Case No. S179378

IN THE
SUPREME COURT OF CALIFORNIA

TARRANT BELL PROPERTY, LLC, et al.
Petitioners,

vs.

THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent
REYNALDO ABAYA, et al., Real Parties in Interest

SPANISH RANCH I, L.P.
Petitioner,

vs.

THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent
REYNALDO ABAYA, et al.,
Real Parties in Interest

After a Decision by the Court of Appeal
First Appellate District, Division Four
Civil Nos. A125496, A125714

Superior Court Alameda County, No. HG08418168
Hon. George C. Hernandez, Jr.

REAL PARTIES IN INTEREST REYNALDO ABAYA, ET AL.'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Petitioners Tarrant Bell Property, LLC and Spanish Ranch I, L.P. (hereinafter "Parkowners"), in an apparent attempt to insulate themselves from a court trial relating to their actions in failing to maintain their mobilehome park, inserted "arbitration" provisions in the leases they required from many mobilehome homeowners who rented spaces in the park. Hidden in the numerous provisions regarding arbitration is one paragraph which provided that if the arbitration provisions were held unenforceable, Homeowners would agree to refer their disputes against the Parkowners to judicial reference.[1]

In this case the Superior Court held that the arbitration clauses in the mobilehome leases were unenforceable and, after examining the plain language of California Code of Civil Procedure, section 638,[2] the

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[1] This is only one of a series of instances where arbitration and reference provisions have been used by mobilehome parkowners in an attempt to restrict groups of mobilehome homeowners from trying "failure to maintain" actions against parkowners in court trials. The following are a list of some of the cases Homeowners' attorneys have handled: *Alvarez v. Orange Ave. Mobilehome Park LLC,* 2nd Dist., Div. 2, Case No. B216918, 2010 WL 2280620 (June 8, 2010); *Aronowitz v. Paul Goldstone Trust,* 6th Dist., Case No. H033725, 2010 WL 928199 (March 16, 2010); *Adams v. MHC Colony Park Ltd. Partnership,* 5th Dist., Case No. F053046, 2008 WL 2502527 (June 24, 2008); *Harvey v. Katella Mobilehome Estates, L.P.,* Fourth Dist., Div. 3, Case No. G031737, 2003 WL 22436265 (October 28, 2003); *Hawley-McGrath v. General Trailer Park Assoc.*, 2nd Dist., Div. 5, Case No. B173970, *Andrade v. MHC Operating Limited Partnership,* 6th Dist., Case No. H034960 (petition for writ pending).

legislative history of that provision, and determining that reference in this case would not achieve any of the benefits of section 638, exercised its discretion to deny judicial reference.

The Court of Appeal affirmed and this Court granted review. In this Answer Brief on the Merits the Homeowners explain why the Superior Court and Court of Appeal decisions were proper, and further argue that in the alternative, the Court should deny reference because the reference provisions are also unenforceable because they are substantively and procedurally unconscionable.

STATEMENT OF THE CASE

A. General Background Regarding California Mobilehome Residency Law

> A mobile home owner typically rents a plot of land, called a "pad" [or "space"] from the owner of the mobile home park. The park owner provides private roads within the park, common facilities within the park such as washing machines or a swimming pool, and other utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Yee v. City of Escondido ("Yee"), 503 U.S. 519, 523 (1992).

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[2]Unless otherwise specified, all statutory citations are to the Code of Civil Procedure.

Because mobilehomes are typically permanently attached to the space, the relationship between parkowners and homeowners has shifted from a strict landlord-tenant relationship (similar to that in residential apartments) to a relationship between co-investors in a joint venture. In this relationship, the parkowner provides investment in the site, utilities, and other amenities and the homeowner provides concurrent investment in the mobilehome and its appurtenances. Both parties to this relationship have obligations: the homeowner is obligated to pay space rent and abide by the rules of the park; the parkowner is obligated to provide a space for the mobilehome, amenities, and a safe and sanitary park. [3]

The California Legislature recognized the unique vulnerability of mobilehome owners in the Mobilehome Residency Law ("MRL"), Civil Code section 798 *et seq*. Section 798.55(a) provides:

> The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.

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[3]The term "mobilehome" is a misnomer. Mobile homes are largely immobile as a practical matter, because once installed, manufactured homes are almost never moved. *Id. Yee, supra*, 503 U.S. at 523.

Civil Code section 798.87 (a) further provides:

> The substantial failure of the management to provide and maintain physical improvements in the common facilities in good working order and condition shall be deemed a public nuisance. . . . this nuisance may only be remedied by a civil action or abatement.

Emphasis added.

The Legislature also has set forth these protections in the Mobilehome Parks Act, Heath and Safety Code, section 18250 *et seq.*:

> § 18250. Condition and rights of residents
>
> The Legislature finds and declares that increasing numbers of Californians live in manufactured homes and mobilehomes and that most of those living in such manufactured homes and mobilehomes reside in mobilehome parks. Because of the high cost of moving manufactured homes and mobilehomes, most owners of manufactured homes and mobilehomes reside within mobilehome parks for substantial periods of time. Because of the relatively permanent nature of residence in such parks and the substantial investment which a manufactured home or mobilehome represents, residents of mobilehome parks are entitled to live in conditions which assure their health, safety, general welfare, and a decent living environment, and which protect the investment of their manufactured homes and mobilehomes.

Health and Safety Code, section 18251 further reiterates the unique protections guaranteed a mobilehome owner:

> The Legislature finds and declares that the standards and requirements established for construction, maintenance, occupancy, use, and design of mobilehome parks should guarantee park residents maximum protection of their investment and a decent living environment. . .

This Court has recognized the economic imbalance of power between mobilehome parkowners and homeowners. *See, e.g., Galland v.*

City of Clovis ("Galland"), 24 Cal. 4th 1003, 1010 (2001), *cert. denied*, 534 U.S. 826 (2001).

B. Real Parties In Interest Are The Homeowners Who Are Suing Parkowners For Failing To Maintain The Park

Real Parties in Interest are 120 current or former residents ("Homeowners") at the Spanish Ranch Mobilehome Park ("Park") owned and operated at various times by Parkowners. Homeowners own their own homes, which are located on spaces in the Park. They lease spaces from the Parkowners pursuant to leases and rental agreements which are governed by the MRL. Civil Code § 798, *et seq*.

C. The Complaint

On October 30, 2008, Homeowners filed their Complaint alleging ten causes of action arising from Parkowner's failure to properly maintain Park infrastructure and common facilities. 5 PE 1327. The Complaint alleges, among other things, that a failing sewer system caused repeated backups of raw sewage in and around Homeowners' homes and in their yards; a substandard water supply provided odorous and dirty water and was not large enough to provide enough water for all of the Homeowners; an aging electrical system did not provide the requisite electrical supply causing blackouts, brownouts and damage to appliances; and a lack of maintenance in the common areas including, but not limited to, the clubhouse, the laundry facilities, Park restrooms, streets and driveways.

D. Parkowners File A Motion to Compel Arbitration Or In The Alternative, Judicial Reference

In December 2008, Parkowners specially appeared in the action by filing a motion to compel arbitration, or, in the alternative, to have the matter tried by a referee. 1 PE 3-21. Parkowners alleged that 99[4] out of the 120 Homeowners had signed rental agreements that contained provisions requiring arbitration in the event of a dispute between the resident and the Parkowners or, in the alternative, the agreements mandated reference if the court invalidated the arbitration clause. *Id.* at 20-21. Parkowners also filed the Declaration of Patrick F. Mockler (*id.* at 22-26) and attached the lease/rental agreements. 1 PE 30- 3 PE 869. In addition, Parkowner filed a Notice of Lodgment attaching sample rental lease types (4 PE 876) and a Request for Judicial Notice. 4 PE 872.

