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]

DEFENDANTS'/APPELLANTS' SUPPLEMENTAL BRIEF

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

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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]**
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Defendants/Appellants.	)	

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INTRODUCTION

Shortly after the last brief was filed in this matter, the U.S. Supreme Court issued its ruling in *AT&T Mobility LLC v. Concepcion* (2011) 563 ___ U.S. ___; 131 S.Ct. 1740; 179 L.Ed.2d 742 ("*Concepcion*"). In *Concepcion*, the lower courts, relying on an opinion from this Court, *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), held that an arbitration clause barring class actions was unconscionable and therefore invalid. The U.S. Supreme Court reversed, holding that *Discover Bank*'s unconscionability doctrine is preempted in cases, like this one, that arise under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA"). The purpose of this Supplemental Brief is to address the impact of *Concepcion* on this case. *Concepcion* applies to much more than class actions, and it strongly supports Appellants' position.

FACTS OF *CONCEPCION*

The Concepcions had a cell phone contract with a company later bought by AT&T. Advertisements claimed that phones would be provided for free with a contract, but the Concepcions were charged California's sales tax on the phone's value, for which they sought to hold AT&T liable. AT&T moved to compel arbitration, not in a class, which the trial court denied as unconscionable pursuant to *Discover Bank*. The Ninth Circuit affirmed. *Concepcion*, 131 S.Ct. at 1744-1745. The U.S. Supreme Court reversed.

I

CONCEPCION PROHIBITS STATE COURTS FROM REFUSING TO ENFORCE THE ARBITRATION PROVISION IN THIS CASE

The core question in this case is whether the FAA compels enforcement of the arbitration provision in the Project CC&Rs. The FAA requires that state courts uphold arbitration agreements that are subject to it "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Appellants have asserted that this statute prohibits states from discriminating against arbitration directly or indirectly. *Concepcion* strongly supports Appellants.

Concepcion's analysis began by addressing the plaintiffs' contention that California's ban on class-action waivers, "given its origins in California's unconscionability doctrine and California's policy against exculpation, is a

ground that 'exist[s] at law or in equity for the revocation of any contract' under FAA §2." *Concepcion*, 131 S.Ct. at 1746. *Concepcion* addressed two situations: state law that "prohibits outright the arbitration of a particular type of claim," and generally applicable doctrines that are "applied in a fashion that disfavors arbitration." *Concepcion*, 131 S.Ct. at 1747. *Concepcion* instructs that the FAA preempts both approaches.

A. *Concepcion* Prohibits State Courts From Finding That Attributes Of Arbitration Are Unconscionable.

The Court of Appeal in this case held arbitration unconscionable based on, among other things, the absence of a jury. (Court of Appeal's Slip Opinion, pages 12-13 [hereinafter Slip Opn. page]) *Concepcion* holds that the FAA prohibits states from avoiding arbitration "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S.Ct. at 1746. Arbitration *means* there will be no jury, so as Appellants previously argued, the Court of Appeal's holding is contrary to, and therefore barred by, the FAA.

B. *Concepcion* Is Broader Than Class Action Waivers And Applies Forcefully To This Case.

Opinions should be understood in light of the facts that led to them, but that does not mean they only apply when every detail is the same. The U.S.

Supreme Court wrote *Concepcion* to apply to much more than class action waivers.

First, *Concepcion expressly* addresses broad problems needing broad solutions. Congress enacted the FAA to address "judicial hostility towards arbitration" that "had manifested itself in 'a great variety' of 'devices and formulas,'" including some using traditional legal grounds. *Concepcion*, 131 S.Ct. at 1747. Thus, the tests for preemption in FAA cases must be broad: the FAA will preempt a state rule that is applied to "stand as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 131 S.Ct. at 1748, 1753; "interferes with arbitration," *Concepcion*, 131 S.Ct. at 1750; or "would have a disproportionate impact on arbitration agreements," *Concepcion*, 131 S.Ct. at 1747.

Second, *Concepcion* expressly rejects many bases used to avoid arbitration. The U.S. Supreme Court expressly states that these rejected bases include the informal rules of evidence, limited discovery, and absence of a jury that are characteristic of arbitration. *Concepcion*, 131 S.Ct. at 1747. The opinion addresses adhesion, noting that "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 131 S.Ct. at 1750. The opinion expressly bars local policy rationales for avoiding arbitration. One example *Concepcion* gives of an improper rationale was this Court's rejection of arbitration because, among other things, some of its

attributes could favor business. *Concepcion*, 131 S.Ct. at 1747, citing *Discover Bank*, 36 Cal.4th at 161.

Finally, the U.S. Supreme Court re-affirmed its broad view of *Concepcion* by vacating and remanding, for reconsideration in light of *Concepcion*, several cases concerning issues other than class action waivers. One such case is *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 ("*Sonic*") (which this Court decided a few months after granting review in the instant case) in which this Court held that an attempt to waive an administrative hearing before arbitration was unconscionable and not preempted by the FAA because it was a general state rule. *Sonic*, 51 Cal.4th at 676-695. The U.S. Supreme Court vacated this Court's judgment and remanded *Sonic* to this Court for reconsideration in light of *Concepcion*, ___ U.S. ___; 132 S.Ct. 496; 181 L.Ed.2d 343 (2011), even though *Sonic* was *not* a class action.

