SUPREME COURT COPY

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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.

PETITIONERS' JOINT OPENING BRIEF ON THE MERITS

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioners MONTEREY COAST, LP, TARRANT BELL PROPERTY, LLC and SPANISH RANCH I, LP (jointly "Petitioners") respectfully submit their Joint Opening Brief On The Merits in connection with this Court's review of the published decision in this matter issued on December 2, 2009, by the California Court of Appeal, First Appellate District, Division Four. The current Lexis version of the opinion is appended. (*Tarrant Bell Property, LLC v. Superior Court* (179 Cal. App. 4th 1283; 2009 Cal. App. LEXIS 1929) (*Tarrant Bell*).

QUESTIONS PRESENTED FOR REVIEW

ISSUE 1

May courts refuse to enforce a valid pre-litigation consensual reference agreement contained in a lease on the grounds there is a potential for "multiplicity of lawsuits," "conflicting rulings on a common issue of law or fact" or other "judicial inefficiencies" when neither existing precedent nor governing statutes authorize such grounds for invalidating a reference agreement? That is, did the California Legislature intend to confer on trial courts broad discretion to refuse to enforce a valid consensual reference on such grounds? And, do the arbitration statutes, specifically

Code of Civil Procedure section 1281.2(c)[1] vesting discretion in trial courts to deny arbitration on the aforementioned grounds, serve as a comparable scope of discretion to that conferred by section 638 that provides a referee "may" be appointed when the court finds a valid agreement exists between the parties requiring that, "all controversies between them shall be heard by a referee," as the Court of Appeal reasoned below? But, in doing so the lower Courts are in conflict with two other recent District Court of Appeal decisions on the same issue which hold that this is a legislative determination, otherwise it is an unwarranted rewriting of the parties contract and an abuse of discretion.

ISSUE 2

Respondent trial court considered and weighed the parties conflicting evidence and found that the lease agreements containing a pre-litigation reference provision were valid and that they were neither procedurally nor substantively unconscionable nor void as a waiver of rights under landlord tenant law. The Court of Appeal did not address these issues. (*Tarrant Bell*, *supra,* 179 Cal.App.4th 1295) nor are they raised, or fairly included in the Petition for Review. It is mentioned here only because Real Parties, without substantive discussion, analysis or supporting authority, simply noted them in their Answer to the Petition for Review as an alternative question (Ans. p. 1 (no. 3), 10). (Cal. Rules of Court, Rule 8.520(b)(2)(B))

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1 All statutory citations are to the Code of Civil Procedure unless otherwise indicated.

Where, as here, an opposing party neither files a cross-petition for review, nor adequately asserts in its answer to a petition for review an issue properly raised below, the issue is not adequately preserved for review. (Cal. Rules of Court., Rule 8.516(b)(1); *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal. 4th 643, 654, fn 2, discussing former rule 29(b).) Therefore, in this proceeding the issues of unconscionability and waiver are neither adequately raised nor fairly included as issues for review and should be disregarded.

Should this Court nevertheless find that the issues of unconscionability and waiver are adequately raised or fairly included for review, since Real Parties have failed to set forth any argument, analysis or citation to supporting authority in their Answer, Petitioners expressly reserve their arguments in opposition for their reply brief should Real Parties in their Answer Brief decide to pursue these issues.

INTRODUCTION

This case arises out of certain lease agreements between the owner of a mobilehome park and the park's residents. Each of the subject leases contain a valid agreement that all disputes between the parties arising under the leases shall be submitted to arbitration, or, alternatively, judicial reference pursuant to section 638. Until now, the Courts of Appeal in California have uniformly held that it is an abuse of discretion to refuse to enforce otherwise valid reference agreements on grounds that there is a potential for "multiplicity of lawsuits," "conflicting rulings on a common issue of law or fact" or other "judicial inefficiencies." The Courts of Appeal have concluded that to allow consideration of these factors would mean rewriting the parties' contracts as well as section 638 which courts lack the authority to do. The Court of Appeal, First District nonetheless disregarded this settled precedent, and reached a different conclusion which is erroneous and should be reversed.

The Court of Appeal's published decision improperly creates a new judicially made rule, outside the statutory scheme governing a general reference and existing precedent, but which (if not reversed) trial courts may now rely on as precedent, on a case-by-case basis, to refuse to enforce otherwise valid reference agreements, thereby essentially authorizing trial courts everywhere to rewrite the parties' contracts. Furthermore, this newly minted rule was forged from conflating discretion vested in the trial court under the arbitration statutes, which are supported by public policy considerations, and this Court's precedents that in material respects are inapplicable to the general reference statutory scheme, e.g., limited appellate review of arbitration award, inapplicability of the Evidence Code absent consent, contrasted with right to appeal a referee's decision and referee's required application of the Evidence Code.

In *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337 (*Greenbriar*), the trial court, as here, believed it had the discretion to refuse to enforce a valid reference agreement between a developer and multiple homeowners claiming construction defects. The trial court believed it had the same discretion as derived from the arbitration statutes that allow refusal to enforce an arbitration agreement on the grounds of potential multiplicity of actions. On issuing a writ of mandate vacating the order, Third District Court of Appeal, held:

> 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 we lack authority to invalidate an otherwise valid contractual agreement. '[W]e do not rewrite any provision of any contract [or any statute] . . .for any purpose. (117 Cal.App.4th at 348; emphasis added.)

The Third District held that the trial court lacked the discretion to invalidate or refuse to enforce the reference provision based on multiplicity of lawsuits, and that therefore its denial of the motion to compel judicial reference on those grounds was an abuse of discretion as a matter of law. (*Id.*)

The issue of discretion under section 638 was again addressed the following year by the Fifth District Court of Appeal which reached the same conclusion as the Third District in *Greenbriar*. In *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950 (*Trend Homes*), as in *Greenbriar*, the real parties objected to a reference notwithstanding a valid enforceable contact, arguing the provision was unconscionable and its enforcement could result in a multiplicity of actions. (131 Cal.App.4th at 955.)

The Fifth District Court of Appeal, after resolving an unconscionability issue, explained that the issue of enforcement in this context had already been decided in *Greenbriar*:

> Finally, real parties contend the provision should not be enforced because there is no evidence the subcontractors have agreed to participate in judicial reference and there is a possibility of inconsistent verdicts since the majority of

homeowners are not subject to judicial reference and their case will be tried to a jury. <u>Real parties have not cited any authority that supports the proposition that the risk of multiple actions proceeding in different forums renders the agreements unconscionable or invalidates the parties' agreement to have all disputes decided by judicial reference</u>. As the *Greenbriar* court explained in rejecting a similar argument: '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 . . ' (131 Cal.App.4th at 964; emphasis added.)

Following *Greenbriar*, the Court in *Trend Homes* determined that the agreements were valid, and that the trial court had no authority under section 638 to refuse to enforce the reference provisions based on the risk of multiple actions. (*Id.*) Neither the *Greenbrier* nor the *Trend Homes* Courts found it necessary or proper to refer to extrinsic legislative materials in interpreting section 638. Rather, they noted the Legislature had elected to write the reference statute different from the arbitration statute, and that the Legislature, if it had wanted to, could have written section 638 similar to the arbitration statute but it elected not to do so.

Nonetheless, the Court of Appeal below refused to follow either *Greenbrier* or *Trend Homes,* instead holding that, "It is section 638 that vests the trial court with authority to exercise its discretion to deny reference where multiple actions arising from the same transaction or operative facts risk inconsistent rulings, duplication of efforts, increased costs, and delays resolution. The failure of *Greenbriar* and *Trend* to fully consider section 638 renders those cases unpersuasive, and we decline to follow them. [¶] We therefore conclude that a trial court may refuse to enforce a reference agreement where there is a possibility of conflicting rulings on a common issue of law or fact or other circumstances related to considerations of judicial economy, consistent with the purposes and policies of section 638. We do not suggest that refusal is always warranted where there are multiple actions triable by the superior court judge and a private referee. The trial court must make a case-by-case assessment." (*Tarrant Bell, supra.,* 179 Cal. App. 4th 1295).

While recognizing on the one hand that the Legislature enacted separate and distinct statutes to govern judicial references as opposed to arbitration proceedings, the Court appeared to nonetheless rely upon the *arbitration* statutes to come to its conclusion here that the trial court had discretion to deny an agreed upon reference.

