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IN REPLY REFER TO:

July 19, 2011

**Original Via Overnight Mail**

California Supreme Court  
350 McAllister Street  
San Francisco, California 94102-4797

**RE: AMICUS LETTER IN SUPPORT OF REAL PARTY IN INTEREST,  
MHC OPERATING LIMITED PARTNERSHIP**

**SUPREME COURT CASE NO. S194078  
REQUEST FOR HEARING  
DAMON L. ANDRADE, et al., Petitioners**

**vs.**

**SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent  
MHC OPERATING LIMITED PARTNERSHIP, Real Party in Interest**

**[Review After a Decision by the Court of Appeal, Sixth Appellate District,  
Santa Clara County Case No. 1409 CV 140751]**

To: Honorable Chief Justice and Associate Justices of the California Supreme Court:

This office represents the Western Manufactured Housing Communities Association (“WMA”). WMA joins petitioner in requesting that the Court grant the Petition for Review in this case or remand in light of *AT&T Mobility LLC v. Concepcion*<sup>1</sup> (“AT&T”).

WMA respectfully contends that the Court incorrectly ruled that the voluntary arbitration provisions within a standard mobilehome park rental agreement were unconscionable and hence unenforceable. The opinion was issued on May 10, 2011, contemporaneously with the United State Supreme Court pronouncement in *AT&T* on April 27, 2011. Accordingly, the Court of Appeal did not consider the impact of this ground-breaking precedent.

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<sup>1</sup> 131 S.Ct. 1740, 179 L.Ed.2d 742, 79 USLW 4279, 161 Lab.Cas. P 10,368, 11 Cal. Daily Op. Serv. 4842, 2011 Daily Journal D.A.R. 5846, 52 Communications Reg. (P&F) 1179, 22 Fla. L. Weekly Fed. S 957.

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Essentially, the Court of Appeal erred in the following ways:

1. *AT&T* holds that any state law conflicting with the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (“FAA”) is preempted. *AT&T* overturned the underlying precedents for invalidating arbitration clauses under California law and has cast much of the state of California’s jurisprudential development of arbitration clause scrutiny into doubt and uncertainty. Specifically, *e.g.*, the *Discover Bank* rule<sup>2</sup> was overturned. *AT&T* further referred to *Armendariz v. Foundation Health Pyschcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745 (2000), in condemning State bars and impediments to FAA policy. This was not considered by the Court in the instant case.<sup>3</sup>
2. In this instance, the Court further erroneously held that the voluntary arbitration provisions of the lease agreement were “mandatory,” despite its acknowledgment that the arbitration provisions were conspicuously drafted and apparent within the lease agreement, typed in all capital letters, with a prominent descriptive caption, and required the tenants to separately initial those provisions in order to render it enforceable. The Mobilehome Residency Law (*Civil Code* §§798, *et seq.*, see *Civil Code* §798.25.5<sup>4</sup>) outright abolishes mandatory clauses, and thereby virtually eliminates procedural unconscionability by statute. On substantive grounds, the Court essentially eliminates arbitration agreements from leasing documents altogether. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008).” *AT&T*, 131 S.Ct. 1740, 1747.
3. The opinion seeks to micro-manage the content and depth of technical detail of alternate dispute resolution clauses, calling for mobilehome park owners to, *inter alia*, include specification of arbitration cost. This imponderable burden is not applicable under general contract law and therefore barred by the FAA. Moreover, the arbiter can interpret and decide such issues; the courts may sever such a clause if deemed so unfair no right thinking individual would enter such an agreement.

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<sup>2</sup> *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005)

<sup>3</sup> *AT&T*, *supra*, 131 S.Ct. 1740, 1753, held that because “it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ [citation], California’s *Discover Bank* rule is preempted by the FAA.”

<sup>4</sup> *Civil Code* §798.25.5 (“Any rule or regulation of a mobilehome park that (a) is unilaterally adopted by the management, (b) is implemented *without the consent of the homeowners*, and (c) by its terms purports to deny homeowners their right to a trial by jury or which would mandate binding arbitration of any dispute between the management and homeowners shall be void and unenforceable”)(emphasis supplied).

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Further, the Legislature has remained silent on requirements other than express bilateral consent, rendering it improper to legislate further impingements on freedom of choice by judicial *fiat*. Since clauses are bilateral, the park owner must offer a fair agreement; bilateral consent is a strong *indicia* of fairness.

4. The Court incorrectly ruled that arbitration clauses could not be enforced unless certain types of claims were included. *AT&T* overturned the California determination that class action exclusions from arbitration were impermissible. Requiring certain claims to be included is an impediment to federal policy of favoring arbitration for the claims that are included. Requiring arbitration of a defined excluded claim deters and would eliminate arbitration clauses altogether for mobilehome park owners. For example, unlawful detainer proceedings are a streamlined, summary procedure for claiming possession of one's property. Indeed, such actions are entitled to trial preference. And too, injunctive relief actions are often excluded from arbitration where need for relief is immediate. Where speed of a proceeding is its *forte*, arbitration is obviously antithetical. Excluding such issues is of no moment to the analysis of general law and does not render a clause so one-sided as to entirely annul it. And such concerns have no place in the FAA scheme to promote enforcement of arbitration over those disputes which the parties have agreed to arbitrate.

In sum, the opinion below has created a *de facto* prohibition of arbitration agreements in rental agreements between mobilehome park owners and tenants, which is preempted by the FAA as held in *AT&T*. This precedent discourages arbitration, chills the rights of park owners to include arbitration clauses in residency documents, and ultimately ignores the import of the FAA in analysis of the arbitration remedy.

### THE WMA

If the Petition for Review is granted, WMA will seek standing as *amicus curiae* in support of MHC Operating Limited Partnership.

WMA is non-profit organization created in 1945 to preserve and to promote the interests of manufactured housing community owners, operators and developers. WMA is a statewide trade association representing the owners manufactured housing communities located in all 58 counties of California.

WMA represents a coalition of representation for the entire manufactured housing industry in California. WMA represents the owners of approximately 1,608 manufactured housing communities, which contain about 160,000 homes. In California, there are 4,846 mobilehome communities, with 372,093 homes.<sup>5</sup> These communities provide Californians the opportunity to own their home at low cost compared to traditional foundation-constructed housing, and the flexibility to move their homes around the state.

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<sup>5</sup> California Housing and Community Development, March 2004.

