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Appellate Case No.: S229762

IN THE SUPREME COURT STATE OF CALIFORNIA

McMILLIN ALBANY LLC ET AL.,
Petitioners

v.

SUPERIOR COURT OF KERN COUNTY
Respondent

CARL & SANDRA VAN TASSEL, et al.
Real Parties in Interest

After A Decision By The Court Of Appeal
Fifth Appellate District Case No. F069370

[PROPOSED] AMICUS CURIAE BRIEF BY APPLICANTS CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL.

Anne L. Rauch (Bar No. 182990)
EPSTEN GRINNELL & HOWELL, APC
10200 Willow Creek Rd.
Suite 100
San Diego, California 92131
PH: (858) 527-0111
FAX: (858) 527-1531
arauch@epsten.com

Tyler P. Berding (Bar No. 60567)
BERDING & WEIL
2175 N California Blvd.
Suite 500
Walnut Creek, California 94596
PH: (925)838-2090
FAX: (925)820-5592
tberding@berding-weil.com

ATTORNEYS FOR AMICUS CURIAE
CONSUMER ATTORNEYS OF CALIFORNIA

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I. INTRODUCTION

According to this Court's case docket, this case presents the following issue: Does the Right to Repair Act (Civ. Code, § 895 et seq., hereafter referred to as "SB 800 or the "Right to Repair Act" or "Act") preclude a homeowner from bringing common law causes of action for defective conditions that resulted in physical damage to the home? The Consumer Attorneys of California ("CAOC") respectfully submit that it does not, and that this question should be answered not only by looking to the legislative history as advanced by the Petitioners but also by interpreting the phrase "cause of action" as referenced in the Act according to the primary rights doctrine. To that end, the CAOC offers the following amicus brief for the purpose of aiding this Honorable Court in the determination of whether the Act precludes the assertion of common law theories of liability to frame the pursuit of claims for violation of the primary rights covered by the Act.

As briefed below, the assertion of common law theories of liability (colloquially referred to as causes of action) to support a claim for violation of the primary rights covered by the Act is proper. There is nothing in the Act or its legislative history to suggest the Act, which addressed certain primary rights in Civil Code section 896 and confirmed the continuing right to pursue others under Civil Code section 897, was intended to eliminate all

applicable common law theories of liability from a consumer's complaint for construction defect damages.

However, as this matter and scores of other proceedings in the trial and intermediate appellate courts demonstrate, there is considerable confusion on this fundamental point... and all over the words "cause of action." As that phrase is used in Civil Code section 896 and 943(a), did the Legislature mean to refer to the **claim or injury** or is this a reference to the common law **theories of liability** (strict liability, negligence, negligence per se, etc.) asserted in a complaint to frame the claim and sometimes also referred to as a "cause of action?" Given the importance of this distinction to the trial presentation of a consumer's claim for deficiencies in home construction, since a theory of liability shapes relevance issues at trial, the CAOC respectfully submits that in deciding the question presented by the petition for review, this Court should articulate the answer in a way which responds to demonstrable lower court confusion on this arguably subtle -- but essential -- point.

Why does this matter? As it relates to the importance of the evidentiary presentation of a claim for defective home construction at trial, the distinction is critical. One example of the type of impacted litigation would be those cases involving product failures causing a violation of the statutory standards of construction. In such cases, well-trodden theories of liability sounding in strict liability (failure to warn, fitness for a particular

purpose, etc.) would permit a trial presentation of a fuller picture with better remedial results than would be permitted if the theory of liability were abridged in the manner suggested by the builder and builder-related amici.

Such theories of liability are critical to the consumer's ability to conduct important discovery, the ultimate trial presentation, and consequently consumer protection. For example, the evidence of what a manufacturer knew about specific product shortcomings, or failed to test to support a product's fitness for a particular purpose in a case involving a claim for a deficiency enumerated in the Act, would arguably be irrelevant in a denuded proceeding where the only element is whether a defect as defined in Civil Code section 896 exists. On the contrary, that evidence is squarely relevant and thus both discoverable and (unless a valid evidentiary objection otherwise applies) admissible under well-tested and applicable theories of liability.

Permitting a consumer to frame claims for violation of the primary rights established under the Right to Repair Act (the so-called "statutory standards of construction") pursuant to the theory of liability which fits the facts and circumstances of the case does no violence to the builder's rights under the Act, so long as all statutorily prescribed procedures are followed. These are not mutually exclusive.

An interpretation of Civil Code section 943(a) providing that "no other cause of action [may be asserted] for a claim covered by this title or for damages recoverable under Section 944," without distinguishing and explaining what that means under the primary rights doctrine, would perpetuate confusion already plaguing the trial and intermediate appellate courts. Without guidance on this material point, the trial courts will continue failing to distinguish between "cause of action" meaning claim, from the colloquial use of that phrase in reference to the counts of a complaint which are framed around common law theories of liability. This has far reaching implications in ways not addressed by any party or in the amici briefs submitted, and the CAOC respectfully submits it is an important point which should be addressed in the Court's opinion.

II. SUMMARY OF ARGUMENT

In 2003, California adopted the Right to Repair Act. As to certain defined construction deficiencies, the Right to Repair Act abrogated the economic loss rule enunciated by *Aas v. Superior Court* (2000) 24 Cal.4th 627, and provided for a pre-litigation notice, a builder's right to repair, and alternative dispute resolution procedure before litigation may be initiated. Prior to enactment of the Right to Repair Act, homeowner associations were already subject to a pre-litigation notice and alternative dispute resolution process under Civil Code section 6000 (formerly 1375) (the "Calderon Act.")

Although the Right to Repair Act (which applies to both homeowner association claims and single family home claims) unquestionably brought sweeping changes to construction defect claims, establishing primary rights inuring to consumers and builders alike, the statutory scheme is not exclusive of all other California law. This is a point made clear by the Legislature when it extended the Calderon Act (which was set to expire in 2017) just a month ago. (See accompanying Request for Judicial Notice.) Moreover, the Right to Repair Act did not address the legal theories of liability, other than to acknowledge the continuing applicability of them, which would apply in the event the builder's pre-litigation repair process fails to resolve the claim and construction defect litigation ensues.

