Case No. S208345

IN THE

SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

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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

APPELLANT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S208345 - BALTAZAR v. FOREVER 21

Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
Forever 21, Inc.	[x]	[ ]	Defendant/Appellant - Delaware Corp.
Forever 21 Logistics, LLC	[x]	[ ]	Defendant/Appellant - Delaware Corp. Subsidiary Forever 21, Inc.
Darlene Yu	[x]	[ ]	Defendant/Appellant
Herber Corleto	[x]	[ ]	Defendant/Appellant
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

Submitted by: Rebecca J. Smith

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INTRODUCTION AND SUMMARY OF ARGUMENT

Maribel Baltazar ("Baltazar") is a former employee of Forever 21 Logistics, LLC and Forever 21, Inc.[1] Baltazar filed suit against Forever 21 based on allegations that she was sexually harassed, retaliated against, constructively discharged and intentionally caused emotional distress. Baltazar now seeks damages and injunctive relief.

[1] For purpose of brevity Defendants Forever 21, Inc., Forever 21 Logistics, Inc., Darlene Yu and Huber Corleto shall be collectively referred to as "Forever 21."

Forever 21 moved to compel arbitration of Baltazar's claims based on an Arbitration Agreement ("Agreement") she entered into with Forever 21 at the inception of the employment. The trial court denied Forever 21's Motion to Compel Arbitration, however, on appeal, the Court of Appeal, Second Appellate District ("Court of Appeal") correctly found that the Agreement was not substantively unconscionable, reversed the trial court and ordered the underlying action be arbitrated. In reaching its decision, the Court of Appeal held the Agreement was adhesive and therefore procedurally unconscionable, but also held that the degree of procedural unconscionability was low in that there was neither surprise nor any other oppressive factors and further found no substantive unconscionability.

Baltazar has not offered a single persuasive legal argument to establish the Agreement is unenforceable under California law. Baltazar's argument regarding the Agreement's alleged procedural unconscionability – based on its "take it or leave it" nature and the non-attachment of procedural rules therefore fails.

Baltazar's arguments relating to the substantive unconscionability likewise fail. In light of the clear factual record and an accurate and reasoned reading of the Agreement's terms, the Court of Appeal found the Agreement contained no substantive unconscionability. The following supports its conclusion.

First, the Agreement is mutual in all respects. The Agreement requires *both parties* to submit all disputes arising out of the employment relationship to binding arbitration. While the Agreement provides examples of potential claims which must be arbitrated (ironically designed to place Baltazar on notice of the types of claims covered by the Agreement), the Agreement unmistakably provides that these examples are *not* an exhaustive list. (*Baltazar v. Forever 21, Inc.* (2013) 212 Cal.App.4th 221, 234).

The language in the Agreement also provides for mutuality in regards to the use of provisional remedies, allowing both parties to resort to the courts for such a purpose. This is nothing more than a correct statement of law found in *California Code of Civil Procedure* §1281.8 of the California Arbitration Act. Despite the ability of both parties to use the court for provisional remedies, those parties are still obligated to resolve their claims through arbitration.

Second, Baltazar asserts that a simple and straightforward clause in the Agreement, which provides an alternative set of rules, somehow creates unconscionability. Baltazar argues the Agreement dictates claims found to be not arbitrable must still be submitted to arbitration. The Court of Appeal rejected this claim holding:

> The provisions regarding the AAA rules simply provides an alternative means of arbitration if those rules are unenforceable for some reason. There is nothing unconscionable about designating an alternative arbitral forum should the rules to he preferred dispute resolution provider be declared invalid. (Baltazar, supra 212 Cal.App.4th at 241.)

This provision merely provides an alternative as to *what* rules will govern the proceedings; it does not speak to which claims are, or not, arbitrable.

Finally, Baltazar asserts that because the Agreement asks the parties to take all necessary steps to protect trade secrets that it is unduly harsh and one sided. This argument is facially invalid. The provision merely indicates that during the course of any arbitration proceeding all necessary steps will be taken to protect trade secrets and proprietary information from public disclosure. This is nothing more than any plaintiff would face if a defendant asked a trial court to impose a protective order. This provision puts no burden on the employee and merely indicates that if steps become necessary to safeguard proprietary, trade secret and confidential information, they can be taken.