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Manufactured housing, or "mobile homes," fill an important position in the range of housing options available to California. WMA stands behind the official policy of the State of California which is to advance the interests in manufactured housing as arguably the most viable source of future affordable housing.<sup>6</sup>

WMA hopes to assist the Court by revealing important aspects of manufactured housing sometimes lost in the din of a dispute labeled 'landlord-tenant.' A manufactured housing tenancy is hardly that.<sup>7</sup> Mobilehome residents are vested with rights essentially equivalent to defeasible fee title to a mobilehome site.<sup>8</sup> Mobilehome owners are not tenants

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<sup>6</sup> *E.g., Health and Safety Code* § 50007.5 (this section declares that manufactured housing can provide a source of decent, safe, and affordable shelter for persons and families of low and moderate income. The Legislature intends to encourage the increased affordability and availability of manufactured housing for persons and families of low and moderate income); *Government Code* §65580 (subd. (a) declares, "[T]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order"); *Government Code* § 65008(h) declares that "discriminatory practices which inhibit the development of housing for persons and families of low, moderate, and middle income, or emergency shelters for the homeless, are a matter of statewide concern." Section (a) prohibits any action by a local government agency if it denies residence, landownership, tenancy, or any other land use because a residential development is intended for occupancy by persons or families of low, moderate or middle income. Local government agencies are also prohibited from imposing different requirements on residential developments for persons or families of low, moderate or middle income than those imposed on developments generally. The term "residential development" includes manufactured homes); *Government Code* § 65583 (housing must be provided for all economic segments of the population. The housing authority, called the "housing element" shall "identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes." Under subsection (c)(1) the statute provides that adequate sites will be made available through "appropriate zoning and development standards . . . to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing, factory-built housing, mobilehomes"); *Health and Safety Code* §18551(a)(4) provides that once a manufactured or mobile home is installed on a permanent foundation, on property which is owned (or in some cases leased) by the homeowner, the home is a fixture to the real property.

<sup>7</sup> *Adamson Companies v. City of Malibu*, 854 F.Supp. 1476, 1481 (C.D.Cal. 1994) (" . . . if the tenant decides to live elsewhere, he does not move the coach, but rather sells it "in place." The buyer, then, becomes the new tenant. The California Mobile Home Residency Law, not challenged here, forbids the termination of a mobile home tenancy without cause, as well as the assessment of transfer fees, and requires that the park owner accept any buyer of the coach as a tenant so long as the purchaser has the ability to pay the rent. Cal.Civ.Code § 798 *et seq.* As a consequence of the tenant's guaranteed occupancy and his freedom to sell without penalty, any economic power the park owner might potentially have over the tenant is significantly lessened.")

<sup>8</sup> *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans*, 26 Cal.App.4th 1139, 1146, 32 Cal.Rptr.2d 464, 468 (1994) (" . . . the MRL, in order to protect the mobilehome owner, prohibits

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subject to “at will” termination of tenancy for any or no reason.<sup>9</sup> Indeed, the homes may be sold on site<sup>10</sup> for significant premiums, replaced with new homes, sold at profit, and inherited and passed between generations. *Civil Code* § 798.78.<sup>11</sup> No mobilehome tenancy may be terminated, ever, except for expressly specified reasons defined by statute. *Civil Code* §798.55(b).<sup>12</sup>

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the park management from evicting a homeowner or refusing to renew a lease except for specified reasons. Thus the MRL gives the homeowner a potential qualified life estate in the park. . . .”). See, *Civil Code* §798.55(a): “The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.”

<sup>9</sup> *Civil Code* §798.55 (“(a) The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction. . . .”). And see *Schmidt v. Superior Court*, 48 Cal.3d 370, 256 Cal. Rptr. 750 (1989) at 377 (“Beginning in the late 1960’s, the Legislature undertook significant statutory regulation of both mobilehomes and mobilehome parks, addressing a number of concerns that arose out of the unique features of the mobilehome park phenomenon. (See, e.g., Stats. 1967, ch. 1056, § 2, p. 2664; Stats. 1973, ch. 785, § 1, p. 1404; Stats. 1977, ch. 845, § 1, p. 2538.) In 1975, the Legislature amended former section 789.10 to protect the interests of mobilehome owners by placing limitations on a mobilehome park owner’s discretion to disapprove the continued leasing of spaces in the mobilehome park to purchasers of mobilehomes located in the park. (Stats. 1975, ch. 146, § 3, pp. 280-281”).

<sup>10</sup> *Civil Code* §798.73 (“Management shall not require the removal of a mobilehome from the community in the event of the sale of the home to a third party . . .”).

<sup>11</sup> *Civil Code* §798.78 (“(a) An heir, joint tenant, or personal representative of the estate who gains ownership of a mobilehome in the mobilehome park through the death of the owner of the mobilehome who was a homeowner at the time of his or her death shall have the right to sell the mobilehome to a third party in accordance with the provisions of this article . . . .”(c) Prior to the sale of a mobilehome by an heir, joint tenant, or personal representative of the estate, that individual may replace the existing mobilehome with another mobilehome, either new or used, or repair the existing mobilehome so that the mobilehome to be sold complies with health and safety standards provided in Sections 18550, 18552, and 18605 of the *Health and Safety Code*, and the regulations established thereunder. . . .”(d) In the event the heir, joint tenant, or personal representative of the estate desires to establish a tenancy in the park, that individual shall comply with those provisions of this article which identify the requirements for a prospective purchaser of a mobilehome that remains in the park.”

<sup>12</sup> *Civil Code* §798.55 (b) (1): (“The management may not terminate or refuse to renew a tenancy, except for a reason specified in this article and upon the giving of written notice to the

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The task of terminating a mobilehome tenancy can be very burdensome based on the special protections afforded to mobilehome homeowners under the Mobilehome Residency Law. *Civil Code* §798.55(a).<sup>13</sup> Park owner members of the WMA commonly include various voluntary alternatives for dispute resolution including arbitration and reference (*Civil Code* §§638, *et seq.*). And based on the *bilateral consent requisite* for arbitration clauses in mobilehome rental agreements, there is no party with superior bargaining power respecting those rights and duties. The mobilehome owner, and prospective homeowner, are under no obligation to accept it. *Civil Code* §798.25.5.<sup>14</sup> Hence, arbitration clauses must be fair enough to be accepted by both sides, and often are, whether due to the consideration supported by rights and duties of tenancy as a whole or other legitimate reasons.