On January 8, 2009, Homeowners filed their Opposition to Parkowners' Motion to Compel Arbitration (4 PE 999), along with the Declaration of Patrick A Calhoon. *Id.* at 1020. Homeowners opposed Parkowners' motion on numerous grounds, including that requiring the

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[4] While Parkowner repeatedly stated that 100 Homeowners are subject to their motion, a count of the Homeowners identified in Parkowners' original motion shows that number was 99. 1 PE 4-5. Homeowners believed the actual number as 81. *Tarrant Bell Property, LLC v. Superior Ct.,* 179 Cal. App. 4th 1283, 1287 (2009). The Court of Appeal did not decide this issue stating "The exact number is not important here. It is sufficient to note that many, but not all, of the plaintiffs agreed to submit tenant disputes to ADR." *Id.*

cases of some, but not all, Homeowners to be heard by arbitration would ignore the long-standing public policy to promote judicial economy and prevent inconsistent judgments that undermine the integrity of the judicial system. 4 PE 1017-18. In addition, Homeowners argued the arbitration and judicial reference provisions were unconscionable, void as against public policy and contracts of adhesion. *Id.* at 1008-19.

In support of Homeowners' opposition, 54 Homeowners filed Declarations stating that they were not given a copy of the agreements presented to them, the arbitration provisions were not explained to them, they were just told to "sign and initial here" and they were under economic duress to sign the agreements because they had either put down payment on their homes and were told that couldn't move into the Park unless they signed the agreements presented to them. 4 PE 1024-1138.

On January 14, 2009, Parkowner Tarrant Bell filed its Reply to Opposition to Motion to Compel Arbitration/Reference.[5] 5 PE at 1146. Parkowner Tarrant Bell also filed the Declarations of Richard Brown (*id.* at 1213) and Teresa Cruz (*id.* at 1207) in Support of its Reply.

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[5]On January 14, 2009, Parkowner Monterey Coast also joined in the Motion to Compel Arbitration/ Reference (5 PE 1219), the Request for Judicial Notice in support of the Motion to Compel Arbitration/Reference (*id.* at 1223), Objections to the Declaration of Patrick A. Calhoon (*id.* at 1160) and Objections to Declarations of Homeowners. *Id.* at 1166.

E. The Arbitration And Reference Provisions In The Agreements

Parkowners adduced eight versions of rental agreements which it alleged obligated the parties to arbitrate their disputes or alternatively to have them heard by judicial reference. *See* 1 PE 7, and Declaration of Patrick Mockler attaching rental agreements. *Id.* at 22. Those versions were designated "A," "B," "D," "E," "F," "G," "H," and "K." *Id.* Because the arbitration provisions were intertwined with the reference provisions it is necessary to set forth both provisions herein.

1. The Type "A" Rental Agreements

Parkowners produced six rental agreements it identified as Type "A" agreements. *See, e.g.*, 1 PE 30-75. Paragraph 38.2 of the Type "A" agreements commenced by setting forth those claims **exempt** from "arbitration" which included the typical claims that Parkowners would bring against Homeowners related to: termination of tenancy, forcible detainer, fees a Parkowner might charge a Homeowner for enforcement of park rules

and regulations, change of use of the park, and all disputes of any kind except for those identified in paragraph 38.2. *See e.g.* 1 PE 37.[6]

In contrast, the "disputes" brought by Homeowners which are subject to arbitration are described in paragraph 38.3 are claims relating only to Parkowners' failure to maintain the improvements, conditions, services and utilities in the Park. *Id.* at 37.[7]

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[6]Paragraph 38.2 states:
THE ONLY NON-ARBITRATION EXCEPTIONS **ARE ANY CONTESTED RIGHTS OF OWNER** WHICH RELATE TO : (A) TERMINATION OF TENANCY IN THE PARK DUE TO FAILURE TO PAY RENT OR OTHER CHARGES UNDER CIVIL CODE SECTION 798.56(D); (B) FORCIBLE DETAINER; (C) RELIEF PURSUANT TO [I] CIVIL CODE SECTION 798.88, OR [II] CIVIL CODE SECTION 798.36, OR [III] PAYMENT OF THE MAINTENANCE FEE PROVIDED FOR IN CIVIL CODE SECTION 798.36, OR [IV] CONDEMNATION OR A CHANGE OF THE USE OF THE PARK AS PROVIDED IN CIVIL CODE SECTION 798.56 (E) AND (F), OR [V] TO PRESERVE THE EQUITABLE RIGHTS APPERTAINING TO ANY ARBITRABLE DISPUTE BEFORE RESOLUTION BY ARBITRATION. ALL **DISPUTES** OF ANY KIND, EXCEPTING THE FOREGOING EXCEPTIONS SET FORTH IN THIS SUBPARAGRAPH 38.2, SHALL BE SUBJECT TO ARBITRATION. (Emphasis added)

[7] Paragraph 38.3 states:
DISPUTES INCLUDE, BY WAY OF ILLUSTRATION, BUT NOT LIMITED TO DISPUTES, CLAIMS, DEMANDS, OR CONTROVERSIES RESPECTING; MAINTENANCE, CONDITION, NATURE, OR EXTENT OF THE FACILITIES, IMPROVEMENTS, SERVICES AND UTILITIES PROVIDED TO THE SPACE, PARK, OR THE COMMON AREAS OF THE PARK; ENCODEMENT OF THE RULES AND REGULATIONS; OR TO PROPERTY OR DAMAGES RESULTING TO YOU, RESIDENTS AND INVITEES, OR, TO PROPERTY OF ANY KIND, FROM OWNER'S OPERATION, MAINTENANCE, OR THE CONDITION OF THE PARK OR ITS EQUIPMENT, FACILITIES, IMPROVEMENTS, OR SERVICES, WHETHER RESULTING IN ANY PART FROM OWNER'S

Paragraphs 38.8 and 38.9 are the only two paragraphs discussing judicial reference. Paragraph 38.8 states that if the arbitration provisions are held unenforceable for any reason, it is agreed that all "arbitrable" issues will be subject to reference as provided by California law. *See, e.g.,* 1 PE 38.[8] Paragraph 38.9 provides that the costs for the arbitration and reference shall be advanced equally between the parties and are due and payable on demand. *Id.*[9]

NEGLIGENCE OR INTENTIONAL CONDUCT OR OTHERWISE; BUSINESS ADMINISTRATION OR OF THIS LEASE. "DISPUTE" INCLUDES NOT ONLY DISPUTES YOU MAY HAVE WITH US BUT ALSO DISPUTES AGAINST ANY OF OUR CONTRACTORS OR AGENTS.

[8]Paragraph 38.8 provides:
IF THESE ARBITRATION PROVISIONS ARE HELD UNENFORCEABLE FOR ANY REASON, IT IS AGREED THAT ALL ARBITRABLE ISSUES IN ANY JUDICIAL PROCEEDING WILL BE SUBJECT TO AND REFERRED ON MOTION BY ANY PARTY OR THE COURT FOR HEARING AND DECISION BY A REFEREE (A RETIRED JUDGE OR OTHER PERSON APPOINTED BY THE COURT) AS PROVIDED BY CALIFORNIA LAW, INCLUDING CODE OF CIVIL PROCEDURE, SECTION 638, ET. SEQ.

[9]Paragraph 38.9 provides:
COSTS FOR THE ARBITRATION AND REFERENCE SHALL BE ADVANCED EQUALLY BETWEEN US DUE AND PAYABLE ON DEMAND. ATTORNEY'S FEES AND COSTS INCURRED IN ANY ACTION TO COMPEL ARBITRATION OR SEEK INJUNCTIVE RELIEF THE RESPONDING PARTY WOULD NOT IN ADVANCE STIPULATE TO, TO ABATE SUBSEQUENT DISPUTE(S), OR TO CONFIRM THE ARBITRATION AWARD SHALL BE AWARDED TO THE PREVAILING PARTY. OTHERWISE, ATTORNEY'S FEES AND COSTS SHALL NOT BE AWARDED TO ANY PARTY BUT SHALL BE BORNE BY EACH PARTY SEPARATELY.

Paragraph 38.10 provides a "Notice" to Homeowners that by initialing in the space provided they agree to "arbitration." *Id.* [Nothing in the paragraph states that by initialing a Homeowner agrees to judicial reference.] The "Notice" is quoted *infra* at n. 14.

2. The Type "B" Rental Agreements

Parkowners' claimed 64 Homeowners were subject to Type "B" agreements (1 PE 10-11) and attached those alleged agreements. 1 PE 77-292. Type "B" agreements contain virtually identical arbitration, reference provisions, and "notice" provisions as rental agreements Type "A". Compare 1 PE 37-39 with 1 PE 85-87.