STATEMENT OF FACTS

Baltazar and Forever 21 entered into a written arbitration Agreement. (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217). The Agreement required both parties to arbitrate any employment-related claims they may have against one another. (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217). In its October 7, 2011 Order, the trial court denied Forever 21's Motion to Compel Arbitration and ruled the Agreement was procedurally and substantively unconscionable. (C.T. 234-235). On December 20, 2012, the Court of Appeal reversed the trial court's order.

The undisputed facts demonstrate that, as a matter of law, Defendant's arbitration Agreement fully complies with the requirements set forth by *Armendariz v. Found Health Psychare Servs., Inc.* (2000) 24 Cal.4th 8 and is, therefore, enforceable.

A. **Baltazar and Forever 21 Entered Into An Agreement To Mutually Arbitrate All Employment Disputes**

Defendant Forever 21 is a clothing retailer. Defendant initially employed Baltazar at its warehouse distribution center. (C.T.5:24-26, 6:1). At the time of her hiring, Forever 21 presented Baltazar with a two-page Agreement entitled – in bold capital letters AGREEMENT TO ARBITRATE. (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217). The Agreement provides that the employee and Forever 21 *jointly agree* to submit any employment-related dispute to binding arbitration. It clearly apprised Baltazar – in conspicuous BOLD CAPITAL LETTERS – that she: (1) should enter into the Agreement voluntarily, (2) should carefully read the Agreement and understand its terms, and (3) had the opportunity to consult with private legal counsel or advisor before signing the Agreement. (C.T. 81). The Agreement also set forth, in conspicuous bold letters, that

by signing it Baltazar would waive any and all rights to a court or jury trial. (C.T 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217).

The Agreement, in clear unambiguous language, binds both Baltazar and Forever 21 to binding arbitration:

> The Company and Employee mutually agree that any dispute or controversy arising out of or in any way related to any "Dispute," as defined herein shall be resolved exclusively by final and binding arbitration. (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217).

The term "dispute" is defined in the Agreement as follows:

> [T]he 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 base don employment benefits except where an Employee's benefit or pension plan contains a claim 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. (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217).

The Agreement also provides:

> Both parties agree that the Company has valuable trade secrets and proprietary and confidential information. Both parties agree that in the course of any arbitration proceeding all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information. (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217)

Finally, the Agreement provides:

> If, in any action to enforce this Agreement a Court of competent jurisdiction rules that the parties agreement to arbitrate under the Model Rules for Arbitration of Employment Disputes of the American Arbitration Association is not enforceable, then the parties agree that such Dispute shall be resolved by final and binding arbitration under the California Arbitration Act, *California Code of Civil Procedure*, Section 1280, *et. seq.* (C.T. 61:26-28, 62:1-2, 73:12-18, 80-81, 210, 216-217).

While initially indicating that she did not want to sign the Agreement, Baltazar ultimately signed and returned the Agreement to Forever 21. (C.T. 80-81 and 207).

B. <u>Baltazar Sued In Derogation Of Her Agreement</u>

On August 4, 2011, Baltazar filed her complaint. (C.T. 2-3) Baltazar alleged in her complaint claims for: (1) Racial Harassment, (2) Failure to Prevent Racial Harassment, (3) Racial Discrimination, (4) Sexual Harassment, (5) Failure to Prevent Sexual Harassment, Retaliation, (6) Violation of California Civil Code §51.7 and §52, (7) Constructive Discharge in Violation of Public Policy and, (8) Intentional Infliction of Emotional Distress, seeking monetary damages and, importantly, injunctive relief. (C.T. 3-50). It is without dispute that all of Baltazar's claims arise out of her employment relationship with Forever 21 and were subject to the Agreement she executed.

C. <u>The Trial Court Proceedings</u>

On October 7, 2011 Forever 21 timely filed its Petition to Compel Arbitration under the *Federal Arbitration Act*, 9 U.S.C. §1, *et. seq.* and the California Arbitration Act (C.T. 59-133).

On September 26, 2011, Baltazar filed her opposition in which she argued the Agreement was procedurally unconscionable in that it was a contract of adhesion. (C.T. 134-134-220). Further, Baltazar argued the Agreement was substantively unconscionable in that it lacked mutuality

and provided, in her terms, a "fail safe" provision, which guaranteed all matters proceed to arbitration. (C.T.134-220).

On September 30, 2011, Forever 21 filed its reply brief (C.T. 222-232) and argued that the mere fact that the Agreement was a contract of adhesion did not, in and of itself, render it unenforceable. (C.T. 222-232). Forever 21 further argued that the Agreement specifically and expressly provided for mutuality, with neither party gaining an advantage over the other. (C.T. 222-232).

