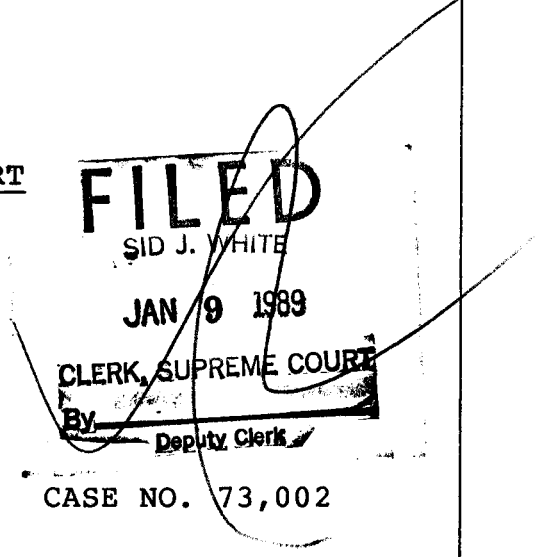
IN THE SUPREME COURT
STATE OF FLORIDA



DONALD HARPSTER, et. al.,

Plaintiffs/Petitioners,

vs.

CASE NO. 73,002

J. T. A., INC.,

Defendant/Respondent.
_____/

AMICUS CURIAE BRIEF
OF
THE FLORIDA MANUFACTURED HOUSING ASSOCIATION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES — PAGE(S)

STATEMENT OF THE CASE AND FACTS

The amicus curiae, FLORIDA MANUFACTURED HOUSING ASSOCIATION, INC., adopts the Statement of the Case and Statement of the Facts as set forth in the Respondent's Answer Brief.

SUMMARY OF ARGUMENT

Contrary to the Petitioner's argument in Point I of its Initial Brief, procedural unconscionability is not proven as a matter of law under the statutory cause of action for unconscionable rent in §723.033, Fla. Stat. This court, in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 F.L.W. 568 (Fla. November 23, 1988), held that the statutory cause of action for unconscionable rent could be maintained as a class action. This court reasoned that in a mobile home park the relationship of the parties, the park owner and mobile home owner, outweighs any other factor in determining the effect of an increase in lot rental amount. This Court also clearly established the factors which a court must consider in judging whether the relationship between the parties would allow the unconscionability claim to be brought as a class action.

The factors set out in the Lanca opinion allow a Plaintiff a presumption of procedural unconscionability to be established to bring a class action. The presumption must be established by pleading and proving certain facts. However, those factors in and of themselves do not establish procedural unconscionability. This Court did not hold that simply living in a mobile home park proved that a rental increase was procedurally unconscionable.

The homeowners must still prove both procedural and substantive unconscionability.

Moreover, the park owner must have the opportunity to present evidence to demonstrate that the homeowners have a "meaningful choice" in accepting the lot rental increase. The statutory cause of action, §723.033(2) Fla. Stat., provides that both "parties shall be afforded a reasonable opportunity to present evidence" as to the relationship of the parties, and any other relevant evidence to aid the court in making the determination of unconscionability.

Further, this Court must allow the park owner the opportunity to rebut the presumption allowing the mobile homeowners to bring a class action. To rule otherwise would mean that this court has created a conclusive presumption of procedural unconscionability, simply by proving the four factors set out in the Lanca opinion. The constitutionality of a presumption is judged by whether there is a rational connection between the facts proven and the ultimate fact presumed, and whether there is a right to rebut the presumption in a fair manner. Straugn v. K & K Land Management, Inc., 326 So.2d 421 (Fla. 1976) (constitutionality of statutory presumptions); Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) (constitutionality of judicial presumptions). To prohibit the park owner from

rebutting the presumption would be an unconstitutional violation of the park owner's due process rights.

Finally, the policies that the Petitioner advances to this Court, to determine that procedural unconscionability is proven as a matter of law are drawn from two cases, Stewart v. Green, 300 So.2d 889 (Fla. 1974) and Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), decided almost 15 years ago when the first statutory protection for mobile homeowners was passed by the Florida Legislature. The substantial protections for mobile homeowners adopted since that time have dramatically changed the nature of the landlord tenant relationship between the park owner and mobile homeowner. In 1984, Chapter 723, Florida Statutes, the "Florida Mobile Home Act" was adopted. Chapter 723 is the first comprehensive statute dealing exclusively with mobile home park landlord tenant regulation. Due to the substantial protections provided to mobile homeowners in Chapter 723, it has been justifiably dubbed the "mobile home park tenant's bill of rights" by two of the District Courts of Appeal. Lemon v. Aspen Emerald Lakes, Ltd., 446 So.2d 177, 180 n.2 (Fla. 5th DCA 1984); Pearce v. Doral Mobile Villas, Inc., 521 So.2d 282, 283 (Fla. 2d DCA 1988). This Court should carefully review Chapter 723, its substantial protections for mobile homeowners, the required disclosure of information in the prospectus prior to

entering into an enforceable rental agreement, and the ability of the mobile homeowner to enforce the provisions of the statute through administrative proceedings by the Department of Business Regulation, as well as by civil proceedings, before this Court adopts the "policy" justifications advanced by the Petitioner. These "policy" arguments are obsolete and should not be used by this Court given the comprehensive statutory regulation of mobile home parks in 1988.

Point II of the Petitioner's Initial Brief argues that the procedural-substantive test for judging unconscionable rent cases under §723.033 should not be adopted by this Court as a rule of law. The Petitioner prefers that the test remain "flexible and chameleon-like", giving little guidance to the lower courts in applying the statutory cause of action for unconscionable rent. The Petitioner's argument must fail for a number of reasons: (1) In State v. De Anza Corp., 416 So.2d 1173 (Fla. 5th DCA 1982) the court applied the procedural-substantive test as the construction of the statutory cause of action for unconscionable rent in §83.754, the predecessor statute to §723.033. The De Anza case was the only appellate decision construing §83.754 when that statute was repealed and replaced by §723.033. The language used in §723.033 is virtually identical to the language of former §83.754;

(2) The legislature is presumed to know the construction of §83.754 by the De Anza court, and to have adopted that construction when it adopted §723.033, absent a clear expression to the contrary. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627, 628-29 (Fla. 1983);

(3) The procedural-substantive test has been used by every appellate court that has applied the statutory cause of action for unconscionable rent in §723.033. Since there has been no amendment of §723.033, and therefor no clear expression of an intent to recede from the procedural-substantive test by the legislature, notwithstanding comprehensive amendments to Chapter 723 in 1986 and 1988, the courts are barred from changing the construction placed on the statute by the courts;

(4) The procedural-substantive test for unconscionable rent agrees with the analysis from Florida common law unconscionable contract cases on which it is based;