The Court below also relied upon section 638 itself, noting that it contains the word "may" and not "shall" such that the trial court would have "discretion" to deny the motion on grounds of potential "multiplicity of lawsuits," "conflicting rulings on a common issue of law or fact" or other "judicial inefficiencies." The Court then "confirmed" its conclusion by reference to extrinsic legislative materials that, "confirm[s] our plain-meaning construction of statutory language.", citing *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046 [95 Cal. Rptr. 3d 636, 209 P.3d 963].) (*Tarrant Bell, supra.*, 179 Cal.App.4th 1291)

The issue presented, however, is not whether the trial court *had* discretion under section 638(a), rather it is the *scope* of judicial discretion and whether Respondent *abused* that discretion as a matter of law by refusing to follow the reference statute – as presently enacted – and the well-established principles set forth in *Greenbriar* and *Trend Homes*.

SUMMARY OF THE CASE

The underlying lawsuit concerns the Spanish Ranch I Mobile Home Park (the "Park") which consists of roughly fifty (50) acres and is located in the City of Hayward. (Petitioner's Exhibit 2, page 22 lines 3 – 11 of Volume 1 of 5 to Petitioner's Writ of Mandate ("1 PE, Exh. 2, p. 22:3-11.")[2] There are 462 mobilehome spaces in the Park. (1 PE, Exh. 2, p. 22:10-11.) The Park is defined by several different streets running throughout the Park. (1 PE, Exh. 2, p. 22:11-12.) In other words, the Park is very large with hundreds of residents.

Petitioner, Tarrant Bell Property, LLC, is a California limited liability company which, at one point, owned a fractional interest in the Park. (1 PE, Exh. 2, p. 22:5-6.) Petitioner, Monterey Coast, LP, is a

2 The exhibits, which are bound separately in Volumes 1 through 5, are part of Respondent's Petition for Writ of mandate below. The exhibits are paginated consecutively from page 1 through page 1371, and page references in this Petition shall reflect the volume, exhibit number and consecutive pagination; i.e., pages 20 through 24 of Exhibit 2 in Volume 1 of Petitioners' Exhibits ("PE") shall be noted as follows: 1 PE, Exh. 1, pp. 20-24. Line references are provided as applicable.

limited partnership which presently owns the park. Petitioner, Spanish Ranch I, LP, was the prior owner of the Park.

On or about October 30, 2008, one hundred and twenty (120) former and present residents of the Park filed a Complaint in the Alameda Superior Court against Petitioners alleging failure to maintain the Park in good working order and condition.[3] (5 PE, Exh. 38, pp. 1327-1371.) The Complaint presents as a mass-pleading with generic claims, with each resident alleging separate claims not common to each other. That is, each Plaintiff asserts individual claims and damages unique to himself or herself. The Complaint is essentially a conglomeration of one hundred and twenty (120) different lawsuits. At the end of the day, liability will have to be determined on a plaintiff-by-plaintiff basis, and there will necessarily be different outcomes for each of the Plaintiff's claims as they have not all suffered, if at all, the same alleged damage nor been subject to the same conditions alleged in the Complaint.

In response to the Complaint, on or about December 8, 2008, Petitioner, Tarrant Bell Property, LLC, specially appeared in the action by way of filing a noticed motion for an order compelling arbitration, to stay proceedings pending the outcome of the arbitration, or, in the alternative, to

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3 The Complaint asserted ten (10) causes of action for nuisance, breach of contract, negligence, intentional interference with property rights, breach of covenant of good faith and fair dealing, negligence per se, unfair business practices, breach of warranty of habitability, breach of covenant of quiet enjoyment, and declaratory and injunctive relief.

have the matter ordered to judicial reference pursuant to Code of Civil Procedure section 638 (the "Motion"). (1 PE, Exh. 2, pp. 3-871.)

In the Motion, Petitioners explained that of the 120 Plaintiffs who filed suit, approximately 83% of them voluntarily and knowingly signed rental agreements containing arbitration/judicial reference provisions pursuant to section 638. The Motion explained that there were actually eight (8) different types of rental agreements signed by Plaintiffs, referred to as rental agreements "A," "B," "D," "E," "F," "G," "H," and "K."[4] (1 PE, Exh. 2, p. 7:18-25.) Rental agreements "A" and "B" contained general reference provisions under paragraph 38.8 on page 10 that read as follows:

> "38.8 IF THESE ARBITRATIONS 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." (1 PE, Exh. 2, pp. 3-871.)

4 "C," "I," and "J" were intentionally left blank.

Rental agreements "D," "E," "F," "G," "H," and "K" all contained similar general reference provisions under paragraph "27.G." or "25.(g)" or "28.G." that read as follows:

> "SHOULD ANY OF THESE ARBITRATION PROVISIONS BE HELD UNENFORCEABLE FOR ANY REASON, IT IS AGREED THAT ALL ARBITRABLE ISSUES IN ANY JUDICIAL PROCEEDING SHALL BE SUBJECT TO A REFEREE ON MOTION BY ANY PARTY FOR HEARING AND DECISION BY A REFEREE AS ALLOWED BY STATE LAW, INCLUDING CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 638, ET SEQ. IN SUCH EVENT, SAID REFEREE SHALL BE APPOINTED BY THE COURT."

(This reference provision appeared specifically in rental agreement "D" at paragraph 27.G. on page 12, in rental agreement "E" at paragraph 27.G. on page 12, in rental agreement "F" at paragraph 27.G. on page 12, in rental agreement "G" at paragraph 25(g) on page 7, in rental agreement "H" at paragraph 25(g) on page 7, and in rental agreement "K" at paragraph 28.G. on page 13.) (1 PE, Exh. 2, pp. 3-871.)

Petitioner's Motion was directed against the 100 plaintiffs who had signed rental agreements containing arbitration/reference provisions. (1 PE, Exh. 2, p. 4:3- p. 5:2.) Petitioner contended that Plaintiffs voluntarily and knowingly agreed to the arbitration and reference provisions, that the provisions were not contracts of adhesion or unconscionable, and would not result in inconsistent judgments. (1 PE, Exh. 2, p. 7:18-19, p. 14:5-p.

15:22.) Petitioner further pointed out in its Motion that, as a matter of law, the potential for "multiple actions" was not a recognized legal ground for invalidating agreements between parties to have claims decided by a judicial reference. (1 PE, Exh. 2, p. 21:2-11.)

On or about January 8, 2009, Plaintiffs filed their opposition to the Motion for arbitration and judicial reference. Plaintiffs argued that the Motion should be denied because the arbitration/reference provisions were against public policy, were unconscionable and contracts of adhesions. As for the motion for a judicial reference, Plaintiffs argued that ordering 100 plaintiffs to reference would result in "inconsistent judgments" and "not promote judicial economy." (4 PE, Exh. 7, p. 1006:7-p. 1019:20.)

On or about January 14, 2009, Petitioner, Tarrant Bell Property, LLC, filed a reply brief in support of the Motion. In its reply, Petitioner argued that the arbitration/reference provisions were not procedurally or substantively unconscionable, that the waiver of a jury trial was not against public policy in the context of this case, and that granting the Motion would not result in inconsistent judgments. (5 PE, Exh. 12, p. 1148:5-p. 1156:23.) Also on January 14, 2009, Petitioner, Monterey Coast, LP, specially appeared in the action and filed a notice of joinder in the Motion. (5 PE, Exh. 17, p. 2:1-4.)

The Motion was first heard by Respondent Court on March 3, 2009. At that hearing, Respondent deemed Monterey Coast, LP's notice of joinder as a motion to join in the Motion and granted the same. As for the merits of the Motion, Respondent denied the motion to compel arbitration.[5] As to the motion for a judicial reference, Respondent continued the hearing on the motion. In its tentative order of February 27, 2009 (5 PE, Exh. 22, p. 1233) as well as its final Order of March 3, 2009 denying arbitration and continuing the motion for judicial reference, Respondent noted that referring the case to a referee was "a distinct possibility," and ordered the parties to meet and confer to determine if the issue could be resolved informally. Respondent permitted each side to further brief the following issues before the continued hearing date: (1) the validity of the reference agreement with respect to the remaining plaintiffs, and/or (2) any other basis for ordering the remaining plaintiffs to submit their claims to a referee. (5 PE, Exh. 23, p. 1235, Exh. 24, pp. 1239-1250.)

