LIU, J.

SUPREME COURT
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#S208345

IN THE
SUPREME COURT OF CALIFORNIA

MARIBEL BALTAZAR,

Plaintiff,

vs.

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

Defendants.

After a Decision By the Court of Appeal,

Second Appellate District, Division One

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

PETITIONER BALTAZAR'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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LEGAL DISCUSSION

I.

DESPITE WHAT IS PROFFERED BY THE DEFENDANTS IN THEIR ANSWER TO PLAINTIFF'S PETITION, THE *TRIVEDI* AND *BALTAZAR* COURTS ARE IN STARK CONTRACT AND THEREFORE PETITIONER BALTAZAR REQUESTS THAT THE SUPREME COURT UNIFORM THE LAW.

The defendants in their answer concede, as they must, that the *Baltazar Court* refused to follow the *Trivedi* Court. Specifically, defendants in their answer write: "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." (Defendants' Answer Brief, p. 8.)

Baltazar, without question, criticizes *Trivedi*. *Trivedi* is an actively published case that can be relied upon by attorneys and the Courts. *Baltazar* is literally in direct conflict with *Trivedi*. The *Trivedi* Court noted that the arbitration agreement in question was substantively unconscionable because it included a provision allowing the parties to seek injunctive relief. (*Trivedi v. Curexo Technology Corp.*, (2010) 189 Cal.App.4th 387, 396-397.) The *Trivedi* Court concluded that such provisions are one sided and accordingly favor employers because employers are more likely to seek such relief, such as seeking relief to stop employee competition or to protect intellectual property. (*Ibid.*) The *Baltazar* Court, in direct contract, explicitly refused to follow *Trivedi,* arguing that it did not agree "with the analysis of mutuality in *Trivedi.*" (*Baltazar v. Forever 21, Inc.*, (2012) 212 Cal.App.4th 221, 238.) Furthermore, the *Baltazar* Court, in unambiguous terms, wrote that it "decline[s] to follow Trivedi. . . ." (*Ibid.*)

Defendants attempt to mitigate the *Trivedi/Baltazar* conflict by arguing that the *Trivedi* Court is flawed because it incorrectly relied on both the *Mercuro* and *Fitz* cases. (Defendants' Answer Brief, p. 5-6; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167.) The *Baltazar* Court likewise stated that both the *Mercuro* and *Fitz* cases "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.)

This, however, significantly deviates from the reason why the *Trivedi* Court even cited the *Mercuro* and *Fitz* cases in the first place – it was not to show that the incorporation of section 1281.8 into an arbitration agreement would make the agreement unconscionable, but rather to show 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." (*Trivedi v. Curexo Technology Corp, supra,* 189 Cal.App.4th at p. 396-397.) The *Baltazar* Court, and defendants in their answer, ignore this crucial point, but rather argue that the *Trivedi* Court is an aberration because it relied on two cases that suggest that the "incorporation of section 1281.8 into an arbitration agreement is unconscionable." (Defendants' Answer Brief, p. 5-6; *Trivedi v. Curexo Technology Corp, supra,* 189 Cal.App.4th at p. 396-397.) That is simply not the case – *Trivedi* referenced *Fitz* and *Mercuro* to suggest that employers are more likely to invoke injunctive relief than employees. (*Trivedi v. Curexo Technology Corp, supra,* 189 Cal.App.4th at p. 396-397.) Accordingly, there is direct conflict between *Baltazar* and *Trivedi* because *Baltazar* out-rightly rejected this viewpoint, *reasoning that employees are not more likely to invoke injunctive relief than employers.* The *Trivedi* Court argued otherwise.

Defendants, then argue, that even though Mrs. Baltazar did not sue specifically for injunctive relief, she still sued pursuant to the Fair Employment and Housing Act, which authorizes injunctive relief pursuant to *California Government Code* §12965. (Defendants' Answer Brief, p. 6-7.) Defendants and the *Baltazar* Court then argue that this essentially proves that employers are not more likely to seek injunctive relief than employees. (Defendants' Answer Brief, p. 6-7; *Baltazar v. Forever 21, Inc., supra,* 212 Cal.App.4th at p. 239.)

