IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

Most of Respondent's Answer Brief on the Merits relies on three arguments, with its other points either depending on or paraphrasing these three. First, Respondent argues that the Project CC&Rs did not form a contract that binds the Association, largely because the Association did not exist when the contract was created. Second, Respondent argues that the Federal Arbitration Act ("FAA") does not apply because the lawsuit concerns a local issue, the construction of improvements to real property. Third, Respondent argues that, even if the FAA applies, enforcement of the arbitration provision of the CC&Rs would be barred under a general state doctrine, unconscionability.

All three of these arguments fail. The first argument fails because case law, including from this Court, has characterized CC&Rs as contracts, and the

Association accepted its role under the Project CC&Rs. Corporations like the Association routinely become bound to contracts by ratifying them, even when the contracts were created before the corporation was formed.

The Association's second argument fails because it is directly contrary to case law, including explicit holdings of the U.S. Supreme Court interpreting the federal statute. Jurisdiction under the FAA arises from the interstate nature of the overall transaction, including the (allegedly defective) construction that the case is about.

The Association's third argument fails for two reasons: because the bases for finding the arbitration provisions to be unconscionable would require invalidating the entire document, and because arbitration here is not unconscionable. Almost all of the Association's reasons to call arbitration unconscionable, such as the length of the contract, would invalidate most CC&Rs everywhere in the state.

Appellants' opening brief began with a lengthy recitation from some of the case law holding that strong public policies *favor* arbitration. The arbitration provisions in the Project CC&Rs were not part of a "scheme" to deprive the Association of a jury trial by "stealth," as Respondent Association charges. (Answer Brief on the Merits, page 1 [hereinafter ABM, page]) The provisions occupy several pages of a document given to the Association's members, much of it in bold print, and the people who comprise the Association

had already approved arbitration of their own disputes. Arbitration of construction disputes is not uncommon, and arbitration necessarily means that there will be no jury.

ARGUMENT

I
RECORDED CC&Rs ARE AGREEMENTS BINDING OWNERS' ASSOCIATIONS

Respondent's primary argument is that the Project CC&Rs are not a contract binding the Association because the Association did not give its consent. The supposed lack of consent, in turn, is based on the assumption that property owners' associations do not exist, or at least have no independence, when CC&Rs are created.[1] However, it is undisputed that the Association is acting as the "Association" in the Project CC&Rs; in fact, that is the premise of this lawsuit. (E.g., AA 1:2, ¶1) Thus, there is a simple response to the Association's argument, even assuming the Association was not formed until after the contract in question was created: The Association is not a stranger to this agreement. It took over the role, obligations and rights of the "Association" in the Project CC&Rs and is thus bound by the entire contract.

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[1] There is a technical answer to this argument in this case: The Project CC&Rs were recorded in 2005. (AA 2:361) However, they restated a set originally recorded April 23, 2003. (AA 2:367 ¶B) The Request for Judicial Notice that accompanies this brief shows that this Association had been formed five days earlier, on April 18, 2003. As the text of this brief explains, though, resolution of the issues before the Court should not depend on this sequence.

Several long-established legal doctrines support this conclusion. Viewing the Project CC&Rs as a contract being proposed to the Association, the Association performed the conditions of the proposal and accepted the consideration offered by the proposal, including control over the Project. CIVIL CODE §1584. Similarly, if the problem were a lack of consent, "subsequent consent" ratifies the contract. CIVIL CODE §1588. And the assumption of the benefits of the contract "is equivalent to a consent." CIVIL CODE §1589.

These long-established legal doctrines, in turn, have led to supporting case law. One whose predecessor relied on a contract is bound by all of it, including its arbitration clause. *NORCAL Mutual Insurance Co. v. Newton* (2000) 84 Cal.App.4th 64, 81 (spouse of insured). More broadly:

> It is the general rule that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all of the obligations arising from it so far as the facts are known, or ought to have been known, to the person accepting, and that he who takes the benefit must bear the burden. *Thompson v. Swiryn* (1950) 95 Cal.App.2d 619, 630-631.

The Association is no different from any other corporation whose promoters entered into a contract. The corporation, like the Association here, becomes bound to a contract created before it was formed by ratifying it, i.e., "if it knowingly accepts the benefits of the contract." *White v. Kaiser-Frazer Corp.* (1950) 100 Cal.App.2d 754, 760; see also, e.g., *El Rio Oils (Canada) Ltd. V. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 192; *02 Development, LLC v. 607 South Park, LLC* (2008) 159 Cal.App.4th 609, 612. The

Association argues that it owns property separately from the Owners, and so its claims are not derivative of the Owners' claims. (ABM, 21) However, this is irrelevant; the Association itself accepted the contract and is now bound by it.

