#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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

The arguments presented by Forever 21 are both factual and legally deficient.[1] In Forever 21's analysis of procedural unconscionability, they fail to consider key facts that have a direct impact in assessing procedural unconscionability. Specifically, Forever 21 ignores the tactics that they used in order to procure Mrs. Baltazar's signature. That is, they ignore the fact that Mrs. Baltazar initially refused to sign the arbitration agreement. (I CT 206, ln. 21-26, 210-219). They also ignore the fact that upon noticing that the arbitration agreement was not signed, Mr. Chung, a Forever 21 manager, approached Mrs. Baltazar and told her to sign the agreement – she refused, now for a second time. (I CT 207). Forever 21 then fails to consider in their analysis the fact that after Mrs. Baltazar refused to sign the arbitration agreement for a second time, Mr. Chung, in the presence of Plaintiff, approached another Forever 21 manager by the name of Jeff Shin, and after they briefly conversed in Korean, Mr. Shin specifically told Mrs. Baltazar, "sign it or no job." (*Ibid.*) It should also be noted that Forever 21 also failed to consider the financial distress of Mrs. Baltazar, as she was unemployed, had just separated from her husband (whom she later reconciled with), and had to immediately provide for her children. (*Ibid.*) She could not afford to "leave" this "take it or leave" offer at the minimal pay of $8.00 per hour. (*Ibid.*)

Instead of focusing on the foregoing facts, Forever 21 chose instead to exclusively focus on the adhesive language in the arbitration agreement. With that limited analysis, Forever 21 then argues that there is a low degree of procedural unconscionability.

Plaintiff Baltazar takes serious issue with this approach, as Forever 21 chooses to ignore key uncontroverted facts, which have a direct impact

[1] "Forever 21" will collectively refer to Forever 21, Inc., and Forever 21 Logistics, Inc.

on measuring the level of procedural unconscionability. Forever 21's procedural unconscionability analysis further fails because Mrs. Baltazar not only shows a high degree of oppression, but also shows surprise since Forever 21 did not even provide her a copy of the rules of arbitration. The high oppression and surprise are all in addition to a contract of adhesion, which is evidenced by Forever 21's arbitration agreement being in Mrs. Baltazar's employment application. (I CT 206-219.) Forever 21, however, only chooses to review the contract of adhesion aspect in its procedural unconscionability analysis. (Appellant's Answer Brief on the Merits ("Answer"), p. 11-15.) Accordingly, their procedural unconscionability analysis is truly faulted.

Forever 21 does not far any better in their analysis in relation to substantive unconscionability. It should be well noted that Plaintiff Baltazar has not only shown *some* degree of substantive unconscionability, but has shown a significant amount, when in reality, all she has to do is show a small amount, given the high degree of procedural unconscionability.

With regards to substantive unconscionability, the arbitration agreement is written to favor Forever 21 because it specifically itemizes employee-related claims subject to arbitration, while purposely failing to itemize employer-related claims. (I CT 216-217.) The arbitration agreement does not itemize employer-initiated claims, such as claims for confidentiality, unfair competition claims, misappropriation of trade secret claims, copyright claims, and/or patent infringement claims. (*Ibid.*) Instead, the arbitration agreement only enumerates employee-initiated claims for harassment, breach of contract, discrimination, retaliation, and termination. (*Ibid.*) Forever 21 attempts to minimize this argument by stating that the "including but not limited to" language includes all other unidentified disputes. (Answer, p. 18.) In reality, however, the "including

but not limited to" language simply applies to other employee-initiated claims that are not listed. If Forever 21 had wanted the arbitration agreement to apply to confidentiality breaches, misappropriation claims, non-compete violations, copyright claims and/or patent claims, Forever 21 would have simply listed them. They chose not to. Consequently, in the event of a challenge, Forever 21 can then, *after the fact,* argue that the arbitration agreement does not apply to such claims, and therefore they are not subject to arbitration. This is exactly the reason the *Pinedo* court held that in relation to its analysis of substantive unconscionability, that it is "inherently one-sided" to only enumerate employee initiated claims. (*Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 781.) The *Pinedo* court stated this despite the fact that the arbitration agreement in *Pinedo* applied to all disputes between the employer and the employee. (*Pinedo v. Premium Tobacco Stores, Inc. supra* 85 Cal.App.4th at p. 775.) The *Pinedo* rationale negates Forever 21's "including but not limited to" language because pursuant to *Pinedo*, if only employee-initiated claims are itemized, that is by itself inherently one-sided. (*Pinedo v. Premium Tobacco Stores, Inc. supra* 85 Cal.App.4th at p. 781.)