After the parties' meet and confer efforts, on or about April 29, 2009, Plaintiffs filed a supplemental opposition brief in which they argued, among other things, that a general reference would result in inconsistent rulings between those that signed reference agreements and those that did not, that Respondent had discretion under section 638, not to appoint a

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5 Petitioners appealed Respondent's Order of March 3, 2009, denying the motion to compel arbitration. That appeal is designated as Case No. A125298 in the Court of Appeal. Appellant's Reply Brief is due August 20, 2010.

referee, and that it would be contrary to judicial economy to compel judicial reference. (5 PE, Exh. 27, p. 1258:5-p. 1265:15.)

On or about May 5, 2009, Petitioners (Tarrant and Monterey) filed their supplemental reply brief in which they pointed out that "multiplicity of actions" or the "risk of inconsistent rulings on common issues" as found in section 1281.2 (applicable to motion to compel arbitration) was not proper grounds for denying a motion to compel a judicial reference. (5 PE, Exh. 32, p. 1305:1-12.) In fact, Petitioners pointed out that Respondent (and appellate courts as well) lack the legal authority to invalidate an otherwise valid contractual agreement for judicial reference based on "multiplicity of lawsuit." (5 PE, Exh. 32, p. 1305:7-12.) That is to say, where there is a valid contractual agreement for judicial reference, Respondent [based on case law] could not refuse to enforce the written agreements on the basis of claims of judicial economy, multiplicity of actions or risk of inconsistent rulings. Petitioners argued that the reference provisions were all valid and, thus, Respondent had no authority to deny the Motion as to the signatory-plaintiffs (Real Parties in Interest) based on judicial economy, multiplicity of actions, etc.[6]

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6 As to the trial court's question as to what to do with the non-signatory plaintiffs, Petitioners suggested that the Court appropriately issue an order of special reference under Code of Civil Procedure section 639(a), after which the Trial Court could review the referee's decision and decide to adopt the same as appropriate to specific issues, if any, raised by the remaining plaintiffs in the action. (5 PE, Exh. 32, p. 1305:13-p. 1306:7.)

The Motion was eventually continued and heard again on May 12, 2009. A few days before that hearing, on May 8, 2009, Respondent issued a tentative ruling that indicated Respondent would grant the judicial general reference as to all the "Signatory Plaintiffs" and "Co-habitating Plaintiffs" based on Respondent's determination that the reference provisions were valid and not unconscionable. The tentative was to deny the request for a special reference as to "Non-Signatory Plaintiffs." (5 PE, Exh. 35, p. 1318.)

On May 12, 2009, Respondent heard argument on the Motion, and following the hearing, on May 14, 2009, issued its final ruling on the reference motion. Respondent reversed itself and denied Petitioners' motion for a general reference against the Plaintiffs who had signed the rental agreements. As stated in its Order of May 14, 2009, Respondent determined that the subject general reference agreements were not unconscionable. (5 PE, Exh. 36, p. 1320.) Respondent further acknowledged 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.) Nonetheless, Respondent ultimately denied the Motion as to those Plaintiffs who had signed the rental agreements. (5 PE, Exh. 36, p. 1320.)

As stated in the Order itself, the sole basis for Respondent's ruling to deny the Motion and not enforce the reference provisions against Plaintiffs was Respondent's view that granting the Motion would result in duplicative or multiplicity of lawsuits. Specifically, Respondent stated in its ruling of May 14, 2009:

> "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 resulting 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, Exh. 36, p. 1321-1322; emphasis added.)

Petitioners filed a petition for writ of mandate. Following oral argument on the petition, the Court of Appeal, First Appellate District, affirmed Respondent's decision. In its published opinion, the Court appeared to rely upon section 1281.2 (that governs only motions to compel arbitration) and concluded that, even though a separate statute was enacted with regard to references (section 638), the same type of discretion authorized under section 1281.2 could also apply to motions for judicial reference. The Court also relied upon the fact that the reference statute, section 638, used the word "may" which the Court viewed as empowering Respondent with wide discretion. The Court, however, failed to consider the limitations placed on that discretion and the importance of enforcing parties' contractually agreed upon reference provisions, as explained in *Greenbriar* and *Trend Homes*. Rather than concede that *Greenbriar* and

Trend Homes control, the First District simply stated that Petitioners' reliance on those cases was "misplaced."

LEGAL DISCUSSION

I. THE LOWER COURT'S REFUSAL TO ENFORCE THE JUDICIAL REFERENCE PROVISIONS BASED ON MULTIPLICITY OF LAWSUITS, POSSIBLE CONFLICTING RULINGS ON COMMON ISSUES OF LAW AND FACT OR OTHER JUDICIAL EFFICIENCIES CONSTITUTES AN ABUSE OF DISCRETION AS A MATTER OF LAW

A reference for private judging is a general reference. (*Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 342-343.) The referee is empowered to "hear and determine any or all of the issues in an action or proceeding, whether of fact or of law" (section 638, subd. (a)), and to make a binding decision that "must stand as the decision of the court." (*Id.*; section 644, subd. (a).) An order of general reference must be based on either the agreement of the parties filed with the clerk or judge or entered in the minutes or in the docket, or the motion of a party seeking to enforce a written contract or lease that require any controversy arising from it to be heard by a referee. (*Id.*; section 638.)

Furthermore, contrasting a general reference with arbitration the court in *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal. App. 4th 1334, 1342, explained:

> "There are significant differences between a judicial reference and a contractual arbitration. ...A general reference occurs where the court, with the consent of the parties, directs

a referee to try any or all of the issues in the action. (Code Civ. Proc., § 638; *Ruisi v. Thieriot* (1997) 53 Cal. App. 4th 1197, 1208 [62 Cal. Rptr. 2d 766].) The court appoints the referee, although the person chosen may be the result of the parties' agreement. (Code Civ. Proc., § 640.) The hearing before a referee is conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings. (Evid. Code, § 300; *Rice v. Brown* (1951) 104 Cal. App. 2d 100, 103, 106-107 [231 P.2d 65]; *In re McNamee* (1933) 131 Cal. App.. 30, 31 [20 P.2d 722].) In the case of a general reference, the referee must prepare a statement of decision which stands as the decision of the court and is reviewable in the same manner as if the court had rendered it. (Code Civ. Proc., § 644, 645; *Jovine v. FHP, Inc.*, supra, 64 Cal. App. 4th at p. 1522; *In re Marriage of Demblewski* (1994) 26 Cal. App. 4th 232, 236 [31 Cal. Rptr. 2d 533]; 6 Witkin, Cal. Procedure, supra, Proceedings Without Trial, § 68, 69, pp. 466-468.)

"An arbitration is defined as, ' "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.' [Citation.]" (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal. App. 4th 676,

> 684 [57 Cal. Rptr. 2d 867].) Contractual arbitration includes the following attributes: "(1) [A] third party decision maker; (2) a mechanism for ensuring neutrality with respect to the rendering of the decision; (3) a decision maker who is chosen by the parties; (4) an opportunity for both parties to be heard, and (5) a binding decision." (*Ibid.*; see also *Elliott & Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal. App. 4th 495, 503 [67 Cal. Rptr. 2d 140].) Unless the parties otherwise agree, the rules of evidence and judicial procedure do not apply. (Code Civ. Proc., § 1282.2, subd. (d).) Arbitrators are not bound to decide cases in accordance with the law and may base a decision on principles of justice and equity. (*Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 11-12 [10 Cal. Rptr. 2d 183, 832 P.2d 899].)'"

In this case, the underlying action involves about 100 plaintiffs who signed rental agreements with valid and enforceable judicial reference provisions and about 26 plaintiffs who did not sign agreements with such provisions. The issue presented is whether Respondent abused its discretion in refusing to enforce the reference provisions against the 100 Plaintiffs based on the possibility of "multiplicity of lawsuits," "conflicting rulings or common issues of law and fact" or other "judicial efficiencies." Prior to this case, the issue had been fully explored and decided in two recent appellate cases – both of which involved writs of mandate to trial courts that had on the aforementioned grounds refused to enforce valid reference agreements. In both cases, the Courts of Appeal held that

Respondents abused their discretion in not enforcing an otherwise valid reference provision based on "multiplicity of lawsuits."

The first case (decided in 2004) was *Greenbriar*, *supra*, 117 Cal.App.4th 337. In *Greenbriar*, homeowners brought suit against a homebuilder corporation to recover for damages allegedly suffered due to defective construction of their homes. 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 in privity of contract with the homebuilder (i.e., original purchasers). The remaining twenty-six (26) were owned by parties who were not the original purchasers and were not in privity of contract with the builder (non-original purchasers). The purchase and sales agreement between the homebuilder and original purchasers required all disputes to be determined by a judicial referee pursuant to sections 638-645.1. The homebuilder filed a motion to compel to have the consolidated action heard by a referee. (117 Cal.App.4th at 341.)

