Case No. 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. BC237173 (LOS ANGELES SUPERIOR COURT NO.

VC059254

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Cases

Statutes

Rules

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I. INTRODUCTION

This answer brief by Defendants and Respondents FOREVER 21, INC., FOREVER 21 LOGISTICS, LLC, HERBER CORLETO and DARLENE YU (hereinafter collectively referred to as "Defendants") addresses the petition for review filed by Plaintiff and Petitioner MARIBEL BALTAZAR. (hereinafter "Plaintiff") Plaintiff seeks Supreme Court review pursuant to *California Rules of Court*, rule 8.500(b)(1) which

provides the Supreme Court may order review of an appellate decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Specifically, Plaintiff is seeking review of the Court of Appeal's reversal of the trial court's denial of a petition to compel arbitration and Court of Appeal's order that the underlying action be arbitrated pursuant to a written arbitration agreement. Plaintiff asserts that the Court of Appeal decision in *Baltazar v. Forever 21* (2012) 212 Cal.App.4th 221 "criticized" the *Trivedi* Court (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387) and "ignored" the Pinedo Court (*Pinedo v Premium Tobacco Stores, Inc.* (2000) 85 Cal.App.4th 774) thereby creating a "split in authority" There is however, no split in authority in that the *Pinedo* and *Trivedi* cases cited to by Plaintiff are distinguishable from the facts in the present case both in terms of the underlying facts and the language of the arbitration agreement.

In declining to apply the *Trivedi* analysis, the *Baltazar* Court first noted the cases relied on in *Trivedi* (*Mercuro v. Superior Court* (2002) 96 Cal. App. 4th 174, and *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702 do not stand for the proposition asserted in *Trivedi.* Specifically, the *Baltazar* Court noted that those cases "do not suggest that the incorporation of section *California Code of Civil Procedure* §1281.8 is unconscionable." Additionally, noting the specific facts in the case before them, the *Baltazar* Court noted that it could not "say that Forever 21 is more likely to seek

injunctive relief than an employee" as the court had concluded in *Trivedi.* Finally, since "section 1281.8 would apply even if it were not expressly mentioned in the agreement" the *Baltazar* Court concluded that expressly incorporating what would otherwise be automatically read into the agreement cannot create substantive unconscionability.

The *Trivedi* Court, without explanation veered from the line of cases addressing the issue of whether reserving injunctive relief to the court in arbitration agreements created unconscionability. The *Baltazar* Court in their opinion merely held consistent with the previous cases on the subject matter and placed such issue back on course.

Plaintiff further argues that the *Baltazar* Court ignored the *Pinedo* case and by doing so created a split in authority. Plaintiff erroneously reads the *Pinedo* case for the proposition that an arbitration agreement which only itemizes employee-initiated disputes as arbitrable is inherently unfair and unconscionable. In fact, the *Pinedo* Court did not hold that all arbitration agreements which contain a non-exhaustive list of arbitrable claims were unconscionable, but rather addressed only the language of the agreement before it. The language in the agreement signed by Baltazar is noticeably different from the language in *Pindeo,* most notably providing that items to be arbitrated ***included, but were not limited to*** those set forth in the agreement, Plaintiff has failed to identified any conflict between the *Pinedo* and *Baltazar* cases which would warrant review.

Plaintiff further asserts that review is warranted in that the Baltazar Court's opinion is in conflict this court's opinion in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064. There is not a conflict between the *Baltazar* Court's opinion and the decision in the *Little* case as the *Little* case, while standing for the general proposition that substantive unconscionability exists where the terms of an arbitration agreement are written to favor one party, also recognized that asymmetrical provision which are included for purposes other than the employer's desire to maximize its advantage are not unconscionable.

Review should be denied for the simple reason that Plaintiff's petition neither presents an important question of law nor a necessity to secure uniformity of decision. Accordingly, Defendants respectfully request that Plaintiff's Petition be denied so that the Parties may proceed to arbitration in accordance with the Agreement to which Plaintiff and Defendants agreed to be bound.