Secondly, if that were not enough, Forever 21 then guarantees itself an option to avoid arbitration by seeking injunctive relief. Forever 21 clearly favored itself in this sense because injunctive relief claims for misappropriation of trade secrets, and for temporary and permanent restraining orders are highly likely to be brought by itself, which is an international clothing merchandizer, as opposed to its employee who is making $8.00 per hour. (I CT 212.) Multiple courts, using their common sense, experience, and logic, have concluded that it is more likely that employers will be seeking injunctive relief, as opposed to employees. (*Trivedi v. Curexo Tech. Corp, supra,* 189 Cal.App.4th 387, 397; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 176; *Fitz v. NCR Corp.*

(2004) 118 Cal.App.4th 702, 725.) Forever 21, in response incorrectly argues that Plaintiff Baltazar is seeking injunctive relief, when in actuality, she is seeking monetary damages, lost wages, and punitive damages. In no paragraph in Plaintiff's complaint does she request injunctive relief. (I CT 3-48.)

Therefore, in practice, any injunctive relief provision will certainly benefit the employer, as it presents an option to avoid arbitration despite a signed arbitration agreement. Furthermore, Forever 21, by inserting the injunctive relief provision into its arbitration agreement, further attempted to secure benefits prematurely. The California Arbitration Act ("CAA") applies only after the arbitration agreement is deemed enforceable and conscionable. 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 arbitration agreement to begin with.

Thirdly, Forever 21's arbitration agreement requires the parties, without any showing, to automatically, without question, accept that Forever 21 has "valuable trade secrets and proprietary and confidential information." It then requires both Forever 21 and the employee to take "all necessary steps" to protect from the public disclosure such trade secrets and proprietary and confidential information." To emphasize the one-sidedness and unfairness of this provision, nowhere does the Forever 21 arbitration agreement state that Forever 21 will protect *any* confidential information related to the employee. (I CT 216-217.) Moreover, nowhere in the arbitration agreement does it say that Forever 21 will protect from disclosure an employee's disciplinary record, personnel file, private communications, or anything else that may relate to the privacy of Plaintiff. (*Ibid.*) There is no question that the provision specifically excludes any privacy interests of the employee, but solely shields any and all undefined privacy interests of Forever 21.

Finally, the trial court agreed that the language in the arbitration agreement further required arbitration, even in the event that there was an order asserting that the arbitration agreement was unconscionable pursuant to the Model Rules. (I CT 235.) The trial court ruled: ". . . 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 the Model Rules.") (*Ibid.*) Forever 21 argues that the language simply reserves another set of rules in the event that one set of rules is not used – the language of the arbitration agreement simply does not say that.

Therefore, Plaintiff Baltazar has presented unequivocal evidence to support not only a high level of procedural unconscionability, but also a high level of substantive unconscionability. In reality, however, in light of the high level of procedural unconscionability, only a minimal amount of substantive unconscionability is required. According, Plaintiff Baltazar respectfully requests that this Supreme Court reverse the Court of Appeals, and hold the arbitration agreement as unconscionable and unenforceable.

LEGAL DISCUSSION

I.

THE COURT MAY DECIDE BOTH SUBSTANTIVE AND PROCEDURAL UNCONSCIONABILITY ISSUES IN THE PURSUIT OF DETERMINING THE ENFORCEMENT OF THE FOREVER 21 ARBITRATION AGREEMENT.

The court has discretion to review "any issues that are raised or fairly included in the petition or answer." (CRC 8.516(b)(1); *Goldstein v. Super.Ct.* (*Grand Jury of Los Angeles* County)(2008) 45 Cal.4th 218, 225.) It also has discretion to review "an issue that is neither raised nor fairly

included in the petition or answer if the case presents the issue and the Court has given the parties reasonable notice and opportunity to brief and argue it." (C.R.C. 8.516(b)(2).) Therefore, the scope of review is not restrained by the statement of issues. (*Shulman v. Group W. Productions, Inc.* (1998) 18 Cal.4th 200, 234, fn. 13 – whether or not issue was "reasonably comprehended" in issues raised in petition for review, "we have found it necessary to address this point in order to state and decide fairly and accurately the legal questions inherent in the case.")

Here, Forever 21 claims, that in framing the issues, Mrs. Baltazar "ignores her obligation to prove the existence and degree of procedural unconscionability, or prove substantive unconscionability." (Answer, p. 9.) It should be well noted, however, that each of the three issues that Mrs. Baltazar presents, all require an inquiry to the existence of substantive unconscionability, since the Court of Appeals ruled that *no* substantive unconscionability existed. Furthermore, in order to determine whether an arbitration agreement in conscionable, and thereby enforceable, there must be an inquiry into both the procedural and substantive aspects of law. In assessing enforceability, one cannot discuss substantive unconscionability without also discussing procedural unconscionability.