In *Greenbriar*, the plaintiffs opposed the motion to compel, arguing the agreement to decide all disputes by reference was unconscionable. They also argued 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 trial court in *Greenbriar* denied the motion because it thought it would cause multiplicity of lawsuits. (117 Cal.App.4th at 341-342.) The trial court subsequently stated that it had denied the motion to compel because the reference "only applied to a few of the parties and not to all the parties. And I thought they would be **duplicate litigation** of the case if one was in the arbitration [sic] system and the other was in the court system." (117 Cal.App.4^{th} at 342; emphasis added.)

Homebuilder filed a petition for writ of mandate, challenging the trial court's denial of its motion to compel the reference. Homebuilder argued that the trial court had abused its discretion by denying the motion based on the alleged potential of a multiplicity of suits. (117 Cal.App.4^{th} at 342.)

The appellate court (Third District) in *Greenbriar* granted the petition in part, agreeing that that the issue was whether the trial court had abused its discretion in not enforcing the provision against the original purchasers based on the possibility of multiple lawsuits. Homebuilder contended that since the subject provision was not unconscionable or otherwise invalid, the trial court had to enforce the provision; that respondent-trial court had no authority to ignore the valid agreement between the parties on the basis of multiplicity of actions, and to do so was an abuse of discretion. (117 Cal.App.4^{th} at 346, 347.) Real parties in interest (plaintiffs), meanwhile, argued, as here, that the trial court had discretion to deny the motion to compel based on the possibility of multiplicity of lawsuits. (*Id.*) They argued that the discretion derived from analogous statutory authority given courts to refuse to enforce arbitration agreements pending a court action between a party to the arbitration agreement and a third party. (*Id.*)

The Court of Appeal disagreed. It noted there are 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 and to do so was an abuse of discretion as a matter of law. (117 Cal.App.4th at 348.)

Trend Homes, supra, 131 Cal.App.4th 950 in 2005 as noted above followed *Greenbriar*. In *Trend Homes*, a homebuilder similarly filed a petition for writ of mandate, challenging a trial court's denial of its motion to compel judicial reference of an underlying construction defect action brought against it by homebuyers. The petitioner-homebuilder named eleven (11) people as real parties in interest who owned six of the homes. The real parties, along with thirty-nine (39) other individuals who own 26 other homes within the development, filed suit. In reliance on a reference provision in the purchase and sale agreements, petitioner moved to compel judicial reference against the eleven (11) real parties in interest who were the only plaintiffs to have signed the agreements with the reference provisions. As in *Greenbriar*, the real parties in *Trend Homes* objected, arguing the provision should not be enforced because it was unconscionable and its enforcement could result in a multiplicity of actions. (131 Cal.App.4th at 955.)

The Court of Appeal in *Trend Homes* noted that the issue had already been decided in *Greenbriar*. (131 Cal.App.4th at 964.) Following *Greenbriar*, the Court in *Trend Homes* determined that the agreements were not invalid, and that trial court therefore had no authority to invalidate the reference provisions based on the risk of multiple actions. (131 Cal.App.4th at 964.)

In the present case, like the Court of Appeal decisions in *Greenbriar* and *Trend Homes*, Respondent here determined that the subject rental agreements between Petitioners and Real Parties were not unconscionable or otherwise invalid. (5 PE, Exh. 36, p. 1320.) To the contrary, Respondent concluded that the subject agreements were fully enforceable and would otherwise be enforceable against the 100 signatory-plaintiffs. Nonetheless, Respondent denied Petitioners' motion to compel in its Order of May 14, 2009, based solely on grounds that there would be duplicative litigation, i.e., multiplicity of lawsuits. Again, Respondent's order stated:

> "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 resulting a <u>duplication</u> 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, Exh. 36, p. 1321-1322; emphasis added.)

Plainly, Respondent found the reference agreements fully enforceable against 100 plaintiffs, but decided that since a very small percentage of the plaintiffs (i.e., 20 of the 120 plaintiffs) had not signed, it would deny the motion based on multiplicity of lawsuits. Just as the trial court in *Greenbriar* denied the motion to compel because it "would cause multiplicity of lawsuits" and the trial court "thought they would be duplicate litigation of the case," Respondent here denied the Motion for the same reason. However, that reason – duplicative litigation and/or multiplicity of lawsuits – is not a valid basis for denying the Motion as a matter of law. As explained in *Greenbriar* and *Trend Homes*, Respondent lacked authority to invalidate the reference provisions based on the fear of multiple actions. Consequently, what Respondent did here in refusing to enforce the reference provisions was an abuse of discretion as a matter of law. This is especially true given the fact that 83% of the plaintiffs had voluntarily and knowingly agreed to have disputes resolved by a referee.

II. A TRIAL COURT'S ACT THAT TRANSGRESSES THE CONFINES OF THE APPLICABLE PRINCIPLES OF LAW IS OUTSIDE THE SCOPE OF DISCRETION AND IS THUS DEEMED BY COURTS AS AN "ABUSE" OF DISCRETION

Contours of a court's discretion are shaped by the particular legal principles being applied. The court in *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 393, explained that:

"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 *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal. App. 4th 1210, 1218-1219, citing, among other cases, *Westside*

Community for Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355, "The discretion of a trial judge is . . . a legal discretion, which is subject to the limitations of legal principles governing the subject of its action…'"; *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833 (First App. Dist.), scope of discretion always resides in the particular law being applied; *Communities v. City of Concord* (2001) 91 Cal.App.4th 1407, 1417, "'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action ….''; *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*, both of which, as here, unambiguously applied section 638 in a multiparty situation where some parties had a reference agreement while others did not. That principle of law was simple: Where there is an otherwise valid contractual agreement for judicial reference, the trial court exceeds its judicial discretion by denying a judicial reference based on claims of judicial economy, multiplicity of actions or risks of inconsistent rulings. Here, Respondent's act in denying the Petitioners' motion based solely on multiplicity of lawsuits transcends the confines of the applicable principles of law found in *Greenbriar* and *Trend Homes*. Therefore, Respondent acted in excess of its jurisdiction which constitutes an abuse of discretion as a matter of law. The Court of Appeal's published decision below (affirming Respondent's ruling) is thus erroneous and must be reversed.

III. THE LEGISLATIVE HISTORY OF THE 1982 AMENDMENT TO SECTION 638 IS NOT DISPOSITIVE[7]

It is well settled that, "[w]hen construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) This Court has repeatedly instructed that, "to determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent. If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*Diamond Multimedia Sys., Inc.* v. *Superior Court of Santa Clara County* (1999) 19 Cal. 4th 1036, 1047, cert. denied, 527 U.S. 1003, 144 L. Ed. 2d 235, 119 S. Ct. 2338 (1999) (citations omitted); accord *Ventura County Deputy Sheriffs' Ass'n v. Board of Retirement* (1997) 16 Cal. 4th 483, 492-93, "if a statute is unambiguous, it must be applied according to its terms. Judicial construction is neither necessary nor permitted");

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7 The Court may take judicial notice of legislative materials without a separate application. Evidence Code §459. "[A] request for judicial notice of published material is unnecessary. Citation to the material is sufficient. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra*, 17 Cal. 4th 553, 571, fn. 9.) We therefore consider the request for judicial notice as a citation to those materials that are published." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 46)

Normally, the first step is to examine the statute's text because the statutory language is generally the most reliable indicator of legislative intent. (*People v. Trevino* (2001) 26 Cal.4th 237, 241 [109 Cal. Rptr. 2d 567, 27 P.3d 283].) The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. (*Ibid.*; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 282 [45 Cal. Rptr. 2d 241, 902 P.2d 259]; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570–571 [38 Cal. Rptr. 2d 139, 888 P.2d 1268].) (*People v. Braxton* (2004) 34 Cal. 4th 798, 810). Yet, despite the clear direction from this Court, the Court of Appeal below without finding any ambiguity in 638 or dual interpretations, indulged in extrinsic legislative materials to supposedly "confirm" its one hundred and eighty degree departure from existing precedent. (*Tarrant Bell*, *supra.*, 179 Cal.App.4th 1290 - 91).

