Supreme Court 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.

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Real Parties' Answer fails to address any of the important reasons why this Court should grant review of the Court of Appeal's decision below. Real Parties, for instance, fail to address the fact that – until the decision below - no precedent existed for trial courts to refuse to enforce a valid pre-litigation consensual reference agreement based on "multiplicity of lawsuits, "conflicting rulings on a common issue of law or fact" or other "judicial inefficiencies." Real Parties also fail to address the fact that (without review by this Court) the law is now entirely unclear as to how trial courts throughout California are to hear and decide motions under the reference statute as opposed to the arbitration statute.

Real Parties also fail to address the fact that the Court of Appeal's decision below now creates a huge conflict between the appellate district courts. Nor do Real Parties address the fact that this conflict instantly creates widespread uncertainty for an important sector of California's housing market where parties to existing residential purchase contacts or leases have bargained for and agreed to have their controversies resolved by a referee rather than a court or jury. Indeed, the only other party (besides Petitioners) who has addressed the issue is the California Association of Realtors which explained in its *amicus curiae* letter brief the nature of this uncertainty and the impact the decision below will have on its entire industry if this Court does not grant the petition for review.

Nor do Real Parties address the fact that the decision below creates a new rule – previously not part of the statutory scheme governing a general reference – that for the first time gives trial courts throughout California license to refuse to enforce valid reference agreements, thereby essentially rewriting the parties' contract.

Perhaps most importantly, Real Parties fail to address the central issue of law raised in this appeal. The issue is not – as both Real Parties and the First District Court of Appeal below have tried to suggest – whether trial courts *have* discretion to grant a motion for an order compelling reference. The issue is, rather, what is the proper *scope* of that discretion. Do trial courts have the discretion to deny reference based on the potential for multiplicity of lawsuits, etc.? Both the Third District (*Greenbriar*) and the Fifth District (*Trend Homes*) have responded with a resounding "no." Both the Third and Fifth Districts have recognized it would be entirely improper to allow trial courts the discretion not to enforce (and thus invalidate) parties' reference contracts simply because it would help the court's efficiency. As the court in *Greenbriar* stated, neither trial courts nor appellate courts have the legal authority to invalidate reference agreements on such grounds.

The First Appellate District Court of Appeal, however, has now – for the first time ever - decided the *opposite*: that it is *not* an abuse of discretion for trial courts to summarily invalidate reference agreements when granting of such motions might aid judicial efficiencies.

The conflict that now exists between the districts is of wide-spread interest to the people of California, especially those who rely upon, or intend to rely upon, reference provisions in their contracts as a means of alternative dispute resolution. To what extent, and under what circumstances, in California are parties' contractual agreements for judicial reference to be enforced? Are the agreements to be enforced when there is an otherwise enforceable agreement? Or, are such agreements to be enforced only when a number of other policy considerations have first been considered and exhausted?

Real Parties' "Answer" does nothing to answer *these* questions. Nor does the Answer state why review would not otherwise be appropriate. The writ of mandate below does not simply involve the question of whether one trial court in one case made the correct call under Code of Civil Procedure section 638. Rather, the writ involves the important legal question of what discretion does section 638 confer on trial courts, and how are motions to compel reference to be decided by trial courts throughout California.

This Court should address the question now to resolve the present conflict between the districts and to provide guidance to countless trial courts wrestling with the amount of discretion they have to compel or deny reference. Without resolution now, the published opinion of the First District below will certainly increase the amount of litigation as litigants argue the scope of discretion afforded under section 638 in light of the conflicting holdings by the Third, Fifth and First District Courts.