3. Type "D" through "G" Rental Agreements

Parkowners identified 24 Homeowners it claimed were subject to Type "D" through "G" rental agreements (1 PE 107) and attached those alleged agreements. 3 PE 584-814.

While the language of these agreements is slightly different from the Type "A" and Type "B" agreements discussed *supra*, the Type "D" through "G" agreements also contain extensive arbitration provisions. Paragraph 27 (3 PE 592-96) basically requires the Homeowner to "arbitrate" any "deficiencies" in the Park while exempting from arbitration the Parkowner's right relating to eviction, unlawful detainer, or items other than

the "deficiencies" described in paragraph 26(B) which relate to lack of maintenance of the Park. Paragraph 27(A), 3 PE 592.

The only provision referring to "reference" is paragraph 27(G). As in the Type "A" and "B" leases, this paragraph states that if the arbitration provisions are held unenforceable, it is agreed that the dispute shall be heard by a referee. *Id.* 595.

As in the Type "A" and "B" leases, paragraph 27(G) also provides a "notice" provision which requires the Homeowners to initial stating they voluntarily agree to "arbitration." *Id.* at 595. Again, this paragraph, does not mention agreeing to judicial reference.

4. The Type "H" Agreements

Parkowners claimed that two Homeowners were subject to Type "H" agreements (1 PE 12) and attached those alleged agreements. 3 PE 816-31. The arbitration, reference and notice provisions in these agreements are substantially similar to those in the "Type D" through "G" agreements. Compare 3 PE 592-96 (Type "D-G"), with 3 PE 820-22 (Type "H").

5. The Type "K" Agreements

Parkowners claimed that three Homeowners were subject to Type "K" agreements (1 PE 12) and attached those alleged agreements. 3 PE 833. As in the Type "D" through "G" agreements, "deficiencies" subject to arbitration only relate to the Parkowners' maintenance, repair, or upkeep of the Park *(see e.g.,* paragraph 27 (B), 3 PE 844). Paragraph 28 (A) exempts

from arbitration all other types of deficiencies including termination of tenancy, unlawful detainers and injunctive relief. *Id.* at 844.

Paragraph 28(G) provides for reference if arbitration is held unenforceable. *Id.* at 846. The agreements contain the same "notice" provision contained in the Type "A," "B," and "D" through "G" agreements asking Homeowners to initial acceptance of the "arbitration" provisions. *Id.* at 847.

F. The Superior Court Denied Parkowners' Motion To Compel Arbitration

On March 3, 2009, the motion to compel arbitration was heard before the Honorable George C. Hernandez, Jr., Judge of the Alameda Superior Court. 5 PE 1235-36. The Superior Court denied the arbitration motion on the grounds the clauses were void because they impermissibly waived Homeowners' right to bring a civil action under Civil Code, section 798.87(c); and because they created a risk of conflicting rulings on common issues of fact and law under Civil Procedure Code, section 1281.2(c). *Id.* The Superior Court then continued the hearing on Parkowners' motion for judicial reference. *Id.*

G. The Superior Court Denied Parkowners' Motion For Judicial Reference

On April 29, 2009, Homeowners filed a Supplemental Memorandum of Points and Authorities in opposition to Parkowners' Motion to Compel Judicial Reference (5 PE 1255) along with the Declaration of George H. Kaelin. *Id.* at 1266. On May 4, 2009, Parkowners filed two Supplemental Reply briefs (*id.* at 1278 and 1301) and the Declaration of Frank J. Ozello. *Id.* at 1292.

On May 14, 2009, the Superior Court denied Parkowners' alternative motion to compel judicial reference. *Id.* at 1319-22. The Superior Court found that sending some Homeowners to a referee, while others remained in court, risked inconsistent rulings. It stated however, that this was not a proper basis for denying judicial reference. *Id.* at 1321. Instead, relying on the discretionary language in Code of Civil Procedure, section 638, the Superior Court found that splitting the action would defeat the purposes of the reference statute by duplicating efforts and increasing costs. The Court ruled:

> Ordering two groups of plaintiffs to try their cases in separate but parallel proceedings would not reduce the burdens on this court or the parties, result in any cost savings, streamline the proceedings, or achieve efficiencies of any kind. The parties would be required to conduct the same discovery, litigate and ultimately try the same issues in separate but parallel forums. A general reference would thus result in a duplication of effort, increased costs, and potentially, delays in resolution. Moreover, it would not reduce any burden on this Court,

which would almost certainly have to hear, and decide, all of the same issues.

5 PE at 1321-1322.

H. The Court Of Appeal Affirmed The Superior Court's Decision Denying Reference

On August 10, 2009, Parkowners filed a Petition for Writ of Mandate with the Court of Appeal seeking review of the order denying reference. Following oral argument on the writ petition, the Court of Appeal affirmed in a published opinion issued December 2, 2009, previously cited as *Tarrant Bell, supra,* 179 Cal. App. 4th 1283 (2009).

The Court of Appeal held that the plain language of Code of Civil Procedure, section 638 vests the court with discretion as to whether to appoint a referee. *Id.* at 1290. The Court examined the legislative history of that section to confirm that the Legislature meant to empower the Superior Court with discretionary authority to refuse enforcement of a reference agreement. *Id.* at 1290-1292. The Court also held that the Superior Court may consider the risk of inconsistent ruling and judicial economy in making its decision. *Id.* at 1292-96. The Court further held that the decisions in *Greenbriar Homes Communities, Inc. v. Superior Court ("Greenbriar"),* 117 Cal. App. 4th 337 (2004) and *Trend Homes, Inc. v. Superior Court ("Trend")*, 131 Cal. App. 4th 950 (2005) failed to explore the language and objective of section 638 and found them unpersuasive. *Id.* at 1294-95. The Court further held that the Superior Court did not abuse its discretion in

determining that reference in this case would not achieve the objectives of section 638. Finally, in light of its prior ruling, the Court found it unnecessary to determine whether the reference provisions were unconscionable. *Id.* at 1295.

I. This Court Grants Review

On January 11, 2010, Parkowners filed a Petition for Review seeking review on the grounds that no precedent exists for Superior Courts to refuse to enforce valid pre-litigation reference agreements based on a potential for "multiplicity of lawsuits," "conflicting rulings of law or fact" or "other judicial inefficiencies," and the Court of Appeal decision is contrary to *Greenbriar* and *Trend.*

On January 28, 2010, Homeowners filed their Answer to Petition for Review raising the following questions for review:

1. Does Code of Civil Procedure, section 638 give a trial court discretion to deny a motion to compel judicial reference where the parties have contractually agreed to have certain disputes decided by judicial reference?

2. Here, there were numerous plaintiffs who had not contractually agreed to judicial reference, but shared identical claims with the reference plaintiffs. Under the circumstances, did Respondent Trial Court abuse its discretion by denying Petitioners' motion to compel judicial reference on the grounds that enforcement of the Reference provision would: adversely affect judicial economy by creating duplicative litigation; and, risk the potential of inconsistent rulings on common issues of law or fact?

3. Should Respondent's denial of the motion to compel reference be affirmed on the alternative ground that the

reference provisions were unconscionable and void as against public policy?

On February 18, 2010, this Court granted review. On July 22, 2010, 2010, Parkowners filed their Joint Opening Brief (Petitioners' Opening Brief "POB"). Homeowners' Answer Brief on the Merit is timely filed.

SUMMARY OF ARGUMENT

1. On its face Code of Civil Procedure, section 638 is permissive and gives the Superior Court discretion to deny reference.

2. The legislative history of the 1982 amendment to section 638, which authorized the Superior Court to order a reference based upon a prior agreement of the parties, considered and rejected making such a reference mandatory.

3. Since the clear purpose of the 1982 amendment was to ease judicial delays, the Superior Court (and Court of Appeal) correctly considered whether or not reference in this case would reduce the burdens on the court or parties, result in cost savings, streamline the proceedings, or achieve efficiencies of any kind.

4. The Superior Court (and Court of Appeal) correctly concluded that since in this particular case a reference would not achieve any of these results it should be denied.

5. The Superior Court (and Court of Appeal) correctly distinguished *Greenbriar* and *Trend* pointing out that neither case

considered the discretionary language of section 638, its legislative history, nor decided whether reference would achieve the desired efficiency of any kind.