Although the Right to Repair Act established addressed important primary rights inuring to both consumers and builders alike, and established an additional pre-litigation alternative dispute resolution procedure, the Right to Repair Act did not address any litigation procedure or legal theories of liability which apply in the litigation of construction defect claims should the Right to Repair Act's pre-litigation alternative dispute resolution process not resolve the claim. As briefed below, examination of the express language of the Right to Repair Act and the full legislative history behind it (as well as the legislative history behind the recent extension of the Calderon Act) show the reviewing court in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98

("*Liberty Mutual*") – claimed to be wrongly decided by the builder parties in this case and criticized by the intermediate appellate court in this proceeding -- reached the correct result. Regrettably, the *Liberty Mutual* Court reached its conclusion, to wit, that a subrogation claim for damages arising out of a fire sprinkler pipe burst was not time-barred under the short statute of repose applicable to Civil Code 896(e) claims for use and functionality issues affecting a plumbing systems (arguably a subset of all things that can go wrong with a plumbing system), without analyzing that question under the primary rights doctrine. This is critical to a proper interpretation of the Act, and in particular whether the harm asserted by the plaintiff in Liberty Mutual asserted a claim which fell under the short statute of repose under Civil Code section 896(e) or under the catch-all under 897. This depends on the definition of the claim (and thus the primary right) asserted, which has nothing to do with the framing of construction defect claims defined in Civil Code sections 896 and 897, under common law theories of liability (e.g., negligence or strict liability).

Even if this Court is persuaded that the Act establishes an exclusive "claim" or "cause of action," an issue briefed heavily by the parties, such a reference to "cause of action" in Civil Code sections 896 and 943 is to the primary rights created and addressed by the Act. There is simply no support in the language of the Act itself or the legislative history to suggest the Act as intended to eliminate the well-established common law theories

of liability applicable to defective construction claims as contoured by the specific provisions of the Act. Quite the contrary, the Act's many references to the applicable common law theories of liability and affirmative defenses makes it clear there was no such intent to do so.

III. MEMORANDUM

A. The Right to Repair Act Does Not "Occupy the Field"

At page 17 of its Answering Brief, McMillin Albany proclaims "the Legislature clearly intended SB800 to "occupy the field" of residential construction defect claims...." The concept of "occupying the field" applies to federal preemption principles not applicable here. (See, generally, *Scheiding v. GMC* (2000) 22 Cal.4th 471.) Assuming McMillin Albany meant that the Act somchow obscures or preempts all other state law on the topic of construction defect litigation, the Legislature's recent extension of Civil Code section 6000 alone belies such an assertion. (See accompanying Request for Judicial Notice.) Even if principles of preemption applied here conceptually, preemption would only be appropriate if it could be shown that permitting a consumer to frame a claim asserting the primary rights expressed in the Act under the state common law theories of liability are inconsistent. (See *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238.) In any event, this is not the case here. The Right to Repair Act does not "occupy the field" to the exclusion of all other California statutory and common law. Further, permitting a consumer

to frame a claim for defective construction around common law theories of liability (which would vary according to the facts) is consistent with the Act when the phrase "cause of action" is properly interpreted under the primary rights doctrine, a bedrock of California jurisprudence. It is not a reference to strict liability or negligence.

B. "Cause of Action" As Used in Civil Code Section 943 Does Not Mean Theory of Liability or Count

At the root of present argument before the Court is the assumption the phrase "cause of action" in Civil Code section 943 is used in the colloquial sense, equating each **theory of liability** or **count** alleged in a complaint as a "cause of action" to the underlying primary right asserted. The phrase "cause of action" is sometimes used, loosely, to refer to the various counts or theories of liability alleged in a complaint. However, in the context of a statute defining primary rights – as does the Right to Repair Act -- the phrase "cause of action," refers to the violation of a **primary right** – not the count or theory of liability (i.e., negligence, strict liability, etc.) selected by counsel to assert the primary right in a pleading. The interchangeable way in which the Legislature referred to "claim" or "cause of action" in Civil Code section 896 is instructive:

> In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910),

> a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's **claims or causes of action** shall be limited to violation of, the following standards, except as specifically set forth in this title. (Emphasis added.)

Cause of action, as used in this context, plainly refers to the primary rights established by Civil Code section 896 (going on for pages, detailing defects which do not require a showing of property damage) and the catch all provision of section 897 for all other defects not expressly covered under section 896 which otherwise cause damage. Under the Act, the reference to "causes of action" refers to the primary rights of a consumer asserting construction defect claims, not the common law theory of liability. In *Bay Cities Paving & Grading v. Lawyers' Mutual Ins. Co* (1993) 5 Cal.4th 854, this Court explained that under the primary rights doctrine, followed in California, the definition of a single cause of action means the violation of a single right – even where multiple theories of liability may be asserted in a pleading to pursue that cause of action. This Court explained:

> . . ."[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. . . . Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." (*Slater v. Blackwood, supra,* 15 Cal.3d 791, 795, italics added.) Bay Cities suffered a single injury as a result of its attorney's omissions--the inability to

> collect the amount owed to Bay Cities for its work on the construction project. (5 Cal.4th at 860.)

See also Weil & Brown, et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2016) 6:106-6:109, on the difference between the colloquial use of the phrase "cause of action" and the meaning of that phrase in a primary rights state:

> [6:106] Comment: Few lawyers or judges use the term "count" in civil cases. Complaints are usually broken into "causes of action," and most lawyers and judges are accustomed to this usage.
>
> [6:107] Definitions: However, as noted by the Supreme Court, such usage is "imprecise" and "indiscriminate." [citations]
>
> [6:108] "Cause of action" technically refers to the invasion of a primary right: e.g., injury to person, property, etc. (see ¶ 6:250 ff.). **It is based on the harm suffered, as opposed to the particular theory of recovery asserted by the litigant.** [citations omitted, emphasis added.]
>
> The most salient characteristic of a primary right is that it is indivisible: i.e., violation of a single primary right gives rise to but a single cause of action. A pleading purporting to state two "causes of action" involving the same primary right contravenes the rule against "splitting" a cause of action (see ¶ 6:250 ff.). [citations omitted]
>
> The fact plaintiff seeks several different remedies does not necessarily establish different causes of action. Alternative forms of relief are often available for enforcement of a single right (e.g., damages or rescission for fraud). [citations omitted]
>
> [6:109] **"Count" means a group of related paragraphs in the complaint setting forth a legal theory of recovery. Counts "are merely ways of**

> **stating the same cause of action differently."** [citations omitted, emphasis added.]
>
> * * *
>
> [6:251.2] **Where single primary right: Where a single primary right and injury are involved, there is only one cause of action, no matter how many counts are pleaded. It makes no difference that the complaint asserts different legal theories or seeks different remedies.** [citations omitted; emphasis added]

Accord, Witkin, California Procedure (5th Ed. 2008), Pleading, section 35, "the meaning of 'cause of action' remains elusive and subject to frequent dispute and misconception."

> Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving on the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. . . . Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action. . . . [T]he existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.

Witkin, California Procedure (5th Ed. 2008) section 34, *citing* Pomeroy, Code Remedies (5th ed.), p. 528; James 5th, §11.9; 1

Am.Jur.2d (2005 ed.), Actions §§1, 46; *See also* Robin James, *Res Judicata: Should California Abandon Primary Rights*, 23 Loy. L.A. L. Rev. 351, 366 (1989) ("Primary rights are categories of rights whose violation causes injury to a plaintiff. By contrast, theories of recovery are the legal theories that enable a plaintiff to establish the defendant's liability. A plaintiff may employ several theories of recovery in order to establish the defendant's liability and thereby enforce the plaintiff's primary right").

Thus, the primary right is the underlying harm or the gravamen of the complaint. The theory of liability (i.e., the multiple and alternative "causes of action" or theories of liability pleaded as counts in a complaint such as negligence and strict liability which are alleged to frame a pleading) is not what the Right to Repair Act addressed at all. Rather, the Right to Repair Act defined the primary rights, or the harm which may be asserted as a claim, in a construction defect action and – in particular -- whether damage would be required to support the claim. (*See Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382; ["**Regardless of the number of legal theories which the complaint states, if there is but one injury to a primary right, only one cause of action arises**"]; *Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal.2d 845, 847 ["The same cause of action, of course, may be stated variously in separate counts . . . In California the phrase 'causes of action' is often used indiscriminately to

mean... *counts* which state differently the same cause of action . . ."]; *Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co.* (1970) 10 Cal.App.3d 206, 215 [Regardless of the labels of plaintiff's theories of recovery, the cause of action "will be the *facts* from which the plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts which constitutes the defendant's delict or wrong. . . The seeking of different kinds of relief does not establish different causes of action"].)

In the construction defect context, "cause of action" in the primary rights sense has long since been defined as the pursuit of damages for a particular defect or category of defects. Stated another way, the primary right in a construction defect case is the right to be free from a defined defect or category of defects.[1] For example, in *Winston Square Homeowner's Ass'n v. Centex West, Inc.* (1989) 213 Cal.App.3d 282 (*"Winston Square"*), the Court of Appeal held a homeowners association did not just have one all-inclusive cause of action for all construction defects. Instead, the Court held that under the primary rights theory a "cause of action" in the context of a construction defect case would be defined by what type of defect or categories of defects that were being pursued.

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[1] Other primary rights recognized in California include the right to be secure in one's person, the right to be secure in one's property, the right to recover real or personal property, etc.

> [A]pplying the definition of "cause of action" strictly, one could probably set forth three causes of action -- one for drainage defects, one for defects causing water intrusion in the townhome units, and one for defective balcony railings. (213 Cal.App.3d at 289.)

This is consistent with the statutory definition of the enumerated deficiencies under Civil Code section 896 (and the catch all for all other defects which cause damage), the violation of which constitutes a claim, cause of action, or primary right. This is what the Right to Repair Act addressed, not the legal theories of liability which would apply in the event the pre-litigation procedures required by the Right to Repair Act failed to resolve the claim.

As such, just because a consumer alleges multiple counts sounding in theories of liability such as negligence, strict liability, and breach of implied warranty to pursue a particular deficiency now defined in the Act does not mean there are three causes of action asserted. Rather, in that scenario there is one cause of action for each distinct deficiency asserted, pursued under three different theories of liability or counts in a complaint.

As briefed above, California follows the primary right theory of recovery. In the construction defect context a "cause of action" is the right to acquire new property free of particular types of defects now prescribed by statute under Civil Code section 896, and then an undefined "anything else" not defined but recoverable if it causes property damage under Civil

Code section 897.[2]. The Right to Repair Act simply codified and defined certain enumerated defects which will be recoverable under Section 896 without a showing of damage. For all other deficiencies not expressly defined in Civil Code section 896, those may be pursued according to Section 897 if the claimed deficiency causes damage. However, there is nothing to suggest the Right to Repair Act eliminated a consumer's right to assert firmly-rooted and applicable theories of liability to frame the claims arising out of these now statutorily defined construction defects. That conclusion or interpretation of Civil Code section 943(a) would be in error.

C. The Legislative History of The Right to Repair Act

Nothing in the legislative history of the Right to Repair Act suggests any intent to eliminate a consumer's determination to frame its legal action around common law theories of liability to pursue construction defect claims which are not resolved under the Act's pre-litigation procedures. Quite the contrary, the Senate Judiciary Committee, in its 2001-2002 Regular Session report, described the Act as follows:

> This bill would 1) provide for detailed and specific liability standards for newly constructed housing, 2) create a pre-trial process that includes a builder's right to repair an alleged defect, and 3) provide third party inspectors with immunity from liability. (See Amicus Curiae Building Industry's Request for Judicial Notice, Exhibit 1, at p. 172.)

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[2] This is simply a reaffirmation of the common law "economic loss rule" which continues to apply to all other defects not expressly enumerated in Civil Code section 896.

This does not indicate an intent to preempt **all** other applicable law on the subject. On the contrary, under the Senate Judiciary Committee's Comments, Comment 2, the report expressly states the Right to Repair Act does not modify existing law as to product manufacturers, suppliers, and others in connection with common law theories of liability and joint and several liability:

> Explanation of the Bill's Standards.
>
> This bill would set detailed standards in areas including, but not limited to, water intrusion, structural stability, soils, fire protection, plumbing, and electrical systems. Except in certain specified circumstances, the bill would provide that these standards govern any action seeking recovery of damages arising out of or related to construction defects. The bill would provide that any function or component not specifically addressed by the standards shall be actionable if it causes damage. **As a result, the bill would preserve homeowners' ability to recover for defects that cause damage that are not otherwise covered by the standards.**
>
> In addition, except where explicitly specified otherwise, liability would accrue under the standards regardless of whether the violation of the standard had resulted in actual damage or injury. As a result, the standards would essentially overrule the *Aas* decision and, for most defects, eliminate that decision's holding that construction defects must cause actual damage or injury prior to being actionable. Also, as noted by the Assembly Judiciary Committee analysis, "Rather than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet."
>
> . . . .