I. REAL PARTIES' ANSWER INCORRECTLY DESCRIBES THE STANDARD OF REVIEW

Real Parties' Answer describes an incomplete, and hence incorrect, description of the abuse of discretion standard of review applicable to this case. Real Parties contend that the standard of review for abuse of discretion is simply whether Respondent "exceeded the bounds of reason." (Answer, p. 7, last para.) However, as the court in *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 393, explained:

> "This description of the appropriate standard of review is complete, however, only if 'beyond the bounds of reason' is understood as something in addition to simply 'irrational' or 'illogical.' While an irrational decision would usually constitute an abuse of discretion, the legal standard of review encompasses more than that: 'The scope of discretion always

> resides in the particular law being applied, i.e., in the "'legal principles governing the subject of [the] action . . .'" Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "'abuse'" of discretion.' [Citation] [¶] For example, a trial court could be mistaken about the scope of its discretion and the mistake could be entirely 'reasonable' – that is, it adopts a position about which reasonable judges could differ. But a reasoned decision based on the reasonable view of the scope of discretion is still an abuse of discretion when it starts from a mistaken premise, even though nothing about the exercise of discretion is, in the ordinary-language use of the phrase, 'beyond the bounds of reason.' [Citation] In other words, *judicial discretion must be measured against the general rules of law* and, in the case of a statutory grant of discretion, against the specific law that grants the discretion." [Emphasis added];

(*See also Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833 – scope of discretion always resides in the particular law being applied; *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831 – act exceeding bounds of reason is abuse of discretion, but "abuse of is not limited to such an extreme case")

In this case, the scope of discretion Respondent possessed resided in the legal principle set forth in *Greenbriar* and *Trend Homes*. That principle of law is simple: Where there is an otherwise valid contractual agreement for judicial reference, the trial court has no discretion to deny a reference based on claims of judicial economy, multiplicity of actions or risks of inconsistent rulings. Here, the Respondent's act in denying the Petitioners'

motion based solely on multiplicity of lawsuits transgresses the confines of the applicable principles of law found in *Greenbriar* and *Trend Homes* and therefore constitutes an abuse of discretion as a matter of law.

II. REAL PARTIES FAIL TO EXPLAIN WHY *GREENBRIAR* AND *TREND HOMES* DO NOT CREATE A CONFLICT AMONG THE DISTRICTS ON THE ISSUE OF DISCRETION WHICH WOULD MAKE REVIEW BY THIS COURT APPROPRIATE

In their Answer, Real Parties try to argue that no conflict exists between *Greenbriar* and *Trend Homes*, on the one hand, and the First District Court's decision below, on the other. (Answer, pp. 10 & 11.) Although somewhat difficult to understand, Real Parties apparently argue that the cases do not conflict because the courts of appeal in *Greenbriar* and *Trend Homes* did not consider and decide the issue of discretion under section 638 (as the Court of Appeal below contended), but rather only the issue of unconscionability. This is incorrect based on any reading of the cases.

In *Greenbriar*, the plaintiffs in the underlying action opposed the motion to compel reference, making the *one* argument that the agreements were unconscionable, and then by making the *second, alternative* argument that granting the motion would result in "multiplicity of lawsuits" because it would result in the original purchasers litigating in the reference proceedings, while, at the same time, the non-original purchasers would be litigating in the trial court. The Court of Appeal heard and decided the issue of discretion and "multiplicity of lawsuits." The Court of Appeal in *Greenbriar* in fact noted that there were no California cases holding that the potential for multiple actions invalidates the parties' agreement to have all disputes decided by judicial reference. It further noted that 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 lacked the authority to invalidate an otherwise valid contractual agreement. (117 Cal.App.4th at 348.)

Thus, Real Parties' apparent argument that the Court of Appeal in *Greenbriar* had only decided the issue of unconscionability and not the issue involving the scope of discretion afforded under section 638 is incorrect as the opinion plainly indicates (rather obviously) the opposite. The Court of Appeal specifically took up and decided the issue of discretion, and then held that it was an abuse of discretion to invalidate a reference provision based on multiplicity of actions:

> "Having determined the reference was not unconscionable, we must decide whether the trial court *abused its discretion* in not enforcing the provision against the original purchasers based on the possibility of multiple lawsuits.
>
> Because the provision was not unconscionable or otherwise invalid, petitioner claims the court had to enforce the provision. The court, petitioner argues, had no authority to ignore the valid agreement between the parties on the basis of multiplicity of actions.
>
> *Real parties, however, argue that the court had discretion not to enforce the reference provision against the original purchasers."* (117 Cal.App.4th 337, 376; emphasis added.)