II. LEGAL DISCUSSION

A. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW BECAUSE THE PETITION NEITHER ASSERTS AN IMPORTANT QUESTION OF LAW NOR PRESENTS A NECESSITY TO SECURE UNIFORMITY OF DECISION.

1. THE BALTAZAR COURT'S CRITICISM OF THE TRIVEDI DECISION DOES NOT CREAT A REVIEWABLE ISSUED BY THIS COURT.

Plaintiff maintains that "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." (Petition, P. 10) Plaintiff's first basis for seeking review is the erroneous conclusion that substantive unconscionability exists in an arbitration agreement even when the arbitration agreement allows both the employer and the employee to seek injunctive relief. Relying on the *Trivedi* case, plaintiff argues that permitting injunctive relief through the courts in an arbitration agreement favors employers because employers are more likely too seek injunctive relief than employees. Plaintiff further argues in misplaced reliance on *Trivedi* that an agreement's specific incorporation of *California Code of Civil Procedure* §1281.8 renders it unconscionable. In declining to apply the *Trivedi* analysis, the *Baltazar* Court pointed to two incongruities. First the *Baltazar* Court indicated that the cases relied on in *Trivedi* (*Mercuro v. Superior Court* (2002) 96 Cal.

App. 4th 174, and *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702 "do not suggest that the incorporation of section 1281.8 is unconscionable." Rather, *Mercuro* and *Fitz* dealt with carve-outs in arbitration agreements that were cherry picked by the employer and were clearly unilateral. Further the court in *Trivedi* itself specifically noted that the clause under their analysis was substantively unconscionable, in that "[t]he provision regarding injunctive relief also appears to create greater access to injunctive relief than what is permitted under C[ode of] C[ivil] P[rocedure] section 1281.8 [subdivision] (b)" (*Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th at 396) a claim which is not made in regard to the present case. Accordingly the arbitration provisions in *Trivedi* and *Baltazar* significantly differ.

Additionally, the *Baltazar* Court noted that it could not "say that Forever 21 is more likely to seek injunctive relief than an employee." As the Court astutely pointed out, seven of Baltazar's nine claims were brought under statutes that allow her to seek injunctive relief. Interestingly, Plaintiff argues in her Petition that "she does not sue for any type of injunctive relief pursuant to California Government Code §12965, as the *Baltazar* Court opines" (Petition, P. 11) Rather, plaintiff argues she sued for Discrimination and Harassment based on various protected class under the Fair Employment and Housing Act. (Petition, PP 11-12) What plaintiff fails to address is that California Government Code §12965 provides the mechanism by which an individual may enforce or address violations of the

Fair Employment and Housing Act. Accordingly, by virtue of bringing the claims under the Fair Employment and Housing Act, §12965 of the Government Code is implicated. Since §12965 provides for remedies, including injunctive relief, the Baltazar Court's assertion that the injunctive relief provision in the arbitration agreement does not favor employers more so than employees is an appropriate conclusion.

Finally, the Court observed that 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." Expressly incorporating what would otherwise be automatically read into the agreement cannot create substantive unconscionability. Plaintiff appears to argue that including injunctive relief for both parties is unconscionable, regardless of the fact that a statute (1281.8) provides support for the inclusion of such terms within. This argument is unsupported by any authority. Further, plaintiff argues that the *Baltazar* Court's opinion that "section 1281.8 would apply even if it were not expressly mentioned in the agreement" is incorrect since in Plaintiff's analysis the CAA applies only after the arbitration agreement is deemed enforceable. Plaintiff's argument in essence is that if the contract is deemed unconscionable, the CAA is inapplicable. Plaintiff's argue is unsupported by authority and is an irrational interpretation of the law. Plaintiff concedes that the agreement at issue is governed by the CAA. Plaintiff also concedes that the CAA provides for injunctive relief

during the arbitration process. Plaintiff; however argues that since the agreement in question is unconscionable because it provides for mutual injunctive relief hat the CAA will never come into play to help resolve that issue in that the agreement must be deemed "conscionable" first. Simply stated, the CAA does not apply only after the agreement is deemed enforceable, but rather the CAA is one of the mechanism by which the agreement is evaluated