D. <u>The Superior Court Denied The Petition To Compel Arbitration</u>

On October 7, 2011, the Superior Court, the Honorable Raul A. Sahagaun presiding, heard oral argument on the Petition to Compel on October 7, 2011. (Reporters Transcript. ("R.T.") 1-11). The trial court denied the Petition to Compel finding the Agreement was procedurally unconscionable:

> Plaintiff's declaration establishes, and defendants proffer no evidence to the contrary, that her agreement to arbitrate was required. She has established procedural unconscionability. (C.T. 235:4-6).

The trial court's order went on to indicate:

> Based upon the strength of that showing, plaintiff needs only some evidence of substantive unconscionability. Here, plaintiff argues the Agreement applies to "any dispute or controversy," but that the examples expressly enumerated in the Agreement apply to claims by the employee. The Agreement further gives defendants the right to take "all necessary steps" to protect its trade secrets or other confidential information. That provision is vague as to what steps could be taken, but it can only be constructed to expand (rather than restrict) defendants' rights. Finally, the Agreement also provides that if a court were to find it unenforceable, then the parties would still have to arbitrate (using California rules, rather than the Model Rules.) (C.T. 235:8-15).

E. Forever 21 Appealed the Trial Court's Order

On April 17, 2012, Forever 21 filed a Notice of Appeal challenging the trial court's ruling. (C.T. 236-239). On December 20, 2012, the Court of Appeal issued its opinion finding in favor of Forever 21 and ordered the trial court's order denying the motion to compel arbitration reversed. (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221).

LEGAL DISCUSSION

Baltazar has raised three (3) issues in her Opening Brief, each focused on whether substantive unconscionability exists in an arbitration agreement between Baltazar and Forever 21. Specifically, Baltazar has placed before this Court the following issues:

1. 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). (Emphasis Added).
2. 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 initiate disputes as arbitrable? (*Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal.App.4th 774, 781). (Emphasis Added).

3. 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? (Emphasis Added).

In framing the issues, Baltazar ignores her obligation to prove the existence and degree of procedural unconscionability, or prove substantive unconscionability.

A. Baltazar Fails to Carry Her Burden to Establish The Arbitration Agreement is Unconscionable

One ground for refusing to enforce an arbitration agreement is unconscionability. (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238 at 1248). This is the path Baltazar chose to challenge her Agreement with Forever 21. Unconscionability has both procedural and substantive elements. (*Roman v. Superior Court* (2009), 172 Cal.App.4th 1462 at1469). While procedural unconscionability focuses on oppression and surprise, substantive unconscionability focuses on the terms of the agreement and evaluates whether any term, or combination thereof, is so overly harsh or one-sided as to shock the conscience. The more substantively oppressive the contract terms are, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa. (*Id.*) Accordingly, Baltazar not only bears the burden of establishing the arbitration provision is both procedurally and substantively unconscionable, but the degree thereof. She has not and cannot do this as is more fully set forth below.

B. The Court of Appeal Property Applied A Sliding Scale Analysis In Evaluating Procedural And Substantive Unconscionability

It is well settled California law that "procedural unconscionability must be measured in a sliding scale with substantive unconscionability;" and courts must initially determine not only "whether procedural unconscionability exists, but more importantly, to what degree it may exist." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1319). Once an employee has established procedural unconscionability, and to what degree, the employee must then prove that the agreement is substantively unconscionable. It is not enough that one may exist without the other. *e.g.,* (*Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 723). Despite Baltazar's stance to the contrary, the Court of Appeal acknowledged these principles; both procedural and substantive unconscionability needed be present, but not necessarily to the same degree.

As the court noted noted in *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704, "[i]t is well settled that adhesion contracts . . . typically contain some aspect of procedural unconscionability." But as the *Serpa* court pointed out, that does not conclude the analysis, for "this adhesive aspect of an agreement is not dispositive". (*Id.*) The *Serpa* court further observed that "when there is no other indication of oppression and surprise "the procedural unconscionability of an adhesion agreement is low and the agreement will be enforced unless the substantive unconscionability is high."

