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

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QUESTION PRESENTED

In a prior decision in this case, the Hawaii Supreme Court held that an agreement to arbitrate is categorically unenforceable unless the contractual text unambiguously demonstrates that the parties intended to provide for arbitration—even though Hawaii law provides that other types of contracts with ambiguous language must be enforced when the ambiguity can be resolved through extrinsic evidence. This Court vacated that decision and remanded the case for reconsideration in light of *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015), where the Court applied the Federal Arbitration Act's (FAA) requirement that state law "place arbitration contracts on 'equal footing with all other contracts'" (*id.* at 471 (citation omitted)).

On remand, the Hawaii Supreme Court again refused to enforce the arbitration agreement, but on very different grounds. This time, the state court held that certain ancillary provisions of the arbitration agreement addressing discovery, confidentiality, and punitive damages were unconscionable; and that, despite an unambiguous severance provision, the agreement to arbitrate therefore was wholly unenforceable.

The question presented is:

Whether the FAA preempts state-law rules precluding enforcement of an arbitration contract on the basis of state-law requirements that uniquely disfavor arbitration contracts and invalidate contractual provisions embodying essential features of arbitration.

RULE 14.1(b) STATEMENT

Defendants in the proceedings below 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.

Plaintiffs in the proceedings below 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; Gary Anderson; Ronald W. Lorenz; Renee Y. Lorenz.

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.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..i
TABLE OF AUTHORITIES.....................................vi
OPINIONS BELOW...1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.................................1
STATEMENT 3
A. Factual background......................................5
B. Court proceedings...7
1. Initial proceedings 7
2. This Court's decision..............................8
3. Proceedings on remand from this Court...9
REASONS FOR GRANTING THE PETITION 14
A. The Hawaii Supreme Court's Refusal To Enforce The Arbitration Contract's Limits On Discovery Violates The FAA. 15
1. Hawaii law impermissibly restricts the ability of parties to limit discovery in arbitration. 16
2. Hawaii's limit on discovery restrictions impermissibly frustrates a fundamental attribute of arbitration. 18
B. The Hawaii Supreme Court's Invalidation Of The Arbitration Contract's Confidentiality Provision Violates The FAA. 20

TABLE OF CONTENTS—continued

Page

C. FAA Principles Mandate Severance Of Any Unconscionable Provisions And Enforcement Of The Agreement. 23

1. The arbitration agreement's severance clause should have been enforced according to its plain terms. 23

2. The Hawaii Supreme Court's approach to severance singles out arbitration for unfavorable treatment. 29

D. The Question Presented Here Involves Frequently Recurring Issues That Warrant Review..32

CONCLUSION 35

APPENDIX A – Opinion of the Hawaii Supreme Court on Remand (July 14, 2017) 1a

APPENDIX B – Summary Disposition Order of the Hawaii Supreme Court on Remand (July 14, 2017) 34a

APPENDIX C – Summary Disposition Order of the Hawaii Supreme Court on Remand (July 14, 2017) 37a

APPENDIX D – Hawaii Supreme Court Order Denying Motion for Reconsideration (Aug. 9, 2017)...............................40a

TABLE OF CONTENTS—continued

Page

APPENDIX E – Hawaii Supreme Court Order Denying Motion for Reconsideration (Aug. 9, 2017) 43a

APPENDIX F – Initial Opinion of the Hawaii Supreme Court (June 6, 2015) 46a

APPENDIX G – Opinion of the Hawaii Intermediate Court of Appeals (Aug. 23, 2013) 74a

APPENDIX H – Order of the Hawaii Circuit Court of the Second Circuit (Aug. 28, 2012) 85a

TABLE OF AUTHORITIES

Page(s)

CASES

Adler v. *Fred Lind Manor*,
153 Wash. 2d 331 (2004) (en banc)......................10

Ai v. *Frank Huff Agency*,
607 P.2d 1304 (Haw. 1980).................................30

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995).......................................15, 32

Armendariz v. *Found. Healthy Psychcare Servs., Inc.*,
6 P.3d 669 (Cal. 2000)..27

Ass'n of Apt. Owners of Waikoloa Beach Villas v. *Sunstone Waikoloa*,
307 P.3d 132 (Haw. 2013)...................................30

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011).....................................*passim*

Baxter Int'l, Inc. v. *Abbott Labs.*,
297 F.3d 544 (7th Cir. 2002)................................21

Beneficial Haw., Inc. v. *Kida*,
30 P.3d 895 (Haw. 2001)......................................30

Booker v. *Robert Half International, Inc.*,
413 F.3d 77 (D.C. Cir. 2005)........................*passim*

Citizens Bank v. *Alafabco, Inc.*,
539 U.S. 52 (2002) (per curiam) 33

Cordova v. *World Fin. Corp.*,
208 P.3d 901 (N.M. 2009) 31

Dean Witter Reynolds Inc. v. *Byrd*,
470 U.S. 213 (1985)..25

TABLE OF AUTHORITIES—continued

Page(s)

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2015) .... *passim*

Doctor's Assocs., Inc. v. *Casarotto*,
517 U.S. 681 (1996) 17

EEOC v. *Waffle House, Inc.*,
534 U.S. 279 (2002) 4

First Options of Chicago, Inc. v. *Kaplan*,
514 U.S. 938 (1995) 24

Gannon v. *Circuit City Stores, Inc.*,
262 F.3d 677 (8th Cir. 2001) 25

Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) 29

Gonzales v. *Thomas*,
547 U.S. 183 (2006) 33

Hac v. *Univ. of Haw.*,
102 Haw. 92 (2003) 18

Hay Grp. v. *EBS Acquisition Corp.*,
360 F.3d 404 (3d Cir. 2004) 19

Kindred Hospitals East, LLC v. *Estate of Klemish*,
No. 17-365 (S. Ct.) 5, 34

Kindred Nursing Ctrs. Ltd. P'Ship v. *Clark*,
137 S. Ct. 1421 (2017) .... *passim*

Konno v. *Cnty. of Haw.*,
103 Haw. 480, 2004 WL 264109 (2004) 30

TABLE OF AUTHORITIES—continued

Page(s)

KPMG LLP v. *Cocchi*,
132 S. Ct. 23 (2011) (per curiam) 32, 33

Marmet Health Care Ctr., Inc. v. *Brown*,
132 S. Ct. 1201 (2012) (per curiam) 15, 33, 34

Mastrobuono v. *Shearson Lehman Hutton, Inc.*,
514 U.S. 52 (1995)...24

Mitsubishi Motors v. *Soler Chrysler-Plymouth*,
473 US 614 (1985)..19, 25

Morrison v. *Circuit City Stores, Inc.*,
317 F.3d 646 (6th Cir. 2003)................................25

Moses H. Cone Mem. Hosp. v. *Mercury Constr. Corp.*,
460 U.S. 1 (1983)..25, 27

Nishimoura v. *Gentry Homes. Ltd.*,
338 P.3d 524 (Haw. 2014)...................................30

Nitro-Lift Technologies, L.L.C. v. *Howard*,
133 S. Ct. 500 (2012) (per curiam) 15, 32

Perry v. *Thomas*,
482 U.S. 483 (1987)..15, 18

In re Poly-America, L.P.,
262 S.W.3d 337 (Tex. 2008) 26

Southland Corp. v. *Keating*,
465 U.S. 1 (1984)..15

Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*,
559 U.S. 662 (2010)..24

TABLE OF AUTHORITIES—continued

Page(s)

Volt Info. Scis., Inc. v. *Bd. of Trs.*,
489 U.S. 468 (1989)....................................4

Zaborowski v. *MHN Gov't Servs., Inc.*,
601 F. App'x 461 (9th Cir. 2014)..........................27

STATUTES AND RULES

9 U.S.C. § 2..2, 3, 15, 18

28 U.S.C. § 1257(a)....................................1

Hawaii Revised Statutes
§ 658A-4...3
§ 658A-4(b)(1).......................................16
§ 658A-17..2, 12
§ 658A-17(a)...16
§ 658A-17(b)...16

AAA Commercial Arbitration Rule R-23(a).............22

AAA Commercial Arbitration Rule R-25..................22

CPR Administered Arbitration Rule R-20...............21

JAMS Comprehensive Arbitration Rule
26(a)-(b)...22

MISCELLANEOUS

4 Hon. Paul A. Crotty & Robert E.
Crotty, *Business and Commercial*
Litigation in Federal Courts § 48:32
(3d ed. Supp. 2014)....................................21

TABLE OF AUTHORITIES—continued

Page(s)

Liz Kramer, *Hawaii Finds Arbitration Agreement With "Severe Limitations on Discovery" is Unconscionable*, Arbitration Nation (June 19, 2015), http://perma.cc/85PP-ZMNY 33

1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 10:55 (Supp. 2015) 21

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 on remand from this Court (App., *infra*, 1a-33a) is reported at 400 P.3d 544; related summary orders (App., *infra*, 34a-39a) are unreported. The initial decision of the Hawaii Supreme Court (App., *infra*, 46a-72a) is reported at 350 P.3d 995. The decision of the Intermediate Court of Appeals of Hawaii (App., *infra*, 73a-84a) is unpublished but is available at 2013 WL 4522945. The order of the Hawaii Circuit Court (App., *infra*, 85a-86a) is unreported.

JURISDICTION

The Hawaii Supreme Court entered its judgment on remand from this Court on July 14, 2017, and denied timely petitions for rehearing on August 9, 2017. App., *infra*, 40a-45a. 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.

Section 658A-17 of the Hawaii Revised Statutes provides in relevant part:

> (a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing * * * .
>
> (b) In order to make the proceedings fair, expeditious, and cost effective, upon the request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing. * * *

Section 658A-4 of the Hawaii Revised Statutes provides in relevant part:

> (b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement shall not: (1) Waive or agree to vary the effect of the requirements of section * * * 658A-17(a), 658-17(b) * * *.

STATEMENT

In a prior decision in this case, the Hawaii Supreme Court refused to enforce a contractual arbitration agreement by applying a state-law rule that uniquely disfavored arbitration contracts. This Court vacated that decision and remanded the case for reconsideration in light of *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015)—in which the Court disapproved a similar state-law rule that did "not place arbitration contracts 'on equal footing with all other contracts'" (*id.* at 471 (citation omitted)).

The Hawaii Supreme Court has now reaffirmed its prior decision, invoking a different set of state-law rules in holding the parties' arbitration agreement unenforceable in its entirety. But this ruling suffers from the same flaw as the prior one: it is inconsistent with the Federal Arbitration Act (FAA), which mandates 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).

In particular, the court below held that certain provisions of the arbitration agreement are unconscionable and therefore unenforceable, including those limiting discovery and requiring confidentiality

in arbitration proceedings. The court then refused to enforce the arbitration contract's express severance clause, which provides that the agreement to arbitrate must remain in effect even if other elements of the agreement are invalidated.

This holding cannot be squared with FAA principles that this Court has applied repeatedly. It improperly "singl[es] out" arbitration contracts "for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017). It "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). It disregards the "liberal federal policy favoring arbitration agreements" codified in that Act. *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002). And it is impossible to reconcile with the "'principal purpose' of the FAA," which is to "'ensure that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 563 U.S. at 344 (alterations omitted; quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 478 (1989)).

The decision below, like the Hawaii Supreme Court's initial decision in this case, manifests the persistent and "longstanding judicial hostility to arbitration agreements" (*Waffle House*, 534 U.S. at 289 (internal quotation marks omitted)) that the FAA was meant to reverse and that this Court has long condemned. In fact, the holding below is quite similar to a decision of the Florida Supreme Court—challenged in a certiorari petition pending before this Court—that refused to enforce an arbitration agreement based on state law rules that, like the rules invoked here, expressly eliminated parties' ability to include in arbitration agreements provisions embod-

ying essential features of arbitration. See No. 17-365, *Kindred Hospitals East, LLC* v. *Estate of Klemish* (pet. filed Sept. 1, 2017). Given the failure of these lower courts to follow this Court's direction, and the significant practical implications of the courts' erroneous decisions, further review in both of these cases 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 of the project. The plaintiffs, respondents in this Court, are purchasers of some of the condominiums. App., *infra*, 38a-39a. 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 47a-49a.