The Court of Appeal relied heavily on an Assembly committee staff comment contained in the Assembly Committee on Judiciary's (1981 – 82 Reg. Sess.) analysis of Assembly Bill No. 3657, amending section 638 suggesting the amendment should, "simply create a presumption that a court should compel a reference when the parties have contractually agreed to one thereby permitting the court to determine that such a reference would be appropriate[.]" (*Id.*) This comment apparently, according to the decision below, prompted the Legislature to amend the bill by deleting "shall" and inserting "may" so that the statute reads in its current form, as it did before the amendment; the court "may" appoint a referee upon motion of a party to a pre-dispute reference agreement. (*Id.*)

However, the staff comment did not suggest, and the Legislature did not adopt, qualifying language in this amendment to the effect that a court may enforce a pre-dispute reference agreement, *except where the court finds the potential for multiplicity of actions, potential conflicts in ruling on common issues of law or fact or other judicial inefficiencies*. The Court of Appeal below, nonetheless, effectively added these "exceptions" to section 638, even though they are clearly not present in the statute. It did so through the concept of discretion. (*Id.* at 1292) The fundamental flaw in the Court's analysis is that it essentially rewrites section 638 with exceptions which the Legislature did not choose to include.

As for the Court's reliance upon extrinsic legislative history, an Assembly committee staff comment does not constitute an established legal principal on which discretion may be exercised. (*Westside Community For Independent Living, Inc. v. Obledo*, *supra*., 33 Cal.3d at 355). Furthermore, the Assembly Judiciary staff comment does not outweigh the overall purpose of the amendment to section 638, which is to provide the courts with a vehicle for *enforcing* reference agreements. (See Sen. Com. on Judiciary, com. on Assem. Bill No. 3657 (1981-82 Reg. Sess.), as amend. May 10, 1982, p. 2, "The purpose of this bill is to aid courts in enforcing reference agreements."; see also 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 a reference upon the motion of a party to a written contract or lease that provided that any controversy arising from its terms would be heard by reference.")

To support its position that it is proper to refer to extrinsic legislative materials in this case, the Court of Appeal cites *Hughes v. Pair* (2006) 46 Cal. 4th 1035, 1046 (*"Pair"*). However, *Pair* simply cited two other cases for the authority of looking to legislative history to confirm plain meaning construction of statutory language: *Viva! Int'l Voice for Animals v. Addidas Promotional Retail Operations, Inc.* (2007) 41 Cal. 4th 929, 943 ("*Viva!*") and *Troppman v. Valverde* (2007) 40 Cal. 4th 121, 137 ("*Troppman*"). Both cases are distinguishable from the Court of Appeal's analysis in how they apply reference to extrinsic legislative materials to confirm plain meaning construction of a statute.

In *Viva!*, the issue was whether federal law allowing an exemption for management of certain protected species, in that case kangaroos, preempted California's statutory protection prohibiting importation of the same protected species from other countries. (*Id.* at 936) A key provision of the Federal Endangered Species Act of 1973 ("Act") defined the scope of preemption. This Court referred to the legislative history of the Act to confirm its interpretation that species not on that federal list were subject to state regulation. (*Id.* at 943) However, in doing so, the Court also relied on federal case law construing the same statue and agreeing with that interpretation, citing two cases articulating certain principles of federal preemption of state law. (*Id*). Here, the Court of Appeal below cited no case law supporting its interpretation of section 638 that the Legislature intended to empower courts with discretion to refuse to enforce a reference agreement based upon potential multiplicity of actions, potential conflict in rulings on common issues of law or fact or other judicial efficiencies. As discussed *supra.*, the *Greenbriar* court held to the contrary that it is an abuse of discretion for the court to refuse to enforce a reference agreement on those grounds.

Similarly, in *Troppman*, in harmonizing two Vehicle Code statutes governing driver's license suspension and the implied consent law requiring submission to chemical sobriety testing, this Court referred to legislative history confirming its interpretation of its construction of the legislative scheme resolving a conflict between appellate districts. But in doing so, it also relied on case authority articulating the legal principles governing the statutory scheme that supported the Court's interpretation. (40 Cal.4th at 1138-1139).

In *Greenbriar* and *Trend Homes* (*supra.*, Sec. I) – 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,* interpreting the plain meaning of section 638, held that it was an abuse of discretion to deny judicial reference on grounds there was a potential for multiple proceedings and thus not improve the efficiency of the court in any way. The Courts held, rather, that the parties' agreements for judicial reference was paramount and that trial courts could not invalidate some plaintiffs' reference agreements based on the inefficiencies of duplicated effort. Indeed, in analyzing today – and not 26 years ago – the Legislative intent, both the *Greenbriar* and *Trend Homes* courts recognized that the Legislature could have adopted a statute which permitted trial courts to refuse 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 Court of Appeal decisions 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.

The Court of Appeal decision below to the contrary therefore is erroneous and must be reversed.

CONCLUSION

For all of the foregoing reasons, the published Court of Appeal decision below must be reversed and a writ of mandate, or other appropriate relief, should be issued ordering Respondent to vacate its Order of May 14, 2009 denying Petitioner's motion for reference and enter an order granting Petitioner's motion for a reference.

Dated: July 21, 2010 HART, KING & COLDREN

By: ______________________
Robert S. Coldren
Robert G. Williamson, Jr.
Daniel T. Rudderow
Attorneys for Defendants-Petitioners,
TARRANT BELL PROPERTY, LLC,
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CERTIFICATE OF LENGTH OF PETITION

(California Rules of Court, Rule 8.504(d)(1))

The undersigned, counsel for the Defendants and Petitioners, hereby certifies pursuant to Rule 8.504(d)(1), California Rules of Court, that the foregoing petition is proportionately spaced, has a 13-point typeface, and contains 8.048 words as computed by the word processing program Microsoft Word XP (Version 2003) used to prepare the petition.

Dated: July 21, 2010

HART, KING & COLDREN

By: ______________________

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LEXSEE 179 CA4TH 1283

TARRANT BELL PROPERTY, LLC, et al., Petitioners, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; REYNALDO ABAYA et al., Real Parties in Interest. SPANISH RANCH I, L.P., Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; REYNALDO ABAYA et al., Real Parties in Interest.

A125496, A125714

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

179 Cal. App. 4th 1283; *102 Cal. Rptr. 3d 235*; *2009 Cal. App. LEXIS 1929*

December 2, 2009, Filed

NOTICE:

NOT CITABEL--SUPERSEDED BY GRANT OF REVIEW

SUBSEQUENT HISTORY: Review granted, Depublished by *Tarrant Bell Property LLC v. S.C. (Abaya), 106 Cal. Rptr. 3d 769, 227 P.3d 341, 2010 Cal. LEXIS 1134 (Cal., 2010)*
Later proceeding at *Tarrant Bell Property LLC. v. S.C. (Abaya), 2010 Cal. LEXIS 2239 (Cal., Mar. 25, 2010)*
Later proceeding at *Tarrant Bell Property, LLC. v. S.C. (Abaya), 2010 Cal. LEXIS 3811 (Cal., Apr. 20, 2010)*
Later proceeding at *Tarrant Bell Property v. S.C. (Abaya), 2010 Cal. LEXIS 4679 (Cal., May 20, 2010)*
Application granted by *Tarrant v. Superior Court, 2010 Cal. LEXIS 5881 (Cal., June 23, 2010)*

PRIOR HISTORY: [*1]**
Superior Court of Alameda County, No. HG08418168. George C. Hernandez, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Current and former residents of a mobilehome park sued the current and former owners of the park, alleging that the owners failed to properly maintain the common areas and facilities within the park, and otherwise subjected the residents to substandard living conditions. The trial court denied the owners' alternative motion to compel judicial reference. (Superior Court of Alameda County, No. HG08418168, George C. Hernandez, Jr., Judge.)

The Court of Appeal denied the owners' petitions for a writ of mandate to vacate the trial court's order denying reference. The court observed that the reference statute (*Code Civ. Proc., § 638*) does not have a general provision mandating enforcement followed by exceptions to enforcement, as does the arbitration statute. Instead, the reference statute has a general provision making enforcement discretionary. A referee "may" be appointed if the court finds a reference agreement exists between the parties. The court concluded that the trial court has the discretion to refuse to enforce a reference agreement where there is a possibility of conflicting rulings on a common issue of law or fact or other circumstances related to considerations of judicial economy, consistent with the purposes and policies of *§ 638*. No abuse of that discretion had been shown in the instant case because the trial court's assessment was reasonable. The trial court found that sending some of the residents to a referee while others remained in the superior court risked inconsistent rulings on common issues of law or fact and would require the parties to conduct the same discovery, litigate and ultimately try the same issues in separate but parallel forums, resulting in duplication of effort, increased costs, and potentially, delays in resolution. (Opinion by Sepulveda, J., with Ruvolo, P. J., and Rivera, J., concurring.) **[*1284]**

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Referees § 1--Appointment--Consensual Reference--Effect of Statement of Decision.--Parties may consent, either before or after a lawsuit commences, to appointment of a referee to hear and decide their dispute in whole or part (*Code Civ. Proc., § 638*). Where a consensual reference is made, the court shall appoint as referee the person agreed upon by the parties and the referee's fees shall be paid as agreed by the parties (*Code Civ. Proc., §§ 640, 645.1, subd. (a)*). In a general reference, the referee prepares a statement of decision that stands as the decision of the court and is reviewable as if the court had rendered it. The primary effect of such a reference is to require trial by a referee and not by a court or jury.