> **Finally, the standards are intended to apply to subcontractors, material suppliers, individual product manufacturers and design professionals to the extent that they cause in whole or in part, a violation of a particular standard as a result of their negligent acts or omission, or breach of contract. As a result, the bill does not modify current law pertaining to joint and several liability for subcontractors and design professionals that contribute to any specific violation of the construction defect standards set out in the bill.** (Building Industry's Request for Judicial Notice, Exhibit 1, at p. 174-5, emphasis added.)

The Legislature expressed absolutely no intent to modify existing law in connection with the underlying theories of liability that apply in a construction defect action. In fact, the Legislature expressly stated it was leaving existing law in this respect unchanged, with the stated intention that strict liability would apply to builders and negligence as to subcontractors and design professionals. The Senate Judiciary Committee expressly recognized the continuing applicability of traditional theories of liability such as negligence, in connection with the claims made under the Right to Repair Act.[3] To this end, the Assembly Committee on Judiciary Report from the August 26, 2002 hearing also recognized the continuing applicability of the common law theories of liability, and corresponding affirmative defenses, finding:

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[3] Under Civil Code section 942, the proof is simplified to the extent no showing of causation or damages is required for those defects identified in Civil Code section 896.

> This act is intended to apply to subcontractors and design professionals to the extent that the subcontractors, material suppliers, individual product manufacturers and design professionals caused, in whole or in part, a violation of a particular standard as a result of its **negligent act or omission or a breach of contract.** These persons may assert the affirmative defenses to liability set forth in the bill, **as well as common law and contractual defenses as applicable**. This bill does not modify current law pertaining to joint and several liability for subcontractors and design professionals that contribute to a specific violation of the construction defect standards set out in the bill. (See Amicus Curaie Building Industry's Request for Judicial Notice, Exhibit 1, at p. 201.)

This principle is expressly embodied in Civil Code section 936 which provides that the common law theories of liability and corresponding affirmative defenses continue to apply to others involved in the construction (including contractors, product manufacturers and suppliers, and others) in pursuit of the primary rights established by the Act. Section 936 provides:

> Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that the general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard **as the result of a negligent act or omission or a breach of contract.** In addition to the affirmative defenses set forth in Section 945.5, a general contractor, subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer **common law and contractual defenses as applicable**

> **to any claimed violation of a standard.** All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional is preserved. Nothing in this title modifies the law pertaining to joint and several liability for builders, general contractors, subcontractors, material suppliers, individual product manufacturer, and design professionals that contribute to any specific violation of this title. **However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply.** (Emphasis added.)

The statute is clear. The theories of liability including strict liability and negligence, as provided in well-settled common law, continue to apply depending on the facts and the identity of a particular defendant. Otherwise, this part of the Act would have no meaning. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611 ["We assume each term [in a statute] has meaning and appears for a reason"]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799 ["Significance should be given, if possible, to every word of an act... Conversely, a construction that renders a word surplusage should be avoided"].)

The August 27, 2002 Assembly on Committee on Judiciary described the principle feature of the bill as the "codification of construction defects." The Assembly report provides:

> For the first time, California law would provide a uniform set of standards for the performance of residential building components and systems. Rather

> than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet. Significantly, these standards effectively end the debate over the controversial decision in the *Aas* case to the effect that homeowners may not recover for construction defects unless and until those defects have caused death, bodily injury, or property damage, no mater (sic) how imminent those threats may be. (See Amicus Curiae Building Industry's Request for Judicial Notice, Exhibit 1, at p. 203.)

The Right to Repair Act defined the defects that would be actionable under Section 896. In large part, the requirement of property damage for pursuit of those enumerated deficiencies was eliminated for public policy reasons favoring remedial action before property is damaged.

Prior to the Act, the applicability of the primary rights doctrine to the definition of a "cause of action" for construction defects was manifest. In *Winston Square, supra,* 213 Cal.App.3d at 289, applying the primary rights doctrine to define the "causes of action," in one of the more common ways the primary rights doctrine comes up (e.g., a statute of limitations defense) the Court referred to broad categories of deficiencies (drainage defects, roofing defects, etc.) to define each as a separate "cause of action." At that time, the defects were defined in each case by expert opinion. The intent of the Right to Repair Act was to expressly provide by statute what an actionable defect would be under Civil Code section 896, with the catch-all for other defects causing damage allowed by section 897. (*See, e.g.*

Sen.Com. on Judiciary, Rep. on SB800 as amended Aug. 28, 2002 in See Amicus Curiae Building Industry's Request for Judicial Notice, Exhibit 1, at p. 173 ["[A]ny action against a builder...seeking recovery of damages arising out of, or related to deficiencies in residential construction...shall be governed by detailed standards set forth in the bill"].) Just as in *Winston Square*, each "cause of action" was a category of deficiencies -- then defined by expert opinion, now under Civil Code section 896. However, the common law theories of liability (negligence, negligence per se, strict liability / failure to warn or fitness for a particular purpose) attaching to the claim or cause of action for the violation of primary right, is not limited by anything in the Right to Repair Act itself. Indeed, the Legislature expressly acknowledged the continuing applicability of the common law theories of liability and affirmative defenses when it adopted the Right to Repair Act and section 936.[4]

In interpreting legislation, and here the Court's task is to interpret the phrase "cause of action" to the extent that language is advanced as a limitation of the Act, courts presume the Legislature is cognizant of existing law. (*In re Manuel L.* (1994) 7 Cal.4th 229, 235; *Sherwin-*

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[4] Of course, a major distinction is that for certain enumerated deficiencies in Civil Code section 896 the economic loss rule as stated in *Aas* has been abrogated. This does not mean, however, that all common law theories of liability cease to apply. This simply means as to those particular defects, the requirement of proof of property damage or personal injury has been eliminated.

Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 907 ["Legislature is presumed to be aware of preexisting law, and intended to maintain a consistent body of rules"] (internal quotations omitted).) On this very point the court in *Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 592 observed:

> The legislative history of Senate Bill No. 800 [the Right to Repair Act] indicates that it was "the product of extended negotiations between various interested parties" and "reflect[ed] extensive negotiations between builder groups, insurers and the Consumer Attorneys of California, with the substantial assistance of key legislative leaders over the past year, leading to consensus on ways to resolve these issues." The legislature had input from various interested groups; it presumably considered their conflicting interests and enacted statutes that reflected its policy choices. It is not our place or the place of the trial court to substitute our notions of good policy for those of the Legislature.