C. <u>In This Case The Procedural Unconscionability Is Minimal</u>

1. Oppression

Baltazar asserts the Agreement is procedurally unconscionable because it is a contract of adhesion; presented as a term of employment and without any negotiation by Baltazar. While the Court of Appeal acknowledged an adhesion contract may provide some procedural unconscionability, it further recognized that such unconscionability was minimal, at best, and additional oppression or surprise must also be present, stating:

> [T]he Agreement was not "'hidden in a prolix printed form drafted by [Forever 21]'" (citation omitted) and therefore did not involve an element of surprise. On the contrary, the Agreement was prominently featured as part of the employment application, plaintiff read the Agreement when filing out the application, and having read the agreement initially refused to sign it. (*Baltazar v. Forever 21, supra* 212 Cal.App.4th at 231).

Much like the plaintiff in *Dotson v. Amgen, Inc* (2010) 181 Cal. App. 4th 975, Baltazar asserts the Agreement is procedurally unconscionable because it is a contract of adhesion. In *Dotson*, the Appellate Court pointed out that economic "disparity" exists in virtually all cases where one of the parties is a corporation, stating:

> In employment cases, the agreement is typically prepared by the employer, and presented to the employee as a condition of employment without negotiation regarding its terms...In this case, the court finds that the arbitration agreement is a contract of adhesion. *This however, is not dispositive*. A contract of adhesion is not per se unenforceable. Only when its provisions are unfair does it become unenforceable. (*Id.* at 980-981). (Emphasis Added).

Accordingly, its mere status as an adhesion contract does not invalidate the Agreement. As the court pointed out in *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554 at 1571:

> Our conclusion that the Atlas Account Agreements are adhesion contracts "heralds the beginning, not the end of our inquiry into its enforceability." (citation omitted). A procedural unconscionability analysis also includes consideration of the factors of surprise and oppression.

Therefore, the existence of minimal procedural unconscionability based on the Agreement being a contract of adhesion cannot support a refusal to enforce the Agreement.

2. Surprise

- **The Arbitration Agreement Was Not Hidden Or Inconspicuous**

The Court of Appeal found no surprise relating to the Agreement. The Agreement is a document consisting of two (2) pages and clearly titled on the first page: "AGREEMENT TO ARBITRATE." The first words of the document leave no question as to its purpose: "This Agreement to Arbitrate (hereinafter 'Agreement')." The second page contains the sentence: "This Agreement contains the entire agreement between the parties pertaining to the subject matter hereof." (C.T. 81e). Lest there be any doubt, towards the end of the Agreement, it provides in ALL-CAPS that the Agreement consists of two (2) pages. This conspicuous, capitalized notification that the Agreement consists of two pages underscores the absence of procedural unconscionability. Baltazar does not dispute she read the Agreement, saw it for what it was, and while initially objected to, signed it.

- **Failure To Attach The American Arbitration Association Rules Does Not Constitute Surprise**

Baltazar cites to, and misinterprets *Trivedi,* to support her position that because she was not given a copy of the AAA Rules she was "surprised." "Surprise" under *Trivedi* concerns being taken advantage of regarding the terms and conditions of the arbitration. (need cite). But here,

the AAA Rules met all the legal requirements for arbitration. Further, Baltazar does not contend the AAA Rules are unfair, deprive her of any discovery rights, minimize the remedies available to her or provide some benefit to Forever 21 over her.

Trivedi was fundamentally different from this case. *Trivedi* turned on the incompatibility between the attorneys' fee provision in that arbitration agreement and the special attorneys' fee provision in the Fair Employment and Housing Act ("FEHA") - which was designed to give employees incentive to pursue discrimination claims. The *Trivedi* Court focused on substantive unconscionability, including the mandatory fee and cost provision in favor of the prevailing party, finding the provision provided a significant advantage to the employer and corresponding serious disadvantage to the employee. Therefore, the employee in *Trivedi* faced a financial risk in arbitrating his claims; a risk not present in court. (*Trivedi, supra,* 189 Cal.App. 4th at 394-395). This, *Trividi* concluded, would chill an employee's desire to pursue his statutory rights, which is forbidden by *Armendariz*. (*Armendariz, supra,* 24 Cal.4th at 117-118). Accordingly, it was not the failure to attach the arbitration rules in and of itself which created unconscionability, but rather the "hidden" provisions of those rules which were procedurally unconscionable.