The Court has, by this decision if it stands, created yet another obstacle for park owners to provide voluntary options to explore with residents, and essentially deprives them both of the freedom to agree on terms, totally voluntary, which serve the interests of preserving affordability of the housing.

Under the Mobilehome Residency Law and specifically *Civil Code* §798.25.5, each resident has the option of accepting or rejecting such clauses. State law also, as well, prohibits waivers of tenant rights in arbitration clauses. *Civil Code* §798.19 (prohibiting waivers of rights in a rental document and not cited by the Court) therefore does not apply to the waiver of rights in an arbitration clause; nor does *Civil Code* §798.77 (prohibiting waivers of rights in a rental or sale agreement). The law already prohibits waivers of *any* tenancy rights. State law imposes at least two specific restrictions on content and procedure for mobilehome arbitration clauses. If any further restriction were deemed properly imposed, the legislature would certainly take that action.

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homeowner, . . . to sell or remove, at the homeowner's election, . . . ”); *Civil Code* §798.56 (“(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation . . . within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency. ¶(b) Conduct by the homeowner or resident, upon the park premises, that constitutes a substantial annoyance . . . ¶(c)(1) Conviction of the homeowner or resident for prostitution, for a violation of subdivision (d) of Section 243, paragraph (2) of subdivision (a), or subdivision (b), of Section 245, Section 288, or Section 451, of the Penal Code, or a felony controlled substance offense, . . . ¶(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation . . . ¶(e)(1) Nonpayment of rent, . . . ¶(f) Condemnation of the park. . . . (g) Change of use of the park . . . ” Even when tenancy is terminated, the defaulting resident has the right to sell the mobilehome in the park.

<sup>13</sup> “(a) The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.”

<sup>14</sup> Note 4, *ante*.

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WMA favors arbitration in mobilehome rental documents for the very same reasons which underlie the purposes of the Federal Arbitration Act and California law.<sup>15</sup> Since the State legislature has considered and provided the express and specific rights for the protections of mobilehome residents, allowing for arbitration *solely when a resident expressly assents*, extant specific protections now equalize the rights of the parties in respect to arbitration agreements. Under general rules of law, there is no superior bargaining power where the terms are optional.

WMA is concerned that the Court has gone farther than the State legislature ever intended and essentially eliminated, by *fiat*, arbitration clauses from the manufactured housing industry, contrary to legislative intent, and moreover, in an affront to the FAA.

WMA believes that it can contribute to an understanding of the evolving growth of rights and protections for mobilehome owners which has resulted by both state and local legislation over the course of the past 40 years. Such significant restrictions and regulations have developed through the years that reasonable hopes for new mobilehome park housing opportunity have been virtually eliminated.

The context of mobilehome tenancy also deals extensively with tenant-v-tenant disputes. Disgruntled residents very frequently resort to the park management to problem-solve, complain, protest and demand action targeted at other residents. Arbitration is a useful tool to assist in resolving such "tenant-v-tenant" disputes and management's responsibilities in protecting the peace and quiet. See, *e.g.*, *Andrews v. Mobile Aire Estates*, 125 Cal.App.4th 578, 22 Cal.Rptr.3d 832 (2005) (a classic tenant-v-tenant dispute)<sup>16</sup>. Such disputes can be

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<sup>15</sup> *E.g.*, *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1319-1320, 231 Cal.Rptr. 315, 320 (1986) ("[A]rbitration is generally considered to be a mutually advantageous process, providing for resolution of disputes in a presumptively less costly, more expeditious, and more private manner by an impartial person or persons typically selected by the parties themselves. (Citation omitted)" "There is a strong public policy in favor of arbitration agreements and the law is designed to encourage persons 'who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' (Citation omitted) Arbitration provides a means of giving effect to the intention of the parties [and] easing court congestion...." (Citation omitted).

<sup>16</sup> *Id.*, at 836: "The relationship between the Andrewses and Molyneux was far from neighborly. Overall, between February 2000 through August 2002, approximately 50 calls were placed to the Covina Police Department by either the Andrewses or Molyneux. ¶On January 15, 2001, Tovar, an onsite manager at the park, received several "resident objection forms" from the Andrewses regarding Molyneux concerning incidents that occurred in September, October and November 2000, and on January 3, 2001. In these objection forms, the Andrewses complained: Molyneux repeatedly had splashed mud on their newly washed cars; had aimed a video camera into their living room; had subjected them to a racial epithet as well as other verbal abuse; and in the most recent incident, on January 3, 2001, Molyneux had driven down the middle of the street, forcing Joel Andrews to swerve and nearly run his vehicle into space K-6."

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expeditiously and less expensively resolved with fair arbitration clauses. The Court's opinion, here, will discourage and in many cases eliminate the pursuit to achieve such alternate means by which to resolve disputes.

WMA seeks to therefore assist the Court in providing an understanding of the rights and duties as between park operators and residents in the interest of promoting flexibility for parties across the state in their individual decisions to offer and accept ways to deal with disputes aside from the expense, erosion of good will, and cost engendered by court litigation.

### **THE ARBITRATION PROVISIONS WERE VOLUNTARY AND OPTIONAL**

Under *Civil Code* §1670.5, a court may not refuse to enforce a contract clause unless it determines that the clause is both *procedurally* and *substantively* unconscionable. Here, the Court of Appeal invoked the doctrine of unconscionability to render the arbitration provisions in the mobilehome park leases invalid, applying standards that create a *de facto* prohibition of arbitration clauses in mobilehome park lease agreements. This evaluation was without consideration of *AT&T*.

Too, the Court re-weighed the evidence instead of applying the substantial evidence rule, and misunderstood the Mobilehome Residency Law. The Court of Appeal determined that the mobilehome park lease agreements were contracts of adhesion. Certainly the agreements were preprinted standard lease forms drafted by the park. This adds nothing to the analysis in this day and age in light of *AT&T*.<sup>17</sup> Consumers regularly sign documents that are presented on a "take it or leave it" basis without opportunity for individual bargaining, from credit cards and insurance policies to sales slips and parking lot receipts.