It is particularly odd for a property owners association to make this argument. The individual owners who buy into a project after CC&Rs are recorded are "deemed to agree to them." *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 363. Binding parties who get involved later is the purpose of recording CC&Rs. Indeed, in an older common interest project, current homeowners might not have been born when the original CC&Rs were signed, yet the CC&Rs bind them contractually upon their purchase of interests in the project.

The Association argues (ABM, 15) that CC&Rs are "enforced" as equitable servitudes but are only "interpreted" as contracts. However, CC&Rs can be both, and case law clearly calls them "contracts." E.g., *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054. The fact that they are "interpreted" as contracts merely reflects the rule that different types of documents are interpreted using similar techniques. E.g., CODE OF CIVIL PROCEDURE §1858, §1859, §1860 (rules to interpret statutes and any "instrument").

Appellants already provided case authority showing that CC&Rs are contracts. E.g., *Barrett*, 61 Cal.App.4th at 1054; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 512. The Association tries to distinguish

these cases by arguing that they only apply "between members or between members and associations." (ABM, 14)[2] However, this overlooks a basic fact about contracts: A person is either a party to a contract or is not a party to that contract. If the contract exists, which it does, and it has three sets of parties, which it does (Owners, the Association, and the Declarant), then all three are parties to the contract. The Association's argument might make sense if there were two separate contracts, one between the Owners and their Association and the other between the Owners and the Declarant, with no privity between the Association and the Declarant. However, that is not the case here. A three-party document comprises this contract.[3]

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[2] The modified opinion in *Villa Vicenza Homeowners Association v. Nobel Court Development LLC* (2011) ___ Cal.App.4th ___; 2011 WL 72200, repeats many of the same arguments raised in this case. (There is, not surprisingly, an overlap in the panels between that case and this one.) The holding in *Villa Vicenza* does not appear to break new ground and it was filed after Respondent filed its Answer Brief, so unless this Court requests supplemental briefing, Appellants will not address it separately from the other arguments here.

[3] The first cause of action in the Association's complaint alleges breaches of warranties given through, among other means, "contracts of sale." (AA 2:6, ¶20)

Respondent Association argues that Appellants cannot enforce the arbitration provision because Appellants no longer own an interest in the Project.[4] This is irrelevant to a contract analysis because contract rights do not depend on ownership, but rather on what the contract says and intends. E.g., CODE OF CIVIL PROCEDURE §1858, §1859. Contractual rights can continue long after the subject has been performed; an obvious example would be construction defect cases (as this one is), which typically include breach of contract allegations. What matters is whether the contract intends that rights and obligations continue after performance. The Association (ABM, 23) argues that it is against "public policy" for the developer to maintain control of a project after selling out, but arbitration is not about control of the Project; it is not about assessments, maintenance, voting, or any similar issue. Rather, it is about the process by which a particular type of dispute gets resolved.

B.C.E. Development, Inc. v. Smith (1989) 215 Cal.App.3d 1142, 1147 explicitly held that, if the CC&Rs so intend, the developer has ongoing enforcement rights even after selling its interest in a project. The Association tries to distinguish *B.C.E.* by arguing that the developer there was helping the

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[4] The Association made the claim that Appellants no longer own any of the Project without citing any evidence in the record. (ABM, 9) The record does not address this issue. If the Court believes the result in this case depends on the facts of current ownership, it may direct the trial court to take evidence on the issue and rule in accordance with this Court's guidance. E.g., *Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 710.

association while here the developer and the association are antagonists. However, that distinction has nothing to do with *B.C.E.*'s holding. What *B.C.E.* held, consistent with long-standing rules for interpreting instruments, was that the intent of the document governs the parties' rights. *B.C.E. Development*, 215 Cal.App.3d at 1147. As explained in the opening brief, the Project CC&Rs are replete with references to the developer's continuing involvement. (E.g., AA 2:376, §2.2(k) [easement]; 2:402, §15.1 ["right to enforce"]; 2:403, §16.1 [easement]; 2:404, §16.6(b) [indemnity to Children's Museum]; 2:404, §16.7 [arbitration with Children's Museum]; 2:407, §17.11 [continued work]; 2:411, §17.28 [easement to examine claims], 2:412-415 [arbitration clause in question]) This document expressly intended to allow the developer to have continuing contractual rights, including the right to compel arbitration.

