#S208345

IN THE SUPREME COURT OF CALIFORNIA

MARIBEL BALTAZAR,

Plaintiff and Respondent,

vs.

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

Defendants and Appellants.

After a Decision By the Court of Appeal,

Second Appellate District, Division One

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

RESPONDENT BALTAZAR'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

On August 4, 2011, Jane Doe ("Plaintiff" or "Respondent" or "Maribel Baltazar") sued Forever 21, Inc. ("Forever 21, Inc."), Forever 21 Logistics, LLC ("Forever 21 Logistics"), Raul Martinez ("Mr. Martinez"), Darlene Yu ("Ms. Yu"), and Herbert Last Name Unknown, subsequently identified as Herber Corleto ("Mr. Corleto.") ("Defendants.") (I CT 3-50.)[1] Plaintiff alleged violations of the Fair Employment Housing Act (sexual harassment, racial harassment, failure to prevent harassment, and retaliation), violations of Civil Code §51.7 and §52, and claims for constructive discharge. (*Ibid.*) On September 8, 2011, Forever 21, Yu, and Corleto filed a motion to compel arbitration. (I CT 59.) On October 7, 2011, the trial court denied the motion. (I CT 233-235.) Defendants Forever 21, Yu and Corleto ("Appellants") filed a notice of appeal on November 3, 2011. (I CT 236.)

It should be well emphasized that the trial court correctly and justly denied defendants' motion to compel arbitration, deeming it both procedurally and substantively unconscionable. (I CT 234-235.) The trial court appropriately reviewed Plaintiff's *uncontroverted* declaration and accurately concluded that Plaintiff was unfairly coerced and pressured to sign the arbitration agreement, as a condition for employment. (I CT 206-207, 234-235.) The trial court, likewise, correctly ruled that there was a high degree of procedural unconscionability, and therefore, only a small degree of substantive unconscionability was necessary in order to deem the arbitration agreement as unconscionable, and thereby unenforceable. (I CT 235 ("Based upon the strength of that showing, plaintiff needs only some evidence of substantive unconscionability.")

[1] For purposes of this brief, Forever 21 Logistics, LLC and Forever 21 Inc. will be collectively referred to as "Forever 21."

The Court of Appeal, however, erroneously applied the incorrect standard in assessing substantive unconscionability, and using that standard, found no substantive unconscionability ***anywhere*** in the Forever 21 arbitration agreement with Plaintiff Baltazar. (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 225.) Despite years of consistent case law that allowed the Courts to find substantive unconscionability where the terms are found to be **one-sided** or unduly harsh or oppressive, the Court of Appeal raised the threshold for substantive unconscionability. (*Ajamian v. CANTORCO2e, LP* (2012) 203 Cal.App.4th 771, 797; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1147; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 824-825; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113, 117-118, 121, 126.) That is, the *Baltazar* Court of Appeal ruled that substantive unconscionability can **only** be shown when the contract terms are: (1) overly harsh **or** (2) so one sided as to shock the conscience." (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at p. 231 (emphasis added).)

This approach should be rejected because it contradicts case law regarding the sliding scale approach in assessing *both* procedural and substantive unconscionability. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655; *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114, 119; *Mercuro v. Sup.Ct. (Countrywide Secur. Corp.)* (2002) 96 Cal.App.4th 167, 175.) That is, if there is an arbitration agreement with a significant amount of procedural unconscionability, the amount of substantive unconscionability to be shown, via the sliding scale analysis, is small. The *Baltazar* court, however, ignores this and still requires that the contract terms be "so one sided as to shock the conscience" or "overly harsh" in order to demonstrate

that there is *any* substantive unconscionability. (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 231.)

Be that as it may, there should still be little question that the arbitration agreement between Forever 21 and Ms. Baltazar, not only has a high degree of procedural unconscionability, but is indeed substantively unconscionable, and the degree of substantive unconscionability is significant. It is undisputed that the arbitration agreement only enumerates employee-initiated actions as arbitrable, in the exact same fashion that led the *Pinedo* Court to rule that such a practice is "inherently one-sided." (*Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal.App.4th 774, 781.)

In addition to Forever 21's arbitration agreement only enumerating employee-initiated claims, it specifically allows the parties to petition the Court for injunctive relief pursuant to *California Civil Code* §1281.8, further allowing Forever 21 the option to avoid arbitration in matters relating to the misappropriation of trade secrets, intellectual property violations, and issues regarding confidentiality – all claims that are typically asserted by employers. (I CT 216.)

If that were not enough to evidence substantive unconscionability, the arbitration agreement actually requires the employee, Ms. Baltazar, to take "all necessary steps" to protect Forever 21's "valuable trade secrets and proprietary and confidential information." (I CT 216.) The provision, however, offered no reciprocity to the employee that the Company would *likewise* take "all necessary steps" to protect any confidential information regarding the employee, or the prosecution of her claims.

Therefore, the issues raised by Plaintiff Baltazar in her petition to the Supreme Court include the following:

- 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?

Plaintiff/Respondent Maribel Baltazar will now show that the trial court was indeed correct, and that the arbitration agreement in issue is unconscionable. Mrs. Baltazar will further show that the Court of Appeal narrowed the legal test for substantive unconscionability, and even under the Court of Appeal's own standard, it still did not have the correct legal and factual justification to reverse the trial court.

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 Court of Appeal consequently ordered the case to arbitration.

Plaintiff Maribel Baltazar filed her Petition for Review to the California Supreme Court on January 30, 2013. The California Supreme Court granted review on March 20, 2013. On August 28, 2013, the California Supreme Court ordered that Plaintiff Baltazar file her opening brief within 30 days.