(2) Referees § 1--Appointment--Discretionary Authority of Trial Court.--*Code Civ. Proc., § 638*, by its plain terms, vests the trial court with discretion when the court is asked by a party to appoint a referee pursuant to a predispute reference agreement. The statute does not say that a party may move for trial by referee but that the court may appoint a referee upon a party's motion. The permissive language relates to the court's conduct, not the parties' conduct. Respected commentators have so interpreted *§ 638*: The statutes authorizing appointment of referees make the appointment discretionary, not mandatory. The legislative history of *§ 638* confirms that the Legislature meant to empower the trial court with discretionary authority to refuse enforcement of a reference agreement.

(3) Statutes § 21--Construction?Legislative Intent--Statutory Language--Plain Meaning.--The role of judges is to effectuate legislative intent, and statutory language is generally the most reliable indication of legislative intent. If the statutory language is unambiguous, the court presumes the Legislature meant what it said, and the plain meaning of the statute controls.

(4) Referees § 1--Statutory Construction of "May" and "Shall"--Mandatory and Discretionary Meanings.--The word "may" usually denotes permissive action, in contrast to "shall," which is ordinarily used in laws to express what is mandatory. The Legislature is well aware of the distinction between the words "shall" and "may." In interpreting the meaning of "may? in *Code Civ. Proc., § 638*, it is also significant that the Legislature used both "shall" and "may" in legislating the use of trials by referees by, for example, stating that the court "may" appoint a referee pursuant to the parties' predispute agreement while providing **[*1285]** that the selection and payment of the referee "shall" be as agreed by the parties (*Code Civ. Proc., §§ 638, 640, 645.1, subd. (a)*). When the Legislature has used both "shall" and "may" in close proximity in a particular context, a court may fairly infer the Legislature intended mandatory and discretionary meanings, respectively.

(5) Courts § 3--Powers and Organization--Discretion of Trial Court--Scope.--A trial court's discretion is never unbounded. "In its discretion," is not the equivalent of "if it wants to" or "if it feels like it." The scope of 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. Discretion should be exercised in a manner that best effectuates the purposes of the law granting the discretion.

(6) Referees § 1--Predispute Agreements--Enforcement--Discretion of Court.--*Code Civ. Proc., § 638*, as amended, allows enforcement of predispute agreements as a means to ease court congestion, and courts are effectively given discretion to refuse enforcement of such agreements where the case would more efficiently be handled in the superior court.

(7) Referees § 1--Agreements--Enforcement--Case-by-case Assessment.--A trial court may refuse to enforce a reference agreement where there is a possibility of conflicting rulings on a common issue of law or fact or other circumstances related to considerations of judicial economy, consistent with the purposes and policies of *Code Civ. Proc., § 638*. It is not suggested that refusal is always warranted where there are multiple actions triable by the superior court judge and a private referee. The trial court must make a case-by-case assessment.

(8) Referees § 1--Agreements--Enforcement--Discretionary Authority of Trial Court.--The trial court acted within its discretion in denying enforcement of reference agreements on the basis of multiplicity of actions and the attendant risk of inconsistent rulings and duplication of efforts established in the case. The trial court found that sending some plaintiffs to a referee while others remained in the superior court risked inconsistent rulings on common issues of law or fact and would require the parties to conduct the same discovery and to litigate and ultimately try the same issues in separate but parallel forums, resulting in duplication of effort, increased costs, and potentially, delays in resolution.

[*Cal. Forms of Pleading and Practice (2009) ch. 38, Reference, § 38.11*; *2 Kiesel et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure (2009) § 25.05.*] **[*1286]**

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JUDGES: Opinion by Sepulveda, J., with Ruvolo, P. J., and Rivera, J., concurring.

OPINION BY: Sepulveda

OPINION

[237] SEPULVEDA, J.**--It is undisputed that a trial court may, in its discretion, refuse to compel arbitration between contracting parties where there are other individuals suing over the same matter and separate arbitration and court actions risk conflicting rulings on a common issue of law or fact. (*Code Civ. Proc., § 1281.2, subd. (c).*) The question presented here is whether the trial court is vested with comparable discretion when asked to compel a different form of alternative dispute resolution, trial by a private referee. (*Code Civ. Proc., § 638 et seq.*) We conclude that the answer is yes.

There are several forms of alternative dispute resolution that contracting **[***2]** parties may use to settle disputes arising under their contract, including arbitration (*Code Civ. Proc., § 1280 et seq.*) and trial by a referee (*Code Civ. Proc., § 638 et seq.*). Statutory law provides that an agreement to submit a controversy to arbitration "shall" be enforced unless specified circumstances exist. (*Code Civ. Proc., § 1281.2.*) Among those circumstances: the court may refuse to enforce the arbitration agreement where "[a] party to the arbitration agreement is also a party to a pending court action ... with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (*Code Civ. Proc., § 1281.2, subd. (c).*)

The reference statute has a different structure. The reference statute does not have a general provision mandating enforcement followed by exceptions to enforcement, as does the arbitration statute. Instead, the reference statute **[*1287]** has a general provision making enforcement discretionary. A referee "may" be appointed "if the court finds a reference agreement exists between the parties." (*Code Civ. Proc., § 638.*)

The question here is whether the trial court may **[***3]** refuse to enforce a reference agreement, as it may an arbitration agreement, where there is a possibility of conflicting rulings on a common issue of law or fact. We conclude that the court has the discretion to refuse to enforce a reference agreement under these circumstances, or related considerations of judicial economy, and that no abuse of that discretion has been shown in this case.

I. FACTS

Spanish Ranch I Mobile Home Park (the Park) is a 50-acre Hayward facility with 462 sites. In October 2008, 120 current and former residents of the Park sued the Park owners upon allegations that the owners failed to properly maintain the common areas and facilities within the Park, and otherwise subjected the residents to substandard living conditions. Defendant Monterey Coast, L.P., is the current owner, and defendants Tarrant Bell Property, LLC, and Spanish Ranch I, L.P., are former owners.

In December 2008, defendants moved to compel arbitration or, in the alternative, judicial reference. (*Code Civ. Proc., §§ 638, 1281.2.*) Many of the plaintiffs had signed Park leases containing an alternative **[**238]** dispute resolution (ADR) provision. The parties dispute the exact number of plaintiffs subject to **[***4]** an ADR lease provision. Defendants put the number at 100 while plaintiffs say 81. 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. [1]

1 It is not clear from the record whether the tenants without ADR provisions in their leases were asked to agree to ADR and refused, or were never asked to agree to ADR at the time they signed their leases.

There were several standard form leases used over the years at the Park, with slight variation in the ADR provisions, but those differences are not material. In substance, the leases state that it is agreed that any tenancy dispute (with major exceptions for actions by the Park owner) shall be submitted to arbitration conducted under the provisions of *Code of Civil Procedure section 1280 et seq.* " 'Dispute' " is defined to include claims regarding "maintenance, condition, nature, or extent of the facilities, improvements, services, and utilities provided to the space, park or common areas of **[*1288]** the park." [2] The leases further state: "If these arbitration provisions are held unenforceable for any reason it is agreed that all arbitrable issues in any judicial **[***5]** 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.*" Costs for the arbitration or reference "shall be advanced equally" between the tenant and Park owner.

2 The lease arbitration and reference clauses are typed in all capital letters. We do not follow that capitalization scheme when quoting those clauses here.

