

SUPREME COURT
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IN THE SUPREME COURT Frederick K. Onfrich Clerk
OF THE STATE OF CALIFORNIA Deputy

PINNACLE MUSEUM TOWER)	CASE NO. S186149
ASSOCIATION,)	
)	[Fourth District Court
Plaintiff/Respondent,)	of Appeal, Division One,
)	Case No. D055422]
v.)	[San Diego County
)	Superior Court Case No.
PINNACLE MARKET)	37-2008-00096678-
DEVELOPMENT (US), LLC, et al.,)	CU-CD-CTL,
)	Hon. Ronald L. Styn]
Defendants/Appellants.)	
)	

REPLY TO ANSWER TO PETITION FOR REVIEW

An Appeal from a Judgment of
the Honorable Ronald L. Styn

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Market Development (Canada), Ltd.; Michael De
Cotiis; and Apriano Meola

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engaged in an “attempt to create an artificial conflict.” (Answer, page 3.)

Respondent’s argument is nothing more than an effort to re-interpret the opinions at issue. The direct language of the opinion that is the subject of this Petition, actually contradicts Respondent’s argument. Specifically, the Court of Appeal opinion stated:

“The *Villa Milano* court concluded that an arbitration clause contained in the CC&R’s of a condominium homeowners association was a sufficient agreement to require that the association’s construction defect claims against the developer be submitted to arbitration. (*Id.* at pp. 825-826, fn. 4.) **In *Treo*, we declined to follow that aspect of the opinion.** (*Treo, supra*, 166 Cal.App.4th at pp. 1066-1067.) **Here, we again decline to follow that aspect of *Villa Milano*.**” (Slip Opn. 10-11, bold added for emphasis.)

In fact, the Court of Appeal majority explicitly criticized the reasoning of their colleagues in Division Three:

“First, that portion of the *Villa Milano* opinion was poorly reasoned . . .” (Slip Opn. 11.)

As addressed in the Petition, the Court of Appeal’s opinion in this case drew a dissent which pointed out that the “issue has been answered differently

in *Villa Milano . . .*" (Slip Opn. dissent 1.) While the majority in this case criticized the reasoning of the prior opinion, the dissenting Justice in this case stated the prior published opinion had the "better reasoned conclusion." (Slip Opn. dissent 1.)

There was a simple reason that all three justices in the subject published opinion found a conflict with prior case law: There *is* a conflict. Case law holds that the arbitration provision in CC&Rs is an agreement binding the homeowners association:

"The arbitration clause, as a provision of the Villa Milano CC&R's, is therefore a part of the contract between the parties. This, then, answers the threshold question: There is an agreement to arbitrate." *Villa Milano Homeowners Association v. Il Davorge* (2000) 84 Cal.App.4th 819, 825-826.

However, the opinion in the present case holds that it is not:

"II. *The Arbitration Provision in the CC&R's Does Not Constitute an Agreement to Arbitrate*

The trial court concluded that the CC&R's contained an arbitration agreement binding Pinnacle and the Association. We disagree." (Slip Opn. 6, italics original.)

Respondent wants to defend the opinion that is helpful to its position, but that is not the question at this stage. The only question at this stage is whether a conflict exists among published opinions. There is clearly a conflict among published decisions, as the appellate justices in this case said so themselves. Only this Court can resolve that disagreement.

B. THERE IS A CONFLICT WITH FEDERAL LAW

The second basis for review discussed in Appellants' Petition is the conflict between the subject opinion and federal case law. As explained in the Petition, the Federal Arbitration Act ("FAA") binds state courts and preempts state law as to arbitration agreements involving interstate commerce. The U.S. Supreme Court held that although state courts may apply traditional contract rules such as unconscionability to arbitration agreements, it may not do so in a manner that discriminates against arbitration provisions. States may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 281; 115 S.Ct. 834, 843.

The Petition quoted numerous parts of the Court of Appeal's opinion to demonstrate the doctrine of unconscionability was applied differently to the arbitration provision of the CC&Rs than to the other parts of the document. For example, the Court of Appeal rejected the arbitration provision because the "CC&R's are 50 pages long" and there was no "specific evidence showing"

Appellants provided the document to buyers (Slip Opn. 21-22). However, even though the points identified by the Court of Appeal were applicable to the entire document, they were only applied to invalidate the arbitration provision.

Respondent's Answer does not address any of these inconsistencies in the application of unconscionability. Instead, Respondent's Answer returns to the issue of whether there is a contract in effect to conclude the FAA did not apply. Respondent's position is that, since Appellants have "disposed of all of [their] property interests," the bulk of the CC&Rs have become "totally independent" of the arbitration provisions. (Answer, pages 5-6.) This, however, incorrectly and inappropriately argues the merits of the case rather than addressing whether or not a conflict exists.

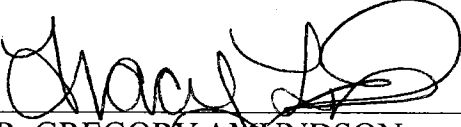
In fact, Respondent's argument is incorrect – either a contract took effect or it did not. But more importantly for this stage of proceedings, Respondent's argument only confirms that review is necessary and appropriate, as its argument depends entirely on whether there is a contract – an issue on which published opinions disagree as articulated above and in the Petition.

II. PRAYER

WHEREFORE, Appellants respectfully request that this Court grant review.

Dated:

WOOD, SMITH, HENNING & BERMAN LLP

By: 

R. GREGORY AMUNDSON
SHEILA E. FIX
TRACY LEWIS

Attorneys for Defendant/Appellants Pinnacle Market
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LLC; Pinnacle Market Development (Canada), Ltd.;
Michael De Cotiis; and Apriano Meola

CERTIFICATE RE LENGTH OF BRIEF

I am the attorney for Defendants/Appellants Pinnacle Market Development (US), LLC; Pinnacle International (US), LLC; Pinnacle Market Development (Canada), Ltd.; Michael De Cotiis; and Apriano Meola. According to my computer=s word count (using Word 2003, which counts each numerical citation separated by a space as a word), this document contains a grand total of 1,542 words. This figure includes everything: cover page, tables, text, headings, citations, this certificate, and the proof of service.

Dated: September 22, 2010 WOOD, SMITH, HENNING & BERMAN LLP

By: _____



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Pinnacle International (US), LLC;
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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is Wood, Smith, Henning & Berman LLP, 505 N. Brand Boulevard, Suite 1100, Glendale, California 91203. On September 12, 2010, I served the following documents:

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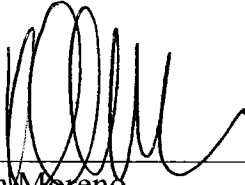
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Karen Moreno