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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Cases

Table of Authorities Cont'd...

Table of Authorities Cont'd...

Statutes

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

INTRODUCTION

The Answer Brief on the Merits ("Answer Brief") filed by Real Parties in Interest ("Real Parties") does little more than summarize several sections of the First Appellate District's opinion in *Tarrant Bell Property, LLC v. Superior Court* (2009) 179 Cal.App.4th 1283 ("*Tarrant Bell*"). Importantly, Real Parties fail to address the central issue presented in this appeal as to whether the First District was correct in essentially construing Code of Civil Procedure section 638[1] the *same* as the arbitration statutes, when all the courts (i.e., the Third, Fifth and First District Courts of Appeal) acknowledge that the Legislature clearly intended, and thus enacted, *different* statutes to govern arbitrations as opposed to trials by reference.

Indeed, the Answer Brief and the First District fail to recognize the plain and undeniable fact that different statutes, with different provisions, were enacted by the California Legislature to govern two different alternative dispute resolution systems. The Answer Brief and First District also fail to address the critical fact (recognized by both *Greenbriar*[2] and

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1 All further references are to the Code of Civil Procedure unless otherwise specified.

2 Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal.App.4th 337 (Greenbriar).

Trend Homes[3]) that courts would be improperly legislating if they were to graft upon the reference statute the various provisions contained in the arbitration statute -- essentially re-writing the reference statute to contain provisions which were never intended by the Legislature. Indeed, what the First District did here was to improperly rewrite section 638 by holding that certain factors (which the Legislature included only in the arbitration statute) may now also be considered in connection with a motion to compel reference, even though the Legislature enacted section 638 in a manner completely different from the arbitration statutes.

Real Parties and the First District contend that enlarging the scope of discretion that courts may have to decide reference issues (in a fashion similar to the arbitration statutes) should be permissible because of the supposed supportive legislative history behind section 638. However, a court's selective review of a statute's legislative history does not then empower that court to rewrite the final law that was actually enacted by the Legislature. It is what the Legislature finally enacted that governs, not the reports and advisory opinions that led up to the final version of the law.

If the proposition is that trial courts, as a matter of public policy, should have the same discretion deciding a motion to compel a trial by reference as they would have in deciding a motion to compel arbitration, that issue may be debated, but, ultimately, it is up to the Legislature to pass a new law if it wishes. As *Greenbrier* and *Trend Homes* correctly point

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3 Trend Homes, Inc. v. Superior Court (2005) 131 Cal.App.4th 950 (Trend Homes).

out, it is not up to the courts to decide policy or change the public policy adopted by the Legislature.

Again, it is important to note what is, and what is not, the issue presented in this appeal. Petitioners are *not* contending that a trial court has no discretion. What Petitioners are arguing is that the trial court *abuses its discretion* when it denies enforcement of Petitioners' contractual reference provision based on considerations of "multiplicity of lawsuits," potential "conflicting rulings on a common issue of law or fact," or other "judicial inefficiencies." Indeed, the First District spends a lot of time discussing how factors, such as inconsistent rulings, judicial economy, etc., etc., are all "reasonable" considerations. They may be reasonable in and of themselves. But what Petitioners (and the courts in *Greenbriar* and *Trend Homes*) are saying is that a trial court's consideration of whether a reference will help unclog the court system (or help the judge empty his/her in-box) is <u>not</u> a proper consideration when deciding whether to order a reference. The enforcement of the contract needs to take priority and parties cannot be denied enforcement of their contractual rights simply because potentially there might be some inefficiencies for the trial court in connection with that enforcement.

Thus, the central issue to be decided by this Supreme Court is not whether a trial court has discretion under section 638 – since clearly it does – but rather whether a trial court may exercise discretion under this statute in a manner in which considerations of multiplicity of lawsuits, possible inconsistent rulings on common issues of law and fact and judicial economy are allowed to take priority over a party's right to have its contractual provision for reference fully enforced by the courts. Petitioners

would argue their right to a reference is the paramount concern here. However, what is *controlling* in the end is the fact that the Legislature, in enacting section 638 in the manner that it did, made a conscious choice that a party's interest in having its reference provision enforced is paramount. Again, the law might be changed in the future to allow for other considerations to be made paramount, but that is for the Legislature, not the courts, to address.

I. THE CALIFORNIA LEGISLATURE'S DECISION TO ENACT THE REFERENCE LAW WITH PROVISIONS DIFFERENT FROM THOSE PROVISIONS GOVERNING ARBITRATIONS REFLECTS A PUBLIC POLICY DECISION FAVORING THE ENFORCEMENT OF PARTIES' REFERENCE AGREEMENTS OVER CONSIDERATIONS OF JUDICIAL EFFICENCY AND ECONOMY

Real Parties' Answer Brief and the First District's opinion spend an inordinate amount of time reviewing the legislative history of section 638 simply to support their position that the word "may" in section 638 means that trial courts have "discretion" in determining reference issues under the statute. However, Petitioners do not dispute, nor did *Greenbriar* or *Trend Homes* dispute, that the word "may" means the trial courts have discretion. The issue is not whether courts have discretion, but rather the *scope of that discretion.*

In determining the scope of discretion, both *Greenbriar* and *Trend Homes* reviewed the language in section 638 ultimately adopted by the California Legislature and observed that its provisions were not the same as those in section 1281.2 governing arbitrations. Whereas section 1281.2 expressly permits the trial court to consider such factors as "possibility of conflicting rulings on a common issue of law or fact," or that parties to an

arbitration are also parties to litigation, and whereas section 1281.2 then expressly permits courts to "*refuse to enforce the arbitration agreement*" (section 1281.2(c); emphasis added), the *Greenbriar* and *Trend Homes* courts recognized that section 638 was not drafted in the same manner. Rather, the reference statute was drafted without such language indicating that, with respect to reference provisions, it was not the Legislature's intent to allow trial courts to "refuse to enforce" reference agreements based on considerations of conflicting rulings, different parties, judicial economy, etc.