Plaintiffs opposed the motion to compel arbitration or reference on a number of grounds. Plaintiffs argued that the ADR provision is unenforceable as an invalid waiver of rights protected under the Mobilehome Residency Law and landlord-tenant law. (*Civ. Code, §§ 798.77, 798.87, subd. (a), 1953, subd. (a).*) Plaintiffs also asserted that the ADR provision is unconscionable because it exploits the weak bargaining position of mobilehome residents and requires ADR of the residents' disputes while exempting unlawful detainer and other Park owner actions from ADR. Finally, plaintiffs urged the court to refuse enforcement of the ADR provision because its enforcement risked conflicting **[***6]** rulings on common issues of law and fact by sending the claims of some Park residents to arbitration or reference, while others remained in the superior court for resolution.

In March 2009, the court denied defendants' motion to compel arbitration on two grounds: (1) the Mobilehome Residency Law precludes waiver of a resident's right to bring a civil action for a park's improper maintenance of the common facilities (*Civ. Code, §§ 798.77, 798.87, subd. (a)*); and (2) there is the risk of inconsistent rulings on common issues (*Code Civ. Proc., § 1281.2, subd. (c)*). It will be recalled that the lease provided alternative forms of ADR: arbitration preferentially, but reference if the "arbitration provisions are held unenforceable for any reason." The court, having held the arbitration provisions unenforceable, was asked by defendants to compel reference.

The court received supplemental briefing on defendants' alternative request for reference and, in May 2009, denied that request as well. The court found that sending some of the plaintiffs to a referee while others remained in the superior court risked inconsistent rulings. The court also found that splitting the action would defeat the purposes **[***7]** of the reference **[**239]** statute by duplicating efforts and increasing costs: "Ordering two groups of plaintiffs to try their cases in **[*1289]** 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."

Defendants appealed the trial court's March 2009 order denying their motion to compel arbitration, and that appeal is pending. (*Code Civ. Proc., § 1294, subd. (a).*) Defendants also filed petitions for a writ of mandate to vacate the court's May 2009 order denying their alternative motion to compel reference. We now turn to consideration of the merits of defendants' petitions challenging the order denying reference.

II. DISCUSSION

(1) Parties may consent, either before or after a lawsuit commences, **[***8]** to appointment of a referee to hear and decide their dispute in whole or part. (*Code Civ. Proc., § 638* (hereafter, *section 638*).) *Section 638* provides: "A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any **[*1290]** controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties: [¶] (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision. [¶] (b) To ascertain a fact necessary to enable the court to determine an action or proceeding." Where a consensual reference is made, the court "shall appoint as referee" the person agreed upon by the parties and the referee's fees "shall be paid as agreed by the parties." (*Code Civ. Proc., §§ 640, 645.1, subd. (a).*)

We are here concerned with a predispute agreement in a lease that provides for a general reference with all issues to be decided by a referee. "In a general reference, the referee prepares a statement of decision that stands as the decision of the court and is **[***9]** reviewable as if the court had rendered it. The primary effect of such a reference is to require trial by a referee and not by a court or jury." (*Treo @ Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal.App.4th 1055, 1061 [83 Cal. Rptr. 3d 318].*)

A. *A trial court has discretion to refuse enforcement of a predispute reference agreement*

(2) *Section 638*, by its plain terms, vests the trial court with discretion when the court is asked by a party to appoint a referee pursuant to a predispute reference agreement: "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 ... ." (Italics added.) **(3)** Our role as 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 (2008) 44 Cal.4th 876, 888 [80 Cal. Rptr. 3d 690, 188 P.3d 629].*) "If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls." (*Ibid.*) **(4)** The word "may" usually denotes permissive action, in contrast to **[**240]** "shall," which is ordinarily used in laws to express what is mandatory. (*Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 133 [142 Cal. Rptr. 325].*) **[***10]** The Legislature is well aware of the distinction between the words "shall" and "may." (*Ibid.*) In interpreting the meaning of "may" in *section 638*, it is also significant that the Legislature used both "shall" and "may" in legislating the use of trials by referees by, for example, stating that the court "may" appoint a referee pursuant to the parties' predispute agreement while providing that the selection and payment of the referee "shall" be as agreed by the parties. (*Code Civ. Proc., §§ 638, 640, 645.1, subd. (a).*) "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. (1978) 21 Cal.3d 349, 353-354 [146 Cal. Rptr. 604, 579 P.2d 495].*)

Defendants argue that the trial court has no discretion to deny a motion to compel reference once a party requests reference and demonstrates the existence of a reference agreement. The permissive language of *section 638*, according to defendants, relates to the moving party's desire for reference and not the court's authority. It is the parties who may or may not request a reference. The court itself has no discretion **[***11]** in the matter and must order the reference if elected by the parties, defendants contend. Defendants' interpretation is contrary to the plain language of *section 638*. The statute provides, in relevant part: "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 if the court finds a reference agreement exists between the parties ... ." (*§ 638.*) The statute does not say that a party may move for trial by referee but that the court may appoint a referee upon a party's motion. The permissive language relates to the court's conduct, not the parties' conduct. Respected commentators have so interpreted *section 638*: "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) ¶ 6:152, p. 6-45 (rev. # 1, 2006).)

The legislative history of *section 638* confirms that the Legislature meant to empower the trial court with discretionary authority to refuse enforcement of a reference agreement. While the statutory language is clear in expressing **[*1291]** this legislative intent, we may also "look **[***12]** to legislative history to confirm our plain-meaning construction of statutory language." (*Hughes v. Pair (2009) 46 Cal.4th 1035, 1046 [95 Cal. Rptr. 3d 636, 209 P.3d 963].*) Here, legislative intent on this point is unmistakable.

Prior to 1982, *section 638* authorized a court to order trial by referee upon the present agreement of parties to pending litigation. (Legis. Counsel's Dig., Assem. Bill No. 3657 (1981-1982 Reg. Sess.) 6 Stats. 1982, Summary Dig., p. 152.) *Section 638* was amended in 1982 to authorize a court to order trial by referee upon a predispute reference agreement when one of the parties moved to enforce the agreement. (Legis. Counsel's Dig., Assem. Bill No. 3657, *supra*, 6 Stats. 1982, Summary Dig., p. 152; Stats. 1982, ch. 440, p. 1810.) The State Bar of California sponsored the bill to amend *section 638* and urged its adoption, arguing "that this bill is needed because there is no present procedure for compelling a reference if one party unilaterally decides not to abide by a prior agreement that any dispute may be submitted to a referee." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Apr. 28, 1982, p. 1.) The bill's sponsor argued that "court congestion" makes reference an "attractive remedy." (*Ibid.*)

[241]** Importantly, the bill as originally introduced required the court to enforce predispute **[***13]** reference agreements and *was amended to give the court discretion* to decide whether to enforce such agreements. The original version of the bill contained a separate paragraph on predispute reference agreements, stating: "Parties to a written contract or lease may provide that any controversy arising therefrom will be heard by a reference and any party to such an agreement may move the court to compel the reference. If the court finds a reference agreement existing between the parties, the reference *shall* be ordered." (Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Mar. 18, 1982, italics added.) An Assembly committee report noted that then existing law provided that a court "may" order a reference upon agreement of the parties and that the proposed bill "would require a court to compel a reference if there is a pre-dispute agreement to refer." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Apr. 28, 1982, p. 1.) Committee staff commented: "Should not the court have the discretion to decide that, despite the existence of the pre-dispute agreement, the issues would be more properly or efficiently decided by the judge? Therefore, should not this bill simply create a presumption **[***14]** 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?" (*Id.* at pp. 1-2.) The legislators embraced this recommendation. The bill was amended to delete the mandatory language of the bill as originally introduced, and to use permissive language. (Assem. Amend. to Assem. Bill No. 3657 (1981-1982 Reg. Sess.) May 10, 1982.) The amendment deleted **[*1292]** the separate paragraph (quoted above) relating to predispute reference agreements and incorporated predispute agreements into the existing discretionary provision governing postdispute reference agreements. (*Ibid.*) *Section 638* was thus amended to read as it does now, in substantial form: "A reference may be ordered upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes or in the docket, *or upon the motion of a party to a written contract or lease which provides that any controversy arising therefrom shall be heard by a reference if the court finds a reference agreement exists between the parties*." (Assem. Amend. to Assem. Bill No. 3657, *supra*, May 10, 1982, original italics.) The legislative history **[***15]** thus confirms that the Legislature specifically intended to vest courts with discretion to deny predispute reference agreements, just as the court has discretion to deny postdispute reference agreements.