(5) The lower courts need a clear direction from this Court in construing the statutory cause of action for unconscionable rent under §723.033. A few lower courts have incorrectly applied the test for substantive unconscionability, and engaged in inquiries into the financial basis for the park owner's decision to increase the rent, the relationship between the rent

increase and the consumer price index, and the business judgement of the park owner. The appropriate test for substantive unconscionability is whether the terms of the rental agreement are unreasonable or unfair to the mobile homeowner. This consideration is easily judged by comparing the rent being charged against the rent charged in similar mobile home parks with similar facilities and services. The test is clearly stated, "It must be shown that the rental being paid by the complaining tenants grossly exceed that being paid by similarly situated tenants for lots of equal value." Garrett v. Janiewski, 480 So.2d 1324, 1326 (Fla. 4th DCA 1985), cert. denied 492 So.2d 1333 (Fla. 1986) This Court should give clear guidance to the lower courts of this state in construing the statutory cause of action for unconscionable rent under §723.033, by adopting the substantive unconscionability test as a rule of law.

ARGUMENT

I.

PROCEDURAL UNCONSCIONABILITY IS NOT PROVEN AS A MATTER OF LAW IN THE STATUTORY CAUSE OF ACTION FOR UNCONSCIONABLE RENT

Contrary to the Petitioner's argument in Point I of its Initial Brief, this Court has not held that procedural unconscionability is established as a matter of law in the statutory cause of action for unconscionable rent in §723.033, Fla. Stat. This court, in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 F.L.W. 568 (Fla. November 23, 1988), did hold that the statutory cause of action for unconscionable rent in §723.033 could be brought as a class action. This court reasoned that, in a mobile home park the relationship of the parties outweighs any other factor in determining the effect of an increase in lot rental amount. This Court also clearly established the factors which a court must consider in judging whether the relationship between the parties would allow the unconscionability claim to be brought as a class action. Lanca, at 569.

The factors set out in the Lanca opinion allow a presumption of procedural unconscionability for the Plaintiff, in order to bring a class action. However, those factors in and of themselves do not establish procedural unconscionability. This Court did not hold that simply living in a mobile home park proved that a

rental increase was procedurally unconscionable. The homeowners must still prove both procedural and substantive unconscionability.

Moreover, the park owner should have the opportunity to present evidence to demonstrate that the homeowners have a "meaningful choice" in accepting the rental increase. The statutory cause of action, §723.033(2) Fla. Stat., provides that both "parties shall be afforded a reasonable opportunity to present evidence" as to the relationship of the parties, and any other relevant evidence to aid the court in making the determination of unconscionability. This Court must allow the park owner the opportunity to rebut the presumption to allow a class action for unconscionable rent. To rule otherwise would mean that this court has created a conclusive presumption of procedural unconscionability, simply by proving the four factors set out in the Lanca opinion. The constitutionality of a presumption is judged by whether there is a rational connection between the facts proven and the ultimate fact presumed, and whether there is a right to rebut the presumption in a fair manner. To prohibit the park owner from rebutting the presumption would be an unconstitutional violation of the park owner's due process rights.

Finally, the policies that the Petitioner advances for this Court to determine that procedural

unconscionability is proven as a matter of law are drawn from two cases decided almost 15 years ago when the first statutory protection for mobile homeowners was passed by the Florida Legislature. The substantial protections for mobile homeowners adopted since that time have dramatically changed the nature of the landlord tenant relationship between the park owner and mobile homeowner. In 1984, Chapter 723, Florida Statutes, the "Florida Mobile Home Act" was adopted. Chapter 723 is the first comprehensive statute dealing exclusively with mobile home park landlord tenant regulation. Due to the substantial protections provided to mobile homeowners in Chapter 723, it has been justifiably dubbed the "mobile home park tenant's bill of rights" by two of the District Courts of Appeal. This Court should carefully review Chapter 723, its substantial protections for mobile homeowners, the required disclosure of information in the prospectus prior to entering into an enforceable rental agreement, and the ability of the mobile homeowner to enforce the provisions of the statute through administrative proceedings by the Department of Business Regulation, as well as by civil proceedings, before this Court adopts the "policy" justifications advanced by the Petitioner. These "policy" arguments are obsolete and should not be used by this Court given the comprehensive statutory regulation of mobile home parks in 1988.

A. THE LANCA CASE ONLY ESTABLISHED A PRESUMPTION OF PROCEDURAL UNCONSCIONABILITY IN ORDER TO ALLOW A CLASS ACTION UNDER THE STATUTE IT DID NOT ESTABLISH PROCEDURAL UNCONSCIONABILITY AS A MATTER OF LAW SIMPLY BECAUSE AN INDIVIDUAL LIVES IN A MOBILE HOME PARK.

In Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 F.L.W. 568, 569 (Fla. November 23, 1988) this Court construed the provisions of §723.033(2), Fla. Stat., the statutory cause of action for unconscionable rental agreements in a mobile home park, to allow a class action for unconscionable rent by the mobile home owners association. This Court looked at the statutory language of §723.033(2), as set forth below:

> (2) When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purpose, the relationship of the parties, and other relevant factors to aid the court in making the determination.

and stated that,

> As a rule, the relationship that exists between the park owner and resident clearly outweighs any other factor in determining the effect of the increase on individual residents. This circumstance is shared equally by each member of the park. Thus the unconscionability of such an increase lends itself to proof in the class action format.
>
> Lanca, at 569.

The holding in Lanca is based on a presumption that this Court established to satisfy the prerequisites for procedural unconscionability to bring a class action under §723.033. That presumption is set forth below:

> Where a rent increase by a park owner is a unilateral act, imposed across the board on all enants and imposed after the initial rental agreement has been entered into, park residents have little choice but to accept the increase. They must accept it or, in many cases, sell their homes or undertake the considerable expense and burden of uprooting and moving. The "absence of a meaningful choice" for these residents, who find the rent increased after their mobile homes have become affixed to the land serves to meet the class action requirement of procedural unconscionability.
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> Lanca, at 569.

However, it is clear from the Lanca opinion, that "an absence of meaningful choice" is not present in all cases for all residents of a mobile home park. The homeowner's association may represent members who, by their individual circumstances, do have a meaningful choice and therefore do not fall into the class entitled to bring an unconscionable rent case. See e.g. 13 F.L.W. at 569 n.1.

First, the class must consist of tenants who have all had the same rental increase imposed on them "across the board." Certainly, those individual homeowners who had no increase in rent or perhaps a small increase in rent, would not qualify as members of the class.