6. Alternatively, the Superior Court's (and Court of Appeal's) denial of reference can be affirmed on the ground that the reference provision were unconscionable and void as a matter of public policy.

ARGUMENT

I

THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION UNDER SECTION 638 BY DECLINING TO ORDER JUDICIAL REFERENCE

A. The Plain Language Of Section 638 Establishes That The Courts' Authority To Deny Reference Is Discretionary

The Court of Appeal properly held that "the plain language of section 638 vests the trial court with discretion when the court is asked to appoint a referee pursuant to a predispute reference." *Tarrant Bell, supra,* 179 Cal. App. 4th at 1290. The Court also properly looked at the intent of the statute by examining the legislative history of its enactment to confirm the plain meaning of the statute language.

In determining statutory construction, this Court applies well-established principles of statutory construction in order "to determine the Legislature's intent in enacting the statute so that it "may adopt the construction that best effectuates the purpose of the law." *Kibler v.*

Northern Inyo County Local Hospital Dist., 39 Cal. 4th 192, 199 (2006). The role of judges is to effectuate legislative intent and statutory language is "generally the most reliable indication of legislative intent." *Miklosy v. Regents of University of California ("Miklosy")*, 44 Cal. 4th 876, 888 (2008).

If the statutory language is unambiguous, the court presumes the Legislature meant what it said, and the plain language of the statute controls. *Id.* Contrary to Parkowner's argument, the plain language of the statute does not prevent the trial court from exercising its discretion to deny reference.

Code of Civil Procedure, section 638 states:

> A referee **may** be appointed . . . upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee. . . . *[Emphasis added.]*

Ordinarily, the word "may" denotes permissive action, while the word "shall" is commonly used in laws that are mandatory. *Hogya v. Superior Ct.*, 75 Cal. App. 3d 122, 133 (1977). The Legislature is well aware of the distinction between "shall" and "may." *Id., Cole v. Antelope Valley Union High School Dist.*, 47 Cal. App. 4th 1505, 1511-1513 (1996). Further, "When the Legislature has, as here, used both "shall" and "may" in close proximity in a particular context, we may fairly infer the

Legislature intended mandatory and discretionary meanings, respectively." *In re Richard E.,* 21 Cal. 3d 349, 353-354 (1978).

Here, "shall" and "may" are used in legislating the use of referees. For example, section 638 provides that a referee "may" be appointed. If a referee is appointed, section 638 (c) provides that a copy of the order "shall" be forwarded to the presiding judge, the judicial council "shall" collect information on the use of these referees and the Judicial Council "shall" collect information on fees paid by the parties. Section 640 (a) provides that the court "shall" appoint as referee the person agreed upon by the parties. Section 645.1 further provides that when a referee is appointed the referee's fees "shall" be paid as agreed by the parties. Because "shall" and "may" are in close proximity in this legislation, it can be inferred that the Legislature intended "shall" to mean mandatory and "may" to mean discretionary.

As the Court of Appeal pointed out, respected commentators agree that section 638 is permissive: "The statutes authorizing appointment of referees make the appointment discretionary, not mandatory." Knight et al, Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2008) section 6.152, p. 6-45 (rev.# 1, 2006), *Tarrant Bell, supra,* 179 Cal. App. 4th at 1290.

B. The Legislative History Of Section 638 Confirms The Discretionary Language Of The Statute [10]

Prior to 1982, section 638 authorized a court to order reference if there was an agreement of the parties to the pending litigation. Legislative Counsel's Dig., Assembly Bill No. 3657 (1981-1982 Reg. Sess.) 6 Stats. 1982, Summary Dig., p. 152. In 1982 the State Bar sponsored an amendment to section 638 to add a provision that authorized a court to order reference where one of the parties to a predispute reference agreement brought a motion to enforce that agreement. The purpose of the statute's amendment was to lessen judicial delay due to court congestion. *Treo@Kettner Homeowners Ass'n v. Superior Court,* 166 Cal. App. 4th 1055, 1066 (2008) ("We reviewed the legislative history applicable to that amendment. The amendment was sponsored by the State Bar and was an attempt to lessen judicial delays that were at the time a serious problem.")

When the Legislature considered the 1982 amendments, it initially considered mandating the enforcement of judicial reference provisions. The Legislature reconsidered making enforcement mandatory after a report from the State Assembly's Committee on the Judiciary:

> Should not the court have the *discretion to decide* that, *despite the existence of a pre-dispute agreement, the issues would be more properly or efficiently decided by the judge*? Therefore,

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[10] Simultaneous with the filing of this brief, Homeowners' have filed a Request for Judicial Notice of the legislative history of the 1982 amendments to section 638.

> should not this bill simply create a presumption that a court should compel a reference when parties have contractually agreed to one, thereby permitting the court to determine that such a reference would be inappropriate?

Tarrant Bell, supra, 179 Cal. App. 4th at 1291, citing Assem. Com. On Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Mar. 18, 1982. [Emphasis added].

The Legislature accepted the recommendations of the Committee report, amending section 638 to delete the mandatory language of the bill as originally introduced, to use permissive language by substituting the word "may" for the word "shall" in order to allow the court discretion. *Tarrant Bell, supra,* 179 Cal. App. 4th at 1291, citing Assem. Com. On Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.), May 10, 1982.

In an apparent attempt to refute this argument, Parkowners cite to an Assembly committee staff comment, Sen. Com. on Judiciary, com. on Assem. Bill No 3656 (1981-82 Reg. Sess.), as amend, May 10, 1082, p. 2, (POB at 29), for the proposition that the 1982 amendment's purpose was to provide a vehicle for aiding in the enforcing of reference provisions. Contrary to Parkowners' argument, "aiding" the enforcement of reference provisions is not inconsistent with the attempt to lessen judicial delays and, in any event, nothing in this comment supports its position that a trial court must require mandatory enforcement of predispute reference agreements .

Similarly, Parkowners' citation to the quote from the Enrolled Bill Mem. to Governor (AB 3657, 1982 Reg. Sess., Chap. 440), 7-6-82, PE 2 ("This bill would provide that the court **could** also order reference. . ." Emphasis added) does not support its interpretation that a court cannot deny reference where it finds that reference would not reduce the burdens on this court or the parties, result in any cost savings, streamline the proceedings, or achieve efficiencies of any kind. In fact that very language supports the lowers court discretionary interpretation of section 638.

Parkowners argue (POB at 29-31) that the Court of Appeal improperly relied on the above legislative history of section 638 in making its decision. Parkowners' argument is without merit.

This Court has consistently used legislative history to dispel any ambiguity or doubt as to the interpretation of a statute, even though it determined that the plain language of the statute dictated. *See Hughes, v. Pair,* 46 Cal. 4th 1035, 1046 (2009) (this Court examined the legislative history of Civil Code section 51.9, after determining that the words "pervasive" and "severe" should be given the same meaning as in the employment context); *Miklosy, supra,* 44 Cal. 4th at 890-97 (after finding no ambiguity in the statute, this court nonetheless examined the legislative history of the statute to support its conclusion); *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 543-44 (2007) (after finding the plain language of Code of Civil Procedure, section 340.1(b)(2) controlled, this court looked to the

legislative history to confirm its interpretation); *People v. Corpuz,* 38 Cal. 4th 994, 997 (2006) (after finding that the plain language of Penal Code, section 636.9 controlled, this Court dispelled any ambiguity or doubt by examining the legislative history of the provision to disclose the Legislature's intent); *Barratt Am. Inc. v. City of Rancho Cucamonga,* 37 Cal. 4th 685, 697 (2005) ("Although the plain language of the statutes dictates the result here [citation], legislative history provides additional authority.").

Under the circumstance, the Court of Appeal's review of the legislative history of section 638 was not only proper but supported the lower courts' decisions that trial courts have discretion as to whether to enforce reference provisions.

II

PARKOWNERS' RELIANCE ON *GREENBRIAR* AND *TREND* IS MISPLACED

Parkowners devote the majority of their argument (POB 4-7,17-24, 31-32), to an analysis of *Greenbriar, supra,* 117 Cal. App. 4th at 337 and *Trend, supra,* 131 Cal. App. 4th at 950. Contrary to their contention, however, the decision herein does not conflict with those cases and Parkowners' reliance on these cases is misplaced.