The opinion below states that Petitioners' reliance on *Greenbriar* and *Trend Homes* is "misplaced," but the First District never really addresses why *Greenbriar* and *Trend Homes* are not controlling. For example, the First District says that *Greenbriar* and *Trend Homes* failed "to fully explore section 638" and "failed to explore the language and objectives of section 638" (179 Cal.App. at 1294), but these statements are simply conclusions without any analysis. In fact, *Greenbriar* and *Trend Homes did* fully consider the language, objective, purpose and policy of section 638. *Greenbriar* and *Trend Homes* fully considered the contention that conflicting rulings, judicial economy, etc., should be permitted as reasonable considerations. However, looking at section 638 in its entirety, both in terms of the manner in which it was drafted as well as the manner in which it was not drafted, *Greenbriar* and *Trend Homes* determined that the Legislature, although it could have, elected not to include such considerations into the reference statute, reflecting an intent to enforce, and not invalidate, parties' reference agreements simply because it may serve other interests of the trial judge. Having fully considered the language,

objective, purpose and policy of section 638, *Greenbriar* and *Trend Homes* determined it would be improper to re-write the reference law enacted by the Legislature by incorporating into the law factors the Legislature expressly elected not to include.

In fact, the First District's opinion may be summarized as having really only two points: (1) that the word "may" in section 638 means the trial courts have discretion, and (2) that the legislative history indicates that the bill's sponsor "argued that 'court congestion' makes reference an 'attractive remedy." (179 Cal.App.4th at 1291.) Petitioners do not dispute the first point. As to the legislative history, the fact that a sponsor of the bill thought that sending cases to judicial reference might have the effect of easing "court congestion" cannot mean that parties' reference agreements may be summarily invalidated whenever a trial court does not see the reference by trial easing court congestion. Again, this is a policy decision, but one which the Legislature resolved and decided when it passed section 638. The Legislature decided not to allow reference agreements to be invalidated simply because it would not help the trial court's workload. Notably, the First District fails to address the fact that "easing court congestion" was not a factor specified in section 638 the way factors were spelled out in section 1281.2.

In fact, it was completely unnecessary, if not improper, for the First District to resort in this case to legislative history given the fact that section 638 was unambiguously inn affording courts discretion and *Greenbriar* and *Trend Homes* both determined the scope of that discretion. The First District nonetheless found that it could "look to legislative history to confirm our plain-meaning construction of statutory language," citing to

Hughes v. Pair (2009) 46 Cal.4th 1035, 1046 ("*Pair*"). (*Tarrant Bell*, supra, 179 Cal.App. at 1290-1291.)[4]

As Petitioners point out in section 3 of their Opening Brief, *Pair* simply cited two other cases for the authority of looking to legislative history to confirm plain meaning construction of statutory language, but, importantly, in those two cases (*Viva!*[5] and *Troppman*[6]) the courts also relied on the established case law supporting or confirming the courts' statutory interpretations in those cases. Here, the First District cited no case law supporting its interpretation of section 638 that the Legislature intended to empower courts with discretion to refuse to enforce reference agreements based on potentially multiplicity of actions, potential conflicts in rulings on common issues of law or fact or other judicial efficiencies. In fact, the case law that existed (*Greenbriar* and *Trend Homes*) categorically held that courts were not vested with such broad discretion.

Real Parties attempt to support the First District's resort to legislative history by citing several cases decided by this Supreme Court in which this Court has purportedly used legislative history to dispel any ambiguity even when the plain meaning of the statute is clear. (Answer Brief, pp. 23-24.) Again, however, in the cases cited by Real Parties this

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4 In *Tarrant Bell*, the First District found the word "may" in section 638 clearly meant that the trial court had discretion. (179 CalApp.4th at 1290.) But recognizing that the word "may" did not address the real question of this appeal – namely the scope of discretion – the First District looked to the legislative history to support its position that the scope of discretion should include unclogging the court system.

5 Viva! Int'l Voice for Animals v. Addidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 943 ("Viva!").

6 *Troppman v. Valverde* (2007) 40 Cal.4th 121, 137 ("*Troppman*").

Court looked to existing case law to *support and confirm* its interpretation of a statute. (See, for example, *Miklosy v. Regents* (2008) 44 Cal.4th 876, 889 – Supreme Court's interpretation of statute is "also the interpretation we have given the statute in our prior decisions"; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543 – Supreme Court relied on prior *Aaronoff* case decided a year earlier to support its interpretation of statute; *Barratt Am. Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 696-700 - Supreme Court interpretation of government code sections supported by multiple citations to prior case law interpreting statutes.)