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. (*Ibid.*) 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. (*Ibid.*)

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." (*Ibid.*) 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." (*Ibid.*)

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." (*Ibid.*) Mrs. Baltazar, at all times, found these comments unwelcomed, highly offensive, and inflammatory. (*Ibid.*) 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." (*Ibid.*) Mrs. Baltazar further alleges that Ms. Yu would refer to Mrs. Baltazar as "all you Mexicans" and complain about the way "Mexicans" write. (*Ibid.*) Mrs. Baltazar also alleges that Ms. Yu physically intimidated Mrs. Baltazar, by using her shoulder to shove Mrs. Baltazar. (*Ibid.*) 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 approaching her from behind as she was bending forward and drinking water from a drinking fountain – as she was bending forward, Mr. Martinez, from behind, rubbed 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 she 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. (*Ibid.*) 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." (*Ibid.*)

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"). (*Ibid.*) 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. (*Ibid.*) 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. (*Ibid.*) Mrs. Baltazar thereafter presented her employment application to Mr. Chung. (*Ibid.*)

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. (*Ibid.*) Mrs. Baltazar specifically conveyed to Mr. Chung that she did not want to sign the arbitration agreement. (*Ibid.*) Mr. Chung told Mrs. Baltazar that she had to sign it. (*Ibid.*) Mrs. Baltazar then shook her head without saying a word. (*Ibid.*) 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. (*Ibid.*)

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. (*Ibid.*) After Mrs. Baltazar signed the arbitration agreement, Forever 21 immediately hired her, and she started work that day. (*Ibid.*)

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. (*Ibid.*) Mrs. Baltazar thereafter approached Mr. Chung and asked if it was possible for the entire employment application to be in Spanish. (*Ibid.*) Mr. Chung informed Mrs. Baltazar that he would talk to Human Resources. (*Ibid.*) 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. (*Ibid.*) He further informed Mrs. Baltazar that "Human Resources wants everything signed." (*Ibid.*)

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. (*Ibid.*) Mrs. Baltazar and the prospective employees walked together to the main warehouse office. (*Ibid.*) Mrs. Baltazar informed Mr. Chung that the prospective employee did not want to sign the arbitration agreement. (*Ibid.*) Mr. Chung again confirmed to Mrs. Baltazar that all employees must sign the arbitration agreement. (*Ibid.*) The prospective employee then signed the arbitration agreement and departed from the main warehouse. (*Ibid.*) At this point, Mrs. Baltazar was

in the office with both Mr. Jeff Shin and Mr. Chung. (*Ibid.*) Mrs. Baltazar again asked about the arbitration agreement. (*Ibid.*) 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." (*Ibid.*)

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.

NEITHER THE FEDERAL ARBITRATION ACT, NOR THE CALIFORNIA ARBITRATION ACT, APPLY TO AN UNENFORCEABLE ARBITRATION AGREEMENT, AND THEREFORE THE QUESTION OF ENFORCEABILITY SHOULD BE THE FIRST ISSUE ANALYZED.

It should be well noted that not all compulsory arbitration agreements will be enforced. They must still comply with traditional contract law principles, including the doctrine of unconscionability. (*Fergunson v. Countrywide Credit Indus., Inc.* (9th Cir. 2002) 298 F.3d 778, 782; *Alexander v. Antony Intl'l, LP* (3rd Cir. 2003) 341 F.3d 256, 264.) When a party challenges an arbitration provision as unconscionable and hence invalid, the issue is for the court to decide, applying relevant state contract law principles. (*Doctor's Assocs., Inc. v. Casarotto* (1996) 517 US 681, 686-687.) Accordingly, it is the court that decides challenges to the validity of the arbitration agreement, assessing the existence of either illegality or unconscionability. (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 US 440, 445-446.)

Appellants argued to the Court of Appeal that it should reverse the trial court because Forever 21's arbitration agreement is enforceable pursuant to the Federal Arbitration Act ("FAA") and California Law.

(Appellants' Opening Brief to Court of Appeal ("AOB"), p. 14-17.) Likewise, the Court of Appeal, in its opinion discussed in detail both the FAA and the California Arbitration Act ("CAA"); it then ultimately ruled that the CAA applies to this pending action. (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 228-230.) Plaintiff Balatzar asserts that any such determination as to whether the FAA or CAA applies is simply premature. The first concern is to determine whether the purported arbitration agreement is enforceable, and if it is unenforceable because the contract is unconscionable, then there is no need to determine whether the FAA or CAA applies – as those laws only apply to *enforceable* arbitration agreements, not *unconscionable* or *unenforceable* contracts.

Plaintiff is not arguing that conscionable arbitration agreements must avoid arbitration, but is simply arguing that *unconscionable* arbitration agreements are unenforceable, and thus if unenforceable, there is no arbitration. Accordingly, both the appellants, as well as the Court of Appeal's arguments related to the backdrop of the FAA and CAA are inapplicable, *until it is first determined that the arbitration agreement is an enforceable conscionable contract.*[2]

[2] It is anticipated that Appellants will argue, as they did in their opening brief to the Court of Appeal, that arbitration is a favored means of settling disputes and that *conscionable* arbitration agreements shall be enforced. (AOB, p. 14-17.) It is also anticipated that they will argue, as they did to the Court of Appeal, that there is a strong policy favoring arbitration. (AOB, p. 35-38.) However, such arguments assume that the arbitration agreement is conscionable. Courts have held that arbitration agreements are to be rescinded on the same ground as other contracts. "In this respect, arbitration agreements are ***neither favored nor disfavored,*** but simply placed on an equal footing with other contracts. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 126-127.)