The criticizing by the *Baltazar* Court of the Trivedi opinion does not create a reviewable issue by this Court. The *Trivedi* Court, without explanation veered from the line of cases addressing the issue of whether reserving injunctive relief to the court in arbitration agreements created unconscionability. The *Baltazar* Court in their opinion, merely held consistent with the previous cases on the subject matter and placed such issue back on course.

2. THE BALTAZAR COURT'S FAILURE TO ADDRESS THE PINEDO CASE DOES NOT CREATE A SPLIT OF AUTHORITY.

Plaintiff asserts that the *Baltazar* Court ignored the *Pinedo* case and by doing so created a split in authority. Plaintiff cites the *Pinedo* case for the proposition that an arbitration agreement which only itemizes employee-initiated disputes as arbitrable is inherently unfair and unconscionable. There are two problems with this argument. First, this is

not what the *Pinedo* opinion holds and second, the arbitration agreement at issue in the *Baltazar* case is noticeable distinguishable from the language in the *Pinedo* case.

In *Pinedo*, the court was confronted with an arbitration provision which included language that the arbitrable disputes were:

> 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 *(Pinedo*, 85 Cal.App.4th at 776).

The agreement further provided:

> Employee recognizes that by agreeing to arbitrate all disputes, it is knowingly and willingly waiving its right to a trial by jury and waiving any other statutory remedy it might have concerning any such dispute including, but not limited to, disputes concerning claims for harassment or discrimination due to race, religion, sex or age." (*Id*)

Relying on that language, the court in *Pinedo* held that the agreement was one-sided in that "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 the employment.'" (*Id*) The *Pinedo* Court however **did not hold** that all arbitration agreements which contain a non-exhaustive list of arbitrable claims were unconscionable.

Citing the list included in her agreement as to the disputes which must be arbitrated, *Baltazar* argues that the agreement was set up to force only claims brought by employees into arbitration. While the list did consist of claims that employees would most likely bring against their employer, the *Baltazar* Court recognized that adjacent language in the

agreement destroyed plaintiff's argument and clearly distinguishes the agreement from that in the *Pinedo* case. Specifically, the fact that the list was prefaced by the phrase "include but are not limited to" and the fact that the paragraph immediately following stated that "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" led the *Baltazar* Court to correctly recognize that the agreement was bilateral, rather than unilateral and as such distinguishable from the agreement and therefore the holding in the *Pinedo* case.

Plaintiff attempts to argue that the language in *Pinedo* parallels that in the agreement signed by plaintiff. Specifically, plaintiff states that the Pinedo agreement included "similar language" to the Baltazar agreement citing to the Pinedo provision which provided "any controversy or dispute arising out of or relating to this Agreement or relating to Employee's employment by employer." (Petition, P. 15) This language is not similar to that in *Baltazar* and is not clear and explicit in regard to the claims to be arbitrated whereas the language in the Baltazar agreement is. Significantly, nowhere in the *Pinedo* agreement is there any language which indicates that the list is not limited to those outlined. Unlike the *Pinedo* language the language in the agreement signed by Baltazar indicated that the matters which were to be arbitrated "included" but were "not limited to" those enumerated. Thus expressly including claims beyond those which were

articulated in the agreement. Equally as important the language of *Pinedo* specifically provided that the Employee recognized that it was waiving its right to a jury trial; while the language in Baltazar clearly indicated that "each of the parties" were bound by the arbitration agreement and were waiving their right to a jury trial.