Second, as this Court stated in Lanca, the class would not include individual home owners who were paying the lot rental amount during the initial term. Nor should the class include purchasers of a mobile home existing in the park, who purchased in an arms length transaction, and with full knowledge of the rental

increase by notice from the park owner given prior to purchase. (See, for example, the statutory notice provisions in §723.031(5), Fla. Stat.)

Third, as this court noted in Lanca, the mobile home tenant's "absence of meaningful choice" occurs only "after their mobile homes have become affixed to the land." This consideration, coupled with the "considerable expense and burden of uprooting and moving" is a fundamental underpinning to this Court's decision in Lanca. It would be unfair to allow individuals to prove an absence of meaningful choice if their homes were not affixed to the property, or if there were not a considerable expense and burden of uprooting and moving their homes. Mobile homes are not all of one type. There are many distinct and different types of mobile homes in mobile home parks. The cost and expense of "uprooting and moving" one type of mobile home may be little different than the cost and expense to the tenant of moving out of an apartment or townhouse. Indeed, in the Jones v. Thomas case, also before this court, the trial court found that it cost "approximately 1,000 to $1,500 to move a mobile home in the park," Jones v. Thomas, 16 Fla.Supp.2d 30, 32 (Cir.Ct. Osceola Cty. 1986). One type of mobile home may require considerably more expense and burden to move. Others may cost less. The cost and expense is certainly not the same in every situation, nor is it the

same for all the mobile homes in a mobile home park.

Under the holding in Lanca, the mobile home owners are required to prove factual prerequisites to establish the presumption of procedural unconscionability in order to bring a class action. Under Lanca, the homeowners association must plead and prove that: (1) a rental increase was imposed across the board on all class members, (2) the rental increase was imposed on each of the members of the class after the initial rental agreement had been entered into, (3) the homes are permanently affixed to the land, and (4) the homeowner's options are to either sell their homes or incur a "considerable expense and burden of uprooting and moving."

These requirements should be proven in any class action brought under the statutory cause of action for unconscionability, whether brought by a homeowners association or by an individual or individuals acting as a class representative. However, the proof of procedural unconscionability is not conclusively presumed by proving these facts. Under the statutory cause of action the park owner has "a reasonable opportunity to present evidence" as to the relationship of the parties, and any other relevant factors to aid the court in making its decision in the case.

B. THE PRESUMPTION OF PROCEDURAL UNCONSCIONABILITY MUST BE REBUTTABLE BY THE PARK OWNER.

Upon carrying the burden of proof of establishing the facts to bring a class action for unconscionable rent does the park owner have the right to rebut the presumption at trial? This Court must answer in the affirmative, for two reasons: (1) The statutory cause of action specifically allows the park owner to present evidence on the relationship of the parties, and, (2) The park owner has a due process right to be able to rebut the presumption.

The statutory cause of action for unconscionable rent, §723.033(2), specifically states that "the parties shall be afforded a reasonable opportunity to present evidence" as to the relationship of the parties, and any other relevant factors to aid the court in making the determination. This Court has recognized that the mobile home owners have the opportunity to demonstrate that procedural unconscionability can be brought as a class action in the Lanca case. This Court must recognize the equal rights of the park owner under the statutory cause of action to rebut the presumption at the trial in the cause. To rule otherwise would make the presumption created in Lanca a conclusive presumption that is irrebutable.

This Court recently held that conclusive presumptions unconstitutionally violate due process if they fail to

provide an adverse party any opportunity to rebut the presumption. Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596, 599 (Fla. 1987). In the Valcin case this Court was asked to rule upon a conclusive presumption created by the district court in a medical malpractice case. The presumption provided that if a doctor deliberately failed to make a surgical report, or a hospital deliberately failed to maintain the surgical report, "then a conclusive irrebuttable presumption" arises that the surgery was negligently performed. Valcin, @ 598. This Court held that the conclusive presumption violated the defendant's due process rights because it did not provide the opposing party any opportunity to rebut the presumption. Valcin, at 599.

The holding in Valcin applied the rule from Straughn v. K & K Land Management, Inc., 326 So.2d 421 (Fla. 1976), involving the constitutionality of statutory presumptions, to the presumption created by the district court. In Straughn this Court held that the test for the constitutionality of presumptions is two pronged:

> First, there must be a rational connection between the fact proved and the ultimate fact presumed. Second, there must be a right to rebut in a fair manner.
>
> Straughn, at 424.

By applying this test to the presumption created by the district court in Valcin, this Court established the test for determining the constitutionality of

presumptions, whether created by statute or the courts.

In Lanca a presumption of procedural unconscionability is created to allow the Plaintiffs to bring a class action, based upon facts which must be proven by the homeowners association. The park owner should be given an opportunity to rebut the presumption at the trial in the case. The individual residents should not be conclusively presumed to be able to bring a class action because they have no meaningful choice in accepting the rental increase. The presumption, once established, should be rebuttable by the park owner by putting evidence before the court to show that the individual mobile home owner or owners did have a meaningful choice of whether to accept the rental increase.

C. THE PROCEDURAL-SUBSTANTIVE TEST MUST BE SATISFIED TO PROVE UNCONSCIONABILITY UNDER THE STATUTORY CAUSE OF ACTION.

There should not be a finding of procedural unconscionability simply because an individual lives within a mobile home park. The procedural-substantive test for unconscionability requires that the plaintiff/lessee prove that there was an absence of meaningful choice and that the lot rental amount was grossly in excess of the rent paid by other tenants for similar facilities and services. See, e.g. Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985), cert.

denied 492 So.2d 1333 (Fla. 1986); Pearce v. Doral Mobile Villas, Inc., 521 So.2d 282 (Fla. 2d DCA 1988).

This two pronged test is the appropriate test for determining unconscionability under the statutory cause of action provided in §723.033. The courts should not set aside a contract entered into between two parties unless the terms of the contract are clearly unreasonable and unfair, and the other party had no meaningful choice in entering into it. As the court in Steinhardt v. Rudolph explained, the courts should be conservative in using the unconscionable contract doctrine, as the law of contracts should not be undermined:

> All of this does not mean, however, that a court will relieve a party of his obligations under a contract because he has made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him. Indeed, the entire law of contracts, as well as the commercial value of contractual arrangements, would be substantially undermined if parties could back out of their contractual undertakings on that basis. " 'People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.'" (citations omitted).
>
> Steinhardt v. Rudolph, 422 So.2d 884, 890 (Fla. 3d DCA 1982).

