispute arising out of or relating to this Agreement or relating to Employee's employment by employer." (*Pinedo v. Premium Tobacco Stores, Inc., supra,* 85 Cal.App.4th at p. 775.) Yet, the *Pinedo* Court *still* found the language to be inherently one-sided. Accordingly,

Plaintiff's petition should be granted to uniform the law and to prevent future confusion by the trial and appellate courts.

III.

CONTRARY TO THE *LITTLE* COURT, THE *BALTAZAR* COURT FINDS THAT THERE IS NO SUNBSTANTIVE UNCONSCIONALBILITY PRESENT IN THE FOREVER 21 ARBITRATION AGREEMENT, DESPITE THE AGREEMENT REQUIRING ITS EMPLOYEES TO TAKE "ALL NECESSARY STEPS" DURING ARBITRATION TO PRESERVE THE EMPLOYER'S CONFIDENTIAL INFORMATION, THEREBY IMPOSING A ONE-SIDED OBLIGATION ON THE EMPLOYEE.

"Substantive unconscionability" refers to terms that unreasonably favor one party. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) Substantive unconscionability exists where the terms are written to favor one party. (*Ibid.*) In Forever 21's arbitration agreement, it requires the following:

> "Both parties agree that the Company has valuable trade secrets and proprietary and confidential information. Both parties agree that in the course of any arbitration proceeding all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information." (I CT 216.)

In the event that Forever 21 participates in arbitration, the Forever 21 arbitration agreement **forces the employee** to take "all necessary steps" to

protect the employer's "trade secrets and proprietary and confidential information." (I CT 216.) This is clearly a one-sided term and solely benefits the employer. Nowhere does the Forever 21 arbitration agreement state that Forever 21 must take all necessary steps in relation to the *employee's* privacy and confidential information, but strictly limits it to the benefit of the employer. The *Baltazar* court found that the Forever 21 arbitration agreement was not substantively unconscionable in any regard, despite the *Little* case stating that "substantive unconscionability exists where the terms are written to favor one party." The *Baltazar* Court essentially refused to abide by the standard in determining the existence of substantive unconscionability, and now accordingly, the *Baltazar* case, sets precedent allowing attorneys representing employers to argue that even if an arbitration agreement is one sided, it does not mean that it is substantively unconscionable. This argument will further complicate efforts by employees to prove that an arbitration agreement is substantively unconscionable, and also hinder employee-safeguards from mandatory arbitration.

CONCLUSION

Plaintiff Maribel Baltazar respectfully requests that this Supreme Court grant her petition so that the law in relation to substantive unconscionability may be reconciled and applied uniformly.

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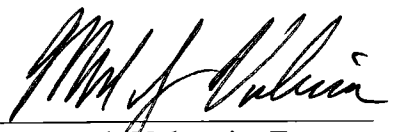
January 28, 2013

Respectfully Submitted,

THE LAW OFFICES OF MARK JOSEPH VALENCIA, ALC



Mark Joseph Valencia, Esq.

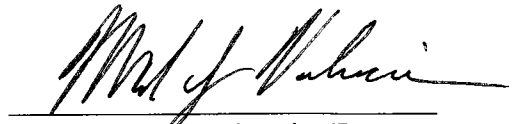
Attorney for Plaintiff and Petitioner, Maribel Baltazar

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 4,403 words as counted by the Mircrosoft Word software program used to generate this brief.

January 28, 2013



Mark Joseph Valencia, Esq.

Attorney for Plaintiff and
Petitioner, MARIBEL
BALTAZAR

APPELLATE COURT OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARIBEL BALTAZAR, Plaintiff and Respondent, v. FOREVER 21, INC., et al., Defendants and Appellants.	B237173 (Los Angeles County Super. Ct. No. VC059254)

APPEAL from an order of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Reversed with directions.

Gilbert, Kelly, Crowley & Jennett, Arthur J. McKeon III, Rebecca J. Smith and Edward E. Ward for Defendants and Appellants.

Law Offices of Mark Joseph Valencia and Mark Joseph Valencia for Plaintiff and Respondent.

Plaintiff filed this action against her former employer and three employees, alleging she was constructively discharged and subjected to discrimination and harassment based on race and sex. The employer and two of the employees filed a motion to compel arbitration pursuant to an arbitration agreement between plaintiff and the employer. Plaintiff opposed the motion, arguing the agreement was unconscionable. The trial court ruled in plaintiff's favor and denied the motion. Defendants appealed.

We conclude the trial court erred. Although the arbitration agreement was a contract of adhesion, it was not substantively unconscionable. In particular, we do not find unconscionable a provision in the arbitration agreement allowing either party to seek provisional remedies — such as a temporary restraining order or an injunction — in court. Nor is any other provision substantively unconscionable. We therefore reverse the order denying the motion to compel arbitration.

I

BACKGROUND

The facts and allegations in this appeal are taken from the complaint and the declarations and exhibits submitted in connection with the motion to compel arbitration.