Moreover, it should be especially well noted that both Mrs. Baltazar and Forever 21 thoroughly analyzed and debated, in both the opening brief on the merits, as well as the answer brief on the merits, the analysis of procedural unconscionability in Forever 21's arbitration agreement, and consequently the enforcement of the arbitration agreement as a whole. (The Court of Appeal did this as well.) Therefore, even though the issues in Plaintiff's petition specifically relate to the evaluation of the existence of substantive unconscionability, the issues of procedural unconscionability are nevertheless cogently linked, as an assessment into both issues must be evaluated in order to determine enforceability.

II.

THERE IS A HIGH DEGREE OF PROCEDURAL UNCONSCIONABILITY IN FOREVER 21'S ARBITRATION AGREEMENT WITH PLAINTIFF BALTAZAR.

In order to analyze the existence of procedural unconscionability, one must assess how the contract was negotiated, and further assess the presence of 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.)

A. A High Level of Oppression Equals a High Level of Procedural Unconscionability.

"An arbitration agreement that is an essential part of a 'take it or leave it" employment condition, without more, is procedurally unconscionable." (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114; *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 oppression component arises from an inequality of bargaining power and an absence of 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 bargain 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.)

Here, in Forever 21's answer, they concede, as they must, that their arbitration agreement was indeed a contract of adhesion. (Answer, p. 11.) This is consistent with both the holding from the trial court, as well as the opinion from the Court of Appeals. (*Baltazar v. Forever 21, Inc.* (2013) 212 Cal.App.4th 221, 234.) Forever 21 erroneously argues, however, that there is a "minimal" amount of procedural unconscionability because there must be "additional oppression or surprise." (Answer, p. 11.)

In their answer, they completely ignore a majority of the facts that surround Mrs. Baltazar signing the arbitration agreement. Instead, they argue procedural unconscionability in a vacuum with selective facts. That is, they ignore the following sequential pivotal facts that evidence additional oppression towards Plaintiff: 1) Ms. Baltazar completed an eleven page employment application – pages eight and nine referred to Forever 21's arbitration policy; 2) the signature block for the arbitration agreement was already highlighted in yellow, requiring Plaintiff to sign it; 3) Plaintiff refused to sign the arbitration agreement; 4) Forever 21's manager, Mr. Chung, noticed that the arbitration agreement was not signed, and presented it to plaintiff, and told her to sign; 5) Plaintiff shook her head without saying a word; 6) Mr. Chung then approached Mr. Shin, another Forever 21 manager, and in front of Plaintiff, they conversed in Korean; 7) Mr. Shin then told Plaintiff "sign it or no job."; 8) Plaintiff, who was recently separated from her husband (whom she later reconciled with), unemployed, in financial distress and in need of immediate employment to provide for her children, reluctantly signed the arbitration agreement. (I CT 206-219.) Forever 21 conveniently omitted all of the foregoing facts in their analysis.

Rather, Forever 21 cites cases that state that an adhesive contract, by itself, is not dispositive in demonstrating a high degree of unconscionability. (Answer, p. 10-11; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704; *Dotson v. Amgen, Inc.,* (2010) 181 Cal.App.4th 975, 980-981.) The cases that they cite, however, do not have any facts remotely close to the oppressiveness as presented in relation to Ms. Baltazar.

It should be noted that in *Serpa,* the only evidence of procedural unconscionability was the language in the arbitration agreement itself – there was nothing else. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal. App. 4th 695, 699-701, 704.) Specifically, the only argument Ms. Serpa argued in relation to procedurally unconscionable was that the contract was a contract of adhesion. (*Ibid.*) Ms. Serpa did not argue any conduct by any manager, any coercion by any manager, did not initially refuse to sign it, and was not in financial circumstances that warranted her to sign it (*Ibid.*) *Serpa* is clearly distinguishable from *Baltazar.*

Forever 21's reliance on *Dotson* is also inapplicable. The *Dotson* Court found a low amount of procedural unconscionability because Mr. Dotson did not argue that he was "rushed or coerced" to sign the agreement. (*Dotson v. Amgen, Inc., supra,* 181 Cal.App.4th at p. 981.) Here, Mrs. Baltazar, initially refused to sign the arbitration agreement with Forever 21, but only did so after several refusals, and after she was told by Mr. Shin "sign it or no job." (I CT 206-207.)

In addition, the *Dotson* court found a minimal amount of procedural unconscionability because Mr. Dotson was a highly educated attorney. (*Dotson v. Amgen, Inc., supra,* 181 Cal.App.4th at p. 981.) "Dotson is not an uneducated, low-wage employee without the ability to understand that he was agreeing to arbitration. He was the opposite—a highly educated

attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package. In such circumstances, the courts have found a minimum degree of procedural unconscionability." (*Ibid.*) Mrs. Baltazar, on the other hand, is financially unstable and is in dire need of employment, as she is unemployed, separated from her husband, and in need to immediately provide for her children, and accordingly, accepted her $8.00 per hour position at Forever 21. (I CT 206-207.)

