IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

OPENING BRIEF ON THE MERITS

An Appeal from a Judgment of the Honorable Ronald L. Styn, San Diego County Superior Court

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v.	)	**[San Diego County Superior Court Case No. 37-2008-00096678-CU-CD-CTL, Hon. Ronald L. Styn]**
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TABLE OF CONTENTS

///

///

///

///

///

TABLE OF AUTHORITIES

California Statutes

California Administrative Regulations

///

///

U.S. Supreme Court Cases

U.S. Code

/ / /

/ / /

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ISSUES PRESENTED BY PETITION FOR REVIEW

1. Do recorded covenants, conditions and restrictions ("CC&Rs") for common interest developments constitute agreements that bind the residents' homeowners association?

2. May state courts in matters subject to the Federal Arbitration Act (9 U.S.C. §1 *et seq.*) apply state law differently to arbitration provisions in an agreement than to other provisions in the agreement?

No additional issues were presented in the Answer to the Petition for Review.

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INTRODUCTION

This case arises from the trial court's denial of a set of motions to compel arbitration, as required by a recorded declaration of covenants, conditions and restrictions for a common interest development. The arbitration provision incorporated the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA"). The trial court denied the motions because it believed arbitration was unconscionable. The Court of Appeal affirmed in a published opinion, concluding that there was no agreement to arbitrate and that, even if there was, the arbitration provision was unconscionable.

This Court granted review to address the two issues stated above. The Court of Appeal acknowledged that its conclusion conflicted with its own earlier decision finding that there was an agreement. In addition, the Court of Appeal found unconscionability by applying the doctrine differently to the arbitration provision of the agreement than to the rest of the agreement, an approach which the U.S. Supreme Court has expressly banned in FAA cases.

As this Court would expect, Appellants disagree with the lower courts' reasoning. The legal details of those disagreements form most of the body of this brief. However, it may be best to begin by pointing out that public policy *favors* the use of arbitration, a point made repeatedly by this Court. For example, in the course of explaining why a court would only rarely reject an arbitrator's award, this Court said:

> Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. Through this detailed statutory scheme, the Legislature has expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. Consequently, courts will "'indulge every intendment to give effect to such proceedings.'" Indeed, more than 70 years ago this court explained: "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (internal citations omitted for readability).[1]

The lengthy list of internal citations in the footnote shows how well-established this favorable view of arbitration is in California. More recently, this Court noted that California law is "like federal law" in favoring enforcement of arbitration agreements. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97. This statement was based on many similar pronouncements by the U.S. Supreme Court. For example:

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[1] The omitted citations were CODE OF CIVIL PROCEDURE §1280 et seq.; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322; *Madden* v. *Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707; *Victoria* v. *Superior Court* (1985) 40 Cal.3d 734, 750 [dis. opn. of Lucas, J.]; *City of Oakland* v. *United Public Employees* (1986) 179 Cal.App.3d 356, 363; *Shearson/American Express Inc.* v. *McMahon* (1987) 482 U.S. 220, 226; 107 S.Ct. 2332; Federal Arbitration Act, 9 U.S.C. § 1 et seq.; *Doers* v. *Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189; *Pacific Inv. Co.* v. *Townsend* (1976) 58 Cal.App.3d 1, 9; and *Utah Const. Co.* v. *Western Pac. Ry. Co.* (1916) 174 Cal. 156, 159.

> [T]he Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contact language itself or an allegation of waiver, delay, or a like defense to arbitrability. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983) 460 U.S. 1, 24-25; 103 S.Ct. 927, 941.

As the U.S. Supreme Court explained more recently:

> First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate. The origins of those refusals apparently lie in "'ancient times,'" when the English courts fought "'for extension of jurisdiction–all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" American courts initially followed English practice, perhaps just "'stand[ing] . . . upon the antiquity of the rule'" prohibiting arbitration clause enforcement, rather than "'upon its excellence or reason.'" Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a . . . desire" to change this antiarbitration rule. It intended courts to "enforce [arbitration] agreements into which parties had entered," and to place such agreements 'upon the same footing as other contracts.'" *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 270; 115 S.Ct. 834, 838 (internal citations omitted for readability; ellipses and brackets original).

And even more recently:

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> We have likewise rejected generalized attacks on arbitration that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because "'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,'" the statute serves its functions. *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 89-90; 121 S.Ct. 513, 521 (internal citations omitted for readability, brackets original).

The arbitration provisions of the Project CC&Rs were approved by the government regulatory agency with jurisdiction – the Department of Real Estate (the "Department") – because they complied with regulatory requirements. They are not unusual in any way. They are not one-sided. They are set off in bold, capital type. Each buyer of a unit in the common interest development saw and initialed a similar provision in their purchase agreements. Appellants respectfully request that this Court reverse the judgments below and direct the lower courts to grant the petitions to compel arbitration.