A. Neither *Greenbriar* Nor *Trend* Examined The Plain Language, Legislative History Or Purpose Of Section 638 In Reaching Their Decisions

In *Greenbriar*, the Court of Appeal granted a petition for writ of mandate against a trial court's order denying a real estate developer's motion to compel reference for 43 out of 69 homeowners who alleged defective construction of their homes. Before the Trial Court, the homeowners had opposed reference on two grounds: (1) the reference agreement was unconscionable; and, (2) reference would result in multiple lawsuits. The Trial Court denied reference based on the multiple lawsuit ground.

The Court of Appeal first held that the reference provisions in the homeowners' purchase and sales agreements were not procedurally or substantively unconscionable. *Id.* at 346. The Court of Appeal then addressed the homeowners' argument that the court's discretion to refuse to enforce the reference provisions on the grounds of multiplicity of lawsuits "derived from analogous statutory authority given courts under Code of Civil Procedure, section 1281.2 to refuse to enforce *arbitration* agreements pending a court action between a party to the arbitration agreement and a third party." *Id.* at 346. Emphasis in original. Thus, rather than focusing their argument on the discretionary language of section 638 and its legislative history, the homeowners in *Greenbriar* instead made the strained argument that the Court's discretion to deny reference somehow was

derived from section 1281.2. *Greenbriar*, *supra*, 117 Cal. App. 4th at 346. The *Greenbriar* Court of Appeal rejected that argument, noting that "*Code of Civil Procedure, section 1281.2* is a specific statute that creates a special rule, which invalidates *only* arbitration agreements." *Id.* at 347, italics in original.

The *Greenbriar* Court *in dicta* also stated:

> Had the Legislature intended to allow judicial reference agreements to be invalidated on the basis of other pending or multiple actions, it could have adopted a statute so stating. Without such statutory authorization, however, both the trial court and [the appellate court] lack authority to invalidate an otherwise valid contractual agreement.

Id. at 348.

In making that statement, however, the *Greenbriar* Court did not consider the discretionary language of section 638 nor its legislative history. Had it done so, it would have learned that the Legislature intended to give courts discretionary authority not to order judicial reference when the enforcement of a reference agreement would impact the propriety and efficiency of litigating a case.

Parkowners assert that the Court of Appeal herein "appeared to ... rely upon the *arbitration* statutes to come to its conclusion here that the trial court had discretion to deny an agreed upon reference." POB at 7, italics in original. This assertion is baseless, as the opinion contains no language to support this argument. To the contrary, the Court of Appeal herein *agreed*

with the *Greenbriar* court's ruling that a court's discretion to deny a motion to compel judicial reference is completely unrelated to section 1281.2, noting: "The Third District promptly, *and rightly*, rejected that argument ... ." *Tarrant Bell*, *supra*, 179 Cal. App. 4th at 1294, emphasis added. The Court of Appeal herein properly looked to the language of section 638, not section 1281.2.

The *Trend* Court focused on the issue of unconscionability, reversing the trial court's ruling that the reference agreements at issue were unconscionable. In the course of its discussion, it also rejected the argument that the risk of inconsistent rulings from the referee and the trial court in multiple actions rendered the agreement unconscionable or otherwise invalidated the parties' agreement. *Trend*, *supra*, 131 Cal. App. 4th at 964. In rejecting this argument, the *Trend* Court merely parroted the *Greenbriar* decision, never discussing the discretionary language of section 638, the legislative history of that section, or whether or not the proposed references would advance the intent of that section.

B. Parkowners Incorrectly Argue That The Sole Basis For The Lower Courts' Decisions Denying Reference Herein Was Duplicative Or Multiplicity of Lawsuits

Parkowners argue throughout its' Opening Brief that the **sole basis** for the Superior Court and the Court of Appeal ruling denying reference was that granting reference "would result in duplicative or multiplicity of lawsuits." POB at 15, 23 and 26. Parkowners' argument is wrong.

Here, while the Superior Court found that sending some of the Real Parties to a referee while others remained in the court risked inconsistent rulings on common issues of law or fact, it did not solely base its decision on this finding. 5 PE 1321. It also found that reference would be inefficient from a judicial economy perspective, would potentially cause delays in resolving the case, and would not reduce the burden on the court. These were the same concerns raised in the 1982 Judiciary Committee report which resulted in 638 being amended to delete language which would have required judicial reference.[11] See, Assem. Com on Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Apr. 28, 1982 p. 1, *supra* ("Should not the court have the discretion to decide the issues would be more properly or efficiently decided by a Judge?").

The Court of Appeal held that the considerations weighed by the court, including increased costs, potential delays in resolution and an unmitigated burden on the Superior Court were relevant considerations given the purpose and policy of section 638. 179 Cal. App. 4th at 1293.

Contrary to Parkowners' argument, the fact that one ground for denial of reference- the risk of inconsistent rulings- is a statutory ground for arbitration but not a statutory ground for denying reference is of no

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[11] These considerations are also consistent with the Court's inherent power to "insure the orderly administration of justice." *Walker v. Superior Court ("Walker"),* 53 Cal. 3d 257, 266 (1991), *Hays v. Superior Court,* 16 Cal. 2d 260, 264 (1940).

moment. Parkowners' argument fails to recognize the distinction between the enforcement of arbitration clauses and reference clauses. Because the arbitration statute (Code of Civil Procedure, section 1281.2) uses the word shall, it is mandatory, and a statutory exception was required to effect the underlying public policy of avoiding conflicting rulings in an arbitration setting. Code of Civil Procedure § 1281.2(c). Because section 638 is permissive, without limiting the court's discretion, no such statutory exception was necessary. Indeed it would be perverse for the public policy of avoiding conflicting rulings to be contravened by permitting the denial of arbitration, but compelling reference instead.

Under the above circumstances, the Court of Appeal did not find that *Trend* and *Greenbriar* were wrongly decided; instead it found them distinguishable and unpersuasive because neither fully considered section 638. 179 Cal. App. 4th at 1295.

Furthermore, the standard of review for abuse of discretion is whether the court's decision exceeded the bounds of reason. *See, e.g., Walker, supra,* 53 Cal. 3d at 272, *Shamblin v. Brattain,* 44 Cal. 3d 474, 478 (1988).

In the Superior Court and Court of Appeal, Parkowner argued that the court had **no** discretion to deny a motion to compel reference. *Tarrant Bell, supra,* 179 Cal. App. 4th at 1290. Now, Parkowners apparently concede that the proper standard of review is whether the Superior Court

abused its discretion. POB at 24-26. They now argue (POB at 26), however, that the Superior Court's decision "exceeds the bounds of reason" because it did not apply the legal principles set forth in *Greenbriar, supra,* and *Trend, supra.* Parkowner is wrong.

As Parkowners correctly point out (POB 24-26), in cases involving a statutory grant of discretion, judicial discretion "must be measured against the specific law that grants the discretion." *Horsford v. Board of California State University*, 132 Cal. App. 4th 359, 393 (2005). Here the Court of Appeal specifically examined section 638, its legislative history and whether reference would achieve any benefits under section 638, in making its decision affirming the Superior Court's decision. Clearly, that decision effectuates the purpose of the statute. Further, as discussed, *supra*, *Greenbriar* and *Trend* are both distinguishable and unpersuasive because neither examined Code of Civil Procedure 638's discretionary language, the relevant legislative history, nor whether or not reference could impact the propriety and efficiency of litigating a case.

III

THIS COURT CAN ALSO AFFIRM ON THE ALTERNATIVE GROUNDS THAT REFERENCE SHOULD BE DENIED BECAUSE THE REFERENCE PROVISION IS UNCONSCIONABLE

A. This Court May Consider The Unconscionable Argument As An Alternative Grounds To Uphold The Court Of Appeal Decision

An Answer to a Petition can raise additional issues for review in "a concise, non-argumentative statement of those issues, framing them in terms of the facts of the case but without unnecessary detail." California Rules of Court, Rule 8.504 (c). This Court may consider any issues that were raised or fairly included in the Answer. California Rules of Court, Rule 8.516 (b), *Goldstein v. Superior Court,* 45 Cal. 4th 218, 225 n. 4 (2008).