In the end, the lower courts in this case essentially rewrote the reference statute to now include exceptions to enforcement of a valid pre-litigation reference agreement based on possible "multiplicity of lawsuits," "conflicting rulings on a common issue of law or fact," or other "judicial inefficiencies" that the Legislature did not include in its 1982 amendment of section 638. And the lower courts, in doing so, essentially overruled *Greenbriar* that, interrupting the same section 638 on facts substantially similar as here, held these were not valid grounds for refusing to enforce a valid reference agreement.

Moreover, the Court of Appeal below drew a comparison with discretion vested in trial courts to deny arbitration pursuant to section 1281.2(c) and graphed it onto section 638 to arrive at its conclusion that trial courts are vested with the same discretion, despite acknowledging that the *Greenbriar* court "rightly, rejected" the notion section 1282.1(c) was authority to refuse to enforce a reference agreement. (*Tarrant Bell, supra,* 179 Cal.App.4th at 1294.)

Again, the issue presented is not whether Respondent had the discretion under section 638(a), but whether Respondent abused that discretion as a matter of law. Based on the well-established principles set forth in *Greenbriar* and *Trend Homes*, it is clear that Respondent did in fact abuse its discretion, making the issuance of a preemptory writ appropriate.

II. RESPONDENT'S RULING THAT REAL PARTIES HAD FAILED TO CARRY THEIR BURDEN OF PROOF THAT THE REFERENCE PROVISIONS WERE UNCONSCIONABLE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE SHOULD NOT IN ANY WAY AFFECT THE GRANTING OF THE WRIT

A. The Respondent's ruling on unconscionability is subject to the "Substantial Evidence" standard of review because it was based on Respondent's resolution of conflicts in the evidence and/or factual inferences which may be drawn therefrom

With respect to unconscionability, the Respondent's findings "are reviewed de novo if they are based on declarations that raise 'no meaningful factual disputes.' [Citation.] However, where an unconscionability determination 'is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, [appellate courts] consider the evidence in the light most favorable to the [trial court's] determination and review those aspects of the determination for substantial evidence.' [Citation.]" (*Murphy v. Check 'n Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144; *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal.App.4th 494, 502.)

In this case, the Respondent determined the Real Parties had not met their burden in showing that the arbitration/reference provisions were

unconscionable.[7] (5 PE, Exh. 36, p. 1320.) Respondent's determination was based on its resolution of numerous conflicts in the following evidence and/or on the factual inferences which may be drawn therefrom:

Petitioners submitted in support of their motion the Declaration of its property manager, Patrick F. Mockler. Mr. Mockler stated that: (1) the subject arbitration/reference provisions were voluntary and optional, (2) prospective residents were requested to initial their agreement to arbitrate disputes between the resident and the Park, and (3) certain residents did in fact initial the arbitrations provisions acknowledging their agreement to arbitrate. (1 PE Exh. 2, p. 25, lines 9-13.)

In opposition to the motion to compel arbitration/reference, Real Parties submitted numerous declarations to ***factually dispute*** that the agreements were entered into voluntarily (and thus not voluntary). Real Parties submitted the Declaration of their attorney, Patrick A. Calhoon, in which Mr. Calhoon stated that: (1) the agreements were one-sided as to the type of claims that could be arbitrated, (2) the agreements were procedurally unconscionable because there is "no indication" that the arbitration provisions were negotiable or other rental agreement types were offered, (3) the rental agreements were offered by Petitioners on a "take it or leave it basis," and (4) Real Parties were under "economic duress" to

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7 Real Parties, as the parties opposing arbitration/reference, had the burden of proving the arbitration/reference provisions were unconscionable. (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1099.)

sign the rental agreements because they had already purchased their homes in the park. (4 PE, Exh. 8, p. 1021, line 7, through p. 1022, line 18.)

In a further effort to factually dispute that the arbitration/reference agreements were voluntarily agreed upon, Real Parties also submitted fifty-six (56) declarations signed by Real Parties. In the declarations, each Real Party essentially stated (with some slight variations) that: (1) they were given only one rental agreement to sign, (2) they felt "rushed" to sign the lease agreement, (3) they were told by park managers to "sign here and initial here," (4) no one explained the lease agreement to them, (5) they didn't recall reading and/or signing the arbitration provisions, and that (6) they were under "economic duress" to sign the lease agreements since they had already purchased their home and had to sign the lease to move into the park. (See, for example, Declaration of Reynaldo Abaya, 4 PE, Exh. 9, page 1025, lines 8-19.)

In their reply to the opposition, Petitioners then filed additional declarations of the current park manager, Teresa Rochelle Cruz, and the prior park manager, Richard Brown. In her declaration, Ms. Cruz stated that each prospective resident is provided a "binder of leases" containing several rental agreements with different terms, month-to-month, 5-year, 10-year, etc., to review and determine which best suits the prospective resident's needs. Further, she stated that the prospective resident is provided one to three weeks to review these different leases, the several leases are not presented in the hurried "take it or leave it" basis, nor were they offered only the rental agreement they signed. (5 PE, Exh. 15, p. 1208, line 28 through p. 1209, line 15.)