Likewise, in *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702 ("*Fitz*"), the employer purported to incorporate the AAA rules into its arbitration agreement, but expressly modified those rules to severely limit discovery. (*Id.* at 708-709). The *Fitz* court held that the employer's alteration of the AAA rules created "an adverse material inconsistency" between the employment arbitration agreement and the AAA rules. (*Id* at 720). Having done so, the court concluded:

> [The employer] deliberately replaced the AAA's discovery provision with a more restrictive one, and in doing so failed to ensure that the employees are entitled to discovery sufficient to adequately arbitrate their claims. [The employer] should not be relieved of the effect of an unlawful provision it inserted in the [arbitration] policy due to the serendipity that the AAA rules provide otherwise. (*Id.* at 721)

Baltazar misstates the law in arguing that providing the procedural rules in all circumstances is a pre-requisite to having an enforceable arbitration agreement. This is not the law. Nor do *Trivedi* and *Fitz* require this. No court has required that copies of the referenced provisions always be provided in order to have a valid and enforceable arbitration provision. (*See e.g., Roman v. Superior Court, supra,* 172 Cal.App.4th at 1467 ("Roman"), *Maggio v. Winward Capital Management* (2000) 80 Cal.App.4th 1210, 1212).

- **There Are No Inconsistencies Between The Agreement And The AAA Rules**

In the present case, unlike *Trivedi,* there are no inconsistencies between the Agreement and the AAA rules. Other cases have taken issue with the failure to attach the arbitration rules. These cases all involve rules which materially altered the rights and remedies of the non-drafting party. (*Harper v. Ultimo, supra,* 113 Cal.App.4th at 1405 (unattached Better Business Bureau rules precluded the consumer from obtaining damages); *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1665-1666 (unattached arbitration rules required consumers to pay arbitration fees and conduct arbitration outside of state of residence); *Suh v. Superior Court* (2010) 18 Cal.App.4th 1504 (rules barred employee from receiving exemplary, incidental, or special damages).). Here, the Agreement's provisions and the AAA rules mirror the requirements of *Armendariz*, and favor neither party.

On October 2, 2013, the California Appellate Court for the First District addressed this very issue and held that the failure to attach the AAA rules is insufficient grounds to support a finding of procedural unconscionability. (*Peng v. First Republic 2013 Daily Journal* D.A.R. 13).

Baltazar miscomprehends the potential issue in not attaching the rules. The vice in failing to attach the arbitration rules lies in the employer providing rules that are themselves unfair. The issue is *not* the mere omission to provide a copy to the other party. These unconscionable factors are not present here. The parties' Agreement incorporates the AAA rules, which assure minimum standards of fairness in the arbitration of employment disputes[2], and which the Agreement does not alter. (*Knight, et al., Cal Prac. Guide: Alternative Dispute Resolution* (The Rutter Group 2012) Chapter 5, § 5:155.14).

3. The Court Of Appeal Applied The Correct Test To Assess The Existence Of Substantive Unconscionability

Baltazar asserts that the criteria by which a court determines whether substantive unconscionability exists is whether the agreement imposes unduly, harsh and oppressive, or one-sided terms. She argues that the Court of Appeal eviscerated these criteria by adding that the Agreement's terms must be so one-sided as to shock the conscious. Yet other California courts, like the Court of Appeal here, have consistently applied these criteria.

In *Stirlin v. Supercuts, supra,* the court used the "traditional standard of unconscionability – contract terms so one-side as to shock the conscience." (*Id.* at 1532) In *Roman v. Superior Court, supra,* the court

[2] Baltazar has made no claim that the terms of AAA Arbitration Rules are unconscionable themselves. Such rules meet all of the standards of *Armendariz* and may be viewed at C.T. 103-116.

recognized the substantive unconscionability focuses on the terms of agreement and whether those terms are so one sided as to shock the conscience." (*Id.* at 170.) The court in *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199 also recognized this criterion for determining substantive unconscionability, stating:

> While courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms. (*Id.* at 1213.)

Further, in *Morris v. Redwood Empire Bancorp, supra,* 128 Cal.App.4th at 1322, the court concluded substantive unconscionability focuses on the terms of the agreement and whether those terms are 'so one-sided as to shock the conscience." Likewise in the recent *Peng* case, the court recognized the higher standard required to prove unconscionability, noting that it is not enough to show merely one-sided or overly harsh terms, but rather terms that are "so one-sided as to shock the conscience." (*Peng v. First Republic, supra*). Accordingly, the Court of Appeal's analysis applied in this matter was well settled law.