A. Complaint

This action was filed on August 4, 2011. The complaint alleges as follows. Plaintiff, Maribel Baltazar, is a married woman of Mexican ancestry. She began working for Forever 21, Inc. (Forever 21), as an "associate" on or about November 13, 2007. Forever 21 is a clothing retail merchandiser. Plaintiff worked in the company's distribution center in downtown Los Angeles. The distribution center sorted incoming clothing so it would be properly delivered to Forever 21's retail locations. The complaint does not allege whether shipments *to* the warehouse came from out of state or whether deliveries *from* the warehouse to retail locations were sent out of state.

From early 2008 through the end of 2008, one of plaintiff's managers made racist statements to or about her. Throughout her employment, Forever 21 discriminated against Hispanic associates by paying them less than non-Hispanic associates who were performing the same duties. When plaintiff complained about the pay disparity, her

superiors responded with laughter. Korean employees received preferential treatment at the distribution center.

One of plaintiff's coworkers, Darlene Yu, made racist remarks to plaintiff, threatened to "'kick [her] ass,'" assaulted her on two occasions by "physically shouldering" her, and assaulted her on a third occasion by throwing an envelope that touched her. Plaintiff reported these events to management, but no one took any action. Plaintiff was a victim of racial harassment throughout her employment.

Beginning in April 2008, plaintiff was sexually harassed by her supervisor, Herber Corleto. He frequently commented on plaintiff's breasts and "'butt'" and asked her to "'sleep with [him].'" Corleto also asked plaintiff if she and her husband performed certain sexual acts.

One of plaintiff's coworkers, Raul Martinez, sexually harassed plaintiff by making crude sexual comments about her body, staring at her breasts, and asking her when they were going to have sexual relations. In June 2009, when plaintiff was drinking at the water fountain and was slightly bent down, Martinez "rubbed his genitalia against [plaintiff's] genitalia." On another occasion in June 2009, Martinez touched plaintiff's breasts with his knuckles. From December 2009 through around June 2010, Martinez would often touch his genitalia in front of plaintiff and bite his lower lip. Plaintiff reported Martinez's conduct to management and the human resources department. She received no response.

In December 2008, plaintiff became pregnant. In February 2009, plaintiff's physician restricted her working conditions: She was not to lift more than 10 pounds or climb ladders or stairs. Plaintiff showed her managers a physician's note that listed the restrictions. Plaintiff was still required to lift merchandise exceeding 10 pounds. On one occasion she fell and injured herself while carrying a bag of clothes weighing more than 10 pounds.

In March 2010, plaintiff complained to Forever 21's senior human resources officer, Ms. Kim, about being sexually harassed. Kim told plaintiff to put her complaints in writing. Plaintiff sent Kim an e-mail, describing the acts of harassment and

discrimination. Thereafter, plaintiff was contacted by Mr. Paredes, who worked in the human resources department. He delayed an investigation into plaintiff's complaints. In May 2010, Paredes informed plaintiff that he had completed the investigation, and "[n]othing came up." After the investigation, Corleto and Martinez continued to harass plaintiff.

In January 2011, plaintiff e-mailed the human resources department and stated she was quitting "'because of the harassment and discrimination.'" The department replied that plaintiff should attend a meeting scheduled for January 28, 2011, at 10:00 a.m., and two supervisory employees from the human resources department would meet with her. Plaintiff showed up for the meeting. She waited 20 minutes. No one else entered the room. Plaintiff turned in her badge and resigned.

The complaint contains nine causes of action, six of them under the Fair Employment and Housing Act (FEHA) (Gov. Code, §§ 12900–12996): (1) hostile work environment based on racial harassment (*id.*, § 12940, subd. (j)); (2) failure to prevent racial harassment and discrimination (*id.*, § subd. (k)); (3) race discrimination (*id.*, subd. (a)); (4) hostile work environment based on sexual harassment (*id.*, subd. (j)); (5) failure to prevent sexual harassment (*id.*, subd. (k)); and (6) retaliation (*id.*, subd. (h)). The remaining causes of action allege a violation of the Ralph Civil Rights Act of 1976 (Civ. Code, § 51.7); constructive discharge in violation of public policy; and intentional infliction of emotional distress. Named as defendants were Forever 21, Forever 21 Logistics, LLC, Darlene Yu, Herber Corleto, and Raul Martinez.

B. Motion to Compel Arbitration

On September 8, 2011, Forever 21, Forever 21 Logistics, LLC, Darlene Yu, and Herber Corleto (collectively defendants) filed a motion to compel arbitration of plaintiff's claims pursuant to the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1–16) and the California Arbitration Act (CAA) (Code Civ. Proc., §§1280–1294.2; all undesignated section references are to the Code of Civil Procedure). Attached to the motion was an "Arbitration Agreement" (Agreement) dated November 13, 2007, and bearing a signature reading, "Maribel Baltazar." In their supporting papers, defendants argued that the

Agreement satisfied the arbitration standards set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