Petitioners moved to compel arbitration, invoking an agreement to arbitrate disputes that was included in the parties' contract. Respondents replied, among other things, that the contract was ambiguous on the parties' intent to require arbitration. App. *infra*, 76a.[1]

[1] It is undisputed that the document containing the arbitration clause, the so-called "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." App., infra, 77a. Respondents do not dispute that they received, read, and are bound by the Condominium Declaration.

The express arbitration agreement at the center of this disagreement is titled "alternative dispute resolution." App., *infra*, 6a (reprinting arbitration clause). The agreement 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." *Ibid.*

It further addresses a wide range of points relating to the conduct and effect of any arbitration, among them the location of an arbitration (Honolulu); that "[i]ssues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration"; the effect of an arbitrator's decision ("final and binding"); the arbitrator's authority to issue injunctive or other relief to prevent irreparable harm; the governing law (the "substantive laws of the State of Hawaii"); and the availability of attorneys' fees and costs related to arbitration proceedings. *Id.* at 6a-9a.

The arbitration provision also contains four additional clauses that relate to the decision below:

- It limits discovery, providing that "[t]he arbitrator may order the parties to exchange copies of nonrebuttable exhibits and copies of witness lists in advance of the arbitration hearing," but "shall have no other power to order discovery or depositions unless and then only to the extent that all parties otherwise agree in writing." App., *infra*, 7a-8a.

- It provides for confidentiality, stating that "[n]either a party, witness, 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," unless "required to enforce or challenge the negotiated agreement or the arbitration award." App., *infra*, 8a.
- It provides that "[t]he arbitrator shall not have the power to award punitive, exemplary, or consequential damages." App., *infra*, 7a.
- It contains a severance clause, providing: "If any part of this Article is held to be unenforceable, it shall be severed and shall not affect either the duties to mediate and arbitrate hereunder or any other part of this Article." App., *infra*, 9a.

B. Court proceedings

1. Initial proceedings

The state trial court summarily denied petitioners' motion to arbitrate. App., *infra*, 85a-86a. But Hawaii's intermediate appellate court reversed. *Id.* at 73a-84a. It held that the language of the parties' agreement established their intent to arbitrate, finding that the arbitration requirement "is unambiguous on its face" and that other language in the parties' contract is consistent with that requirement. *Id.* at 77a, 78a-80a. The court also rejected respondents' contention that elements of the arbitration clause are unconscionable under Hawaii law, seeing "no factual basis to conclude that the contracts in this case were contracts of adhesion" and that, because "[t]he

record in this case shows Plaintiffs received reasonable notice of the arbitration provision," "there is no element of unfair surprise or oppression in Plaintiffs' transaction." *Id.* at 83a, 83a-84a.

In its initial decision, the Hawaii Supreme Court reversed. App., *infra*, 46a-72a. The court held that "to prove the existence of an enforceable agreement to arbitrate[,]" the agreement "must be unambiguous as to the intent to submit disputes or controversies to arbitration.'" *Id.* at 57-58a. Starting from that premise, the court concluded 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 60a. The court went on to state that specific clauses of the arbitration provision limiting discovery, requiring confidentiality, and precluding the award of punitive damages could not be enforced because they were unconscionable (*id.* at 61a-71a), although the court did not explain the significance of this discussion in light of its threshold holding that the agreement to arbitrate is wholly unenforceable on ambiguity grounds.

2. This Court's decision

Petitioners then sought review in this Court, contending that the Hawaii Supreme Court's holding violated the FAA by discriminating against arbitration. As petitioners explained, Hawaii courts generally determine the meaning of ambiguous contracts by considering all the factual circumstances that bear on the intent of the parties, but the Hawaii Supreme Court treated ambiguous arbitration agreements as *per se* unenforceable. See Pet. 10-15, *Ritz-Carlton Dev. Co., Inc.* v. *Narayan*, No. 15-406. Among other

things, petitioners suggested that the Court hold the petition for disposition in light of the then-pending decision in *Imburgia*, which presented a related question regarding state discrimination against arbitration. See *id.* at 25-26.

This Court took that approach, deferring resolution of the initial petition in this case pending the decision in *Imburgia*. When issued, this Court's decision overturned the refusal of the California state courts to enforce an agreement to arbitrate, holding that the refusal did "not place arbitration contracts 'on equal footing with all other contracts'" and did "not give 'due regard … to the federal policy favoring arbitration.'" 136 S. Ct. at 471 (citations omitted; ellipses added by the Court). The Court then granted the initial petition in this case, vacated the initial decision of the Hawaii Supreme Court, and remanded the case for reconsideration in light of *Imburgia*. 136 S. Ct. 800 (2016).

3. Proceedings on remand from this Court

a. In supplemental briefing on remand to the Hawaii Supreme Court, petitioners maintained that *Imburgia* confirmed the invalidity under the FAA of Hawaii's unique requirement that agreements to arbitrate be unambiguous. See Defendants' Supp. Br. 7, *Narayan* v. *Ritz-Carlton Dev. Co.*, No. SCWC-12-0000819 (HI). Noting the Hawaii court's prior observation that certain provisions of the arbitration agreement were unconscionable under state law, petitioners also represented, "in the interests of efficiently resolving this litigation," that they would "not seek to enforce or rely upon those elements of the arbitration provision that th[e] [Hawaii Supreme] Court found unconscionable in the initial decision." *Id.* at 11. Petitioners further observed that "the [Ha-

waii Supreme] Court's unconscionability determination provides no basis for refusing to enforce the agreement as a whole" because the arbitration provision contains a severance clause and "[a]pplication of [the severability] rule facilitates the accomplishment of important federal and state policies favoring arbitration of disputes.'" *Id*. at 12 (quoting *Adler* v. *Fred Lind Manor*, 153 Wash. 2d 331, 359 (2004) (en banc)).

Respondents acknowledged that "Hawaii's test for formation of an arbitration agreement has been stated as requiring an 'unambiguous' agreement" to arbitrate. Pl.'s Supp. Br. 5 n.9, *Narayan* v. *Ritz-Carlton Dev. Co.*, No. SCWC-12-0000819 (HI). Accordingly, respondents urged that "Hawaii's test" be "rearticulated" by the Hawaii Supreme Court "to require a showing of mutual assent or a meeting of the minds, instead of requiring 'unambiguous intent to submit claims to arbitration.'" *Ibid.* (citations omitted).

b. In its second decision, the Hawaii Supreme Court reaffirmed its initial ruling holding the arbitration clause unenforceable, but rested on grounds different from those underlying its initial decision. App., *infra*, 1a-33a. This time, the court declined to "address whether ambiguity existed as to the intent to arbitrate," and it therefore avoided discussion of the aberrant Hawaii rule that requires only arbitration agreements to be unambiguous before they can be enforced. *Id*. at 27a n.9. Instead, the court held that "unconscionability so pervades the arbitration clause that it is unenforceable." *Id*. at 27a.

In reaching this conclusion, the court below observed that, "[u]nder Hawaii law, unconscionability is recognized as a general contract defense." App., *in-*

fra, 14a. Under this doctrine, the court continued, the inquiry looks to "procedural and substantive unconscionability" (*id.* at 15a (citation omitted)), both of which generally must be present to invalidate a contractual provision; procedural unconscionability "focuses on the '*process* by which the allegedly offensive terms found their way into the agreement'" and substantive unconscionability "focuses on the *content* of the agreement and whether the terms are one-sided, oppressive, or 'unjustly disproportionate.'" *Id.* at 16a (citations omitted) (emphasis added).

Here, the court found the arbitration agreement procedurally unconscionable because "[t]he party with the superior bargaining strength, the Defendants," drafted the arbitration clause; "[t]he Homeowners were required to conform to the terms of the declaration as recorded if they wanted to purchase a Ritz-Carlton condominium on Maui"; and the agreement was ambiguous, which could "confuse or mislead the non-drafting parties." *Id.* at 16a-19a.[2]

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[2] The Hawaii court did not explain how its statement that the agreement was ambiguous was consistent with its declaration earlier in the opinion that it was not "address[ing] [on remand] whether ambiguity existed as to the intent to arbitrate." App., *infra*, 27a n.9. The court below also did not explain why its finding of procedural unconscionability was limited only to the arbitration clause, even though the condominium declaration in which that clause appears was required by Hawaii law as an essential prerequisite to development and sale of the condominium units, was created all of a piece and made known to the public and condominium purchasers as a complete document, and those purchasers, including respondents, had no greater power to bargain over any of the contract terms included in the declaration than they did over the arbitration provisions.

The court then found that three provisions of the arbitration agreement are substantively unconscionable:

First, the court held that the prohibition on punitive damages, "[w]hile not wholly exculpatory," was unenforceable "[w]hen coupled with 'inequality of bargaining power.'" App., *infra*, 21a (citation omitted).

Second, the court held the agreement's limits on discovery unenforceable, for two reasons. The court regarded those limits as "in direct contravention to Hawaii's 'basic philosophy' that a party is entitled to all relevant, unprivileged information pertaining to the subject matter of the action." App., *infra*, 23a (citation omitted). And it found the arbitral discovery limits barred by Section 658A of Hawaii's Revised Statutes, the Hawaii Arbitration Act, "which grant[s] an arbitrator considerable discretion in permitting discovery." App., *infra*, 23a.

In particular, the court noted that the state statute expressly allows arbitrators to issue subpoenas for the attendance of witnesses and the production of documents, and to permit the taking of depositions—and provides that these provisions "cannot be waived by parties to an arbitration agreement." App., *infra*, 24a; see *id*. at 24a n.8. Although the court recognized that these provisions of state law are "specific to arbitration," it justified the singling out of arbitration in this respect on the theory that "the referenced sections of HRS § 658A-17 reflect Hawaii's 'basic philosophy' on discovery, and mirror similar provisions found in the Hawai'i Rules of Civil Procedure." *Id*. at 25a.

Third, the court found the arbitration agreement's confidentiality requirement unconscionable. In the court's view, "the confidentiality provision at issue here, especially when read in conjunction with the discovery provision, impairs the Homeowner's ability to investigate and pursue their claims." App., *infra*, 26a.

Having held these provisions to be unenforceable, the Hawaii Supreme Court refused to apply the arbitration agreement's severance provision, which expressly provides that any part of the arbitration agreement held to be unenforceable "shall be severed and shall not affect either the duties to mediate and arbitrate hereunder or any other part of this Article." App., *infra*, 9a.

The court recognized Hawaii's "'general rule is that severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable when the illegal provision is not central to the parties' agreement." *Id*. at 28a (citation omitted). Here, however, the court declined to apply that principle and refused to sever the unenforceable portions of the arbitration agreement. It noted its determination that the agreement was procedurally unconscionable and its finding that three specific portions of the agreement were substantively unconscionable. Then, without further explanation, and without citing any Hawaii decisions that disregarded a severance clause in such circumstances, the court held: "Because unconscionability so pervades the arbitration clause, it is unenforceable." App., *infra*, 29a. The court accordingly affirmed its initial decision invalidating the arbitration agreement. *Id*. at 33a.

c. Petitioners sought rehearing. They maintained that the decision below both (1) impermissibly singled out arbitration for disfavored treatment by expressly precluding arbitral limits on discovery; and (2) interfered with fundamental aspects of arbitration, in violation of the FAA, by precluding agreed-upon contractual limits on discovery and confidentiality. See Rehearing Pet. 2-4, *Narayan* v. *Ritz-Carlton Dev. Co.*, No. SCWC-12-0000819 (HI).