II.

FOREVER 21's ARBITRATION AGREEMENT WITH MRS. BALTAZAR IS UNCONSCIONABLE.

A. Though Unconscionability Requires The Existence of Both Procedural and Substantive Unconscionability, Such Elements Need Not Exist in the Same Degree.

Under California law, the doctrine of unconscionability arises where there is an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favored to the other party." (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1328.) Whether an agreement is unconscionable depends on the circumstances at the time it was made. (*Cal. Civil Code* §1670.5(a); *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655.)

Unconscionability has both a procedural and a substantive element; and both elements must be present before a contract provision will be rendered unenforceable on grounds of unconscionability. (*Alexander v. Anthony Int'l LP* (3rd Cir. 2003) 341 F3d 256, 265; *Kinney v. United Health Care Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) The procedural and substantive elements need **not** be present in the same degree: "The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and **vice versa**." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 119 (emphasis added).) In *Mercuro,* the Court found that even though there was only a minimal showing of substantive unconscionability, the Court nevertheless found that

the arbitration agreement was unenforceable because of the significant existence of procedural unconscionability. (*Mercuro v. Sup.Ct. (Countrywide Secur. Corp.)* (2002) 96 Cal.App.4th 167, 175 ("Given Countrywide's highly oppressive conduct in securing Mercuro's consent to its arbitration agreement, he need only make a minimal showing of the agreement's substantive unconscionability.") "Courts use a 'sliding scale' approach in assessing the two elements." (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655 citing *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114.) Hence, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid.*)

With regards to Mrs. Baltazar and Forever 21, the procedural unconscionability in Forever 21's arbitration agreement is significant. Consequently, only some substantive unconscionability must be shown in order for the arbitration agreement to be unconscionable. This approach confirms the trial court's order that supported its decision to deny Forever 21's motion to compel arbitration. Specifically, the trial court ruled: "Based upon the strength of that showing [procedural unconscionability], plaintiff needs only some evidence of substantive unconscionability. [CT 235].

B. Forever 21's Arbitration Agreement is Procedurally Unconscionable.

There is a high degree of procedural unconscionability in Forever 21's arbitration agreement with Plaintiff Baltazar. "Procedural unconscionability" concerns the manner in which the contract was

negotiated. It may result from either oppression or surprise. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1287; *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F3d 1066, 1073.) The oppression component arises from an inequality of bargaining power and an absence or real negotiation or meaningful choice on the part of the weaker party. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329). Oppression results when there is no real negotiation of contract terms because of unequal bargaining power. (*Parada v. Sup. Ct.* (2009) 176 Cal.App.4th 1554, 1572.) When a contract is found to be oppressive, awareness of its terms or lack of surprise does not preclude a finding of procedural unconscionability. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 663.)

Courts have consistently held that an arbitration agreement is procedurally unconscionable when it is presented as a condition of employment. Hence, the *Ingle* Court confirmed the ruling in *Armendariz* and stated: "The California Supreme Court's decision in *Armendariz* is also instructive in this case. The *Armendariz* court held that it is procedurally unconscionable to require employees, **as a condition of employment**, to waive their right to seek redress of grievances in a judicial forum. (*Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F3d 1165, 1171-1172, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115 (emphasis added).)

Subsequent to both *Armendariz* and *Ingle*, the *Martinez* court in 2004, held,

> "It is undisputed Martinez was required to execute the arbitration agreement as a

> prerequisite of his employment by FireMaster. . . . Indeed, when he informed FireMaster's Human Resources representative he would prefer not to sign the agreement, Martinez was told "[he] could not work at FireMaster if [he] did not sign the document." **An arbitration agreement that is an essential part of a "take it or leave it" employment condition, without more, is procedurally unconscionable.** (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-115; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1534.) The arbitration agreement meets that definition and is **clearly adhesive and procedurally unconscionable.**" (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114 (emphasis added).)

Again, even subsequent to *Martinez,* the *Trivedi* court *again* confirmed that procedural unconscionability occurs when the stronger party drafts the contract and presents it to the weaker party on a "take it or leave it basis." (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393.)

Here, with Mrs. Baltazar, there should be little debate that the arbitration agreement is procedurally unconscionable. In fact, both the trial court and the Court of Appeal held that Forever 21's arbitration agreement was indeed procedurally unconscionable. The trial court specifically stated: "Plaintiff's declaration establishes, ***and defendants proffer no evidence to the contrary,*** that her agreement to arbitrate was required. She has established procedural unconscionability." (CT 235 (emphasis added).) Likewise, the Court of Appeal held: "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." (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 234.)

Moreover, there is undisputed substantial evidence to support Mrs. Baltazar's contentions, since Forever 21 did not even attempt, with counter-declarations, to dispute the facts asserted in Plaintiff's declaration. (I CT 206-207, 235, ln. 4-6.) It is accordingly undisputed that Forever 21 pressured Plaintiff to sign the arbitration agreement as a condition of employment. The presentation of the arbitration agreement is without question in a "take it or leave it" context.

