

Supreme Court No. 80480-0

SUPREME COURT OF THE STATE OF WASHINGTON

BLAKELEY COMMONS CONDOMINIUM ASSOCIATION, LLC,

Respondent,

v.

BLAKELEY COMMONS LLC,

Petitioner.

Appellant
REPLY BRIEF OF PETITIONER

BETSY A. GILLASPY, WSBA #21340
DANIEL L. DVORKIN, WSBA #32776
SALMI GILLASPY, PLLC

STELLMAN KEEHNEL, WSBA #9309
KIT ROTH, WSBA #33059
DLA PIPER US LLP
701 Fifth Avenue, Suite 7000
Seattle, Washington 98104
Telephone: (206) 839-4800
Fax: (206) 839-4801
Attorneys for Defendant-Petitioner
Blakeley Village, LLC

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 FEB 20 A 8:22

BY RONALD B. CARPENTER

[Signature]
CLERK

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	4
A.	The Federal Arbitration Act Applies (and therefore preempts the anti-arbitration provision in the Washington Condominium Act).	4
B.	The Association Is Bound By The Agreements Made By the Unit Owners On Whose Behalf They Sue.	11
C.	Arbitration Agreements Are Not "Unconscionable":	20
1.	The Agreements Are Not <i>Procedurally</i> Unconscionable Because The Homeowners Had A Meaningful Choice.....	21
2.	The Agreements Are Not <i>Substantively</i> Unconscionable, Because They Are Not Unduly One-Sided And Harsh.	23
III.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<i>Adler v. Fred Lynn Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	12, 15
<i>Beaudry v. Harman</i> , 28 Wn. App. 719, 626 P.2d 50 (1981).....	6
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	6
<i>Beroth v. Apollo College, Inc.</i> , 135 Wn. App. 551, 145 P.3d 386 (2006).....	12
<i>Citizens Bank v. Alafabco, Inc.</i> , 539 U.S. 52 (2003).....	4
<i>Ex Parte McNaughton</i> , 728 So. 2d 592 (Ala. 1998).....	16
<i>Harris v. Green Tree Fin'l Corp.</i> , 183 F.3d 173 (3rd Cir. 1999).....	16
<i>Intern. Ass'n. of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	16
<i>Katzenbach v. McClung</i> , 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964).....	4, 5
<i>M.A. Mortenson Co., Inc. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 998 P.2d 305 (2000).....	15
<i>McKay Building v. Juliano</i> , 949 So. 2d 882 (Ala. 2006).....	5
<i>McLain v. Real Estate Bd. of New Orleans</i> , 444 U.S. 232 (1980).....	4
<i>Mendez v. Palm Harbor Homes</i> , 111 Wn. App. 446, 45 P.3d 954 (2004).....	11
<i>Metro Park Dist. of Tacoma v. Griffith</i> , 106 Wn.2d 425, 723 P.2d 1093 (1986).....	16

<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S. Ct. 3346 (1985).....	15
<i>Motsinger v. Lithia Rose-FT, Inc.</i> , 156 P.3d 156 (Or. App. 2007).....	16
<i>Nelson v. McGoldrick</i> , 127 Wn.2d 124, 896 P.2d 1258 (1995).....	15
<i>Ryan's Family Steak Houses, Inc. v. Regelin</i> , 735 So.2d 454 (Ala. 1999).....	11
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 139 Wn. App. 175, 156 P.3d 1000 (2007).....	9
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843 (2007).....	15
<i>Shepard v. Edward Mackay Ents., Inc.</i> , 148 Cal. App. 4th 1092 (2007).....	5
<i>Tjart v. Smith Barney, Inc.</i> , 107 Wn. App. 885, 28 P.3d 823 (2001).....	12
<i>Wise v. Tidal Constr. Co.</i> , 583 S.E.2d 466 (Ga. App. 2003).....	5
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	12, 13, 14, 16

Statutes & Administrative Codes

9 U.S.C. § 1.....	1
9 U.S.C. § 2.....	6
9 U.S.C. § 4.....	11
RCW § 64.34.100(2).....	3
RCW § 64.34.224(1).....	8
RCW § 64.34.228(1).....	8
RCW § 64.34.304(1)(d).....	8
RCW § 64.34.443(1).....	9
RCW § 64.34.445(3).....	10
RCW § 64.34.445(6).....	10