Ms. Cruz also explained that it is necessary for rental agreements to be in place prior to the close of escrow on any particular mobilehome in the park. In the event that, for reasons under the Mobilehome Residency Law ("MRL"), a prospective resident does not qualify to reside in the park, their application is denied but they are not "stuck" with purchasing the mobilehome. Specifically, the prospective resident would not be required to pay the down payment on the mobilehome. In other words, Real Parties' claims they were under "economic duress" besides being factually devoid inadmissible conclusions, were gross inaccuracies. Indeed, the MRL requires that a lease be in place prior to the close of escrow. (*See* Civ. Code, § 798.75(a).) (5 PE, Exh. 15, p. 1208, line 28 through p. 1209, line 23.)

The declaration of Richard Brown similarly disputed Real Parties' claim that they were rushed through the signing process. Mr. Brown stated that he and his wife Sharon served as the Park managers from 1992 to 2004 and 2006, and that all prospective residents were handled in the same manner.

When a prospective resident applied for tenancy, Mr. Brown would perform credit verification and, after the prospective resident's credit was verified, Mr. Brown provided the prospective resident with a number of different leases.

Once the prospective resident had decided on a lease, ***Mr. Brown or his wife made it a practice to sit down with the resident for at least one hour and go over the terms of the lease, including the arbitration provisions.*** There was never a "rushed" procedure as claimed by Real Parties. (5 PE, Exh. 16, p. 1214, line 8 through p. 1216, line 8.)

After considering all of the conflicting factual statements set forth in all of the supporting and opposing declarations, Respondent ultimately ruled that the "Signatory and Co-habitating Plaintiffs have not shown that the reference provision is unconscionable." (5 PE, Exh. 36, page 1320.) Because Respondent's ruling on unconscionability was based upon its resolution of numerous conflicts in the proffered evidence, or on the numerous factual inferences which may be drawn therefrom, this Court should consider the evidence in the light most favorable to Respondent's determination and review those aspects of the determination for substantial evidence.

B. Real Parties have waived the entire issue of unconscionability by failing to fully and fairly discuss the conflicting evidence submitted by Petitioners below

As a threshold matter, it is well established that a "party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737; *Doe v. Roman Catholic Archbishop of Cashel & Emly*, 2009 Cal.App. Lexis 1452, p. 15. Otherwise, the party has waived the issue. (*Id.*)

For example, in *Doe v. Roman Catholic Archbishop of Cashel & Emly*, *supra*, plaintiff sued defendant, an archdiocese located in Ireland, alleging that he was sexually molested by one of defendant's priests. The trial court quashed service of summons and process on defendant based on lack of personal jurisdiction. Plaintiff appealed, but the Court of Appeal held that plaintiff had waived the issue by failing to fairly and completely set forth, discuss, and analyze the relevant facts. The plaintiff's opening brief set forth only his version of the evidence, omitting any reference to

the conflicting evidence submitted by the defendant. The plaintiff also failed to mention the many evidentiary objections that were sustained to his supporting declarations and documents, as well as the trial court's factual findings in granting the motion to quash.8 (2009 Cal.App. Lexis 1452, p. 15.) Instead, plaintiff simply asserted in his opening brief that the facts were *not* in conflict, calling for the Court's independent review of the issue. (*Id.*)

However, the Court of Appeal in *Doe* noted the plaintiff's arguments on appeal ignored many of the conflicting facts presented by the defendant in seeking to quash service. (2009 Cal.App. Lexis 1452, p. 15-16.) Because plaintiff had referred solely to his one-sided version of the facts, the Court of Appeal found plaintiff had failed in his obligations concerning the discussion and analysis of a substantial evidence issue, such that plaintiff's issue on appeal was deemed waived. (*Id.*)

In the present case, Real Parties have similarly waived the issue of unconscionability (as they did before the Court of Appeal below) by failing to fairly and completely set forth, discuss, and analyze the relevant facts. Just as in *Doe*, Real Parties' Answer Brief sets forth only their version of the evidence, omitting <u>any</u> reference to the conflicting evidence submitted by Petitioners. For instance, Real Parties' Answer Brief cites only to, and even quotes from, their proffered declaration of George H. Kaelin, III, submitted in connection with the underlying motion and issue of unconscionability. (Answer Brief, p. 45.) In addition, the Answer Brief cites to the Real Parties' 56 declarations. (Answer Brief, pp. 35, 37-38.)

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8 As a result, any issues concerning the propriety of the trial court's evidentiary rulings were deemed waived. (2009 Cal.App. Lexis 1452, p. 15, fn. 3.)

Nowhere, however, does the Answer Brief mention, much less discuss, the opposing evidence presented by Petitioners, such as the declarations of Patrick F. Mockler, Teresa Rochelle Cruz or Richard Brown. The Answer Brief does nothing other than present one side of the story.

Moreover, just as in *Doe*, Real Parties fail to mention the many evidentiary objections that were sustained to their evidence. (See Ruling on Objections, 5 PE, Exh. 24, p. 1243.)[9]

Rather than acknowledge and discuss the conflicting evidence and the evidentiary objections that were sustained, Real Parties simply assert -- without any legal analysis whatsoever -- that *de novo* review is appropriate.[10] Just as in *Doe*, Real Parties' arguments in their brief simply ignore many of the conflicting facts presented by Petitioners in their declarations that showed the arbitration/reference provisions were in fact voluntary and not unconscionable.