Firstly, and most importantly, Forever 21 would not hire Mrs. Baltazar unless she actually signed the arbitration agreement. Specifically, Mrs. Baltazar evidences that when she filled out the employment application, she noticed on pages eight and nine, that there was an "arbitration agreement." (I CT 206, ln. 21-26.) On page nine, there was a signature block that was already highlighted in yellow for her to sign. (*Ibid.*) She 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. (*Ibid.*) Mrs. Baltazar thereafter presented her employment application to Mr. Chung. (*Ibid.*)

Mr. Chung sat down and reviewed her employment application. (I CT 207, ln. 1-16.) Mrs. Baltazar noticed that when Mr. Chung reviewed the unsigned arbitration section, Mr. Chung gave her back the entire employment application and told her to sign the arbitration agreement. (*Ibid.*) Plaintiff Baltazar specifically communicated to Mr. Chung that she did not want to sign the arbitration agreement. (*Ibid.*) Mr. Chung told her that she had to sign it. (*Ibid.*) She then shook her head without saying a word. (*Ibid.*) Mr. Chung then approached Mr. Shin, a Forever 21 manager, and they in front of Mrs. Baltazar conversed in Korean, which Mrs. Baltazar did not understand. (*Ibid.*)

Mr. Shin then specifically told Mrs. Baltazar, "sign it or no job." (*Ibid.*) Therefore, Mrs. Baltazar, who was unemployed, and recently

separated from her husband (whom she later reconciled with), and who needed income to support her children, and clearly in a weaker position as compared to the company Forever 21, had no meaningful choice but to sign the arbitration agreement in order to attain employment necessary to provide for her family. (I CT 206-207.)

Secondly, Forever 21 essentially concedes that Plaintiff signed the arbitration agreement the day of employment. Forever 21's own Human Resources representative confirms this, stating that Plaintiff signed the arbitration agreement the same day she became employed. (I CT 63.) Furthermore, all one has to do is review the eleven page employment application, which includes the arbitration agreement, to further conclude that signing the arbitration agreement was a condition for employment. (I CT 210-219.) Accordingly, there is no dispute that the arbitration agreement was provided to Plaintiff as a condition of employment.

Thirdly, procedural unconscionability exists when the employer fails to provide the rules of the arbitration to the employee. (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721.) Here, there is absolutely no evidence that Forever 21 provided the arbitration rules to Plaintiff. Though selected rules were attached as an exhibit to defendants' motion to compel arbitration, the rules were not provided to Plaintiff at the time she signed the employment agreement. In Plaintiff's declaration, Mrs. Baltazar does not identify ever receiving any arbitration rules whatsoever, but rather states that she received an eleven page employment application. (I CT 206-219.)

Therefore, in light of Plaintiff's zero bargaining power, and Forever 21's insistence that Plaintiff sign the agreement as a condition of employment, procedural unconscionability clearly exists – and its existence is significant in light of the oppression. This is not a case where the

oppression is strictly related to the language of the arbitration agreement, but rather, the conduct is severe. Two Forever 21 managers, aware of Plaintiff's objection to the arbitration agreement, and after discussing her objections amongst themselves, *still* nevertheless insist that she sign the arbitration agreement. (I CT 206-207.) Mr. Shin specifically tells Plaintiff that if she does not sign the agreement, she will not have a job. (*Ibid.*) This was all done after Plaintiff, both verbally and non-verbally (shaking the head) objected to signing the agreement. (*Ibid.*) This was all done after the signature block in the arbitration agreement was already highlighted in yellow for Plaintiff to sign, which already indicated that signing it was a condition of employment. (*Ibid.*) In addition, the oppression is further heightened by Mrs. Baltazar financial situation, as well as her family situation. (*Ibid.*) The oppression here is significant, as was correctly concluded by the trial court. (I CT 235.)

C. Forever 21's Arbitration Agreement is Substantively Unconscionable.

1. The Court of Appeal in the *Baltazar* Action Did Not Apply the Correct Test To Assess the Existence of Substantive Unconscionability.

"Substantive unconscionability" refers to terms that unreasonably favor one party. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) In assessing substantive unconscionability, the "paramount consideration" is mutuality of the obligation to arbitrate. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1287.) "Substantive unconscionability arises when a contract imposes unduly harsh, oppressive, **or one-sided terms**." (*Ajamian v. CANTORCO2e, LP* (2012) 203 Cal.App.4th 771, 797; *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 113 (emphasis added).)

"Substantive Unconscionability focuses on the **one-sidedness or** overly harsh effect of the contract term or clause." (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1147 citing *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 824-825 (emphasis added).)

The Court of Appeal in the *Baltazar* action decided to eviscerate a key component necessary to the determination of substantive unconscionability – that is, eliminate the "one-sidedness" inquiry. The *Baltazar* court in its opinion held the following:

> "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. . . . [citation omitted] Simply put, the contract term must be either (1) overly harsh **or** (2) so one sided as to shock the conscience." (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 231.)

This is a significant deviation from the long standing rule that substantive unconscionability can be shown by simply assessing the **"one sidedness"** of the contract terms. (*Ajamian v. CANTORCO2e, LP* (2012) 203 Cal.App.4th 771, 797; *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 113 (emphasis added).) **Here, for the *Baltazar* Court, it is simply not enough to have terms that are one sided in order to show substantive unconscionability, but in order to evidence substantive unconscionability, one must have "overly harsh" terms or terms that are "so one sided as to shock the conscience."** (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at 231.)