Plaintiff filed an opposition, asserting the Agreement was unconscionable. In a supporting declaration, plaintiff stated that on November 13, 2007, she had an interview at the Forever 21 warehouse in downtown Los Angeles. When she arrived, she was greeted by a Korean man, Mr. Chung, who introduced himself and handed her an employment application. The application consisted of 11 pages, several of which required plaintiff's signature at the bottom of the page. The signature lines were highlighted in yellow. Page 8 was entitled, "AGREEMENT TO ARBITRATE." The Agreement continued onto the ninth page, at the bottom of which was a yellow highlighted signature line. Plaintiff signed all of the signature lines in the application with the exception of the one for the Agreement. She handed the application to Chung. He reviewed the application and gave it back to her, saying she had to sign the Agreement. Plaintiff shook her head, indicating she would not do so. Chung took the application and spoke to another Forever 21 employee, Mr. Shin. The men spoke in Korean, and plaintiff did not understand what they said. Eventually, Shin told plaintiff, "'sign it or no job.'" Plaintiff "had no other choice but to sign the [Agreement]." After plaintiff signed the Agreement, she was hired and started to work that day.

The motion to compel arbitration came on for hearing on October 7, 2011. The trial court denied the motion, stating the Agreement was unconscionable. The trial court found that the Agreement was substantively unconscionable because (1) it required the arbitration of employee — but not employer — claims, (2) it gave Forever 21 the right to take "'all necessary steps'" to protect its trade secrets or other confidential information, and (3) it mandated arbitration even if the Agreement was unenforceable.

Defendants appealed.

II

DISCUSSION

"'"Whether an arbitration provision is unconscionable is ultimately a question of law."' . . . 'On appeal, when the extrinsic evidence is undisputed, as it is here, we review

the contract de novo to determine unconscionability.'" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511–1512, citations omitted; accord, *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174 (*Mercuro*).)

"We interpret the Agreement . . . in light of [its] plain meaning. . . . Under the plain meaning rule, courts give the words of the contract . . . their usual and ordinary meaning. . . . '[W]e interpret the words in their ordinary sense, according to the plain meaning a layperson would attach to them.'" (*Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 162, citations omitted.)

As a preliminary matter, the parties disagree as to whether the Agreement is governed by the FAA or the CAA. The Agreement is silent on the issue. (Cf. *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 476 & fn. 5, 478–479 [109 S.Ct. 1248] [parties may adopt procedural provisions of CAA in arbitration agreement otherwise governed by FAA]; *Valencia v. Smyth, supra*, 185 Cal.App.4th at pp. 173–175, 177–180 [FAA's procedural provisions do not apply in state court unless arbitration agreement expressly adopts them].)

The FAA applies to a contract "evidencing a transaction *involving* commerce." (9 U.S.C. § 2, italics added.) The United States Supreme Court has "'interpreted the term "involving commerce" in the [FAA] as the functional equivalent of the more familiar term "affecting commerce" — words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. . . . Because the statute provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," . . . it is perfectly clear that the [FAA] encompasses a wider range of transactions than those actually "in commerce" — that is, "within the flow of interstate commerce," . . .' . . . 'Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control." . . . Only that general practice need bear on interstate commerce in a substantial way.'" (*Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 585–586, citations omitted.)

In *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, the Court of Appeal addressed whether the FAA governed a dispute between a homeowner renovating his single family home and the contractor retained to perform the work. The Court of Appeal stated: "Because [the contractor] has not presented a factual record to establish [that the parties' agreement involves interstate commerce], his reliance on *Hedges v. Carrigan*[, *supra*,] 117 Cal.App.4th 578 is misplaced. *Hedges* found an agreement to purchase a single family residence 'was a contract which evidenced a transaction "involving commerce" within the meaning of [the FAA].' . . . There, the evidence showed, '[t]he anticipated financing involved the use of a . . . Federal Housing Administration home loan which is subject to the jurisdiction of the United States Department of Housing and Urban Development headquartered in Washington, D.C. Further, the various copyrighted forms used by the parties and their brokers could only be utilized by members of the National Association of Realtors.' . . . [¶] Unlike the showing made in cases such as . . . *Hedges*, [the contractor] has not presented any *facts* to show the instant transaction involved interstate commerce. This case is akin to *Steele v. Collagen Corp.* (1997) 54 Cal.App.4th 1474, 1490, wherein the party asserting [the application of the FAA] 'made no attempt to establish its actions' fell within the ambit of federal law. We conclude [the contractor] failed to meet his burden of establishing the FAA [applies] . . . ." (*Woolls v. Superior Court*, at pp. 213–214, citations omitted; see *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1207 [party seeking to compel arbitration has burden of proving that underlying agreement involves interstate commerce]; *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1099–1101 [discussing whether FAA applies in context of real estate transactions].)