Despite the freedom of voluntary choice preserved by *Civil Code* §798.25.5, the Court suggests a compulsion which is generated by reason of a posited prospective homeowner's antecedent purchase of a mobilehome, prior to applying for a mobilehome tenancy.<sup>18</sup> However, a mobilehome *cannot be purchased* until it is determined whether the purchaser qualifies for tenancy. *Civil Code* §798.74 sets forth the procedure for qualification and screening. Management has fifteen days to process and approve or decline a prospect. *Id.* *Civil Code* §798.75 states that the sale cannot proceed unless there is an agreement

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<sup>17</sup> "The rule is limited to adhesion contracts, *Discover Bank*, 36 Cal.4th, at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110, but the times in which consumer contracts were anything other than adhesive are long past." *AT&T* at 131 S.Ct. 1740, 1750.

<sup>18</sup> "Additionally, defendant's admitted custom and practice was to require a prospective tenant to sign a written rental agreement before moving into the park." 2011 WL 1782031, at 6.

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establishing tenancy.<sup>19</sup> Establishment of tenancy further requires two different forms of statutory disclosures. *Civil Code* §§798.74.4, 798.75.5. Purchase of a home is therefore contingent on approval for tenancy and agreement to terms for mobilehome tenancy. *The Court has the cart before the horse in this case.* A mobilehome sale cannot occur until such time as a mobilehome tenancy has been offered and agreed on. If there is pressure to close a sale, it is not from the park management, but from a demanding dealer or broker.

The Court of Appeal incorrectly concluded that the tenants had to accept the arbitration provisions of the lease agreement in order to rent a space in the park. On the contrary, the arbitration provisions were voluntary and optional as evidenced by the declaration of the park manager and the language of the document on its face. And specifically, tenants were not subject to arbitration unless they separately, voluntarily, initialed the arbitration clause. It is submitted that requiring an initialing of the clause is the farthest extent a state court may go in delimiting arbitration rights under *AT&T*.<sup>20</sup>

The substantial evidence rule applies in a conflict of evidentiary showing; this Court respectfully but erroneously re-weighed the evidence. In other words, if the prospective tenant declined an arbitration clause, the rental agreement would take effect, nonetheless, but absent agreement to that alternative. Tenants are not denied tenancy if they reject arbitration. Nor does the arbitration provision limit the liability of the park; rather, it substitutes one forum for another. To the extent of change in the contours of rights and liabilities provided, the arbiter is in the best position to take evidence and reach equitable results. Indeed, it is the parties' intent and agreement that the arbiter do so.

Moreover, as the Court acknowledged, the arbitration provisions were not inconspicuous, or couched in fine print, or hidden on the reverse side of the document. Rather, they were clearly and unambiguously set forth, in all capital letters, with a prominent descriptive caption, and a separate signature line. The tenants were given a simple and clear choice. Their initials on the provisions support an implied finding that the provisions are not hidden. *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 729. Having been expressly agreed to, as evidenced by a tenant's initials, the general rule of contract law is that the tenants are assumed to have read the clause. There is a presumption, in general law, that one who signs a contract has read it. This rule is required by the FAA.

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<sup>19</sup> "An escrow, sale, or transfer agreement involving a mobilehome located in a park at the time of the sale, where the mobilehome is to remain in the park, shall contain a copy of either a fully executed rental agreement or a statement signed by the park's management and the prospective homeowner that the parties have agreed to the terms and conditions of a rental agreement. . . ."

<sup>20</sup> *AT&T*, at 131 S.Ct. 1750, n.6 ("Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.")

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A cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement. (See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109, 63 Cal.Rptr.2d 261 (Powers); *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1318, 231 Cal.Rptr. 315.) "To make out a claim of fraud in the execution," parties seeking to avoid arbitration "must show their apparent assent to the contracts—their signatures on the client agreements—is negated by fraud so fundamental that they were deceived as to the basic character of the documents they signed and had no reasonable opportunity to learn the truth." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 425, 58 Cal.Rptr.2d 875, 926 P.2d 1061 . . .) Accordingly, "[a] necessary element of the defense of fraud in the execution is reasonable reliance," and "[g]enerally, it is not reasonable to fail to read a contract; this is true even if the plaintiff relied on the defendant's assertion that it was not necessary to read the contract." (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 958, 959, 85 Cal.Rptr.3d 817 (Brown).)

*Desert Outdoor Advertising v. Superior Court*, 196 Cal.App.4th 866, — Cal.Rptr.3d —, 2011 WL 2496664 (2011), 4.

See, 1 Witkin, Summary 10th (2005) Contracts, § 118, p. 157 ("Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to consent to all its terms, and cannot escape liability on the ground that he or she has not read it. If the person cannot read, he or she should have it read or explained. (*Greve v. Taft Realty Co.* (1929) 101 C.A. 343, 351, 281 P. 641; *Security First Nat. Trust & Savings Bank v. Loftus* (1933) 129 C.A. 650, 654, 19 P.2d 297; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 C.A.4th 158, 163, 21 C.R.2d 245, quoting the text; see 7 Corbin (Rev. ed.), §28.38; 1 Williston 4th, §4:16; 17A Am.Jur.2d (2004 ed.), Contracts §210.)). See, also, *Constantian v. Mercedes-Benz Co.* (1936) 5 Cal.2d 631, 634 [55 P.2d 841]; *Taussig v. Bode & Haslett*, 134 Cal. 260, 266 [66 P.2d 259]; *Larrus v. First National Bank* (1954) 122 Cal. App.2d 884, 889-890 [266 P.2d 143]; *Hunter v. Sparling* (1948) 87 Cal. App.2d 711, 724-725 [197 P.2d 807]; *Cunningham v. International Committee of Y.M.C.A.* (1921) 51 Cal. App. 487, 490-491 [197 P. 140]"

Moreover, the uncontradicted evidence was that the park manager spent between one and one-half and two hours reviewing the mobilehome park leases with the tenants before they signed the agreement. And without surprise (procedural unconscionability), the sole claim asserted can only be in essence, that no man "in his right mind" would sign such an agreement. *Armendariz v. Foundation Health Pyschcare Services, Inc.*, 24 Cal.4th 83, 118, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000), recognizes that "parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope." But the Mobilehome Residency Law prevents any waiver of the rights to action (*Civil Code* §798.19) provided therein, while guaranteeing the right to arbitrate. Given the many advantages of arbitration, the contract to arbitrate, read in context with rights and duties of the contract as a whole, cannot be rejected on such thin analysis. That some claims are in or out; or cost is not

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specified, *etc.*, does not suffice for a finding of substantive unconscionability under *AT&T* analysis of the FAA.<sup>21</sup>

**REQUIRING THE PARTIES TO SPLIT ARBITRATION FEES AND COSTS  
DOES NOT RENDER THE ARBITRATION PROVISIONS UNCONSCIONABLE**

The Court of Appeal ruled that the arbitration provisions were unconscionable because they were beyond the tenants' reasonable expectations, specifically regarding the "arbitral costs." The agreement requires the parties to "split" the arbitration fees, which requirement is supported under *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.3d 950, 961-962.

