No.

In the Supreme Court of the United States

THE RITZ-CARLTON DEVELOPMENT CO., INC., *ET AL.*,
Petitioners,

v.

KRISHNA NARAYAN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITION FOR A WRIT OF CERTIORARI

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
ARCHIS A. PARASHARAMI
JEFFREY H. REDFERN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That provision "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) (internal quotation marks omitted).

In this case, the Hawaii Supreme Court addressed the meaning of a contract that contained both an unambiguous arbitration provision and venue and related provisions that, the court believed, could be read to contemplate in-court litigation. Concluding that the contract as a whole was ambiguous as to the parties' intent to submit disputes to arbitration, the court (1) held that arbitration is categorically unavailable unless the contractual text makes unambiguous the parties' intent to provide for arbitration; and (2) chose to read the arbitration clause out of the contract rather than adopt a construction of the contract that reconciled the arbitration clause with the venue and related provisions. Both of these holdings departed from the Hawaii Supreme Court's usual approach to contract construction.

The question presented is:

Whether the Hawaii Supreme Court's use of a rule of contract construction that uniquely disfavors arbitration and that requires that ambiguity be resolved against arbitration is inconsistent with the FAA.

RULE 14.1(B) STATEMENT

Petitioners are The RITZ–CARLTON DEVELOPMENT COMPANY, INC.; The Ritz–Carlton Management Company, LLC; John Albert; Edgar Gum, Marriott International Inc.; Maui Land & Pineapple Co., Inc.; Exclusive Resorts, LLC; Kapalua Bay, LLC; Association of Apartment Owners of Kapalua Bay Condominium; Caroline Peters Belsom; Cathy Ross; Robert Parsons; Ryan Churchill; The Ritz–Carlton Hotel Company, L.L.C.; Marriott Vacations Worldwide, Corporation; Marriott Ownership Resorts, Inc.; Marriott Two Flags, LP; MH Kapalua Venture, LLC; MLP KB Partner LLC; Kapalua Bay Holdings, LLC; ER Kapalua Investors Fund, LLC; ER Kapalua Investors Fund Holdings, LLC; Exclusive Resorts Development Company, LLC; and Exclusive Resorts Club I Holdings, LLC.

Respondents are Krishna NARAYAN; Sherrie Narayan; Virendra Nath; Nancy Makowski; Keith MacDonald as co–trustee for the DKM Trust dated October 7, 2011; Simon Yoo; Sumiyo Sakaguchi; Susan Renton, as trustee for the Renton Family Trust dated 12/3/09; Stephen Xiang Pang; Faye Wu Liu; Massy Mehdipour as trustee for Massy Mehdipour Trust dated June 21, 2006; G. Nicholas Smith; Tristine Smith; Ritz 1303 Re, LLC, a Colorado Limited Liability Company; and Bradley Chaffee as trustee of the Charles V. Chaffee BRC Stock Trust dated 12/1/99 and the Clifford W. Chaffee BRC Stock Trust dated 1/4/98.

RULE 29.6 STATEMENT

Petitioners The Ritz-Carlton Development Company, Inc., The Ritz-Carlton Management Co., LLC, Marriott Ownership Resorts, Inc., and MH Kapalua Venture, LLC, are subsidiaries of MVW U.S. Holdings, Inc., which is wholly owned by petitioner Marriott Vacations Worldwide Corp. No publicly held company owns 10% or more of the stock of Marriott Vacations Worldwide Corp.

Petitioners The Ritz-Carlton Hotel Co., LLC, and Marriott Two Flags, L.P., are subsidiaries of petitioner Marriott International, Inc. No publicly held company owns 10% or more of the stock of Marriott International, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Hawaii Supreme Court in this case.

OPINIONS BELOW

The opinion of the Hawaii Supreme Court (App., *infra*, 1a-27a) is reported at 350 P.3d 995. The decision of the Intermediate Court of Appeals of Hawaii (App., *infra*, 28a-39a) is unpublished but is available at 2013 WL 4522945. The order of the Hawaii Circuit Court (App., *infra*, 40a) is unreported.

JURISDICTION

The judgment of the Hawaii Supreme Court was entered on June 3, 2015. On August 21, 2015, Justice Kennedy extended the time within which to file the petition for a writ of certiorari to October 1, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides in relevant part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in relevant part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

Faced with a contract containing an express arbitration clause and other provisions that arguably advert to the possibility of litigation, the Hawaii Supreme Court held the contract ambiguous regarding the availability of arbitration—and that arbitration therefore is not available because, under Hawaii law, an arbitration provision "'must be *unambiguous as to the intent to submit disputes or controversies to arbitration*.'" App., *infra*, 13a (emphasis added by the court). That holding contravenes the Federal Arbitration Act and this Court's decisions interpreting it, is inconsistent with the decisions of other courts, and significantly undermines the effectiveness of agreements to arbitrate.

The decision below is wrong in two related respects. *First*, the Hawaii court applied an interpretive approach that uniquely disadvantages arbitration agreements. Its requirement that the text of an arbitration provision be unambiguous and its decision to read the arbitration clause out of the contract rather than attempt to reconcile that clause with

other contractual provisions both depart from the approach taken by Hawaii law in all other contractual contexts. The decision therefore runs afoul of the FAA's mandate that arbitration contracts be enforceable "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Second, the Hawaii court's holding that ambiguity must be resolved *against* arbitration disregards the fundamental rule that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*," including when "the problem at hand is the construction of the contract language itself[.]" *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (applying "'the federal policy *favoring* arbitration'") (emphasis added).

These errors warrant this Court's attention. They reflect the "longstanding judicial hostility to arbitration agreements" (*EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted)) that the FAA was meant to reverse and that this Court has long condemned. And they typify an approach that would "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). Further review accordingly is warranted.

A. Factual background

This case involves allegations growing out of financial problems at a luxury condominium development in Maui, Hawaii. The defendants, petitioners

here, were involved in various capacities in the original development and management companies for the project. The plaintiffs, respondents in this Court, are purchasers of some of the condominiums. App., *infra*, 2a-3a. Bringing suit in Hawaii state court, respondents alleged that petitioners defaulted on loans encumbering the project, left the project and its owners' association underfunded, and failed to respond adequately to respondents' requests for information. *Id.* at 3a-4a.

Petitioners moved to compel arbitration; respondents replied that the parties did not enter into an enforceable agreement to resolve disputes through arbitration and that, in any event, the dispute falls outside the scope of any agreement to arbitrate that does exist. The documents that bear on the existence of an arbitration agreement include:

1. The Condominium Declaration. This document contains an express arbitration clause titled "alternative dispute resolution." The clause broadly provides that, "[i]n the event of the occurrence of any controversy or claim arising out of, or related to, this Declaration * * * the dispute shall be resolved by arbitration pursuant to this Article and the then-current rules and supervision of the American Arbitration Association." *Id.* at 7a. It further states that "[i]ssues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration." *Id.* at 30a.

It is undisputed that the Condominium Declaration is part of the contract between the parties; it "in general is binding on [respondents] and * * * it contains an arbitration provision that is unambiguous on its face." *Id.* at 32a. Respondents do not dispute

that they received, read, and are bound by the Condominium Declaration.

2. The Purchase Agreements. These agreements between respondents and the developer state that the Condominium Declaration (along with other documents) form an "essential part" of the Purchase Agreements; the Condominium Declaration "is referenced more than twenty times in the purchase agreements and in a variety of contexts. * * * Thus, on many occasions, the purchaser is put on notice that more specific information concerning particular rights and obligations is contained in the condominium declaration." *Id.* at 6a. As relevant here, the Purchase Agreements also contain a provision labeled "Waiver of Jury Trial," which provides that the seller and purchaser "expressly waive their respective rights to a jury trial" on any claim arising out of the agreements and that "[v]enue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, State of Hawaii." *Id.* at 6a.[1] In addition, a provision of the Purchase Agreements labeled "Attorneys['] Fees" provides that, "[i]f any legal or other proceeding, including arbitration, is brought," the prevailing party will recover a reasonable attorneys' fee. *Id.* at 6a-7a.

3. The Condominium Public Report. The Purchase Agreements "also incorporate the terms of the [condominium] public report" which, along with the other contract documents (including the Condominium Declaration), "control the rights and obligations of the apartment owners." *Id.* at 9a. The Public Report states that "[t]he provisions of these documents

[1] The Second Circuit is located in Wailuku, on Maui.

are intended to be, and in most cases are, enforceable in a court of law." *Id.*[2]

B. State court proceedings

1. The state trial court denied the motion to compel arbitration without explanation. See *id.* at 41a. But the intermediate appellate court reversed, holding that the arbitration clause binds the respondents. See *id.* at 39a.

The appellate court found "no dispute that the [Condominium] Declaration in general is binding on Plaintiffs and that it contains an arbitration provision that is unambiguous on its face." *Id.* at 32a. From that starting point, the court rejected respondents' argument that the "venue" and "enforceable in a court of law" language of the Purchase Agreements and Public Report were inconsistent with, and therefore precluded enforcement of, the arbitration clause. *Id.* at 33a-34a.

The court explained that "[w]e interpret contracts so as to give reasonable and effective meaning to all terms" and that, because "arbitration awards are 'enforceable in a court of law,' * * * the language [of the Purchase Agreements and Public Report] can be reconciled with the arbitration clause rather than revoking it." *Id.* at 33a-34a. The court therefore found that "nothing in the language [respondents cite] vitiates the [Condominium] Declaration's arbitration provision." *Id.* at 32a. The court went on to conclude that respondents' claims are "within the

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[2] The Hawaii Supreme Court also described other documents, including the apartment owners' association bylaws, but these did not affect the court's ultimate arbitrability analysis. See App., *infra*, 8a-9a.

scope of the [Condominium] Declaration's provision requiring arbitration." *Id.* at 35a.

2. The Hawaii Supreme Court reversed, holding that "the arbitration provision contained in the condominium declaration is unenforceable because the terms of the various condominium documents are ambiguous with respect to the Homeowners' intent to arbitrate." *Id.* at 15a.

The court began by specifying "three elements [that] are necessary to prove the existence of an enforceable agreement to arbitrate: '(1) it must be in writing; (2) it must be *unambiguous as to the intent to submit disputes or controversies to arbitration*; and (3) there must be bilateral consideration.'" *Id.* at 12a-13a (quoting *Douglass* v. *Pflueger Haw., Inc.*, 135 P.3d 129, 140 (Haw. 2006) (emphasis added by the court)). The court noted that there was no dispute as to the first and third of these elements. As to the second, the court characterized it as a question of assent: "'With respect to the second requirement, there must be a mutual assent or a meeting of the minds on all essential elements or terms to create a binding contract.'" *Id.* at 13a.

Applying these principles, the court held that "[i]n this case the purported agreement to arbitrate is unenforceable because it is ambiguous when taken together with the terms of the purchase agreements and the public report." *Id.* at 14a. The court determined that the statement in the Purchase Agreements that "'[v]enue for any cause of action brought by a Purchaser hereunder shall be in the Second Circuit Court [in Maui]'" conflicts with the statement in the Condominium Declaration's arbitration clause that claims "'shall be decided by arbitration'" and that the arbitration "'shall be held in Honolulu.'" *Id.*

at 14a-15a. In the court's view, because "both documents contain dispute resolution provisions that use broad language to define their scope"—and therefore "a dispute may arise out of both the purchase agreement and the declaration"—"[i]t is facially ambiguous whether those disputes would be confined to arbitration in Honolulu pursuant to the condominium declaration or the 'Second Circuit Court' pursuant to the purchase agreement." *Id.* at 15a.