STATEMENT OF FACTS

This appeal concerns the declaration of covenants, conditions and restrictions for a mixed-use, common interest development called Pinnacle (the "Project"). (Appellants' Appendix Volume 2, pages 367 *et seq.* [hereafter AA vol:page; where the record contains more than one copy of a document, only one will be cited]) The Project is located at 550 Front Street in downtown San Diego. (AA 2:342) The Project's developer, and the initial seller of individual

units in it, was Appellant PINNACLE MARKET DEVELOPMENT (US), LLC, identified in the Project CC&Rs as "Declarant." (AA 2:330; 2:370, §1.18)[2] The Project includes residential and commercial units. (AA 2:367-368, ¶A–¶H) Plaintiff/Respondent PINNACLE MUSEUM TOWER ASSOCIATION (the "Association") is the association of the Project's property owners, including residents and commercial members. (AA 2:367, ¶E; 2:368, §1.3)

The Project CC&Rs were initially recorded on April 23, 2003 (AA 2:367, ¶B), but the restated declaration at issue here was recorded on September 27, 2005 (AA 2:361).[3] Article XVIII of the Project CC&Rs governs construction defect claims. Section 18.1(b) defines the key term, "Construction Dispute," to mean:

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[2] The other Appellants – PINNACLE INTERNATIONAL (US), LLC; PINNACLE MARKET DEVELOPMENT (CANADA), LTD.; MICHAEL DE COTIIS; and APRIANO MEOLA – are affiliates, officers or employees of the actual developer, with little or nothing to do with the alleged construction defects. Given the procedural posture of this appeal, though, their connection to the complaint's allegations concerning the Project will be assumed *arguendo*. For simplicity, they will be referred to collectively in this brief as "Appellants."

[3] The original CC&Rs for the Project were revised to reflect minor construction issues such as the location of window washing equipment. Buyers were given the opportunity to rescind their purchase agreements before the revised and restated CC&Rs were recorded, but all agreed to the changes. In any event, there is no indication in the record that the relevant (arbitration) provisions changed.

> . . . any dispute between an Owner or the Association and Declarant or between an Owner or the Association and any employee, agent, partner, contractor, subcontractor, or material supplier of Declarant which dispute relates to the use or condition of the Project or any improvements to the Project. Construction Disputes include, but are not limited to, disputes regarding boundaries, surveys, soils conditions, grading, design, specifications, construction, installation of improvements or disputes which allege breach of implied or express warranties as to the condition of the Project. (AA 2:412)

Subdivisions (a) and (b) of Section 18.2 of the Project CC&Rs require that a Construction Dispute claimant first give notice of its claim, then allow the other party to inspect and correct the alleged problem. (AA 2:412) The Project CC&Rs expressly reserve the parties' rights under applicable statutes. (AA 2:412, §18.2(b), (c)) If the parties do not resolve the problem informally, subdivision (d) of Section 18.2 requires that the parties submit the dispute to mediation. (AA 2:412) Finally, if mediation does not end the dispute, the Project CC&Rs require the use of arbitration rather than litigation:

> **Section 18.3. Resolution of Construction Disputes by Arbitration.** It is the desire and intention of the Declarant, Owners and Association (referred in this Section as "parties") to agree upon a mechanism and procedure under which any controversy, breach or dispute between Declarant and an Owner or the Association will be resolved in a prompt and expeditious manner. If the parties cannot resolve the Construction Dispute pursuant to the procedures described in Section 18.2 above, the matter shall be submitted and resolved exclusively through binding arbitration in the county in which the Project is located. (AA 2:413, bold and underlining original)

Arbitration would be conducted through JAMS, the Judicial Arbitration and Mediation Services, using a retired judge. (AA 2:413-414, §18.3(a), (b)) The Project CC&Rs expressly limit the arbitration costs that the Association or Owners could incur so as not to exceed similar costs in litigation. (AA 2:414, §18.3(c)) The arbitrator must render a written decision. (AA 2:414, §18.3(g))

Section 18.3(i) expressly binds the parties to the FAA:

> (i) **Federal Arbitration Act.** Because many of the materials and products incorporated into the residences and other improvements constructed within the Project are manufactured in other states, this Declaration involves and concerns interstate commerce and is governed by the provisions of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) now in effect and as the same may from time to time be amended. Accordingly, Federal Arbitration Act shall govern the interpretation and enforcement of the arbitration provisions of this Article. (AA 2:414, bold original)

The fact that the Project's construction required a great deal of out-of-state and foreign material was shown in the record below (AA 2:277, ¶2) and has not been disputed.

The next paragraph of the Project CC&Rs expressly, and in bold capital letters, waived the rights to jury and appeal:

> **(j) WAIVER OF JURY TRIAL AND RIGHT TO APPEAL. DECLARANT, AND BY ACCEPTING A DEED FOR ANY PORTION OF THE TOWER ASSOCIATION PROPERTY, THE ASSOCIATION AND EACH OWNER, AGREE (i) TO HAVE ANY CONSTRUCTION DISPUTE DECIDED BY NEUTRAL ARBITRATION IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT AND THE CALIFORNIA ARBITRATION ACT, TO THE EXTENT THE CALIFORNIA ARBITRATION ACT IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT;**

> **(ii) TO GIVE UP ANY RIGHTS THEY MIGHT POSSESS TO HAVE THE CONSTRUCTION DISPUTE LITIGATED IN A COURT OR JURY TRIAL; (iii) TO GIVE UP THEIR RESPECTIVE RIGHTS TO APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE APPLICABLE ARBITRATION RULES OR STATUTES. IF ANY PARTY REFUSES TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, SUCH PARTY MAY BE COMPELLED TO ARBITRATE UNDER THE FEDERAL ARBITRATION ACT AND THE CALIFORNIA ARBITRATION ACT, TO THE EXTENT THE CALIFORNIA ARBITRATION ACT IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT.** (AA 2:414, bold capitals original)

Purchase agreements for the individual units in the Project – i.e., for the members of the Association – affirmed these provisions. These contracts provided, with each buyer initialing the following:

> **SECTION 8—DISPUTE NOTIFICATION; RESOLUTION PROCEDURES; WAIVERS**
> Buyer and Seller agree that any certain disputes shall be resolved according to the provisions set forth in Article XVIII of the Declaration and waive their respective rights to pursue any dispute in any manner other than as provided in that Article.
> Buyer and Seller acknowledge that by agreeing to resolve all disputes as provided in the Declaration, they are giving up their respective rights to have such disputes tried before a jury.
> **WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO COMPLY WITH ARTICLE XVIII OF THE DECLARATION WITH RESPECT TO THE DISPUTE REFERENCED THEREIN.** (AA 2:337, §8, bold capitals original)

In addition, Buyers separately initialed a paragraph in an addendum to the purchase agreement requiring them to provide all subsequent buyers with copies of all purchase documents. (AA 2:355 §5)

When a Construction Dispute arose between Declarant and the Association, efforts at an informal resolution pursuant to the "Right to Repair" law failed. (AA 2:279 §2; see Civil Code §895 *et seq.*, often called "SB 800")

STATEMENT OF THE CASE

The Association filed this construction defect lawsuit in San Diego County Superior Court. (AA 1:1-47) The different Appellants, in separate motions, moved the trial court to compel arbitration. (AA 1:48 *et seq.*, 1:159 *et seq.*, 2:251 *et seq.*, 2:266 *et seq.*; cf. 2:432fn1) The Association submitted no evidence in opposition to the motion, only argument. (AA 2:428-448) The trial court nevertheless denied the motions to compel arbitration on June 5, 2010, holding that the agreements were unconscionable. (AA 2:469-471) Appellants timely appealed the order denying arbitration. (AA 2:473-476, 478-483) The denial of the petitions is made appealable by CODE OF CIVIL PROCEDURE §1294(a).

The Court of Appeal affirmed in an opinion originally published at 187 Cal.App.4th 24; 113 Cal.Rptr.3d 399. This Court granted review on November 10, 2010.

STANDARD OF REVIEW

When a petition to compel arbitration is filed, this Court has held that:

> Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a

> defense to enforcement–either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation–that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413 (internal citations omitted for readability).

In *Rosenthal*, this Court demanded *evidence* on each point. Thus, the Court looked at the "Sufficiency of Plaintiffs' Showings," ultimately holding that some plaintiffs had met their factual and evidentiary burdens while others had not. *Rosenthal*, 14 Cal.4th at 423-431.

Unconscionability is a question of law for the court, but "numerous factual issues may bear on that question." *Gutierrez v. Autowest, Inc.* (2006) 114 Cal.App.4th 77, 89. As to the evidence that is presented, reviewing courts will consider *de novo* the interpretation of a written contract when no conflicting extrinsic evidence was admitted. E.g., *CPI Builders, Inc. v. Impco Technologies, Inc.* (2001) 94 Cal.App.4th 1167, 1171–1172. Where there *are* conflicts in evidence, the trial court's findings are entitled to deference under the substantial evidence test. E.g., *American Federation of State, County & Municipal Employees, Local 1902, AFL–CIO v. Metropolitan Water District of Southern California* (2005) 126 Cal.App.4th 247, 257. In this case, however, the terms of the Project CC&Rs are not in dispute, and no extrinsic evidence was in dispute – only its legal significance and sufficiency, which are for this Court to decide.

The *Moncharsh* quotation in this brief's introduction included an important principle relevant to the standard of review – because arbitration is favored, courts should try to find ways to enforce it, not find ways to avoid it:

> Arbitration is highly favored as a method for settling disputes. Courts should indulge every intendment to give effect to such proceedings . . . *Pacific Investment Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9 (internal citations omitted for readability).

This Court has approved this favorable approach to arbitration in, for example, *Moncharsh*, 3 Cal.4th at 9, and *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189. It is also the approach of the U.S. Supreme Court in FAA cases. E.g., *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25; 103 S.Ct. at 941. What happened below in this case, though, was the opposite: every "intendment" and "interpretation" was applied to avoid arbitration.

ARGUMENT

I
RECORDED CC&Rs ARE AGREEMENTS BINDING OWNERS' ASSOCIATIONS

This Court has described the "differing history, uncertain mutual interplay, and varying technical requirements" of the doctrines governing CC&Rs as "'an unspeakable quagmire,'" with inconsistent case law providing "byzantine" results. *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 352, 361. Consequently, this brief will attempt to provide a conceptual framework for the Court's analysis within the issues raised in the

petition for review, rather than arguing which Court of Appeal opinion is more similar to this case.

The starting point is whether there was an agreement. The Court of Appeal held that the Project CC&Rs "did not constitute an 'agreement' sufficient to waive the constitutional right to jury trial for construction defect claims brought by the homeowners association." (Court of Appeal's Slip Opn. 2) However, CC&Rs have consistently been construed as contracts by California courts. Any agreement would normally encompass the entire document. There should be nothing surprising about these conclusions if one starts at the beginning of a contract analysis.

For over a century, the Civil Code has defined a contract as "an agreement to do or not to do a certain thing." CIVIL CODE §1549. The elements of a contract are:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. A sufficient cause or consideration. CIVIL CODE §1550.

As to the first element, "All persons" can enter into a contract unless they are minors, of unsound mind, or have been deprived of their civil rights. CIVIL CODE §1556. Nothing on the face of the Project CC&Rs or elsewhere in the record suggests that Appellants, the people who bought condominium units, or the association of the people who bought units, are minors, insane, or felons.