Therefore, the cases cited by Forever 21 are inapplicable. Furthermore, the contract of adhesion part in relation to Plaintiff Baltazar is essentially shown in the employment application, which included the arbitration agreement. (I CT 210-219.) *In addition to that,* there is heightened oppression towards Mrs. Baltazar because of her financial duress, as well as the interactions between her, Mr. Chung, and Mr. Shin. (I CT 206-207.)

B. Not Only Is There A High Degree of Oppression to Support Procedural Unconscionability, But There is Also Surprise Because Forever 21 Failed to Provide the Arbitration Rules to Plaintiff Baltazar.

A strong degree of procedural unconscionability is present, not only because there is an adhesive contract and a high degree of oppression, but also because Forever 21 failed to provide Mrs. Baltazar with a copy of the arbitration rules, thereby constituting surprise. (I CT 210-219.) Forever 21 in its answer brief argues that the failure to attach the arbitration rules to an arbitration agreement does not necessary constitute surprise. (Answer, p. 12 -15.) They are mistaken.

In support of their proposition, they argue that the AAA rules met all of the legal requirements for arbitration, and that Ms. Baltazar does not

argue any deficiencies in the AAA rules, and therefore, there is no surprise. (Answer, p. 12-15.)

The problem with this rationale is that it is not supported by either case law or the facts. Surprisingly, Forever 21 argues *Trivedi*, which *in its procedural unconscionability analysis,* holds that when the rules are not provided to Plaintiff, surprise exists, thereby constituting procedural unconscionability. (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal. App. 4th 387, 393.) The *Trivedi* court further stated: "Here, the failure to give Trivedi a copy of the AAA rules was no trifling matter. The rules extend over 26 single-spaced pages." (*Ibid.*)

In addition, *Trivedi* specifically cited *Gutierrez,* a case that specifically held that when the AAA rules are not provided to Plaintiff, procedural unconscionability exists (*Trivedi v. Curexo Technology Corp., supra,* 189 Cal.App.4th at p. 393 citing *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 84, 89.)

Forever 21 then argues that "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. (Answer p. 15.) This is a misstatement of law. If one actually carefully reviews *Peng,* the *Peng* court stated: "Thus, we find the failure to attach the AAA rules, **standing alone**, is insufficient grounds to support a finding of procedural unconscionability." (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472.) The words "standing alone" are paramount. In *Peng*, there was no evidence of oppression, or anything else to support procedural unconscionability, other than the failure to provide the rules. (*Ibid.*) That is simply not the case here with Mrs. Baltazar and Forever 21, and accordingly the case is misapplied. With regards to Mrs. Baltazar, she has already shown a significant degree of oppression, and in addition to that,

has also shown surprise. Therefore, Ms. Baltazar is not making any "stand alone" arguments, that is, asserting that her only justification for procedural unconscionability is the failure for Forever 21 to provide her the rules of arbitration. Actually, it is quite the opposite. Accordingly, the *Peng* rationale is inapplicable because Ms. Baltazar is also arguing a high degree of oppression (no oppression was argued in Peng), and Peng does not state that the failure to provide the AAA handbook cannot be a *contributing factor* to further evidence procedural unconscionability. (*Ibid.*)

Therefore, the *failure to provide arbitration rules is just another factor to consider in relation to the totality of the degree of procedural unconscionability.* Moreover, the issue is "surprise." How can one not be surprised if the rules are not attached? If one had at least the opportunity to review the rules of arbitration, one could then make a more informed decision in deciding to sign the arbitration agreement, and may even encourage negotiation regarding the proposed rules if there is disagreement over them and/or an expressed willingness not to be bound by them.

Accordingly, it should be fairly evident that there does indeed exist a significant degree of procedural unconscionability in Forever 21's arbitration agreement with Mrs. Baltazar. Not only is the arbitration agreement procedurally unconscionable because it is a contract of adhesion, but there is also a heightened oppressiveness as indicated by the conduct of Forever 21 managers Mr. Chung and Mr. Shin, as well as Plaintiff's financial vulnerability, and finally surprise. (I CT 206-219.)

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III.

FOREVER 21'S ARBITRATION AGREEMENT IS SUBSTANTIVELY UNCONSCIONABLE.

A. Mrs. Baltazar Satisfies Any of the Applicable Legal Standard In Determining Substantive Unconscionability Be It Either: 1) Overly Harsh; 2) So One Sided to Shock the Conscience; 3) Oppressive; or 4) One Sidedness.

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).)