Because Real Parties have referred solely to their one-sided version of the facts, this Court should find that Real Parties have failed in their obligations concerning the discussion and analysis of a substantial evidence issue, such that Real Parties' arguments concerning unconscionability are

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9 As a result, any issues concerning the propriety of Respondent's evidentiary rulings should be deemed waived. (2009 Cal.App. Lexis 1452, p. 15, fn. 3.)

10 Real Parties' Answer Brief actually omits reference to the standard of review but in its previous briefs claimed that this "Court reviews Respondent's ruling on unconscionability de novo" and cites to *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1250. *Higgins,* however, simply recites the same rule discussed above that when the "question of unconscionability [is] based on declarations that contain no meaningful factual disputes, [the appellate court reviews] the trial court's ruling de novo." (140 Cal.App.4th at 1250.) The point here is that Real Parties offer no legal analysis or argument as to why *de novo* review would be appropriate, given the numerous factual disputes contained in the supporting and opposing declarations.

deemed waived.

C. Even if not waived, Respondent's ruling was supported by substantial evidence

The standard of appellate review both guides and restricts the appellate court in resolving points raised by an appellant and, as such, has been characterized as the "threshold issue" in every appeal. (*Clothesrigger, Inc., v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611; see *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667 – standard of review "prescribes the degree of deference given by the reviewing court to the actions or decisions under review.")

Real Parties' arguments concerning unconscionability, which challenge the sufficiency of the evidence, are guided and restricted by the "substantial evidence" rule. The trial court's resolution of disputed factual issues must be affirmed if supported by "substantial" evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632)

"Substantial" evidence must be of ponderable legal significance. It must be reasonable, credible, and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) The testimony of a single credible witness – even if a party to the action – may constitute "substantial evidence." (*Marriage of Mix* (1975) 14 Cal.3d 604, 614; *City & County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 56.) So long as a witness' testimony is "substantial," appellant is not aided by the fact that other witnesses may have testified to the contrary. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) The "substantial evidence" rule is succinctly stated as follows:

> "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination."

(*Id.* at 873-874; see also *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

So long as there is "substantial evidence," the appellate court must affirm even if the reviewing justices personally would have ruled differently had they presided over the proceedings below, and even if substantial evidence would have supported a different result. Stated another way, when there is substantial evidence in support of the trial court's decision, the reviewing court has no power to substitute its reasoning. (*Bowers*, *supra*, at 874; *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5)

In this case, Real Parties, as the parties opposing arbitration/reference, had the burden of proving the arbitration/reference provisions were unconscionable. (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1099.) Respondent's conclusion that Real Parties failed to meet their burden was supported by substantial evidence.

(1) There was substantial evidence to support Respondent's conclusion that the provisions were not procedurally unconscionable.

Civil Code, section 1670.5, subdivision (a), provides, in pertinent part, that a contract clause found to be unconscionable is unenforceable, unless the court severs the clause or so limits its application as to avoid any unconscionable result. Under this statute, a court may not refuse to enforce a contract clause unless it determines that the clause is both procedurally and substantively unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487, 491; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 87.)

The procedural element focuses on "oppression" or "surprise." (*Id.*) Where the parties to a contract have unequal bargaining power and the contract is not the result of real negotiation or meaningful choice, it is oppressive. (*Id.*) "Surprise" is defined as "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." (*Id.*) The procedural element of an unconscionable contract generally takes the form of a contract of adhesion. (*Little v. Auto Stiegler* (2003) 29 Cal.App.4th 1064, 1071.) An adhesive contact is defined as "'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]" (*Armendariz,* at p. 113.)

Real Parties contend the subject arbitration/reference provisions are procedurally unconscionable because (1) the subject agreements were offered by the park on a "take it or leave it basis," (2) there was unfair "surprise" and "economic duress" because some Real Parties were presented with rental agreements after they had already purchased their mobilehome, and (3) park management routinely failed to instruct park tenants of the nature of the rental agreement and that is contains an arbitration clause and instead rushed tenants through signing the rental agreement telling them to "sign here" or "initial here" without any explanation. (4 PE, Exh. 7, p. 1014, lines 1-13.)

However, Petitioners presented substantial evidence to refute the Real Parties' claims of procedural unconscionability. Petitioners submitted the Declaration of its property manager, Patrick F. Mockler, in which Mr. Mockler stated that: (1) the subject arbitration/reference provisions were voluntary and optional, (2) prospective residents were requested to initial their agreement to arbitrate disputes between the resident and the park, and (3) certain residents did in fact initial the arbitrations provisions acknowledging their agreement to arbitrate. (1 PE Exh. 2, p. 25, lines 9-13.)

In their reply to the opposition, Petitioners then filed additional declarations of the current park manager, Teresa Rochelle Cruz, and the prior park manager, Richard Brown. In her declaration, Ms. Cruz stated that each prospective resident is provided a "binder of leases" containing several rental agreements with different terms, month-to-month, 5-year, 10-year, etc., to review and determine which best suits the prospective resident's needs. Further, she stated that the prospective resident is

provided one to three weeks to review these different leases, the several leases are not presented in the hurried "take it or leave it" basis, nor were they offered only the rental agreement they signed. (5 PE, Exh. 15, p. 1208, line 28 through p. 1209, line 15.)