The proceedings below raised technical questions about whether the Association existed and whether it and Appellants are parties to this agreement. As to the Association, it is settled law that CC&Rs generally constitute agreements. E.g., *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 512; *Share v. Casiano Bel-Air Homeowners Association* (1989) 215 Cal.App.3d 515, 522-523. Associations are necessarily parties to those agreements because they exist to administer and enforce them. E.g., CIVIL CODE §1351(a) ("created for the purpose of managing a common interest development"); CIVIL CODE §1363(a) ("common interest development shall be managed by an association"). The Department requires that CC&Rs provide for the "[c]reation," governance, and budget of associations. 10 CAL. CODE REGS. §2792.8(a). Not surprisingly, associations can sue to enforce CC&Rs. CIVIL CODE §1368.3; *Windham at Carmel Mountain Ranch Association vs. Superior Court* (2003) 109 Cal.App.4th 1162. If associations exist and can sue to enforce CC&Rs, they can also arbitrate disputes about them.[4]

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[4] The Project CC&Rs identify the Association as a "California nonprofit mutual benefit corporation." (E.g., AA 2:367 ¶E) Judicial notice can be taken that the Association was formed April 2003, based on the Secretary of State's records. EVIDENCE CODE §452(h) (not reasonably subject to dispute, capable of immediate confirmation from reliable source). Appellants will submit, with their reply brief, a formal request for judicial notice accompanied by a certified copy of the Secretary of State's records. The burden of proof actually should have been on the Association as plaintiff to have put this in the record in order to prove it was duly formed and in existence so that it could sue.

Property owners associations consist of the owners of individual units in common interest developments. Thus, there is an additional reason why this Association agreed to the Project CC&Rs: The individuals who comprise the Association (AA 2:377, §3.1) are bound to arbitrate (AA 2:426, 2:427). Allowing people to avoid arbitration by creating a corporate version of themselves would reward creation of a "shell," *Villa Milano Homeowners Association v. Il Davorge* (2000) 84 Cal.App.4th 819, 825n4, to say nothing of wasting judicial resources.

As to Appellants, another question raised below was whether they could be parties to a contract concerning a land development after they had sold their interests in the Project. Although the common law rule prohibited enforcement of servitudes by one who no longer had an interest in the property, e.g., *Farber v. Bay View Terrace Homeowners Association* (2006) 141 Cal.App.4th 1007, 1011, the test now is whether the parties to the writing *intended* the developer to remain a party. If the document says so, and the Project CC&Rs do (e.g., AA 2:412-415), the developer does retain a right even after selling out a project. *B.C.E. Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 1147.

The intent that the developer have continuing involvement appears throughout the Project CC&Rs. Section 15.1 gives Declarant, among others, "the right to enforce" all terms of the Declaration "now or hereafter imposed." (AA 2:402) This was important for several reasons, not the least being that

Declarant was going to continue working on various development issues related to the overall Project until all units were sold. (AA 2:376, §2.2(k); 2:403, §16.1, §16.4; 2:407, §17.11) The Project CC&Rs mention the Declarant's (Appellants') bonded obligations to complete the Project even if the Declarant has sold out its interest. (AA 2:406, §17.10) The Project CC&Rs give Declarant an explicit veto power over amendments that could interfere with these continuing obligations. (AA 2:405, §17.4)

More to the point, the Project CC&Rs expressly reserve a continuing easement for Declarant (Appellants) to inspect the Project for the subject of this dispute, i.e., construction issues. (AA 2:411, §17.28) Declarant also ended up with a continuing indemnity obligation toward the neighboring Children's Museum (AA 2:404, §16.6(b)) and, not coincidentally, a duty to arbitrate any disputes with that entity (AA 2:404, §16.7). And finally, of course, the arbitration provision, which repeatedly mentions Declarant (i.e., Appellants), necessarily concerns post-sale disputes. (AA 2:412-415)

Consent, the second element of a contract, must be:

1. Free;
2. Mutual; and
3. Communicated by each to the other. CIVIL CODE §1565.

Whether there was mutual consent depends on "objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." Thus, the courts' "primary focus in

determining the existence of mutual consent is upon the acts of the parties involved." *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943. The parties' actions showing consent include performance of the contract, e.g., *McAuley v. Jones* (1952) 110 Cal.App.2d 302, 307, and acceptance of its benefits, e.g., CIVIL CODE §1589. The Association was formed and began governing its members. As a matter of law, again, the Association's reason to exist is to effectuate the Project CC&Rs. CIVIL CODE §1351(a). There is no reason to question the Association's consent to the Project CC&Rs.

The third element of a contract, a lawful object, should not be at issue at all. The law explicitly authorizes CC&Rs in (and requires them for) common interest developments. E.g., CIVIL CODE §1352(a), §1353. And as shown above, both statute and case law expressly authorize (and encourage) arbitration agreements. E.g., CODE OF CIVIL PROCEDURE §1281; *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 964; 9 U.S.C. §2. The Right to Repair law, SB 800, *expressly* does not limit the use of arbitration: it states that "Nothing" in it "is intended to affect existing statutory or decisional law" pertaining to other dispute resolution methods, including "contractual arbitration," "requiring a binding resolution to enforce . . . any other disputes." CIVIL CODE §914(b).

One issue raised below which this Court could conceivably reach, given the "quagmire" of analysis for CC&Rs, is whether CC&Rs could be enforced as

equitable servitudes. That analytical approach would not change the result. The test for whether something is a proper equitable servitude is whether it is "unreasonable." *Nahrstedt v. Lakeside Village Condominium Association, Inc.* (1994) 8 Cal.4th 361, 380-381. The long list of cases upholding arbitration agreements, e.g., *Moncharsh*, 3 Cal.4th at 9, says that arbitration is reasonable.