Petitioners also contended that the Hawaii Supreme Court's refusal to sever the ostensibly invalid provisions of the arbitration contract, even in the face of an express severance clause, both violated the FAA and departed from Hawaii's ordinary contract rule because the arbitration agreement's "essential object"—the resolution of disputes through arbitration rather than in litigation—could be fully implemented without regard to the unconscionable provisions. *Id.* at 4-7. Petitioners noted that there is no other Hawaii decision invalidating an entire agreement in such circumstances. *Id.* at 7.

The court below, however, denied rehearing without explanation. App., *infra*, 40a-45a.

REASONS FOR GRANTING THE PETITION

Like its now-vacated initial decision, the Hawaii Supreme Court's post-remand holding departs from this Court's precedents and the FAA's plain terms. It singles out arbitration for unfavorable treatment; it frustrates the FAA's policy favoring arbitration; and it disregards the language of the parties' contractual agreement to arbitrate. As a consequence, this holding leaves doubtful the status of arbitration agreements in Hawaii, and more broadly calls into question the enforceability of arbitration agreements that

contain terms similar to those at issue in this case—including the innumerable agreements that include severance clauses.

In all of this, the decision below is another in a long line of state-court decisions, many quite recent, that ignored or sought to evade this Court's precedents on arbitration. See, *e.g.*, *Kindred Nursing Centers*, 137 S. Ct. 1421; *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*,132 S. Ct. 1201 (2012) (per curiam). This Court repeatedly has set those decisions aside; it should do so again here.

A. The Hawaii Supreme Court's Refusal To Enforce The Arbitration Contract's Limits On Discovery Violates The FAA.

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 arbitration contracts. 9 U.S.C. § 2; see also, *e.g.*, *Kindred Nursing Centers*, 137 S. Ct. at 1424; *Imburgia*, 136 S. Ct. at 465; *Concepcion*, 563 U.S. at 339; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272-73 (1995); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 (1984). It requires "that private arbitration agreements [be] enforced according to their terms." *Concepcion*, 563 U.S. at 344 (citations and internal quotation marks omitted). And it preempts state laws "disfavoring contracts that * * * have the defining features of arbitration agreements." *Kindred Nursing Centers*, 137 S. Ct. at 1426.

The decision below departed from each of those principles when it held the arbitration provision's limit on discovery to be unenforceable in this case. Applying rules that *only* govern arbitration contracts, Hawaii law expressly imposes restrictions on the contracting parties' ability to limit discovery. And those restrictions make it impossible for the parties to effectuate one of the core purposes—and "defining features"—of arbitration.

1. Hawaii law impermissibly restricts the ability of parties to limit discovery in arbitration.

The court below rested its holding that the discovery limits in this case are unenforceable in part on its conclusion that the arbitration agreement violates the Hawaii Arbitration Act, HRS § 658A-4(b)(1), which the court held to preclude the contracting parties from adopting limits on discovery rules. App., *infra*, 13-25a. It reached this result on the basis of a statutory provision holding nonwaivable the statutory section authorizing arbitrators to subpoena witnesses and other evidence and to order the deposition of witnesses. App., *infra*, 24a (citing HRS § 658A-4(b)(1)).[3]

Application of this state statute to prevent enforcement of a contractual arbitration provision, however, is squarely inconsistent with the FAA. It is beyond doubt that "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable

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[3] This provision states: "Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement shall not: (1) Waive or agree to vary the effect of the requirements of section * * * 658A-17(a), 658A-17(b) * * *."

only to arbitration provisions." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). Thus, a State may not "condition[] the enforceability of arbitration agreements on compliance with" procedural or substantive requirements "not applicable to contracts generally." *Ibid.*; see also, *e.g.*, *Kindred Nursing Centers*, 135 S. Ct. at 1426-27; *Imburgia*, 136 S. Ct. at 469. The procedural requirements in the Hawaii Arbitration Act—which by their plain terms and very nature are applicable only to arbitration—are just such discriminatory provisions. Accordingly, they may not be the basis for refusing to enforce an arbitration agreement according to its terms. After all, a rule that allowed States to render certain provisions in arbitration agreements unenforceable merely by so providing in a state statute "would make it trivially easy for States to undermine the [Federal Arbitration] Act." *Kindred Nursing Centers.*, 137 S. Ct. at 1428.

For its part, the court below recognized that the discovery provisions of the Hawaii Arbitration Act *are* "specific to arbitration" (App., *infra*, 25a), but regarded the state Act's singular focus on arbitration contracts as permissible because that law's broad authorization of discovery "mirror[s] similar provisions found in the Hawaii Rules of Civil Procedure." *Ibid.*

This reasoning, however, wholly misses the point of the FAA. Even if the Hawaii Arbitration Act and the Hawaii Rules of Civil Procedure both authorize specified forms of discovery, only the Hawaii Arbitration Act contains a provision that expressly prohibits the parties from *waiving specified discovery procedures by contract*; there is no analogous provision in the generally applicable Rules of Civil Procedure. And the FAA does not allow a State to mandate that

certain contractual terms are unenforceable in arbitration contracts—and *only* in arbitration contracts: "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with * * * [FAA] § 2." *Perry*, 482 U.S. at 492 n.9.

2. Hawaii's limit on discovery restrictions impermissibly frustrates a fundamental attribute of arbitration.

The Hawaii court was wrong for a second, related reason. In addition to its reliance on the Hawaii Arbitration Act, the court below held that the discovery restrictions in the arbitration agreement are unconscionable because they place "severe limitations on the disclosure of relevant information" and therefore contravene "Hawaii's 'basic philosophy' that a party is entitled to all relevant, unprivileged information pertaining to the subject matter of the action." App., *infra*, 22a (citing *Hac* v. *Univ. of Haw.*, 102 Haw. 92, 100 (2003)). See *id.* at 25a (arbitration agreement's "discovery provision is at odds with Hawaii's long-standing legal precedent of allowing parties to access relevant information for their claims").

But this reasoning again misunderstands the FAA: that Hawaii generally allows for unfettered discovery *in litigation* says nothing about which state rules may permissibly be applied to govern *arbitration*—which is, after all, a procedure that Congress favored as a substitute for litigation that would eliminate the more expensive and burdensome elements of resolving disputes in court. The Hawaii court's contrary conclusion, which requires arbitration agreements to implement the "basic philosophy" of the expansive discovery available in lawsuits, would read the FAA off the books.

This Court recognized just that principle in *Conception*, noting that "[t]he *point* of affording parties discretion in designing arbitration procedures is to allow for efficient, streamlined procedures tailored to the type of dispute." 563 U.S. at 344-45 (emphasis added). There is nothing controversial in that observation: courts generally have observed that limiting discovery, and departing from the judicial discovery model, is *inherent* in arbitration. See, *e.g.*, *Mitsubishi Motors* v. *Soler Chrysler-Plymouth*, 473 US 614, 628 (1985) (party that agrees to arbitrate generally "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); *Hay Grp.* v. *EBS Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004) (Alito, J.) ("A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process.") (citation and internal quotation marks omitted).

Treating the provisions in an arbitration agreement as unconscionable because they do not track the discovery procedures of the state rules of civil procedure—as did the court below—accordingly "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

Indeed, the Court in *Concepcion* cited a state law invalidating arbitration agreements that do not provide for "full discovery" as an "obvious" example of one that is inconsistent with the FAA. 563 U.S. at 342, 344. The Court observed that such a provision might be labeled unconscionable on the theory that "no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing," or because "restricting discovery

would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue." *Id.* at 342. Compare App., *infra*, 23a (arbitral discovery limit unconscionable because it "hinders the Homeowners' ability to prove their claims"). But, the Court continued, "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements." 563 U.S. at 342.

The recognition that state requirements of arbitral discovery are preempted by the FAA is fully consistent with the understanding that generally applicable state contract defenses are enforceable. The Court has explained that, "[a]lthough [FAA] § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. "As [the Court] ha[s] said, a federal statute's savings clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Ibid.* (citations and internal quotation marks omitted). The holding below that the arbitration agreement's discovery limitations are unenforceable departs from that principle. See generally *Kindred Nursing Centers*, 137 S. Ct. at 1427 (noting that *Concepcion* bars a "legal rule hinging on the primary characteristic of an arbitration agreement").

B. The Hawaii Supreme Court's Invalidation Of The Arbitration Contract's Confidentiality Provision Violates The FAA.

The Hawaii Supreme Court also violated the FAA when it held the arbitration agreement's confi-

dentiality provision unenforceable. App., *infra*, 25a-27a. Like limits on discovery, the requirement of confidentiality is a "primary characteristic of an arbitration agreement." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427. Precluding enforcement of such a provision is inconsistent with the FAA.

It is almost universally recognized that "[o]ne hallmark of arbitration is the confidentiality of the process and the award, unless all parties stipulate otherwise." 1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 10:55 (Supp. 2015). See also, *e.g.*, 4 Hon. Paul A. Crotty & Robert E. Crotty, *Business and Commercial Litigation in Federal Courts* § 48:32 (3d ed. Supp. 2014) ("Arbitration is generally considered to be confidential."); *Baxter Int'l, Inc.* v. *Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002) ("businesses that fear harm from disclosure required by the rules for the conduct of litigation [in court] often agree to arbitrate"). Thus, this Court has specifically noted confidentiality as among the requirements that may be included in arbitration agreements, as an element of the "discretion in designing arbitration processes" conferred on the parties by the FAA. *Concepcion*, 563 U.S. at 344, 348.

Leading arbitration providers therefore guarantee the confidentiality of arbitration proceedings—even in the absence of an express confidentiality agreement. For example, the rules of the International Institute for Conflict Prevention & Resolution ("CPR") require both the tribunal and the parties to maintain the confidentiality of proceedings. See CPR Administered Arbitration Rule R-20 ("Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confiden-

tial, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party."). Similarly, under the rules of JAMS and of the American Arbitration Association ("AAA"), the arbitrator generally must "maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing," and can enter additional orders to bar parties from disclosing information produced during the proceedings. JAMS Comprehensive Arbitration Rule 26(a)-(b); accord AAA Commercial Arbitration Rules R-23(a), R-25.

It therefore is not surprising that confidentiality provisions are ubiquitous in arbitration agreements. There is no doubt that, in contracts of all stripes—ranging from form consumer contracts to commercial agreements negotiated in arms-length transactions by parties with equal bargaining power—arbitration provisions specify that the arbitration proceedings are to remain confidential.

Against this background, what the Court said of state-law rules mandating discovery is just as true of a state-law doctrine that has the effect of precluding enforcement of a confidentiality clause: "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. And for the same reason, such a state limitation is not saved because it purports to rest on a generally applicable state-law unconscionability doctrine. Here, too, "the [FAA] cannot be held to destroy itself." *Id*. at 343.

C. FAA Principles Mandate Severance Of Any Unconscionable Provisions And Enforcement Of The Agreement.

The Hawaii Supreme Court's decision to abrogate the arbitration provision altogether, rather than sever the elements it found to be unconscionable, also cannot be squared with this Court's decisions or with the language and policy of the FAA—and is an independent reason why the holding below should not stand.[4]

1. The arbitration agreement's severance clause should have been enforced according to its plain terms.

a. The arbitration agreement in this case contains an express and unambiguous severance clause, which provides: "If any part of this Article is held to be unenforceable, it shall be severed and shall not affect either the duties to mediate and arbitrate hereunder or any other part of this Article." App., *infra*,

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[4] Of course, if we are correct that the Hawaii Supreme Court's finding of unconscionability in the agreement's discovery and confidentiality provisions is inconsistent with the FAA, that court's holding of pervasive unconscionability—which in part rests on those rulings—also cannot survive. Although petitioners do not here challenge the Hawaii court's determination that the arbitration agreement's prohibition on the award of punitive damages is unconscionable, that holding, standing alone, surely could not require invalidation of the entire arbitration agreement: "severing a remedial component of the arbitration clause * * * remove[s] a provision generally understood as not being essential to a contract's consideration, and thus more readily severable." *Booker* v. *Robert Half International, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (Roberts, J.).