This logic is troublesome. First off, the fact-pattern in *Trivedi* reveals that the plaintiff in *Trivedi,* like Mrs. Baltazar, sued for discrimination pursuant to the California Fair Employment and Housing Act. (*Trivedi v. Curexo Technology Corp, supra,* 189 Cal.App.4th at p. 390.) Yet the *Trivedi* Court did not conclude that, given this, employees are just as likely to seek injunctive relief as employers. Rather, the *Trivedi* Court found the contrary, that employers are more likely than an employee to invoke injunctive relief. (*Trivedi v. Curexo Technology Corp, supra,* 189 Cal.App.4th at p. 396-397.)

By the *Baltazar* rationale, every plaintiff who sues for any provision of the Fair Employment and Housing Act is therefore automatically seeking injunctive relief, despite the fact that they are specifically seeking monetary relief pursuant to other provisions of the Fair Employment and Housing Act. Both Plaintiffs Baltazar and Trivedi were suing pursuant to *California Government Code* §12940, which prevents retaliation, discrimination, and/or harassment. (*Baltazar v. Forever 21, Inc., supra,* 212 Cal.App.4th at p. 226-227; *Trivedi v. Curexo Technology Corp, supra,* 189 Cal.App.4th at p. 390.)

This debate, again, roots back to the *Trivedi/Baltazar* conflict because the *Trivedi Court* opined that employers are more likely to *invoke* the equitable powers of the Court to prevent employee competition and to protect intellectual property. Accordingly, the *Trivedi* Court gave ***direct***, concrete examples of an employer invoking the equitable powers of the Court, as opposed to the *Baltazar* Court which provided theoretical possibilities, such as an employee suing under one provision of the act (such as *California Govt. Code* §12940 for retaliation), and then indirectly implicating another statute in the act which authorizes injunctive relief (*California Govt. Code* §12965). Both cases are in stark contrast to each other.

Finally, defendants in their answer argue that section *California Code of Civil Procedure* §1281.8 would apply to the arbitration agreement even if it were not expressly mentioned in the arbitration agreement. (Defendants' Answer Brief, p. 7.) This however, presumes that there is a valid agreement. If the arbitration agreement is held unenforceable, then there is ***no agreement*** whatsoever, and the provisions of the California Arbitration Act are simply inapplicable because there is no valid enforceable agreement to begin with. 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 F3d 778, 782.) Accordingly, defendants and the Appellate Court incorrectly argue and assume that the California Arbitration Act applies, even before the rendering and assessment of whether the arbitration agreement is valid. Accordingly, the analysis should be an independent assessment of whether the arbitration agreement is enforceable, and given this foundation, the Court would conclude that such injunctive relief does indeed favor employers over employees and is accordingly substantively unconscionable, *even before the assessment of statutes codified by the California Arbitration Act.*

Be that as it may, in any respect that these positions are evaluated, one comes to the conclusion that there is indeed conflicting law between the *Trivedi* Court and the *Baltazar* Court. Accordingly, Plaintiff Baltazar respectfully requests this Supreme Court to grant review so such cases may be reconciled.

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II.

THE *BALTAZAR* COURT DID IGNORE THE *PINEDO* COURT, AND THEREBY REFUSED TO FOLLOW THE *PINEDO* PRECEDENT.

The *Pinedo* Court held an arbitration agreement to be "inherently one sided" and substantively unconscionable because it only addressed and enumerated employee-initiated claims. (*Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 781.) Plaintiff Baltazar argues that the *Baltazar* Court ignored the *Pinedo* approach, and if it had followed the *Pinedo* precedent, it would have concluded that the arbitration agreement by Forever 21 was also "inherently one sided" and substantively unconscionable. Forever 21's arbitration agreement, without question, specifically enumerated employee-initiated claims for arbitration, while yet failing to enumerate employer-initiated claims. (I CT 216.) Accordingly, pursuant to the *Pinedo* precedent, the Forever 21 arbitration agreement should have been found substantively unconscionable.