The fourth and final element, consideration, is not at issue. "Any benefit conferred, or agreed to be conferred," can suffice as consideration. CIVIL CODE §1605. The Project CC&Rs declare (AA 2:368) that they provide the Association and its members a variety of mutual benefits and protections. This Court has recognized that CC&Rs do provide mutual benefits. *Nahrstedt*, 8 Cal.4th at 374-75.

It is not surprising, then, that case law has consistently affirmed that CC&Rs are contracts. For example:

> We need not get bogged down in the metaphysics of where property ends and contract rights begin to know that, in this case, the right of the neighbors to enforce a restrictive covenant limiting the use of *neighboring* property is clearly contractual. *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054 (italics original).

See also, e.g., *Citizens for Covenant Compliance*, 12 Cal.4th at 363 (owners buying after CC&Rs recorded are "deemed to agree to them").

Nor should it be surprising that courts have found that CC&Rs are contracts binding homeowners associations. For example, in *Frances T.*, 42 Cal.3d 490, plaintiff alleged that her homeowners association had breached,

among other things, contractual duties to protect her from criminal attack. This Court held that "plaintiff's contract with defendants consists of the CC&Rs and the bylaws contained in the grant deed for plaintiff's condominium." *Frances T.*, 42 Cal.3d at 512. See also, e.g., *Fourth La Costa Condominium Owners Association v. Seith* (2008) 159 Cal.App.4th 563, 575 ("The issue is one of contract interpretation"); *Franklin v. Marie Antoinette Condominium Owners Association* (1993) 19 Cal.App.4th 824, 828-829 (contract assumed, rules of contract interpretation used). The contractual nature of CC&Rs has even been used to enforce an attorney's fee (prevailing party) clause against an association through a contempt proceeding. *Share v. Casiano Bel-Air Homeowners Association* (1989) 215 Cal.App.3d 515, 522-523.

Besides the present case, two published Court of Appeal opinions have addressed the narrower question of whether CC&Rs create an agreement to resolve disputes by an alternative dispute resolution process. In *Villa Milano*, 84 Cal.App.4th 819, the court said:

> 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*, 84 Cal.App.4th at 825-826.

Another published opinion from the same Court of Appeal disagrees. In *Treo @ Kettner Homeowners Association v. Superior Court* (2008) 166 Cal.App.4th 1055, 1066-1067, the court held that CC&Rs were contracts for

some purposes – the operation or governance of the association, for example – but not for others – i.e., as a jury waiver for judicial reference:

> We agree with *Villa Milano* insofar as it holds that CC&R's can reasonably be 'construed as a contract' . . . when the issue involved is the operation or governance of the association or the relationships between owners and between owners and the association; we do not believe, however, they suffice as a contract when the issue is the waiver pursuant to section 638 of the constitutional right to trial by jury. *Treo @ Kettner*, 166 Cal.App.4th at 1066.

The *Treo* approach, on which the Court of Appeal in this case relied, cannot be reconciled with basic contract law. One accepts a contract as a whole. One cannot accept part of a contract while demanding changes, because that would constitute a rejection of the entire contract. E.g., CIVIL CODE §1585; *Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855. Courts have made exceptions to this rule when part of the contract was not known to one party. E.g., *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 990 (hidden); *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 471 (misled about terms). However, that was not the case here. Consent was given to the entire contract. The arbitration provisions here were presented exactly as the rest of, and as part of, the document. The contract is what was printed, which is the Project CC&Rs, including the arbitration provisions.

What underlays the concerns of the *Treo* court and the Court of Appeal in this case was their desire to avoid a jury waiver. The *Treo* court applied a special rule to the arbitration provision, which it felt "does not comport with the

importance of the right waived" – i.e., the right to a jury. *Treo @ Kettner*, 166 Cal.App.4th at 1067. However, arbitration agreements are presumptively valid and have been supported by a great deal of case law finding that they effectuate important public policies. Arbitration inherently *means* the parties will not use a jury, or for that matter a judge. E.g., *Grafton Partners*, 36 Cal.4th at 955. To reject arbitration because it does not provide for a jury is to reject arbitration.

Case law upholds CC&Rs as agreements. Statutes and numerous cases affirm the use of arbitration. There is no reason to disregard an arbitration provision in the Project CC&Rs as part of such an agreement.

II
THE FEDERAL ARBITRATION ACT PROHIBITS LOWER COURTS FROM APPLYING STATE LAW SUCH AS UNCONSCIONABILITY DIFFERENTLY TO ARBITRATION PROVISIONS IN AN AGREEMENT THAN TO OTHER PROVISIONS IN THE AGREEMENT, AND ARBITRATION IS NOT UNCONSCIONABLE

According to the Court of Appeal, there was no agreement to arbitrate, but even if there was, such an agreement would have been invalid because it was unconscionable. The discussion above addresses the first issue, the existence of an agreement. This brief will now turn to the second issue, whether arbitration was unconscionable.

Appellants disagree that arbitration is unconscionable. However, whatever general authority the lower courts may have had to find arbitration unconscionable, they were barred from doing so here because they applied the doctrine differently to arbitration than to the remainder of the agreement. The

FAA applies whenever an agreement to arbitrate involves commerce. The FAA is a federal declaration that arbitration is in the public's interest and a mandate that arbitration provisions be upheld. Although states may nullify arbitration provisions under state law, they may not do so by discriminating against arbitration – states may not apply their rules differently to arbitration provisions than to other parts of an agreement. These Project CC&Rs are subject to the FAA both because of the undisputed involvement of interstate commerce and because they incorporated the FAA. Thus, the lower courts' invalidation of the arbitration provision here violated the FAA.