Plaintiff Baltazar argues that there are several legal standards to demonstrate substantive unconscionability, and that the *Baltazar* Court is limiting those standards. (Plaintiff's Opening Brief on the Merits, p. 20.) That is, there are other legal standards to demonstrate the existence of substantive unconscionability, other than being exclusively required to produce contract terms that are "so one-sided as to shock the conscious." (*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; *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.) The other legal standards are to show that the contract terms are simply one sided, oppressive, **or** unduly harsh. (*Ibid.*) The reason

for this is because of the sliding scale approach. That is, if there is a high degree of procedural unconscionability, then only a small amount of substantive unconscionability must be shown. When there are contract terms that are so one-sided to "shock the conscience", a large amount of substantive unconscionability is presumed. The term "shock the conscience" is exactly what it sounds – terms that are so high in substantive unconscionability that it literally shocks the conscience. This "shock the conscience" standard is not necessary to satisfy *when* there is a high degree of procedural unconscionability, because according to the sliding scale approach, only a minimal amount of substantive unconscionability must be shown when there is a high degree of procedural unconscionability, and a high degree of substantive unconscionability is presumed when there are terms that "shock the conscience." Hence, there are lesser standards in determining the existence of *any* substantive unconscionability, such as an investigation as to whether the terms are simply one-sided, oppressive, **or** unduly harsh. These approaches reconcile the legal implications of the sliding scale approach.

Here, Plaintiff Baltazar asserts that she has already shown a very high degree of procedural unconscionability, and thereby, according to the sliding scale approach, she only now need to show a minimal amount of substantive unconscionability. Though she will demonstrate a high degree of substantive unconscionability, in reality, however, she only needs to show a small degree of substantive unconscionability to hold the arbitration agreement as unenforceable as unconscionable.

Therefore, the legal standard to prove substantive unconscionability should not only be "overly harsh" or "so one sided as to shock the conscience", as the *Baltazar* court held ("Simply put, the contract term ***must*** be either (1) overly harsh or (2) so one sided as to shock the conscience"), but rather, when there exists a high degree of procedural

unconscionability, it is sufficient then to simply show that the terms are "one-sided" (*Baltazar v. Forever 21, Inc.* (2012) 212 Cal.App.4th 221, 231.)

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.)

With this being said, however, Plaintiff Baltazar demonstrates substantive unconscionability and satisfies all of the posited tests to assess unconscionability: 1) she shows simple one-sidedness when procedural unconscionability is high; 2) she demonstrates that the terms are overly-harsh and oppressive, and 3) and she demonstrates that the terms are indeed "so one sided to shock the conscience." The latter approach of "shock the conscience" is not necessary to satisfy, however, especially when there is already a high degree of procedural unconscionability.

B. Forever 21 Attempts to Further Limit the Application of Substantive Unconscionability.

Forever 21 argues that in order for there to be substantive unconscionability, there has to be "exclusions" that favor one party over the other. (Answer, p. 16.) That is, they argue that in order for there to be substantive unconscionability, there has to be in the arbitration agreement, language that excludes one party from arbitration, and requires the other party to be bound to arbitration. (*Ibid.*) Forever 21 then cites to *Abramson, O'Hare,* and *Fitz* to support these propositions. (Answer, p. 16-17.)

What Forever 21 fails to acknowledge is that substantive unconscionability can take on many different forms, other than just "exclusions." Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) Accordingly the threshold question is not necessary "exclusions," but rather "one sidedness."

Case law has been fairly consistent in relation to this principle. "Substantive unconscionability" refers to terms that unreasonably favor one party. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) "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).)

Accordingly, there are numerous examples where substantive unconscionability is found, but yet there are no "exclusions." Hence, substantive unconscionability has been found where there is improper cost splitting. (*Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F. 3d 1101, 1107-1109; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1177-1178.) Substantive unconscionability has also been found in arbitration agreements that limit discovery. (*Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 716-719; *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal, App. 4th 1322, 1332.) Substantive unconscionability has

further be found where the arbitration agreement requires limited recovery. (*Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1178.) It has also been found where the arbitration agreement shortens the limitations periods. (*Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F. 3d 1101, 1107-1109). It has also been additionally found in arbitration agreements where there is a condition precedent that prior to proceeding to arbitration, the employee discuss her claims with the employer. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal. App. 4th 1267, 1282-1283, 1287-1288.)

Accordingly, again, the threshold inquiry is not "exclusions" as zealously proffered by Forever 21, but simply the existence of one-sidedness.