In its Answer to Petition for Review, Homeowners' concisely raised the following issues: "Should Respondent's denial of the motion to compel reference be affirmed on the alternative ground that the reference provisions were unconscionable and void as against public policy?" Contrary to *Scottsdale Ins. Co. v. MV Transportation,* 36 Cal. 4th 643, 654 n.2 (2005) (POB at 3) where the respondent did not raise the additional issue it sought addressed in its Answer, Homeowners here have raised these issues.

Here, the Superior Court, while refusing to order either arbitration or reference, did not find that the provisions in the leases were unconscionable. 5 PE 1320. Homeowners respectfully disagreed and urged the Court of Appeal to consider the issue in its ruling on Parkowners' Writ. However, in light of its ruling the Court of Appeal found it unnecessary to address this issue. *Tarrant Bell, supra,* 179 Cal. App. 4th at 1295.

While Homeowners believe the Superior Court should affirm the Court of Appeal's refusal to refer the case for the reasons stated by both the Superior Court and Court of Appeal, they also strongly urge this Court to refuse to refer this case on the grounds that the reference provisions are unenforceable because they are unconscionable.[12]

B. The Standards For Determining Unconscionability

Although the doctrine of unconscionability was judicially created, Civil Code, section 1670.5 now provides a statutory basis for refusing to enforce provisions in a contract. Civil Code, section 1670.5 (a) states:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable clause, or it

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[12]In the event that this Court reverses the Court of Appeal on the grounds that the court abused its discretion in refusing to refer this matter to judicial reference based on section 638, and this Court refuses to consider this alternate argument, Homeowners respectfully request that the unconscionability issue be remanded to the Court of Appeal for its consideration.

> may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The two-pronged test for determining whether contract provisions are unconscionable is: 1) whether the clause is procedurally unconscionable; and, 2) whether it is substantively unconscionable. *Armendariz v. Foundation Health Psychcare Serv. ("Armendariz")*, 24 Cal. 4th 83, 114 (2000); *Pardee Construction Co. v. Superior Court ("Pardee")*, 100 Cal. App. 4th 1081, 1088 (2002).

Although both elements must be present before a contract provision is rendered unenforceable on the grounds of unconscionability, both need not be present in equal amounts. There is a sliding scale; the greater the degree of substantive unconscionability, the less evidence is needed of procedural unconscionability, and vice versa. *Armendariz, supra,* 24 Cal. 4th at 114; *Kinney v. United Health Care Services, Inc. ("Kinney")*, 70 Cal. App. 4th 1322, 1329 (1999).

C. The Reference Provisions Are Procedurally Unconscionable

Procedural unconscionability focuses on "oppression" or "surprise." *Armendariz, supra,* 24 Cal. 4th at 114. "The oppression component arises from an unequal bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party." *Kinney, supra,* 70 Cal. App. 4th at 1329.

1. The provisions are oppressive because Parkowners have superior bargaining power and Homeowners were not given a choice to refuse to sign the agreements

With regard to "oppression," this Court has recognized the "economic imbalance of power in favor of mobilehome park owners." *See, e.g., Galland, supra,* 24 Cal. 4th at 1010. Clearly, the mobilehome park resident is the weaker bargaining party. *See also, De Anza Santa Cruz Mobile Estate Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates,* 94 Cal. App. 4th 890, 911 (2001) (Courts have recognized that many mobilehome owners are on limited or fixed incomes).

Procedural unconscionability is shown where the resident has no meaningful choice but to sign the agreement. Indeed, in circumstances where a party must "accept the arbitration clause and the other preprinted terms, or reject the lease entirely . . . the arbitration clause [is] procedurally unconscionable." *Gutierrez v. Autowest, Inc.,* 114 Cal. App. 4th 77, 89 (2004) (Court found that arbitration clause was procedurally unconscionable because the lease was presented on "take it or leave it" basis; plaintiffs were given no opportunity to negotiate any of the preprinted terms in the lease). *See also Pardee, supra,* 100 Cal. App. 4th at 1089; *Thompson v. Toll Dublin, LLC,* 165 Cal. App. 4th 1360, 1372 (2008).

Further, despite any boilerplate legalese in Parkowners' rental agreements stating that acceptance is "voluntary," Homeowners had no real choice with respect to accepting either the arbitration or reference

provisions. *See, e.g., Pardee, supra,* 100 Cal. App. 4th at 1081, 1089 (court held that a judicial reference provision was unconscionable because procedural unconscionability existed as the parties had unequal bargaining power; no residents struck out the judicial reference provision and the waiver of a right to a jury trial was buried in the form contract); *see also Szetela v. Discovery Bank,* 97 Cal. App. 4th 1094, 1100 (2002). Here, there is no indication that the reference of disputes provisions were negotiable or other rental agreements types were offered. In fact, declarations of the Homeowners clearly establish that the rental agreements offered by Parkowners were on a "take it or leave it" basis. *See* Declarations of Homeowners at 4 PE 1024-1138.

2. The reference provisions are hidden in the leases and the provision asking Homeowners to acknowledge their acceptance only refers to arbitration

The "surprise" component arises where the terms to which the party supposedly agreed are contained "in a prolix printed form drafted by the party seeking to enforce them." *Kinney, supra,* 70 Cal. App. 4th at 1329; *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001).

Here the element of "surprise" is clearly present. The reference provision is buried in form rental agreements drafted by Parkowners that are as long as seventeen pages and are difficult to read because they were printed in dense, single spaced, capital letters. They are contained in paragraphs entitled "Arbitration and Dispute Resolution," with no mention

in the heading of judicial reference. Except for the one paragraph discussing reference as an alternative and the provisions that Homeowners must share in the costs of both arbitration and reference, the remaining paragraphs under this heading discuss only arbitration. These are the types of "surprises" that have been held procedurally unconscionable. *See Pardee, supra,* 100 Cal. App. 4th at 1089-90.

Further the party who prepared the contract containing unexpected or harsh terms has the burden of showing that the other party had notice of them. *Woodside Homes of Cal., Inc. v. Superior Court,* 107 Cal. App. 4th 723, 728-29 (2003). *See also, Treo, supra,* 166 Cal. App. 4th at 1065 (voluntary consent is required before a party can be deprived on the constitutional right to a jury trial).

Here, the provisions labeled "Notice" requiring initials indicating acceptance of the terms of the provisions, do not mention judicial reference but merely refer to the acceptance of the terms regarding arbitration. *See* 1

PE 38-39, 86-87; 3 PE 609-10, 625-26; 730-31, 812, and 830. [13] Under the circumstances, Parkowners cannot meet their burden to show that Homeowners had actual notice or acceptance of the reference provision.

Further, as the Declarations of the Homeowners state, in many cases the Homeowners were presented with rental agreements after they purchased their mobilehome. 4 PE 1024-1138. These Homeowners were under economic duress to sign the rental agreement because they were told by management they must sign the rental agreement in order to move into

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[13] For example, Paragraph 38.10 from a Type "A" lease states::

38.10 NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSES TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTER INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

Resident (s) initials____

their newly purchased mobilehome. *Id.* Additionally, Park Management failed to instruct Homeowners of the nature of the rental agreement and that it contained an arbitration or reference clause and instead rushed Homeowners through signing the rental agreement telling them to "sign here" or "initial here" without any explanation. *Id.*

The element of surprise is also present in that a lay person would not generally comprehend the impact of the non-joinder provisions. *Parada v. Superior Court ("Parada")*, 176 Cal. App. 4th 1554, 1571 (2009) ("The weaker party would not reasonably expect that his or her claims could not be joined with others in a single proceeding."). Here, absent reference to a JAMS fee schedule or any evidence that Parkowners pointed out the nonjoinder provisions to the Homeowners, Homeowners also would be surprised by the considerable expense of reference.