The Court of Appeal said it was appropriate to consider "the amount of arbitration fees and costs and the ability of the party resisting arbitration to pay them." The Court ignored the lower court's ruling and made a fresh judgment on a cold record, after a hearing on the motion to compel arbitration. Plaintiffs' showing was conclusory and vague--the plaintiffs' proffered bare and unsupported statements in their declarations that they could not afford arbitration. Such are self-serving and without foundation of any kind. For a finding that arbitral costs were unconscionable requires detailed financial evidence. (See, *e.g.*, *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77) [evidence included "a declaration setting forth plaintiffs' income, expenses and savings"].

The claim of excessive cost, which is, however, within the ability of both parties to fathom in determining whether to voluntarily agree to arbitration, has not considered all the benefits and cost savings of arbitration. Smaller matters may not require counsel; the informality and convenience of the arbitration forum may be more desired than the local courthouse; and the additional cost as per existing statute (to be split or as determined by the arbiter) is an extant safeguard against unfairness. In any case, *AT&T* holds that even smaller claims are within the scope of the FAA's intention to promote arbitration. Cost alone is no determinant. *E.g.*, *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F.Supp.2d 952, 965-966 (N.D.Cal.2010), where the court dismissed a claim of unconscionability as to a loan for \$987,000 that ballooned to \$2,401,502.08:

Plaintiff also maintains that "Defendants intended to deceive [him] into believing that the 1% interest rate would be fixed for the life of the loan so they could close the deal and run off with his money." . . . Plaintiff states that "because of the negative amortization, what started as a \$987,000.00 loan would turn into \$2,401,502.08 after all principal and interest payments are made," and argues that "[n]o person in their right mind would ever agree to such a contract." *Id.* at 11:20-22. Given this allegation, Plaintiff contends that

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<sup>21</sup> Without the procedural element of unconscionability, the mere allegation that price exceeds cost or fair value is not sufficient to establish substantive unconscionability. *Perdue v. Crocker National Bank*, 38 Cal.3d 913, 926 (1985).

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reformation is proper because the loan agreement was unconscionable at the time it was made.

The court held that the debtor had the chance to read the contract, and signed it. In the instant case, the lease could go forward with or without the agreement to arbitrate; that option was not even available to Mr. Rosenfeld.<sup>22</sup>

In the instant case, the Court held that the “surprise” element could be inferred because neither the governing arbitration rules nor the arbitration fee schedule were attached. The Court has improperly added a dimension to arbitration contracts that would not be required, generally, for requisite mutual assent to a written contract. Nor would such requirement be a proper defense under general contract law absent statute. Now, in addition to setting forth the arbitration provisions clearly, unambiguously and separately in writing for consideration and signature by the parties, the park owner must also attach a schedule of the arbitration fees that may be imposed? And a copy of the governing rules of the arbitration? The legislature requires mutual assent, but never went so far.

Given the reality that the lease agreement signed by the tenants at the commencement of tenancy generally remains in effect for its duration, and may well exceed even the lives of the contracting parties, the burden on park owners to monitor fee schedules and provide a guess at costs of actual arbitration is imponderable. What type of dispute? How many parties involved? Discovery costs? The cost of defense or prosecution cannot be factually represented because it represents sheer speculation, *per se*. The risk of providing inaccurate information poses such great risk (giving rise to new defenses such as claims of misrepresentation, changed conditions, concealment, mistake) that, moreover, park owners will simply dispense with arbitration remedies. In fact, each dispute carries its own set of facts and likely costs. Generalizing cannot but result in an inaccurate representation of costs.

### **THERE WAS REASONABLE JUSTIFICATION FOR EXEMPTING CERTAIN ACTIONS FROM THE REQUIREMENT TO ARBITRATE**

The Court of Appeal further found the arbitration provisions to be substantively unconscionable, relying on the holding in *Abramson v. Juniper Networks, Inc.*, 115

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<sup>22</sup> “In this case, Plaintiff has set forth no facts to demonstrate that Defendants engaged in any act of oppression, surprise, or overly-harsh conduct in connection with the originating of the subject loans. Plaintiff argues that “Defendants intended to deceive [him] into believing that the 1% interest rate would be fixed for the life of the loan so they could close the deal and run off with his money.” . . . However, as detailed above, the Adjustable Rate Rider attached to the DOT, which Plaintiff executed, clearly explains the terms of repayment. And Plaintiff has a duty to read the terms of a contract before signing. (Citation omitted). Accordingly, given the clear terms of the subject loan, the Court finds that Plaintiff has failed to state a claim for reformation under the California Civil Code, and he can not allege any facts to show otherwise. Thus, the Court GRANTS Defendants’ motion to dismiss . . . ” *Id.*, 732 F.Supp.2d 952, 966.

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Cal.App.4th 638, 662 (2004), that the paramount consideration in assessing substantive unconscionability is mutuality.

The “lack of mutuality” found by the Court was based upon the “exemptions” from arbitration for unlawful detainer and eviction actions. The Court incorrectly ruled that the exemptions unilaterally favored defendants, and that they were without reasonable justification.

In *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745 (2000), the Supreme Court clarified that not all lack of mutuality in an adhesive arbitration agreement is invalid. Rather, quoting from *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1534, 60 Cal.Rptr.2d 138 (1997), the Court explained that “a contract can provide a ‘margin of safety’ that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable.” Thus, if the stronger party has a justification “grounded in something other than the [stronger party’s] desire to maximize its advantage based on the perceived superiority of the judicial forum,” then the arbitration agreement would not be unconscionable. *Armendariz, supra*, 24 Cal.4th 83 at 120. Conversely, a one-sided arbitration agreement that imposes arbitration on the weaker party while providing a choice of forums for the stronger party is unfair and unconscionable “without at least some reasonable justification for such one-sidedness based on ‘business realities.’” (*Id.* at 117, 99 Cal.Rptr.2d 745, 6 P.3d 669.) However, unless the “business realities” that create the special need for such an advantage are explained in the contract itself, they must be factually established. (*Ibid.*)

In this case, the exemptions for unlawful and forcible detainer (eviction actions) are at the very least “reasonably” justified given the summary nature of unlawful detainer proceedings under the Unlawful Detainer Act (*Code of Civil Procedure* §§1159, *et seq.*). The procedure is a speedy means of repossessing real property, faster and more efficient than arbitration proceedings. Trial preference is given as well. An unlawful detainer action is a summary proceeding, the primary purpose of which is to obtain the possession of real property in the cases specified by statute. *Union Oil Co. of Cal. v. Chandler*, 4 Cal. App.3d 716, 721, 84 Cal. Rptr. 756 (1970).