RCW § 64.34.450 (2004).....	10
RCW § 64.34.450(b)(2).....	10
RCW § 704.04.0404(2).....	11

Other Authorities

7 U.L.A. II, Uniform Common Interest Ownership Act.....	8
---	---

I. INTRODUCTION

When the Petitioner (“Blakeley Village”) agreed to sell the condominium units at issue in this case, the unit purchasers agreed that warranty claims would be arbitrated. The condominium unit owners now bring warranty claims against Blakeley Village through their homeowners’ Association. But the owners refuse to honor their agreement to arbitrate those claims.

The issue before this Court is simple: Should this Court enforce the unit owners’ agreements to arbitrate?

The Association’s response brief cannot (and does not) dispute that the Federal Arbitration Act (9 U.S.C. §1 *et seq.*) applies to all contracts within the reach of the United States Constitution’s Interstate Commerce Clause. Nor does the Association dispute that real estate sales contracts are within the reach of the Commerce Clause. As shown in Part II.A below, the Federal Arbitration Act therefore preempts the Washington statute invoked by the trial court when it refused to compel arbitration, and the Federal Arbitration Act requires that the arbitration agreements in this case be enforced.

The Association’s attempt to evade arbitration by distancing itself from its members’ agreements also fails. The Association brought the warranty claims at issue on its members’ behalf, and those claims are

based on warranties that were made to its members – not to the Association. The Association did not and could not bring these claims on its own behalf, only on the unit owners' behalf. Because the Association's claims belong only to its members, it is bound to arbitrate as they would be.

The Association's final argument, raised for the first time on appeal, is that the arbitration agreements are somehow unconscionable. That argument has no basis. There is no evidence of unfair bargaining, shockingly excessive deprivation of substantive rights, or any other legally recognized reason to invalidate the arbitration clause of the contracts at issue in this case.

In short, the Association's response brief does not refute the showing in Blakeley Village's opening brief that the arbitration agreements in this case are valid, applicable, and enforceable under the law.

II. ARGUMENT

A. **The Federal Arbitration Act Applies And Therefore Preempts The Anti-Arbitration Provision In The Washington Condominium Act.**

There is no dispute that where the Federal Arbitration Act applies, it preempts any anti-arbitration provision in a State statute and requires that agreements to arbitrate be enforced. The trial court refused to compel

arbitration of warranty claims allowed by the Washington Condominium Act, based on that statute's anti-arbitration provision (RCW 64.34.100(2)).¹ The primary issue on appeal is thus whether the Federal Arbitration Act—which extends to the farthest reaches of Congress's Commerce Clause power—applies in this case.

Petitioner's opening brief explained how the U.S. Supreme Court's Federal Arbitration Act case law establishes that the Federal Arbitration Act indeed applies to this case, requiring arbitration of all the Association's claims, including the Washington Condominium Act claims.

The Association's brief does not dispute that analysis. It does not dispute that Washington's anti-arbitration provision is preempted if the Federal Arbitration Act applies to the underlying real estate contracts. Nor does it dispute that the Federal Arbitration Act applies to those contracts even if there were no showing of the transactions' specific effect on

¹ The Association incorrectly asserts that the trial court did not compel arbitration of the Association's claims brought under Washington's Consumer Protection Act. Brief of Respondent ("Resp. Br.") 2. In fact, the trial court compelled arbitration of all the Association's claims other than its Washington Condominium Act claims. The trial court expressly held that "Plaintiff Blakeley Commons, LLC's claims against Defendant Blakeley Village, LLC ... that are not based on the Washington Condominium Act, Chapter 64.34 RCW, are hereby stayed pending arbitration of those non-Washington Condominium Act claims" CP 752. The Association does not argue, let alone cite to any supporting authority, that avoiding arbitration of its Washington Condominium Act claims somehow bootstraps its CPA claims out of arbitration. Indeed, the CPA does not include an analogous anti-arbitration provision.

interstate commerce, if those contracts merely evidence a transaction of a sort which “in the aggregate” would “represent a general practice...subject to federal control.” For that is the Interstate Commerce Clause test, and that test is satisfied if the general practice merely “bear[s] on interstate commerce in a substantial way.”²

Nor does the Association’s brief refute that the contracts here satisfy that test. As set forth in Blakeley Village’s opening brief, the general practice of real estate development and sales has long been subject to extensive federal regulation and control under the Interstate Commerce Clause. That federally-regulated real estate market undisputedly has a powerful effect on national commerce.³ And the real estate contracts here undisputedly involved interstate purchases, interstate financing and securitization, interstate common ownership by residents from different States, and interstate materials used to develop the property at issue. The reconsideration contests none of that.