Ms. Cruz also explained that it is necessary for rental agreements to be in place prior to the close of escrow on any particular mobilehome in the park. In the event that, for reasons under the MRL, a prospective resident does not qualify to reside in the park, their application is denied but they are not "stuck" with purchasing the mobilehome. Specifically, the prospective resident would not be required to pay the down payment on the mobilehome. In other words, Real Parties' claims they were under "economic duress" besides being factually devoid inadmissible conclusions, were gross inaccuracies. Indeed, the MRL requires that a lease be in place prior to the close of escrow. (*See* Civ. Code, § 798.75(a).) (5 PE, Exh. 15, p. 1208, line 28 through p. 1209, line 23.)

The declaration of Richard Brown similarly disputed Real Parties' claim that they were rushed through the signing process. Mr. Brown stated that he and his wife Sharon served as the Park managers from 1992 to 2004 and 2006, that all prospective residents were handled in the same manner. First, when a prospective resident applied for tenancy, Mr. Brown would perform credit verification and, after the prospective resident's credit was verified, Mr. Brown provided the prospective resident with a number of different leases. Once the prospective resident had decided on a lease, ***Mr. Brown or his wife made it a practice to sit down with the resident for at least one hour and go over the terms of the lease, including the***

arbitration provisions. There was never a "rushed" procedure as claimed by Real Parties. (5 PE, Exh. 16, p. 1214, line 8 through p. 1216, line 8.)

Based on Brown's declaration regarding the manner in which the rental agreements were presented and signed, coupled with the corroborating declarations of Mockler and Cruz, there was substantial, if not overwhelming, evidence to refute Real Parties' claims that the agreements were offered on a "take it or leave it basis," or that there was unfair "surprise" or "economic duress," or that management routinely failed to instruct park tenants of the nature of the rental agreement or rushed them through signing the rental agreement.

(2) There was substantial evidence to support Respondent's conclusion that the provisions were not substantively unconscionable.

Substantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if the disputed provision of the contact falls outside the "reasonable expectations" of the nondrafting party or is "unduly oppressive." (*Gutierrez, supra,* 114 Cal.App.4th at p. 88.) Some courts have imposed a higher standard: the terms must be "'so one-sided as to shock the conscience.' [Citation.]" (*American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391.)

(i) The agreements are not "so one-sided as to shock the conscience."

Real Parties first argue the agreements are "one-sided" because they must submit their claims to arbitration, but the owner is not required to submit all of its claims to arbitration. However, Real Parties overlook the

fact (as they did below) that certain disputes are "carved-out" from the arbitration clause by necessity *as to both parties*. The following actions cannot be heard by arbitration: unlawful detainer, forcible detainer, injunctive relief, payment of maintenance fees (this concerns a seven-day notice to comply with the Park's Rules and Regulations), condemnation or change of use of the park, and any equitable rights. (1 PE, Exh. 2, p. 37, para. 38.2.) *These actions cannot be heard by an arbitrator and, therefore, they must be excluded from the arbitration clause as to both parties.*

Plaintiffs' reliance on *Jaramillo v. JH Real Estate Partners, Inc.*, (2003) 111 Cal. App. 4th 394 is misplaced. In *Jaramillo* the plaintiff tenant brought personal injury claims against the defendant landlord. The lease contained an arbitration provision but the court declined to submit the claims to arbitration because it determined the arbitration provision was "unconscionable." (Id at 406.) The court found the arbitration provision was unconscionable because it was not mutual, it was "buried in small print," the demand for arbitration had to be made within 180 days after the claim arose and all fees and costs had to advanced prior to arbitration and no opportunity to decline the provision – by not initialing the provision. (Id.)

Jaramillo can be distinguished as follows: (1) the arbitration provisions are mutual between the parties and the only "carve-outs" are for actions that cannot be heard by an arbitrator; (2) the provisions are in capital letters taking up several pages of the respective agreements; (3) the applicable statute of limitations generally apply to the agreements; (4) fees and costs are to be split between the parties and many of the agreements contain exceptions wherein Real Parties can apply to have the Park pay the

arbitration fees; and each arbitration provision needed to be initialed thereby allowing Real Parties to decline the provision. Thus, it is likely the *Jaramillo* court would have enforced the arbitration/reference clauses at issue here.

O'Hare v. Municipal Resource Consultants, (2003) 107 Cal. App. 4th 267 is similarly inapplicable to the present facts. In *O'Hare*, the appellate court affirmed the trial court's denial of Municipal's motion to compel arbitration. (*O'Hare* at 284.) The *O'Hare* court held that the arbitration clause was non-mutual and Municipal purposefully preserved its right to bring any claims against O'Hare by trial but all of O'Hare's claims needed to be arbitrated. Further, the court held the clause precluding discovery was overly harsh and the cost provision was unconscionable. (Id.) These facts do not apply to the instant matter because the arbitration clause is mutual and the only "carve-outs" are required by law, many of the clauses provide that the Park will pay the arbitration costs if Plaintiffs can show they are financially unable, and, finally, the arbitration provision explicitly provides for traditional discovery procedures. Thus, *O'Hare* is inapplicable.