D. <u>There Is No Substantive Unconscionability</u>

1. <u>The Agreement Is Mutual And Does Not Reserve Additional Rights To Forever 21</u>

The Agreement *does not* reserve additional rights to Forever 21 to allow them to operate outside of it. Courts have found lack of mutuality, it is only where specific "exclusions" favored one party over the other. (*See, Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 665, where the agreement required the parties to arbitrate all employment related claims except those pertaining to trade secrets, confidential information and other intellectual property. The court found the agreement "explicitly exclude[ed] all claims that the employer would be likely to assert against

the employee;" *see, O'Hare v. Municipal Resource Consultants* (2009) 107 Cal.App.4th 267, 271, where the agreement expressly provided the employer could file suit for claims involving trade secrets, while the employee was obligated to arbitrate all employment related claims; *see also, Fitz v. NCR* (2004) 118 Cal.App.4th 702, 725, where the employee dispute resolution policy provided for arbitration of employment related claims, but expressly excluded disputes over confidentiality, noncompetition agreements and intellectual property. The court concluded the agreement was unfairly one-sided because it compelled arbitration of claims more likely to be brought by the employee and exempted claims of the type the employer was likely to bring).

The Agreement in the present action does not suffer from these failings, and in fact, contains numerous expressions leaving no doubt as to the mutual agreement to arbitrate all disputes relating to Baltazar's employment. The Agreement provides in paragraph 2 that "*[e]ach of the parties* hereto is voluntarily entering into the Agreement in order to gain the benefit of a speedy, impartial dispute-resolution procedure. (C.T. 80). (Emphasis Added). In paragraph 3, the Agreement specifically provides that *[t]he Company and Employee mutually agree* that any disputes . . . shall be resolved exclusively by final and binding arbitration. (*Id.*) Further, Paragraph 5 states in bold letters that *"[e]ach of the parties* voluntarily and irrevocably waives any and all rights to have any Dispute heard or resolved in any forum other than through arbitration as provided herein." (*Id.*).

Unlike the agreements in the cases cited above (*Abramson, O'Hare* and *Fitz*), the Agreement in this case does not exclude any employer claims from arbitration, either expressly or by limiting arbitration to the type of claims most likely to be brought by the employer. Rather, the Agreement applies to all employment related disputes on behalf of both Baltazar and

Forever 21. While the Agreement contains a *non-exhaustive* list of claims that must be arbitrated, the list also includes claims for breach of contract or covenant which either the employer or the employee could bring. Furthermore, the list states the disputes set forth in the Agreement include, "but are not limited to" those included in the examples.

2. The *Pinedo* Case Baltazar Relied Upon is Distinguishable from the Present Action

Baltazar cites to *Pinedo* 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: (1) this is not what the *Pinedo* opinion holds and, (2) the Agreement at issue is distinguishable from that in *Pinedo*.

The *Pinedo* court was confronted with an arbitration provision which included language defining the arbitrable disputes as follows:

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

While the Baltazar Agreement also contained a list of possible claims to be addressed through arbitration, unlike *Pinedo*, "the Baltazar Agreement['s] "list" was prefaced by the phrase "including, but not limited to." (C.T. 80) This critically important phrase was absent from the *Pinedo* agreement. Additionally, the "list" in the Baltazar Agreement included claims other than solely "employee type" claims, such as breach of contract or covenant and "disputes arising out of or relating to the termination of the employment relationship between the parties." Thus, the unfairness in *Pinedo* is absent here.

The *Pinedo* 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." (*Ibid.*)

In contrast, the language in the Baltazar Agreement provided that "each of the parties" voluntarily and irrevocably waives the right to have the disputes heard in any other forum other than arbitration. (C.T. 81-82).

Relying on the specific language of their agreement, the *Pinedo* court held the agreement lacked mutuality because "it addresse[d] only claims based on 'changes in position, conditions of employment or pay, or the end of the employment.'" (*Id.*) The *Pinedo* court did not hold, as plaintiff asserts, that all arbitration agreements which contain a non-exhaustive list of arbitrable claims were unconscionable. Rather, the *Pinedo* court concluded "the arbitration agreement was limited in scope to employee claims regarding wrongful termination. (*Id.*) The Baltazar Agreement is not limited to such claims and specifically provides that the parties (as opposed to just the employee) are required to arbitrate claims.

3. <u>The Agreement Is Mutual As To The Use Of Provisional Remedies</u>

Baltazar erroneously contends the following injunctive relief provision contained in the Agreement unfairly favors Forever 21:

> 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.

Baltazar is mistaken on two counts.