9a. Under the clear language of this clause, as well as the presumptive intent of the parties as expressed in the contractual language, any unenforceable element of the arbitration agreement must be severed, leaving unaffected "the duties to mediate and arbitrate."

Enforcing this severance provision as written is mandated by the FAA. As a general matter, the "'principal purpose' of the FAA" is to "'ensure that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 563 U.S. at 344 (alterations and citation omitted); see also, *e.g.*, *Casarotto*, 517 U.S. at 688; *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). This rule affords parties broad discretion "to structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 57; see also *Concepcion*, 563 U.S. at 344, 351; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). And the imperative to implement arbitral severance clauses also, unquestionably, effectuates the "'the federal policy favoring arbitration'" that is codified in the FAA. *Mastrobuono*, 514 U.S. at 62.

It therefore is not surprising that the federal courts have recognized the force of these principles in the specific context of severance clauses like the one at issue in this case. Then-Judge Roberts wrote for the D.C. Circuit, in a decision that enforced an arbitral severance clause after a provision of the arbitration agreement was held unenforceable, that "[a] critical consideration in assessing severability is giving effect to the intent of the contracting parties," which "was also the 'preeminent concern of Congress in passing the [FAA]'—'to enforce private agree-

ments into which the parties had entered.'" *Booker*, 413 F.3d at 84 (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985) (bracketed material added by the court)). When a court enforces a severance clause, it therefore "honor[s] the intent of the parties reflected in the [arbitration] agreement, which included not only the [provision held unenforceable] but the explicit severability clause as well. In doing so, the court [is] also faithful to the federal policy which 'requires that we rigorously enforce agreements to arbitrate.'" *Id.* at 85-86 (quoting *Mitsubishi Motors*, 473 U.S. at 626 (citation omitted by the court)).[5]

To be sure, some courts have recognized the possibility that an arbitration requirement could be unenforceable, notwithstanding the inclusion of a severance agreement, when "illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts." *Booker*, 413 F.3d at 84-85. In such a case, "the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Id.* at 85. But that is not this case.

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[5] Accord, *e.g.*, *Morrison* v. *Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003) ("when the arbitration agreement at issue includes a severability provision, courts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement)"; *Gannon* v. *Circuit City Stores, Inc.*, 262 F.3d 677, 680-82 (8th Cir. 2001) (invalidating entire arbitration agreement rather than severing unconscionable provisions "would represent the antithesis of the 'liberal federal policy favoring arbitration agreements'" (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

There is no question that the purpose of the arbitration provision at issue here—its "defining feature[]" (*Kindred Nursing Centers*, 137 S. Ct. at 1426)—is to resolve disputes through arbitration rather than litigation. Once the three ancillary provisions of the arbitration agreement that were disapproved by the court below are removed, the agreement still clearly provides for arbitration "pursuant to * * * the then-current rules and supervision of the American Arbitration Association," "before a single arbitrator who is knowledgeable in the subject matter at issue," with "[i]ssues of arbitrability" to be "determined in accordance with the federal substantive and procedural laws relating to arbitration," and with all other issues "interpreted in accordance with, and the arbitrator * * * bound to follow, the substantive laws of the State of Hawaii." App., *infra*, 6a-8a.

These requirements and the remainder of the arbitration agreement are hardly a "disintegrated fragment" (*Booker*, 413 F.3d at 85): they are easily enforced as written, make perfect sense standing on their own, and if applied would effectuate the agreement's central goal. *See, e.g.*, *In re Poly-America, L.P.*, 262 S.W.3d 337, 360 (Tex. 2008) (voiding arbitral remedies-limitation provisions as unconscionable, but applying the remainder of the arbitration agreement because excising the unconscionable portions "will not defeat or undermine" the "main purpose of the agreement," which was to "submit the[] [parties'] disputes to an arbitral forum rather than proceed in court").

In such circumstances, as Judge Gould has observed, "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of

unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Zaborowski* v. *MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464-65 (9th Cir. 2014) (Gould, J., concurring in part and dissenting in part). This principle is an aspect of the "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And Judge Gould's observation applies fully to this case: "Here, if all the unconscionable provisions of the arbitration agreement, as determined by the [Hawaii Supreme Court], were severed * * *, the remainder of the arbitration agreement can still be enforced, and the * * * court need not 'assume the role of contract author.'" *Zaborowski*, 601 F. App'x at 465.[6]

b. The Hawaii Supreme Court, however, wholly ignored these principles. Remarkably, the lower court's severance analysis failed even to *mention*, let alone apply, the severance clause in the parties' arbitration agreement. And that analysis made *no* reference to the FAA or to this Court's decisions recognizing the federal policies favoring arbitration and

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[6] The Ninth Circuit majority in *Zaborowski* invalidated the entirety of the arbitration clause at issue over Judge Gould's dissent on the point, applying a California rule that deemed arbitration agreements unenforceable whenever multiple provisions of the agreement were determined to be unconscionable. See 601 F. App'x at 464; *Armendariz* v. *Found. Healthy Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000). This Court granted review of that decision, but dismissed the case when the parties settled prior to decision. See 136 S. Ct. 1539 (2016).

mandating the enforcement of arbitration contracts as written.

Instead, the Hawaii court simply asserted, essentially without explanation, that "unconscionability so pervades the arbitration clause that it is unenforceable." App., *infra*, 29a. The court's only support for this holding was its recital that it had found the arbitration agreement to be procedurally unconscionable and its listing of the three contract elements that it had found to be substantively unconscionable. These background observations led to the court's observation that, "[a]s written, the arbitration clause goes beyond designating a forum for dispute resolution by depriving the Homeowners of a meaningful ability to assert rights that they might legitimately hold," and then to the conclusion that "unconscionability so pervades the arbitration clause [that] it is unenforceable." *Id*. at 29a.

But this conclusion is one of those dubious holdings that calls for the use of two Latin pejoratives: it is both a *non sequitur* and an *ipse dixit*. That a contract contains unconscionable provisions hardly means that the agreement is necessarily so pervaded by unconscionability that the remainder is a "disintegrated fragment" (*Booker*, 413 F.3d at 85) and that its severance clause therefore should be disregarded.

Here, the Hawaii Supreme Court made no attempt to show that its invalidation of contract provisions that were ancillary to the agreement to arbitrate "unravel[ed] 'a highly integrated' complex of interlocking illegal provisions" (*ibid.*), such that the remaining, valid provisions—including the central agreement to resolve disputes through arbitration rather than litigation—could not sensibly be applied. For the reasons we have explained, such a showing

could not be made in this case. That point is proved by petitioners' offer, on the initial remand from this Court, to proceed to arbitration without invoking those provisions of the contract that were challenged as unconscionable—an offer that the court below failed to mention in its decision.

In fact, the holding below, if taken seriously, would make severance clauses in arbitration contracts effectively unenforceable. It is literally *always* the case that, when an arbitration clause contains an ancillary provision found to be unconscionable, "[a]s written, the arbitration clause goes beyond designating a forum for dispute resolution." Consequently, given the imperative to "'ensure that private arbitration agreements are enforced according to their terms'" (*Concepcion*, 563 U.S. at 344) and "a 'healthy regard for the federal policy favoring arbitration'" (*Booker*, 413 F.3d at 79 (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)), a holding that an element of an arbitration agreement that contains a severance clause is unconscionable simply begins the severance analysis; the court then must determine whether anything makes it impossible to enforce the remainder of the agreement as written. But the court below found the holding of unconscionability *itself* to resolve the severance inquiry. This decision casts doubt on the effectiveness of arbitral severance clauses generally, is sure to cause confusion on when those clauses are effective—and is wrong. It should not stand.

2. The Hawaii Supreme Court's approach to severance singles out arbitration for unfavorable treatment.

In addition, the Hawaii court's severance holding was flawed in a second respect: the court's decision to

sever the entirety of the arbitration agreement, although resting on ostensibly neutral contract principles, in fact applied an unusually strict severance standard that seems particular to the arbitration context.

In deciding whether to sever invalid portions of a contract from the remainder of the agreement, Hawaii courts generally ask whether the void provisions "may be excised from the [contract] without doing violence to the [contract's] essential objects." *Ai* v. *Frank Huff Agency*, 607 P.2d 1304, 1313 (Haw. 1980).[7] Here, as we have explained, there is no question that the purpose of the arbitration provision in this case—its "essential object[]"—is to resolve disputes through arbitration rather than litigation. And as we also have noted, once the provisions of the arbitration agreement that were disapproved by the Hawaii court are removed, the agreement still clearly provides for arbitration and is easily enforced as written.

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[7] See, *e.g.*, *Nishimoura* v. *Gentry Homes. Ltd.*, 338 P.3d 524 (Haw. 2014) (severing arbitrator-selection provision from remainder of the contract); *Ass'n of Apt. Owners of Waikoloa Beach Villas* v. *Sunstone Waikoloa*, 307 P.3d 132 (Haw. 2013) (severing invalid provisions of contract relating to initiation of litigation or arbitration); *Beneficial Haw., Inc.* v. *Kida*, 30 P.3d 895, 917 (Haw. 2001) (recognizing Hawaii's "general rule" that "severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable when the illegal provision is not central to the parties' agreement"); *Konno* v. *Cnty. of Haw.*, 103 Haw. 480, 2004 WL 264109, at *2 (2004) (severing unconscionable provision in non-arbitration case while noting the "express severability clause").

In this case, however, the court below did not follow the usual approach; it did not address whether the agreement could still be enforced in accord with its essential object after severing the objectionable provisions, an inquiry that would have led to upholding the arbitration agreement. Instead, the court declared, without further explanation, that the arbitration agreement is "pervade[d]" by unconscionabilty. See App., *infra*, 29a. Simply put, this is not an approach the Hawaii Supreme Court applies outside of the arbitration context.

In fact, although citing rulings from other jurisdictions that declined to sever unlawful contractual provisions, the court below pointed to no Hawaii decisions in support of its severance ruling. That is for good reason: we are unaware of any Hawaii case other than this one in which the court invalidated an entire agreement or contract in the face of a severance clause where the remaining contractual language was easily enforced.[8]

For this reason as well, the Hawaii Supreme Court's approach in this case appears to have given an arbitration agreement special, and impermissibly

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[8] The court below observed that it is appropriate to "'strike down an arbitration clause in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties.'" App., *infra*, 29a (quoting *Cordova* v. *World Fin. Corp.*, 208 P.3d 901, 911 (N.M. 2009)). Here, the provision central to resolving the dispute between the parties is that providing for arbitration. Given the choice between voiding the entire arbitration provision and excising those "part[s]" of the provision "held to be unenforceable," it is the former option that engages in improper "judicial surgery."

unfavorable, treatment, failing to put arbitration agreements "on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468. See *id*. at 470-71 ("that we can find no similar case" applying the state court's approach outside the arbitration context suggests that its approach "would not lead [Hawaii] courts to reach a similar conclusion in similar cases that do not involve arbitration").

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

Finally, the error committed by the court below warrants this Court's intervention.

As this 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.*, 133 S. Ct. at 501; see also *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam).

And consistency in the lower courts on the application of the FAA is a matter of considerable practical significance. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority" (*Allied-Bruce Terminix Cos.*, 513 U.S. at 272), which means that departure from the FAA's principles will create confusion about the application of arbitration agreements and lead to the defeat of the contracting parties' expectations.

The approach taken by the court below, moreover, is especially questionable. That court has been

clear in its hostility to arbitration, as demonstrated in each of its decisions in this case. 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 (referring to the Hawaii Supreme Court's initial decision in this case, "[i]f 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.").

In fact, 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 arbitration precedents (*Concepcion*, 131 S. Ct. at 1747), the Court might wish to consider summary reversal of the Hawaii Supreme Court's decision. 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' Commerce Clause power" that was inconsistent with this Court's holdings). And the Court also, of course, has recently overturned other flawed state-court arbitration rulings

after plenary review. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28; *Imburgia*, 136 S. Ct. at 468-71.