This approach should be rejected because it contradicts case law regarding the sliding scale approach in assessing *both* procedural and

substantive unconscionability. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655; *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114, 119; *Mercuro v. Sup.Ct. (Countrywide Secur. Corp.)* (2002) 96 Cal.App.4th 167, 175.) That is, if there is an arbitration agreement with a significant amount of procedural unconscionability, the amount of substantive unconscionability to be shown, via the sliding scale analysis, is small. The *Baltazar* court, however, ignores this and still requires that the contract terms be "so one sided as to shock the conscience" or "overly harsh" in order to demonstrate that there is *any* substantive unconscionability. The phrase "shock the conscience" is exactly what it means – terms that are so blatantly unfair and unreasonable that there is a *high degree* of substantive unconscionability. The *Baltazar* approach essentially eradicates the sliding scale approach, and requires that if there is a significant degree of procedural unconscionability, there must then still be a *high degree* of substantive unconscionability, because according to the *Baltazar* court, one must still demonstrate that terms are "overly harsh" or "so one sided as to shock the conscience." (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 231.)

Case law has avoided this scenario. That is why, case law, since *Armendariz*, has consistently held that Courts may simply look to the **one-sidedness** of the terms in the contract to determine the existence of substantive unconscionability, as opposed to being required to find that the terms are "overly harsh" or "so one sided as to shock the conscience." (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655; *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24

Cal.4th at p. 114, 119; *Mercuro v. Sup.Ct.* (*Countrywide Secur. Corp.*) (2002) 96 Cal.App.4th 167, 175.)

Therefore, the threshold inquiry to determine the existence of substantive unconscionability is to assess whether any of the contract terms are: 1) one sided; ***or*** 2) unduly harsh; ***or*** 3) oppressive. Even though the Court of Appeal only assessed the "overly harsh" and "so one-sided as to shock the conscience," Mrs. Baltazar still, nevertheless, proves that a high degree of substantive unconscionability exists.

2. The Ruling in the *Pinedo* Court Is Indicative that the Arbitration Agreement in the *Baltazar* Action is One-Sided and Overly Harsh – Therefore the Agreement is Substantively Unconscionable.

Substantive unconscionability exists where the terms are written to favor one party. (*Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at 1071.) Specifically, the *Pinedo* court found an arbitration agreement to be one-sided because, even though the arbitration agreement in question required both parties to arbitrate, the arbitration agreement was inherently one sided because it only enumerated claims that were brought by employees, not employers. (*Pinedo v. Premium Tobacco Stores, Inc.,* (2000) 85 Cal.App.4th 774, 781.)

In *Pinedo*, the arbitration agreement required both the employer and the employee to arbitrate "any controversy or dispute." (*Pinedo v. Premium Tobacco Stores, Inc.,* 85 Cal.App.4th at 775.) The listed disputes in the *Pinedo* arbitration agreement were one sided, however. The arbitration agreement in *Pinedo* stated that following controversies were subject to arbitration:

> "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.*, 85 Cal.App.4th at 775.)

The *Pinedo* Court, finding that the arbitration agreement was unconscionable, specifically ruled that such language was one sided. Hence:

> "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.)

Accordingly, substantive unconscionability, in relation to the enumeration of claims, clearly exists in *Pinedo*.

In relation to the *Baltazar* action, the "disputes" that are enumerated in Forever 21's arbitration agreement, just like in *Pinedo,* are claims that are typically brought *against* employers. (I CT 216.) Conveniently to Forever 21, ***employer-initiated*** claims, such as intellectual property claims, trade secret claims, confidentially claims, and non-compete claims, are all omitted in the description of "disputes." Nowhere does Forever 21 enumerate *any* employer-initiated disputes. (*Ibid.*)

Hence, the disputes that are enumerated in Forever 21's purported arbitration agreement are as follows:

> "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.)

Since both the *Pinedo* arbitration agreement, as well as Forever 21's arbitration agreement clearly enumerate employee-initiated claims, and both fail to clearly enumerate employer-initiated claims, there is no question that there is one-sidedness that make the terms substantively unconscionable because the terms, as framed, are indeed, inherently unfair in both arbitration agreements.

Hence, by identifying these disputes, Forever 21 can guarantee an arbitration for claims that *it* wants to arbitrate, such as discrimination and retaliation actions. For claims, however, that it does not want to arbitrate, they can subsequently argue that such claims were not properly enumerated, and arbitration does not apply to the employee. These tactics are overly harsh and oppressive to the employee because it provides an avenue for Forever 21 to avoid arbitration for unidentified employer-initiated claims.

Appellants are expected to contend, as they did in their opening brief with the Court of Appeal, that even though the arbitration agreement only enumerates employee-initiated claims, that does not mean that the employer does not have to submit to arbitration regarding "any disputes or controversies" arising out of the employment relationship. (AOB, p. 22.) Forever 21 and the Court of Appeal argue that the enumerated disputes were prefaced by "including but not limited to," language, and on that basis, the disputes include employer-initiated claims. (AOB, p. 24; *Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at 234.)

These arguments, however, are inconsistent with the actual list of enumerated claims, which are solely employee-initiated claims, such as claims for discrimination, harassment, and employee benefits. (I CT 216.) Furthermore, the "including but not limited to" language applies to additional claims, not listed, that are *employee-initiated*. Hence, all of the claims identified are employee initiated, and the "including but not limited to" is overly inclusive language to ensure that if an employee does in fact bring an unidentified claim that is not enumerated, such a claim would *still* be subject to arbitration because of the catch-all phrase "including but not limited to" – thereby continuing to benefit Forever 21.

By Forever 21 taking the position that the "included but not limited to language" applies to employer-initiated actions, such an argument reveals how one-sided, overly harsh, and oppressive the arbitration agreement actually is, since Forever 21 can sit on the fence, argue one position, and at its convenience, argue a contradictory position. Here, on this appeal, they are arguing that the "included but not limited to" language may include employer-initiated claims, and therefore the arbitration

agreement is not one-sided. *Yet,* in the event that they sue an employee for a claim that was not enumerated, and Forever 21 did not want to arbitrate, they could argue that the "included but not limited to" language was only drafted to apply to employee initiated claims, and this is proven by the list of enumerated claims, which are all employee initiated. (I CT 216.)