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

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

Defendants, in their answer, argue that the *Baltazar* Court does not have to follow the *Pinedo* precedent because the words "include but are not limited to" are used in Forever 21's arbitration agreement. (Defendants' Answer

Brief, p. 10.) Forever 21 argues that the "include but are not limited to" language refers to also employer-initiated claims, even though no such claims are enumerated. (*Id.*) Plaintiff asserts that the "include but are not limited to" language in the Forever 21 arbitration agreement is no different than the "any controversy or dispute" language in the *Pinedo* court. Hence, both arbitration agreements provide language that appears to be all-inclusive, and both then enumerate, exclusively, employee-initiated claims. Yet, only the arbitration agreement in *Pinedo* is seen as "inherently one sided" by such language, and the *Baltazar* arbitration agreement is not assessed as one-sided, even though it should be pursuant to the similarities in *Pinedo*. Accordingly, the "include but are not limited to" language followed by potential employee-initiated claims is absolutely no different than the arbitration agreement in *Pinedo*, which states, "any controversy or dispute arising out of or relating to this Agreement" language followed by potential employee-initiated claims. Both arbitration agreements, as written, are inherently one-sided and favor the employer because in unambiguous terms, the arbitration agreement specifically identifies employee-initiated claims as arbitrable, but yet fails to identify any employer-initiated claims as arbitrable, leaving room for employers to argue that the arbitration agreement does not apply to their claims, since their claims are not specifically identified.

Accordingly, if the *Baltazar* Court followed the *Pinedo* rationale and precedent, it would have concluded, like in *Pinedo*, the arbitration agreement in *Baltazar* was also inherently one-sided and substantively unconscionable. Instead, it chose to ignore the *Pinedo* precedent.

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III.

IF THE *BALTAZAR* COURT HAD FOLLOWED *LITTLE*, IT WOULD HAVE CONCLUDED THAT WHEN FOREVER 21 REQUIRED ITS EMPLOYEE TO TAKE ALL NECESSARY STEPS TO ENSURE CONFIDENTIALITY, SUCH A PROVISION WOULD BE SUBSTANTIVELY UNCONSCIONABLE.

Pursuant to *Little,* "substantive unconscionability" refers to terms that unreasonably favor one party. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) Forever 21's arbitration agreement states:

> "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.)

Such a provision essentially requires the ***employee*** to take "all necessary steps" to protect the ***employer's*** "trade secrets and proprietary and confidential information." (I CT 216.) *There is no reciprocation.* This is clearly a one-sided term and solely benefits the employer. The arbitration agreement does not require Forever 21 to take all necessary steps in relation to the *employee's* privacy and confidential information, but strictly limits it to the benefit of the employer.

Defendants in their answer argue that the provision is innocuous, narrow, and "consistent with both the Uniform Trade Secrets Act and general confidentiality and non-disclosure agreements." (Defendants'

Answer Brief, p. 12.) The defendants further argue that since Forever 21 is in the clothing retail business, its "asymmetrical" provision is justified. (*Id.*) Yet, the language itself does not suggest an interpretation. The provision is written too broadly – what confidential information is Forever 21 seeking to protect? The proposals are limitless, indicating that such a provision is anything but narrow or innocuous, or even mutual for that matter. In theory, Forever 21, by such language, could mandate that the facts related to Plaintiff's testimony be held confidential. Accordingly, the provision is inexcusably one-sided. Therefore, pursuant to *Little*, the Court of Appeals should have deemed this provision to be substantively unconscionable. It should be well noted, however, that the *Baltazar* Court did not find *any degree of substantive unconscionability throughout the entire arbitration agreement, even though there are numerous instances that qualify the arbitration agreement as substantively unconscionable.*

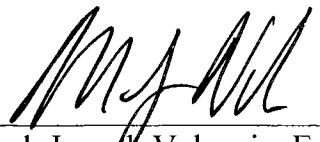
CONCLUSION

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

February 25, 2013

Respectfully Submitted,

THE LAW OFFICES OF MARK JOSEPH VALENCIA, ALC



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CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 2,072 words as counted by the Mircrosoft Word software program used to generate this brief.

February 25, 2013

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On **February 25, 2013,** I served the documents described below in the manner described below:

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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 February 25, 2013, at Los Angeles, California.

BY: Mark Joseph Valencia

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