Given the presumption the Legislature is cognizant of existing law, as well as the vast input the Legislature had before enacting the Right to Repair Act and the clear references to the continuing applicability of common law theories of liability throughout the Act, the only logical conclusion is that in its use of the phrase "cause of action," in the Act the Legislature referred to "claim or cause of action" under the primary rights doctrine. The Legislature did not eliminate all theories of liability in codifying and refining the primary rights which underpin a construction defect claim.

D. Having Addressed Certain Primary Rights, The Right to Repair Act Does Not Preclude the Presentation of Common Law Theories of Liability.

Any action for construction defects otherwise subject to the Act[5] is subject to the prelitigation notice and the builder's right to repair. Thus, here, assuming the underlying harm was for a claim covered by the Act, the trial court should have simply stayed the underlying proceeding for completion of the pre-litigation process, if it concluded the claims or deficiencies asserted were defined and therefore covered by the Act (an issue regrettably not covered in the Typed Opinion). However, the Fifth Appellate District's opinion in *McMillin Albany LLC v. Superior Court* (2015) 239 Cal.App.4th 1132 ("*McMillin Albany*"), goes too far in its discussion of why that is the case.

The Court of Appeal's conclusion that the Right to Repair Act precludes presentation of claims for construction defects under common law theories of liability (negligence, strict liability, etc.) is rooted in a failure to discern the difference between a primary right and a theory of liability. Without considering whether negligence or strict liability are

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[5] There are claims arising from construction defects which are expressly excepted from the Act under Civil Code section 943. Claims for breach of contract, fraud, and violation of statute are outside the scope of the Act. These are all distinct primary rights and carving those claims out from the reach of the Act is also consistent with the primary rights doctrine. A cause of action in contract is grounded in a primary right separate from those primary rights which give rise to tort actions. (*Holmes v. David H. Bricker, Inc.* (1969) 70 Cal.2d 786, 789. See also *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 80; *Schermerhorn v. Los Angeles P.R. Co.* (1912) 18 Cal.App. 454.)

primary rights unto their own or theories of liability created at common law to frame a claim for defective construction, *McMillin Albany* observed, "Neither list of exceptions in section 943 [for fraud, contractual claims, or statutory claims] or in section 931, includes common law causes of action, such as negligence or strict liability." (*McMillin Albany, supra,* 239 Cal.App.4th at 1144.) This is an unfortunate statement, since the *McMillin Albany* court's conclusion that the underlying action for construction defects should be stayed regardless of whether the count entitled *Violation of the Statutory Standards* had been dismissed from the pleading, is actually consistent with the primary rights doctrine (assuming the underlying specific defects asserted are, in fact, covered by the Act and not expressly carved out of the Act as in Civil Code section 943 – facts which are simply not discussed in the Typed Opinion.) Implicit in the court's conclusion that the underlying action should be stayed as provided in the Act is that the label assigned to a numbered cause of action in a pleading (e.g., negligence, strict liability, or even something styled "Violation of the Statutory Standards of Construction") does not control because, regardless of the label of a pleading count, the question is whether the underlying harm asserted is one of the enumerated deficiencies or the type of claim for construction deficiencies within the scope of the Act. Although *McMillin Albany's* conclusion about the propriety of the stay of the proceeding to complete the pre-litigation procedures required under the Act is consistent

with the primary rights doctrine, assuming the conclusion that the claim asserted by the plaintiff is covered by the Act regardless of the labels assigned to the various counts in the complaint, the court's observation about the common law causes of action for negligence and strict liability (as if they are primary rights unto themselves) feeds the underlying misconceptions which plague this issue.

The lack of analysis of the type of deficiencies asserted, and whether they are the type of claims covered by the Act and not excepted from the Act, creates some important questions which are better framed if the issue is addressed in light of the primary rights doctrine. A stay of the underlying proceeding was appropriate if the plaintiff (Petitioner) pursued claims for construction defects covered by the act, but that has nothing to do with the legal theories of liability framed in the complaint. As explained above, a primary right is separate and distinct from a theory of liability or recovery. (*See, e.g. Peiser v. Mettler* (1958) 50 Cal.2d 594, 605 ["The cause of action is based upon the injury to the plaintiff and not the particular legal theory of the defendant's wrongful act"].)

McMillin Albany, in its Answering Brief, perpetuates the flawed analysis. It, too, fails to discern "cause of action" (as the term is used in section 943) in the primary rights sense. McMillin Albany's assertion that the Legislature "intended SB800 to 'occupy the field' of residential construction defect claims" and "abrogate the common law" in its entirety –

including the abolishment of all traditionally held theories of liability including negligence, strict liability, strict products liability -- [McMillin's Answer Brief on the Merits, p.16, 17, 37] is completely without support particularly when "cause of action" is correctly interpreted under the primary rights doctrine. As briefed above, and as evidenced by the Legislature's extension of Civil Code section 6000, the Right to Repair Act, albeit extensive, does not "occupy the field" of this area of the law.

1. Alternative Pleading Is Permitted to Assert Multiple Theories of Liability.

If a plaintiff's primary rights are violated, the plaintiff must then assert all of the possible legal theories to enforce that right. (23 Loy. L.A. L. Rev. 351 at 370.) Which theory or combination of theories the plaintiff chooses to assert depends on the particular facts of the case, the identity of the defendant, and what the plaintiff expects to be able to prove at the time of trial.

In this vein, California is an alternative pleading state. (*Adams v. Paul* (1995) 11 Cal.4th 583, 593.) Indeed, it is fundamental bedrock of California law that a plaintiff may plead alternative theories of liability in a complaint. (*Id.* at 593.) As such, to interpret the Right to Repair Act as eliminating all common law theories of liability despite the explicit language of sections 897 and 936 *et seq.*, suggesting otherwise, would be improper. There is no reason why a plaintiff cannot allege a violation of

the statutory standards of construction through counts styled under theories sounding in strict liability and negligence, in the alternative. As to a manufacturer whose product was improperly placed into the stream of commerce, when testing data available to the manufacturer was either insufficient or shows the product to be prone to cause damage precisely as that which is proscribed by a statutory standard of construction set forth in Civil Code 896, an applicable common law theory of liability would be strict liability – failure to warn. The contours of the Act are incorporated into the legal theories of liability, because the Act addresses primary rights not theories of liability. The evidence in any case must be tailored to the facts peculiar to each case, but the underlying harm and the primary right asserted in the action would be the rights addressed in the Right to Repair Act.