This is especially true in the mobile home park statute, where the legislature has enacted comprehensive regulation of the mobile home park landlord tenant relationships, without modifying the unconscionable rent cause of action. This Court should not abandon the procedural-substantive test under the statutory cause of action for unconscionability, without a clearly stated intention from the legislature to do so. The procedural-substantive test has been the construction applied by the appellate courts in judging these cases under the §723.033. See, e.g. Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985), cert. denied 492 So.2d 1333 (Fla. 1986); Ashling Enterprises Inc. v. Browning, 487 So.2d 56 (Fla. 3d DCA 1986); Pearce v. Doral Mobile Villas, Inc., 521 So.2d 282 (Fla. 2d DCA 1988). There is no case construing the statute, nor factual finding or policy presented by the Petitioner to justify setting aside the procedural-substantive test for unconscionability. In fact, the only justification offered by the Petitioner arises from two cases decided almost 15 years ago. There have been substantial statutory protections afforded since then, especially with the adoption of Chapter 723, Fla. Stat.

D. THE POLICIES ADVANCED BY THE PETITIONER IN SUPPORT OF ITS ARGUMENT ARE OBSOLETE CONSIDERING THE SUBSTANTIAL PROTECTIONS FOR MOBILE HOMEOWNERS IN CHAPTER 723, FLORIDA STATUTES.

The Petitioner in it's Initial Brief argues that the public policies identified by this Court in Stewart v. Green, 300 So.2d 889 (Fla. 1974) and Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), should be used by this Court in this case to find procedural unconscionability as a matter of law under §723.033.

The Florida landlord-tenant laws in the early 1970's, when the legislature adopted the first specific mobile home park landlord tenant regulation, required amendment to provide specific treatment of mobile home park problems. In Stewart v. Green this Court reviewed a number of government studies from the early 1970's detailing the problems in Florida rental mobile home parks, especially the problems encountered by evicted homeowners. This Court concluded that the legislation limiting the park owner's right to terminate a lease, or evict a mobile homeowner, was within the police power. Stewart v. Green, at 894. However, in the last 16 years since the legislation addressed in Stewart v. Green, mobile home owners have been afforded substantial protection.

Since 1972 the Florida landlord tenant laws have undergone substantial modification, revision and amendment to provide specific protection for the mobile

home park tenants. In 1976, Chapter 83, the Florida Landlord Tenant statute, was overhauled to create a separate section, the "Mobile Home Landlord and Tenant Act." Chapter 76-81, Laws of Florida. In 1977, the legislature again adopted sweeping changes to the statute, creating a Mobile Home Landlord Tenant Commission to regulate rents in mobile home parks that were "unconscionable or not justified under the facts and circumstances." Chapter 77-49, Laws of Florida. However, in this regulation the legislature went too far. The statute was found to be unconstitutional rent control by this Court in Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So.2d 1132, 1137 (Fla. 1979). Although the legislature added a number of minor amendments to the statute between 1979 and 1983, it was not until the legislature created the 1983 Mobile Home Study Commission, that a comprehensive evaluation of the issues affected mobile home park owners and residents was accomplished. The Mobile Home Study Commission, a joint legislative committee established to comprehensively deal with mobile home park landlord tenant issues, was formed in 1983 (Chapter 83-219, §4, Laws of Florida). The Commission was directed to research the problems in mobile home park landlord tenant statute, meet throughout the state to take testimony, and recommend revisions to the mobile home

landlord tenant statute. In 1984 the Mobile Home Study Commission recommended legislation to comprehensively deal with the issues identified in the mobile home landlord tenant statute. The 1984 Florida Legislature followed the proposals of the Commission, and adopted Chapter 84-80, Laws of Florida, now known as Chapter 723, Florida Statutes, the "Florida Mobile Home Act."

Chapter 723 deals exclusively with mobile home park landlord tenant regulation, and provides for comprehensive treatment of the subject in one statute. A state agency, the State Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, was given authority to regulate the mobile home park industry, and to adopt rules to enforce, interpret and implement the statute. §§723.004 - 723.006.

The relationship of the parties to the rental agreement was fundamentally changed by Chapter 723. For mobile home parks containing 26 or more spaces, the statute mandated that upon the termination or renewal of any existing rental agreement, the mobile home owner was to be delivered a "prospectus" that disclosed all material aspects of the landlord tenant relationship, including the factors that would be used in raising the rent, all fees and charges that could ever be charged by the park owner, the rental agreement to be offered for

the length of the tenancy, and all of the facilities and services that would be provided by the park owner. See, e.g. §§723.011, 723.012 and 723.013. The prospectus requirement became effective January 1, 1985 for parks with 100 or more spaces, and July 1, 1985 for parks with less than 100 spaces. Chapter 84-80, §10, Laws of Florida. The Florida Department of Business Regulation is required to review every park owner's proposed prospectus, prior to it being delivered to the mobile homeowner or being used in an "enforceable rental agreement", to determine whether the prospectus is adequate to meet the requirements of Chapter 723. §723.011(1)(a),(b). Under the terms of the statute, the prospectus is deemed incorporated into the rental agreement (§723.031(10)), and once delivered to the home owner, the prospectus binds the park owner, and the existing homeowner who assumes it, to its terms, and creates an obligation which may be assumed by a subsequent purchaser of the mobile home. Hobe Associates, Ltd. v. State Department of Business Regulation, 504 So.2d 1301, 1305 (Fla. 1st DCA 1987). Furthermore, upon delivery of the prospectus, the mobile home owner has 15 days in which to cancel the rental agreement offered. §723.014(2). If the mobile home owner chooses to cancel the rental agreement, the park owner must either pay relocation costs for the mobile home, or purchase the mobile home from the mobile

homeowner at the market value of the mobile home. §723.014(2).

In addition to the requirements governing disclosure of information to prospective lessees in the prospectus, the statute requires that all advertising used in a mobile home park be filed and approved by the Division. §723.016. The statute established a number of independent causes of action pursuant to the terms contained in the statute: for damages from any false or misleading statement in advertising or a prospectus delivered to the homeowner, §723.017; for recision of any rule, regulation or rental agreement that limits certain rights of the homeowners established in the statute, §723.056; for damages resulting from any retaliatory conduct by the park owner against a mobile home owner, §723.0615. The prevailing party in any of these actions shall be awarded attorneys fees, §723.068. The statute authorizes the homeowners association a limited right to purchase the park, §§723.071 - 723.072. The homeowners association is established as the representative of the homeowners in the park, in order to bring actions on behalf of the homeowners, §723.079. See, Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 F.L.W. 568 (Fla. November 23, 1988). The park owner is required to notify the homeowners of the sale of the mobile home park, §723.071, or of any change in zoning sought for the park, §723.081. In

addition to these provisions, §723.033 provided a statutory cause of action for unconscionable rent.