If it was the intent of Forever 21 to include employer-initiated claims in the list of disputes, *they would have simply done so*. But they purposely failed to do so, and a reasonable inference is that they did not want to restrict their judicial remedies in relation to employer-initiated claims, ***or unequivocally be bound to arbitration.*** In essence, if they specifically identified the employer-initiated claim, then there is no question that they must arbitrate. Such tactics clearly indicate that the arbitration agreement is one-sided, overly harsh, and oppressive because mutuality is lacking. Therefore the terms are substantively unconscionable, and solely written to benefit Forever 21, to the significant detriment to those employees who sign it because Forever 21 can maneuver its obligation to arbitrate.

3. Forever 21's Arbitration Agreement is Also Substantively Unconscionable Because It Allows the Employer to Seek Injunctive Relief – Relief that is Typically Brought by the Employer.

The *Trivedi* Court held that an 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. (*Trivedi v. Curexo Tech. Corp* (2010) 189 Cal.App.4th 387, 396-397.) Specifically, the Trivedi 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. Accordingly, 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)." (*Trivedi v. Curexo Tech. Corp,* 189 Cal.App.4th a p. 396-397.)

With regards to Forever 21's arbitration agreement with Mrs. Baltazar, there is no question that the agreement allows for injunctive relief:

> "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.)

Specifically, *California Code of Civil Procedure* §1281.8 permits a party to file an application to the Court "for preliminary injunctions and temporary restraining orders pursuant to Section 527." (*Cal. Civ. Proc. Code* §1281.8(a)(3).) Therefore, Forever 21, without restriction, may seek injunctive relief regarding a wide variety of employer-related issues, including motions to restrain the misappropriation of trade secrets, motions to restrict former employees from competing, and the prevention of purported intellectual property violations. Forever 21 is expected to argue that employees may also likewise seek the same judicial remedies –

realistically, however, and in practice, it is unlikely that an employee who is making $8.00 per hour will bring injunctive relief for trade secrets, or allege intellectual property violations, as compared to an international clothing merchandizer such as Forever 21.

a. The Court of Appeal Erroneously Asserts that the *Mercuro* and *Fitz* Cases Do Not Support the *Trivedi* Rationale.

The *Baltazar* Court erroneously argues 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.*, *supra,* 212 Cal.App.4th at p. 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 <u>*rather*</u>, it cited *Mercuro* and *Fitz* to support the proposition that employers are <u>more likely</u> 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.)

The *Mercuro* court stated:

> "Thus the agreement compels arbitration of the claims employees are most likely to bring against Countrywide. On the other hand, the agreement specifically excludes '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 exempts from arbitration the claims Countrywide is most likely to bring against its employees.
>
> In *Armendariz*, the court observed substantive unconscionability may manifest itself if the form of "an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." (*Mercuro v. Superior Court, supra,* 96 Cal.App.4th at p. 176)

Likewise, the *Fitz* court stated:

> "The ACT policy is unfairly one-sided because it compels arbitration of the claims more likely to be brought by Fitz, the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by NCR, the stronger party. NCR argues that both employer and employee are bound by the terms of the agreement, noting that the company must arbitrate claims against the employee for embezzlement and theft, and the employee must arbitrate claims for employment discrimination and wrongful termination. However, "[t]he 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, [the employer]." (Citation Omitted). A substantial portion of the claims NCR is most likely to initiate against employees, 'such as claims that an employee violated a non-competition agreement or divulged confidential information need not be arbitrated.'"(*Fitz v. NCR Corp.*, *supra,* 118 Cal.App.4th at 725.)

Therefore, the references to both the *Mercuro* and *Fitz* cases by the *Trivedi* Court are in fact correct, thereby supporting its rationale and logical

conclusion that employers are more likely to benefit from injunctive relief as permitted in an arbitration agreement. The *Baltazar* Court, however, fails to clash with this proposition and/or offset the validity of this argument, which was the impetus in the *Trivedi* court ruling the way it did.

b. Though Employees May In Theory Seek Injunctive Relief Against Their Employer, In Practice, However, It Is Going to Be Employers Who Actually Seek Injunctive Relief Remedies, Not Employees.

The *Baltazar* Court of Appeal, argued, that it could not say that Forever 21, as an employer, 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"), as well as a cause of action pursuant to *California Civil Code* §51.7 – all of which allow, *in theory,* Mrs. Baltazar to seek injunctive relief. (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at p. 239.)

This argument does not distinguish between potential and actual relief that Mrs. Baltazar is seeking. Despite three different Courts of Appeal arguing that employers are more likely to seek injunctive relief than employees, the *Baltazar* Court, nevertheless, asserts that it cannot say that "Forever 21 is more likely to seek injunctive relief than an employee." (*Trivedi v. Curexo Tech. Corp, supra,* 189 Cal.App.4th a p. 396-397; *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at p. 176; *Fitz v. NCR Corp., supra,* 118 Cal.App.4th at 725.) This argument should be rejected.

First off, in Mrs. Baltazar's 48 page complaint, she specifically, and continuously seeks, monetary damages for lost benefits, lost income, future earnings, as well as compensation for emotional damages. [I CT 3-50.] Nowhere in the complaint does Mrs. Baltazar ask for any type of equitable relief pursuant to *California Government Code* §12965, such as requesting

that Forever 21 "conduct training for all employees, supervisors, and management." (*Cal. Govt. Code* §12965.)