Conversely, Appellants have argued that it would be unfair and illogical to allow the Association to avoid arbitration when the Association's members had agreed to it. The Association argues at length that it is not bound by those agreements because it is a separate entity. The Association's argument misses the point; the point was not a technical one about the separate nature of entities, but rather that such an evasive tactic would be against public policy. Cf., *Villa Milano Homeowners Association v. Il Davorge* (2000) 84 Cal.App.4th 819, 825-826n4 ("shell"). However, the Association's argument is also wrong on legal

grounds; as explained above, the Association became bound to the Project CC&Rs by accepting its benefits and ratifying it.[5]

The real error in the Association's argument is its effort to carve out part of a single, unified contractual document and assert that one part of it – arbitration – is not really contractual. The Association acknowledges that an "impartial observer" might raise this point. (ABM, 14) The Association argues that such selective treatment is authorized by the "severability" provision of the Project CC&Rs, which states that if a portion of the contract is determined to be void, invalid or unenforceable, the remaining provisions "'shall be and remain in full force and effect.'" (ABM, 27, citing AA 1:135, §17.1) But that argument ignores that this severability provision could only exist in an otherwise effective contract; it does not pertain to whether a contract was created in the first instance. The issue at hand is contract *formation* and *breadth*, rather than enforcement of a particular provision. As a matter of law, the Project CC&Rs are a single contract and the Association exists to implement the Project CC&Rs. As a matter of fact, the Association took over the duties of the "association" in the Project CC&Rs. This means it consented to the Project CC&Rs and is bound by them contractually.

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[5] Property owners' associations are uniquely subordinate to their members. For example, the Association's governing board and members are the Owners, BUSINESS & PROFESSIONS CODE §11018.1(c) (also, AA 2:367 ¶E), who are in this case people who had seen and approved arbitration for themselves (AA 2:337 §8, 2:279 ¶4 ["exemplar"], 2:427).

II
THE FEDERAL ARBITRATION ACT APPLIES TO THIS CASE

Respondent Association argues that the FAA does not apply because the current dispute is merely a local one. The Association's position misstates precedent. According to the U.S. Supreme Court, the statute "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 277; 115 S.Ct. 834, 841. Thus, what matters is whether the overall transaction that led to the lawsuit involves interstate commerce. The transaction includes the construction of the Project, which, it is uncontested, involved interstate commerce. Indeed, this suit is about construction of the Project.

Several cases show this. In *Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52; 123 S.Ct. 2037, the U.S. Supreme Court considered debt-restructuring agreements between an Alabama bank and an Alabama fabrication company. The state court had concluded that the issue was local, i.e., merely the debt-restructuring agreements between two Alabamans. However, the U.S. Supreme Court held that the proper perspective included the fabricator's business and property using the loans, which crossed state lines; thus, the FAA applied. *Citizens Bank*, 539 U.S. at 56-57; 123 S.Ct. at 2040. Similarly, in *Allied-Bruce*, the dispute concerned termites in local real estate. However, the U.S. Supreme Court held that the FAA applied because the overall transaction – i.e., the

material used for the treatment came – from other states. *Allied-Bruce*, 513 U.S. at 282; 115 S.Ct. at 843. Since *Allied-Bruce* was decided, California courts have applied this same broad view of the FAA's reach in circumstances (construction) similar to those of the present case. *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1100-01; *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 1213-1214.

The trial court in this case had an undisputed declaration (AA 2:277 ¶2) and a supporting recital in the Project CC&Rs (AA 2:414 [¶18.3(i)]) stating that construction of the Project required a great deal of out-of-state and even foreign material. There was thus substantial evidence that the FAA applied. Its applicability should not be in dispute.

III
THE LOWER COURTS VIOLATED THE FAA BY DISCRIMINATING AGAINST THE ARBITRATION PROVISIONS OF THE PROJECT CC&Rs

The FAA allows agreements to arbitrate to be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Thus, states may apply "generally applicable contract defenses" to arbitration agreements. *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; 116 S.Ct. 1652, 1656. Where the parties disagree is in defining how those defenses may be applied. Respondent Association believes a state may nullify arbitration agreements at will, so long as the state used a generally applicable law such as the doctrine of unconscionability. The Association's

view, though, omits a crucial qualification: The FAA also prohibits states from applying those doctrines *differently* to arbitration provisions of agreements than to the rest of the agreement.

A generally applicable doctrine may not be used only against an arbitration provision. If the doctrine would apply to the arbitration provision, it must be applied equally to the entire agreement; it may not be used to attack only the arbitration provision. According to the U.S. Supreme Court:

> 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).