D. The Reference Provisions Are Substantively Unconscionable

"Substantive unconscionability" focuses on the terms of the agreement and whether those terms are overly harsh or one-sided. *Armendariz, supra,* 24 Cal. 4th at 114; 24 *Hour Fitness, Inc. v. Superior Court,* 66 Cal. App. 4th 1199, 1213 (1998); *Villa Milano Homeowners Ass'n v. Il DaVorge,* 84 Cal. App. 4th 819, 829 (2001). Courts refuse to enforce agreements which are one-sided, holding they must have a "modicum of bilaterality." *Armendariz, supra,* 24 Cal. 4th at 117; *Pardee, supra,* 100 Cal. App. 4th at 1092; *O'Hare v. Municipal Resource*

Consultants ("O'Hare"), 107 Cal. App. 4th 267, 273-74 (2003); *Kinney, supra,* 70 Cal. App. 4th at 1332. Courts also refuse to enforce agreements where the stronger party is seeking to make the assertion of weaker party's rights prohibitively expensive. *See Parada, supra,* 176 Cal. App. 4th at 1581. Both substantive elements are present here.

1. <u>The reference provisions are one-sided in that they permit Parkowners' typical claims to be presented in Court, but relegate Homeowners' typical claims to a reference</u>

"The doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Jaramillo v. JH Real Estate Partners, Inc. ("Jaramillo"),* 111 Cal. App. 4th 394, 405 (2003) (court found agreement unenforceable because it allowed the landlord to bring an action for unlawful detainer, while requiring the tenant to submit all his claims to arbitration).

In *Armendariz, supra,* employees sued their employer for discrimination and wrongful termination. The California Supreme Court refused to enforce the one-sided agreement, calling the agreement unconscionable. 24 Cal.4th at 91.

The *Armendariz* Court held:

> Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when

> it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on "business realities." As has been recognized "'unconscionability turns not only on a "one-sided" result, but also on an absence of "justification" for it.'" [Citation.] If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose.

Id. at 117-118.

In *O'Hare, supra,* 107 Cal. App. 4th at 267, the Court refused to enforce an agreement in a suit filed by an employee against a former employer for wrongful termination and age discrimination. The Court held that unconscionability permeated the contract because it required arbitration of all of the employees' claims against the employer, but left the employer free to pursue all remedies including the right to file a lawsuit. *Id.* at 274.

In *Kinney, supra,* 70 Cal. App. 4th 1330-31, the Court also held that terms of an arbitration agreement were so unconscionable as to preclude the enforcement because employees were required to arbitrate their claims but the employer was not required to arbitrate claims against the employee.

Similarly in *Pardee, supra,* 100 Cal.App. 4th at 1091, the Court held reference provisions unconscionable because they effected a waiver of the right to recover punitive damages only for Pardee's benefit.

Here, the major reference provision in the leases contain a paragraph which provides that if the arbitration provisions are held unenforceable for any reason, it is agreed that all arbitrable issues will be referred on a motion by any party, for a hearing and decision by a referee (a retired Judge or other person appointed by the Court). *See, e.g.,* paragraph 38.8, 1 PE 98.

Since the reference provision only goes into effect if the arbitration provisions are held to be unenforceable, it is necessary to examine the substance of the arbitration provisions in the lease to determine which issues are subject to reference.

As set forth, *supra,* Parkowners exempt from arbitration/reference only those type of disputes a Parkowner would have against Homeowners. *See* the Type "A" and "B" agreements which exempt from arbitration disputes relating to the rights of the "Owner," defined in section 2.5 as the Parkowners. 1 PE 89. *See, e.g.*, Paragraph 38.2 of a Type "A" Agreement quoted in note 6 *supra*.

As further evidence of substantive unconscionability, Parkowners reserve their own rights to bring state law actions against Homeowners for nuisance, eviction and unlawful detainer actions despite the initiation of arbitration or reference in all other disputes including action[s] for termination of tenancy pursuant to Civil Code, section 798.56, an action for injunctive relief brought pursuant to Code of Civil Procedure, section

527.6 or Civil Code, sections 798.87(b), or 798.88, or to preserve a party's equitable rights appertaining to any arbitrable dispute prior to resolution of arbitration. The agreements state that such nonarbitrable matters shall proceed to judgment even though related to an arbitrable dispute.[14] *See, e.g.,* 1 PE 98, ¶ 38.4 (which refers back to paragraph 38.2).

"Disputes" subject to arbitration are defined in paragraph 38.3 to include the typical suits a Homeowner would bring against a Parkowner: disputes regarding maintenance of the Park's facilities, improvements, services and utilities or the common area, the enforcement of the rules and regulation, damage to residents' property or to themselves or their invitees from the Park's "operation maintenance, or the condition of the Park or its equipment, facilities, improvements, or services resulting from owner's negligence or intentional conduct or otherwise; business administration or of this lease." 1 PE 37. It further provides that "disputes" includes not only disputes you may have with us but also disputes against any of our contractors or agents." *Id.* at 38.

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[14]Each code section included in this provision benefits only Parkowner: (1) Civil Code, section 798.56 provides authorization for termination of a tenancy; (2) Code of Civil Procedure, section 527.6 permits restraining orders based on harassment; (3) Civil Code, section 798.87(b) states that violation of a mobilehome Park rule is a public nuisance; (4) Civil Code, section 798.88 provides for injunctions for violations of Park rules.

Thus, the reference provisions in Parkowners' agreements are substantively unconscionable because **they exempt from arbitration and reference the very types of lawsuits Parkowners are likely to bring against the Homeowners.** On the other hand, arbitration/reference is mandated for claims that would most likely be brought by the Homeowners. As discussed above, Courts have refused to uphold such provisions. *See Mercuro v. Superior Court,* 96 Cal. App. 4th 167, 176-77 (2002).

2. The reference provisions make it economically impractical for Homeowners to assert their claims

The public court system is relatively free (certain fees excepted); private judging is expensive. Court's have held that arbitration clauses are substantively unconscionable when their effect is to make it economically impractical for the weaker party to assert his rights. Here, the arbitration and reference agreements not only require Homeowners to advance half of the reference costs up front, but they prohibit the joinder of their claims in the same action. *See, e.g.*, 1 PE 98, ¶ 38.9 and ¶ 38.7.[15] The combined

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[15]Parkowners have filed a declaration regarding unavailability of hearing transcripts in this proceeding (*see* Petition at 18); however, out of fairness, Homeowners' counsel believes that at one of the hearings, Parkowners' counsel offered to waive the nonjoinder provision. Notwithstanding that proffer, "unconscionability is determined as of the time the contract was entered into, not in light of subsequent events" (*Higgins v. Superior Court*, 140 Cal. App. 4th 1238, 1250 (2006)) such as counsel's attempt years later to save the offending provisions during oral argument. *See Parada, supra,* 176 Cal. App. 4th at 1585-87.

effect of these provisions is to prevent Homeowners from having their day in court.

In *Parada, supra,* 176 Cal. App. 4th at 1274, plaintiffs sued defendant precious metal dealer, *inter alia,* for fraudulently handling their investments. Plaintiffs had signed agreements with defendant which contained provisions requiring any disputes between them to be resolved by arbitration through JAMS. The trial court granted defendant's motion to compel arbitration, and plaintiffs sought a writ of mandate to overturn the order.

The Court of Appeal granted the writ petition finding the arbitration agreements were unconscionable. In finding substantive unconscionability, the Court focused on the fact that the clause required a panel of three arbitrators and that "the arbitration provisions prohibit the consolidation or joinder of claims so each [plaintiff] must initiate a separate arbitration and pay one-half the cost of three arbitrators." *Id.* at 1581- 82. After thoroughly reviewing case law on the issue, the Court concluded that even without consideration of the plaintiffs' ability to pay, the non-joinder provisions in combination with the arbitration costs, render those portions of the arbitration provisions "substantively unconscionable to a high degree." *Id.* at 1282.

Here, as in *Parada, supra*, Homeowners adduced evidence of the considerable costs of a judicial reference. Specifically, Homeowners filed a declaration stating:

> The plaintiffs in this case live in a mobilehome park. They are low income people, not well able to pay for the costs associated with a judicial reference. As of April 29, 2009, the JAMS office quoted the costs of a judicial reference as follows: an initial $400 case management fee; an additional $400 for every 30 hours of a neutral's time; and, neutral fees ranging from $325 per hour to $7,000 per day depending on the neutral selected. *Id.* Based on counsel's experience in trying the cases, a judicial reference as to 83 plaintiffs could consume 30 trial days, costing as much as $200,000.