² *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (internal quotation marks and ellipses omitted).

³ See *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980) (“whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance,” and may invoke The Commerce Clause); *Katzenbach v. McChung*, 379 U.S. 294, 300 (1964) (Commerce Clause extended to local neighborhood barbecue restaurant’s discriminatory practices because those practices could affect the volume of raw materials it buys, some of which travel in interstate commerce).

Instead of disputing the governing law or the facts, the Respondent Association focuses on red herrings.

The Association denies that courts have ever held that the use of materials or money from other States is, by itself, enough to invoke the Interstate Commerce Clause. Not only is this irrelevant, as the evidence here shows a much greater nexus with interstate commerce than that alone, it is also in error. Blakeley Village's opening brief is replete with such precedents – including several cases specifically holding that the use of construction materials from other States made a contract subject to the Federal Arbitration Act.⁴

The Association also asserts that its Complaint on its members' behalf is about warranty violations, not construction materials or financing. But that too is not true – for the Complaint expressly seeks damages resulting from defective materials (CP 330). The Association's assertion also is not relevant – for the issue is whether the transactions related to interstate commerce, not just whether the Complaint did.

Lastly, the Association claims that the “contract” to which the Interstate Commerce Clause test should be applied is just the Warranty

⁴ *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964); *Shepard v. Edward Mackay Ents., Inc.*, 148 Cal.App.4th 1092, 1095-96, 56 Cal.Rptr.3d 326 (2007); *McKay Building v. Juliano*, 949 So.2d 882, 886 (Ala. 2006); *Wise v. Tidal Constr. Co.*, 583 S.E.2d 466, 469 (Ga. App. 2003).

Addendum, standing all alone. But the very name of that document confirms that it did not stand all alone. It was instead part of the purchase and sale agreement. See *Black's Law Dictionary*, 38 (7th ed. 1999) (addendum is a thing “added, esp. to a document; a supplement”); *Beaudry v. Harman*, 28 Wn. App. 719, 720, 626 P.2d 50 (1981) (two contracts executed at the same time and involving the same matter are construed as one contract).⁵ Moreover, even if the addendum were a separate contract, it would still be part of the real estate sales transaction – a transaction which undisputedly is “a transaction involving interstate commerce.”⁶

In short, the Respondent Association does not refute that the Federal Arbitration Act applies to the real estate contracts in this case. The arbitration mandate of that Federal statute accordingly preempts the anti-arbitration provision of the State statute relied upon by the trial court below.

⁵ The Association itself describes the Warranty Addendum as “the addendum buried within the purchase and sale documents.” Resp. Br. 8.

⁶ 9 U.S.C. § 2; and see *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (context rule requires contract to be read in light of purpose and circumstances surrounding formation).

B. The Association Is Bound By The Agreements Made By the Unit Owners On Whose Behalf They Sue.

The Association next asserts that it does not have to arbitrate the warranty claims because it purportedly brought this action on its own behalf instead of on behalf of its members (the individual unit owners). There are at least two fatal flaws in this reasoning.

First, the Association is wrong on the facts. The Association in this case in fact admits that it brought this action “on behalf of itself and all unit owners.”⁷ Since the Association in fact does assert the warranty claims of the unit owners in this action, it is bound by the arbitration agreements to the same extent as the unit owners themselves.

Second, and also fatal to its argument, the Association is wrong on the law. The Association could not have brought these claims on its own behalf. The Association alleges injuries to the common elements of the condominiums, which the homeowners own and the Association does not. The Association paradoxically asserts that because it has a duty to the homeowners to maintain the common elements of the condominium, it must therefore have the power to bring an action thereupon on its own behalf.⁸ That position has no support in logic or the Washington Condominium Act cited by the Association. Indeed, under the explicit

⁷ CP 328.