The comprehensive nature of Chapter 723, including its substantial protections for mobile home owners, the strict requirements for disclosure of all material aspects of the future rental agreement, and the ability of the mobile home owner to "cancel" the rental agreement within 15 days of delivery of the prospectus, give the mobile home owners equal footing with the park owner. To say that a mobile home owner does not have a meaningful choice in accepting the rental agreement, or that the contract terms were not disclosed to the homeowner, flies in the face of Chapter 723's substantial protections.

The Petitioner, in making its policy argument for a finding of procedural unconscionability as a matter of law, ignores the statutory protections contained in Chapter 723. Instead, the Petitioner focuses on the findings of this Court from Stewart v. Green and Palm Beach Mobile Homes, Inc. v. Strong from almost 15 years ago. This court should look carefully at the regulation that is in place to protect mobile home owners in Chapter 723. The amicus curiae, Florida Manufactured Housing Association, Inc., is proud to have supported this legislation, and agrees with both appellate courts that have called Chapter 723 the mobile home park tenant's "bill of rights". Lemon v. Aspen Emerald

Lakes, Ltd., 446 So.2d 177, 180 n.2 (Fla. 5th DCA 1984); Pearce v. Doral Mobile Villas, Inc., 521 So.2d 282, 283 (Fla. 2d DCA 1988). The policy reasons that the Petitioner posits for a modification of the case law in the statutory cause of action for unconscionable rent are simply obsolete.

II.

THE PROCEDURAL SUBSTANTIVE TEST WAS THE CONSTRUCTION INTENDED BY THE LEGISLATURE WHEN IT ADOPTED THE STATUTORY CAUSE OF ACTION FOR UNCONSCIONABLE RENT.

The Petitioner in its initial Brief urges that this Court not direct the lower courts to use the procedural-substantive test in judging mobile home park unconscionable rent cases under §723.033, Fla. Stat. The argument of the Petitioner fails for a number of reasons: (1) The De Anza case established the procedural-substantive test as the construction of the statutory cause of action for unconscionable rent in §83.754, the predecessor statute to §723.033; (2) The legislature is presumed to know of the construction of §83.754 by the De Anza court, and to have adopted that construction when it adopted §723.033; (3) The procedural-substantive test has been used by every appellate court that has applied the statutory cause of action for unconscionable rent in §723.033; (4) The procedural-substantive test for unconscionable rent agrees with the Florida common law contract unconscionability doctrine;

(5) Finally, this Court should give guidance to the lower courts in applying the statutory cause of action for unconscionable rent. A few lower courts have used incorrect interpretations of the statutory cause of action in finding substantive unconscionability. The test for substantive unconscionability should be to determine whether the terms of the rental agreement are unreasonable or unfair to the mobile home park tenant. That test is best judged by comparing the rent being charged to the rent charged in a comparable mobile home park with similar facilities and services. In order for the rent to be determined unconscionable, the test is clearly stated, ""It must be shown that the rental being paid by the complaining tenants grossly exceeds that being paid by similarly situated tenants for lots of equal value." This Court should clearly state that the procedural-substantive test is the construction to be applied by the lower courts in judging unconscionability under the statutory cause of action for unconscionable rent in §723.033. This Court should adopt the comparable rent test for substantive unconscionability test as a rule of law.

A. THE DE ANZA CASE ESTABLISHED THE JUDICIAL CONSTRUCTION OF THE CAUSE OF ACTION FOR UNCONSCIONABLE RENT UNDER §83.754.

When §723.033, the statutory cause of action for unconscionable rent, was adopted by the Florida

Legislature in 1984, it was virtually identical to the statutory cause of action for unconscionable rent contained in its predecessor statute, §83.754(2). That subsection is set forth below:

> (2) When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to meaning, relationship of the parties, purpose, and other relevant factors to aid the court in making the determination.
>
> §83.754(2), Fla. Stat. (1983).

The only case construing the language of §83.754 at the time of its adoption as §723.033 was State v. De Anza, 416 So.2d 1173 (Fla. 5th DCA 1982). The complaint in that case was brought by the state attorney and approximately one hundred named individual lessees of mobile home lots against a mobile home park owner. In Count II of the complaint the plaintiffs sought to have a rental increase declared "unconscionable" within the meaning of §83.754, Fla. Stat. The complaint alleged that the park owner's rental increases exceeded the cost of living index, and that the park owner was making too much money on its capital investment. State v. De Anza Corp., 416 So.2d at 1175. The lower court dismissed the complaint, and the appeal followed.

The Fifth District Court in De Anza noted that a claim contract unconscionability requires a pleading and proof of both procedural and substantive unconscionability. The court upheld the dismissal of

the complaint, and set out the test for evaluating unconscionability under §83.754, Fla. Stat. Substantive unconscionability, the court explained, requires more than a price-value disparity, but requires a comparison between the particular price being paid by one party to the price being paid by another similarly situated consumer in a similar transaction for a similar facility. De Anza, at 1175. The court upheld the dismissal because the complaint failed to allege that the "schedule of rentals and increases is in excess of the property's rental value. De Anza, at 1175. In De Anza the court employed the two pronged test for unconscionability - the procedural-substantive test- and established that construction for the statutory cause of action for unconscionable rent under §83.754. De Anza at 1175.

B. THE LEGISLATURE IS PRESUMED TO HAVE ADOPTED THE PROCEDURAL-SUBSTANTIVE TEST FOR THE STATUTORY CAUSE OF ACTION FOR UNCONSCIONABLE RENT.

The legislature is presumed to know the construction placed upon a statute by the courts, and by reenacting the statute, is presumed to have intended to adopt that construction. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983). The De Anza decision is the only appellate court decision construing the provisions of §83.754, Fla. Stat. prior to adoption of Chapter 723 in 1984.

The language of §723.033 is virtually identical to the language in former §83.754. Since the De Anza case was the only appellate decision construing §83.754 at the time of adoption of §723.033, it is presumed that the legislature knew of the decision and intended to adopt that construction for §723.033. As this Court stated in Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627, 628-29 (Fla. 1983):

> When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary.

Moreover, as will be demonstrated in the following section, the procedural-substantive test has been the construction applied by the appellate courts that have construed the statutory cause of action for unconscionable rent under §723.033. Since its adoption in 1984, the legislature has not amended the language of §723.033, notwithstanding the major amendments to other sections of Chapter 723 in 1986 and 1988. See, e.g. Chapter 86-162, Laws of Florida; Chapter 88-147, Laws of Florida.

Moreover, since there was no clear expression of an intent by the legislature to recede from the procedural-substantive test after that construction of the statute in De Anza and subsequent cases, the courts are barred and precluded from changing the earlier construction.

Deltona Corporation v. Kipnis, 194 So.2d 295, 297-98 (Fla. 3rd DCA 1967); Rabinowitz v. Keefer, 100 Fla. 1723, 132 So.2d 297 (Fla. 1931).