The court added that "[t]he public report creates further ambiguity"; pointing to the Public Report's statement that the Condominium Declaration and certain other documents "'are intended to be, and in most cases are, enforceable in a court of law,'" the court found that "[a] reasonable buyer presented with these documents 'would not know whether she or he maintained the right to judicial redress or whether she or he had agreed to arbitrate any potential dispute.'" *Id.* at 15a. For these reasons, the court held that the intermediate appellate court had "gravely erred when it concluded that the parties had formed a valid and enforceable agreement to arbitrate." *Id.* at 15a.[3]

REASONS FOR GRANTING THE PETITION

As this Court has explained repeatedly, Congress enacted the FAA "broadly to overcome judicial hostility to arbitration agreements * * * in both federal

[3] The Hawaii Supreme Court also stated that two specific provisions of the arbitration clause—those limiting discovery and precluding the award of punitive damages—could not be enforced because they were unconscionable. App., *infra*, 22a-26a. The court did not explain the relevance of this discussion in light of its threshold holding that the arbitration provision is unenforceable in its entirety.

and state courts." *Allied-Bruce Terminix*, 513 U.S. at 272-73. To accomplish this goal, the statute establishes two related principles that are controlling in this case: first, Section 2 of the FAA provides expressly that arbitration agreements must be placed "upon the same footing as other contracts" (*Waffle House*, 534 U.S. at 289 (internal quotation marks omitted)). Second, the Act's "liberal federal policy favoring arbitration agreements," *ibid.*, requires that doubts regarding the meaning of such an agreement "should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 25. These principles are an aspect of the FAA's creation of "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id*. at 24.

But the decision below—by placing a thumb on the scales *against* arbitration, and by adopting an interpretive approach that uniquely *disfavors* arbitration agreements—violated both of those principles. That decision should be set aside.[4]

A. The Decision Below Impermissibly Discriminates Against Arbitration Contracts.

The FAA limits a state's authority to invalidate an arbitration agreement to "such grounds as exist at law or in equity for the revocation of any contract," and thereby bars the application of state-law rules that specifically target or discriminate against arbi-

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[4] The judgment of the court below is final within the meaning of 28 U.S.C. § 1257(a). This Court has frequently granted certiorari petitions seeking review of state-court judgments finally denying efforts to compel arbitration. See, *e.g.*, *Perry* v. *Thomas*, 482 U.S. 483, 489 n.7 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984).

tration agreements. 9 U.S.C. § 2; see also, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1746 (2011); *Allied-Bruce Terminix*, 513 U.S. at 272-73; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 (1984); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). The Hawaii decision departs from that principle, applying special rules that disadvantage arbitration.

1. The decision below applied an interpretive approach that uniquely disfavors arbitration.

a. To begin with, the Hawaii court expressly held that ambiguity regarding whether parties agreed to arbitrate *must* be resolved against arbitration. The court thus listed as one of the "elements" that is "necessary to prove the existence of an enforceable agreement to arbitrate": "'*it must be unambiguous as to the intent to submit disputes or controversies to arbitration*.'" App., *infra*, 12a-13a (emphasis added by the court). As so stated, Hawaii law makes ambiguous arbitration agreements *per se* unenforceable. The Hawaii Supreme Court articulated that rule in *Douglass*, 135 P.3d at 140; in this case, the court literally gave its statement of the rule added emphasis.

There is, moreover, no doubt that application of the Hawaii rule that textual ambiguity necessarily is fatal to an arbitration agreement determined the outcome of this case. The entirety of the Hawaii Supreme Court's analysis of the enforceability of the arbitration provision consisted of its consideration of the text of the parties' contract (App., *infra*, 12a-15a); after recounting that language, the court held "that the arbitration provision contained in the condominium declaration is unenforceable *because the terms of the various condominium documents are ambiguous*

with respect to the [respondents'] intent to arbitrate." *Id.* at 15a (emphasis added). The court made no further inquiry into the parties' actual intent. That, however, is not the Hawaii courts' usual approach to questions of contract interpretation outside the context of arbitration agreements. Instead, Hawaii contract law generally treats contractual ambiguity as an issue to be resolved by a trier of fact, rather than as something to be determined through application of a legal presumption:

> Where the language of the contract is ambiguous, so that there is some doubt as to the intent of the parties, that intent is a question of fact. *DiTullio* v. *Hawaiian Insurance & Guaranty Co., Ltd.*, 1 Haw. App. 149, 616 P.2d 221 (1980). Inasmuch as the determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ, summary judgment often will be an inappropriate means of resolving an issue of that character.

Bishop Trust Co., Ltd. v. *Cent. Union Church*, 656 P.2d 1353, 1356 (Haw. Ct. App. 1983); see also, *e.g.*, *Hawaiin Ass'n of Seventh-Day Adventists* v. *Wong*, 305 P.3d 452, 464 (Haw. 2013) (where contract terms "are reasonably susceptible to more than one interpretation, there are genuine issues of material fact regarding the intent of the drafters, and summary judgment is therefore inappropriate"); *Found. Int'l, Inc.* v. *E.T. Ige Constr., Inc.*, 78 P.3d 23, 33 (2003) ("When an ambiguity exists so that there is some doubt as to the intent of the parties, intent is a question for the trier of fact."). The Hawaii Supreme Court thus resolved this case by applying a special rule that disadvantages arbitration.

b. The court below also departed from its usual approach to contract interpretation in a second respect. In all other contexts, the Hawaii Supreme Court has "long expressed [its] disapproval of interpreting a contract such that any provision be rendered meaningless." *Stanford Carr Dev. Corp*. v. *Unity House, Inc.*, 141 P.3d 459, 470 (Haw. 2006) (collecting cases dating to 1909). Invoking just that principle in this case, the Hawaii intermediate appellate court found that the venue and "enforceable in a court of law" contractual language could be, and therefore had to be, "reconciled with the arbitration clause rather than [be read as] revoking it." App., *infra*, 34a.

Indeed, in circumstances materially indistinguishable from those here, federal courts have held almost universally that arbitration provisions are *consistent* with, and therefore are neither abrogated nor rendered ambiguous by, venue selection and related clauses like those contained in this case's Purchase Agreements and Condominium Public Report. These courts have recognized that "service-of-suit clauses do not negate accompanying arbitration clauses; indeed, they may complement arbitration clauses by establishing a judicial forum in which a party may enforce arbitration." *Century Indem. Co.* v. *Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 554 (3d Cir. 2009).

In *Bank Julius Baer & Co., Ltd.* v. *Waxfield, Ltd.*, 424 F.3d 278 (2d Cir. 2005), abrogated on other grounds, *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010), for example, the parties (as here) entered into a contract containing a provision that broadly agreed to arbitrate their disputes. See *id.* at 282. Subsequent contractual provisions

purported to supersede prior agreements between the parties and included a forum selection clause stating that actions against one of the parties "may be heard" in New York state court and that this party waived forum non conveniens defenses against "any action in any jurisdiction." *Ibid*.

Assessing this language—which is substantially identical to that of the Purchase Agreements here—the Second Circuit rejected the argument that, "by admitting the possibility of litigation in court, the Forum Selection Clause constitutes a waiver of the agreement to arbitrate." *Id*. at 283-84. As the court explained: "The Forum Selection Clause can be understood * * * as complementary to an agreement to arbitrate. * * * It may be read, consistent with the Arbitration Agreement, in such a way that the [parties] are required to arbitrate their disputes, but that to the extent [one party] files a suit in New York—for example, to enforce an arbitral award, or to challenge the validity or application of the arbitration agreement—[the other party] will not challenge either jurisdiction or venue." *Id*. at 284-85.

Other courts have taken the same approach in essentially identical circumstances. See *Personal Sec. & Safety Sys. Inc.* v. *Motorola Inc.*, 297 F.3d 388, 395-96 (5th Cir. 2002) ("we must * * * interpret the forum selection provision * * * in a manner that is consistent with the arbitration provision"; "we interpret the forum selection clause to mean that the parties must litigate in Texas courts only those disputes that are not subject to arbitration—for example, a suit to challenge the validity or application of the arbitration clause or an action to enforce an arbitration award"); *Patten Sec. Corp.* v. *Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 407 (3d Cir. 1987) (fo-

rum selection clause that does not refer to arbitration is "ambiguous"; "[b]oth [forum selection and arbitration clauses] can be given effect, for arbitration awards are not self enforceable"), abrogated on other grounds, *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 287 (1988).

In the arbitration context, this Court itself has identified as a "cardinal principle of contract construction" "that a document should be read to give effect to all of its provisions and to render them consistent with each other." *Mastrobuono*, 514 U.S. at 63. Applying that principle, the Court explained that "the best way to harmonize" contractual provisions is to read them so that "neither sentence intrudes upon the other" and to avoid a construction that "sets up the two clauses in conflict with one another." *Id.* at 63-64.

The Hawaii Supreme Court too has understood it to be the generally accepted rule that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Stanford Carr Dev. Corp.*, 141 P.3d at 470 (quoting Restatement (Second) of Contracts § 203(a) (1981)).

But the court below departed from that approach here. Far from avoiding a contract interpretation under which "any provision [would] be rendered meaningless" (*Stanford Carr Dev. Corp.*, 141 P.3d at 470), the court simply read the arbitration clause out of the contract altogether. Yet the court did not deny that it is possible to reconcile the venue and "enforceable in a court of law" clauses with the arbitration provision by recognizing that "arbitration awards *are* 'enforceable in a court of law'" (App., *in-*

fra, 34a (emphasis added)), as found by the intermediate court of appeals in this case and by numerous federal courts in nearly identical circumstances.

Nor did the court below make *any* effort to reconcile the various contract provisions before concluding that the arbitration clause is *per se* unenforceable because the different clauses, when read together, are "facially ambiguous." *Id.* at 15a. By treating a venue selection clause as vitiating an arbitration agreement, the Hawaii Supreme Court again applied an interpretive approach that discriminates against arbitration.

2. Rules that uniquely disfavor arbitration agreements are preempted by the FAA.

That discriminatory approach violates the plain terms and manifest purpose of the FAA. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements" by "plac[ing these] agreements upon the same footing as other contracts." *Waffle House,* 534 U.S. at 289 (internal quotation marks omitted). Section 2 of the FAA therefore expressly commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). "Congress precluded States from singling out arbitration provisions for suspect status" (*Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996)) or from invalidating arbitration provisions by providing

"defenses that apply only to arbitration." *Concepcion*, 131 S. Ct. at 1746.[5]

That, however, is just what Hawaii did here. The court below both announced a rule that by its terms applies *only* to arbitration agreements—"an enforceable agreement to arbitrate * * * 'must be *unambiguous as to the intent to submit disputes or controversies to arbitration*'" (App., *infra*, 12a-13a)—and, by disregarding the generally applicable imperative to reconcile all elements of a contract, "applied [state law] in a fashion that disfavors arbitration." *Concepcion*, 131 S. Ct. at 1747. Thus, the Hawaii court's approach "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Doctor's Assocs.*, 517 U.S. at 688. The aberrational rules of contract interpretation applied below are not even remotely "a ground * * * 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions." *Southland Corp.*, 465 U.S. at 16 n.11.