In the present case, defendants have offered no evidence showing that plaintiff's employment or any pertinent transaction involved interstate commerce, nor have they cited anything in the record to that effect. Instead, they contend the FAA governs an arbitration agreement unless the parties expressly "opt out" of its coverage. For that proposition, defendants rely solely on *Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205. But *Wolsey* addressed whether the terms of the parties' contract

constituted an agreement to arbitrate under the FAA. The Ninth Circuit held that the parties' dispute resolution procedures created an enforceable arbitration agreement under the FAA even though the arbitrators' decision was *nonbinding*. (See *Wolsey*, at pp. 1207–1209.) The Ninth Circuit then discussed whether the agreement was governed by the procedural provisions of the CAA in light of the following contractual language: "'[T]his Agreement . . . shall be interpreted and construed under the laws of the State of California, U.S.A.'" (*Id.* at p. 1209.) The court concluded that California's arbitration provisions did not apply. (*Id.* at pp. 1209–1213.) That aspect of *Wolsey* has been rejected by our Supreme Court. (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393, fn. 8, followed in *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263–1265; see also *Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 717–726 [disagreeing with *Wolsey*'s choice-of-law analysis]; *Valencia v. Smyth*, *supra*, 185 Cal.App.4th at pp. 173–175, 177–180 [CAA's procedural provisions apply in state court unless arbitration agreement expressly adopts FAA's procedural provisions].)

In sum, *Wolsey* does not support the application of the FAA in this case and there is no evidence that plaintiff's employment or any relevant transaction involved interstate commerce. We therefore conclude the Agreement is governed by the CAA.

On appeal, defendants contend the Agreement is not unconscionable and should be enforced. Plaintiff argues in favor of the trial court's ruling. We conclude the Agreement is not substantively unconscionable in any respect and reverse the trial court.

A. Doctrine of Unconscionability

"In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. . . . As section 1670.5, subdivision (a) states: 'If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' Because unconscionability

is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under [the CAA], which . . . provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (9 U.S.C. § 2), recognized that 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements . . . .' . . .

". . . '[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results. . . . 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' . . . But they need not be present in the same degree. . . . [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 114, citations omitted; accord, *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1288–1289.) "The party resisting arbitration bears the burden of proving unconscionability." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.)

"'The procedural element of unconscionability focuses on two factors: oppression and surprise. . . . '"Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'" . . . '"Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." . . .'" (*Bruni v. Didion*, *supra*, 160 Cal.App.4th at p. 1288.)

"Of course, simply because a provision within a contract of adhesion is not read or understood by the nondrafting party does not justify a refusal to enforce it. The unbargained-for term may only be denied enforcement if it is also *substantively*

unreasonable. . . . Substantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if the disputed provision of the contract falls outside the 'reasonable expectations' of the nondrafting party or is 'unduly oppressive.' . . . Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88, citations omitted.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh *or* one-sided. . . . A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC, supra*, 55 Cal.4th at p. 246, citations omitted, italics added.) Simply put, the contract term must be either (1) overly harsh *or* (2) so one-sided as to shock the conscience. (See *id.* at p. 248, citing *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213 ["substantive element . . . traditionally involves contract terms that are so one-sided as to 'shock the conscience,' *or* that impose harsh or oppressive terms" (italics added)].)

B. The Agreement

Page 8 of the employment application began as follows and continued onto the ninth page:

"**AGREEMENT TO ARBITRATE**

"**FOR CALIFORNIA STORES ONLY**

"This Agreement to Arbitrate (hereinafter 'Agreement') is entered into by and between Forever 21, Inc., and its subsidiary and affiliated companies, and each of their officers, directors, agents, benefit plans, insurers, successors, and assigns (hereinafter collectively 'the Company') and [handwritten name of plaintiff], hereinafter 'Employee' located at Warehouse . . . .

"It is the desire of the parties to this Agreement that, whenever possible, 'Disputes' relating to employment matters will be resolved in an expeditious manner. Each of the

parties hereto is voluntarily entering into the Agreement in order to gain the benefits of a speedy, impartial dispute-resolution procedure.

"The Company and Employee mutually agree that any dispute or controversy arising out of or in any way related to any 'Dispute,' as defined herein, shall be resolved exclusively by final and binding arbitration. Such arbitration shall be held in Los Angeles, California pursuant to the Model Rules for Arbitration of Employment Disputes of the American Arbitration Association then in effect.

"For purposes of this Agreement, the term 'Disputes' means and includes any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee. The potential Disputes which the parties agree to arbitrate, pursuant to this Agreement, *include but are not limited to*: claims for wages or other compensation due; claims for breach of any employment contract or covenant (express or implied); claims for unlawful discrimination, retaliation or harassment (including, but not limited to, claims based on employment benefits (except where an Employee's benefit or pension plan contains a claims procedure which expressly provides for a final and binding arbitration procedure different from this one)), and Disputes arising out of or relating to the termination of the employment relationship between the parties, whether based on common law or statute, regulation, or ordinance.

"**Each of the parties voluntarily and irrevocably waives any and all rights to have any Dispute heard or resolved in any forum other than through arbitration as provided herein. This waiver specifically includes, but is not limited to, any right to trial by jury.**

"This Agreement does not cover claims that Employee my have for worker's compensation benefits or unemployment compensation benefits. . . .

"Pursuant to California Code of Civil Procedure 1281.8 either party hereto may apply to a California court for any provisional remedy, including a temporary restraining order or preliminary injunction.