Violation of the Right to Repair Act could also be asserted under theories of liability like negligence and strict liability (applicable to claims under the act depending upon the identity of the defendant), or even negligence per se, also recognized as a theory of liability in California. The doctrine of negligence per se, however, is not a distinct *cause of action,* "but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence." (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal. App. 4th 549, 556 ["The doctrine of negligence per se does not provide a private right of action for violation of a statute"].) "To apply

negligence per se is not to state an independent cause of action. The doctrine does not provide a private right of action for violation of a statute... Instead, it operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of **an element of a preexisting common law cause of action**." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285-1286 (emphasis added); *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 125.)

Nor does the doctrine of negligence per se establish tort liability in its own right. (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 80, fn. 11.) Rather, it merely codifies the rule that a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm that the plaintiff suffered as a result of the violation. (*Id.*) Civil Code Section 945 is consistent with this presumption, because violation of the statute is all that must be shown to establish a violation. Proof of causation and damages is not required. (*See also Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353, fn. 2 ["[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence"].)

2. *Liberty Mutual*

Amici curiae filing in support of McMillin Albany contends the *Liberty Mutual* decision is wrong. (Amicus Curiae Brief of Ulich Ganion, p. 2.) The CAOC respectfully submits that *Liberty Mutual* court reached the right result, but fell short in its analysis. Moreover, *Liberty Mutual* failed to distinguish between the primary rights the Legislature codified through the Act and a legal theory of liability.

In *Liberty Mutual, supra,* 219 Cal.App.4th 98, a fire sprinkler pipe in an insured's home burst and caused significant damage. The homeowner's insurer paid its insured's relocation expenses which were incurred while repairs were undertaken. The insurer then sued the builder in subrogation to recover those expenses, asserting claims of strict liability, negligence, breach of contract and breach of warranty, among others. The builder argued that the Right to Repair Act eliminated the homeowner's ability to frame a claim under a common law theory of liability, and also contended that the homeowner's claims were time-barred by the Right to Repair Act's four-year statute of repose which applies to a claim for violation of the statutory plumbing system *functionality standards* provided by the Right to Repair Act. (Civil Code section 896(e)[6].) The trial court agreed.

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[6] Civil Code section 896(e) provides: "Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow."

The Fourth District Court of Appeal reversed. The court observed that one of the primary purposes of the Right to Repair Act was, responding to *Aas, supra*, 24 Cal.4th at 627, to provide remedies to homeowners where certain specific and enumerated construction defects have caused merely "economic injury" without property damage. The court concluded, "We hold the Act does not eliminate a property owner's common law rights and remedies, otherwise recognized by law, where, as here, actual damage has occurred." (219 Cal.App.4th at 101.)

In response to the builder's argument that the legislative history of the Right to Repair Act reflected an intent to narrow homeowners' rights (the same argument McMillin and Amici Ulich Ganion make here), the *Liberty Mutual* court determined:

> Nowhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage. Instead, the legislative history shows the legislation was intended to grant statutory rights in cases where construction defects caused economic damage; the Act did nothing to limit claims for actual property damage. Simply put, a homeowner who suffers actual damages as a result of a construction defect in his or her house has a choice of remedies; nothing in the Act takes away those rights. (219 Cal.App.4th at 104.)

The CAOC respectfully submit that the issue before the Court in *Liberty Mutual* should have been whether the sudden pipe burst in the fire sprinkler system, and resulting damage, was the type of injury contemplated by Civil Code section 896(e) as asserted by the builder (the

functionality standard, which does not require a showing of property damage but is subject to the short four-year statute of repose). If not, then the sudden pipe burst – the details of which were never discussed in *Liberty Mutual* – would arguably fall under the catch-all provision of Civil Code section 897 and thus not subject to the short statute of repose applicable to the use and functionality standard of Civil Code section 896(e). Notably, in Liberty Mutual, there was no question that the builder had been given notice and had repaired the property. The subrogation action was brought because the builder did not pay all associated damages to the owner (who tendered to its own carrier, Liberty Mutual, which stood in the shoes of the consumer in the subrogation action). The *Liberty Mutual* court observed that the very language of the Right to Repair Act envisioned its remedies would be combined with other common law remedies. The court quoted Civil Code section 943(a) in full, and then stated that it and section 931 "establish the Act itself acknowledges that other laws may apply to, and other remedies may be available for, construction defect claims, and, therefore, that the Act is not the exclusive means for seeking redress when construction defects cause actual property damage." (219 Cal.App.4th at 107.)

The court's conclusion was as follows:

> [W]e conclude the Act was never intended to, and does not, establish exclusive remedies for claims

> for actual damages for construction defects such as those suffered by [plaintiff].
>
> For all these reasons, Civil Code section 896 does not provide an exclusive remedy, as Brookfield argues. By creating a remedy for a particular cause of action, the Right to Repair Act does not expressly or impliedly support an argument that it mandates an exclusive remedy, and certainly does not derogate common law claims otherwise recognized by law. (See, e.g., *Century Surety Co. v. Crosby Ins., Inc.* (2004) 124 Cal.App.4th 116, 126 [21 Cal.Rptr.3d 115] [by analogy, in the insurance context, a statute establishing rescission as a remedy for concealment does not make rescission the exclusive remedy for such a claim].)
>
> Based on the foregoing analysis of the language of the Right to Repair Act and its legislative history, we hold the Act does not provide the exclusive remedy in cases where actual damage has occurred because of construction defects. (219 Cal.App.4th at 108-109.)

On September 26, 2013, at 2013 Cal.App. LEXIS 777, the *Liberty Mutual* court issued a modification, and reinforcement, of its opinion by stating:

> Nothing in the Act supports a conclusion it rewrote the law on common law claims arising from actual damages sustained as a result of construction defects. As our Supreme Court has acknowledged: "As a general rule, '[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. . . . "A statute will be construed in light of common law decisions, unless its language ' "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . ." Accordingly, '[t]here is a presumption that a statute does not, by implication, repeal the common law. . . . Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially

> conflicting laws.'" (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.)

The issue not addressed in *Liberty Mutual* should have been whether the short statute of repose of four years from close of escrow applied broadly to **all** plumbing failures or just to those use and functionality standards which theoretically would be obvious to an occupant from the close of escrow. In discussing the *Liberty Mutual* opinion, the *McMillin Albany* court observed:

> Finally, the court discussed section 896. (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 108.) Instead of analyzing the language of the section itself, however, the court analyzed the builder's argument, which it dubbed "circular." (*Ibid.*) "Brookfield argues the language 'any action' means that the present case must fall within the Right to Repair Act. Brookfield's argument, however, is circular; Brookfield's argument is essentially that any action arising out of the Act is an action under the Act. Section 896 refers to any action that is covered by the Right to Repair Act; as explained ante, we conclude the Act was never intended to, and does not, establish exclusive remedies for claims for actual damages for construction defects such as those suffered by Hart." (*Ibid.*)

(*McMillin Albany, supra,* 239 Cal.App.4th at 1145.)