B. The Decision Below Departs From The Federal Policy Favoring Arbitration.

The decision below also departs from a second and related rule of federal arbitration law: the "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam). If the venue and related provisions create an ambiguity when considered together with the arbitration provision

[5] It is immaterial that the discriminatory rule here derives from common law rather than a statute; the FAA preempts any "state law, whether of legislative or judicial origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9; see also *Doctor's Assocs.*, 517 U.S. at 687 n.3.

here—the conclusion that dictated the outcome below[6]—that ambiguity requires that arbitration *must* be available.

The "'liberal federal policy favoring arbitration'" (*Concepcion*, 131 S. Ct. at 1745) means that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is *not susceptible of an interpretation that covers the asserted dispute*." *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (emphasis added); see also *Moses H. Cone*, 460 U.S. at 24-25 ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*," including when "the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.") (emphasis added); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.") (quoting *Moses H. Cone*, 460 U.S. at 24).

That conclusion follows from the fundamental purpose of the FAA. Before enactment of the statute, state courts routinely refused to enforce arbitration agreements as contrary to public policy. Congress enacted the statute to reverse this "longstanding ju-

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[6] The Hawaii Supreme Court emphasized repeatedly its view that the contract as a whole is "ambiguous" as to the availability of arbitration. See App., *infra*, 14a (arbitration agreement "is ambiguous when taken together with the terms of the purchase agreement and public report"); *id.* at 15a (it is "facially ambiguous" whether arbitration clause or purchase agreement governs); *ibid.* (Public Report "creates further ambiguity"); *ibid.* ("the terms of the various condominium documents are ambiguous with respect to the Homeowners' intent to arbitrate").

dicial hostility to arbitration agreements," "to place [these] agreements on the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *Waffle House*, 534 U.S. at 289 (internal quotation marks omitted). The Court accordingly has explained that when an agreement concerns arbitration, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to the issues of arbitrability." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

And the dispute here falls squarely within this principle: "arbitrability" is the term the Court has used to encompass "threshold issues concerning the arbitration agreement," "such as whether the parties have agreed to arbitrate." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010). That, of course, is the question in this case.

Here:

- the parties unquestionably acknowledged and entered into a binding contract;
- the contract contains an express and unambiguous arbitration provision—there is no dispute either that the Condominium Declaration is binding on respondents or that the language of the Condominium Declaration's arbitration provision, viewed in isolation, requires arbitration of this dispute;
- no other language in the contract expressly precludes recourse to arbitration (or, indeed, mentions arbitration at all); and
- the only issue is whether other elements of the contract, by implication, somehow detract

> from or limit the applicability of the arbitration clause.

"In assessing whether an agreement to arbitrate has been made, * * * '[c]ourts are to examine the language of the contract in light of the strong federal policy in favor of arbitration. Likewise, any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration.'" *Great Earth Cos., Inc.* v. *Simons*, 288 F.3d 878, 889 (6th Cir. 2002); see also *Moses H. Cone*, 460 U.S. at 24 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

This principle should apply with full force where different documents comprising a single contract contain both an express, unambiguous arbitration clause on the one hand, and venue and related clauses that say nothing about arbitration on the other. In closely analogous circumstances, courts consistently have held that, when parties have executed an express arbitration provision, any subsequent or separate agreement that contains a venue selection or similar clause will not be interpreted to displace or abrogate the existing arbitration agreement unless the intent to do so is clearly expressed.

Again, as the Second Circuit explained:

> Under our cases, if there is a reading of the various agreements that permits the Arbitration Clause to remain in effect, we must choose it: "[T]he existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an inter-

> pretation that covers the asserted dispute." * * * In the circumstances presented to us in this appeal, we cannot say that the Forum Selection Clause, which does not even mention arbitration, either "specifically precludes" arbitration or contains a "positive assurance" that this dispute is not governed by the Arbitration Agreement.

Bank Julius Baer, 424 F.3d at 284; accord *AT&T Techs.*, 475 U.S. at 650 (Arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.").

Courts faced with such disputes have been guided by "the strong federal policy in favor of arbitration." *Bank Julius Baer*, 424 F.3d at 281; see also, *e.g.*, *Personal Sec. & Safety Sys.*, 297 F.3d at 392. The same approach is proper in the very similar circumstance of this case, where the separate documents comprising the contract contain an express arbitration clause and a venue selection clause that is silent as to arbitration.[7]

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[7] These cases differ from decisions where the party resisting arbitration disputed assenting to the contract *at all*, leaving it unclear whether that party is bound by the arbitration clause. Courts generally have declined to apply the presumption favoring arbitration in those circumstances. See, *e.g*, *Auto Parts Mfg. Miss., Inc.* v. *King Constr. of Houston, L.L.C.*, 782 F.3d 186, 197 (5th Cir. 2015), petition for cert. filed, No. 15-177 (U.S. Aug. 10, 2015); *UBS Fin. Servs., Inc.* v. *Carilion Clinic*, 706 F.3d 319, 324 n.2 (4th Cir. 2013); *Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1103-04 (9th Cir. 2006); *Dumais* v. *Am. Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002); *McCarthy* v. *Azure*, 22 F.3d 351, 355 (1st Cir. 1994).

This Court itself took a similar tack in *Mastrobuono*, which addressed the question whether a contract permitted the arbitrator to award punitive damages. The party opposing arbitration pointed to a contractual choice-of-law provision that applied New York law, noting that New York allowed only courts and not arbitrators to award punitive damages. 514 U.S. at 56-58. But this Court explained that "when read separately [the contract's arbitration] clause strongly implies that an arbitral award of punitive damages is appropriate"; that "[a]t most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards"; and that "when a court interprets such provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Id.* at 62 (quoting *Volt Info. Sci., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)). That reasoning is logically applicable where, as here, the arbitration clause "when read separately" makes the dispute arbitrable and other contractual clauses "[a]t most * * * introduce[] an ambiguity."[8]

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[8] The Court also invoked the "common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it" (*Mastrobuono*, 514 U.S. at 62), a rule that in *Mastrobuono* favored arbitration. See *id.* at 62-63. The court below noted that rule in passing, in its description of background principles of Hawaii law. See App., *infra*, 13a. But the Hawaii Supreme Court did not invoke that rule in its decision, instead relying on its determination that an agreement to arbitrate must be "unambiguous." The latter rule cannot be squared with the FAA.

The decision below cannot be reconciled with these holdings. The Hawaii Supreme Court expressly ruled that a finding of ambiguity precludes arbitration (App., *infra*, 13a); other courts have held that "if there is a reading of the various agreements that permits the Arbitration Clause to remain in effect, we must choose it." *Bank Julius Baer*, 424 F.3d at 284. The latter approach is the correct one.

C. The Question Presented Here Involves Frequently-Recurring Issues That Warrant Review.

1. The error committed by the Court below warrants this Court's intervention, for a number of reasons. *First*, as the Court has recognized on several occasions, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], * * * including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012) (per curiam); see also *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam).

The error in this case, moreover, which singled out and disfavored arbitration in a manner that reflects the "longstanding judicial hostility to arbitration agreements" (*Waffle House*, 534 U.S. at 289 (internal quotation marks omitted)), is one that this Court repeatedly has condemned.

Second, the particular issue presented in this case—involving the proper treatment of a contract involving several documents, one containing an unambiguous arbitration provision and the others containing venue and related clauses that are silent on

the subject of arbitration—arises frequently. As the reported decisions illustrate, commercial contracts more often than not take that form. See cases cited at pages 12-14, *supra*. It therefore is essential that courts understand how the federal policy favoring arbitration and the principle that "'ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration'" (*Mastrobuono,* 514 U.S. at 62) properly apply in this context.

Holdings like the ruling below can be expected to cause confusion and generate litigation on this frequently-recurring question. They open the door to conflicting interpretations of similar (or identical) contracts, in a manner that undermines the national policy favoring arbitration and that defeats the expectations of parties that have structured their contractual relations in reliance on that policy.

2. Given the "obvious" nature of the error below (*Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006)) in failing to follow the "straightforward" approach dictated by this Court's precedents (*Concepcion*, 131 S. Ct. at 1747), the Court might wish to consider summary reversal of the Hawaii Supreme Court's decision.[9]

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[9] We note that the Hawaii Supreme Court's discussion of unconscionability does not insulate its holding regarding arbitration from review. The analysis of unconscionability did not provide a separate ground for refusing to find an enforceable arbitration agreement; the lower court concluded only that two aspects of the arbitration agreement were unconscionable—the court referred to "unconscionable terms"—and therefore invalid. App., *infra*, 16a-26a. The unconscionability rulings therefore were not relied upon as a separate basis for invalidating the arbitration agreement as a whole. Nor could they have been, as the arbitration provision contains a severability clause.

The Court has taken that step no fewer than three times in recent years to set aside similar manifest failures by state courts to adhere to this Court's arbitration rulings. See *Marmet*, 132 S. Ct. at 1202 (state court erred "by misreading and disregarding the precedents of this Court interpreting the FAA"); *Cocchi*, 132 S. Ct. at 26 (state court "fail[ed] to give effect to the plain meaning of the [FAA]"); *Nitro-Lift Techs.*, 132 S. Ct. at 503 (state court decision "disregard[ed] this Court's precedents on the FAA"); see also *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2002) (per curiam) (state court in arbitration case took an "improperly cramped view of Congress'

We suggest, moreover, that, if the Court does set aside the Hawaii Supreme Court's arbitration holding, it should vacate the Hawaii court's unconscionability analysis and remand the case so that the unconscionability question may be reconsidered in light of the arbitration principles articulated by this Court. It is not entirely clear *why* the Hawaii court addressed unconscionability or what impact it expected its unconscionability discussion to have; having already held that the arbitration provision was altogether unenforceable, it is not evident what further effect the court expected its holding that *particular* provisions of the arbitration agreement were unconscionable could have in this case. Given this uncertainty, if this Court sets aside the underlying enforceability ruling, the Hawaii court should reconsider its unconscionability ruling in light of the strong federal policy—not addressed by the Hawaii court in its unconscionability analysis—that courts must enforce arbitration agreements "according to their terms." *Concepcion*, 131 S. Ct. at 1745. Cf. *Marmet*, 132 S. Ct. at 1204 (after reversing a state court's holding of non-arbitrability that was premised on a blanket state rule "against [certain] pre-dispute arbitration agreements," this Court vacated the state court's "'alternativ[e]' holding that the particular arbitration clauses [at issue] were unconscionable" and sent the case back for a determination whether, "absent that [invalid] general public policy [against pre-dispute arbitration agreements], the arbitration clauses [at issue] are unenforceable").

Commerce Clause power" that was inconsistent with this Court's holdings).

Such a result is especially warranted in this case because the decision below is a clear outlier in its hostility to arbitration. See, *e.g.,* Liz Kramer, *Hawaii Finds Arbitration Agreement With "Severe Limitations on Discovery" is Unconscionable*, Arbitration Nation (June 19, 2015), http://perma.cc/85PP-ZMNY ("If there is a continuum of state arbitration decisions, varying from hostile to arbitration on one end to rubber-stamping of arbitration on the other end, I think Hawaii just situated itself on the very hostile end, even further than California and Missouri.").