"Both parties agree that the Company has valuable trade secrets and proprietary and confidential information. Both parties agree that in the course of any arbitration

proceeding all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information. [¶] . . . [¶]

"The provisions of this Agreement are severable, and if any one or more are determined to be void or otherwise unenforceable, the remaining provisions shall continue to be in full force and effect. If, in any action to enforce this Agreement, a Court of competent jurisdiction rules that the parties agreement to arbitrate under the Model Rules for Arbitration of Employment Disputes of the American Arbitration Association is not enforceable, then the parties agree that such Dispute shall be resolved by final and binding arbitration under the California Arbitration Act, California Code of Civil Procedure Section 1280, et seq.

"The promises of the parties herein to arbitrate differences, rather than litigate them before courts or other bodies, provide consideration for each other." (Capital letters, underscoring, and boldface in original.)

At the bottom of page 9 was a line for the employee's signature and a line for the date.

1. Procedural Unconscionability

Because plaintiff was required to sign the Agreement as a condition of employment, was unable to negotiate the terms of the Agreement, and had no meaningful choice in the matter, the Agreement was oppressive and procedurally unconscionable. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114.) But the Agreement was not """"*hidden* in a *prolix* printed form drafted by [Forever 21]"""" (*Bruni v. Didion*, *supra*, 160 Cal.App.4th at p. 1288, italics added) and therefore did not involve an element of surprise. On the contrary, the Agreement was prominently featured as part of the employment application, plaintiff read the Agreement when filling out the application, and, having read the Agreement, initially refused to sign it.

2. Substantive Unconscionability

Plaintiff contends the Agreement is substantively unconscionable in four respects. We discuss them in turn.

a. Unilateral Arbitration

An arbitration agreement is substantively unconscionable if employees are required to submit their disputes to arbitration while the employer remains free to pursue its claims in any forum. (See *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at pp. 117–120; *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1332.)

Here, plaintiff cites the examples of disputes set forth in the Agreement's fourth paragraph and argues that Forever 21 did not have to submit its disputes to arbitration. But the list of examples — "claims for wages or other compensation due; claims for breach of any employment contract or covenant (express or implied); claims for unlawful discrimination, retaliation or harassment . . ." — albeit limited to causes of action that only an employee would bring, is prefaced by "*include but are not limited to*," indicating the list is not exclusive. (Original italics; cf. *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 709, 716–717, 724–725 (*Fitz*) [where arbitration agreement (1) listed examples of covered disputes, all of which were employee claims, (2) employer was expressly permitted to seek judicial resolution of disputes involving confidentiality and noncompete agreements, and (3) discovery was significantly curtailed, trial court properly found agreement unconscionable].)

The Agreement, when read as a whole, leaves no doubt that Forever 21 must submit its disputes to final and binding arbitration. For instance, the Agreement's second paragraph states in part: "*Each of the parties hereto* is voluntarily entering into the Agreement in order to gain the benefits of a speedy, impartial *dispute-resolution procedure*." (Italics added.) In the third paragraph, the Agreement provides: "The Company and Employee *mutually agree* that any dispute or controversy arising out of or in any way related to any '*Dispute*[]' . . . shall be resolved exclusively by *final and binding arbitration*." (Italics added.) The term "dispute" is defined as "any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee." That definition is sufficiently broad to encompass any claim Forever 21 might have against an employee. The paragraph

immediately following the list of examples states in boldface: "***Each of the parties* voluntarily and irrevocably waives any and all rights to have *any Dispute* heard or resolved in any forum *other than through arbitration* as provided herein. This waiver specifically includes, but is not limited to, *any right to trial by jury*.**" (Italics added.) And both parties "'promise[d]'" to "'arbitrate differences, rather than litigate them before courts or other bodies.'"

Thus, Forever 21 and its employees are bound to submit their disputes to final and binding arbitration. The Agreement is bilateral, not unilateral.

b. Availability of Provisional Relief

The Agreement provides: "Pursuant to California Code of Civil Procedure 1281.8 either party hereto may apply to a California court for any provisional remedy, including a temporary restraining order or preliminary injunction." Section 1281.8, subdivision (b), is part of the CAA. It states: "A party to an arbitration agreement may file in the *court* in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper *court*, an application for a *provisional remedy* in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." (Italics added.) Section 1281.8 defines "provisional remedy" to include "[p]reliminary injunctions and temporary restraining orders." (§ 1281.8, subd. (a)(3).) It "'was enacted primarily to allow a party to an arbitration [or subject to an arbitration agreement] to obtain provisional judicial remedies without waiving the right to arbitrate, as some early cases had suggested.'" (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1537 (*Stirlen*).) Plaintiff contends the Agreement's incorporation of section 1281.8 is unconscionable. We disagree.

In *Stirlen, supra*, 51 Cal.App.4th 1519, the employer exempted from arbitration "[a]ny action initiated by the Company seeking specific performance or injunctive or other equitable relief in connection with any breach or violation of [its intellectual property rights]." (*Stirlen*, at p. 1528; see *Mercuro, supra*, 96 Cal.App.4th at pp. 177–178 [discussing *Stirlen*].) The arbitration agreement also limited the parties' remedies to "'a

money award not to exceed the amount of actual damages for breach of contract'" and excluded "'any other remedy at law or in equity, including but not limited to other money damages, exemplary damages, specific performance, and/or injunctive relief.'" (*Stirlen*, at p. 1529.)