The discussion under the first heading focused on the existence of an agreement. The Court of Appeal in this case concluded there was no agreement to arbitrate because such an agreement would have improperly waived a jury. That conclusion, too, violated the FAA. To conclude that arbitration is illegal because it waives a jury is to find that arbitration is illegal.

A. The Federal Arbitration Act Applies To And Validates The Arbitration Provisions Of The Project CC&Rs.

The FAA applies to any contract "evidencing a transaction involving commerce." 9 U.S.C. §2. According to the U.S. Supreme Court, the FAA is based upon federal control over interstate commerce. Thus, the phrase "involving commerce" is functionally equivalent to "affecting commerce" and "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce*, 513 U.S. at 277; 115 S.Ct. at 841. All that is necessary for the FAA to

apply is that the transaction involve interstate commerce. *Allied-Bruce*, 513 U.S. at 277-279; 115 S.Ct. at 841-842. Once the FAA applies, it applies to the entire transaction, not just to one clause of an agreement. *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1100-01. Parties to a contract can agree to be bound by the FAA even if the FAA did not otherwise apply. *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1121-1122.

It was undisputed below that construction of the Project required a great deal of out-of-state and foreign material. (AA 2:277 ¶2) Paragraph 18.3(i) of the Project CC&Rs acknowledged that "many of the materials and products incorporated into" the Project were manufactured in other states, and included the parties' agreement that the FAA "govern the interpretation and enforcement" of the arbitration provision. (AA 2:414) There was substantial evidence and law that the FAA applied, and its applicability should not be in dispute.

The FAA expressly validates arbitration agreements that are subject to it:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2.

It is "well-established" that the FAA applies even in cases filed in state courts. *Allied-Bruce*, 513 U.S. at 271-272; 115 S.Ct. at 838-839. Where it applies, it preempts state laws that would conflict with it. *Perry v. Thomas* (1987) 482 U.S. 483, 107 S.Ct. 2520 (California statute barring arbitration of wages was preempted by FAA). And as stated at length in the Introduction, the FAA establishes, as a matter of law, that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25; 103 S.Ct. at 941.

B. The Lower Courts Violated The FAA When They Invalidated The Arbitration Provisions of the Project CC&Rs.

The crux of this controversy is the last part of Section 2 of the FAA – that an agreement to arbitrate is valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Although the FAA allows states to enforce generally applicable rules, state law may not apply if the result would conflict with the FAA. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University* (1989) 489 U.S. 468, 477; 109 S.Ct. 1248, 1255. This is because one "effect" of the FAA "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24; 103 S.Ct. at 941.

The FAA allows states to apply "generally applicable contract defenses" such as unconscionability to arbitration agreements. *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; 116 S.Ct. 1652, 1656. However, states may not apply these "generally applicable contract defenses" differently to arbitration provisions than to other provisions of the same agreement. If a "generally applicable contract defense" would invalidate an arbitration provision, it must invalidate the entire agreement. According to the U.S. Supreme Court:

> In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). What States may not do is 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. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent. *Allied-Bruce*, 513 U.S. at 281; 115 S.Ct. at 843 (italics original).

This was not the first or only time the U.S. Supreme Court made the point that state courts could not evaluate arbitration differently than they evaluate other parts of a contract. For example, the Court has quoted a treatise approvingly to say that "'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is

preempted.'" *Doctor's Associate*, 517 U.S. at 687; 116 S.Ct. at 1656; see also e.g., *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; 104 S.Ct. 852, 858 (California statute barring waiver of franchisee rights could not bar arbitration under FAA).

Unfortunately, the lower courts in this case found that arbitration was unconscionable by examining the arbitration provision under different – and much tougher – rules than they used to examine the rest of the Project CC&Rs. In short, they discriminated against arbitration. A short list of this unequal treatment by the Court of Appeal would include:

- There was supposedly no agreement because the parties waived a jury. (Court of Appeal's Slip Opn. 12) However, the absence of a jury is what arbitration means. E.g., *Grafton Partners*, 36 Cal.4th at 955. Rejecting an arbitration agreement because it avoids a jury means rejecting arbitration, which is against policy and law.

- The Project CC&Rs are supposedly unconscionable because they are long. (Court of Appeal's Slip Opn. 21-22) However, that concern, by definition, would invalidate every provision of the document. Applying that concern to invalidate only the arbitration provision violates the FAA.

- The Project CC&Rs are supposedly unconscionable because they might not have been given to buyers. (Court of Appeal's Slip Opn. 21-22)

Again, though, this concern would have invalidated the entire document. It also, incidentally, reverses the evidentiary standard.

- The Project CC&Rs are supposedly unconscionable because recording them might not have made them readily obtainable. (Court of Appeal's Slip Opn. 22) Again, the Court of Appeal's concern relates to the entire document. Indeed, it challenges the very notion of recordation.

- The Project CC&Rs are supposedly unconscionable because they were preprinted and presented on a take-it-or-leave-it basis. (Court of Appeal's Slip Opn. 22-23) Again, this is true of the entire document. In fact, this concern questions the validity of all CC&Rs everywhere. *Prospective* buyers must be allowed to see a copy of the CC&Rs before signing a purchase agreement, and they must *receive* a copy before closing escrow on their purchase. BUSINESS & PROFESSIONS CODE §11018.6(a). They must also receive a copy of the public report, approved by the Department, before signing a purchase agreement, BUSINESS & PROFESSIONS CODE §11018.1(a), §11018.2, and the CC&Rs must be part of the application the Department reviews before issuing the public report, e.g., 10 CAL. CODE REGS. §2792.1(a)(2). In fact, localities may require that they review the CC&Rs before there is even a legal lot (i.e., before a final subdivision map is recorded). BUSINESS & PROFESSIONS CODE §11010.10.