C. Forever 21's Analysis Regarding *Pinedo* is Unpersuasive.

Forever 21 fails to acknowledge that by enumerating employee-initiated claims, and failing to enumerate employer-initiated claims, they are giving themselves an unfair advantage because when enforceability becomes an issue, they are in a much better position to argue that the arbitration agreement does not apply to them because the examples that are enumerated are all employee-initiated. In addition, they are in a much better position to enforce an arbitration agreement against an employee, because all of the typical claims brought by employees are specifically identified in the arbitration agreement, that is, "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 contain 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. (I CT 216.) It is fairly obvious that all of the foregoing claims are employee–initiated.[2] Therefore, it is evident that Forever 21 is in a stronger position to enforce the claims that it wants to enforce.

Forever 21 then defends that even if their arbitration agreement specifically enumerates employee-related claims, it does not matter because their arbitration agreement requires arbitration of all "disputes." (Answer, p. 18.) The *Pinedo* court disagreed with this, however.

In *Pinedo*, just like the situation here, there was language in the *Pinedo* arbitration agreement that required all disputes to be subject to arbitration. (*Pinedo v. Premium Tobacco Stores, Inc.*, (2000) 85 Cal.App.4th 774, 775.) Specifically, in *Pinedo*, the arbitration agreement applied to "***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 . . . .*" (*Ibid.*) Yet, the *Pinedo* court, in its substantive unconscionability analysis ***also*** found this

[2] Forever 21 argues, on page 18 of their Answer, that the list contains claims for "breach of contract" and suggests that the employer would be bound to arbitrate such claims, but in reality, the arbitration agreement states "claims for breach of any *employment* contract or covenant (express or implied)," suggesting that if there is a dispute between the employer and employee regarding a contract other than an employment contract, such as a confidentiality contract, non-compete agreement, copyright/patent agreement, those such disputes are not specifically enumerated.

language to be **"inherently one sided"** because the arbitration agreement only addressed "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.) The listed disputes in the *Pinedo* arbitration agreement were one sided, just like the enumeration of itemized disputes by Forever 21.

Here, the Forever 21 arbitration agreement is even more inherently one sided than *Pinedo*, because Forever 21 further defines such employee-initiated claims, specifically stating claims for unlawful discrimination, retaliation, harassment, and termination. The *Pinedo* court did not even have such specificity, and yet the *Pinedo* Court *still* found the listing to be "inherently one sided." (*Pinedo v. Premium Tobacco Stores, Inc. supra* 85 Cal.App.4th at p. 781.) It should be further noted that even though the *Pinedo* court found the *Pinedo* arbitration agreement to be substantively unconscionable on other grounds, the *Pinedo* court still stated that in addition to those grounds, it was "also" inherently unfair because it listed employee-initiated claims. (*Ibid.*)

Forever 21, ignoring the "inherently one sided" language from the *Pinedo* court, attempts to debate words, specifically, the "including but not limited to" language. This is really not that different from the *Pinedo* arbitration agreement, because in *Pinedo*, the arbitration agreement also provided non-exclusive language, stating "the term 'disputes' means and includes . . .", suggesting that additional claims are subject to the arbitration agreement, even though not specifically identified. Moreover, Forever 21's "including but not limited to" language assessed in light of the numerous itemized employee-initiated claims that follow, suggests that it will actually

incorporate other employee-initiated claims that are not specifically identified, as opposed to unidentified employer-related claims.

Forever 21 essentially maintain a fail-safe for employer-initiated disputes, so they can argue, at their convenience, whether arbitration is best for them. There is absolutely no ambiguity that if the dispute is in regards to a termination, the employee has to arbitrate. There is absolutely no ambiguity that if a dispute is regarding harassment or discrimination, then the employee must arbitrate. **However, if there is a dispute regarding covenants not to compete, intellectual property violations, copyright infringement, confidentiality breaches, there is no itemization of such claims that require arbitration. Absent such specific enumerations, Forever 21 may attempt to seek judicial relief because there is no such clear itemization.**

If Forever 21 wanted to be bound to arbitration in relation to confidentiality breaches, copyright violations, patent violations, non-compete issues, and claims regarding the misappropriation of trade secrets, then they should be required to itemize such claims, and not leave it completely arbitrary and ambiguous for future argument, while yet securing, without question, their right to arbitration in relation to employee-initiated claims of harassment, discrimination, retaliation, and termination. The one-sidedness is clear.

D. Forever 21's Arbitration Agreement is Substantively Unconscionable Because It Unjustifiably Reserves Injunctive Relief.

Forever 21's arbitration agreement specifically states: "Pursuant to California Code of Civil Procedure §1281.8 either party hereto may apply to a California court for any provision remedy, including a temporary restraining order or preliminary injunction." (I CT 216.)

Plaintiff argues that the inclusion of this provision is substantively unconscionable because: 1) that is the law pursuant to *Trivedi*; 2) employers are more likely than employees to invoke injunctive relief, a position supported by multiple appellate courts; 3) there is no legitimate justification to insert the provision in light of the California Arbitration Act, other than to prematurely allow anticipated and highly likely behavior from an employer; and, 4) the provision ensures, without any justification, employers a premature procurement of such rights, even though those rights do not vest until the arbitration agreement is indeed deemed conscionable and enforceable.