Moreover, the “mutuality” standard is not a general principle of contract law. In fact, the mutuality test has been repeatedly rejected by California courts outside the context of arbitration. See, *e.g.*, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 672 n.14 (1988).

To impose special rules for arbitration provisions that do not apply to general contract law is prohibited under recent holding in *AT&T*. A review is warranted to address the preemptive effect of the FAA on state law unconscionability claims.

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**AT&T MOBILITY HAS RESULTED IN SEVERAL REMANDS  
FOR RECONSIDERATION OF ITS IMPACT;  
REMAND FOR THE MANY-FACETED ISSUES DECIDED IS APPROPRIATE.**

*AT&T* has dramatically changed the landscape of arbitration law in California and this Court did not consider it.

Forcing a party to arbitrate individually, a claim for \$35.00 to safeguard federal policy would never have been sustained in a California court. Despite the cost of arbitration, such a claim is suited to arbitration to foster FAA policy.

*AT&T* has resulted in summary reversal and remands of several cases for reconsideration. *Affiliated Computer Services v. Fensterstock*, — S.Ct. —, 2011 WL 338870, 1 (U.S. 2011), 79 USLW 3457, 79 USLW 3694, 79 USLW 3696 (“The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. — (2011).”); *Sonic Automotive, Inc. v. Watts*, — S.Ct. —, 2011 WL 1631040, 79 USLW 3129, 79 USLW 3622, 79 USLW 3627 (2011)(“On petition for writ of certiorari to the Supreme Court of South Carolina. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of South Carolina for further consideration in light of *AT & T Mobility LLC v. Concepcion*, 563 U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)”); *Cellco Partnership v. Litman*, — S.Ct. —, 2011 WL 1631041, 79 USLW 3210, 79 USLW 3622, 79 USLW 3627(“On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *AT & T Mobility LLC v. Concepcion*, 563 U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).”); *Missouri Title Loans, Inc. v. Brewer*, — S.Ct. —, 2011 WL 531553, 79 USLW 3494, 79 USLW 3622, 79 USLW 3627) (“On petition for writ of certiorari to the Supreme Court of Missouri. Petition for writ of certiorari granted. Judgment vacated, and case remanded to Supreme Court of Missouri for further consideration in light of *AT & T Mobility LLC v. Concepcion*, 563 U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).”); *In re: Checking Account Overdraft Litigation*, 2011 WL 1663989 (C.A.11 (Fla.)) (“After oral argument in this case, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, —L.Ed.2d — (2011). The district court’s order denying the motion to compel arbitration is VACATED, and this case is remanded to the district court for reconsideration in light of the Supreme Court’s opinion”; *Fensterstock v. Education Finance Partners*, 2011 WL 2580166, (C.A.2 (N.Y.)) (“In *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Supreme Court of the United States ruled that “California’s Discover Bank rule is preempted by the [Federal Arbitration Act, 9 U.S.C. § 1 et seq.]” 131 S.Ct. at 1753. Accordingly, the Supreme Court has vacated this Court’s decision in *Fensterstock II* and remanded for further consideration in light of *AT & T Mobility LLC v. Concepcion*. See *Affiliated Computer Services, Inc. v. Fensterstock*, 131 S.Ct. — (2011), No. 10–987, 2011 WL 338870 (U.S. June 13, 2011) (“*Fensterstock III*”).

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The U.S. Supreme Court has recognized that arbitration cases need to be reconsidered in light of *AT&T*. Likewise, this Court should reach the same conclusion and order reversal or at least reconsideration due to *AT&T*.

*AT&T* progeny continue to grow. In *Estrella v. Freedom Financial*, 2011 WL 2633643 (N.D.Cal.), the Court, in light of *AT&T*, ordered arbitration and stayed the civil action. The Court granted a motion to compel arbitration of Unfair Competition Law, Consumer Legal Remedies Act, and negligence claims. Slip Op., 1. In that case, the defendants offered a debt reduction service. The arbitration clause provides for an award of costs.<sup>23</sup> Defendants' motion to compel arbitration was filed in response to *AT&T* (noting that *AT&T* holds that the FAA preempts *Discover Bank* and prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures). *AT&T*, 131 S.Ct. at 1744, 1753. The Court granted the motion to compel, citing *AT&T*.

In *Concepcion*, the Supreme Court said that the "overarching purpose" of the FAA is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, S.Ct. 131 at 1748. Because requiring the availability of class-wide arbitration "interferes with fundamental attributes of arbitration," the Court said the requirement is inconsistent with the FAA. *Id.* In support of its argument that a change from bilateral arbitration to class-action arbitration is "fundamental," the Court cited the loss of arbitration's informality, making the "process slower, more costly, and more likely to generate procedural morass," and an increased risk to defendants. *Id.* at 1750–52. While the *Concepcion* dissent argued that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the cracks of the legal system, the Court said that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753. The Court acknowledged that States are still able to take action to address concerns about adhesion contracts, providing as an example a requirement that class-action waivers be highlighted in arbitration agreements, but said "such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1750 n. 6.

*Id.*, Slip Op at 4.

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<sup>23</sup> *Id.*, Slip Op., at 2. "THE PARTIES SHALL SHARE THE COST OF ARBITRATION, INCLUDING ATTORNEY'S FEES, EQUALLY. IF THE CONSUMERS SHARE OF THE COST IS GREATER THAN \$1,000 (ONE-THOUSAND DOLLARS), THE COMPANY WILL PAY THE CONSUMERS SHARE OF COSTS IN EXCESS OF THAT AMOUNT. IN THE EVENT A PARTY FAILS TO PROCEED WITH ARBITRATION, UNSUCCESSFULLY CHALLENGES THE ARBITRATOR'S AWARD, OR FAILS TO COMPLY WITH THE ARBITRATOR'S AWARD, THE OTHER PARTY IS ENTITLED TO COSTS OF SUIT, INCLUDING A REASONABLE ATTORNEY'S FEE FOR HAVING TO COMPEL ARBITRATION OR DEFEND OR ENFORCE THE AWARD."