Brookfield was assuming that all plumbing failures were within the four year statute of repose applicable to use and functionality standards embodied in Civil Code section 896(e). This was a critical issue never addressed by the Court in *Liberty Mutual* because it was never framed that way by the parties and the Court did not recognize that issue sua sponte.

Liberty Mutual did, however, correctly concluded the Legislature did not eliminate the common law theories of liability available to frame the claims homeowners have long been entitled in construction defect actions, including those falling under the catch-all provision of Civil Code section 897. Indeed, if the Legislature had intended to entirely eviscerate decades of common law establishing the applicable legal theories of negligence, implied warranty and strict liability for purposes of framing claims arising out of defective construction -- that intent would certainly and specifically have been mentioned in the legislative history of the Right to Repair Act. Such an intent appears nowhere in the legislative history, or in the legislative history applicable to the recent extension of the Calderon Act. (See accompanying Request for Judicial Notice.)

E. The Builders' Right to Repair and the Pre-litigation Process

Without question, in addition to abrogating the economic loss rule as to scores of different types or claims for construction defects, one of the most important features of the Right to Repair Act is the builder's right to repair. As observed by the court in *Anders, supra,* 192 Cal.App.4th at 590:

> The major component of [SB800] is the builder's absolute right to attempt a repair prior to the homeowner filing an action in court. Builders, insurers and other business groups are hopeful that this right to repair will reduce litigation.

Certainly by repairing construction defects before litigation commences, such litigation can be avoided if the builder makes proper

repairs. Since the *Liberty Mutual* opinion was issued, there is a fear that in practice plaintiffs' counsel will artfully plead around the Right to Repair Act's pre-litigation procedures, or that there will be parallel tracks of claims, some of which are subject to pre-litigation notice procedures and others which are not. (See, e.g. Amicus Brief of Ulich Ganion, pp. 7-9.) This is where the CAOC respectfully submits the Court should provide guidance. Indeed, it is the CAOC's position that a homeowner must provide notice to the builder pursuant to Civil Code section 910 for all claims covered by the Act and must allow the builder the opportunity to repair the property before the construction defect claims within the scope of the Act are asserted. (*See KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1475.[7]) Now that the issue is squarely and properly before this Court, the CAOC respectfully submits that the issue should be analyzed not only for purposes of clarifying the scope of the Act as posited by the parties, but also under principles of the primary rights doctrine, so that there can be no confusion that no common

[7] The issue before the court in *KB Homes* was whether the Right to Repair Act requires that notice be given to a builder before repairs are made. Notably, *Liberty Mutual* did not address the issue since the builder was allowed an opportunity for repair. KB Home, in contrast, was not given notice or an opportunity to inspect and repair the defects. The Second District Court of Appeal concluded the failure to give timely notice to KB Home was fatal to Allstate's claims, rendering summary judgment in KB Home's favor proper. (223 Cal.App.4th at 1479 ["The failure to give KB Home timely notice and an opportunity to inspect and offer to repair the construction defect excuses KB Home's liability for damages under the Act"].)

law theories of liability asserted in a complaint -- be it negligence, strict liability (failure to warn, fitness for a particular purpose, etc.), negligence per se -- were "abrogated" by SB800. Rather, SB800 abrogated *Aas* and the economic loss rule as to many deficiencies, and established primary rights inuring to consumers and builders alike which are advanced pursuant to the common law theories of liability and affirmative defenses expressly acknowledged in the Act itself.

IV. CONCLUSION

The CAOC and many of the builder-related parties and amici agree on one thing: the Right to Repair Act's pre-litigation procedures must be exhausted as to any claims and "causes of action" falling under the Act before filing suit to pursue claims for construction defects. It appears the plaintiff an Petitioner in this proceeding would agree to that as axiomatic, the dispute being the scope of the Act. However, the question being confounded in the lower courts as the lower courts struggle with that issue, is whether in any subsequent litigation for claims under the Act, the well-settled legal theories of liability (strict liability, negligence per se, negligence, breach of implied warranty, etc.) apply to the claim. To suggest – as McMillin Albany does – that there can be no articulation of claims for construction defect sounding in negligence, negligence per se, strict liability, failure to warn, breach of implied warranty, and any other theory of liability which may apply (something which will vary depending

on the identity of the defendants and the underlying facts of the case) – simply takes the matter too far. Such a proposition is not borne out by the Right to Repair Act.

Thus, the CAOC respectfully submits that in addition to considering the legislative history as the reach of the Act is analyzed, this Court should define the phrase "cause of action" set forth in Civil Code section 943(a) and 896 applying the primary rights theory. In so doing, the Court should also provide guidance to the lower courts which clarifies the continuing availability of all traditionally embraced common law theories of liability applicable to such claims in the legal proceedings. Thus, in either rejecting or affirming the intermediate Court of Appeal's determination that the trial court should have stayed the underlying proceedings to allow for the completion of the statutory pre-litigation process, something that will depend upon whether the underlying harm asserted by the Petitioner was for a construction deficiency "covered by the Act," this Court should also clarify for the benefit of all impacted consumers, builders, and attorneys alike that the presentation of these claims under well-settled theories of liability is perfectly proper and consistent with the Act. These principles are not mutually exclusive, and the confusion has been created by the failure to consider whether "claim or cause of action" in Civil Code section 896 and "cause of action" in Civil Code section 943(a) refers to the

violation of a primary right or a legal theory of liability (negligence, strict liability, etc.) asserted as a count or multiple counts in a complaint.

Dated: August 15, 2016 EPSTEN GRINNELL & HOWELL, APC

and

BERDING | WEIL LLP

By: _____

Anne L. Rauch, Esq.
and Tyler Berding Esq.

Attorneys for Amicus Curiae Consumer Attorneys of California

CERTIFICATE OF WORD COUNT

I, Anne L. Rauch, certify that pursuant to California Rule of Court 8.204(1) that the word count on the foregoing Amicus Curiae Brief including footnotes is 9,543, as counted by Microsoft Word, the word processing program used to generate the brief.