Based on a plain reading of *Greenbriar*, the parties clearly raised, and the court clearly considered, the issue of discretion, after which the Court of Appeal concluded it was an *abuse* of that discretion for the trial court to deny a reference based on multiplicity of suits.

Real Parties similarly fail to explain why *Trend Homes* does not conflict with the decision below. Real Parties contend that *Trend Homes* did not consider the issue of "discretion." (Answer, p. 10.) Again, Real Parties are wrong. The court in *Trend Homes* specifically noted that the issue of the court's authority (i.e., discretion) to invalidate an otherwise enforceable agreement based on multiplicity of suits had already been decided in *Greenbriar*, and was thus determinative on the issue. (131 Cal.App.4th at 964.) Real Parties' apparent claim that the court in *Trend Homes* did not consider a trial court's discretion or authority to deny a motion for reference based on multiplicity of actions is simply incorrect.

III. REAL PARTIES' RELIANCE UPON THE TERM "MAY" IN SECTION 638 IS MISPLACED AND WILL NOT WARRANT AFFIRMING THE DECISION BELOW IF REVIEW IS GRANTED

Real Parties' principal argument appears to be that, notwithstanding the holdings in *Greenbriar* and *Trend Homes*, Respondent had the discretion to deny the motion to compel reference for any reason, including reasons having to do with judicial economy, because Code of Civil Procedure, section 638(a) uses the word "may" instead of "shall." (Answer, pp. 5-6.) As mentioned above, however, Petitioners are not disputing the fact that the term "may" indicates that the trial court *has* discretion. Rather, Petitioners maintain that there are *clear limits* to said discretion and that, under the holdings in *Greenbriar* and *Trend Homes*, it is, as a matter of law, an abuse of discretion for the trial court to refuse to enforce a party's contractually agreed upon reference provision based on a multiplicity of suits, etc. Stated another way, the word "may' (indicating the court has discretion) is immaterial because this appeal does not concern the existence of discretion, but rather the *scope* of that discretion.

IV. THE FACT THAT SECTION 638 WAS AMENDED TWENTY-EIGHT (28) YEARS AGO TO, IN PART, SUPPOSEDLY LESSON JUDICIAL DELAYS IS NOT DISPOSITIVE

Finally, Real Parties argue that Respondent's ruling was not an abuse of discretion because section 638 was amended in 1982 to lesson judicial delays and Respondent here found that ordering a reference would not improve the efficiency of the court, but rather would simply be duplicative. However, in *Greenbriar* and *Trend Homes* – cases decided recently in 2004 and 2005 -- the Courts of Appeal were confronted with the same scenario presented here – a single lawsuit with some plaintiffs having signed valid reference provisions and some plaintiffs having not signed. Under such circumstances, the courts in *Greenbriar* and *Trend Homes* held that it was an abuse of discretion to deny judicial reference on grounds it would result in multiple proceedings and thus not improve the efficiency of the court in any way.[1] The courts held that the parties' agreement for reference was paramount and that the courts could not invalidate some plaintiffs' reference agreements based on the inefficiencies of duplicated effort. Indeed, in analyzing today – and not 28 years ago – the Legislative intent, both the *Greenbriar* and *Trend Homes* courts recognized that the Legislature could have adopted a statute which permitted the trial court not