First, the provision only echoes the rights granted to both parties under the California Arbitration Act - this provision of the Agreement is expressly available to both Baltazar and Forever 21. Indeed, Baltazar is entitled to seek injunctive relief under her Fair Employment and Housing Act ("FEHA") claims and could, if she deemed necessary, seek provisional relief in court. The Court of Appeal clearing recognized this in their opinion stating:

> [W]e cannot say that Forever 21 is more likely to seek injunctive relief than an employee. In the present case, for example, plaintiff alleged nine claims. Six of those claims are based on the FEHA, which authorizes the employee to seek injunctive relief. (*Baltazar, supra,* 212 Cal.App.4th at 239).

Baltazar's case establishes a claim for injunctive relief is just as likely to be brought by an employee as an employer

Second, the Agreement simply refers to the legal principle that "[p]ursuant to *California Code of Civil Procedure* §1281.8," either party may apply to a California court for any provisional remedy. In so doing, the Agreement restates the statutory provision which gives any party the right to seek an injunction regardless of whether its dispute is subject to arbitration. An arbitration agreement is not unconscionable because it restates undisputed, mutual statutory rights.

Again, Baltazar relies on the aberrational decision in *Trivedi, supra.* As noted above, the *Trivedi* arbitration agreement's material shortcoming was the mandatory prevailing party attorneys' fee provision. There is no such provision in the Agreement at issue here. Further, the rationale of *Trivedi* - that employers might seek injunctive relief more than employees - is factually unsupported and legally irrelevant. In support, the *Trivedi* court cited *Fitz*, *supra,* as does Baltazar, but the agreement in *Fitz* contained a pro-employer unilateral carve-out for all disputes "'over

confidentiality/non-compete agreements or intellectual property rights'" - not a mutual right taken verbatim from *California Code of Civil Procedure* §1281.8 "for any provisional remedy, including a temporary restraining order or preliminary injunction," sought by either party. (*Id.* at 709).

Baltazar also relies on *Mercuro v. Superior Court* (2002) 96 Cal. App. 4th 167, 176-178, which does not support her argument that injunctive relief as an arbitration exemption renders the agreement unenforceable. In *Mercuro*, the arbitration agreement excluded injunctive relief claims involving intellectual property violations, unfair competition, or unauthorized disclosure of trade secrets or confidential information. (*Id.*) There are no such employer-tilted exemptions in this case.

Baltazar's argument that injunctive relief would more likely be utilized by Forever 21 fails to acknowledge that §1281.8 of the *Code of Civil Procedure* allows both parties to seek provisional remedies in court. Moreover, as noted above, Baltazar seeks injunctive relief in this case. As such, there is no factual support for her position that this provision favors Forever 21. The Court of Appeal refused to follow *Trivedi*, first finding its reliance on *Mercuro* and *Fitz* as involving quite different provisions relating to the right to seek provisional remedies, which did in fact favor the employer. Second, the Court of Appeal could not say Forever 21 was more likely to seek injunctive relief. The Court of Appeal cited to Baltazar's complaint, which contained no less than six (6) causes of action that allowed her to seek injunctive relief. (need cite). Third, as the Agreement is subject to the California Arbitration Act, the provisions of § 1281.8 would apply, even if not specifically incorporated into the Agreement.

4. <u>The Agreement Does Not Require Baltazar To Arbitrate If a Court Were To Find The Agreement Unenforceable</u>

Baltazar's argument in this regard is difficult to follow and Forever 21 will not attempt to explain it. The Agreement provides that disputes shall be resolved pursuant to the Model Rules of Arbitration of Employment Disputes of the American Arbitration Association then in effect. (C.T. 80). Alternatively, the Agreement provides that if a Court found the American Arbitration Association rules were unenforceable under the law then the rules under the California Arbitration Act would apply. (C.T. 81). This provision does not favor one party over the other. Rather, it merely provides an alternative set of rules under which arbitration could be conducted, *only if the Agreement were enforced.* Accordingly, in the circumstances of any challenge to the Agreement, the court would first consider whether the Agreement was unconscionable under the terms of the American Arbitration Association rules and if so, the court would then turn to the California Arbitration Act to determine if application of such Act remedied the issues of unenforceability.

