No. S186149
(Court of Appeal No. D055422)
(San Diego Super. Ct. No. 37-2008-00096678-CU-CD-CTJ)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PINNACLE MUSEUM TOWER ASSOCIATION,

Plaintiff and Respondent,

v.

PINNACLE MARKET DEVELOPMENT (US), LLC, PINNACLE INTERNATIONAL (US), LLC, MARKET DEVELOPMENT (CANADA), LTD., MICHAEL DE COTIIS, an Individual, and APRIANO MOELA, an Individual,

Defendants and Petitioners.

RESPONDENT'S OPPOSITION TO APPELLANTS' SUPPLEMENTAL BRIEF

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OPPOSITION TO SUPPLEMENTAL BRIEF

Plaintiff and respondent Pinnacle Museum Tower Association ("Association") objects to the gamesmanship displayed by defendants and appellants Pinnacle Market Development (US), LLC, et al. (collectively "Pinnacle") in filing its supplemental brief arguing this case is controlled by *AT&T v. Concepcion* (2011) ___ U.S. ___; 131 S.Ct. 1740; 179 L.Ed.2d 741 ("*Concepcion*") more than a year after *Concepcion* came down and just twelve days before oral argument.

For the following reasons, *Concepcion* does not control and, in fact, is inapplicable to this case:

In *Concepcion*, customers brought a putative class action against a telephone company alleging the company fraudulently offered free telephones when if fact, as the customers alleged, the telephone company charged customers sales tax on the retail value of the free telephone. The issue decided by the Supreme Court in *Concepcion*, was whether this Court could find the telephone contract unconscionable, and thus unenforceable, because the contract contained a class arbitration waiver. The High Court concluded the contract's inclusion of the class action waiver was not unconscionable and that the Federal Arbitration Act ("FAA") preempted this Court's decision in *Discover Bank v. Superior Court* (2009) 36 Cal.4th 148 (2005) holding class action arbitration waivers are unconscionable.

Pinnacle asserts that the Court of Appeal wrongly found the arbitration provisions in the CC&Rs are unconscionable because, as Pinnacle asserts, that decision wrongly targeted only the arbitration provision as being unconscionable but allowed the rest of the CC&Rs to stand. In making this argument, Pinnacle ignores the most obvious

distinction between this case and *Concepcion.* In *Concepcion,* the Supreme Court observed throughout its opinion that there was a bilateral contract between the plaintiff and AT&T that provided for arbitration with a class action waiver. The present case does not involve a bilateral agreement between Pinnacle and the Association. Rather, the CC&Rs are a document binding the Association and its members and provides for restrictions on the use and maintenance of the Association's property. Thus, that the CC&Rs are still enforceable for those purposes for which it exists begs the question as to who may enforce the CC&Rs and for what purpose.

It is important to remember this is not a dispute between homeowners under the CC&Rs, or between the Association and one of its members. The offending arbitration provisions are beyond the purpose of community governance; they were tailored by Pinnacle to apply only to construction defect claims against Pinnacle and Pinnacle seeks to enforce them even though it no longer owns property subject to the CC&Rs. Furthermore, the underlying construction defect dispute is not a suit under the CC&Rs or to enforce the CC&Rs. Thus, *Concepcion* has no application here.

In addition, Pinnacle's brief overlooks or ignores the facts that the CC&Rs specifically contain a severability clause and that the United States Supreme Court has long held, in multiple decisions, that arbitration provisions are severable. (CC&Rs § 17.1; *Buckeye Check Cashing, Inc. v.* Cardegna (2006) 546 U.S. 440, 445; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1067) 388 U.S. 395, 403-404.) More importantly, the Court of Appeal initially found the CC&Rs are not a contract as between the Association and Pinnacle because "[b]ased on

the application of fundamental contract formation principles" the court "failed to see how the Association could have agreed to waive its constitutional right to a jury trial" when "Pinnacle was the only party to the 'agreement,' and there was no independent homeowners association when Pinnacle recorded the CC&Rs." (Court of Appeal's Slip Opinion, at pp. 8-9.)

Pinnacle complains that the Court of Appeal erred because it found that CC&Rs are a contract for some purposes, but not a contract for arbitration. That complaint is unfounded. What the Court of Appeal concluded was that CC&Rs are interpreted on contract principles in disputes between common interest community members or between members and an association, but CC&Rs are not a contract as between the Association and any third-party, including the developer which drafts and records the CC&Rs long before an association is formed. (Slip.Op at pp. 11-12.) The Court of Appeal's conclusion is applicable to all provisions of the CC&Rs not just the arbitration provisions and is in keeping with the provisions of Civil Code section 1354 providing, in pertinent part that CC&Rs are equitable servitudes that "may be enforced by any owner of a separate interest or by the association, or by both."