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Meanwhile, in *In re California Title Insurance Antitrust Litigation*, 2011 WL 2566449 (N.D.Cal.), the court granted a motion to compel arbitration in light of *AT&T* in a title insurance case, where plaintiffs purchased the insurance in connection with the purchase of real estate. The title insurance policies for each real estate transaction at issue included an arbitration clause which was however, silent as to class-action arbitration. The Court said, citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000):

“Under § 4 of the FAA, a district court must issue an order compelling arbitration if the following two-pronged test is satisfied: (1) a valid agreement to arbitrate exists; and (2) that agreement encompasses the dispute at issue.” *United Computer Systems v. AT & T Corp.*, 298 F.3d 756, 766 (9th Cir.2002).

Finding no defense to enforcement of the arbitration clause, the Court was compelled to issue the order to arbitrate.<sup>24</sup>

In *Zarandi v. Alliance Data Systems Corp.*, 2011 WL 1827228 (C.D.Cal.), a credit card customer had a dispute with her local Ann Taylor store, at which she opened a credit account for purchases made on the same occasion. Terms, later amended, included an arbitration clause (covering “any claim, dispute, or controversy between you and us that in any way arises from or relates to this Agreement, the Account, the issuance of any Card, any rewards program, any prior agreement or account,” including disputes based on “consumer rights” and a “statute”). Slip Op., 1. She could have opted out; a mobilehome resident need never agree to such a clause to opt in.

Plaintiff does not dispute that she received the terms and conditions for her card. Her failure to opt out of the Arbitration Provision constitutes consent to those terms. See *Gentry v. Superior Court*, 42 Cal.4th 443, 467–68, 64 Cal.Rptr.3d 773, 165 P.3d 556 (2007) abrogated on other grounds, *Concepcion*, — U.S. —, 131 S.Ct. 1740, —L.Ed.2d —, 2011 WL 1561956. Her second argument is no longer viable after *Concepcion*. See — U.S. —, —, 131 S.Ct. 1740, —L.Ed.2d —, —, 2011 WL 1561956, \*5–\* 13. The Court also rejects the request to bifurcate the claims seeking injunctive relief because the FAA preempts state law to the extent it prohibits arbitration of a particular type of claim. See *id.* at \*6.

*Id.*, Slip op., 2.

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<sup>24</sup> *Id.*, at slip op., 2: (“In the wake of new Supreme Court precedent, arbitration agreements may be ‘invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.’ *Concepcion*, 131 S.Ct. at 1742–43 (internal quotation marked omitted). Accordingly, the Court is compelled to enforce the parties’ arbitration provisions in the contracts at issue”).

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Nor is the fact an arbitration clause purports to deal with a special class to be protected any difference under *AT&T*. In *Wolf v. Nissan Motor Acceptance Corporation*, 2011 WL 2490939 (D.N.J. 2011), following *AT&T*, plaintiff alleged violations to the Service Members Civil Relief Act, 50 U.S.C.App. §§ 501 *et seq.* The defendants argued the existence of a “broad” and “binding” arbitration agreement as part of their lease contract. *Id.*, Slip op., 2. Plaintiff objected on the grounds that suit was on behalf of a specially protected class, Reserve and National Guard members of the United States Armed Forces, who before reporting for military duty are afforded protection when resolving their civilian affairs by the Service members Civil Relief Act, 50 U.S.C.App. §§ 501 *et seq.* The SCRA, Wolf surmises, nullified the parties’ arbitration clause. *Id.* The Court held that *AT&T* was controlling.

“Though Wolf’s argument and authority are persuasive, the Court must take note of the recent decision issued by the Supreme Court of the United States in *AT & T Mobility L.L.C. v. Concepcion*, 131 S.Ct. 1740 (2011). In that case, the Supreme Court addressed a California rule of law that—like the New Jersey principles of contract articulated in *Muhammad*—deemed as unconscionable class action and collective arbitration waivers in consumer contracts of adhesion in which the likely damages would be predictably small. *Id.* at 1746, 1750. The Supreme Court held that the FAA, with its objective toward encouraging arbitration, preempted the California rule, because by invalidating portions of arbitration agreements and imposing class-wide proceedings where they otherwise have been waived, the California rule interferes with and stymies arbitration. *Id.* at 1750–51, 1753.”

*Id.*, Slip opinion, 6. And see *Soto–Fonalledas v. Ritz–Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471 (1<sup>st</sup> Cir., Puerto Rico, 2011), 112 Fair Empl.Prac.Cas. (BNA) 275, 94 Empl. Prac. Dec. P 44,167, 24 A.D. Cases 1165, at 476.<sup>25</sup> In the same way, mobilehome residents’ status, having been afforded special protections of the Mobilehome Residency Law as a laudable public policy in California, is of no moment in judging the enforceability of an arbitration clause for purposes of advancing FAA policy.<sup>26</sup> The same rule should apply

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<sup>25</sup> “This court has previously held that employers and employees may agree to submit Title VII and ADA claims to arbitration and that this does not violate congressional intent. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7–12 (1st Cir.1999); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 148–51 (1st Cir.1998). *Soto* is bound by these holdings”.

<sup>26</sup> And fee shifting, cost, and expense considerations were deemed to be severable. *Id.*, 2011 WL 2490939), Slip op., 7 (“... the cost-shifting provision and the provision pertaining to the costs of appeals are unconscionable and unenforceable to the extent they may be construed and applied to require Wolf to shoulder the entire financial burden of the arbitration and, irrespective of the outcome, the appeal of his claims. However, that narrow, unconscionable interpretation and application of those provisions do [*sic*] not invalidate the entire arbitration agreement . . .”). Similarly, the arbiter can decide and construe the provisions dealing with cost, or they may be severed.