Forever 21 in its answer brief argues that the inclusion of this injunctive relief provision is not substantively unconscionable because: 1) such rights are granted under the California Arbitration Act; 2) employees are just as likely to seek injunctive relief as employers; and 3) *Mercuro* and *Fitz* are inapplicable to support Plaintiff's proposition because those cases are distinguishable and had different fact patterns. (Answer, p. 19-21.)

Forever 21's first argument, that such rights are granted under the California Arbitration Act, is misapplied. First off, the California Arbitration Act only applies to conscionable and enforceable agreements, and therefore, in order for any right to apply pursuant to the Act, the arbitration agreement has to be enforceable and conscionable to begin with. Here, with regards to Forever 21's arbitration agreement with Mrs. Baltazar, Forever 21 is attempting to prematurely reserve rights without first having the rights vested. That is, their arbitration agreement is both procedurally and substantively unconscionable, and accordingly, the California Arbitration Act does not even apply. Furthermore, there is no legitimate justification to insert such a provision into an arbitration agreement, when such a provision is already codified, *except to improperly*

benefit the employer in its premature application for "any provision remedy, including a temporary restraining order or preliminary injunction.

In regards to Forever 21's second argument, they argue that employees are just as likely to seek injunctive relief, than are employers. They then argue that Plaintiff Baltazar is suing for six causes of action that each allow her to attain injunctive relief, and then outrightly say that Plaintiff is suing for injunctive relief. In reality, however, throughout Mrs. Baltazar's 48 page complaint, she 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.) Furthermore, Forever 21 does not distinguish between potential relief, and relief that is actually sought. According to *California Government Code* §12965, anyone who sues for any statutory violation anywhere in the Fair Employment and Housing Act can seek injunctive relief pursuant to *California Government Code* §12965 – but that does not mean that everyone does.

Realistically, however, it is going to be employers, not employees, who seek injunctive relief, and who do in fact, seek injunctive relief. That is, using logic, experience, and common sense, as the three different Courts of Appeal did (*Trivedi, Mercuro & Fitz*), 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 387, 397; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 176; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702,

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 Forever 21.

Finally, Forever 21's third argument, just like the Court of Appeal's analysis in this regard, is completely misplaced. Both Forever 21 and the Court of Appeal argue that *Mercuro* and *Fitz* do not support *Trivedi's* analysis, and then each argues how the fact patterns in *Mercuro* and *Fitz* are different from the facts in *Trivedi*. (*Baltazar v. Forever 21, Inc., supra,* 212 Cal.App.4th at p. 238; Answer, p. 20-21.) Plaintiff Baltazar emphasizes that the *Trivedi* court cited to the *Mercuro* and *Fitz* cases, not only to identify other cases where injunctive relief provisions were held substantively unconscionable, **but also because in those cases, those courts specifically stated that employers are more likely than employees to seek injunctive relief.** (*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.) **The *Trivedi* court specifically agreed with this rationale from both the *Mercuro* and *Fitz* courts.** Specifically, both the *Mercuro* and *Fitz* courts supported the notion that employers are more likely to seek injunctive relief than employees. The *Mercuro* court specifically stated:

> "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." (*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. . . . 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 *Trivedi* court was accurate in relying on both of the rationales cited in *Mercuro* and *Fitz*. Thus, *Trivedi* accurately relied on both *Mercuro* and *Fitz* to support its conclusion that employers are more likely to invoke injunctive relief.

After review and analysis of Forever 21's arguments, they fail to persuade because *Trivedi* was indeed correct in finding substantive unconscionability because of the injunctive relief language in the arbitration agreement. In addition, three different Courts of Appeal, using common sense, logic, and experience, all agree that employers are more likely to invoke injunctive relief. (*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.)

Therefore, there is no reason or justification for Forever 21 to even include the injunctive relief provision into the arbitration agreement other than to prematurely secure judicial leave for claims that are most likely to be brought by employers. Accordingly, such a provision is without question one-sided.

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E. Forever 21's Arbitration Agreement is Substantively Unconscionable Because, Without Any Reciprocity, It Requires Its Employees to Agree that Forever 21 Has Confidential Information, And Then Requires Its Employees to Take all "All Necessary Steps" to Protect Such Information.

The substantive unconscionability in relation to Forever 21's confidentiality mandates are fairly self-explanatory. 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).)

Mrs. Baltazar argues 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.

In the event of an arbitration, this provision contractually obligates an 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 because 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 a "trade secret." (*Cal. Civ. Code* §3426.1(d).)