The Court's phrasing in *Allied-Bruce* was not unique. For example, at issue in *Southland Corp. v. Keating* (1984) 465 U.S. 1; 104 S.Ct. 852, was a California statute of seemingly general applicability; it barred franchise agreements from requiring franchisees to waive their rights under the franchise law. State courts applied the statute to bar the use of arbitration, but the U.S. Supreme Court held that the FAA preempted the statute. The Court majority explained that general rules should not be allowed to single out arbitration clauses for different treatment:

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> We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this dissenting view, "a state policy of providing special protection for franchisees ... can be recognized without impairing the basic purposes of the federal statute." *Post*, at 864. If we accepted this analysis, states could wholly eviscerate congressional intent to place arbitration agreements "upon the same footing as other contracts," H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements. *Southland Corp.*, 465 U.S. 16n11; 104 S.Ct. 861n11.

The *Southland Corp.* court's description of an earlier case, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* (1967) 388 U.S. 395; 87 S.Ct. 1801, is also illuminating. One of Respondent Association's arguments is that the FAA only bars discriminatory statutes, and not common law doctrines. According to the U.S. Supreme Court, however, if even a general doctrine such as fraud in the inducement were raised, it would have to apply equally to the whole contract; it could not be used only to nullify the arbitration provision:

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> The contract in *Prima Paint*, as here, contained an arbitration clause. One party in that case alleged that the other had committed fraud in the inducement of the contract, although not of the arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts," 388 U.S., at 400, 87 S.Ct., at 1804. *Southland Corp.*, 465 U.S. at 11; 104 S..Ct. at 858.

If a state decides "a contract is fair enough to enforce all its basic terms," then it must be "fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281; 115 S.Ct. at 843. The lower courts in this case violated this rule; they discriminated against arbitration. The Court of Appeal found no fault with most of the Project CC&Rs, yet it nullified the arbitration provision. The Court of Appeal (and Respondent Association) believed arbitration was unconscionable because it was part of a long document, but the Court of Appeal did not then nullify the rest of the document. The Court of Appeal barred arbitration because it speculated that the CC&Rs might not have been given to buyers, but again that (if true) would have invalidated the entire document. In fact, the Court of Appeal expressly concluded that CC&Rs are contracts, just not for arbitration, because it meant there would be no jury. However, the absence of a jury is the essence of arbitration. E.g., *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 955. The lower courts in this case improperly discriminated against the arbitration provision of the Project CC&Rs. They used the doctrine of unconscionability against arbitration, but

not against other aspects of the contract to which it could have applied. That approach violated the FAA.

"Courts will '"indulge every intendment to give effect to"'" arbitration, not avoid it. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9. Unfortunately, what happened below was the opposite.

IV
EVEN IF THE FAA DID NOT REQUIRE EQUAL TREATMENT OF THE ARBITRATION PROVISION, IT IS NOT UNCONSCIONABLE

Respondent Association repeats the lower courts' view that this arbitration provision is unconscionable. Appellants respectfully disagree. Before reaching the technical analysis of unconscionability, though, it is worth repeating the legal context: First, to be unconscionable, a contractual provision must do something much worse than give one side a greater benefit; instead, it must "shock the conscience." E.g., *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 808. Second, to the extent arbitrability depends on facts, there must be evidence, not speculation. E.g., *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30-33; 111 S.Ct. 1647, 1654-1656. None of the arguments that arbitration here is unconscionable are valid or supported by evidence.

The Association's core objection is an argument phrased several different ways, such as being a contract of "adhesion" or having been presented on a

"take-it-or-leave-it" basis. (ABM, 32-33) However, the fact that the Project CC&Rs were presented in one piece to buyers and the Association is not unreasonable. A complete set of CC&Rs is *required* by the Subdivided Lands Act and the implementing regulations: The CC&Rs must be shown to buyers before they sign a purchase agreement and physically given to them before escrow closes. BUSINESS & PROFESSIONS CODE §11018.6(a). That means the document already exists in its entirety. Nor should arbitration have surprised anyone, as the Association's members had already seen it (AA 2:337 §8, 2:279 ¶4 ["exemplar"], 2:427) and the law encourages owners' associations to use alternative dispute resolution in various circumstances, CIVIL CODE §1363.820, §1369.510, §1369.520. An arbitration provision in the Project CC&Rs should not have surprised anyone.