As noted above, another petition challenging a state court's departure from this Court's arbitration jurisprudence, in *Kindred Hospitals East*, is pending before the Court. Because the courts below in both this case and in *Kindred Hospitals East* premised their rulings on principles that are "specific to arbitration and pre-empted by the FAA" (*Marmet*, 132 S. Ct. at 1204), this Court should summarily reverse or grant plenary review of both decisions. Alternatively, if the Court grants review in *Kindred Hospitals East* prior to the disposition of this petition, it may wish to hold this petition pending resolution of that case.

CONCLUSION

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

Respectfully submitted.

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APPENDICES

APPENDIX A

140 Hawai'i 343
Supreme Court 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.
SCWC-12-0000819

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JULY 14, 2017

Synopsis

Background: Condominium owners brought action against developers, asserting claims for breach of fiduciary duty arising from financial breakdown of condominium project. The Circuit Court, Maui County, 2012 WL 12266450, denied developers' motion to compel arbitration. Developers appealed. The Intermediate Court of Appeals, 2013 WL 4522945, vacated judgment. Upon grant of certiorari, the Supreme Court, Nakayama, J., 135 Hawai'i 327, 350 P.3d 995, vacated judgment of the Intermediate Court of Appeals and remanded. Upon grant of certiorari, the United States Supreme Court, 136 S.Ct. 800, vacated judgment of the Supreme Court and remanded.

ON REMAND FROM THE UNITED STATES SUPREME COURT (CAAP-12-0000819; CIV. NO. 12-1-0586(3))

Attorneys and Law Firms

Terence J. O'Toole, Judith Ann Pavey, and Andrew J. Lautenbach, Honolulu, for petitioners.

Bert T. Kobayashi, Jr., Lex R. Smith, Joseph A. Stewart, Maria Y. Wang, and Aaron R. Mun, Honolulu, for respondents, The Ritz-Carlton Development Company, Inc., The Ritz-Carlton Management Company, LLC, John Albert and Edgar Gum and respondents Marriott International, Inc., The Ritz-Carlton Hotel Company, LLC, Marriott Two Flags,

LP, Marriott Ownership Resorts, Inc., MH Kapalua Venture, LLC, and Marriott Vacations Worldwide Corporation.

RECKTENWALD, C.J., NAKAYAMA, McKENNA, AND POLLACK, JJ., AND CIRCUIT JUDGE

NAKASONE, IN PLACE OF ACOBA, J., RECUSED[1]

OPINION OF THE COURT BY NAKAYAMA , J.

I. INTRODUCTION

In *Narayan v. Ritz-Carlton Development Co.*, 135 Hawaiʻi 327, 350 P.3d 995 (2015) (*Narayan I*), this court held that the Plaintiffs, a group of individual condominium owners, could not be compelled to arbitrate claims arising from the financial breakdown of a Maui condominium project. In reaching this conclusion, this court determined that the arbitration clause was unenforceable because the Plaintiffs did not unambiguously assent to arbitration and because the terms of arbitration were unconscionable.

On January 11, 2016, the Supreme Court of the United States (Supreme Court) vacated and remanded *Narayan I* to this court for further consideration in light of its recent decision in *DIRECTV, Inc. v. Imburgia*, — U.S. —, 136 S.Ct. 463, 193 L.Ed.2d 365 (2015). In *Imburgia*, the Supreme Court determined that state law must place arbitration agreements "on equal footing with all other contracts." *Id.* at 471 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*,

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[1] At the time this case was originally pending before this court, Associate Justice Simeon R. Acoba, Jr. was a member of the court; however, he was recused from the case and Judge Nakasone sat in his place. Justice Acoba retired on February 29, 2014.

546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)).

Again recognizing this principle, we affirm our decision in *Narayan I*, concluding that, under long-standing Hawai'i contract law, the arbitration clause is unconscionable. As such, we vacate the Intermediate Court of Appeals' (ICA) October 28, 2013 judgment on appeal, affirm the Circuit Court of the Second Circuit's (circuit court) August 28, 2012 order denying the Defendants' motion to compel arbitration, and remand the case to the circuit court for further proceedings consistent with this opinion.

II. BACKGROUND

A. Factual History

The following facts[2] are summarized from this court's earlier opinion in *Narayan I*.

Petitioners/Plaintiffs-Appellees Krishna Narayan et al. (collectively, the Homeowners) purchased ten condominium units from Kapalua Bay, LLC, a joint venture owned by Marriott International, Inc., Exclusive Resorts, Inc., and Maui Land & Pineapple Co., Inc. (collectively, the Defendants). These units

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[2] These facts, drawn from the pleadings, are taken as true for the limited purpose of reviewing the Defendants' motion to compel arbitration. *Douglass v. Pflueger Haw., Inc.*, 110 Hawai'i 520, 524, 135 P.3d 129, 133 (2006) ("The standard [for a petition to compel arbitration] is the same as that which would be applicable to a motion for summary judgment ..."); *Nuuanu Valley Ass'n v. City & Cty. of Honolulu*, 119 Hawai'i 90, 96, 194 P.3d 531, 537 (2008) ("[In evaluating a motion for summary judgment,] we must view all of the evidence and inferences drawn therefrom in the light most favorable to the party opposing the motion." (quoting *Kahale v. City & Cty. of Honolulu*, 104 Hawai'i 341, 344, 90 P.3d 233, 236 (2004))).

were part of a Maui condominium development formerly known as the Ritz-Carlton Club & Residences at Kapalua Bay (the project).[3]

The Homeowners entered into purchase agreements with the Defendants when they purchased their condominiums. The purchase agreements contain two clauses relating to dispute resolution: a jury waiver clause and an attorneys' fee clause. While these clauses do not mention a binding agreement to arbitrate, the purchase agreement references another document, the Declaration of Condominium Property Regime of Kapalua Bay Condominium (declaration), which includes an arbitration clause. The Defendants recorded the declaration and the Association of Apartment Owners of Kapalua Bay Condominium Bylaws (AOAO bylaws) in the State of Hawai'i Bureau of Conveyances prior to the sale of the individual condominium units to the Homeowners. Additionally, the Defendants registered the Condominium Public Report (public report) with the Hawai'i Real Estate Commission. All of these documents are incorporated by reference through the purchase agreement.

The arbitration clause is found towards the end of the thirty-six page condominium declaration and provides, in its entirety:

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

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"), if the dispute cannot be resolved by negotiation, the parties to the dispute agree to submit the dispute to mediation by a mediator mutually selected by the parties. If the parties are unable to agree upon a mediator, then the mediator shall be appointed by the American Arbitration Association. In any event, the mediation shall take place within thirty (30) days of the date that a party gives the other party written notice of its desire to mediate the dispute. 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 and arbitrate hereunder shall extend to any officer, employee, shareholder, principal, partner, agent trustee-in-bankruptcy, affiliate, subsidiary, third-party beneficiary, or guarantor of all parties making or defending any claim which would otherwise be subject to this Article.

The arbitration shall be held in Honolulu, Hawaii before a single arbitrator who is knowledgeable in the subject matter at issue. The arbitrator's decision and award shall be final and binding and may be entered in any

court having jurisdiction thereof. 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 or any other agreement between the parties. In order to prevent irreparable harm, the arbitrator may grant temporary or permanent injunctive or other equitable relief for the protection of property rights.

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, and the arbitrator shall apply and be bound to follow, the substantive laws of the State of Hawaii. Each party shall bear its own attorneys' fees associated with negotiation, mediation, and arbitration, and other costs and expenses shall be borne as provided by the rules of the American Arbitration Association.

If court proceedings to stay litigation or compel arbitration are necessary, the party who unsuccessfully opposed such proceedings shall pay all associated costs, expenses, and attorneys' fees which are reasonably incurred by the other party.

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 ex-

tent that all parties otherwise agree in writing.

Neither a party, witness, or the arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiations, mediation, or arbitration hereunder 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.

No party may bring a claim or action, regardless of form, arising out of or related to this Declaration or to any construction or design defects claims pertaining to the Common Elements or to the Improvements of the Project, 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.

Notwithstanding anything to the contrary in this Article, in the event of alleged violation of a party's property or equitable rights, including, but not limited to, unauthorized disclosure of confidential information, that party may seek temporary injunctive relief from any court of competent jurisdiction pending appointment of an arbitrator. The party requesting such relief shall simultaneously file a demand for mediation and arbitration of the dispute, and shall request the American Arbitration Association to proceed under its

> rules for expedited procedures. In no event shall any such court-ordered temporary injunctive relief continue for more than thirty (30) days.
>
> If any part of this Article is held to be unenforceable, it shall be severed and shall not affect either the duties to mediate and arbitrate hereunder or any other part of this Article.

(Emphases added.) Significantly, the underlined portions above indicate that the arbitration clause includes a limit on damages, a limit on discovery, and a confidentiality provision.

In April of 2012, the Homeowners learned that the Defendants had defaulted on loans encumbering the project and that, as a result, the Defendants could not pay maintenance and operator fees to Marriott's management subsidiaries. The Defendants eventually defaulted on the AOAO assessments, abandoned the project, and revoked the Ritz-Carlton branding. Marriott or one of its subsidiaries withdrew approximately $1,300,000.00 from the AOAO operating fund and threatened to withdraw the remaining $200,000.00 from the fund. The 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 but instead indicated that the multimillion dollar shortfall would have to be covered by the Homeowners.

B. Procedural History

On June 7, 2012, the Homeowners filed suit in the circuit court[4] asserting claims for breach of fiduciary duty, access to books and records, and injunctive/declaratory relief. The circuit court denied the Defendants' motion to compel arbitration, which the Defendants appealed. The ICA concluded that the parties had entered into a valid agreement to arbitrate, that the dispute fell within the scope of that agreement, and that the agreement was not procedurally unconscionable. Thus, the ICA held that the Defendants could compel the Homeowners to arbitration.

On June 3, 2015, this court issued an opinion in *Narayan I*, vacating the ICA's judgment on appeal, affirming the circuit court's order denying the Defendants' motion to compel arbitration, and remanding the case to the circuit court for further proceedings consistent with the opinion. 135 Hawai'i at 339-40, 350 P.3d at 1007-08. This court held that the Homeowners could not be compelled to arbitrate for two reasons. First, this court determined 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 335, 350 P.3d at 1003. Second, this court determined that portions of the arbitration clause were unconscionable. *Id.* at 336-39, 350 P.3d at 1004-07.

This court subsequently issued summary disposition orders in line with its opinion for two related cases, *Nath v. Ritz-Carlton Hotel Co.*, No. SCAP-13-2732, 136 Hawai'i 23, 2015 WL 4067573 (Haw. June 30, 2015)(SDO), and *Narayan v. Marriott Interna-*

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[4] The Honorable Joseph E. Cardoza presided.

tional, Inc., No. SCAP-13-3607, 136 Hawai'i 23, 2015 WL 4067610 (Haw. June 30, 2015) (SDO), (collectively, the *Narayan* cases).

The Defendants filed petitions for writ of certiorari for the *Narayan* cases and, on January 11, 2016, the Supreme Court entered orders granting the petitions and vacating and remanding the *Narayan* cases: "The judgment is vacated, and the case is remanded to the Supreme Court of Hawaii for further consideration in light of DIRECTV, Inc. v. Imburgia, [— U.S. — , 136 S.Ct. 463], 193 L.Ed.2d 365 (2015)."

On remand, both parties filed supplemental briefs addressing the impact of *Imburgia* on the *Narayan* cases.