5 PE 1267-68, Declaration of George H. Kaelin III, ¶ 7.

Moreover, presentation of Homeowners' claims at the very least will require expert testimony from: a civil engineer as to the failing water and sewer utilities, roads, and drainage; an electrician as to the failing electrical utility; and, an appraiser as to Homeowners' economic damages. Instead of sharing these significant expert costs, the non-joinder provisions would require each Homeowner to individually call each expert to testify. The significant costs are readily apparent. The fact that such an inefficient process would also potentially increase Parkowners' litigation costs, leads to the ineluctable conclusion that the true purpose of the provisions was to discourage Homeowners from presenting their claims in the first place.

Finally, the non-joinder provisions would effectively preclude Homeowners from finding counsel willing to represent them. These types

of "failure to maintain" cases generally are handled on a contingency fee basis, given the clients' inability to pay hourly rates. The potential damages recovery in an individual action simply would be too small to affect contingency fee representation. Prosecution of the case might cost more than the recoverable damages.

3. Homeowners' waiver of a jury trial is void as against public policy

The reference agreements are void as against statutory public policy. Civil Code, section 1953(a) prohibits provisions in residential leases whereby a tenant agrees to modify or waive certain specified rights as "void as contrary to public policy."

In *Jaramillo, supra,* 111 Cal. App. 4th at 394 tenants sued their landlord alleging, *inter alia*, causes of action for breach of contract, breach of the warranty of habitability and unfair business practices. In denying arbitration the Court held:

> We note that section 1953, subdivision (a)(4), precludes a residential least agreement from including any modification or waiver of a tenant's procedural rights in litigation in any action involving his rights and obligation *as a tenant.*' (emphasis in original). Thus, for example, **the tenant cannot waive in advance, in a residential lease agreement, the right to conduct discovery and to have a jury trial in any affirmative action against the landlord** that involves the tenant's rights or obligations. [citation]. Inherent in an arbitration agreement is a waiver of any right to jury trial. Emphasis added

Id. at 403-04.

Parkowners argued below that section 1953 does not apply to mobilehome park leases because on its face it only applies to leases of a "dwelling" and in a mobilehome park the residents own their own homes and lease the spaces they are on. In *Rich v. Schwab*, 63 Cal. App. 4th 803, 811-12 (1998), however, the Court construed the anti-retaliation provisions of Civil Code, section 1942.3 to apply to mobilehome leases notwithstanding that on its face that provision also applies to leases of a "dwelling." Thus, Courts have held that leases of a "dwelling" apply to mobilehome park tenancies. The Court apparently recognized that a mobilehome lease is a hybrid form of a dwelling in that neither the lot nor the home by itself is habitable. The combination of the two constitute the dwelling.

Under the circumstances, the waiver of a jury trial by the Homeowners is against public policy.

E. The Arbitration and Reference Provisions Are Also Contracts of Adhesion

The arbitration and judicial reference provisions presented to the Homeowners were also adhesion contracts. "[T]he term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only one opportunity to adhere to the contract or reject it." *Armendariz, supra,* 24 Cal. 4th at 113, *Pardee, supra,* 100 Cal. App. 4th at 1086. The

Homeowners signed standardized rental agreements containing multiple generic provisions. The only portions filled in by hand were the names, addresses, commencement of tenancy and rents. Nothing in the document suggests that any provision in the rental agreement was a product of "give and take" or that the Homeowners could "opt out" of the agreement.

Further, the provisions in the agreements do not fall within the reasonable expectation of the Homeowners and, as weaker parties, cannot be enforced. *Graham v. Scissor-Tail, Inc.,* 28 Cal. 3d 807, 820 (1981). As discussed, *supra*, Parkowners' arbitration and reference agreements are unjustly adhesive. As discussed above and detailed in Homeowners' declarations (4 PE 1030-1138), it is clear that Homeowners did not have reasonable expectations of reference.

F. The Reference Provisions Are Illegal and Cannot Be Saved by Severance

Here, the central purpose of the arbitration and reference provisions is to deny Homeowners their day in court. Under the circumstances, severance of the offending provisions is not available.

In *Armendariz, supra,* 24 Cal. App. 4th at 124, this Court stated that in determining whether severance is appropriate, the court should consider whether the "central purpose of the contract is tainted with illegality" or whether the offending provisions are merely collateral to the contract's "main purpose." The *Armendariz* court also noted that: "[M]ultiple defects

indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to an employer's advantage." *Id.* at 124.

After quoting the above language in *Armendariz*, the *Parada* court concluded that the arbitration provisions before it could not be saved by severance,[16] noting:

> Severance is not permitted if the court would be required to augment the contract with additional terms.
>
> . . .
>
> The *Armendariz* court also concluded an unconscionable arbitration claim should not be severed if drafted in bad faith because severing such a term and enforcing the arbitration provision would encourage drafters to overreach.

Parada, supra, 176 Cal. App. 4th at 1586.

Here, the central purpose of the arbitration and reference provisions is to preserve a low-cost judicial forum for Parkowner's claims, while relegating Homeowners' claims to a prohibitively expensive reference procedure. The Court should decline severance.

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[16]Another reason for refusing severance is that a lay person generally would not understand the availability of severance, and the provisions would have their intended effect by discouraging potential litigation in the first place.

CONCLUSION

Throughout their Opening Brief, Parkowners argue that the sole basis of the lower court's refusal to enforce reference was the multiplicity of suits and that no statute authorizes a court to deny reference on that ground. That argument is wrong because in addition to multiplicity of suits the lower court also pointed out that other considerations militated against reference, including increased costs, potential delays in resolution and an unmitigated burden on the Superior Court. That argument also misses the distinction between the enforcement of arbitration clauses and reference agreements. Pursuant to Code of Civil Procedure, section 1281, et seq., an arbitration agreement is enforceable **unless** it meets the specific requirements of section 1281.2 (*e.g.* subsection (c) where there is a possibility of conflicting rulings). In contrast, Code of Civil Procedure, section 638 has always given the Court discretion (by the use of the word "may") to determine whether reference in a particular case is appropriate. Therefore, contrary to the *dicta* in *Greenbriar* and *Trend*, there is no need for a specific statute setting forth specific grounds for the Court's refusal to refer the matter.

Here the lower courts properly exercised their discretion after taking into account whether or not a reference in this proceeding would advance the purpose of section 638. Finding that it would not, the Courts correctly refused to order a reference. Alternatively, both Courts could have reached

a similar result by finding the reference provision to be unconscionable. Under the circumstances it is respectfully submitted that the Court should affirm the lower court's ruling.

Dated: Oct.18, 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned, counsel for the Real Parties in Interest, hereby certifies pursuant to Rule 8.504(d)(1), California Rules of Court, that the foregoing petition is proportionately space, has a 13-point typeface, and contains 11,376 words as computed by the word processing program Corel WordPerfect 12 used to prepare the petition.

Dated: Oct. 18, 2010

Respectfully submitted,

Henry E. Heater
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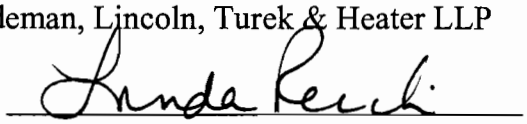
By: 

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PROOF OF SERVICE

Re: Supreme Court No.: S179378
Superior Court Alameda County No.: HG08418168

Case Title: *Tarrant Bell Property, LLC v. The Superior Court of Alameda County; Reynaldo Abaya, et al.*

Spanish Ranch I, L.P. v. The Superior Court of Alameda County; Reynaldo Abaya, et al.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party to the above-entitled action. I am employed in the County of San Diego, and my business address is 600 B Street, Suite 2400, San Diego, California 92101.

On October 18, 2010, I served the attached :

(1) REAL PARTIES IN INTERESTS' REYNALDO ABAYA, ET AL.'S ANSWER BRIEF ON THE MERITS; and

(2) REAL PARTIES IN INTEREST REYNALDO ABAYA, ET AL.'S REQUEST FOR JUDICIAL NOTICE
(*mailed via Federal Express on October 18, 2010 to the Clerk of the Supreme Court of California for filing*)

on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelope in a U.S. Postal Service mailbox in San Diego, CA addressed as follows:

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I, Kelly O'Connell-Martinez, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2010, at San Diego, California.

Kelly O'Connell-Martinez