Alternatively, the Court might wish to hold the petition for certiorari in this case pending resolution of *DIRECTV, Inc.* v. *Imburgia*, No. 14-462 (U.S. Mar. 23, 2015), a case involving the preemptive effect of the FAA that will be argued before the Court on October 6, and then dispose of this case as appropriate in light of the *DIRECTV* decision. Although the question presented in *DIRECTV* is not identical to the one in this case, the cases are similar in significant respects.

Thus, the defendant in *DIRECTV* argues for application of some of the same principles that govern this case, among them that courts must interpret contracts in light of substantive federal arbitration rules—especially those requiring that all doubts be resolved in favor of arbitration; that courts must harmonize other contractual provisions with an arbitration clause; and that, if the contractual language is ambiguous, "the court would [be] constrained to compel arbitration." Pet. Br. at 22, *DIRECTV*, No. 14-462 (U.S. May 29, 2015), 2015 WL 3505225; see also *id.* at 12-14. As a consequence, the Court's deci-

sion in *DIRECTV* will likely have a significant bearing on the issue in this case.

In all events, the court below premised its ruling on principles that are "specific to arbitration and preempted by the FAA." *Marmet*, 132 S. Ct. at 1204. That decision should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
ARCHIS A. PARASHARAMI
JEFFREY H. REDFERN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

OCTOBER 2015

APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF HAWAI'I

Krishna NARAYAN; Sherrie Narayan; Virendra Nath; Nancy Makowski; Keith MacDonald as Co–Trustee for the DKM Trust Dated October 7, 2011; Simon Yoo; Sumiyo Sakaguchi; Susan Renton, as Trustee for the Renton Family Trust Dated 12/3/09; Stephen Xiang Pang; Faye Wu Liu; Massy Mehdipour as Trustee for Massy Mehdipour Trust Dated June 21, 2006; G. Nicholas Smith; Tristine Smith; Ritz 1303 Re, LLC, a Colorado Limited Liability Company; and Bradley Chaffee as Trustee of the Charles V. Chaffee BRC Stock Trust Dated 12/1/99 and the Clifford W. Chaffee BRC Stock Trust Dated 1/4/98,

Petitioners/Plaintiffs–Appellees,

v.

The RITZ–CARLTON DEVELOPMENT COMPANY, INC.; The Ritz–Carlton Management Company, LLC; John Albert; Edgar Gum,

Respondents/Defendants–Appellants,

and

Marriott International Inc.; Maui Land & Pineapple Co., Inc.; Exclusive Resorts, LLC; Kapalua Bay, LLC; Association of Apartment Owners of Kapalua Bay Condominium; Caroline Peters Belsom; Cathy Ross; Robert Parsons; Ryan Churchill; The Ritz–Carlton Hotel Company, L.L.C.; Marriott Vacations Worldwide, Corporation; Marriott Ownership Resorts, Inc.; Marriott Two Flags, LP; MH Kapalua Venture, LLC; MLP KB Partner LLC; Kapalua Bay Holdings, LLC;

ER Kapalua Investors Fund, LLC; ER Kapalua Investors Fund Holdings, LLC; Exclusive Resorts Development Company, LLC; and Exclusive Resorts Club I Holdings, LLC,

Respondents/Defendants.

No. SCWC–12–0000819

June 3, 2015

Before: RECKTENWALD, C.J., NAKAYAMA, McKENNA and POLLACK, JJ., and Circuit Judge NAKASONE, in place of ACOBA, J., recused.

Opinion of the Court by NAKAYAMA, J.

In this appeal we address whether the plaintiffs, a group of individual condominium owners, can be compelled to arbitrate claims arising from financial problems at a Maui condominium project. We hold that because the condominium owners did not unambiguously assent to arbitration, the purported agreement to arbitrate is unenforceable. We also address the doctrine of unconscionability.

I. BACKGROUND

A. A. Factual History

This case arose from the financial breakdown of a Maui condominium development formerly known as the Ritz–Carlton Club & Residences at Kapalua Bay (the project). The project consists of 84 private ownership condominium units and was developed by Defendant Kapalua Bay, LLC (the developer), a joint venture owned by Defendants Marriott International, Inc. (Marriott), Exclusive Resorts, Inc., and Maui

Land & Pineapple Co., Inc. Petitioners/Plaintiffs–Appellees Krishna Narayan, et al. (collectively the Homeowners) purchased ten of the condominiums units from the developer. The developer owns 56 of the condominium units. The Homeowners, the developer, and other third-party owners comprise the Association of Apartment Owners of Kapalua Bay Condominium (AOAO).

Respondents/Defendants–Appellants the Ritz–Carlton Development Company, Inc. (RCDC) and the Ritz–Carlton Management Company, LLC (RCMC) were the original development and management companies for the project, and were then wholly-owned subsidiaries of Marriott. Respondents/Defendants–Appellants John Albert (Albert) and Edgar Gum (Gum) served on the board of directors of the AOAO while allegedly being employed by either Marriott or Ritz–Carlton.

1. The Financial Breakdown of the Project

In April of 2012, the Homeowners learned that the developer and its affiliated entities had defaulted on loans encumbering the project.[1] As a result, the developer could not pay several months of maintenance and operator fees to Marriott's management subsidiaries, and it defaulted on its corresponding AOAO assessments. Due to these problems, Marriott decided to abandon the project and to pull its valuable Ritz–Carlton branding. In the course of its departure, Marriott or one of its subsidiaries used its authority as managing agent to withdraw approximate-

[1] These facts, drawn from the pleadings, are taken as true for the limited purpose of reviewing Respondents' motion to compel arbitration. *See Douglass v. Pflueger Hawaii, Inc.*, 110 Hawai'i 520, 524–25, 135 P.3d 129, 133-34 (2006).

ly $1,300,000.00 from the AOAO's operating fund, and threatened to withdraw the remaining $200,000.00 from the fund. AOAO board members, many of whom were employed by Marriott, Ritz–Carlton, and/or other interested entities, did not attempt to block Marriott from taking these actions. Instead, the AOAO board indicated that the multi-million dollar shortfall would have to be covered by the Homeowners.

2. Documents Governing the Project

Prior to the sale of individual condominium units, several documents relating to the governance of the project were recorded in the State of Hawai'i Bureau of Conveyances pursuant to the requirements of Hawai'i Revised Statutes (HRS) Chapter 514A. These documents included the Declaration of Condominium Property Regime of Kapalua Bay Condominium (condominium declaration) and the Association of Apartment Owners of Kapalua Bay Condominium Bylaws (AOAO bylaws). Additionally, the developer registered a Condominium Public Report (public report) with the Hawaii Real Estate Commission. These documents were incorporated by reference through purchase agreements that the Homeowners executed when they purchased their condominiums.

a. *The Purchase Agreements*

The Homeowners entered into purchase agreements with the developer soon after the documents governing the project were recorded.[2] The first page of the purchase agreements state:

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[2] Representative purchase agreements from two of the Homeowners were cited by the parties. These agreements appear to

> ACKNOWLEDGMENT OF RECEIPT, OPPORTUNITY TO REVIEW, AND ACCEPTANCE OF PROJECT DOCUMENTS
>
> THE FOLLOWING DOCUMENTS THAT ARE REFERRED TO IN THIS PURCHASE AGREEMENT FORM AN ESSENTIAL PART HEREOF. PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED COPIES OF EACH OF THE FOLLOWING DOCUMENTS AND THAT PURCHASER HAS HAD A FULL AND COMPLETE OPPORTUNITY TO READ, REVIEW AND EXAMINE EACH OF THE FOLLOWING DOCUMENTS.
>
> ....
>
> 2. the applicable state of Hawaii Condominium Public Report(s)
>
> 3. the Declaration of Condominium Property Regime of Kapalua Bay Condominium
>
> 4. the Bylaws of the Association of Apartment Owners of Kapalua Bay Condominium

The purchase agreements also contain a clause entitled "Purchaser's Approval and Acceptance of Project Documentation," which states:

> Purchaser acknowledges ... having had a full opportunity to read and review and hereby approves and accepts the following documents ...: the Condominium Public Report(s) indicated in Section C.5, above, the Declaration, the Bylaws.... It is understood and

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be identical and were signed by these Homeowners in late May of 2006.

> agreed that this sale is in all respects subject to said documents.

The Homeowners do not dispute that they received the condominium declaration, the public report, and the AOAO bylaws along with their purchase agreements.

The arbitration clause at issue in this case appears in the condominium declaration, which is referenced more than twenty times in the purchase agreements and in a variety of contexts. For example, the purchase agreements state: "Seller ... reserves the right to utilize unassigned or guest parking spaces described in the Declaration." The purchase agreements also state: "Purchaser agrees to purchase from Seller, in fee simple, the following property: a. The Apartment designated in Section A above and more fully described in the Declaration." Thus, on many occasions, the purchaser is put on notice that more specific information concerning particular rights and obligations is contained in the condominium declaration.

The purchase agreements contain two clauses related to dispute resolution:

> 47. Waiver of Jury Trial. Seller and Purchaser hereby expressly waive their respective rights to a jury trial on any claim or cause of action that is based upon or arising out of this Purchase Agreement.... Venue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, State of Hawai'i.
>
> 48. Attorneys['] Fees. If any legal or other proceeding, including arbitration, is brought ... because of an alleged dispute, breach, de-

> fault or misrepresentation in connection with any provisions of this Agreement, the successful or prevailing party or parties shall be entitled to recover reasonable attorneys' fees, court costs and all expenses even if not taxable as court costs, ... in addition to any other relief to which such party or parties may be entitled.

These clauses do not mention a binding agreement to arbitrate, nor do they direct the purchaser to the alternative dispute resolution clause in the condominium declaration.

b. *The Condominium Declaration*

The arbitration clause at issue in this case appears on pages 34 and 35 of the 36–page condominium declaration. It states:

> XXXIII. ALTERNATIVE DISPUTE RESOLUTION.
>
> In the event of the occurrence of any controversy or claim arising out of, or related to, this Declaration or to any alleged construction or design defects pertaining to the Common Elements or to the Improvements in the Project ("dispute"), ... the dispute shall be resolved by arbitration pursuant to this Article and the then-current rules and supervision of the American Arbitration Association.

The arbitration clause contains several other relevant provisions. First, it states: "The arbitration shall be held in Honolulu, Hawaii before a single arbitrator who is knowledgeable in the subject matter

at issue." Second, it states: "The arbitrator shall not have the power to award punitive, exemplary, or consequential damages, or any damages excluded by, or in excess of, any damage limitations expressed in this Declaration." Third, it states:

> The arbitrator may order the parties to exchange copies of nonrebuttable exhibits and copies of witness lists in advance of the arbitration hearing. However, the arbitrator shall have no other power to order discovery or depositions unless and then only to the extent that all parties otherwise agree in writing.

Fourth, it states: "Neither a party, witness, [n]or the arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiation, mediation, or arbitration hereunder without prior written consent of all parties." Finally, it states:

> No party may bring a claim or action regardless of form, arising out of or related to this Declaration ... including any claim of fraud, misrepresentation, or fraudulent inducement, more than one year after the cause of action accrues, unless the injured party cannot reasonably discover the basic facts supporting the claim within one year.

c. *The Public Report and the AOAO Bylaws*

The purchase agreements also incorporate the terms of the public report and the AOAO bylaws. With respect to dispute resolution, the public report states:

> The Condominium Property Act (Chapter 514A, HRS), the Declaration, Bylaws, and House Rules control the rights and obligations of the apartment owners with respect to the project and the common elements, to each other, and to their respective apartments. The provisions of these documents are intended to be, and in most cases are, enforceable in a court of law.