The Court of Appeal concluded that the agreement's lack of mutuality was unconscionable, explaining: "One of the most significant discrepancies, of course, is the unilateral restriction on employee remedies and the nature of the rights employees are deprived of in this manner. While Supercuts is deprived of no common law or statutory remedies that may be available to it under [the intellectual property provisions] of the employment contract, remedies available to employees in employment disputes are severely curtailed. Not only are employees denied punitive damages for tort claims, they are also denied relief for statutory claims . . . . Supercuts's arbitration clause not only deprives employees of the exemplary damages and equitable relief available under [some] federal statutes, but deprives them as well of the reasonable attorney fees, including litigation expenses, and costs, that prevailing parties can obtain under those statutes. . . . The only remedy left to employees — actual damages for breach of contract — may bear no relation whatsoever to the extent of the wrong and the magnitude of the injuries suffered at the hands of the employer. This would amount to denial of the underlying cause of action, which would be preserved in name only." (*Stirlen*, *supra*, 51 Cal.App.4th at pp. 1539–1540.)

The court continued: "The mandatory arbitration requirement can only realistically be seen as applying primarily if not exclusively to claims arising out of the termination of employment, which are virtually certain to be filed against, not by, Supercuts. Supercuts identifies no provision of the employment contract and no statute likely to give rise to a claim Supercuts would be compelled to submit to arbitration. *The only 'employment disputes' likely to be initiated by Supercuts* — such as claims that an employee violated a non-competition agreement or divulged confidential information — *need not be arbitrated.* [¶] . . . [¶] In short, the arbitration clause provides the employer more rights and greater remedies than would otherwise be available and concomitantly deprives

employees of significant rights and remedies they would normally enjoy." (*Stirlen, supra,* 51 Cal.App.4th at pp. 1540–1542, italics added.)

In *Mercuro, supra,* 96 Cal.App.4th 167, "[t]he arbitration agreement specifically cover[ed] claims for breach of express or implied contracts or covenants, tort claims, claims of discrimination based on race, sex, age or disability, and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation or public policy. Thus the agreement [required] arbitration of the claims employees [were] most likely to bring against [the employer]. On the other hand, the agreement specifically exclude[d] 'claims for injunctive and/or other equitable relief *for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information* . . . .' Thus the agreement exempt[ed] from arbitration the claims [the employer was] most likely to bring against its employees." (*Id.* at pp. 175–176, italics added.) The Court of Appeal concluded that the lack of mutuality rendered the arbitration agreement unconscionable. (*Id.* at p. 179.)

In *Fitz, supra,* 118 Cal.App.4th 702, an employer informed its employees about a new arbitration policy by sending them a brochure. A letter accompanying the brochure stated that "the new policy would be used to settle concerns over almost anything at work, ranging from disagreements over assignments to perceived discriminatory treatment." (*Id.* at p. 708.) But the arbitration policy "was not to be used 'to resolve disputes over *confidentiality/non-compete agreements or intellectual property rights.*'" (*Id.* at p. 709, italics added.) Relying on *Stirlen, supra,* 51 Cal.App.4th at pages 1528 and 1537 (see *Fitz,* at pp. 723–724), the Court of Appeal concluded that the lack of mutuality was unconscionable, saying: "An agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party. . . . [¶] . . . [¶] [The employer] asserts that the [arbitration] policy is 'completely bilateral' because the policy does not carve out particular types of claims where employees are required to arbitrate, but the company is permitted to seek redress for the same claim in a judicial forum. . . . [The employer] states that both the company and [an employee] may

submit disputes regarding noncompete agreements and intellectual property rights to the courts. Though [the employer] cites cases where employees have filed actions against employers over noncompete agreements and intellectual property claims, it is far more often the case that employers, not employees, will file such claims. . . .

"The [arbitration] policy is unfairly one-sided because it compels arbitration of the claims more likely to be brought by [an employee], the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by [the employer], the stronger party. . . . [¶] The [arbitration] policy fails to overcome the *Armendariz* threshold, which states that arbitration agreements imposed in adhesive contexts lack basic fairness if they require one party but not the other to arbitrate all claims arising out of the same transaction or occurrence. . . . For example, in a wrongful termination dispute where the employee claims age discrimination and [the employer] argues the employee was fired for divulging trade secrets to a competitor, the employee is required to arbitrate her claim while [the employer] is permitted to seek judicial review." (*Fitz*, *supra*, 118 Cal.App.4th at pp. 724–725, citation omitted.)

