IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PINNACLE MUSEUM TOWER ASSOCIATION, Plaintiff and Respondent, v. PINNACLE MARKET DEVELOPMENT (US), LLC, ET AL., Defendants and Appellants.	Case Number S186149 [California Court of Appeal, Fourth Judicial District Division One Case No. D055422]

San Diego County Superior Court No. 37-2008-00096678-CU-CD-CTL
The Honorable Ronald L. Styn

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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COMES NOW Pinnacle Museum Tower Association (hereinafter "Association" or "Respondent") to answer the petition for review Pinnacle Market Development (US) LLC; Pinnacle International (US), LLC; Pinnacle Market Development (Canada), Ltd.; Michael De Cotiis; and Apriano Meola (hereinafter, collectively, "Pinnacle") as follows:

INTRODUCTION

The petition for review in this unremarkable appeal by the unsuccessful respondent in a construction defect action challenges a judgment upholding the trial court's denial of a petition to compel arbitration.

Pinnacle was the developer of a multi-use condominium project located in a high-rise tower in downtown San Diego, California ("Subject Property") that is governed by the Association. Even before the Association was formed, Pinnacle drafted and recorded a declaration ("Declaration" or "CC&Rs") that required the Association to arbitrate all claims of defective construction of the Subject Property, and thereby waive the Association's right to trial by jury, that became effective when Pinnacle unilaterally deeded the common areas and other property to the Association. The CC&Rs prohibited an independent Association from amending only the arbitration provisions without Pinnacle's written approval.

After complying with all statutory pre-litigation requirements for construction defect claims, the Association brought a judicial action against Pinnacle. Pinnacle petitioned the trial court for an order compelling arbitration of the Association's claims, which petition was denied by the trial court and affirmed by the Court of Appeal, Fourth Appellate District, Division One.

In this petition Pinnacle contends review is necessary because: (1) the published opinion holding that arbitration provisions in the CC&Rs is not a contract for purposes of compelling arbitration is in conflict with the Court of Appeal, Fourth Appellate District, Division Three's holding in *Villa Milano Homeowners Association v. Il Davorge* (2000) 84 Cal.App.4th 819, 825-826, review denied (2001); and (2) the

published opinion violates the United States Supreme Court's instructions regarding the federal arbitration act ("FAA"), 9 U.S.C. § 2 because the published opinion singles out only the arbitration provisions while allowing the other CC&Rs provisions to remain enforceable.

Neither of these contentions have merit. There is no conflict between the published opinion and *Villa Milano* and the CC&Rs remain enforceable only in the governance of the Association and the relationship between the Association and owners and between owners in which Pinnacle has no interest.

LEGAL DISCUSSION

I.

THERE ARE NO GROUNDS FOR THIS COURT'S REVIEW.

Review should be denied because this case presents neither an important question of law nor a necessity to secure uniformity of decision. (See Cal. Rules of Court, rule 8.51(a)(1).) In its attempt to create an artificial conflict between the instant opinion and *Villa Milano*, the petitioner ignored or overlooked the important fact that in *Villa Milano*, after finding that the arbitration provision hidden in the prolix CC&Rs was a contract as between the association and the developer, the court found the "contract" was unenforceable as being procedurally and substantively unconscionable. (*Villa Milano*, 84 Cal.App.4th at p. 835.) In the instant decision, the Court of Appeal determined that the arbitration provision was not a contract as between the Association and Pinnacle, but, based on the assumption "that the Association is bound by the jury waiver provision contained in the purchase and sale agreements" (Slip Opn. 18) that merely referenced the arbitration provision in the CC&Rs, the court found the

arbitration provision was unconscionable and unenforceable. (Slip Opn. 19-25.) This is the same conclusion that the trial court reached.

The mere fact that in this case the court below found the arbitration provision was not a contract, and the *Villa Milano* court found that the arbitration provision before it was a contract is no basis for reversal or review. A decision correct in law "will not be disturbed on appeal merely because given for a wrong reason." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) On the one hand, the *Villa Milano* court concluded that the arbitration provision was an unenforceable contract and on the other hand the court below found that if this arbitration provision is a contract, it is unenforceable. Accordingly, there is no meaningful conflict between *Villa Milano* and the instant opinion.

Furthermore, Pinnacle's reference to *Treo@Kettner Homeowners Association v. Superior Court* (2008) 166 Cal.App.4th 1055, 1066-1067, review denied (2008) is unwarranted. As Pinnacle argued in the court below, the question in *Treo* was whether a provision in the CC&Rs was a contract for purposes of enforcement of a judicial reference pursuant to Code of Civil Procedure section 638. (*Id.* at p. 1067; see also Slip Opn. 12-13.) *Treo* had nothing to do with the enforcement of arbitration provisions and pursuant to the FAA, the court below refused to make the constitutional analysis, based on *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, in this case that it made in *Treo*. (Slip Opn. 7.)

The Court of Appeal correctly noted "other than *Villa Milano*, we are aware of no California cases treating CC&Rs as a contract between anyone other than as between owners, or between owners and a

homeowners association." In other words, there is no necessity to secure uniformity of decision.

II.

THE COURT OF APPEAL'S OPINION IS NOT IN CONFLICT WITH THE FEDERAL ARBITRATION ACT.