The AOAO bylaws main reference to dispute resolution is an attorney's fees provision that awards fees and costs to the prevailing party in certain types of disputes.

B. Procedural History

On June 7, 2012, the Homeowners filed suit in the Circuit Court of the Second Circuit (circuit court) asserting claims for breach of fiduciary duty, "access to books and records," and injunctive/declaratory relief.[3] Respondents filed a motion to compel arbitration on July 5, 2012, which was summarily denied by the circuit court after a hearing.

Respondents appealed to the ICA. They argued that the circuit court gravely erred when it denied their motion because a valid arbitration agreement existed, this dispute fell within the scope of that agreement, and because the arbitration terms were conscionable. In their Answering Brief, the Homeowners argued that they had not assented to arbitration terms "buried" in a condominium declaration, that the terms of their purchase agreements created ambiguity regarding their assent to arbitrate, and

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[3] The Honorable Joseph E. Cardoza presided.

that even if they had agreed to arbitrate, this dispute fell outside the scope of that agreement. The Homeowners also argued that the arbitration clause was unconscionable because it severely limited discovery, imposed a one-year statute of limitations, and served to unilaterally shield Ritz–Carlton and its partners from liability.

The Intermediate Court of Appeals (ICA) rejected all of the Homeowners' arguments. It held that the parties had entered a valid agreement to arbitrate and that this dispute fell within the scope of that agreement. The ICA also held that the Homeowners could not establish that the arbitration clause was procedurally unconscionable because they received reasonable notice of the arbitration provision, signed an acknowledgment, and had the right to cancel their purchase agreements within thirty days of receiving the public report. The ICA did not address the alleged substantive unconscionability of the arbitration terms. The ICA also separately held that the arbitration clause was not an unenforceable contract of adhesion because the Homeowners were not "subjected to 'oppression' or a lack of all meaningful choice; individual Homeowners could elect to buy property subject to the recorded Declaration and the arbitration clause, or not."

II. STANDARD OF REVIEW

"[T]his court reviews the decisions of the ICA for (1) grave errors of law or fact or (2) obvious inconsistencies in the decision of the ICA with that of the supreme court, federal decisions, or its own decisions." *State v. Wheeler,* 121 Hawai'i 383, 390, 219 P.3d 1170, 1177 (2009) (citing HRS § 602-59(b) (Supp.2012)).

"A petition to compel arbitration is reviewed *de novo." Siopes v. Kaiser Found. Health Plan, Inc.,* 130 Hawai'i 437, 446, 312 P.3d 869, 878 (2013). "The standard is the same as that which would be applicable to a motion for summary judgment, and the trial court's decision is reviewed 'using the same standard employed by the trial court and based upon the same evidentiary materials as were before [it] in determination of the motion.'" *Brown v. KFC Nat'l Mgmt. Co.,* 82 Hawai'i 226, 231, 921 P.2d 146, 151 (1996) (brackets in original) (quoting *Koolau Radiology, Inc. v. Queen's Medical Ctr.,* 73 Haw. 433, 439–40, 834 P.2d 1294, 1298 (1992)).

III. DISCUSSION

The Federal Arbitration Act (FAA) governs arbitration agreements that involve "commerce among the several states," 9 U.S.C. §§ 1–2 (1947), and "reflects the fundamental principle that arbitration is a matter of contract." *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Accordingly, it "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Id.* (internal citations omitted). The parties do not dispute the applicability of the FAA to their dispute.

"'[W]hen presented with a motion to compel arbitration, the court is limited to answering two questions: 1) whether an arbitration agreement exists between the parties; and 2) if so, whether the subject matter of the dispute is arbitrable under such agreement.'" *Douglass v. Pflueger Hawaii, Inc.,* 110 Hawai'i 520, 530, 135 P.3d 129, 139 (2006) (brackets omitted) (quoting *Koolau Radiology Inc.,* 73 Haw. at 445, 834 P.2d at 1300). Pursuant to the FAA, we ap-

ply general state-law principles of contract interpretation to questions of contract formation, *Perry v. Thomas,* 482 U.S. 483, 492 n.9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), while resolving ambiguities as to the scope of arbitration in favor of arbitration. *See Lee v. Heftel,* 81 Hawai'i 1, 4, 911 P.2d 721, 724 (1996); *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 23, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). However, "the mere existence of an arbitration agreement does not mean that the parties must submit to an arbitrator disputes which are outside the scope of the arbitration agreement." *Brown,* 82 Hawai'i at 244, 921 P.2d at 164 (citation and internal quotation marks omitted). "What issues, if any, are beyond the scope of a contractual agreement to arbitrate depends on the wording of the contractual agreement to arbitrate." *Rainbow Chevrolet, Inc. v. Asahi Jyuken (USA), Inc.,* 78 Hawai'i 107, 113, 890 P.2d 694, 700 (App.1995). An arbitration agreement is interpreted like a contract, and "as with any contract, the parties' intentions control." *Heftel,* 81 Hawai'i at 4, 911 P.2d at 724. "The party seeking to compel arbitration carries the initial burden of establishing that an arbitration agreement exists between the parties." *Siopes,* 130 Hawai'i at 446, 312 P.3d at 878.

A. The Existence of an Arbitration Agreement

This court has addressed the formation of an agreement to arbitrate on a number of occasions. *See, e.g., Siopes,* 130 Hawai'i 437, 312 P.3d 869; *Douglass,* 110 Hawai'i 520, 135 P.3d 129; *Brown,* 82 Hawai'i 226, 921 P.2d 146; *Luke v. Gentry Realty, Ltd.,* 105 Hawai'i 241, 96 P.3d 261 (2004). The following three elements are necessary to prove the existence of an

enforceable agreement to arbitrate: "(1) it must be in writing; (2) it must be unambiguous as to the intent to submit disputes or controversies to arbitration; and (3) there must be bilateral consideration." *Douglass,* 110 Hawai'i at 531, 135 P.3d at 140 (emphasis added). In this case, the arbitration clause appears in writing and the Homeowners have not argued that it lacks bilateral consideration. Thus, we are only concerned with the second requirement. "With respect to the second requirement, 'there must be a mutual assent or a meeting of the minds on all essential elements or terms to create a binding contract.'" *Siopes,* 130 Hawai'i at 447, 312 P.3d at 879 (emphasis omitted) (quoting *Douglass,* 110 Hawai'i at 531, 135 P.3d at 140). "The existence of mutual assent or intent to accept is determined by an objective standard." *Id.*

This court has identified at least two circumstances where the requisite unambiguous intent to arbitrate may be lacking. First, where a contract contains one or more dispute resolution clauses that conflict, we have resolved that ambiguity against the contract drafter and held that the parties lacked the unambiguous intent to arbitrate. For example, in *Luke,* we held that an arbitration clause was unenforceable where the ambiguity between it and a reservation of remedies clause meant that a reasonable buyer "would not know whether she or he maintained the right to judicial redress or whether she or he had agreed to arbitrate any potential dispute." 105 Hawai'i at 249, 96 P.3d at 269.

Second, where a party has received insufficient notice of an arbitration clause in a document that is external to the contract that the party signed, we have held that the party lacked the unambiguous in-

tent to arbitrate and that the purported agreement was unenforceable. For example, in *Siopes,* this court held that an arbitration clause was unenforceable where it was not contained in a document that was made available to the plaintiff at the time he executed his contract and where nothing in the surrounding circumstances suggested that the plaintiff was otherwise on notice of the arbitration provision. 130 Hawai'i at 452, 312 P.3d at 884. Likewise, in *Douglass,* we held that an arbitration clause contained in an employee handbook was unenforceable where the employment contract that the employee signed did not contain the arbitration provision or notify employee of the provision, the handbook stated that its policies were merely guidelines, the arbitration provision was not boxed off or otherwise set apart from the other provisions in the handbook, and there was no evidence that the employee was ever informed of the existence of the arbitration provision. 110 Hawai'i at 531–32, 135 P.3d at 140-41. By contrast, in *Brown,* this court held that an arbitration clause was enforceable where it was conspicuously labeled and boxed off in the "Employee Rights" subsection of an employment application, and where the applicant's signature line appeared right below the arbitration clause. 82 Hawai'i at 239–40, 921 P.2d at 159–60.

In this case, the purported agreement to arbitrate is unenforceable because it is ambiguous when taken together with the terms of the purchase agreements and the public report. The purchase agreements contain a provision that states: "Venue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, State of Hawai'i." This conflicts with the arbitration term stating that all claims "arising out of" the condomin-

ium declaration "shall be decided by arbitration," and that the "arbitration shall be held in Honolulu, Hawaii." Given that the purchase agreements reference the condominium declaration more than twenty times and that both documents contain dispute resolution provisions that use broad language to define their scope, a dispute may arise out of both the purchase agreement and the declaration. It is facially ambiguous whether those disputes would be consigned to arbitration in Honolulu pursuant to the condominium declaration or the "Second Circuit Court" pursuant to the purchase agreement.

The public report creates further ambiguity. It states: "[T]he Declaration, Bylaws, and House Rules control the rights and obligations of the apartment owners.... The provisions of these documents are intended to be, and in most cases are, enforceable in a court of law." A reasonable buyer presented with these documents "would not know whether she or he maintained the right to judicial redress or whether she or he had agreed to arbitrate any potential dispute." *Luke,* 105 Hawai'i at 249, 96 P.3d at 269. "Resolving this ambiguity in favor of the Plaintiffs, we cannot say that the Plaintiffs agreed to submit the claims made in this litigation to arbitration." *Id.*

In sum, we hold that the arbitration provision contained in the condominium declaration is unenforceable because the terms of the various condominium documents are ambiguous with respect to the Homeowners' intent to arbitrate. *Luke,* 105 Hawai'i at 249, 96 P.3d at 269. The ICA gravely erred when it concluded that the parties had formed a valid and enforceable agreement to arbitrate.

B. Unconscionability

The FAA provides that an agreement to arbitrate is unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, like other contracts, arbitration provisions "may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rent–A–Center, West, Inc.,* 130 S.Ct. at 2776 (internal quotation marks and citation omitted). "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996). Although our determination regarding the existence of an arbitration agreement is dispositive in this case, the arbitration clause also contains unconscionable terms.

"'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Siopes,* 130 Hawai'i at 458, 312 P.3d at 890 (quoting *City & Cnty. of Honolulu v. Midkiff,* 62 Haw. 411, 418, 616 P.2d 213, 218 (1980)). Stated otherwise, "a determination of unconscionability requires a showing that the contract was both procedurally and substantively unconscionable." *Balogh v. Balogh,* 134 Hawai'i 29, 41, 332 P.3d 631, 643 (2014) (internal quotations, alterations, and citation omitted); *see also Lewis v. Lewis,* 69 Haw. 497, 502, 748 P.2d 1362, 1366 (1988) ("[T]wo basic principles are encompassed within the concept of unconscionability, one-sidedness and unfair surprise.").

Our caselaw defining when a contract of adhesion is unenforceable is best understood as a subset

of unconscionability that utilizes the two-part unconscionability inquiry described above. We have stated:

> a contract that is "adhesive"–in the sense that it is drafted or otherwise proffered by the stronger of the contracting parties on a "take it or leave it" basis–is unenforceable if two conditions are present: (1) the contract is the result of coercive bargaining between parties of unequal bargaining strength; and (2) the contract unfairly limits the obligations and liabilities of, or otherwise unfairly advantages, the stronger party.