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.

Finally, using logic, experience, and common sense, as the three different Courts of Appeal did, an employer is more likely to seek injunctive relief regarding a wide variety of employer-related issues, including motions to restrain the misappropriation of trade secrets, motions to restrict former employees from competing, and the prevention of purported intellectual property violations. (*Trivedi v. Curexo Tech. Corp, supra,* 189 Cal.App.4th a p. 396-397; *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at p. 176; *Fitz v. NCR Corp., supra,* 118 Cal.App.4th at 725.) Moreover, in practice, it is highly unlikely that an employee who is making $8.00 per hour will bring injunctive relief for trade secrets, or allege intellectual property violations, as compared to an international clothing merchandizer such as Forever 21.

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c. The Court of Appeal Analysis is Further Flawed Because it Prematurely Applied the CAA, When In Fact, The CAA Is Only Applied *After* an Arbitration Agreement is Found to Be Enforceable and Conscionable.

The *Baltazar* court argued that "because the Agreement is subject to the CAA, not the FAA, *Cal. Civ. Proc.* §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 CAA applies only *after* the arbitration agreement is deemed enforceable and conscionable, hence not unconscionable. If the contract, however, is deemed unconscionable and unenforceable, the CAA [including all of its provisions, including §1281.8] is inapplicable, since there is no enforceable arbitration agreement to begin with. Therefore, to argue, that a provision of the CAA would apply to an arbitration agreement *before even making a determination as to whether or not that same arbitration agreement is unconscionable,* is premature, because the inquiry is whether or not the arbitration agreement, *as it is presently written,* is enforceable.

By incorporating and referencing §1281.8 into its arbitration agreement, Forever 21 is essentially attempting to ensure rights prematurely, thereby making it one-sided to favor the employer because employers are more likely to invoke injunctive relief than employees. It is clear that there is no legitimate business interest for this provision to be in the arbitration agreement, and that by itself, makes it substantively unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114, 119 citing *A & M Produce Co* (1982) 135 Cal.App.3d 473, 487 ("unconscionability turns not only on a "one-sided" result, but also on an absence of "justification" for it.").)

Forever 21 should simply just let the law apply by itself, at the right stage, *after the arbitration agreement is deemed enforceable*, as opposed to laying the framework to protect its ability to seek judicial relief for issues including temporary restraining orders, injunctive relief, motions to restrict former employees from competing, and the prevention of purported intellectual property violations.

There is no question that the insertion is one-sided and solely inputted to further insulate an exception to the arbitration agreement that benefits Forever 21 as an employer, and is accordingly substantively unconscionable.

d. Forever 21's Arbitration Agreement is Also One-Sided and Overly Harsh Because It Requires The Parties to Agree that Forever 21 *Has* Trade Secrets, and Further Requires that the Parties Take All Reasonable Steps to Preserve the *Company's* Confidentiality from Public Disclosure, While Yet Offering No Reciprocity to the Employee.

It should be well noted that Forever 21's arbitration agreement is one-sided because it requires that the parties to agree that Forever 21 possesses trade secrets, and further requires that the parties take "all reasonable steps" to preserve Forever 21's confidentiality from public disclosure, while yet failing to offer reciprocity to 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 (emphasis added).)

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. First off, it already implies that Forever 21 has trade secrets (which supports the likelihood that it will seek injunctive relief), even though there is a separate legal inquiry in relation to the determination of whether or not a "trade secret" actually exists. (*Cal. Civ. Code* §3426.1(d).)

Furthermore, to indicate additional one-sidedness, *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. Nowhere in the arbitration agreement does it say that Forever 21 will protect from disclosure an employee's personnel file, her private communications, any written counselings, any disciplinary action, and other private information that may eventually have to be disclosed during arbitration. It should be clear that the provision clearly benefits the employer, denying mutuality towards the employee.

The *Baltazar* Court of Appeal argued that the confidentiality exception was narrow because it only applied to the arbitration proceedings. (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at p. 239.) Plaintiff does not consider the exception to be narrow, but actually,

quite the opposite – broad in nature. The phrase "all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information" is completely ambiguous and overbroad. (I CT 216.) First off, what does "all necessary steps" mean? Do necessary steps apply to what Forever 21 considers to be necessary? What happens if there is a dispute between the employer and employee regarding what is "necessary?" Essentially, once an employee signs the arbitration agreement with Forever 21, Plaintiff agrees that she will voluntarily, willingly, and engage "in all necessary steps," *without even knowing what those steps would be.*

Furthermore, the purported agreement that the company has "valuable trade secrets and proprietary and confidential information" is equally vague and overly broad. The words "proprietary and confidential information" can include just about anything that Forever 21 deems to be private, even though there may not be any such privacy interest. Plaintiff Baltazar by agreeing to take "all necessary steps" to protect anything that Forever 21 deems to be private can range from *anything* from the issues that she litigates, to the evidence that she produces against Forever 21, to other information that simply would not be private, but for Forever 21's insistence that the information be private.