(ii) Real Parties waived any argument regarding the non-joinder of claims

Real Parties argue, in the alternative, that the supposed "non-joinder" clause in the rental agreements render the agreements substantively unconscionable. However, Real Parties failed to raise this argument in the trial court, such that this Court should deem it waived. (*Gutierrez v. Autowest* (2003) 114 Cal.App.4th 77, 91, ft. 13.)

Even assuming the argument is not waived, the non-joinder clause is simply a red-herring. It is found in only types "A" and "B" of the rental agreements. More critical, the non-joinder clause is contained *only* in a section of the *arbitration* provisions, not in the reference provision. Thus, even if the non-joinder clause was somehow considered unconscionable, it would be immaterial as it would invalidate only a provision in the arbitration section.

In any event, the issue is really moot. Real Parties have already joined their claims together in suing Petitioners in one lawsuit, and Petitioners sought to compel arbitration and/or reference as to only that one lawsuit. Thus, the reference sought here by Petitioners is to compel one reference proceeding, making Real Parties' arguments and concerns about increased costs for multiple proceedings irrelevant.

(iii) Real Parties failed to produce any evidence showing they could not afford a trial by reference when they signed the agreements

Real Parties alternatively argue that the provisions are substantively unconscionable because they are oppressive inasmuch as Real Parties cannot afford the costs of an arbitration and/or trial by reference. However, Real Parties failed to submit any evidence of their income, expenses or savings showing their inability to pay fees at the time they signed the rental agreements. Having failed to submit any evidence, Real Parties failed to sustain their burden to show substantive unconscionability based on a claimed inability to pay for a trial by reference.

Real Parties' argument concerning their claimed inability to pay relies heavily on the recent case of *Parada v. Superior Court*, (2009) 176 Cal.App.4th 1554. However, even the court in *Parada* stated that in resolving the issue of prohibitively high arbitration/reference fees, it would follow the approach taken in *Gutierrez* of considering the amount of arbitration fees and costs *and* the ability of the party resisting arbitration/reference to pay them. (*Prada*, supra, at p. 1582-1583.) In *Gutierrez*, the plaintiffs had presented evidence of their inability to pay, including a declaration setting forth income, expenses, and savings. (*Gutierrez*, supra, 114 Cal,App.4th at p. 90.) Similarly, in *Parada*, the petitioners had submitted evidence of their income, expenses, and savings showing their inability to pay the arbitration fees at the time they signed the agreements in that case. (*Parada*, supra, at p. 1582-1582.) However, by contrast, Real Parties here never submitted any evidence of their inability to pay, such as any declarations setting forth their income, expenses and savings. This fact also, of course, undermines Real Parties' argument that the park was in a "superior bargaining position" since no evidence was ever submitted as to the financial condition of any of the Real Parties.

Parada is also distinguishable from this case with regard to the fees and costs to be charged for the trial by reference and the manner in which those fees and costs are allocated between the parties. In *Parada*, the investment customers signed agreements that required them to arbitrate disputes before a panel of three (3) arbitrators from JAMS. The Court of Appeal in *Parada* noted that the Real Party seeking to enforce the provision offered no justification for requiring arbitration before three (3) arbitrators rather than one. (*Parada*, supra, at p. 1581-1582.) From this, the Court

could infer that the primary, if not only, purpose of the three-arbitrator requirement in the agreements was to discourage claims against the Real Parties. (*Id.*) That is, the Court in *Parada* held that the high costs of a three-panel panel was added to the agreement in bad faith for the improper purpose of discouraging or preventing customers from vindicating their rights. (*Id.*)

By contrast, in the present case, there are no three-panel arbitrator requirements in the subject agreements that would result in fees and costs becoming prohibitively expensive. Rather, the subject provisions call for a rather generic process of arbitration and/or reference. As the *Parada* court itself recognized, "[a]rbitration itself is a fairly common means of dispute resolution and would not be beyond the reasonable expectation of the weaker party." (*Parada*, supra, at p. 1571.)

Moreover, the *Parada* case is distinguishable because there the court was looking at the costs of the three-panel arbitration and "no-consolidation" provision in relation to the amount of the plaintiffs' investment. In *Parada,* five plaintiff investors sued Monex, a precious metals dealer for fraud and other claims arising out of the plaintiffs' investments. (*Parada* at 1560.) The plaintiffs' respective investments were $140,000, $130,000 and $43,000 (four of the plaintiffs were married and had joint investments). (*Id.* at 1562.) The arbitration agreement in *Parada* required a panel of three arbitrators and the arbitration clauses contained "no consolidation" provisions. (*Id.* at 1581-1582.) As a result, the plaintiffs were not only required to bear of the costs of three *separate* arbitrators, they were required to adjudicate their claims before the panels of arbitrators *separately*. In other words, the plaintiffs would pay three

separate arbitrators, per day of arbitration, on an individual basis. The Court of Appeal determined that each plaintiff would have to pay a minimum of $20,800 for a 4-day arbitration. (*Id.* at 1584.) The Court of Appeal held that in comparing the arbitration costs and the amounts the plaintiffs invested, the arbitration fees and costs were "prohibitively high." (*Id.*) The minimum arbitration fees of $20,800 constituted a significant percentage of the plaintiffs' respective investments. For example, one plaintiff who invested $43,000 would have to advance nearly 50% of his investment in arbitration fees and costs. (*Id.*)