The Court of Appeal expressly concluded that CC&Rs are contracts *except* for arbitration:

> Finally, our adherence to the principles articulated in *Treo* does not create any uncertainty regarding the circumstances when CC&R's will be characterized as contracts and when they will not be characterized as contracts. As *Treo* clearly stated, "CC&R's can reasonably be 'construed as a contract' and provide a means for analyzing a controversy arising under the CC&R's when the issue involved is the operation or governance of the association or the relationships between owners and between owners and the association." (Court of Appeal's Slip Opn. 13)

The Court of Appeal was concerned by the jury waiver, but waiving a jury is the core of arbitration, which higher courts have repeatedly praised. The Court of Appeal then applied the state doctrine of unconscionability to nullify only the arbitration provision, but the facts and principles it used applied equally (or even more forcefully) to the rest of the document. Yet the rest of the document stands. The U.S. Supreme Court has prohibited this.

This is not the situation of *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, in which the issue was allowing state courts to review an actual arbitration *decision* on grounds beyond those in the FAA. This Court's decision in *Cable Connection* merely (and properly) noted that the U.S. Supreme Court, in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 590; 128 S.Ct. 1396, 1406, had expressly allowed non-federal courts to apply state law in deciding whether to affirm the actual award. See also

Christensen v. Smith (2009) 171 Cal.App.4th 931, 936 ("our Supreme Court explained that '... contractual limitations on the arbitrators' powers can alter the usual scope of review'"). Instead, this case presents the more basic issue of whether the arbitration agreement is recognized as valid in the first place, as the FAA requires, after being placed "'on equal footing with all other contracts.'" *Hall Street*, 552 U.S. at 581; 128 S.Ct. at 1402.

If "a contract is fair enough to enforce all its basic terms (price, service, credit)," then it must be "fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281; 115 S.Ct. at 843. Unless courts want to start rejecting all CC&Rs that are longer than one page of bold, thirteen-point type, these arbitration provisions should have been upheld.

C. Even If The FAA Did Not Require Equal Treatment Of The Arbitration Provision, The Provision Should Have Been Upheld Because It Is Not Unconscionable.

Unconscionability is not a conclusion to be drawn lightly. It does not mean that a court feels one side got a better bargain than the other. Rather, it means there is something gravely wrong – that upholding the contract would "shock the conscience." E.g., *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 808. Even if the lower courts had complied with the FAA – i.e., applied the same rules to the arbitration provisions of the Project CC&Rs as they applied to the rest of the document – they should not have found unconscionability anywhere in the document. Arbitrating construction disputes

does not "shock the conscience," particularly where there is no actual evidence to support the facts the lower courts assumed here.

This Court's opinion in *Armendariz* summarized the tests for unconscionability. The "analysis begins with an inquiry into whether the contract is one of adhesion," because that signifies a standardized contract drafted and imposed by a party with "'superior bargaining strength.'" If the contract is adhesive, the court then examines whether the contract falls "'within the reasonable expectations of the weaker'" party or is "'"unduly oppressive."'" Both procedural and substantive elements must be present, though a strong showing of one element can permit a weaker showing of the other. The procedural element focuses on "'"oppression"' or '"surprise,"'" the substantive element on "'"overly harsh or one-sided'" results." *Armendariz*, 24 Cal.4th at 113-114.

The lower courts in this case improperly scrutinized the arbitration provisions of the Project CC&Rs differently than the rest of the document. However, they also committed a second error: they overlooked evidence, or to be more precise, a lack of evidence, showing unconscionability. The party seeking to block enforcement has a burden not only of persuasion, but of proof. The U.S. Supreme Court has expressly rejected "generalized attacks" on arbitration without evidence:

///

> Gilmer first speculates that arbitration panels will be biased. However, "[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." In any event, we note that the NYSE arbitration rules, which are applicable to the dispute in this case, provide protections against biased panels. . . .
> Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions . . . will prove insufficient . . .
> An additional reason advanced by Gilmer for refusing to enforce arbitration agreements relating to ADEA claims is his contention that there often will be unequal bargaining power between employers and employees. Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. . . "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" There is no indication in this case, however . . . *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30-33; 111 S.Ct. 1647, 1654-1656 (internal citations omitted for readability).

More recently, that Court said:

> The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.
> To invalidate the agreement on that basis would undermine the "liberal federal policy favoring arbitration agreements." It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held

> that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. *Green Tree Financial*, 531 U.S. at 91-92; 121 S.Ct. at 522.

Not surprisingly, California normally also requires evidence. E.g., *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1586; *Rosenthal*, 14 Cal.4th at 413.

Perhaps because the issue is fact-dependent, and perhaps reflecting disagreements among the various Courts of Appeal, case law on non-judicial resolution of developer/buyer/association disputes is far from unanimous. Different courts have found similar provisions to be valid or invalid, whether in the context of judicial reference or arbitration. Cf., e.g., *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 956 (reference valid, discusses disagreements among courts) and *Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723 (reference valid) with *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1086-1087 (reference invalid).