⁸ Resp. Br. 9.

terms of the Washington Condominium Act, the common elements to which the Association claims damage belong solely to the homeowners, not to the Association. RCW 64.34.224(1) (“the declaration shall allocate a fraction or percentage of undivided interests in the common elements...to each unit”) (emphasis added); RCW 64.34.228(1) (“the declaration shall specify to which unit or units each limited common element is allocated”) (emphasis added).

In the face of the above-quoted clear statements by the Legislature that the unit owners, and not the Association, own the common elements, the Association erroneously relies on RCW 64.34.304(1)(d), which allows it to litigate “in its own name on behalf of itself or two or more unit owners.” A plain reading of this provision is that the Association, without a named plaintiff homeowner, may bring an action based on its own rights (for example, to enforce a service contract it executed), and also may sue on some or all members’ behalf based on the members’ rights.⁹ Thus, if the Association has a duty or a right to litigate as to the condominium, it can simply bring the action on the owners’ behalf. The Association’s position that RCW 64.34.304(1)(d) also irrevocably and involuntarily

⁹ See 7 U.L.A. II, Uniform Common Interest Ownership Act, § 3-102(a)(4), Cmt. 3 (this provision, the model for RCW 64.34.304(1)(d), is intended to allow association to litigate in its own name rather than owners’ names).

assigns all of its members' realty-based claims to itself is directly contrary to the Legislature's decision that only homeowners, not the Association, own the common elements, and is a perverse misreading, as it would allow the Association to recover for itself damages based on alleged injuries suffered by homeowners.

The slightly less ambitious version of the Association's argument, that the Washington Condominium Act gives the Association independent warranty claims, is equally meritless.¹⁰ The Court of Appeals has held that the Washington Condominium Act provides warranties only to purchasers and not to the Association, so that a claim based on those warranties is "necessarily" brought on behalf of the homeowners.¹¹ This holding is based on a straightforward reading of the statute. Under the Act, certain representations create express warranties "by any seller to a purchaser."¹² Similarly, the Act provides implied warranties of quality by

¹⁰ The Superior Court ruled that all of the Association's other claims are subject to arbitration, and the Association did not appeal that ruling. CP 750-52. The Association's acquiescence is inconsistent with its position that it brought this action on its own behalf and not subject to the unit owners' agreements, which suggests that even the Association itself does not take its own arguments seriously.

¹¹ *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 180, 156 P.3d 1000 (2007).

¹² RCW 64.34.443(1) (emphasis added).

the developer that run with the unit to any “purchaser.”¹³ Those warranties can be modified by an agreement signed “by the purchaser,” which would make no sense if the warranties ran to someone else instead (e.g., to the Association instead of to the purchaser).¹⁴ Subsequent legislation also expressly confirms that the implied warranty protections are provided “to the purchaser.”¹⁵ None of these provisions so much as refers to the homeowners association, never mind grants the association any warranty rights of its own.

The Association also errs when it states that Blakeley Village failed to prove that every purchaser agreed to arbitrate “all claims asserted by the Purchaser or by the Association.”¹⁶ It is the Association, not Blakeley Village, that lacks evidence. Without any support in the record, the Association baldly asserts that some unidentified unit owners who signed arbitration agreements later sold their units, and it further speculates that maybe these hypothetical owners might have breached their contractual obligation to pass their warranty related obligations to

¹³ RCW 64.34.445(6); *and see* RCW 64.34.445(3) (additional implied warranty applies to a “purchaser” only of residential units.)

¹⁴ RCW 64.34.450(b)(2).

¹⁵ RCW 64.34.450 (2004)

¹⁶ CP 16.

their purchaser.¹⁷ The Association provided no proof at all of any such events.¹⁸

Once a party seeking arbitration presents some evidence of a contract requiring arbitration of the claims at issue, the burden shifts to the adverse party to show that the contract is invalid or does not apply to the dispute.¹⁹ Blakeley Village provided proof as to every known unit purchaser. It produced the signed arbitration agreements for 106 of the units, and an affidavit as to the other three.²⁰ The Association disputed none of these facts.²¹

In short, the Association's response does not refute the fact that the Association is suing on its members' behalf to enforce its members'

¹⁷ Blakeley Village is the intended third-party beneficiary of the Warranty Addendum purchaser obligations in subsequent sale contracts.