C. The *Imburgia* Decision

The *Imburgia* lawsuit arose in 2008, when the plaintiffs, DIRECTV customers, challenged DIRECTV's early termination fees on the grounds that the fees violated California law. 136 S.Ct. at 466. The service contract between the plaintiffs and DIRECTV included a binding arbitration provision and class action waiver. *Id.* The contract also provided that "if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable.'" *Id.*

Prior to 2011, the class arbitration waiver clause was unenforceable under California law pursuant to the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). In Discover Bank, the California Supreme Court held that a waiver of class arbitration in a consumer contract of adhesion was unconscionable under California law and should not be enforced. *Id.*, 30 Cal.Rptr.3d 76,

113 P.3d at 1110. However, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the Supreme Court held that the *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and that the Federal Arbitration Act (FAA) preempted and invalidated the rule. (Quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Thus, after the 2011 *Concepcion* decision, class arbitration waiver clauses became enforceable under California law.

Following the Supreme Court's decision in *Concepcion*, DIRECTV requested that the matter be sent to arbitration pursuant to the arbitration clause. *Imburgia*, 136 S.Ct. at 466. The trial court denied that request and DIRECTV appealed. *Id.* The California Court of Appeal referenced two sections of California's Consumers Legal Remedies Act in holding that "the law of California would find the class action waiver unenforceable." *Id.* at 467. The California Supreme Court denied discretionary review and the Supreme Court accepted DIRECTV's petition for writ of certiorari. *Id.* at 467-68.

The Supreme Court stated that the issue before it was "whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.' " *Id.* at 468 (quoting *Buckeye*, 546 U.S. at 443, 126 S.Ct. 1204). The Supreme Court concluded that "California courts would not interpret contracts other than arbitration contracts the same way" and offered six bases for this conclusion. *Id.* at 469. Of relevance to this case, the Supreme Court determined that "nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of 'law of your state' in any

context other than arbitration" and that "the language used by the Court of Appeal focused only on arbitration." *Id.* at 469-70. Specifically, the Supreme Court noted that "[f]raming the question in [arbitration terms], rather than in generally applicable terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration." *Id.* at 470.

Given these considerations, the Supreme Court concluded that "California's interpretation of the phrase 'law of your state' does not place arbitration contracts 'on equal footing with all other contracts.' " *Id.* at 471. As such, the Supreme Court held that "the Court of Appeal's interpretation is preempted by the Federal Arbitration Act." *Id.*

III. DISCUSSION

The FAA states that "an agreement in writing to submit to arbitration ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act, 9 U.S.C. § 2 (2012).

The FAA "creates a body of federal substantive law of arbitrability, enforceable in both state and federal courts and pre-empting any state laws or policies to the contrary." *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001) (quoting *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir. 1988)). "Despite the 'liberal federal policy favoring arbitration agreements,' ... state law is not entirely displaced from federal arbitration analysis." *Id.* at 936-37 (quoting *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)). "[A]s long as state law de-

fenses concerning the validity, revocability, and enforceability of contracts are generally applied to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA." *Id.* at 937; *see also Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740 ("[C]ourts must place arbitration agreements on an equal footing with other contracts ... and enforce them according to their terms."). Specifically, arbitration agreements, like all other contracts, "may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' " *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

A. Unconscionability

Under Hawai'i law, unconscionability is recognized as a general contract defense:

> 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. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.

City & Cty. of Honolulu v. Midkiff, 62 Haw. 411, 418, 616 P.2d 213, 218 (1980) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)); *see also Lewis v. Lewis*, 69 Haw. 497, 501, 748 P.2d 1362, 1366 (1988) ("The basic test is whether ... the clauses involved are so one-sided as to be unconscionable under the circumstances existing

at the time of the making of the contract.... The principle is one of the prevention of oppression and unfair surprise ...").

In *Midkiff*, this court considered whether a general issue of material fact existed as to whether a condemnation clause in a lease was unconscionable. 62 Haw. at 416-17, 616 P.2d at 217. In analyzing the facts of the case under the doctrine of unconscionability, this court observed that the lease was a standard pre-printed form, which "may indicate that there was no arms-length bargaining between the two parties." *Id.* at 417, 616 P.2d at 218. Additionally, this court noted that there could have been a disparity in bargaining power that left the petitioner in a "take-it-or-leave-it position regarding the lease." *Id.* at 418, 616 P.2d at 218. As such, this court concluded that the petitioner did raise a genuine issue of material fact and remanded the case to the trial court to hold a hearing on the issue of the unconscionability of the condemnation clause. *Id.*

Recent Hawai'i decisions have defined unconscionability more specifically by articulating two principles that make up the doctrine: "Unconscionability encompasses two principles: one-sidedness and unfair surprise." *Balogh v. Balogh*, 134 Hawai'i 29, 41, 332 P.3d 631, 643 (2014); *see also Lewis*, 69 Haw. at 502, 748 P.2d at 1366 ("It is apparent that two basic principles are encompassed within the concept of unconscionability, one-sidedness and unfair surprise.").

These principles are also characterized as procedural and substantive unconscionability.[5] *See*

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[5] Generally, both procedural and substantive unconscionability must be present in order to make a contract unconscionable;

Balogh, 134 Hawai'i at 41, 332 P.3d at 643. Procedural unconscionability, or unfair surprise, focuses on the "process by which the allegedly offensive terms found their way into the agreement." 7 Joseph M. Perillo, *Corbin on Contracts* § 29.1 (Rev. ed. 2002). Substantive unconscionability, in contrast, focuses on the content of the agreement and whether the terms are one-sided, oppressive, or "unjustly disproportionate." *Balogh*, 134 Hawai'i at 41, 332 P.3d at 643; Perillo, *supra*, § 29.1.

Thus, under the common law of Hawai'i, unconscionability is a generally applicable contract defense. We turn now to analyzing the facts of the case under this doctrine.

1. Procedural Unconscionability

Procedural unconscionability "requires an examination of the contract formation process and the alleged lack of meaningful choice." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 537 N.Y.S.2d 787, 534 N.E.2d 824, 828 (1988). Courts consider such factors as "whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power" between the parties. *Id.*; *see also* Perillo, *supra*, § 29.4 (noting that the following elements factor into a determination of procedural unconscionability: superior bargaining power, lack of meaningful choice for the weaker party, form

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however, Hawai'i courts "have recognized that, under certain circumstances, an impermissibly one-sided agreement may be unconscionable even if there is no unfair surprise." *Balogh*, 134 Hawai'i at 41, 332 P.3d at 643. Such an analysis is not necessary in this case because the arbitration clause is both procedurally and substantively unconscionable.

contracts that are "heavily weighted in favor of one party and offered on a take it or leave it basis," and where "freedom of contract is exploited by a stronger party").

Procedural unconscionability often takes the form of adhesion contracts, where a form contract is created by the stronger of the contracting parties, and the terms "unexpectedly or unconscionably limit the obligations and liability of the weaker party." *Nacino v. Koller*, 101 Hawai'i 466, 473, 71 P.3d 417, 424 (2003) (quoting *Leong v. Kaiser Found. Hosp.*, 71 Haw. 240, 247, 788 P.2d 164, 168 (1990)). 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.

In this case, the contracting process for the arbitration clause exhibits elements of procedural unconscionability. The party with the superior bargaining strength, the Defendants, not only drafted the arbitration clause found in the declaration, but they also recorded the declaration in the Bureau of Conveyances prior to the execution of the purchase agreements. The Homeowners were required 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 "created by the stronger of the contracting parties" on a "take-it-or-leave-it" basis. *Nacino*, 101 Hawai'i at 473, 71 P.3d at 424; *Midkiff*, 62 Haw. at 418, 616 P.2d at 218 (noting that a "disparity in bargaining position" and a "take-it-or-leave-it" position are factors in determining whether a contract is unconscionable).

In addition to the inequality of bargaining power described above,[6] there is an element of unfair surprise in that the arbitration clause is buried at the end of the declaration and is ambiguous when read in conjunction with the other controlling documents, including the purchase agreement and the public report. For instance, the arbitration clause is on page thirty-four of the thirty-six page declaration and provides that, if a dispute cannot be resolved through negotiation or mediation, "the dispute *shall* be resolved by arbitration." (Emphasis added.) In contrast, the purchase agreement does not provide for mandatory arbitration but instead contains: 1) a waiver of jury trial clause, which states that the parties "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" and that "[v]enue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, State of Hawaii," and 2) an attorneys' fees clause, which provides for fees as a result of "any legal or other proceeding." Similarly, the public report provides that "[t]he provisions of [the controlling documents, including the declaration] are intended to be, and in most cases are, enforceable in a court of law."

Thus, the controlling documents offer conflicting guidance on dispute resolution, with the declaration mandating arbitration for the parties, while the purchase agreement and public report allow for disputes

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[6] This court has noted that "inequality of bargaining power, *in and of itself*, does not transform an agreement to arbitrate ... into an unenforceable contract of adhesion." *Brown v. KFC Nat'l Mgmt. Co.*, 82 Hawai'i 226, 248 n.27, 921 P.2d 146, 168 n.27 (1996).

to be litigated through traditional legal proceedings. Such ambiguity in the controlling documents has the potential to confuse or mislead the non-drafting parties, and deprives those parties from a full and adequate understanding of their rights under contract. *See Balogh*, 134 Hawai'i at 41, 332 P.3d at 643 (explaining that, in the context of postmarital and separation agreements, unfair surprise means that "one party did not have full and adequate knowledge of the other party's financial condition when the ... agreement was executed").

For these reasons, we conclude that the arbitration clause satisfies the procedural element of unconscionability.

2. Substantive Unconscionability

Substantive unconscionability focuses on the one-sidedness of the agreement. *Lewis*, 69 Haw. at 502, 748 P.2d at 1366; *Balogh*, 134 Hawai'i at 41, 332 P.3d at 643; *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 56 Haw. 466, 474, 540 P.2d 978, 984 (1975); *see also Gillman*, 537 N.Y.S.2d 787, 534 N.E.2d at 829 ("This question entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged."). Here, the Homeowners argue that the arbitration clause is substantively unconscionable because it eliminates rights to punitive, exemplary, and consequential damages, precludes discovery, imposes a confidentiality requirement, and imposes a one-year statute of limitations.[7] We

[7] 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.

agree, and affirm our earlier decision that portions of the arbitration clause are substantively unconscionable.

a. Damages Provision

"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). "Since the purpose of punitive damages is not compensation of the plaintiff but rather punishment and deterrence, such damages are awarded only when the egregious nature of the defendant's conduct makes such a remedy appropriate." *Id.* Courts often look to the intentional, deliberate, and outrageous nature of the defendant's actions when considering punitive damages. *Id.*

Hawai'i law 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, 738 (2001) (quoting *Yauger v. Skiing Enters., Inc.*, 206 Wis.2d 76, 557 N.W.2d 60, 62 (1996)). Such provisions "are strictly construed against parties relying on them" and will be held void if the agreement is, *inter alia*,

"gained through inequality of bargaining power." *Id.* at 156, 19 P.3d at 739.

While not wholly exculpatory, the damages provision at issue in this case similarly limits liability because it restricts the amount or type of recoverable damages. When coupled with "inequality of bargaining power," such a limitation on liability will likewise be unenforceable. *See Lucier v. Williams*, 366 N.J.Super. 485, 841 A.2d 907, 912 (2004) (concluding that a limitation of liability provision was unconscionable because: 1) it was incorporated into a contract of adhesion, 2) the parties had "grossly unequal bargaining status" and, 3) the limit on recoverable damages allowed the drafting party to avoid almost all responsibility for his actions); *Cook v. Pub. Storage, Inc.*, 314 Wis.2d 426, 761 N.W.2d 645, 668 (Wis. Ct. App. 2008) ("With respect to punitive damages, we conclude the limitation of liability clause is unenforceable because it is against public policy. Punitive damages serve the public policy purposes of punishing wrongdoers and deterring others.").