3. THE BALTAZAR COURT'S DECISION IS NOT CONTRARY TO THE DECISION IN LITTLE.

Finally, plaintiff argues that the *Baltazar* Court contravenes this Court's decision in *Little v. Auto Stiegler, Inc.* (20030 29 Cal.4th 1064.) Again, the argument is forced and contrived and does nothing to establish grounds for requesting review from this Court. Plaintiff argues that the *Little* case stands for the proposition that substantive unconscionably refers to terms that unreasonably favor one party. The *Little* case does stand for such proposition However, plaintiff goes on to assert that the *Little* case supports a conclusion that requiring an employee to take all necessary steps during arbitration to preserve an employer's confidential information imposes a one-sided obligation sufficient to conclude that there is unconscionability. The *Little* case DOES NOT stand for such proposition.

Plaintiff has taken issue with the provision of the agreement which stated:

> 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 propriety and confidential information.

It is not clear from either the Respondent's Brief at the Court of Appeals or the present petition how the employee's agreeing to protect the employer's trade secrets or proprietary and confidential information" renders the agreement unconscionable. Plaintiff merely argues that because an obligation is imposed upon the employee that the terms "favor" one party and as such the agreement is unconscionable. The *Baltazar* Court held otherwise, finding that this provision was sufficiently narrow and consistent with both the Uniform Trade Secrets Act and general confidentiality and non-disclosure agreements. This holding is not inconsistent with *Little*, but rather is ultimately consistent based on the *Little* Court's own language. In Little the court, citing to Ar*mendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 specifically confirmed that parties may justify an asymmetrical arbitration agreement when there is a legitimate commercial need. Little, 29 Cal.4th 1064, 1073 citing *Armendariz*, supra, 24 Cal.4th at p. 117. What the law allows, according to *Little* is that the asymmetrical provision must be "other than the employer's desire to maximize its advantage" in the arbitration process. *Little*, 29 Cal.4th at 1073 citing *Armendariz*, supra, 24 cal.4th at p. 120.

There have been no facts or argument placed before any of the courts (Trial, Court of Appeal, or Supreme Court) that the confidentiality provision was intended to or in any manner maximizes Defendants

advantage in the arbitration process. Accordingly, there is no conflict between the *Little* decision and the *Baltazar* decision.

B. CONCLUSION

For the foregoing reasons, the Court of Appeal properly reversed the trial court's Order denying Defendants' Motion to Compel Arbitration and ordered that the trial court enter an order granting Defendant's Motion and ordering arbitration. Thus, Defendants' respectfully request this Court deny review of Plaintiff's Petition so that the Parties may proceed to arbitration on Plaintiff's claims in accordance with the Agremene4t to which Plaintiff and Defendants agreed to be bound.

Dated: February 14, 2013

GILBERT, KELLY, CROWLEY & JENNETT LLP

By: Rebecca J. Smith

REBECCA J. SMITH
Attorneys for Defendants and Appellants FOREVER 21, INC., FOREVER 21 LOGISTICS, LLC, HERBER CORLETO and DARLENE YU

CERTIFICATE OF WORD COUNT

The undersigned certifies, in accordance with Rule 8.204(c)(1) of the California Rules of Court, that the computer generated word count of Defendants' Answer to Petition for Review, generated by Microsoft Word, is 3,237 words.

Dated: February 14, 2013 Gilbert, Kelly, Crowley & Jennett LLP

By: Rebecca J. Smith

Rebecca J. Smith
Attorneys for Defendant/Respondent
FOREVER 21, INC., FOREVER 21 LOGISTICS, LLC, DARLENE YU AND HERBER CORLETO.

DECLARATION OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 W. Seventh Street, Suite 2000, Los Angeles, California 90017. On February 14, 2013, I served upon the interested parties in this action the following document described as:

ANSWER TO PETITION FOR REVIEW

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated on the attached service list for processing by the following method:

[X] (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on February 14, 2013, at Los Angeles, California.

Jeannine D. Tillman

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