Here, the cost-sharing provisions are not similarly cost prohibitive such that Real Parties "waive" their rights to bring a "failure to maintain" action. Using the information of Real Parties' counsel's declaration, an average day of arbitration/reference would be approximately $7000 per day. Those fees would be split between all of the parties, and, therefore, the 100 Real Parties would share the daily arbitration fees of $3,500 per day (or $35 per plaintiff). Even if the arbitration took 30 days – which it would not - each Real Party may spend $1,050 in fees for the entire arbitration. Real Parties, meanwhile, are seeking considerable unspecified damages and punitive damages against Petitioners. It is common for residents to seek multiple millions of dollars in failure to maintain actions. (See *Employer Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 343 – 188 residents of mobilehome park settle "failure to maintain" action for $3 million.) Therefore, unlike *Parada*, the amount of fees that Real Parties would have to advance is in stark contrast to the potential millions of dollars Real Parties seek to recover. Indeed, if Real Parties sought just $1,000,000, their advance costs and fees would represent

less than one percent of their potential recovery. Thus, cost-sharing provisions are not substantively unconscionable. There is no "bad faith" or "improper purpose" in the drafting of the agreements as was present in *Parada*, making that case inapplicable here.

Indeed, a fair reading of the agreements here demonstrates the overriding *good faith* of Petitioners. In some of the subject agreements, fees and costs are to be split between the parties (See for example, 1 PE, Exh. 2, p. 38), but in many of the agreements, if a resident is able to demonstrate he or she is financially incapable of paying, then the costs shall be borne by the park *in order to permit the resident to participate* in the proceedings. (See for example, 1 PE, Exh. 2. p. 276.) Thus, the rental agreements do not contain provisions "built in" to make reference unduly cost prohibitive, but rather contain provisions that allow costs to be shifted in appropriate cases to the park so that the resident can still fully participate in the reference proceeding.

III. EVEN IF A PROVISION IN THE RENTAL AGREEMENTS WERE FOUND TO BE UNCONSCIONABLE, IT MAY BE SEVERED SO THAT THIS WRIT MAY BE GRANTED AND THE CASE CAN PROCEED TO A TRIAL BY REFERNCE

Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. (*Gutierrez*, *supra*, 114 Cal.App.4th at 92.) On the other hand, if the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance and restriction, then such severance or restriction are appropriate. (Id.)

In this case, Real Parties contend the arbitration/reference provisions are unconscionable because they require them to shoulder half the costs. (Answer Brief, p. 43.) However, the main purpose of the arbitration/reference provisions was not to regulate costs, but to provide a mechanism to resolve disputes. Because the cost provision is collateral to that purpose, severance or restriction is available. (See *Gutierrez*, *supra*, 114 Cal,App.4th at p. 92.)

Here, in some of the agreements, fees and costs are to be split between the parties, while many of the agreements contain exceptions wherein Real Parties can apply to have the park pay the arbitration fees. Again, there was no evidence presented below that Real Parties could not afford the fees and costs at the time they agreed to either type of provision. However, in the event this Court finds the splitting of costs provision to be unconscionable, the Court could sever this provision and order that each of the 100 Real Parties be bound by the other provision – i.e., be permitted to apply to have the Park pay the arbitration fees based on the evidence presented as to the party's inability to pay.

CONCLUSION

The central issue to be decided by this Supreme Court is not whether a trial court has discretion under section 638 – since clearly it does – but rather whether a trial court may exercise discretion under section 638 in a manner in which considerations of "multiplicity of lawsuits," possible "inconsistent rulings on common issues of law and fact" and "judicial economy" are allowed priority over a party's right to have his/her contractual provision for reference fully enforced by the courts. Petitioners

would argue their right to a reference is the paramount concern here. However, what is *controlling* in the end is the fact that the Legislature, in enacting section 638 in the manner that it did, made a conscious choice that a party's interest in having its reference provision enforced is paramount. Again, the law may be changed in the future to allow for other considerations to be made paramount, but that is for the Legislature, not the courts, to address.

Finally, as discussed above, Real Parties have waived the issue of unconscionability by failing to fairly and completely set forth, discuss and analyze the relevant facts below. Even if not waived, the Respondent's ruling that Real Parties had failed to carry their burden of proving that the reference provision was procedurally or substantively unconscionable was supported by substantial evidence.

Dated: November 8, 2010 HART, KING & COLDREN

By: _____
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CERTIFICATE OF LENGTH OF REPLY BRIEF

(California Rules of Court, Rule 8.520(c)(1))

The undersigned, counsel for the Defendants and Petitioners, hereby certifies pursuant to Rule 8.520(c)(1), California Rules of Court, that the foregoing reply brief is proportionately spaced, has a 13-point typeface, and contains 7,939 words as computed by the word processing program Microsoft Word XP (Version 2003) used to prepare the petition.

Dated: November 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 November 8, 2010, I served the attached document described as a **Petitioners' Joint Reply 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 November 8, 2010, at Santa Ana, California.

Michele D. Mesaros