In this case, there is a damages provision that was, as discussed in the previous section, gained through inequality of bargaining power. Additionally, the provision prevents an arbitrator from awarding "punitive, exemplary, or consequential damages," thereby shielding a defendant from paying such damages to an aggrieved party, even upon a showing of egregious or outrageous conduct by the defendant. 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. Under Hawai'i law, such provisions,

regardless of whether they are found in arbitration agreements or other contracts, are substantively unconscionable.

b. Discovery Provision

Adequate discovery is necessary to provide claimants "a fair opportunity to present their claims." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). In Hawai'i, discovery rules "reflect a basic philosophy that a party to a civil action should be entitled to the disclosure of all relevant information in the possession of another person prior to trial, unless the information is privileged." *Hac v. Univ. of Haw.*, 102 Hawai'i 92, 100, 73 P.3d 46, 54 (2003) (quoting *Wakabayashi v. Hertz Corp.*, 66 Haw. 265, 275, 660 P.2d 1309, 1315 (1983)); *see also* Hawai'i Rules of Civil Procedure (HRCP) Rule 26(b)(1)(A) (2015) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.").

In the arbitration context, limitations on discovery serve an important purpose 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). As such, limitations on discovery may be enforceable in the arbitral forum, so long as they are reasonable and do not hinder a party's ability to prove or defend a claim. *See Hac*, 102 Hawai'i at 100, 73 P.3d at 54 (noting that Hawai'i law favors disclosure of all relevant, unprivileged information); *Gilmer*, 500 U.S. at 31, 111 S.Ct. 1647 (determining that the discovery allowed in the arbitration proceeding—document production, information

requests, depositions, and subpoenas—was sufficient to allow plaintiff "a fair opportunity to present [his] claims").

In the current case, the discovery provision in the arbitration clause provides:

> 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.

For two reasons, this provision is unenforceable.

First, the discovery provision places severe limitations on the disclosure of relevant information and hinders the Homeowners' ability to prove their claims. Except for "nonrebuttable" exhibits and witness lists, the Homeowners are hindered in their ability from discovering potentially relevant information for their claims against the Defendants. This restriction runs in direct contravention to Hawaii's "basic philosophy" that a party is entitled to all relevant, unprivileged information pertaining to the subject matter of the action. *Hac*, 102 Hawai'i at 100, 73 P.3d at 54. On this basis alone, we hold the discovery provision unconscionable.

Second, the discovery provision violates parts of Hawai'i Revised Statutes (HRS) § 658A, which grant an arbitrator considerable discretion in permitting discovery. Specifically, HRS § 658A-17 (Supp. 2001) provides:

> (a) *An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths*. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.
>
> (b) *In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing*, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(Emphases added.) Pursuant to HRS § 658A-4(b)(1) (Supp. 2001),[8] the above subsections of HRS § 658A-17 cannot be waived by parties to an arbitration agreement. As such, the discovery provision, which waives the requirements of HRS § 658A-17, violates HRS § 658A-4(b)(1). Additionally, the discovery provision undermines the discretion generally afforded arbitrators. *See* HRS § 658A-17(c) ("An arbitrator may permit such discovery as the arbitrator decides

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[8] HRS § 658A-4(b)(1) provides: "(b) Before a controversy arises that is subject to an agreement to arbitrate, *a party to the agreement shall not: (1) Waive or agree to vary the effect of the requirements of* section 658A-5(a), 658A-6(a), 658A-8, *658A-17(a), 658A-17(b)*, 658A-26, or 658A-28." (Emphases added.)

is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.")

Although specific to arbitration, the referenced sections of HRS § 658A-17 reflect Hawaii's "basic philosophy" on discovery, and mirror similar provisions found in the Hawai'i Rules of Civil Procedure. *See* HRCP Rule 45 (2015) (allowing courts to issue subpoenas for the attendance of witnesses, production of documentary evidence, and taking of depositions); HRCP Rule 26 (2015) (allowing parties to obtain discovery of relevant information through a variety of methods). As such, the discovery provision is at odds with Hawaii's long-standing legal precedent of allowing parties to access relevant information for their claims. Such an unreasonable limitation on discovery, in either a litigation or an arbitration context, is substantively unconscionable under Hawai'i law.

c. Confidentiality Provision

As is the case with discovery limitations, confidentiality provisions are not *per se* substantively unconscionable. However, where an agreement 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 Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) ("Although facially neutral, confidentiality provisions usually favor companies over individuals.... [B]ecause companies continually arbitrate the same claims, the arbitration process tends to favor the company."); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293, 103 P.3d 753, 765

(2004) ("As written, the [confidentiality] provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process.").

In *Hawai'i Medical Ass'n v. Hawai'i Medical Service Ass'n*, 113 Hawai'i 77, 94, 148 P.3d 1179, 1196 (2006), this court recognized that non-drafting parties to arbitration agreements are sometimes confronted with unfair limitations, and noted that the arbitration agreement at issue prevented the non-drafting party from "placing evidence of broad-based, systemic wrongs before an internal review panel." This court concluded that such one-sided restrictions foreclosed parties from adequately pursuing their claims and therefore could not be upheld. *Id.*

The confidentiality provision in the current case provides: "Neither a party, witness, 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."

Similar to *Haw. Med. Ass'n*, the confidentiality provision at issue here, especially when read in conjunction with the discovery provision, impairs the Homeowners' ability to investigate and pursue their claims. If the confidentiality and discovery provisions in this case were enforced as written, the Homeowners would only be able to obtain discovery by consent and would be prevented from discussing their claims with other potential plaintiffs because the confidentiality provision would make them unable to "disclose the facts of the underlying dispute." *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir.

2010) ("The confidentiality provision in this case ... unfairly favors Quixtar because it prevents Plaintiffs from discussing their claims with other potential plaintiffs and from discovering relevant precedent to support their claims.")

In addition to detrimentally affecting the Homeowners' ability to investigate their claims, the confidentiality provision insulates the Defendants from potential liability. *See Ting*, 319 F.3d at 1152 (noting that, through a confidentiality provision, AT&T "placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract" and that, furthermore, "the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T"). We therefore hold that the confidentiality provision of the arbitration clause is substantively unconscionable because it impairs the Homeowners' ability to investigate and pursue their claims.

In sum, we affirm, on state contract grounds, that the arbitration clause is both procedurally and substantively unconscionable.[9]

3. Severability of Unconscionable Provisions

The Defendants argue that, if this court determines that certain provisions in the arbitration

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[9] Because we conclude that the arbitration clause is unconscionable, it is unnecessary for us to address whether ambiguity existed as to the intent to arbitrate, as we did in *Narayan I*.

agreement are unconscionable, those provisions should be severed from the arbitration clause and the rest of the arbitration clause should be enforced.

"[T]he general rule is that severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable when the illegal provision is not central to the parties' agreement." *Beneficial Haw., Inc. v. Kida*, 96 Hawai'i 289, 311, 30 P.3d 895, 917 (2001). However, where unconscionability so pervades the agreement, the court may refuse to enforce the agreement as a whole.[10] *See Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 293 P.3d 1197, 1199-1200 (2013) ("Severance is the usual remedy for substantively unconscionable terms, but where such terms 'pervade' an arbitration agreement, we 'refuse to sever those provisions and declare the entire agreement void.' " (quoting *Adler v. Fred Lind Manor*, 153

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[10] The Restatement (Second) of Contracts § 208 (Am. Law Inst. 1981) offers similar guidance on unconscionable contracts:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Likewise, but in the commercial context, HRS 490:2-302(1) (2008) provides, "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract …" *See also* Unif. Commercial Code § 2-302 cmt. 21A U.L.A. 156 (2012) ("[T]he court, in its discretion, *may refuse to enforce the contract as a whole if it is permeated by the unconscionability*, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement …"(emphasis added)).

Wash.2d 331, 103 P.3d 773, 788 (2004))); *Cordova v. World Fin. Corp.*, 146 N.M. 256, 208 P.3d 901, 911 (2009) ("[W]e must strike down the arbitration clause in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties.").

Here, unconscionability so pervades the arbitration clause that it is unenforceable. As a starting point, the arbitration clause is part of an adhesion contract whose terms were unilaterally determined by the stronger contracting party, and are ambiguous when read together with the other controlling documents. On a substantive level, the arbitration clause places a limitation on damages that would enable the Defendants to curtail liability for even the most outrageous and intentionally harmful conduct. The clause also hinders the Homeowners' ability to pursue their claims through extreme discovery and confidentiality limitations. As written, the arbitration clause goes beyond designating a forum for dispute resolution by depriving the Homeowners of a meaningful ability to assert rights that they might legitimately hold. Because unconscionability so pervades the arbitration clause, it is unenforceable.

4. Unconscionability in Other Jurisdictions

Other state jurisdictions have also invalidated arbitration clauses on general contract unconscionability grounds.

For instance, in *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. 2012), the Supreme Court of Missouri, on remand from the Supreme Court of the United States, affirmed that the arbitration agreement at issue was unconscionable. Brewer borrowed

$2,215 from the title company, which charged an annual percentage rate on the loan of 300 percent. *Id.* at 487. The agreement between the parties provided that Brewer must resolve any claim against the title company through arbitration, but that the title company could enforce its right to repossess the collateral through the courts. *Id.* Additionally, no customer of the title company had ever successfully renegotiated the terms of the contract. *Id.*

When Brewer filed a class action petition against the title company alleging violations of state statutes, the title company filed a motion to compel arbitration and argued that the arbitration agreement included a class arbitration waiver. *Id.* at 488. The trial court found the class arbitration waiver unconscionable and unenforceable and, on appeal, the Supreme Court of Missouri agreed, holding that the class arbitration waiver was unconscionable and striking the arbitration agreement in its entirety. *Id.*

The Supreme Court granted the title company's petition, and vacated and remanded *Brewer* to the Supreme Court of Missouri for further consideration in light of *Concepcion*. *Id.*

On remand, instead of focusing on the enforceability of the class arbitration waiver, the Missouri court looked to "whether the arbitration agreement as a whole is unconscionable." *Id.* at 492. The Missouri court explained that "[t]he purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise" and that "unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonable terms." *Id.* at 492-93.

The Missouri court then applied the doctrine to the facts of the case:

> The evidence in this case supports a determination that the agreement's arbitration clause is unconscionable. There was evidence that the entire agreement—including the arbitration clause—was non-negotiable and was difficult for the average consumer to understand and that the title company was in a superior bargaining position. Brewer could not negotiate the terms of the agreement, including the terms of the arbitration clause. Indeed, the evidence further demonstrated that no consumer ever successfully had renegotiated the terms of the title company's arbitration contract.

Id. at 493. The court also noted that the terms of the agreement were "extremely one-sided," and that the terms made it unlikely that a consumer like Brewer "could retain counsel to pursue individual claims." *Id.* at 493-94. The Missouri court determined that this "disparity in bargaining power," coupled with the "disparity between Brewer's remedial options and the title company's remedial options," was "strong evidence that the agreement [was] unconscionable." *Id.* at 495. As such, the Missouri court held that the entire arbitration clause within the agreement was unconscionable and unenforceable. *Id.* at 496. The title company subsequently appealed this decision to the Supreme Court, which declined review of the case the second time. *See Mo. Title Loans, Inc. v. Brewer*, 568 U.S. 822, 133 S.Ct. 191, 184 L.Ed.2d 38 (2012).

Similarly, in *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012), the Supreme

Court of Appeals of West Virginia, on remand from the Supreme Court of the United States, also considered if its earlier ruling invalidating the arbitration clause could be upheld under the doctrine of unconscionability. In *Brown*, three lawsuits arose from a nursing home's attempt to compel plaintiffs to participate in arbitration pursuant to a clause in the nursing home admission contract. *Id.* at 222. In two of the three cases, the West Virginia court ruled that the arbitration clauses were unconscionable. *Id.* Additionally, the court determined that the FAA could not be applied to personal injury or wrongful death actions. *Id.*

On certiorari, the Supreme Court reversed the West Virginia opinion on the grounds that the FAA requires courts to enforce arbitration agreements, with no exception for personal injury or wrongful death claims. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532-33, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012). The Supreme Court noted that, on remand, the West Virginia court must determine whether the arbitration clauses were unenforceable under "state common law principles that are not specific to arbitration and preempted by the FAA." *Id.* at 534, 132 S.Ct. 1201.