Pinnacle conflates concepts of contract and real estate by wrongly asserting, "CC&Rs are enforceable whether viewed as contracts or equitable servitudes: Someone gets rights, someone gets obligations, and courts enforce both because later acceptance means one is 'deemed to *agree* to them.'" (Supp.Brief at p. 7, original emphasis.) As this Court has observed:

> "One significant factor in the continued popularity of the common interest form of property ownership is the ability

> of homeowners to enforce restrictive CC&R's against other owners (including future purchasers) of project units. [Citation.] Generally, however, such enforcement is possible only if the restriction that is sought to be enforced meets the requirements of equitable servitudes or of covenants running with the land."

(*Nahrstedt v. Lakeside Village Condominium Association* (1984) 8 Cal.4th 361, 375.)

Put another way, CC&Rs are never contracts because the lack of privity would prevent them from being enforceable against subsequent purchasers, and because CC&Rs are always equitable servitudes, a developer has no enforcement rights after it divests all ownership interests in the project. Pinnacle would have the Court treat the CC&Rs as a contract for purposes of the FAA, but to escape the requisite privity for contract enforcement, Pinnacle would have the CC&Rs run with the land, but to escape the requisite property interest for enforcement of an equitable servitude, Pinnacle would have the CC&Rs treated as a contract that runs with the land. This circular neither fish nor fowl approach to the CC&Rs is not compatible with either contract or real estate law.

The Association urges the Court to adopt the clear reasoning of the Court of Appeal, Second District, Division I in *Promenade at Playa Vista Homeowners Association v. Western Pacific Housing, Inc.,* S198722, grant and hold, January 21, 2012, wherein Justice Mallano, relying on *Nahrstedt* at p. 379, wrote, "[U]nder any rationale interpretation of section 1354, the Developers cannot enforce the CC&Rs once they have completed the project and sold all the units; they no longer have any ownership interest" and concluded that because *Promenade,* like the case before the Court, involved equitable

servitudes, not a contract, the FAA is inapplicable. (B225086 Slip Op. at pp. 4,8); see also, Association Answering Brief at pp. 22-24, 47.)

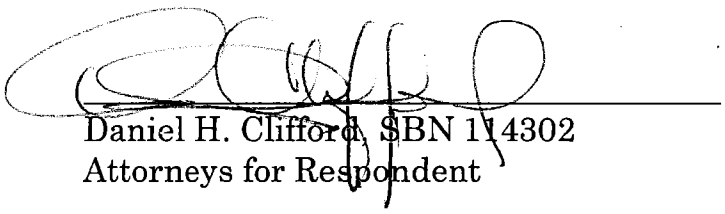
CONCLUSION

Ultimately, the question comes down to whether a developer of a common interest community can use the governing documents, drafted and recorded before an association is formed and before the developers sells even a single separate interest, as a vehicle to promote the developer's self-interest at the expense of the association and its members. Here, it is a one-side arbitration provision that Pinnacle seeks to have deemed approved even though an independent Association had no choice other than to accept it and had no recourse to amend without the developer's written permission, but if this developer can do that, there is no end as to what other developers can include in governing documents to limit the rights and remedies of an association or unfairly burden an association. The FAA's purpose is to enforce arbitration agreements; however, a subdivision's CC&Rs do not constitute such an agreement as between the developer and a homeowners association. The Court must reject Pinnacle's urgings and affirm.

Dated: May 20, 2012

Respectfully submitted,

FENTON GRANT MAYFIELD
KANEDA & LITT, LLP



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CERTIFICATE OF WORD COUNT COMPLIANCE

I certify that the attached Respondent's Brief uses 13 point Century Schoolbook font and contains 1,260 words as counted by Microsoft Word for Mac.

Dated: May 20, 2012

Respectfully submitted,

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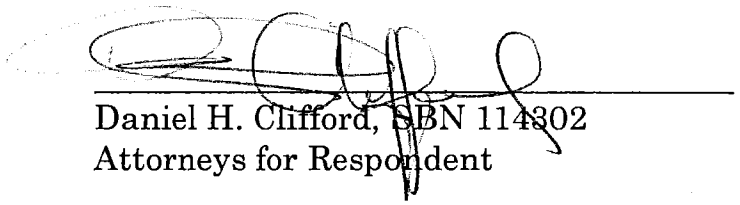
KANEDA & LITT, LLP



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PROOF OF SERVICE

State of Nevada)
)
Clark County)

I am employed in the Clark County, Nevada. I am over the age of eighteen years and not a party to the within action; my business address is 1955 Village Center Circle, Las Vegas, Nevada 89134.

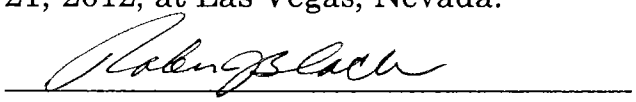
On May 21, 2012, I served the following document(s) described as Respondent's Opposition to Appellants' Supplemental Brief on the interested parties in this action as follows:

SEE ATTACHED LIST

BY **FEDERAL EXPRESS OVERNIGHT DELIVERY**: I placed true copies of the foregoing document(s) enclosed in sealed envelopes addressed as shown on the Service List.

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

Executed on May 21, 2012, at Las Vegas, Nevada.



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Service List

Pinnacle Museum Tower Association v. Pinnacle Market Development, et al.
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