¹⁸ Even if these events had occurred, the Association did not bring this action only on behalf of homeowners who did not agree to arbitrate. It brought the action on behalf of all the owners. The Association does not dispute that most of them agreed to arbitrate, and those agreements would bind the Association for the reasons stated above.

¹⁹ *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So.2d 454, 457 (Ala. 1999).

²⁰ CP 14 (unrebutted affidavit that the three missing contracts were also executed, with arbitration clauses).

²¹ Had any genuine fact issue as to arbitrability been raised, it would have been the duty of the trial court to "proceed immediately to the trial of such issue," not to decide it in advance of a hearing. RCW 7.04.040(2); *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 455, 45 P.3d 954 (2004) ("mini-trial" on arbitrability required by State law); *and see* 9 U.S.C. § 4.

warranty rights. The Association did sue on their behalf, and it had to sue on their behalf. Since the Association is accordingly standing in its members' shoes, the Association must comply with its members' agreement to arbitrate those warranty claims.

C. Arbitration Agreements Are Not “Unconscionable”.

The Association makes one last attempt to evade the arbitration agreements, claiming that they are unconscionable.

The Association bears the burden of proof on this issue.²² And to prove unconscionability, the Association must “examin[e] the circumstances surrounding the making of the agreement.”²³ The Association failed to raise this issue in the trial court, failed to bring forward any proof, and failed to meet its burden.

1. The Agreements Are Not *Procedurally* Unconscionable, Because The Homeowners Had A Meaningful Choice.

The Association's reliance on *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004), is misplaced. *Zuver* Court held that an arbitration agreement in an employment agreement was not procedurally unconscionable, because the plaintiff made a meaningful

²² *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 898, 28 P.3d 823 (2001) (challenger has burden as to unconscionability); *Adler v. Fred Lynn Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004) (same as to arbitrability).

²³ *Beroth v. Apollo College, Inc.*, 135 Wn. App. 551, 561, 145 P.3d 386 (2006).

choice to accept it.²⁴ The Court held, contrary to the Association's position, that a "take it or leave it" arbitration agreement in a contract, even if drafted by a party with much stronger bargaining power, is not *per se* unconscionable.²⁵ The party challenging such a take-it-or-leave-it contract must also show "at minimum" that the drafting party (1) refused to respond to plaintiff's questions or concerns, (2) placed undue pressure on plaintiff to sign the agreement without providing a reasonable opportunity to consider its terms, and/or (3) the terms of the agreement were set forth in such a way that an average person could not understand them.²⁶ Because the plaintiff in that case (*Zuver*) presented no such evidence, she could not avoid arbitration.²⁷

Here, the Association has shown even less. The Association failed to prove, or even argue, any of the three *Zuver* requirements. And the Association has not claimed there was a significant difference in the parties' bargaining power. Following the rule of *Zuver*, these contracts are not procedurally unconscionable.

²⁴ *Zuver*, 153 Wn.2d at 306-07.

²⁵ *Id.* at 305.

²⁶ *Id.* at 306-07.

²⁷ *Id.* at 307.

2. The Agreements Are Not *Substantively Unconscionable*, Because They Are Not Unduly One-Sided And Harsh.

The Association also mischaracterizes Zuver as holding that any “one-sided” provision is substantively unconscionable, and that a unilateral arbitration provision is “one-sided” in this sense.²⁸ Actually, however, Zuver emphasized that Washington does not require that the parties to a contract have identical obligations (which would be absurd).²⁹

A substantively unconscionable provision is, instead, one that is “[s]hocking to the conscience,” “monstrously harsh,” or “exceedingly callous.”³⁰ *Zuver* – which severed and struck only a waiver of remedy within an arbitration provision – expressly rejected the view that its holding would apply to any unilateral portion of an arbitration provision.³¹ Instead, “future litigants must show...that the disputed provision is so ‘one-sided’ and ‘unduly harsh’ as to render it unconscionable.”³² The Association would have to show that “the effect of th[e] provision is so one-sided and harsh,” that it “blatantly and excessively” favors the drafter.

²⁸ Resp. Br. 14.

²⁹ *Id.* at 317.