On remand, the West Virginia court determined that the Supreme Court's decision did not alter their ultimate decision regarding unconscionability because the "doctrine of unconscionability that we explicated in *Brown I* is a general, state, common-law, contract-law principle that is not specific to arbitration, and does not implicate the FAA." *Brown*, 729 S.E.2d at 223. Ultimately, the West Virginia court determined that further development of the factual record regarding unconscionability was proper, and

reversed the circuit court's prior orders and remanded for further proceedings on that issue. *Id.* at 229-30.

Thus, on remand from the Supreme Court, both Missouri and West Virginia determined that the unconscionability doctrine, as rooted in state, common-law contract principles, was a proper method for invalidating arbitration agreements. Likewise, we hold that, under the specific facts of this case, the arbitration clause was unconscionable pursuant to well-established Hawai'i contract law.

IV. CONCLUSION

For the foregoing reasons, we affirm our earlier decision in *Narayan v. Ritz-Carlton Development Co.*, 135 Hawai'i 327, 350 P.3d 995 (2015), on the grounds that the arbitration clause is unconscionable under common law contract principles. As such, the ICA's October 28, 2013 judgment on appeal is vacated and the circuit court's August 28, 2012 order denying the Defendants' motion to compel arbitration is affirmed. This case is remanded to the circuit court for further proceedings consistent with this opinion.

APPENDIX B

SCAP-13-0003607

IN THE SUPREME COURT OF
THE STATE OF HAWAIʻI

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; INDIVIDUALLY AND AS TRUSTEE FOR THE RENTON FAMILY TRUST DATED 12/3/09; STEPHEN XIANG PANG; FAYE WU LIU; MASSY MEHDIPOUR, INDIVIDUALLY AND AS TRUSTEE FOR MASSY MEHDIPOUR TRUST DATED JUNE 21, 2006; G. NICHOLAS SMITH; TRISTINE SMITH; RITZ 1303 RE, LLC, A COLORADO LIMITED LIABILITY COMPANY; CLIFFORD W. CHAFFEE; BRADLEY CHAFFEE, INDIVIDUALLY AND 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, GARY S. ANDERSON, RONALD W. LORENZ, AND RENEE Y. LORENZ,
Plaintiffs-Appellees ,

vs.

MARRIOTT INTERNATIONAL, INC.; THE RITZ-CARLTON DEVELOPMENT COMPANY, INC.; THE RITZ-CARLTON MANAGEMENT COMPANY, LLC; JOHN ALBERT; EDGAR GUM; THE RITZ-CARLTON HOTEL COMPANY, LLC; MARRIOTT VACATIONS WORLDWIDE CORPORATION; MARRIOTT OWNERSHIP RESORTS, INC.; MARRIOTT TWO FLAGS, LP; AND MH KAPALUA VENTURE, LLC,

Defendants-Appellants,

and

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; 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,
Defendants-Appellees.

ON REMAND FROM THE UNITED STATES SUPREME COURT
(CAAP-13-0003607; CIV. NO. 12-1-0586)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Nakayama, McKenna, and Pollack, JJ., and Circuit Judge Nakasone, in place of Wilson, J., recused)

This appeal concerns the arbitrability of certain "purchase-based" claims pursuant to an arbitration clause contained in the Declaration of Condominium Property Regime of Kapalua Bay Condominium. On June 30, 2015, we affirmed the Circuit Court of the Second Circuit's (circuit court) order denying Defendants' motion to compel arbitration pursuant to our opinion in *Narayan v. Ritz-Carlton Development Co.*, 135 Hawai'i 327, 350 P.3d 995 (2015) (*Narayan I*).

On January 11, 2016, the Supreme Court of the United States vacated and remanded *Narayan*

I and this case for further consideration in light of its decision in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

The questions presented in this appeal are controlled by our decision in *Narayan v. Ritz-Carlton Development Co.*, No. SCWC-12-0000819, at 3 (Haw. July 14, 2017) (pub. op.) (*Narayan II*), which affirmed our decision in *Narayan I* and held that "under long-standing Hawai'i contract law, the arbitration clause is unconscionable."

Pursuant to our analysis in *Narayan II*, the circuit court's August 26, 2013 order denying Defendants' motion to compel arbitration is affirmed.

DATED: Honolulu, Hawai'i, July 14, 2017.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Karen T. Nakasone

APPENDIX C

SCAP-13-0002732

IN THE SUPREME COURT OF THE
STATE OF HAWAIʻI

VIRENDRA NATH, NANCY MAKOWSKI,
KRISHNA NARAYAN, AND SHERRIE NARAYAN,

Plaintiffs-Appellees,

vs.

THE RITZ-CARLTON HOTEL COMPANY,
L.L.C., THE RITZ-CARLTON DEVELOPMENT
CO., INC., MARRIOTT INTERNATIONAL, INC.,
MARRIOTT VACATIONS WORLDWIDE COR-
PORATION, MARRIOTT OWNERSHIP RE-
SORTS, INC., THE RITZ-CARLTON MANAGE-
MENT COMPANY, L.L.C., MARRIOTT TWO
FLAGS, LP, AND MH KAPALUA VENTURE,
LLC,

Defendants -Appellants,

and

KAPALUA BAY, LLC, MAUI LAND & PINEAP-
PLE CO., INC., KAPALUA REALTY CO., LTD.,
EXCLUSIVE RESORTS, LLC, MLP KB PART-
NER, LLC, EXCLUSIVE RESORTS CLUB I
HOLDINGS, LLC, EXCLUSIVE RESORTS DE-
VELOPMENT COMPANY, LLC, ER KAPALUA
INVESTORS FUND HOLDINGS, LLC, ER
KAPALUA INVESTORS FUND, LLC, KAPALUA
BAY HOLDINGS, LLC, ET AL.,

Defendants-Appellees .

ON REMAND FROM THE UNITED STATES
SUPREME COURT
(CAAP-13-0002732; CIV. NO. 11-1-0216)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Nakayama, McKenna, and Pollack, JJ., and Circuit Judge Nakasone, in place of Wilson, J., recused)

This appeal concerns the arbitrability of certain purchase-based" claims pursuant to an arbitration clause contained in the Declaration of Condominium Property Regime of Kapalua Bay Condominium. On June 30, 2015, we affirmed the Circuit Court of the Second Circuit's (circuit court) order denying Defendants' motion to compel arbitration pursuant to our opinion in *Narayan v. Ritz-Carlton Development Co.*, 135 Hawai‘i 327, 350 P.3d 995 (2015) (*Narayan I*).

On January 11, 2016, the Supreme Court of the United States vacated and remanded *Narayan I* and this case for further consideration in light of its decision in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

The questions presented in this appeal are controlled by our decision in *Narayan v. Ritz-Carlton Development Co.*, No. SCWC-12-0000819, at 3 (Haw. July 14, 2017) (pub. op.) (*Narayan II*), which affirmed our decision in *Narayan I* and held that "under long-standing Hawai‘i contract law, the arbitration clause is unconscionable."

Pursuant to our analysis in *Narayan II*, the circuit court's July 12, 2013 order denying Defendants' motion to compel arbitration is affirmed.

DATED: Honolulu, Hawai'i, July 14, 2017.

/s/ Mark E. Recktenwald
/s/ Paula A. Nakayama
/s/ Sabrina S. McKenna
/s/ Richard W. Pollack
/s/ Karen T. Nakasone

APPENDIX D

SCWC-12-0000819

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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,

vs.

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 WORDWIDE, 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.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS (CAAP-12-0000819; CIV. NO. 12-1-0586(3))

ORDER DENYING MOTION FOR RECONSIDERATION

(By: Recktenwald, C.J., Nakayama, McKenna, and Pollack, JJ., and Circuit Judge Nakasone, in place of Acoba, J., recused)

Upon consideration of Respondents/Defendants-Appellants the Ritz Carlton Development Company,

Inc., et al's motion for reconsideration of the opinion filed on July 14, 2017, Exclusive Resorts, LLC, et al.'s joinder in the motion for reconsideration and the record herein,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawai'i,
August 9, 2017.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Karen T. Nakasone

APPENDIX E

SCAP-13-0003607

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

KRISHNA NARAYAN; SHERRIE NARAYAN; VIRENDRA NATH; NANCY MAKOWSKI; KEITH MACDONALD, AS CO-TRUSTEE FOR THE DKM TRUST DATED OCTOBER 7, 2011; SIMON YOO; SOMIYO SAKAGUCHI; SUSAN RENTON; INDIVIDUALLY AND AS TRUSTEE FOR THE RENTON FAMILY TRUST DATED 12/3/09; STEPHEN XIANG PANG; FAYE WU LIU; MASSY MEHDIPOUR, INDIVIDUAL LY AND AS TRUSTEE FOR MASSY MEHD IPOUR TRUST DATED JUNE 21, 2006; G. NICHOLAS SMITH; TRISTINE SMITH; RITZ 1303 RE, LLC, A COLORADO LIMITED LIABILITY COMPANY; CLIFFORD W. CHAFFEE; BRADLEY CHAFFEE, INDIVIDUALLY AND 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, GARY S. ANDERSON, RONALD W. LORENZ, AND RENEE Y. LORENZ, PLAINTIFFS-APPELLEES,

vs.

MARRIOTT INTERNATIONAL, INC.; THE RITZ-CARLTON DEVELOPMENT COMPANY, INC.; THE RITZ-CARLTON MANAGEMENT COMPANY, LLC; JOHN ALBERT; EDGAR GUM; THE RITZ-CARLTON HOTEL COMPANY, LLC; MARRIOTT VACATIONS WORLDWIDE CORPORATION; MARRIOTT OWNERSHIP RESORTS, INC.; MARRIOTT TWO FLAGS, LP; AND MH KAPALUA VENTURE, LLC,

Defendants-Appellants,

and

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; MLP KB PARTNER LLC; KAPALUA BAY HOLDINGS, LLC; ER KAPALUA INVESTORS FUND, LLC; ER KAPALOA INVESTORS FUND HOLDINGS, LLC; EXCLUSIVE RESORTS DEVELOPMENT COMPANY, LLC; AND EXCLUSIVE RESORTS CLUB I HOLDINGS, LLC,
Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT (CAAP-13-0003607; CIV. NO. 12-1-0586)

ORDER DENYING MOTION FOR RECONSIDERATION

(By: Recktenwald, C.J., Nakayama, McKenna, and Pollack, JJ., and Circuit Judge Nakasone, in place of Wilson, J., recused)

Upon consideration of Defendants-Appellants Marriott International, Inc., et al. 's motion for reconsideration of the summary disposition order filed on July 14, 2017, Exclusive Resorts, LLC, et al.'s joinder in the motion for reconsideration and the record herein,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawai'i, August 9, 2017.

/s/ Mark E. Recktenwald
/s/ Paula A. Nakayama
/s/ Sabrina S . McKenna
/s/ Richard W. Pollack
/s/ Karen T. Nakasone

APPENDIX F

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. 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 multimillion 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 Hawaiʻi Bureau of Conveyances pursuant to the requirements of Hawaiʻi 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. <u>Waiver of Jury Trial</u>. 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.... <u>Venue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, State of Hawaiʻi.</u>
>
> 48. <u>Attorneys['] Fees</u>. 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

[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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 437, 312 P.3d 869; *Douglass,* 110 Hawaiʻi 520, 135 P.3d 129; *Brown,* 82 Hawaiʻi 226, 921 P.2d 146; *Luke v. Gentry Realty, Ltd.,* 105 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi at 447, 312 P.3d at 879 (emphasis omitted) (quoting *Douglass,* 110 Hawaiʻi 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 Hawaiʻi 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 <u>more acute</u> 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 rather punishment and deterrence, such damages

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[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.

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 G

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[1] (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

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[1] 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 H

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.