Brown, 82 Hawai'i at 247, 921 P.2d at 167. The first condition corresponds to procedural unconscionability and the second condition corresponds to substantive unconscionability.

Although both procedural and substantive unconscionability are required in most cases, they need not be present in the same degree. *See Balogh,* 134 Hawai'i at 41, 332 P.3d at 643. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation ... in proportion to the greater harshness or unreasonableness of the substantive terms themselves." 15 Samuel Williston, *Contracts* § 1763A (3d ed. 1972). "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable." *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000). Indeed, we have stated that "there may be exceptional cases where a provision of the contract is

so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." *Balogh,* 134 Hawai'i at 41, 332 P.3d at 643 (internal quotations and citation omitted). Here, the ICA gravely erred by placing dispositive weight on procedural unconscionability without addressing the alleged substantive unconscionability of the arbitration terms. In addition, the ICA gravely erred when it concluded that the Homeowners had failed to demonstrate procedural unconscionability.

1. Procedural Unconscionability

"The procedural element unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice." *Gillman v. Chase Manhattan Bank, NA.,* 73 N.Y.2d 1, 537 N.Y.S.2d 787, 534 N.E.2d 824, 828 (1988). This analysis is narrowed in the context of adhesion contracts, because the term "adhesion contract" refers to contracts that are "drafted or otherwise proffered by the stronger of the contracting parties on a 'take it or leave it' basis." *Brown,* 82 Hawai'i at 247, 921 P.2d at 167. "Consequently, the terms of the contract are imposed upon the weaker party who has no choice but to conform." *Id.* Although adhesion contracts are not unconscionable *per se,* they are defined by a lack of meaningful choice, and thus, often satisfy the procedural element of unconscionability.

For example, in *Brown,* a prospective employee was "offered the possibility of employment on a take it or leave it form ... that had to be filled out and signed by [the plaintiff] if he wanted to be considered for employment with KFC." 82 Hawai'i at 247, 921 P.2d at 167. Based on that fact alone, this court held that procedural unconscionability, was present "insofar as [the plaintiff's] submission to the arbitration

agreement was the result of coercive bargaining between parties of unequal bargaining strength." *Id.* (quotation marks omitted). In other words, the adhesive nature of the terms contained in KFC's employment application satisfied the procedural element of unconscionability. *Id.*

In this case, there is a higher degree of procedural unconscionability than was present in *Brown.* Not only was the declaration drafted by a party with superior bargaining strength, it was recorded in the bureau of conveyances prior to the execution of the purchase agreements. The Homeowners had no choice but to conform to the terms of the declaration as recorded if they wanted to purchase a Ritz–Carlton condominium on Maui. Thus, the declaration is " 'adhesive'–in the sense that it [was] drafted or otherwise proffered by the stronger of the contracting parties ... 'on a take this or nothing basis." *Brown,* 82 Hawai'i at 247, 921 P.2d at 167. Additionally, there is an element of unfair surprise that was not present in *Brown:* The arbitration clause was buried in an auxiliary document and was ambiguous when read in conjunction with the purchase agreements and the public report. For these reasons, the Homeowners satisfied the procedural prong of the test for unconscionability.

The ICA applied a different test for procedural unconscionability, requiring that "the party seeking to avoid enforcement had no viable alternative source to obtain the services contracted for." Although a lack of viable alternatives may provide some indicia of procedural unconscionability, it is by no means a necessary or dispositive factor. *See Potter v. Hawaii Newspaper Agency,* 89 Hawai'i 411, 424, 974 P.2d 51, 64 (1999) (stating only that "[t]he dis-

parity of bargaining power was made more acute by the paucity of employment opportunities available to young people" (emphasis added)).

In addition, the ICA's application of *Ass'n of Apartment Owners of Waikoloa Beach Villas ex rel. Bd. of Dirs. v. Sunstone Waikoloa, LLC,* 129 Hawai'i 117, 122, 295 P.3d 987, 992 (App. 2013), was erroneous. In *Waikoloa Beach Villas,* the ICA held that an arbitration clause contained in a condominium declaration was not procedurally unconscionable because, despite the adhesive nature of the declaration, the developer's compliance with HRS Chapter 514A ensured that the condominium purchasers had received reasonable notice of the condominium declaration's terms. *Id.* The ICA supported its holding with the policy argument that a finding of procedural unconscionability would "frustrate the expectations of the purchasers, the developer, and other stakeholders who relied on the Declaration provisions." *Id.* (relying on *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC,* 55 Cal.4th 223, 145 Cal.Rptr.3d 514, 282 P.3d 1217, 1232–33 and n. 13 (2012)). The ICA also held that the arbitration provision was not substantively unconscionable. *Waikoloa Beach Villas,* 129 Hawai'i at 122–23, 295 P.3d at 992-93.

We disagree with the ICA's application of *Waikoloa Beach Villas* to the case at bar. By concluding that the arbitration clause was not procedurally unconscionable under *Waikoloa Beach Villas* without also addressing substantive unconscionability, the ICA suggested that a condominium developer could impose substantively unconscionable terms on a purchaser as long as the developer complied with the procedural requirements of HRS Chapter 514A and provided reasonable notice of the unconscionable

terms. This implication is inconsistent with the approach in *Waikoloa Beach Villas,* in which the ICA addressed both procedural and substantive unconscionability, and the legislature's purpose in enacting HRS Chapter 514A, "to protect the buying public and to create a better reception by that public for the condominium developer's product." *Ass'n of Owners of Kukui Plaza v. City and Cnty. of Honolulu,* 7 Haw. App. 60, 69, 742 P.2d 974, 980 (1987). By not addressing substantive unconscionability, the ICA could not fully determine whether the agreement was unconscionable. Conversely, to avoid the terms of a declaration a party must establish more than adhesion, the party must establish that the challenged terms are substantively unconscionable. A mere finding of procedural unconscionability would not eviscerate the terms of an HRS Chapter 514A condominium declaration.

2. Substantive Unconscionability

A contract term is substantively unconscionable where it "unfairly limits the obligations and liabilities of, or otherwise unfairly advantages, the stronger party." *Brown,* 82 Hawai'i at 247, 921 P.2d at 167. Arbitration agreements are not usually regarded as unconscionable because "the agreement 'bears equally' on the contracting parties and does not limit the obligations or liabilities of any of them." *Id.* The agreement "'merely substitutes one forum for another.'" *Leong by Leong v. Kaiser Found. Hosps.,* 71 Haw. 240, 248, 788 P.2.d 164, 169 (1990) (quoting *Madden v. Kaiser Found. Hosps.,* 17 Cal.3d 699, 131 Cal.Rptr. 882, 552 P.2d 1178, 1186 (1976)). However, an arbitration clause may be unconscionable if it unfairly deprives the party resisting arbitration an "effective substitute for a judicial forum." *Nishimura v.*

Gentry Homes, Ltd., 134 Hawai'i 143, 148, 338 P.3d 524, 529 (2014). Here, the Homeowners argue that the arbitration clause is substantively unconscionable because it "purports to: (1) effectively preclude all discovery; (2) eliminate rights to punitive, exemplary, and consequential damages; (3) require that all claims and underlying facts be kept secret, and (4) impose a one-year statute of limitations."

a. *Discovery Limitations and Confidentiality*

Limitations on discovery serve an important purpose in arbitration because "the underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process." *Kona Vill. Realty, Inc. v. Sunstone Realty Partners, XIV, LLC,* 123 Hawai'i 476, 477, 236 P.3d 456, 457 (2010) (internal citation omitted). By agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985). Thus, reasonable limitations on discovery may be enforceable in accordance with our recognition of the strong federal policy in favor of arbitration.

At the same time, adequate discovery is necessary to provide claimants "a fair opportunity to present their claims" in the arbitral forum. *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 1655, 114 L.Ed.2d 26 (1991). Although the amount of discovery that is adequate to sufficiently vindicate a party's claims does not mean unfettered discovery, see *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d 301 at 684–86 (stating that a party can agree

to something less than the full panoply of discovery permitted under the California Arbitration Act), discovery limitations that unreasonably hinder a plaintiff's ability to prove a claim are unenforceable. *See, e.g., In re Poly–America, L.P.*, 262 S.W.3d 337, 357–58 (Tex.2008) (collecting cases). In addition, some limitations on discovery that might otherwise prove unenforceable have been held enforceable because the arbitrator maintained the ability to order further discovery upon a showing of need. *See, e.g., Dotson v. Amgen, Inc.*, 181 Cal.App.4th 975, 982–84, 104 Cal.Rptr.3d 341 (2010) (holding that limiting discovery to two depositions was not unconscionable where additional discovery was available upon a showing of need).

As is the case with discovery limitations, a "[c]onfidentiality provision by itself is not substantively unconscionable[.]" *Davis v. O'Melveny & Myers,* 485 F.3d 1066, 1079 (9th Cir.2007) *overruling on other grounds recognized by Ferguson v. Corinthian Colleges, Inc.,* 733 F.3d 928, 933–34 (2013). However, where an arbitration clause contains severe limitations on discovery alongside a confidentiality provision, the plaintiff may be deprived of the ability to adequately discover material information about his or her claim. *See id.* at 1078–79 (holding unconscionable a confidentiality provision in an employment contract because it "would handicap if not stifle an employee's ability to investigate and engage in discovery"); *see also Grabowski v. Robinson,* 817 F.Supp. 2d 1159, 1176-77 (S.D.Cal.2011).

Here, the discovery limitations and confidentiality provision unconscionably disadvantage the Homeowners. The discovery limitations only allow the arbitrator to order the parties to turn over

"nonrebuttable exhibits and copies of witness lists," and precludes the arbitrator from "order[ing] discovery or depositions unless and then only to the extent that all parties otherwise agree in writing." Thus, the arbitrator does not have the ability to order additional discovery, even on a showing of need. The confidentiality provision further precludes the Homeowners from mentioning "the facts of the underlying dispute without prior written consent of all parties, unless and then only to the extent required to enforce or challenge the negotiated agreement or the arbitration award, as required by law, or as necessary for financial and tax reports and audits." If the arbitration clause were enforced as written, the Homeowners would have virtually no ability to investigate their claims, and thus, would be deprived of an adequate alternative forum. These provisions are therefore unconscionable.[4]

b. *Punitive Damage Limitations*

The Homeowners have also challenged the arbitration clause's restriction on punitive and consequential damages. "Punitive or exemplary damages are generally defined as those damages assessed in addition to compensatory damages for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future." *Masaki v. Gen. Motors Corp.,* 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (citation omitted). "Since the purpose of punitive damages is not compensation of the plaintiff but

[4] We do not decide whether the contractually shortened limitations period is unconscionable because there has been no assertion that the Homeowners' claims are barred by that provision.

rather punishment and deterrence, such damages are awarded only when the egregious nature of the defendant's conduct makes such a remedy appropriate." *Id.* "The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others." *Restatement (Second) of Torts* § 908, cmt. b (1979).