Dated: August 15, 2016 EPSTEN GRINNELL & HOWELL, APC

By: _____

Anne L. Rauch
Attorneys for Amicus Curiae Consumer Attorneys of California

PROOF OF SERVICE
Case No. S229762
McMillin Albany LLC v. Superior Court of Kern County

I, the undersigned, declare as follows:

I am employed in the County of San Diego, State of California. I am over the age of 18 years, and not a party to the within action. My business address is: Epsten Grinnell & Howell, APC, 10200 Willow Creek Rd., Suite 100, San Diego, California 92131.

On August 15, 2016 I caused a true and correct copy of the [PROPOSED] AMICUS CURIAE BRIEF BY APPLICANTS CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL. to be electronically submitted to the Supreme Court of California using the e-submission portal on the Court's website: www.courts.ca.gov/supreme court.htm.

On August 15, 2016 I caused the Original and 8 hard copies of the [PROPOSED] AMICUS CURIAE BRIEF BY APPLICANTS CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL. to be submitted for filing via Overnight Mail by Federal Express to:

Supreme Court of California
350 McAlllister Street
San Francisco, CA 94102-4797
(415) 865-7000

On August 15, 2016, I caused true and correct copies of the [PROPOSED] AMICUS CURIAE BRIEF BY APPLICANTS CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL.to be enclosed in a sealed envelope, addressed to the parties listed below. I am readily familiar with the firm's business practice for collection and processing of envelopes and packages for mailing with the U.S. Postal Service. Under the firm's practice, mail is deposited in the ordinary course of business with the United States Postal Service at San Diego, California, that same day, with postage thereon fully prepaid:

Mark A. Milstein, Esq. Fared M. Adelman, Esq. Aaron Michael Gladstein Mayo L. Makaczyk, Esq. MILSTEIN ADELMAN, LLP 10250 constellation Blvd. , Suite 1400 Los Angeles, CA 90067 Tel: (310) 393-9600/Fax: (310) 396-9635	*Attorneys for Real Parties In Interest: Carl & Sandra Van Tassel, et al.*
Calvin R. Stead, Esq. Andrew M. Morgan, Esq. BORTON PETRINI, LLP 5060 California Avenue, Suite 700 Bakersfield, CA 93309 Tel: (661) 322-3015/Fax: (661) 322-4628	*Attorneys for Petitioners: McMillin Albany, LLC, a Delaware Limited Liability Company; & McMillin Park Avenue, LLC, a Delaware Limited Liability Company*
Robert V. Closson, Esq. Hirsch Closson, APLC 591 Camino de la Reina, Suite 909 San Diego, CA 92108 Tel: (619) 233-7006/Fax: (619) 233-7009	*Objectors to Request for Depublication California Professional Association of Specialty Contractors*
Kathleen F. Carpenter, Esq. Amy Rae Gowan Donahue Fitzgerald LLP 1646 N. California Blvd., Suite 250 Walnut Creek, CA 94596 Tel: (925) 746-7770/Fax: (925) 746-7776	*Attorneys for Amicus Curiae, California Building Industry Association, California Infill Federation & Building Industry Legal Defense Foundation*
Alan H. Packer, Esq. Jon Nathan Owens, Esq. Newmeyer & Dillion 895 Dove Street, 5th Floor Newport Beach, CA 92660 Tel: (925) 988-3200/Fax: (925) 988-3290	*Attorneys for Amicus Curiae, Leading Builders of America*
Donald W. Fisher, Esq. Ulrich, Ganion Balmuth Fisher & Feld, LLP 4041 MacArthur Boulevard, Suite 300 Newport Beach, CA 92660 Tel: (949) 250-9797/Fax: (949) 250-9777	*Attorneys for Amicus Curiae, Ulrich Ganion Balmuth Fisher and Field, LLP*

Kenneth S. Kasdan, Esq. Michael D. Turner, Esq. Bryan M. Zuetel, Esq. Derek J. Scott, Esq. Kasdan, Lippsmith Weber Turner LLP 19900 MacArthur Boulevard, Suite 850 Irvine, CA 92612 Tel: (949) 851-9000/Fax: (949) 833-9455	Amicus Curiae Kasdan Lippsmith Weber Turner LLP in support of Plaintiffs and Real Parties in interest, Carl Van Tassel and Sandra Van Tassel
H. Thomas Watson Daniel J. Gonzalez Horvitz & Levy LLP 3601 West Olive Avenue, 8th Floor Burbank, CA 91505-4681 Tel: (818) 995-0800/Fax: (844) 497-6592	Attorneys for Amici Curiae Truck Insurance Exchange
Susan M. Benson Benson Legal, APC 6345 Balboa Blvd., Suite 365 Encino, CA 91316 Tel: (818) 708-1250/Fax: (818) 708-1444	Amicus Curiae National Association of Subrogation Professionals
Jason P. Williams Williams Palecek Law Group, LLP 3170 4th Avenue, Suite 400 San Diego, CA 92103-5850 Tel: (619) 346-4263/Fax: (619) 346-4291	Amicus Curiae National Association of Subrogation Professionals
Jill J. Lifter Ryan & Lifter 2000 Crow Canyon Pl., #400 San Ramon, CA 99453-1367 Tel: (925) 884-2080/Fax: (925) 884-2090	Amicus Curiae Association of defense Counsel of Northern California and Nevada
Glen T. Barger Chapman, Glucksman Dean Roeb & Barger 11900 W. Olympic Blvd., #800 Los Angeles, CA 90064 Tel: (310) 207-7222/Fax: (310) 207-6550	Amicus Curiae Association of Southern California Defense Counsel

Wendy S. Albers Benedon and Serlin LLP 22708 Mariano Street Woodland Hills, CA 90272 Tel: (818) 340-1950	Amicus Curiae Benedon an Serlin LLP and Law Offices of Brian J. Ferber, Inc.
Brian J. Ferber Law Offices of Brian J. Ferber, Inc. 5611 FallBrook Avenue Woodland Hills, CA 91367-4243	Amicus Curiae Benedon an Serlin LLP and Law Offices of Brian J. Ferber, Inc.
Daniel Joseph Gonzalez Horvitz and Levy LLP 15760- Ventura Boulevard, 18th Floor Encino, CA 91436	Amicus Curiae MWI, Inc.
Honorable David R. Lampe Clerk of the Court Kern County Superior Court 1415 Truxtun Avenue Bakersfield, CA 93301	Case No. S-1500-CV-279141
Civil Clerk of the Court California Court of Appeal Fifth Appellate District 2424 Ventura Street Fresno, CA 93721 (559) 445-5491	Case No. F069370

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct. Executed on August ___, 2016 at San Diego, California.

Patricia A. Fleming