C. THE APPELLATE COURTS HAVE APPLIED THE PROCEDURAL-SUBSTANTIVE TEST WHEN JUDGING UNCONSCIONABILITY UNDER THE STATUTORY CAUSE OF ACTION FOR UNCONSCIONABLE RENT

The statutory cause of action for unconscionable rent in mobile home parks is contained in §723.033 (2), Fla. Stat., which states:

> (2) When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purpose, the relationship of the parties, and other relevant factors to aid the court in making the determination.
>
> Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 F.L.W. 568, 569 (Fla. November 23, 1988).

Section 723.033 is a part of Chapter 723, a comprehensive statute regulating all aspects of the mobile home park landlord tenant situation, which was adopted in 1984 in Chapter 84-80, Laws of Florida. Chapter 84-80, in addition to creating Chapter 723, repealed existing mobile home park regulation contained in Chapter 83, Part III, Fla. Stat. (1983), including the existing statutory cause of action for unconscionable rent, contained in §83.754, Fla. Stat. Section 5, Ch. 84-80, Laws of Florida. Chapter 723 was

again amended in 1986, as part of Chapter 86-162, Laws of Florida, and in 1988, as part of Chapter 88-147, Laws of Florida. The amendments in 1986 and 1988 were comprehensive, and affected many of the sections of the statute. However, notwithstanding the construction of §723.033 by a number of courts during that time, the legislature has not changed the language of that section since 1984.

Although the De Anza case was the first appellate decision construing the statutory cause of action for unconscionable rent in §83.754, subsequent cases construing the language in §723.033, have held that substantive unconscionability, that is the terms of the rental agreement are unreasonable and unfair, is proven by showing that the lessee is "paying an amount grossly in excess of what others similarly situated are paying for the same thing." Garrett v. Janiewski, 480 So.2d 1324, 1326 (Fla. 4th DCA 1985), cert. denied, 492 So.2d 1333 (Fla. 1986).

In Appel v. Scott, 479 So.2d 800 (Fla. 2d DCA 1985), the Second District Court had the opportunity to examine, on an appeal from a judgement on the pleadings in a declaratory judgement action, whether a complaint stated a cause of action for unconscionable rent under section 723.033. Unfortunately, this case gives little guidance as to the judicial test to be utilized in determining unconscionable rent under the statute. The

complaint stated that it was an action under the Declaratory Judgement Act, Chapter 86, Fla. Stat. to determine the mobile home owners rights and obligations under the unconscionable rent provisions of §83.754 and its successor statute, §723.033. The District Court ruled that the complaint stated sufficient facts for the plaintiffs to bring an action for declaratory relief, but did not give an opinion on the elements of the cause of action for unconscionable rent. Appel, at 803. It is unfortunate that due to the procedural posture of the case, the court did not rule upon the elements of the cause of action for unconscionable rent as plead. The plaintiffs had alleged not only the standard for substantive unconscionability from De Anza and subsequent cases (that "the increases are grossly excessive when compared with rents charged by similarly situated mobile home parks in the county"), but also plead a variety of other matters that are irrelevant under the case law for determining substantive unconscionability, such as the rental increases "were not founded upon any legitimate financial basis, and are arbitrary, capricious and confiscatory." Appel, at 801. Because the court ruled that the pleading was sufficient to state a cause of action for unconscionability under the declaratory judgement statute, this case is of little significance in assessing the proper standard for judging unconscionable rent cases under §723.033.

The Fourth District Court of Appeal was the first appellate court to rule on the proper construction of the statutory cause of action for unconscionable rent under §723.033. In Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985), cert. denied, 492 So.2d 1333 (Fla. 1986), the court considered an appeal of a final judgement that directly ruled on an unconscionable rent claim in a mobile home park. The court in Garrett ,in reversing the final judgement of the trial court, dealt exhaustively with the issue of substantive unconscionability, because it found that the lot rental charged did not grossly exceed what other tenants in comparable mobile home parks were paying. Garrett, at 1326. The court, after reciting the standards used in a number of cases, held that when a proof of substantive unconscionability is made:

> It must be shown that the rental being paid by the complaining tenants grossly exceeds that being paid by similarly situated tenants for lots of equal value.
>
> Garrett, at 1326.

The Fourth District Court holding in Garrett is consistent with the Fifth District in De Anza in holding that the test for substantive unconscionability is a rental that grossly exceeds that paid by other tenants for similar facilities and services.

The Third District Court of Appeal, in Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d DCA

1986), was the next court to consider an appeal on the propriety of a judgement against a mobile home park owner in an unconscionable rent case. The court in that case found that the trial court had sufficient evidence to support a finding of substantive unconscionability, "in light of the reduction in services and the amount of rent charged by comparable mobile home parks in the vicinity." Ashling, at 56. Quite obviously, this test is the same as that used by the Fifth District Court in De Anza and the Fourth District Court in Garret v. Janiewski.

Finally, Second District Court of Appeal considered the proper test to apply in an unconscionable rent action in Pearce v. Doral Mobile Villas, Inc., 521 So.2d 282 (Fla. 2d DCA 1988). In Pearce the court was considering an appeal from an order of the lower court granting a discovery request by the Defendant, park owner for financial information from each of the plaintiffs. The court analyzed the relevance of the discovery request against the cause of action to be proven by the plaintiffs, and clearly distinguished the amorphous test utilized in the contract unconscionability cases, from that used in the statutory cause of action for unconscionable rent in a mobile home park. The court stated:

> Although the legal concept of unconscionability of contract provisions has been described as "flexible and chameleon-like", in the context of

> rental increases it is generally accepted that two factors must coalesce. First, the tenant/plaintiff must demonstrate the existence of "procedural unconscionability," elsewhere defined as "an absence of meaningful choice." . . . Next, there must be a demonstration of "substantive unconscionability," that is, that the contract terms are "unreasonably favorable to the other party." (citations omitted).

Pearce, at 283.

The court amplified the basis for finding substantive unconscionability in the rental situation, as follows:

> That a mobile home park may charge rents in excess of the value of its lots, and thereby "make to much money on its capital investment," does not alone signify substantive unconscionability. There must also exist some showing of the disparity between the rent charged by the defendant and those paid "by another similarly situated consumer for a similar transaction for a similar facility." (quoting from De Anza).

Pearce, at 283.

The court disallowed the discovery request, but in the discussion set out above, confirmed the test for substantive unconscionability as set out in De Anza and subsequent cases construing the statutory cause of action under §723.033.