California Civil Code §1641 requires the arbitration agreement be taken together so as to give effect to all provisions. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 741; *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1170). Further, *California Civil Code* §1643 requires that a contract be construed to give it lawful effect. (*Pearson Dental Supplies, Inc. v. Superior Court, supra,* 48 Cal.4th at p. 682; *Roman v. Superior Court, supra,* 172 Cal.App.4th at 1473). Applied, these principals clearly show the Agreement does not require an employee's claims to be arbitrated if a court declares the Agreement unenforceable. The court expressly stated that this argument was "without merit." (*Baltazar, supra,* 212 Cal.App.4th at 241) As the Court of Appeal

recognized, the Agreement at issue merely provides an alternative, which is not unconscionable as a matter of law.

5. The Arbitration Provision Requiring The Parties To Take All Necessary Steps To Protect Trade Secrets From Public Disclosure Is Not Substantively Unconscionable

As with many employers, Forever 21 has trade secrets and other confidential and proprietary information critical to its operation. This information is required to be kept from the public as much as possible.. The law recognizes that such information is subject to protection. In the Agreement at issue, a provision acknowledges Forever 21's trade secrets and confidential and proprietary information and provides:

> Both parties agree that in the course of the arbitration proceeding all necessary steps will be taken to protect from public disclosure such trade secrets and proprietary and confidential information. (need cite)

This provision contemplates that if trade secret, confidential and proprietary information need be introduced into the arbitration that the parties work with the arbitrator to make sure that such information is not disclosed to the public. This provision DOES NOT restrict (except as otherwise provided by the law) the use of trade secret, confidential and proprietary information, but rather, calls for the parties to take steps if such information is required to be used.

Baltazar argues that if Forever 21 participates in arbitration, it may "now force[s] the employee to take 'all necessary steps' to protect the employer's 'trade secrets and proprietary and confidential information." Remarkably, Baltazar omits how protecting the employer's trade secrets (such as marking documents confidential) is a detriment to or imposes any hardship on her.

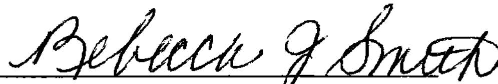
Baltazar's argument is just another attempt to misdirect the court as to the Agreement's language. Once again, the Agreement requires *both parties* to arbitrate all claims arising out of the employment relationship. While the Agreement provides that the parties will take steps to protect Forever 21's trade secrets and confidential and proprietary information during arbitration, the Agreement does not specify any particular steps to be taken, and does not allow for Forever 21 to bring claims for trade secret or confidential and proprietary information violations in court as opposed to arbitration. Both Forever 21 and the employee may seek provisional remedies for these claims in a court. The Agreement is clearly mutual.

CONCLUSION

The parties to this case signed an arbitration Agreement that provided both parities would submit any dispute arising out of the employment relationship to binding arbitration. Nothing in this Agreement constituted unconscionability supporting a denial of its enforcement. In support of that conclusion, that Court of Appeal has correctly rejected each of Baltazar's numerous arguments alleging unconsionability of its provisions.

FOR THE FOREGOING REASONS, the arbitration Agreement between the parties in the present case should be enforced and the opinion of the Court of Appeal must be upheld.

Dated: October 24, 2013 Gilbert, Kelly, Crowley & Jennett LLP

By: 

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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 and Appellans' Answer Brief on the Merits, generated by Microsoft Word, is 6,536 words.

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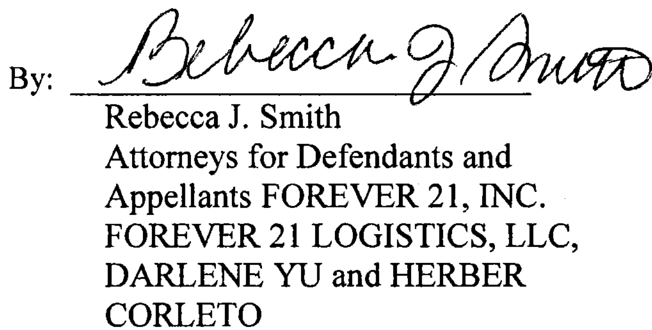
By: 

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PROOF OF SERVICE

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 1055 West Seventh Street, Suite 2000, Los Angeles, California 90017-2577.

On **October 25, 2013**, I served the within document described as:

APPELLANT'S ANSWER BRIEF ON THE MERITS

On the interested parties in this action as stated on the attached mailing list.

X (VIA PRIORITY MAIL) By placing a true copy of the foregoing documents(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 **October 25, 2013**, at Los Angeles, California

KATHLEEN McCORMICK	[signature]
(Type or print name)	(Signature)

SERVICE LIST

Maribel Baltazar v. Forever 21, Inc., Et. Al.
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