Pinnacle urges review because the Court of Appeal, as Pinnacle contends, invalidated the arbitration provision while letting the other provisions stand in violation of the United States Supreme Court decision in *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 281. (Petition **.)[1] This contention has no merit.

As explained in *Nahrstedt v. Lakeside Village Condominium Association, Inc.* (1994) 8 Cal.4th 361, 372-377, CC&Rs are equitable servitudes for the governance of common interest development communities that are enforceable "by any owner of a separate interest or by the association, or by both." (Civ.Code, § 1354, subd. (a).) In the instant case, Pinnacle has disposed of all of its property interests in the Subject Property.

The arbitration provisions in the CC&Rs are limited to resolution of construction disputes between the Association and/or the owners and Pinnacle. These provisions have absolutely no application to the governance of the Association or to the relationship either between the Association and the owners, or between owners. It is inconceivable that Pinnacle would have any interest in the enforcement of any of the other provisions of the CC&Rs, especially after it has completed its construction and marketing activities and sold, or otherwise disposed of all of its property interests.

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[1] The petition is not paginated.

Accordingly, unlike the "basic terms" of price, service and credit addressed by *Allied-Bruce* that exist and continue to bind the contracting parties upon elimination of an arbitration provision, the remaining provisions of the CC&Rs are totally independent of the arbitration provisions that purportedly create a "contract" between the Association and Pinnacle and have no binding effect on the Association vis-à-vis Pinnacle. Said another way, the Court of Appeal eliminated the entire "contract" between the Association and Pinnacle and the instant decision does not run afoul of the High Court's instructions regarding the FAA.

CONCLUSION

The Court of Appeal correctly affirmed the trial court's determination that the arbitration provisions hidden in the CC&Rs are unconscionable and unenforceable – exactly as did the *Villa Milano* court in the case that was before it. There is no meaningful difference between the two cases, nor does the instant decision conflict with any other published decision.

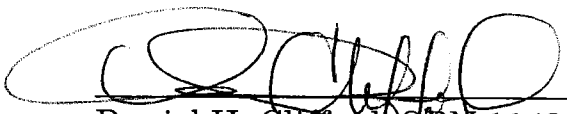
Because the arbitration provision was independent of the equitable servitudes that govern the Association, its elimination creates no conflict between California and federal law.

The petition for review must be denied.

Dated: 9/14/2010

Respectfully submitted,

FEINBERG GRANT MAYFIELD
KANEDA & LITT, LLP



Daniel H. Clifford, SBN 114302
Attorneys for Plaintiff and Respondent
Pinnacle Museum Tower Association

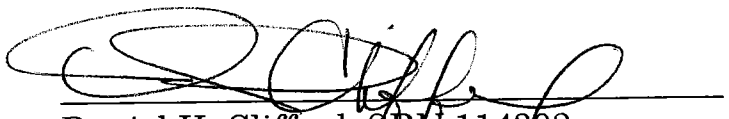
CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petition for Review uses 13 point Century Schoolbook font and contains 1,245 words as counted by Microsoft Word for Mac.

Dated: 9/14/2010

Respectfully submitted,

FEINBERG GRANT MAYFIELD
KANEDA & LITT, LLP



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PROOF OF SERVICE
State of California
Orange County

I am employed in the Orange County, California. I am over the age of eighteen years and not a party to the within action; my business address is Lakeshore Towers, 18101 Von Karman Avenue, Suite 1940, Irvine, California 92612.

On September 15, 2010, I served the following document(s) described as Answer to Petition for Reviw on the interested parties in this action as follows:

SEE ATTACHED LIST

BY MAIL: I placed true copies of the foregoing document(s) enclosed in sealed envelopes addressed as shown on the Service List. I am "readily familiar' with Feinberg Grant Mayfield Kaneda & Litt's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelopes were placed for collection and mailing with postage thereon fully prepaid at Irvine, California, on the same day following ordinary business practices. (Code Civ. Proc., §§ 1013, subd. (a) and 1013, subd. (a).

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Executed on September 15, 2010, at Irvine, California

Trish Watson

Trish Watson

SERVICE LIST

Pinnacle Museum Tower Association v. Pinnacle Market Development, et al.
California Court of Appeal, Fourth Appellate District
Division One
Court of Appeal Case No. D055422
San Diego Superior Court Case No. 37-2008-00096678-CU-CD-CTJ

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PROOF OF SERVICE

Re: Case Number: S186149

Case Title: Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC, ET AL.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Orange and my business address is: 18101 Von Karman Avenue, Suite 1940, Irvine, California.

On **September 16, 2010**, I served the attached document described as :

Respondent's Answer to Petition for Review

on the parties in the above-named case. I did this by depositing it in a box or other facility regularly maintained by Federal Express, an express service carrier providing overnight delivery, or delivering it into an authorized courier or driver authorized by the express service carrier to received documents, in a package designated by the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the person(s) being served at the address(es) shown below:

Supreme Court of California
350 McAllister Street
San Francisco, 94102
(Original plus 13 copies)

I, FABIOLA TORRES, declare under penalty of perjury that the foregoing is true and correct.

Executive on September 16, 2010, at Los Angeles, California.