While *Concepcion* did not involve CC&Rs, it has clear application here. As Appellants previously asserted, states may not "decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 281; 115 S.Ct. 834, 843. The Court of Appeal explicitly held that CC&Rs *are* contracts for some purposes. (Slip Opn. 11, 12) If they are contracts for some purposes, or enforceable under some equitable theory, the arbitration provision may not be excluded because of its attributes.

This case presents this issues squarely. The Court of Appeal rejected arbitration because of the absence of a jury. However, the factors relating to juries "apply only to arbitration or . . . derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S.Ct. at 1746. Enforcing CC&Rs *except for* their arbitration provisions would "prohibit[] outright the arbitration of a particular type of claim," apply a doctrine "in a fashion that disfavors arbitration," and "have a disproportionate impact on arbitration agreements," all in violation of the FAA. *Concepcion*, 131 S.Ct. at 1747. If other parts of CC&Rs merit enforcement, particularly as agreements, so, too, must the arbitration provisions.

C. Other Courts Have Understood *Concepcion* Broadly, Consistent With Appellants' Arguments.

Westlaw shows over three hundred rulings that have already cited *Concepcion*. Many courts have accepted *Concepcion* and applied it to enforce arbitration provisions notwithstanding traditional state doctrines.

For example, in *Kilgore v. Keybank, National Association*, 673 F.3d 947 (9th Cir. 2012), the Ninth Circuit repeated that *Concepcion* was not limited to class actions. *Kilgore* quoted *Concepcion* to the effect that a state rule was prohibited when it was "'applied in a fashion that disfavors arbitration,'" *Kilgore*, 673 F.3d at 957, or when it "'prohibits outright the arbitration of a particular type of claim.'" *Kilgore*, 673 F.3d at 963. The Ninth Circuit thus

held that the FAA preempted California's "*Broughton – Cruz* rule" barring arbitration of public injunctive relief. *Kilgore*, 673 F.3d at 963. See also, e.g., *Robinson v. Title Lenders, Inc.*, __ S.W.3d __; 2012 WL 724669 *8 (Mo.) (*Concepcion* "will not allow an arbitration agreement to be invalidated by any defense that is applied in a way that singles out or disfavors arbitration"); *Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S.Ct. 1201, 1203-1204; 182 L.Ed.2d 42 (2012) (preempting law barring arbitration of nursing home claims).

These cases were not specifically about CC&Rs, but they all demonstrate principles governing this case. 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." E.g., *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 363 (emphasis added). The Court of Appeal held that CC&Rs are enforceable as contracts, just not for arbitration. However, state courts may not prohibit arbitration of a "'particular type of claim'" in FAA cases. *Kilgore*, 673 F.3d at 963. If courts will enforce the other rights and obligations in CC&Rs, they may not nullify only the arbitration provision.

Unfortunately, hostility to arbitration remains prevalent in California even after *Concepcion*. See e.g., *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501-503 (private attorney general claim for labor law

violations differs from individual claim for labor law violations); *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124 (same as *Brown*); *Mayers v. Volt Management Corp.* (2012) 203 Cal.App.4th 1194, 1207-1209 (arbitration unconscionable based on flaws present throughout document).[1]

California courts allow arbitration for businesses. *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1154-1157 (unsuccessful defense was individual's failure to read agreement). However, the U.S. Supreme Court has again, since *Concepcion*, reaffirmed that the FAA "reflects an 'emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi* (2011) 565 U.S. __; 132 S.Ct. 23, 25; 181 L.Ed.2d 323. Appellants ask this Court to effectuate that policy.

CONCLUSION

Concepcion bars discrimination against arbitration provisions in FAA cases in two ways. First, sauce for the goose must be sauce for the gander. If

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[1] *Concepcion* notes that, "California courts have frequently applied this rule to find arbitration agreements unconscionable." *Concepcion*, 131 S.Ct. at 1746. One reason the Court of Appeal gave for finding arbitration unconscionable was that the arbitration provision prohibited amendments without mutual consent. (Slip Opn. 17) As Appellants already pointed out, requiring mutual consent to amend an agreement simply restates the common law requirement. Ironically, one of California's post-*Concepcion* cases rejecting arbitration held, by resolving inconsistencies in *Texas* law, that a *unilateral* right to amend would void an arbitration agreement. *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425; 2012 WL 1297337 *22-*23, *28. This Court has granted review of at least one of these recently published cases, *Sanchez v. Valencia Holding Co., LLC*, now identified as S199119.

the length of a contract or its pre-printed nature do not invalidate the entire document, then they may not invalidate the arbitration provision. Second, state courts may not avoid arbitration by applying seemingly neutral rules to the characteristics of arbitration. Jury waiver and limited discovery are essential aspects of arbitration, so if CC&Rs are an agreement for some purposes, they cannot fail to be a contract because of these characteristics.

Concepcion confirmed many of Appellants' arguments. Appellants again respectfully request that the judgment below be reversed and that this Court direct the Superior Court to grant the motion to compel arbitration.

Dated: May 17, 2012 **HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP**

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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 2,776 words. This figure includes everything – cover page, tables, text, this certificate, and the proof of service.

Dated: May 17, 2012

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PROOF OF SERVICE

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Shirley Woodson
SHIRLEY WOODSON

IN THE SUPREME COURT

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I, the undersigned, declare that I am over the age of eighteen years and not a party to this action; that my business address is Hecht Solberg Robinson Goldberg & Bagley LLP, 600 West Broadway, 8th Floor, San Diego, California 92101, and that I caused to be served the individuals and entities on the service list below the following document described as:

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