³⁰ *Zuver*, 153 Wn.2d at 303 (internal quotation marks and citations omitted).

³¹ *Zuver*, 153 Wn.2d at 319 & n.18, 321.

³² *Id.* at 319 n.18 (emphasis added).

Id. at 318 (emphasis in original).³³ Similarly, *Adler v. Fred Lind Manor* holds that a substantively unconscionable provision would have to be particularly “one sided and harsh.”³⁴

Here, the Association does not show, or even argue, that there was any unduly harsh effect. It only argues that the provision is unilateral. That is not enough to make any contract provision substantively unconscionable, and especially not an arbitration agreement. An agreement to arbitrate, as a mere choice of forum, does not waive any substantive rights.³⁵ Far from holding that arbitration deprives litigants of significant substantive rights, the Washington Supreme Court has repeatedly reaffirmed the strong policy in favor of resolving disputes by

³³ The Court considered this point important enough to repeat: “we [ask] whether the effect of the provision is so ‘one-sided’ as to render it patently ‘overly harsh’ in this case.” *Id.* at 319 n.16 (emphasis added). *See also Scott v. Cingular Wireless*, 160 Wn.2d 843, 860 n.7, 161 P.3d 1000 (2007) (rejecting argument that one-sided waiver of class action was *per se* unconscionable and asking whether agreement removed all effective remedy); *cf. M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 587, 998 P.2d 305 (2000) (arbitration provision limiting consumer’s damages was not substantively unconscionable in context of overall contract).

³⁴ 153 Wn.2d 331, 346, 103 P.3d 773 (2004) (emphasis added); *see also Nelson v. McGoldrick*, 127 Wn.2d 124, 135, 896 P.2d 1258 (1995) (“parties must be given wide latitude to contract, even if a decidedly one-sided agreement results”).

³⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

arbitration.³⁶ By definition, therefore, a mere agreement to arbitrate cannot be substantively unconscionable.

Other courts agree. For example, the Oregon Court of Appeals, following *Zuver*, recently held that a unilateral arbitration provision was not substantively unconscionable.³⁷ The Supreme Court of Alabama followed the same reasoning to the same conclusion as well.³⁸

Finally, the Association asserts without explanation that the arbitration provisions lack mutuality.³⁹ But the Association's reliance on *Metro Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986), is misplaced. That case rejected the argument that an option contract lacked mutuality, because the court considers the entire contract of which a particular agreement is a part, not just one provision alone.⁴⁰ As many courts have held, a unilateral arbitration agreement does not lack mutuality, because it is supported by consideration as part of the entire contract.⁴¹

³⁶ *Intern. Ass'n. of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 51, 42 P.3d 1265 (2002) (citing cases).

³⁷ *Motsinger v. Lithia Rose-FT, Inc.*, 156 P.3d 156, 164 (Or. App. 2007).

³⁸ *Ex Parte McNaughton*, 728 So.2d 592, 597-98 (Ala. 1998); accord *Harris v. Green Tree Fin'l Corp.*, 183 F.3d 173, 183 (3rd Cir. 1999).

³⁹ Resp. Br. 15.

⁴⁰ *See Zuver*, 153 Wn.2d at 317 (discussing *Metro Park*, unilateral damages waiver does not lack mutuality as part of whole contract).

⁴¹ *See Harris*, 173 F.3d at 180-81 (collecting cases).

III. CONCLUSION

Petitioner Blakeley Village's opening brief showed that governing law requires the arbitration agreements in this case to be enforced. The Association's response brief does not refute that showing. Blakeley Village respectfully requests that this Court accordingly require the Superior Court to enforce the law and compel arbitration of the Association's Washington Condominium Act claims.

RESPECTFULLY SUBMITTED this 19th day of February, 2008.

SALMI & GILLASPY, PLLC

**FILED AS ATTACHMENT
TO E-MAIL**



BETSY A. GILLASPY, WSBA #21340
DANIEL L. DVORKIN, WSBA #32776

STELLMAN KEEHNEL, WSBA #9309
KIT ROTH, WSBA #33059

DLA PIPER US LLP
701 Fifth Avenue, Suite 7000
Seattle, Washington 98104
Telephone: (206) 839-4800
Fax: (206) 839-4801
Attorneys for Defendant-Petitioner
Blakeley Village, LLC