As can be clearly seen from the De Anza case forward, the courts construing the statutory cause of action for unconscionable rent in mobile home parks have followed the procedural-substantive test. It should be presumed that the legislature knew of the construction of the statute in these cases each time the statute was reenacted, and that it intended to adopt that construction, absent a clear expression to the

contrary. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627, 628-29 (Fla. 1983) Deltona Corporation v. Kipnis, 194 So.2d 295, 297-98 (Fla. 3rd DCA 1967); Rabinowitz v. Keefer, 100 Fla. 1723, 132 So.2d 297 (Fla. 1931). Yet, notwithstanding major amendments to Chapter 723 in 1986 and 1988, no changes were made to the statutory cause of action for unconscionable rent by the legislature.

D. THE APPELLATE COURTS HAVE CONSTRUED THE STATUTORY CAUSE OF ACTION IN ACCORDANCE WITH THE UCC AND COMMON LAW CONTRACT UNCONSCIONABILITY CASES FROM WHICH IT IS DERIVED.

The statutory cause of action for unconscionable rent contained in §723.033 had its precursor in Chapter 83, the Florida Landlord Tenant Act, in §83.754, Fla. Stat. The language in §83.754 is almost identical to the Uniform Commercial Code statute providing a cause of action for unconscionable contracts involving the sale of goods.1 The statutory cause of action as initially applied by the courts, followed the construction applied

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1. The statutory cause of action from Section 2-302 of the Uniform Commercial Code is codified in Florida as §672.302(2), Fla. Stat., as follows:

> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

to Florida contract and UCC Code unconscionability cases from which it was derived.

The common law test for contract unconscionability is, as this Court has noted, one which has been "articulated and applied on a case-by-case basis over a long period of time during the development of our rich common law heritage. Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So.2d 1132, 1136 (Fla. 1979). The two cases which are most quoted in setting out the rule for Florida common law contract unconscionability are Bennett v. Behring Corp., 466 F.Supp. 689 (S.D.Fla. 1979), and Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (4th DCA), rev. denied 408 So.2d 1094 (Fla. 1981).

In Bennett the federal district court was faced with a complaint seeking to invalidate a recreational lease in a condominium under §672.302, Fla. Stat., which provides a cause of action for unconscionable contracts under the Florida Uniform Commercial Code (UCC) statute. The court held that a cause of action was not available under that provision, as it applied only to the sale of goods, but did recognize a cause of action under Florida common law for unconscionable contract. Bennett, at 694-96. The court analyzed Florida common law contract unconscionability using the test derived from the UCC cases, notably Williams v. Walker Thomas Furniture Co., 350 F.2d 445 (D.C.Cir. 1965) and Florida cases involving

the common law of contracts. The court directed that a trial court in considering substantive unconscionability:

> . . . must compare the price actually being paid by the complaining party, to the price being paid by other similarly situated consumers in a similar transaction. (emphasis supplied by court).
>
> Bennett, at 697.

The court then held that the test to be applied in determining substantive unconscionability to be:

> Is the lessee-buyer paying an amount grossly in excess of what others similarly situated are paying for the same thing? (emphasis added)
>
> Bennett, at 698.

The analysis set out in Bennett for common law contract unconscionability was followed by the court in Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th DCA), rev. denied 408 So.2d 1094 (Fla. 1981). In Kohl the court was considering an appeal from the lower court's denial of a motion to dismiss a class action claim under common law contract unconscionability, based on the terms of a recreational lease for a condominium. The court looked in depth at the two pronged test for unconscionability - the procedural-substantive test - as set out in Bennett and other cases, including the "modern progenitor of the common law concept of unconscionability," Williams v. Walker-Thomas Furniture Co., supra. The court, in an opinion cited often for its review of Florida common law

contract unconscionability cases, stated that,

> The authorities appear to be virtually unanimous in declaring (or assuming) that two elements must coalesce before a case for unconscionability is made out. The first is referred to as substantive unconscionability and the other procedural unconscionability.

Kohl, at 867.

The court upheld the trial court's denial of a motion to dismiss, and concluded by limiting its holding to the narrow legal issue of whether the amended complaint stated a cause of action for unconscionability which may be maintained as a class action.

Finally, in Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3rd DCA 1982), the court applied the Florida common law contract unconscionability cause of action in a complaint brought against a condominium developer. The Court noted that the common law doctrine of unconscionability had been applied by most courts under a "balancing approach" using the procedural-substantive test. Steinhardt v. Rudolph at 889. The court noted that the procedural-substantive analysis had not been used in Florida mortgage foreclosure "unconscionability" cases, and was not a "rule of law," but the court in Steinhardt v. Rudolph proceeded to utilize the procedural-substantive test in ruling on the case under common law contract unconscionability. Steinhardt v. Rudolph, 442 So.2d 884, 892-895 (Fla. 3rd DCA 1982).

The use of the procedural-substantive analysis in

Florida common law contract unconscionability cases should serve as a guide to this Court in the correct approach to the construction of the statutory cause of action for unconscionability in mobile home park rental agreements. These Florida contract cases, all existing prior to the adoption of §723.033 in 1984, indicate the general direction of the courts with respect to the construction of common law contract unconscionability.

E. THIS COURT SHOULD GIVE GUIDANCE TO THE LOWER COURTS IN CONSTRUING THE STATUTORY CAUSE OF ACTION FOR UNCONSCIONABLE RENT BY ADOPTING THE PROCEDURAL-SUBSTANTIVE TEST AS A RULE OF LAW.

The Petitioner, in Point II of its Initial Brief, asks that this Court not adopt the procedural-substantive test as a "rule of law" in the construction of the statutory cause of action for unconscionable rent under §723.033. The Petitioner, in Point I of its Initial Brief, argues that procedural unconscionability is proven as a matter of law by this Court in the Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd. case. Obviously, the Petitioner is urging that this court not adopt the substantive unconscionability test, that is that the rent charged in a mobile home park must be grossly in excess of the rent charged to tenants in mobile home parks providing similar facilities and services. Garrett v. Janiewski, 480 So.2d 1324, 1326

(Fla. 4th DCA 1985), cert. denied 492 So.2d 1333 (Fla. 1986). Rather the Petitioner apparently prefers that the test for substantive unconscionability be "flexible and chameleon-like," giving little to no guidance to the lower courts in construing unconscionability under the statutory cause of action for unconscionable rent in §723.033.

This court should give that guidance. The statutory cause of action for unconscionable rent has been construed by the appellate courts using the procedural-substantive test: from State v. De Anza, 416 So.2d 1173 (Fla. 5th DCA 1982) under §83.754; to Garret v. Janiewski, supra, the first case to apply the statutory cause of action under §723.033; the Third District Court in Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d DCA 1986); to the most recent appellate case applying the cause of action, Pearce v. Doral Mobile Villas, Inc., 521 So.2d 282 (Fla. 2d DCA 1988); and this Court in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd. 13 F.L.W. 568, 569 (Fla. November 23, 1988).