It would create an untenable situation if parties of superior bargaining strength could use adhesionary contracts to insulate "aggravated or outrageous misconduct" from the monetary remedies that are designed to deter such conduct. *Masaki,* 71 Haw. at 6, 780 P.2d at 570. For this reason, many state supreme courts that have considered the issue have held that punitive damage limitations are unconscionable. *See, e.g., Ex parte Thicklin,* 824 So.2d 723 (Ala.2002) *overruled on other grounds by* 929 So.2d 997 (Ala.2005) ("[I]t violates public policy for a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or a judicial forum."); *Armendariz,* 99 Cal.Rptr.2d 745, 6 P.3d at 680, 683 ("'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.'") (quoting California Civil Code § 1668 (1872)); *Carll v. Terminix Int'l Co., L.P.,* 793 A.2d 921, 923 (Pa.Super.Ct.2002) (holding that an arbitration agreement was unconscionable because it precluded the arbitrator from awarding special, incidental, consequential, and punitive damages); *State ex rel. Dunlap v. Berger,* 211 W.Va. 549, 567 S.E.2d 265 (2002) (holding that an arbitration agreement

which prohibited punitive damages was unenforceable as against public policy).

Hawai'i law already disfavors limiting damages for intentional and reckless conduct. In *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. Partnership,* 115 Hawai'i 201, 224, 166 P.3d 961, 984 (2007), this court held that a contract provision limiting tort liability would violate public policy to the extent that it attempted to waive liability for criminal misconduct, fraud, or willful misconduct. Further, we have acknowledged that "[e]xculpatory contracts are not favored by the law because they tend to allow conduct below the acceptable standard of care." *Fujimoto v. Au,* 95 Hawai'i 116, 155, 19 P.3d 699, 739 (2001) (quoting *Yauger v. Skiing Enterprises, Inc.,* 206 Wis.2d 76, 557 N.W.2d 60, 62 (1996)). This court has also acknowledged that "although parties might limit remedies, such as recovery of attorney's fees or punitive damages ... a court might deem such a limitation inapplicable where an arbitration involves statutory rights that would require these remedies." *See Kona Vill.,* 123 Hawai'i at 485, 236 P.3d at 465 (Acoba, J., dissenting) (quoting Uniform Arbitration Act § 4, cmt. 3 (2000)). Extending these principles, and in reliance on persuasive authority from many other state supreme courts, we endorse the view that, with respect to adhesion contracts, a contract term that prohibits punitive damages is substantively unconscionable.[5]

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[5] By contrast, parties may limit consequential damages in appropriate situations. *See, e.g.,* HRS § 490:2–712 (2008).

IV. CONCLUSION

For the foregoing reasons, we vacate the ICA's October 28, 2013 Judgment on Appeal, affirm the circuit court's August 28, 2012 order denying Respondents' motion to compel arbitration, and remand to the circuit court for further proceedings consistent with this opinion.

APPENDIX B

INTERMEDIATE COURT OF APPEALS OF HAWAI'I

Krishna NARAYAN; Sherrie Narayan; Virendra Nath; Nancy Makowski; Keith MacDonald as co–trustee for the DKM Trust dated October 7, 2011; Simon Yoo; Sumiyo Sakaguchi; Susan Renton, as trustee for the Renton Family Trust dated 12/3/09; Stephen Xiang Pang; Faye Wu Liu; Massy Mehdipour as trustee for Massy Mehdipour Trust dated June 21, 2006; G. Nicholas Smith; Tristine Smith; Ritz 1303 Re, LLC, a Colorado Limited Liability Company; and Bradley Chaffee as trustee of the Charles V. Chaffee BRC Stock Trust dated 12/1/99 and the Clifford W. Chaffee BRC Stock Trust dated 1/4/98, Plaintiffs–Appellees,

v.

The RITZ–CARLTON DEVELOPMENT COMPANY, INC.; The Ritz–Carlton Management Company, LLC; John Albert; Edgar Gum, Defendants–Appellants,

and

Marriott International, Inc.; Maui Land & Pineapple Co., Inc.; Exclusive Resorts, LLC; Kapalua Bay, LLC; Association of Apartment Owners of Kapalua Bay Condominium; Caroline Peters Belsom; Cathy Ross; Robert Parsons; Ryan Churchill; and John Does 1–10, Defendants–Appellees.

No. CAAP–12–0000819.

Aug. 23, 2013

FOLEY, Presiding J., REIFURTH and GINOZA, JJ.

MEMORANDUM OPINION

Defendants–Appellants The Ritz–Carlton Development Company, Inc.; The Ritz–Carlton Management Company, LLC; John Albert; and Edgar Gum (Defendants) appeal from the August 28, 2012 "Order Denying Defendants The Ritz–Carlton Development Company, Inc., The Ritz–Carlton Management Company, L.L.C., John Albert and Edgar Gum's Motion To Compel Arbitration And To Dismiss, Or Alternatively, Stay Proceedings Pending Arbitration" entered in the Circuit Court of the Second Circuit[6] (circuit court). On appeal, Defendants contend the circuit court erred in denying their motion to compel arbitration.

I. BACKGROUND

This appeal arises out of a dispute concerning the development of The Ritz–Carlton Residences at Kapalua Bay (Project), a residential development project in Lahaina, Maui. Plaintiffs–Appellees Krishna Narayan, et al. (Plaintiffs) are individual owners of whole ownership units at the Project. On June 7, 2012, Plaintiffs filed a complaint in the circuit court against Defendants and several other defendants who are not a party to this appeal. Plaintiffs' complaint alleged the Defendants defaulted on loans encumbering the Project, left the Project and its owners' association underfunded, and failed to adequately respond to Plaintiffs' requests for information. Plaintiffs asserted claims against all Defendants for (1) breach of fiduciary duty, (2) denial of

[6] The Honorable Joseph E. Cardoza presided.

access to the owners' association's books and records, and (3) injunctive and declaratory relief.

On July 5, 2012, Defendants filed their "Motion To Compel Arbitration And To Dismiss, Or Alternatively, Stay Proceedings Pending Arbitration." Defendants argued that certain written arbitration provisions mandated sending Plaintiffs' claims to arbitration. The "Declaration of Condominium Property Regime of Kapalua Bay Condominium" (Declaration) states, in pertinent part:

> **XXXIII. ALTERNATIVE DISPUTE RESOLUTION.**
>
> In the event of the occurrence or claim arising out of, or related to, this Declaration ... ("dispute"), if the dispute cannot be resolved by negotiation, the parties to the dispute agree to submit the dispute to mediation[.] ... If the dispute is not resolved through mediation, the dispute shall be resolved by arbitration pursuant to this Article and the then-current rules and supervision of the American Arbitration Association. The duties to mediate hereunder shall extend to any officer, employee, shareholder, principal[.]
>
> ....
>
> Issues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration; all other aspects of the dispute shall be interpreted in accordance with ... the substantive laws of the State of Hawaii.

The circuit court held a hearing on the Motion to Compel Arbitration on August 8, 2012, orally denied the motion at the hearing's conclusion, and entered

its order denying the motion on August 28, 2012. Neither the hearing transcript nor the written order states the circuit court's grounds for its decision. Defendants filed a timely notice of appeal from the order on September 26, 2012.

II. STANDARD OF REVIEW

A petition to compel arbitration is reviewed *de novo*. The standard is the same as that which would be applicable to a motion for summary judgment, and the trial court's decision is reviewed using the same standard employed by the trial court and based upon the same evidentiary materials as were before it in determination of the motion. *Sher v. Cella*, 114 Hawai'i 263, 266, 160 P.3d 1250, 1253 (App.2007) (quoting *Douglass v. Pflueger Hawaii, Inc.*, 110 Hawai'i 520, 524–25, 135 P.3d 129, 133–34 (2006)).

III. DISCUSSION

"[W]hen presented with a motion to compel arbitration, the court is limited to answering two questions: 1) whether an arbitration agreement exists between the parties; and 2) if so, whether the subject matter of the dispute is arbitrable under such agreement." *Brown v. KFC Nat'l Mgmt. Co.*, 82 Hawai'i 226, 238, 921 P.2d 146, 158 (1996). Defendants contend the arbitration clause in the Declaration required arbitration of Plaintiffs' claims. Plaintiffs respond that (1) the Declaration's arbitration provision is unenforceable because of ambiguity; (2) even if there is an unambiguous agreement to arbitrate, Plaintiffs' claims are not within the scope of that agreement; and (3) the Declaration's arbitration provision is unconscionable.

When interpreting an arbitration agreement governed by the Federal Arbitration Act, as in this

case, we "apply[ ] general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir.1996). To be valid and enforceable, an arbitration agreement must be unambiguous as to the intent to submit disputes to arbitration. *Douglass*, 110 Hawai'i at 531, 135 P.3d at 140. "As with any contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Lee v. Heftel*, 81 Hawai'i 1, 4, 911 P.2d 721, 724 (1996) (internal quotation marks and brackets omitted).

A. Whether An Arbitration Agreement Exists

There is no dispute that the Declaration in general is binding on Plaintiffs and that it contains an arbitration provision that is unambiguous on its face. *Cf. Douglass*, 110 Hawai'i at 532–33, 135 P.3d at 141–42 (concluding employee was not bound by arbitration provision contained in an employee handbook described as "guidelines" that "do not create a contract"). But Plaintiffs argue the Declaration's arbitration provision is unenforceable because language in the "Bylaws Of Association Of Apartment Owners Of Kapalua Bay Condominium" (Bylaws), their purchase agreements, and the condominium's public report create ambiguity as to whether the parties intended to submit their disputes to arbitration. We conclude nothing in the language Plaintiffs cite vitiates the Declaration's arbitration provision.

Unlike the Declaration, the Bylaws do not contain a section on dispute resolution procedures. Plaintiffs instead rely on a section titled "Abatement

And Enjoinment Of Violations By Apartment Owners," which states that the board of directors may initiate "appropriate legal proceedings, either at law or in equity[.]" Although the Hawai'i Supreme Court has concluded that such language may create ambiguity regarding the parties' intent to arbitrate, *see Luke v. Gentry Realty, Ltd.*, 105 Hawai'i 241, 249, 96 P.3d 261, 269 (2004), here, that language specifically applies to the board of directors and against owners and does not apply to Plaintiffs' claims.

The Bylaws also refer to an owner's ability to bring an "action." The Bylaws state, in pertinent part:

> Section 6. ATTORNEYS' FEES AND EXPENSES OF ENFORCEMENT.
>
> ....
>
> b. If any claim by an Owner is substantiated in any action against the Association, any of its officers or directors or its Board to enforce any provision of the Declaration, these Bylaws, the House Rules or the Act, then all reasonable and necessary expenses, costs and attorneys' fees incurred by such Owner shall be awarded to such Owner[.]

Plaintiffs argue the term "action" refers solely to legal proceedings in court and irreconcilably conflicts with the Declaration's arbitration clause, creating ambiguity.

We interpret contracts so as to give reasonable and effective meaning to all terms. *Cnty. of Hawai'i v. UNIDEV, LLC*, 129 Hawai'i 378, 395, 301 P.3d 588, 605 (2013). Assuming *arguendo* that Plaintiffs' definition of "action" is correct, the Bylaws' attor-

neys' fees provision can be understood as complementary to the arbitration clause. Under the Declaration's arbitration clause, a party may still seek relief in court in certain circumstances. The arbitration clause itself admits the possibility of litigation in court, stating: "Notwithstanding anything to the contrary in this Article, ... [a] party may seek temporary injunctive relief from any court of competent jurisdiction pending appointment of an arbitrator." A party may also file suit to enforce an arbitral award or to challenge the validity or application of the arbitration agreement. We interpret the Declaration and the Bylaws to mean that the parties are generally required to arbitrate consistent with the Declaration, but the Bylaws governs the award of attorneys' fees if a party litigates in court the limited disputes that are not subject to arbitration.