In this case, though, there would be no reason to find unconscionability even if the rules of unconscionability were applied equally to the whole document consistent with the FAA. The lower courts rejected the arbitration provisions of the Project CC&Rs as adhesive because they were drafted and recorded before the Association was formed. (Court of Appeal's Slip Opn. 22-

23) However, this is a necessary result of California common interest development law. As shown above, CC&Rs must be drafted and recorded before any units are sold. E.g., 10 CAL. CODE REGS. §2792.1(a)(2); BUSINESS & PROFESSIONS CODE §11018.2. A finding of unconscionability is equivalent to saying that California common interest development law shocks the conscience.

Several of the *Armendariz* factors fail from lack of evidence. There is no evidence that the developer had superior bargaining strength. There is no evidence that buyers of these units were ignorant or easily misled. There is no evidence that the arbitration provisions were concealed from them.

In fact, the evidence shows the opposite: Neither the Association nor unit Owners could have been surprised by an arbitration clause. Potential unit buyers (i.e., the members of the Association) encountered arbitration in the first document they signed: the purchase agreement calls for arbitration of contract disputes. (AA 2:336, §7.1.3) The purchase agreement also reminded buyers that special dispute resolution procedures appeared in the Project CC&Rs and reminded them of a jury waiver in bold type requiring their initials. (AA 2:337 §8) The second page of the Project CC&Rs told buyers, in capital letters, that construction defect disputes would not be heard by juries. (AA 2:368 ¶I) And the arbitration provisions at issue occupy more than three pages of text in the Project CC&Rs, some of which appears in bold, capital letters. (AA 2:412-415)

Cf., e.g., *Windsor Mills*, 25 Cal.App.3d at 990 (hidden on back of agreement). And again, California law expressly authorizes the arbitration provisions of the Project CC&Rs: Department regulations expressly allow developers to include arbitration provisions in CC&Rs as long as they meet certain conditions, 10 CAL. CODE REGS. §2791.8, which these do. Accepting a right authorized by the state should not shock the conscience.

A key factor in an unconscionability analysis is mutuality. Arbitration is legal as long as each party """effectively may vindicate""" its position. *Green Tree*, 531 U.S. at 90; 121 S.Ct. at 521. Nothing in these provisions limits one side's rights more than the other's. Both sides to an arbitration will have an impartial arbitrator – a retired judge, in fact. (AA 2:414, ¶b) The hearing will take place where the Project is. (AA 2:413, §18.3) The parties must comply with the Right to Repair law, SB 800. (AA 2:414, ¶d) The arbitrator must issue a written decision. (AA 2:414 ¶g) (If the Court does find a particular provision offensive, CIVIL CODE §1670.5(a) allows it to remove that one part without undermining the concept of arbitration.) The Court of Appeal believed it was unconscionable to prohibit amendments to the agreement without mutual consent (Court of Appeal's Slip Opn. 17), but requiring mutual consent reflects long-standing California law allowing written contracts to be modified only with the consent of both parties. E.g., CIVIL CODE §1698(a). The battle will be fought on a level playing field. It will just be less costly than full litigation.

Some cases have found arbitration agreements to be unconscionable, but the differences between those cases and this one are crucial. For example, in *Armendariz*, 24 Cal.4th 83, this Court held an employment arbitration agreement to be unconscionable, but for reasons that do not exist here: Substantive rights are not lost because neither the obligation to enter arbitration nor the possible remedies are one-sided or limited; discovery would not be denied; and although the CC&Rs are presented on a take-it-or-leave-it basis, that is the legal nature of CC&Rs.

While the zeal of the lower courts in this case to protect the right to trial by jury may be admirable, that admirable goal should not be applied in every context. One context in which that goal *should not* apply is arbitration. Courts, including both this one and the U.S. Supreme Court, have repeatedly affirmed the virtues of arbitration. The Court of Appeal effectively found that arbitration is always bad, regardless of any facts or the actual terms of the arbitration provision. However, there is nothing bad, scary or unconscionable about arbitration of the disputes at issue in this case. There are even good reasons, described at length in case law, for people to want to use arbitration.

CONCLUSION

What this case comes down to is fairly simple: A contract includes an arbitration provision. The validity of the overall contract is not at issue. The lower courts nevertheless nullified the arbitration provision under two theories,

but both theories are contrary to law. The first theory was that there could not be an agreement to arbitrate because it deprived the parties of the right to a jury trial. However, arbitration is legal and furthers important public policies, and its nature is that it does not involve a jury. The second theory was that the arbitration agreement is unconscionable. However, there is no evidence of unconscionability. The lower courts nullified the arbitration provision of the Project CC&Rs by improperly treating the arbitration clause differently from the rest of the contract. The factors identified as unconscionable reflect requirements of California law and would nullify entire sets of CC&Rs. Indeed, if this set of Department-approved, even-handed CC&Rs is unconscionable, the Court would be completely barring the use of CC&Rs to provide for the judicially-favored mechanism of arbitration of construction disputes.

Appellants respectfully request that this Court reverse the judgment below and order the lower courts to order arbitration of this dispute.

Dated: 12/9/10

HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP

By: _____
JEROLD H. GOLDBERG
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CERTIFICATE RE LENGTH OF BRIEF

I am co-counsel for Defendant/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 10,020 words. This figure includes everything – cover page, tables, text, headings, citations, this certificate, and the proof of service.

Dated: December 9, 2010

HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP

By: _____

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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 Hecht Solberg Robinson Goldberg & Bagley LLP, 600 West Broadway, 8th Floor, San Diego, California 92101. On December 9, 2010, I served the following documents:

Opening Brief on the Merits

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I enclosed the document in a sealed envelope or package addressed to the persons at the addresses above and placed each envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 9, 2010, at San Diego, California.

Shirley Woodson

SHIRLEY WOODSON

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