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to representative actions. In this respect, WMA contends that *Brown v. Ralphs Grocery Company*<sup>27</sup>, — Cal.Rptr.3d —, 2011 WL 2685959, 11 Cal. Daily Op. Serv. 8765, Cal.App. 2 Dist. (July 12, 2011), is erroneously decided, because it purports to exalt California procedure over the interests of the FAA, as pointed out in the rightly-reasoned dissent.<sup>28</sup>

Post *AT&T*, the courts are concluding that issues of the amount of the dispute in controversy is singularly irrelevant to the analysis of the arbitration clause in question. In *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D.Cal.), the court had stayed claims for injunctive relief pending *AT&T*:

With the benefit now of that decision and further briefing, this order is compelled to do as follows. ¶The recent Concepcion decision compels preemption: “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” Concepcion, 131 S.Ct. at \*6. In sum, the Act preempts California's exemption of claims for public injunctive relief from arbitration, at least for actions in federal court. ¶ Plaintiff's arguments to the contrary are unavailing. First, plaintiff argues that ‘the arbitration clause is void because it agrees to forego substantive rights afforded by statute . . . Perhaps regrettably, this argument was rejected by Concepcion: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” 131 S.Ct at \*13 (citation omitted).

2011 WL 1842712, slip op., 2.

And limitation of substantive remedies is prematurely considered by a court, as the arbiter is in the better position to decide such issues consistent with the policies of the FAA.

See *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003) . . . ¶There, the Court faced a potential conflict between an arbitration agreement that prohibited punitive damages and statutory language entitling the plaintiff to treble damages. See *PacifiCare*,

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<sup>27</sup> <http://www.courtinfo.ca.gov/opinions/documents/B222689.PDF>, last visited July 19, 2011.

<sup>28</sup> “The United States District Court for the Central District of California has recently reached the same result in finding the reasoning of Franco ‘no longer tenable in light of the Supreme Court's recent decision in [AT&T].’ (*Quevedo v. Macy's, Inc.* (C.D.Cal. June 16, 2011, No. CV 09-1522 GAF (MANx) Civ. Minutes at p. 20 (Quevedo).) “The California Court of Appeal's decision in Franco shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. [Citation.] AT&T . . . makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA. [Citation.]’ (*Quevedo*, supra, at p. 21.)” *Id.*, 2011 WL 2685959, Slip op., at 11.

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538 U.S. at 403, 123 S.Ct. 1531. The Court rejected plaintiff's claim that this conflict made the agreement unenforceable, explaining that it would not, "on the basis of 'mere speculation' that an arbitrator might interpret ... ambiguous agreements in a manner that casts their enforceability into doubt, take upon [itself] the authority to decide the antecedent question of how the ambiguity is to be resolved." *Id.* at 406–07, 123 S.Ct. 1531. Reasoning that an arbitrator could interpret the agreement to avoid a direct conflict, the Court found no question of arbitrability and compelled arbitration. See *id.* at 407, 123 S.Ct. 1531 ("[S]ince we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract.... [T]he proper course is to compel arbitration.").

*Id.*, at 477.<sup>29</sup>

When there is a choice to accept or decline the arbitration clause, reviewing courts hold the clauses are not unconscionable.

Moreover, the plaintiff's claim of procedural unconscionability is not meaningfully enhanced by characterizing the Client Agreement as an adhesion contract. In the first place, Justice Scalia, writing for the majority in *AT & T Mobility*, was unimpressed by the fact that the agreement in that case was an adhesion contract, stating that "the times in which consumer contracts were anything other than adhesive are long past." — U.S. — at —, 131 S.Ct. 1740, — L.Ed.2d — at —, 2011 WL 1561956 at \*9. More importantly, the arbitration provision was not a "take-it-or-leave-it" situation, since it provided that the plaintiff could reject the provision by sending a rejection notice to CareOne . . . ¶Under these circumstances, the arbitration provision was not procedurally unconscionable.

*Day v. Persels & Associates*, 2011 WL 1770300 (M.D.Fla.), Slip op., 7

The courts are interpreting *AT&T* to mean that there is little discretion but to order a dispute to arbitration on proof of the existence of an arbitration agreement, leaving the rest for arbitral interpretation.

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<sup>29</sup> And, see, *id.* ("In *Anderson v. Comcast Corp.*, 500 F.3d 66 (1st Cir.2007), this court followed *PacifiCare*, holding that although there were 'direct conflicts' between an arbitration agreement's multiple damages prohibition and a statute's multiple damages provision, the conflicts did not raise a question of arbitrability because one of the conflicts would only emerge under certain factual findings, and the other turned on an interpretation of state law. *Id.* at 72–75. Likewise, in *Kristian*, we explained that when a vindication of statutory rights claim is based on an ambiguity in 'the scope of a remedies limitation of an arbitration agreement,' it is the arbitrator who should 'decide the question of enforceability in the first instance.' *Kristian*, 446 F.3d at 45. . .").

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... the FAA gives the adjudicating court no discretion as to whether to award relief. The statute provides that when a party seeks relief under § 3 of the FAA, "the court ..., upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). As the Supreme Court has recognized, the language of the FAA leaves no room for discretion: "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); see also *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011) (noting that FAA " §3 requires courts to stay litigation of arbitral claims pending arbitration of those claims 'in accordance with the terms of the agreement' " (emphasis added)); *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir.2004) (noting that the FAA limits a court's discretion in ordering arbitration).

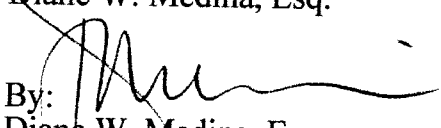
*Countrywide Home Loans, Inc. V. Mortgage Guaranty Insurance Corporation*, — F.3d —, 2011 WL 2373055 (C.A.9 (Cal.)), 11 Cal. Daily Op. Serv. 7304, 2011 Daily Journal D.A.R. 8784, Slip Opinion, 3.

Further, cases continue to be accepted by the Supreme Court in light of AT&T. E.g., *Greenwood v. CompuCredit Corp.* (9th Cir. 2010) 615 F.3d 1204, cert. granted May 2, 2011, — U.S. — [ — S.Ct. —, 179 L.Ed.2d. 1187] to consider whether claims arising under the Credit Repair Organization Act, 15 U.S.C. §1679 *et seq.*, must be arbitrated under valid arbitration agreements.

For these reasons, the Court should grant the Petition for Hearing in this case in order to resolve the issues of paramount importance to the manufactured housing industry and grant WMA's application to file an *amicus curiae* when requested.

Respectfully Submitted,

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