We agree with *Stirlen*, *Mercuro*, and *Fitz* but not with the analysis of mutuality in *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387 (*Trivedi*). There, an employer-employee arbitration agreement provided in part: "'[P]rovisional injunctive relief may, but need not, be sought in a court of law while arbitration proceedings are pending, and any provisional injunctive relief granted by such court shall remain effective until the matter is finally determined by the Arbitrator.'" (*Trivedi*, at p. 396.) The Court of Appeal concluded that the language authorizing provisional injunctive relief was coextensive with section 1281.8 of the CAA. (*Trivedi*, at pp. 396–397.) Nevertheless, the court found the clause unconscionable, reasoning that "allowing the parties access to the courts only for injunctive relief favors [the employer], because it is 'more likely that . . . the employer[] would seek injunctive relief.' While the trial judge did not cite authority supporting this conclusion, it is not a novel or unsupportable proposition." (*Id.* at p. 397.) The Court of Appeal cited *Mercuro* and *Fitz* as support for the trial court's conclusion. (*Ibid.*)

We decline to follow *Trivedi* for three reasons. First, *Mercuro* and *Fitz* do not suggest that the incorporation of section 1281.8 into an arbitration agreement is unconscionable. Both of those cases stand for the proposition that an arbitration agreement is unconscionable if it exempts claims likely to be brought by an employer but requires arbitration of claims likely to brought by an employee. Although the unconscionable provision in *Mercuro* authorized the parties to seek injunctive relief in a judicial forum, it permitted that type of relief only for claims the employer was likely to bring: "'intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information.'" (*Mercuro*, *supra*, 96 Cal.App.4th at p. 176.) In *Fitz*, the unconscionable agreement made no reference to any particular *type of relief* but exempted from arbitration the *type of claims* only an employer would bring: "'disputes over confidentiality/non-compete agreements or intellectual property rights.'" (*Fitz*, *supra*, 118 Cal.App.4th at p. 709.) Here, the Agreement does not exempt from arbitration any claims that Forever 21 might want to pursue, and the provision allowing the parties to obtain provisional remedies in court is not tied to any type of claim.

Second, we cannot say that Forever 21 is more likely to seek injunctive relief than an employee. In the present case, for example, plaintiff alleged nine claims. Six of those claims are based on the FEHA, which authorizes an employee to seek injunctive relief. (See Gov. Code, § 12965, subd. (c)(3); *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 131–132.) The seventh claim, under the Ralph Civil Rights Act of 1976 — which protects an individual's right to be free from violence and intimidation by threat of violence — also authorizes a plaintiff to obtain an injunction. (See Civ. Code, § 52, subd. (c)(3); *id.*, § 51.7.) Further, as *Stirlen* pointed out, the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621–634) expressly permits an employee to seek "equitable relief" (*id.*, §§ 626(c)(2), 633a(c)), and, under the public accommodation provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101–12213), injunctive relief is available (*id.*, § 12188(a)(2)). (See *Stirlen*, *supra*, 51 Cal.App.4th at

p. 1540.) Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e–4) also authorizes injunctive relief (*id.*, § 2000e-5(g)(1)).

Third, because the Agreement is subject to the CAA, not the FAA, section 1281.8 would apply even if it were not expressly mentioned in the Agreement. Put another way, an arbitration agreement governed by the CAA permits a party to seek provisional remedies, such as injunctive relief, in court regardless of whether section 1281.8 is mentioned in the agreement. This is so because, as noted, section 1281.8 is part of the CAA. We fail to see how the Agreement's express incorporation of section 1281.8 is unconscionable given that, if the statute were not expressly incorporated, it would be read into the Agreement. We are aware of no authority for the proposition that a right conferred by the CAA may be unenforceable.

c. Forever 21's Protected Information

The Agreement provides: "Both parties agree that the Company has valuable trade secrets and proprietary and confidential information. Both parties agree that *in the course of any arbitration proceeding* all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information." Plaintiff argues that this provision is unduly harsh and one-sided. We conclude otherwise.

For one thing, the confidentiality provision is narrow: It applies only to a trade secret or similar information that might be publicly disclosed in connection with an arbitration proceeding. Analogous provisions, which protect confidential information related to a specific proceeding, are valid. (See *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869 [where parties had entered into confidentiality agreement concerning mediation of dispute, trial court properly refused to dismiss claim against defendant for breaching agreement by publicly revealing mediator's evaluation of case]; *Roe v. State of California* (2001) 94 Cal.App.4th 64, 67–73 [trial court erred in dismissing claim of real estate appraiser, who alleged that State of California and Office of Real Estate Appraisers had breached confidentiality stipulation by "publishing letters to complainants" about investigation, findings, and conclusions regarding disciplinary proceeding brought against appraiser].)

The confidentiality provision is also consistent with the duties imposed by the Uniform Trade Secrets Act (Civ. Code, §§ 3426–3426.11). For instance, if a person discloses or uses the trade secret of another, he or she may be liable for actual damages or a royalty, plus exemplary damages. (See *id.*, § 3426.3.) In addition, under the act, "a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include . . . holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval." (*Id.*, § 3426.5.)

Further, by analogy, a protective order is appropriate to protect trade secrets and other confidential information. (See Rylaarsdam et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶¶ 8:1456, 8:1456.20, pp. 8H-16 to 8H-17, 8H-18; *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1142–1146.)