Furthermore, the paragraph imposes unilateral benefits to Forever 21 because it fails to require that Forever 21 take "all necessary steps" in relation to Mrs. Baltazar's privacy and confidential information. It does not say anywhere that Forever 21 will protect from disclosure an employee's personnel file, her disciplinary record, private communications, and other private information that may be disclosed during arbitration.

Forever 21 in its answer completely ignores most of the arguments that Plaintiff Baltazar asserts in her brief. (Answer, p. 23-24.) The only argument that they present is that Mrs. Baltazar has not shown any detriment to her in abiding by this provision. (*Ibid.*)

Firstly, it should be clear that the provision clearly benefits the employer, denying any mutuality towards her. Secondly, Forever 21 does not have any incentive to protect Mrs. Baltazar's privacy because Forever 21 already has the benefit of a guaranteed unfettered protective order to whatever it considers to be confidential, and therefore may be opposed to any protective order in relation to Plaintiff's privacy, especially since a majority of protective orders are jointly stipulated too, and apply to the privacy interest of both parties.

Moreover, there may be even liability against Mrs. Baltazar in the event that she fails to take "all necessary steps" to protect the *known/unknown* confidential and proprietary information of Forever 21, since the provision in the arbitration agreement specifically imposes contractual duties on her. In addition, this arbitration provision places Plaintiff also in a perilous position because Plaintiff may disagree with Defendant over what is "confidential", but be forced to agree to Forever 21's definition of confidentiality in order to avoid any potential breach.

Finally, when both parties commence an arbitration, one should not already be at a disadvantage and have obligations of not only proving his/her claims, but have the added responsibility to take "all necessary steps" to protect unknown and undefined privacy interests of your opponent, when the plaintiff does not even know the undefined privacy interests of his/her opponent to begin with.

This provision is clearly substantively unconscionable at it completely lacks any mutuality, imposes extraordinary burdens on Plaintiff, and potentially exposes Plaintiff to liability.

F. The Arbitration Agreement is Substantively Unconscionable Because It States that if a Court were to Find the Agreement Unconscionable, Then The Parties Would Still Have to Arbitrate.

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.)" (I CT 234-235.) Both Ms. Baltazar and the trial court read the straightforward language in the arbitration agreement to come to this conclusion. Forever 21 in their answer admit that they do not follow the argument and "will not attempt to explain it." (Answer, p. 22.) If there is any reason not to follow the argument, it is because of the defective drafting of the provisions in the arbitration agreement. The argument is not, however, obtuse as Forever 21 would like to make it seem. Forever 21's arbitration agreement specifically 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.)

Therefore, if Forever 21 filed a motion to compel arbitration, and the court granted the motion, the rules of the American Arbitration Association would apply, pursuant to the language in Forever 21's arbitration agreement. If however, the motion was denied, no rules of arbitration would apply because there would be no arbitration.

Forever 21's 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).)

Hence, if a Court deems the arbitration agreement unenforceable, the prescribed rules would also be unenforceable because there is simply no arbitration, and hence no AAA rules to apply.

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.)

Literally, the arbitration agreement states that if any court finds the arbitration agreement unenforceable (and thereby the AAA are also unenforceable), the arbitration must still continue, but under different rules. This language unreasonably favors Forever 21, since it further ensures arbitration.

IV.

CONCLUSION

Not only did Forever 21 require Mrs. Baltazar to sign an arbitration agreement as a condition of employment and pursuant to the direct commands of her managers, but Forever 21, also, under the disguise of neutrality, ensured itself an option to litigate employer-initiated claims, while yet guaranteeing that any and all employee-initiated claims proceed to arbitration. In addition, it ensured that it reserved judicial relief for any type of injunctive relief, even though it had no justification to do so, and prematurely reserved such "rights." If that were not enough, in the event that Forever 21 participates in arbitration, it ensures itself an unfettered right to privacy in relation to anything that it wants during arbitration, without objection from Plaintiff. Finally, Forever 21 provides an additional fail-safe that literally states, and directly implies, that arbitration will continue even if enforcement says otherwise.

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, and allow Plaintiff Baltazar to adjudicate her claims by trial.

November 18, 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 7,919 words as counted by the Mircrosoft Word software program used to generate this brief.

November 18, 2013

Mark Joseph Valencia, Esq.

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

On **November 18, 2013,** I served the documents described below in the manner described below:

RESPONDENT BALTAZAR'S REPLY 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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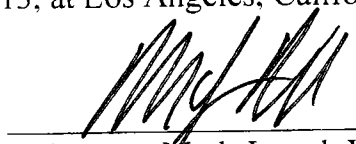
[X] (VIA PRIORITY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course 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 above is true and correct.

Executed November 18, 2013, at Los Angeles, California.



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