Plaintiffs' arguments based on the condominium public report and the purchase agreement language are similarly unpersuasive. The public report states: "The provisions of [the Declaration and the Bylaws] are intended to be, and in most cases are, enforceable in a court of law[,]" and the purchase agreement states: "Venue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, State of Hawaii." Because arbitration awards are "enforceable in a court of law," *e.g.*, *Krystoff v. Kalama Land Co., Ltd.*, 88 Hawai'i 209, 213–14, 965 P.2d 142, 146–47 (1998), the language can be reconciled with the arbitration clause rather than revoking it. *E.g.*, *Bank Julius Baer & Co., Ltd. v. Waxfield Ltd.*, 424 F.3d 278, 284 (2d Cir.2005) (concluding a forum selection clause in one agreement did not foreclose applying an arbitration clause contained in another agreement); *Pers. Sec. & Safety Sys. Inc. v.*

Motorola Inc., 297 F.3d 388, 395 (5th Cir.2002) (same).

B. Whether The Subject Matter Of This Dispute Is Arbitrable

Plaintiffs argue their claims arise out of the Bylaws, not from the Declaration. Therefore, the issue is whether Plaintiffs' claims are within the scope of the Declaration's provision requiring arbitration "[i]n the event of the occurrence of any controversy or claim *arising out of, or related to*, th[e] Declaration" (emphasis added).

Consistent with the strong state and federal policy favoring arbitration, arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *see also UNIDEV*, 129 Hawai'i at 394, 301 P.3d at 604. In *UNIDEV*, the Hawai'i Supreme Court held that an arbitration provision containing "arising under" language constitutes a "general" arbitration clause whose scope is broad. *Id.* at 395, 301 P.3d at 605. The supreme court concluded that the clause's general language and "[t]he failure of the parties to unambiguously limit the arbitrability of disputes suggests that they intended a longer reach for the arbitration clauses." *Id.* at 396, 911 P.2d at 606. The court also noted federal courts have uniformly concluded that language such as "arising out of or relating to" should be interpreted broadly. *Id.* at 395, 301 P.3d at 605. Given that the arbitration provision in this case uses the "arising out of, or related to" language, we conclude the clause governs a broad range of disputes relating to the Declaration.

"Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint." *UNIDEV*, 129 Hawai'i at 396, 301 P.3d at 606. Here, Plaintiffs' claims are based on allegations that the Defendants improperly failed to inform Plaintiffs of the Project developer's default on loans encumbering the Project, abandoned the Project, improperly withdrew from the owners' association's funds, and assessed the Project's operational expenses on Plaintiffs.

We conclude Plaintiffs' claims are subject to the Declaration's broad arbitration clause. The Declaration establishes the Project's existence, and it states its provisions "shall constitute covenants running with the land" and are "binding ... upon the Developer, its successors and permitted assigns, and all subsequent owners" of the Project. The Declaration defines key terms used in the Declaration and the Bylaws, including the owners' association, the board of directors, and the managing agent. It vests the Project's administration in the owners' association and sets forth the association's powers and obligations, including the power to assess the Project's expenses on owners.

Thus, Plaintiffs' claims "arise out of the relationship between the parties" created by the Declaration. *UNIDEV*, 129 Hawai'i at 397, 301 P.3d at 607. The Declaration initiated the Project's development and is essential to the overall dispute: without the Declaration, Plaintiffs' claims would not exist. The Declaration is specifically referenced throughout the Bylaws, and the Bylaws state the Declaration governs to the extent there is any conflict between the two. Because the parties inserted a broad arbitration clause in an agreement that is essential to and gov-

erns the Bylaws, we presume the parties intended the clause to reach disputes that implicate the Bylaws. The failure to insert a dispute resolution section in the Bylaws further demonstrates this intent. Therefore, Plaintiffs' claims fall within the arbitration clause's scope.

C. Whether The Arbitration Clause Is Unconscionable

Plaintiffs argue that even if their claims are within the Declaration's arbitration provision, the provision is an unenforceable adhesion contract. Under Hawai'i law, a contract is an unenforceable contract of adhesion where (1) the party seeking to avoid enforcement had no viable alternative source to obtain the services contracted for, and (2) the contract unconscionably advantages the stronger party. *Brown*, 82 Hawai'i at 247, 921 P.2d at 167.

Although we have not addressed, whether real property contracts constitute contracts of adhesion, our courts have concluded home mortgages are not contracts of adhesion because other sources of mortgage loans are available. *Aames Capital Corp. v. Hernando*, No. 26706 (Apr. 17, 2006) (SDO) ("The mortgage containing the power of sale clause was not an unenforceable contract of adhesion because there is no evidence that Aames was the only source of home mortgage loans in Kauai or that the power of sale clause was unconscionable."); *Pascua v. U.S. Bank Nat'l Ass'n*, No. 25596 (App. Sept. 29, 2004) (SDO) ("[I]t is abundantly clear that the [plaintiffs] were not forced to apply for a mortgage loan from [lender] ... amidst the myriad mortgage lenders we notice were available to them." (internal quotation marks, citations, and brackets omitted)). At least one other jurisdiction has held that a pre-printed home

purchase contract provided by a developer is not a contract of adhesion because purchasers can seek other, more attractive contracts. *State ex rel. Vincent v. Schneider*, 194 S .W.3d 853, 857–58. (Mo.2006); *cf. Aguiar v. Hawaii Hous. Auth.*, 55 Haw. 478, 498, 522 P.2d 1255, 1268 (1974) ("([T]he public housing lease is the epitome of a contract of adhesion.... An applicant for public housing has no choice but to adhere to the dictated terms; if he objects he remains in, or is relegated to, private slum housing.").

There is no factual basis to conclude that the contracts in this case were contracts of adhesion. Nothing in the record indicates Plaintiffs were subjected to "oppression" or a lack of all meaningful choice; individual homeowners could elect to buy property subject to the recorded Declaration and the arbitration clause, or not.

Moreover, Plaintiffs fail to show that the arbitration provision is unconscionable. Unconscionability in the context of arbitration agreements requires a showing of both a procedural and substantive element of unconscionability. *Brown*, 82 Hawai'i at 247, 921 P.2d at 167; *Ass'n of Apartment Owners of Waikoloa Beach Villas ex rel. Bd. of Directors v. Sunstone Waikoloa, LLC*, 129 Hawai'i 117, 121–22, 295 P.3d 987, 991–92 (2013), *aff'd in part*, v*acated in part on other grounds*, SCWC–11–0000998, 2013 WL 3364390 (Haw. June 28, 2013) (*Waikoloa Beach Villas*); *see also Branco v. Norwest Bank Minnesota, N.A.*, 381 F.Supp.2d 1274, 1280 (D.Haw.2005).

In *Waikoloa Beach Villas*, this court concluded an arbitration provision in a declaration was not procedurally unconscionable against an owners' association because there was no showing of oppression or unfair surprise. *Waikoloa Beach Villas*, 129 Hawai'i

at 122, 295 P.3d at 992. The same reasoning applies here. The record in this case shows Plaintiffs received reasonable notice of the arbitration provision. The arbitration clause's heading "**ALTERNATIVE DISPUTE RESOLUTION**" is written in bolded, capitalized letters, and the clause covers one page of the Declaration. Each purchaser acknowledged receipt of the Declaration and the "full and complete opportunity to read, review and examine" it. Each purchaser also acknowledged they had received the developer's public report, which disclosed material facts regarding the Project and advised purchasers to "[s]tudy the [P]roject's Declaration[.]" Finally, purchasers were informed of their statutory right to cancel their purchase agreement within thirty days after receiving the public report. *See* Hawaii Revised Statutes §§ 514A–36, 514A–62 (2006 Repl.). Thus, there is no element of unfair surprise or oppression in Plaintiffs' transaction, and the arbitration clause is not unconscionable and is enforceable against Plaintiffs.

IV. CONCLUSION

Based on the foregoing, we vacate the Circuit Court of the Second Circuit's August 28, 2012 "Order Denying Defendants The Ritz–Carlton Development Company, Inc., The Ritz–Carlton Management Company, L.L.C., John Albert and Edgar Gum's Motion To Compel Arbitration And To Dismiss, Or Alternatively, Stay Proceedings Pending Arbitration" and remand this case for further proceedings.

APPENDIX C

THE CIRCUIT COURT OF THE SECOND CIRCUIT STATE OF HAWAII

Krishna Narayan; Sherrie Narayan; Virendra Nath; Nancy Makowski; Keith Macdonald as co-trustee for the DKM Trust dated October 7, 2011; Simon Yoo; Sumiyo Sakaguchi; Susan Renton as trustee for the Renton Family Trust dated 12/3/09; Stephen Xiang Pang; Faye Wu Liu; Massy Mehdipour as trustee for Massy Mehdipour Trust dated June 21, 2006; G. Nicholas Smith; Tristine Smith; Ritz 1303 Re, LLC, a Colorado Limited Liability Company; and Bradley Chaffee as trustee of the Charles V. Chaffee BRC Stock Trust dated 12/1/99 and the Clifford W. Chaffee BRC Stock Trust dated 1/4/98,

Plaintiffs,

vs.

Marriott International, Inc.; The Ritz-Carlton Development Company, Inc.; The Ritz-Carlton Management Company, LLC; Maui Land & Pineapple Co., Inc.; Exclusive Resorts, LLC; Kapalua Bay, LLC; Association of Apartment Owners of Kapalua Bay Condominium; Caroline Peters Belsom; John Albert; Cathy Ross; Robert Parsons; Ryan Churchill; Edgar Gum; And John Does 1-10,

Defendants.

Civil No. 12-1-0586(3)

August 28, 2012

Order Denying Defendants The Ritz-Carlton Development Company, Inc., The Ritz-Carlton Management Company, L.L.C., John Albert And Edgar Gum's Motion To Compel Arbitration And To Dismiss, Or Alternatively, Stay Proceedings Pending Arbitration

Defendants The Ritz-Carlton Development Company, Inc., The Ritz-Canton Management Company, L.L.C., John Albert and Edgar Gum's Motion to Compel Arbitration and to Dismiss, or Alternatively, Stay Proceedings Pending Arbitration, filed July 5, 2012 (the for hearing before this Court on August 8, 2012. Lisa Cataldo, Esq. appeared on behalf of Defendants the Ritz-Carlton Development Company, Inc., the Ritz-Canton Management Company, L.L.C., John Albert and Edgar Gum. Glenn Melchinger, Esq. appeared on behalf of Defendant Marriott International, Inc., Michael Formby, Esq. appeared on behalf of Defendants Association of Apartment Owners of Kapalua Bay Condominium, Caroline Peters Belsom, Cathy Ross, Robert Parsons and Ryan Churchill. Tom Leuteneker, Esq. appeared on behalf of Defendant Maui Land and Pineapple Company, Inc. Andrew Lautenbach, Esq. and Judith Pavey, Esq. appeared on behalf of Plaintiffs.

This Court, having considered the Motion, the papers filed in support of and in opposition to the Motion, the arguments of counsel, and the pleadings and records on file in this case, hereby ORDERS that the Motion is DENIED.