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[1] For example, in *Greenbriar*, forty-three (43) of the sixty-nine (69) homes involved in the action were owned by parties who purchased their homes from the homebuilder and were thus in privity of contract with the homebuilder. The remaining twenty-six (26) were owned by purchasers who were not in privity. (*Id.* at 117 Cal.App. 4th 341 – 42) The Court was therefore confronted with the same exact scenario confronting Respondent here – to compel judicial reference against some, but not all, plaintiffs, which may not enhance the efficiency of the court as the non-signatories would still need to have their cases adjudicated by way of a bench or jury trial.

to enforce judicial reference agreements based on multiplicity of suits (as in the case of arbitration agreements), but that no such statute was ever adopted. (*Greenbriar*, 117 Cal.App.4th at 348; *Trend Homes*, 131 Cal.App.4th at 964.) Absent a statute, the Courts of Appeal held that trial courts (and appellate courts) lack the authority to refuse to enforce reference agreements based on the theory that the result will be duplicative and not efficient or cost-saving.

Real Parties (and the First Appellate District Court below) cite to the legislative history inasmuch as the history indicates that the trial court should have discretion to deny reference when the issues would be more properly or efficiently decided by a judge. (Answer, pp. 6-7; Opinion, p. 8.) In fact, both Real Parties and the Court of Appeal below argue that *Greenbriar* and *Trend Homes* are distinguishable because they did not consider this legislative history. However, whereas the First District focused on the purported legislative history, the courts in *Greenbriar* and *Trend Homes* looked to the language finally adopted in section 638. The courts in *Greenbriar* and *Trend Homes* concluded that, had the Legislature actually wanted to place conditions on a litigant's right to reference, it could have included such conditions in the statute (similar to the arbitration statute). Absent such conditions in the reference statute, the courts in *Greenbriar* and *Trend Homes* concluded that the parties' interest in having their contracts enforced to be paramount. That is, they concluded that ordering one group of plaintiffs to a referee and having a trial as to the remaining plaintiffs, such that there would be "multiplicity of actions," was not a valid reason to invalidate the reference provisions in the contracts. To do so would be an *abuse* of discretion.[2]

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[2] Both Real Parties and the First District mischaracterize the record *Footnote Cont'd...*

In any event, whether one court relies upon legislative history or another relies on the wording finally adopted in the statute, it is the *conflict* in the courts' holdings that warrants review by this Court.

CONCLUSION

Until now, it was settled under California law that a trial court could not invalidate an otherwise enforceable reference agreement simply because ordering some (signatory) plaintiffs to a referee would result in duplicate or multiple litigation. The First District's decision below now unsettles the law and creates a conflict among the districts on an important issue of law warranting review. The issue ultimately involves the extent to which parties' contractual rights to a judicial reference are to be enforced in California, and when a trial court may properly exercise discretion to deny parties such rights which they have bargained for and negotiated to secure.

DATED: February 8, 2010

Respectfully submitted,

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below, contending that the trial court denied reference for the additional reason of preventing inconsistent rulings. (Answer, pp. 4-5; Opinion, p. 9.) In fact, the trial court stated in its own ruling that a risk of inconsistent judgments was *not* a proper basis for denying a motion for general reference. (5 PE, Exh. 36, p. 1320-1321.)

CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The text of this Reply consists of 2,859 words as counted by the Microsoft Word XP (Version 2003) word processing program used to generate the brief.

DATED: February 8, 2010 HART, KING & COLDREN

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PROOF OF SERVICE

Re: Supreme Court No. S179378, Civil Case Nos. A125496 & A125714

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 in the above-entitled action. I am employed in the County of Orange, and my business address is 200 Sandpointe, Fourth Floor, Santa Ana, CA 92707.

On February 8, 2010, I served the attached document described as a **REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW** on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes provided by an overnight delivery carrier and addressed to the persons identified herein. I placed the envelopes for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.

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I, Laurie Ann Moan, declare under penalty of perjury that the foregoing is true and correct. Executed on February 8, 2010, at Santa Ana, California.

Laurie Ann Moan