The cases cited by the *Baltazar* Court of Appeal are simply inapplicable. (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at p. 239.) The Court of Appeal cites *Paul v. Friedman* in its opinion, arguing that privacy protections exist for "specific proceedings." The "specific proceedings" that the *Paul* case references is a *mediation*, which is protected by independent statutory law, including but not limited to the

Mediator's Privilege, and an entire body of jurisprudence that is specifically delegated towards mediation proceedings. (*Cal. Evid. Code* §1115-1128.) The proceedings between Forever 21 and Mrs. Baltazar, if the arbitration agreement was enforceable, would entail an arbitration, not a mediation, and therefore such rules do not even apply. Moreover, the facts in *Paul* in no way relate to the facts between Forever 21 and Baltazar – in *Paul,* the allegations involved a cause of action regarding a breach of confidentiality in relation to disclosing privileged materials from a private mediation. (*Paul v. Freidman* (2002) 95 Cal.App.4th 853, 858 ("filed written declarations in a civil proceeding describing statements and evaluations made by the mediator in the course of the mediation").)

The *Baltazar* Court of Appeal's citation to the *Roe v. State of California* is equally unavailing. (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at p. 240.) In *Roe,* the parties had agreed to a confidential settlement agreement, and thereafter, one party alleged breach of confidentiality against the other settling party. (*Roe v. State of California* (2001) 94 Cal.App.4th 64, 70.) The situation in *Roe* is nowhere remotely close to the situation between Forever 21 and Maribel Baltazar – that is, there was no confidential settlement agreement between either of them, and neither alleges breach of any confidential settlement agreement against each other.

The Court of Appeal then references the Uniform Trade Secret Act (*California Civil Code* §§3426-3426.11), asserting that the Court automatically has a duty to "preserve the secrecy of an alleged trade secret by reasonable means. . . ." (*Baltazar v. Forever 21, Inc., supra* 212 Cal.App.4th at p. 240.) Using this rationale, the Court implies that since

there is a confidentiality provision in the arbitration agreement that favors Forever 21, it does not matter because the Court would have to take measures to preserve secrecy anyhow. This rationale however only focuses on the language "trade secret" in the arbitration agreement, ignoring the very broad language "and proprietary and confidential information." (I CT 216.) Furthermore, the arbitration agreement forces the employee to agree that it has "valuable trade secrets", without even any showing that the purported trade secret is indeed a trade secret. There is a threshold inquiry into the determination of whether a purported trade secret is actually a trade secret, and the arbitration agreement, as written, shortcuts this inquiry, and already forces a conclusion that whatever Forever 21 alleges is a trade secret, is indeed a trade secret. (*Cal. Civ. Code* §3426.1(d).) The one-sidedness is clearly evident regarding the trade secret language, and even more evident, by the significant ambiguity in the definition of "proprietary and confidential" information, as well as the unilateral benefit to Forever 21, guaranteeing a waiver of objection from the employee, because pursuant to the arbitration agreement, the employee has already agreed that it will take "all reasonable steps" to preserve the *Company's* trade secrets, as well as whatever it deems as confidential and proprietary information.

4. The Arbitration Agreement Requires Arbitration Even If The Court Orders Otherwise.

The arbitration agreement between Maribel Baltazar and Forever 21 reads:

> "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." (I CT 216.)

Accordingly, the arbitration agreement specifically states that the arbitration shall be regulated by the Model Rules for Arbitration of Employment Disputes of the American Arbitration Association. (*Ibid.*) Therefore, if defendants' motion to compel arbitration is granted, those rules would then apply. If however, the motion to compel arbitration is denied and the arbitration agreement is deemed unenforceable, then there is simply no arbitration, and those Model Rules do not apply. (*Ibid.*)

The arbitration agreement continues to read:

> "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 Disputes shall be resolved by final and binding arbitration under the California Arbitration Act, California Code of Civil Procedure Section 1280, et seq." (I CT 217 (emphasis added).)

It is quite clear that if a Court deems the arbitration agreement as unenforceable, the prescribed rules would also be unenforceable because there is simply no arbitration.

The language in Forever 21's arbitration agreement, however, states that even though such rules are unenforceable (by nature of an unenforceable agreement), "***then*** the parties agree that such Disputes shall be resolved by final and binding arbitration under the California Arbitration Act, California Code of Civil Procedure Section 1280, et seq." (I CT 217.)

Therefore, not only does the arbitration agreement unilaterally choose the arbitration rules (without even providing the rules to Plaintiff), but the arbitration agreement literally states that if any court finds the

arbitration agreement unenforceable, the arbitration must still continue, but under different rules. Such an inclusive relief procedure is against public policy (circumvents a court order) and unreasonably favors Forever 21, since it acts as a fail-safe for Forever 21, further ensuring that employee-initiated claims are exclusively resolved via arbitration. It is apparent that such liberal drafting and authorship clearly indicates that the authors intended to circumvent the court and ensure that arbitration occurs no matter what, albeit under different rules. Hence, the trial court correctly held that "the Agreement also provides that if a court were to find it unconscionable, then the parties would still have to arbitrate (using California rules, rather than the Model Rules.)" The one-sidedness in the provisions offered in the arbitration agreement continue to favor Forever 21, to the detriment of Plaintiff.

III.

CONCLUSION

Plaintiff Baltazar respectfully requests that the California Supreme Court reverse the ruling by the Court of Appeal and order that Forever 21's arbitration agreement is unconscionable, and therefore, unenforceable.

September 26, 2013

Respectfully Submitted,
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CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 10,428 words as counted by the Mircrosoft Word software program used to generate this brief.

September 26, 2013

Mark Joseph Valencia, Esq.

Attorneys for Plaintiff and Respondent, MARIBEL BALTAZAR

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: 355 S. Grand Ave, Suite 2450, Los Angeles, CA 90071.

On **September 26, 2013,** I served the documents described below in the manner described below:

RESPONDENT BALTAZAR'S OPENING BRIEF ON THE MERITS

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 September 26, 2013, at Los Angeles, California.

BY: Mark Joseph Valencia

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