There are no cases supporting the Petitioner's argument, other than dicta contained in Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d DCA 1982), involving a discussion of the procedural-substantive test for not being used in the Florida mortgage foreclosure unconscionability cases. Even in Steinhardt v.

Rudolph, while noting that the test was not a rule of law, the court used the procedural-substantive test to reach its decision. Steinhardt v. Rudolph, at 892-95.

The only possible reason for the Petitioner's position is that it would like to have an amorphous test, so "flexible and chameleon-like" that the lower courts would not be sure how to judge the statutory cause of action for unconscionable rent under §723.033. That is what occurred in the case sub judice, and apparently, the Petitioner would like that confusion to reign in the lower courts considering these cases.

This Court should clearly articulate the standard to be applied by the lower courts under the statutory cause of action for unconscionable rent under §723.033. Eliminating confusion over the proper test in construing the statute would only assist in the administration of justice in these cases.

F. THIS COURT SHOULD NOT SANCTION THE LOWER COURT'S ANALYSIS OF SUBSTANTIVE UNCONSCIONABILITY IN THIS CASE.

A few lower courts have used factors which are completely improper in judging unconscionable rent cases under the statutory cause of action for unconscionable rent, such as ruling on the financial basis for the park owner's decision to increase rent, as well as the relationship of the rental increase with increases in the consumer price index. See, e.g. Jones v. Thomas, 16

Fla.Supp.2d 30, 32 (Cir.Ct. Osceola Cty. 1986); Offner v. Keller Park Investors, I, Ltd., 19 Fla.Supp.2d 140, 144 (Cir.Ct. Pasco Cty. 1986); Fredericks v. Hoffmann, 45 Fla.Supp. 44 (Cir.Ct. Sarasota Cty. 1976). To adopt the Petitioner's argument that the procedural-substantive test should not be used in judging unconscionable rent cases will result in confusion among the lower courts as to the proper judicial approach to these cases.

For example, the trial court in the Jones v. Thomas case, in discussing substantive unconscionability, mixed the holdings from a number of appellate and circuit courts. The court stated that the rule of law in substantive unconscionability is "difficult" to determine, and then proceeded to list three possible factors that may be followed by the courts in determining substantive unconscionability, as follows:

> Reported Florida cases have said that substantive unconscionability can be shown by establishing (1) "gross price disparity", i.e. that the rent grossly exceeds that paid for lots of equal value in comparable parks; (2) that the increased rental is significantly higher than the fair market rental value of the lot; and (3) that the increase is not founded upon a legitimate financial basis, but is arbitrary, capricious and confiscatory.
>
> Jones v. Thomas, 16 Fla.Supp.2d 30, 32 (Cir. Ct. Osceola Co. 1986).

The first two factors addressed by the trial court are not really different factors at all, but rather are statements of the same test, which is used in each of

the opinions the trial court cited for authority. See, e.g., Bennett v. Behring Corp., 466 F.Supp. at 698 ("the Court must compare the price actually being paid by the complaining party, to the price being paid by other similarly situated consumers in a similar transaction," and "the price being paid must grossly exceed the price being paid by other similarly situated consumers in similar transactions") (emphasis added); Garrett v. Janiewski, 480 So.2d at 1326 ("It must be shown that the rental being paid by the complaining tenants grossly exceeds that being paid by similarly situated tenants for lots of equal value") (emphasis added); State v. De Anza Corp., 416 So.2d at 1175 ("Price-value disparity alone is insufficient to establish substantive unconscionability, in the absence of a comparison between the particular price being paid by one party to the price being paid by another similarly situated consumer in a similar transaction for a similar facility. Here, there is no allegation that the defendant's schedule of rentals and increases is in excess of the property's rental value."). This test, the market rent test, asks "is the lessee-buyer paying an amount grossly in excess of what others similarly situated are paying for the same thing." Bennett v. Behring Corp., 466 F.Supp. 689, 698 (S.D. Fla. 1979).

The third test set out by the trial court has never been approved by any appellate court in this state.

That test, whether or not the increase is founded upon a legitimate financial basis, but is arbitrary, capricious and confiscatory, has been incorrectly used in some circuit courts as a factor in determining unconscionability. See, e.g. Jones v. Thomas, 16 Fla.Supp.2d at 32; Offner v. Keller Park Investors, I, Ltd., 19 Fla.Supp.2d 140, 144 (Cir.Ct. Pasco Cty. 1986); Fredericks v. Hoffmann, 45 Fla.Supp. 44 (Cir.Ct. Sarasota Cty. 1976). This test is incorrect and should not be sanctioned by this court.

This test presumes that the trial court has the right, in an unconscionable rent case, to investigate the financial basis for increasing the lot rental amount. For example, in Jones v. Thomas, 16 Fla.Supp.2d 30 (Cir.Ct. Osceola Co. 1986), the trial court found the rental increase to be unconscionable because the fixed costs of operating the park did not increase during the years prior to the rent increase. Id. at 34. Furthermore, the trial court, although it noted that it gave little weight to the evidence, considered the relationship between the increases in lot rental amount and the increase in the consumer price index for the same period. Id. at 34. Finally, the court determined that the park's management was such that the park owner could not be trusted to use an increase in rent to correct basic problems with its sewer system. Id. at 34. The trial court has absolutely no business

evaluating the cost of running the business, the relationship of rental increases to some fixed standard (like the consumer price index), or determining what the future use of the rental increase may be.

The test for substantive unconscionability is whether the terms of the rental agreement are so unreasonable and unfair to the tenant that a court finds the terms unconscionable. In the statutory cause of action for unconscionable rent under §723.033 this is easily judged by comparing the rental charged to the rent charged by comparable mobile home parks offering similar facilities and services. The test is clearly stated, "It must be shown that the rental being paid by the complaining tenants grossly exceeds that being paid by similarly situated tenants for lots of equal value." Garrett v. Janiewski, 480 So.2d 1324, 1326 (Fla. 4th DCA 1985), cert. denied 492 So.2d 1333 (Fla. 1986). This is the test this Court should adopt as a rule of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to each of the following: Mr. Lee Jay Colling, Suite 500, Pan American Bank Building, Orlando, Florida 32801; Mr. Johnie A. McLeod, 48 East Main Street, Apopka, Florida 32702 and John T. Allen, Jr., John T. Allen, P.A., 4508 Central Avenue, St. Petersburg, Florida 33711, Alan C. Sundberg, Esquire, Carlton, Fields, Ward, Emanuel, Smith & Cutler, P.A., Post Office Box 190, Tallahassee, Florida 32302, this 6th day of January, 1989.

DAVID D. EASTMAN