Finally, "[t]he greater contains the less." (Civ. Code, § 3536.) While, as noted, the provision here is limited to a specific proceeding, courts have upheld confidentiality and nondisclosure agreements of general application. "Requiring employees to sign confidentiality agreements is a reasonable step to ensure secrecy." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454; see *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 62, fn. 38 [cause of action for breach of contract may be available against employee where he or she discloses information that does not qualify as a trade secret "if the information is protected under a confidentiality or nondisclosure agreement, provided the agreement is not an invalid restraint [on engaging in a lawful profession, trade, or business]"]; *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1429–1430 [confidentiality and nondisclosure agreements in employment context are valid as long as they do not constitute a restraint on engaging in a lawful profession, trade, or business].)

Forever 21's use of "all necessary steps" to protect its trade secrets and proprietary and confidential information is all the more important because it markets products in the clothing industry, and clothing designs are not entitled to copyright protection. (See *Fashion Originators Guild v. Federal Trade Com'n* (2d Cir. 1940) 114 F.2d 80, 83–84;

Jovani Fashion, Ltd. v. Cinderella Divine, Inc. (S.D.N.Y. 2011) 808 F.Supp.2d 542, 547–549; *Aldridge v. The Gap, Inc.* (N.D.Tex. 1994) 866 F.Supp. 312, 314–315.)

d. Arbitration Notwithstanding Agreement's Unenforceability

The Agreement states that arbitration will be conducted pursuant to the rules of the American Arbitration Association (AAA) for the resolution of employment disputes, but if those rules are found unenforceable, the arbitration will proceed under the CAA.

Plaintiff interprets this provision to mean that if a court declares *the Agreement* unenforceable, an employee's claims must still be arbitrated. That contention is without merit. The provision refers only to the invalidation of *AAA rules*, not the validity of *the Agreement*. Further, assuming plaintiff's interpretation of the provision is correct, the Agreement is the source of the parties' obligation to arbitrate disputes. If the Agreement is unenforceable, there is no basis to compel arbitration under any rules or statute. The provision regarding the AAA rules simply provides an alternative means of arbitration if those rules are unenforceable for some reason. There is nothing unconscionable about designating an alternative arbitral forum should the rules of the preferred dispute resolution provider be declared invalid. And such a result is unlikely in any event because AAA rules are fair. (See *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1130 & fn. 21 [AAA rules governing administrative fees, discovery, and remedies are fair]; *In re Poly-America, L.P.* (Tex. 2008) 262 S.W.3d 337, 358 ["'[Claimant] has not adequately demonstrated why arbitration under the AAA rules would deny it a fair opportunity to present its claims.'"]; *Amisil Holdings Ltd. v. Clarium Capital Management* (N.D.Cal. 2007) 622 F.Supp.2d 825, 830 [AAA rules permit adequate discovery]; *Lucas v. Gund, Inc.* (C.D.Cal. 2006) 450 F.Supp.2d 1125, 1131–1134 [approving use of AAA rules because they are fair]; *Andrews v. Education Ass'n of Cheshire* (D.Conn. 1987) 653 F.Supp. 1373, 1379 ["the procedures for selecting arbitrators under the AAA Rules are fair and leave little room for even the appearance of bias"].)

In sum, the Agreement is not unconscionable, and the trial court therefore erred in denying the motion to compel arbitration.

III

DISPOSITION

The order is reversed, and, on remand, the trial court shall enter a new order granting the motion to compel arbitration. Appellants are entitled to costs on appeal.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 633 W. 5th Street, 26th Floor, Los Angeles, CA 90071.

On **January 28, 2013,** I served the documents described below in the manner described below:

PETITION FOR REVIEW

on interested parties in this action, by placing a true copy/copies thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed January 28, 2013, at Los Angeles, California.

BY: Mark Joseph Valencia

SERVICE LIST

Maribel Baltazar v. Forever 21, Inc., et al.
Supreme Court of California

1. Mrs. Rebecca J. Smith
   Gilbert Kelly Crowley & Jennett LLP
   1055 West Seventh Street, Suite 2000
   Los Angeles, CA 90017-2577

   Attorney for Appellants, Forever 21, Inc,
   Forever 21 Logistics, LLC, Herber Corleto,
   and Darlene Yu

   [ONE COPY SERVED]
   [U.S. PRIORITY MAIL]

2. California Court of Appeal, Division One
   Ronald Reagan State Building
   300 S. Spring Street, 2nd Floor, North Tower
   Los Angeles, CA 90013

   [ONE COPY SERVED]
   [U.S. PRIORITY MAIL]

3. Los Angeles County Superior Court
   Clerk – Judge Raul A. Sahagun
   12720 Norwalk Blvd.
   Norwalk, CA 90650-3188

   [ONE COPY SERVED]
   [US PRIORITY MAIL]

4. State Solicitor General
   Office of Attorney General
   1300 "I" Street
   Sacramento, CA 95814-2919

   [ONE COPY SERVED]
   [US PRIORITY MAIL]