B. *A trial court may consider the risk of inconsistent rulings and judicial economy in deciding whether to enforce a reference agreement*

(5) Defendants next argue that any discretion the court has to deny appointment of a referee is not unbounded. We agree. A trial court's discretion is never unbounded. " 'In its discretion,' ... is not the equivalent of 'if it wants to' or 'if it feels like it.' " (*Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 394 [33 Cal. Rptr. 3d 644]*.) The scope of "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." (*Id. at p. 393*; accord, *Westside Community for Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355 [188 Cal. Rptr. 873, 657 P.2d 365]*.) Discretion should be exercised in a manner that best effectuates the purposes of the **[**242]** law granting the discretion. (*Horsford, supra, at p. 394*.)

The question thus becomes whether the grounds given by the court **[***16]** for its refusal to appoint a referee are consistent with the substantive law of *section 638*, read in light of the purposes and policy of the statute. (See *City of Sacramento v. Drew (1989) 207 Cal.App.3d 1287, 1298 [255 Cal. Rptr. 704]* [applying methodology to determine if court exceeded scope of statutory discretion].) The court denied appointment of a referee upon finding that sending some of the plaintiffs to a referee while others remained in the superior court risked inconsistent rulings. The court also found that splitting the action would defeat the purposes of the reference statute by duplicating efforts and increasing costs: "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 **[*1293]** 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 **[***17]** have to hear, and decide, all of the same issues."

(6) Defendants contend that the trial court exceeded the scope of its discretion in denying reference. Defendants assert: "Where there is an otherwise valid contractual agreement for judicial reference, the trial court has no discretion to deny a judicial reference based on claims of judicial economy, multiplicity of actions or risks of inconsistent rulings." We disagree. As noted above, *section 638* was amended to allow enforcement of predispute agreements as a means to ease court congestion, and courts were effectively given discretion to refuse enforcement of such agreements where the case would more efficiently be handled in the superior court. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Apr. 28, 1982, p. 1.)

A report of the Assembly Committee on the Judiciary asked: "Should not the court have the discretion to decide that, despite the existence of the pre-dispute agreement, the issues would be more properly or efficiently decided by the judge? Therefore, should not this bill simply create a presumption that a court should compel a reference when parties have contractually agreed to one, thereby permitting **[***18]** the court to determine that such a reference would be inappropriate?" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Apr. 28, 1982, pp. 1-2.) The bill was soon amended to provide court discretion, which suggests that the Legislature intended to grant a trial judge authority to deny reference where the issues "would be more properly or efficiently decided by the judge." (*Ibid.*; Assem. Amend. to Assem. Bill No. 3657 (1981-1982 Reg. Sess.) May 10, 1982.)

The considerations weighed by the trial court here--the risk of inconsistent rulings on a common issue of law or fact, the duplication of efforts, 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*. Defendants deny the relevancy of these considerations in arguing that "the trial court has no discretion to deny a judicial reference based on claims of judicial economy, multiplicity of actions or risks of inconsistent rulings." The argument ignores the legislative history and objectives of *section 638* and relies exclusively upon two cases where *section 638* was not fully considered. **[**243]** Defendants' reliance **[***19]** upon *Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal.App.4th 337 [11 Cal. Rptr. 3d 371]* (*Greenbriar*) and *Trend Homes, Inc. v. Superior Court (2005) 131 Cal.App.4th 950 [32 Cal. Rptr. 3d 411]* (*Trend Homes*) is thus misplaced. **[*1294]**

In *Greenbriar*, the Third District 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 judicial reference under predispute agreements with 43 of 69 plaintiff homeowners alleging defective construction of their homes. (*Greenbriar, supra, 117 Cal.App.4th at pp. 337, 340-341, 348.*) The trial court had denied reference because " 'it would cause multiplicity of lawsuits.' " (*Id. at pp. 341-342.*) In defending the ruling in the appellate court, the plaintiff homeowners apparently did not rely upon the discretionary language of *section 638* and its legislative objectives to show that multiplicity of lawsuits is a proper basis for denying reference. Instead, the *Greenbriar* plaintiffs argued that court discretion to deny enforcement of the reference agreements "is derived from analogous statutory authority given courts under *Code of Civil Procedure section 1281.2* to refuse to enforce arbitration agreements pending a court **[***20]** action between a party to the arbitration agreement and a third party." (*117 Cal.App.4th at p. 346*, italics omitted.) The Third District promptly, and rightly, 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 p. 347*, original italics.) The appellate court reasoned: "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 we lack authority to invalidate an otherwise valid contractual agreement." (*Id. at p. 348.*) The weakness in this reasoning is the focus on *Code of Civil Procedure section 1281.2*, relied upon by the *Greenbriar* plaintiffs, and the failure to fully explore *section 638*. It is *section 638* that provides statutory authorization to deny enforcement of a reference agreement on the basis of multiple actions where, as here, multiplicity of actions risks inconsistent rulings, duplication of efforts, increased costs, and delays in resolution.

Trend Homes also failed **[***21]** to explore the language and objectives of *section 638*. (*Trend Homes, supra, 131 Cal.App.4th 950.*) In *Trend Homes*, the Fifth District followed *Greenbriar, supra, 117 Cal.App.4th 337* in granting a petition for writ of mandate against a trial court's order denying a real estate developer's motion to compel judicial reference under predispute agreements with 11 of 50 plaintiff homeowners alleging defective construction of their homes. (*Trend Homes, at p. 954.*) The trial court had concluded that the agreements were unconscionable, and thus unenforceable. (*Id. at p. 955.*) The appellate court rejected the unconscionability finding and also rejected the plaintiff homeowners' alternative argument that the possibility of inconsistent rulings from the referee and superior court in the multiple actions warranted denying reference. (*Id. at p. 964.*) The court followed *Greenbriar* and made no assessment of *section 638*. (*Trend Homes, at p. 964.*) It is *section 638* that vests the trial court with authority to exercise its discretion to deny **[*1295]** reference where multiple actions arising from the same transaction or operative facts **[**244]** risk inconsistent rulings, duplication of efforts, increased costs, and delays in **[***22]** resolution. The failure of *Greenbriar* and *Trend* to fully consider *section 638* renders those cases unpersuasive, and we decline to follow them.

(7) We therefore conclude that a trial court may refuse to enforce a reference agreement where there is a possibility of conflicting rulings on a common issue of law or fact or other circumstances related to considerations of judicial economy, consistent with the purposes and policies of *section 638*. We do not suggest that refusal is always warranted where there are multiple actions triable by the superior court judge and a private referee. The trial court must make a case-by-case assessment.

Here, the trial court's assessment was reasonable, and defendants have failed to demonstrate any abuse of discretion. The trial court found that sending some of the plaintiff Park residents to a referee while others remained in the superior court risked inconsistent rulings on common issues of law or fact and would require the parties "to conduct the same discovery, litigate and ultimately try the same issues in separate but parallel forums," resulting in "duplication of effort, increased costs, and potentially, delays in resolution." The court rejected defendants' **[***23]** argument that there was a lack of commonality, and thus no risk of inconsistent rulings, because each Park resident's damages were unique. The court rightly noted that common issues do exist, including the primary issue of liability for the alleged failure to maintain Park premises by, for example, failing to provide adequate sewage, water, and electrical services to all residents. The court also rejected defendants' argument that reference would reduce, not increase costs, by reducing the number of plaintiff witnesses appearing in the superior court. The argument overlooks the likelihood that plaintiffs will call many Park residents to establish the pervasiveness of alleged substandard living conditions in the Park--whether the residents are parties to the superior court action or not. Moreover, the possible savings in time and cost from the appearance of fewer Park residents in the superior court if reference is granted are slight compared to the time and cost incurred by the appearance of many other witnesses, including expert witnesses, in parallel proceedings. The trial court did not abuse its discretion in denying reference.

(8) As a final matter, we note that plaintiffs also argue **[***24]** that the reference agreements are unconscionable, and thus unenforceable, and also void as an invalid waiver of rights protected under landlord-tenant law. (*Civ. Code, § 1953, subd. (a).*) We need not reach these issues because we conclude that the trial court acted within its discretion in denying enforcement of the reference agreements on the basis of multiplicity of actions and the attendant risk of inconsistent rulings and duplication of efforts established in this case. **[*1296]**

III. DISPOSITION

The petitions are denied. The parties shall bear their own costs.

Ruvolo, P. J., and Rivera, J., concurred.

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 July 21, 2010, I served the attached document described as a **Petitioners' Joint Opening Brief on the Merits** 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, Michele D. Mesaros, declare under penalty of perjury that the foregoing is true and correct. Executed on July 21, 2010, at Santa Ana, California.

Original Signed

Michele D. Mesaros