A similar objection is that the arbitration provision requires both sides' consent before it may be amended. This, too, restates ordinary California law, which requires mutual consent to amend (or for that matter, to enter into) any contract. E.g., CIVIL CODE §1698. The Association argues that CIVIL CODE §1356 should allow it to amend Project CC&Rs, but that is not quite accurate; Section 1356 only describes the procedure to amend CC&Rs. Section 1355 is the statute authorizing amendments, and subdivision (b) of that section expressly exempts CC&Rs, like the Project CC&Rs, "to the extent that a declaration provides by its express terms that it is not amendable." In fact, the

Legislature has expressly barred associations' boards from unilaterally changing the parts of CC&Rs concerning a developer's rights, except as to unneeded access rights. CIVIL CODE §1355.5(b).

A key factor in unconscionability is a lack of mutuality, so Respondent Association has sought asymmetries in the Project CC&Rs. However, there are none. Each side will be fully heard near the Project by a retired judge who must issue a written decision. (AA 2:413-414, §18.3, ¶a-¶g) The Association argues that this arbitration provision is not mutual because it improperly deprives successful construction defect plaintiffs of the right to recover experts' fees as costs. The arbitration provision does, indeed, bar the recovery of experts' fees as "costs." (AA 2:414, ¶h) However, experts' fees are not normally recoverable as "costs" in court proceedings, e.g., *Carwash of America-PO LLC v. Windswept Ventures No. I, LLC* (2002) 97 Cal.App.4th 540; CODE OF CIVIL PROCEDURE §1033.5(b)(1), so this does not change the Association's potential remedies as a litigant. The Project CC&Rs were drafted so that the parties' remedies would *not* change. All that has changed is that the litigants would use a process that many people – including the Owners, who agreed to arbitration in their purchase agreements – prefer for its greater efficiency.

Both the lower courts and the Association improperly minimized the significance of the approval of arbitration by the Department of Real Estate (the "Department"). The Department did not just approve the Project CC&Rs.

Rather, it has enacted a regulation, 10 CAL. CODE REGS. §2791.8, specifically authorizing alternative dispute resolution, including arbitration, between associations and developers, on terms ensuring consumer protection. The Department enacted this regulation pursuant to express legislative authority. BUSINESS & PROFESSIONS CODE §11001. According to this Court, a regulation such as this is a "quasi-legislative" act, not one interpreting a statute, so the judicial role should be limited to whether the rule is "arbitrary, capricious or [without] reasonable or rational basis." *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11 (internal quotation marks deleted for readability, brackets original). For that matter, even if the Department were merely "interpreting" a statute, its regulation should have received *some* deference; appellate courts should not be finding that the Department has "shocked the conscience."

CONCLUSION

Numerous court opinions, including from this Court, have held CC&Rs to be contracts, notwithstanding their typical length and having been recorded before a particular owner becomes bound. This particular contract includes an arbitration provision. The lower courts nullified that provision by concluding it was not an agreement or that it was unconscionable. However, both of these conclusions require carving out one part of a document and applying the state's rules differently, and incorrectly, to this provision than to the others. If there is

no agreement or arbitration is unconscionable because the document is long or is presented in one piece, then practically no CC&Rs will be valid. If there is no agreement or arbitration is unconscionable because a jury waiver is unconscionable, then no arbitration is legal.

Yet arbitration is valued by courts. This Court has cited the "'strong public policy in favor of arbitration,'" *Moncharsh*, 3 Cal.4th at 9, and there is a similar "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983) 460 U.S. 1, 24; 103 S.Ct. 927, 941.

This arbitration provision was approved by the government pursuant to a valid quasi-legislative regulation. It ensures a full hearing before a qualified judge. It satisfies all legal requirements. Appellants respectfully request that this Court reverse the judgments below and direct the lower courts to grant the petitions to compel arbitration.

Dated: 1/21/11

HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP

By: _____
JEROLD H. GOLDBERG
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

CERTIFICATE RE LENGTH OF BRIEF

I am co-counsel 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 5,335 words. This figure includes everything – cover page, tables, text, headings, citations, this certificate, and the proof of service.

Dated: January 21, 2011

HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP

By: _____

JEROLD H. GOLDBERG
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

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 January 24, 2011, I served the following documents:

Reply Brief on the Merits

I served the document on the person below, as follows:

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Superior Court of San Diego County
Hon. Ronald L. Styn
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San Diego, CA 92101

Clerk of the California Court of Appeal
Fourth District, Division One
750 "B" Street, Suite 300
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 24, 2011, at San Diego, California.

Shirley Woodson

SHIRLEY WOODSON

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