No. S229762

IN THE SUPREME COURT
STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al.,
Petitioners
vs.

SUPERIOR COURT OF KERN COUNTY
Respondent

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

After Decision By The Court of Appeal,
Fifth Appellate District, Case No. F069370

Kern County Superior Court Case No. S-1500-CV-279141
Honorable David R. Lampe, Presiding Judge, Dept. 11

APPLICATION FOR LEAVE TO FILE AND AMICUS CURIAE BRIEF UNDER CRC 8.520 BY APPLICANTS CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND CALIFORNIA INFILL FEDERATION IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL

Attorneys for Proposed Amici Curiae
California Building Industry Association, Building Industry Legal Defense Foundation, and California Infill Federation

KATHLEEN F. CARPENTER, Bar No. 124932
AMY R. GOWAN, Bar No. 283311
Donahue Fitzgerald LLP
1646 N. California Blvd., Suite 250, Walnut Creek, CA 94596
Telephone: (925) 746-7770 Fax: (925) 746-7776
kcarpenter@donahue.com | agowan@donahue.com

No. S229762

IN THE SUPREME COURT
STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al.,
Petitioners
vs.
SUPERIOR COURT OF KERN COUNTY
Respondent

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

After Decision By The Court of Appeal,
Fifth Appellate District, Case No. F069370

Kern County Superior Court Case No. S-1500-CV-279141
Honorable David R. Lampe, Presiding Judge, Dept. 11

APPLICATION FOR LEAVE TO FILE AND AMICUS CURIAE BRIEF UNDER CRC 8.520 BY APPLICANTS CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND CALIFORNIA INFILL FEDERATION IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL

Attorneys for Proposed Amici Curiae
California Building Industry Association, Building Industry Legal Defense Foundation, and California Infill Federation

KATHLEEN F. CARPENTER, Bar No. 124932
AMY R. GOWAN, Bar No. 283311
Donahue Fitzgerald LLP
1646 N. California Blvd., Suite 250, Walnut Creek, CA 94596
Telephone: (925) 746-7770 Fax: (925) 746-7776
kcarpenter@donahue.com | agowan@donahue.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

ARTICLES AND WEBSITES

APPLICATION FOR LEAVE

TO FILE AMICUS CURIAE BRIEF

The California Building Industry Association ("CBIA"), Building Industry Legal Defense Foundation ("BILD"), and California Infill Federation ("CIF") (collectively, "Amici Curiae") respectfully request permission to file the accompanying Amicus Curiae Brief in support of Petitioners McMillin Albany, LLC and McMillin Park Avenue, LLC (collectively, "McMillin") under California Rules of Court, rule 8.520(f).

Interest of the Amici Curiae

CBIA is a statewide, non-profit trade association representing over 3,000 businesses involved in all aspects of residential and commercial construction. CBIA and member companies directly employ over 100,000 men and women in the State of California. Its members include homebuilders, architects, engineers, sales agents, title and escrow companies, general and specialty contractors,

lenders, attorneys, land planners, material suppliers, insurers and land developers. Collectively, its members are responsible for producing approximately 80% of all new homes built in California annually.

CBIA also provides educational and legislative assistance, and acts as a clearinghouse for ideas and practices to assist and improve the homebuilding industry. CBIA offers seminars, workshops, and conferences, and publishes resource materials concerning a variety of matters affecting the industry. CBIA was the sponsor of Title 7 of Part 2 of Division 2 of the Civil Code, (hereinafter, "SB800" or the "Right to Repair Act"). Upon enactment of SB800, CBIA published an extensive compliance guide and provided seminars and webinars all over the State of California regarding the implementation and operation of the new Right to Repair Act.

BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry

Association of Southern California, Inc. ("BIASC"). BIASC, in turn, is a non-profit trade association representing over 1,000 member companies. The mission of BIASC is to promote a positive business environment for the building industry. BILD's purposes are, among others, to monitor legal and regulatory developments and to initiate or support litigation designed to improve the business climate for the building industry. BILD's interest in this matter is based on its 26-year history of monitoring and defending the legal rights of builders and its keen awareness of the fact that the Right to Repair Act comprehensively reformed construction defect law in California.

CIF is recognized as a leading force for infill economic growth and development in Sacramento. CIF supports rebuilding California from its urban core representing builders, developers, professional services, construction, industry, transportation, shippers, logistics,

financial investors and businesses throughout California. CIF is committed to influencing infill growth and development by advocating for housing, public infrastructure, tax and government reform.

Amici Curiae, along with the numerous homebuilders, land developers, trade contractors, and industry professionals that their respective organizations represent, are vitally concerned with providing much-needed housing to families in California. To that end, Amici Curiae and their respective members participate in and support intelligent and careful legislation promoting the interests of the building industry and its consumers in areas of their mutual concerns.

The proposed Amicus Curiae Brief presents the perspective of a broad group of general members, including industry leaders that may be affected by the Court's decision in this matter. The proposed brief also presents unique but publicly available historical, industry-

related educational materials and other studies. Amici Curiae believe that these important studies and other publicly available data will aid the Court in understanding how its interpretation of the Right to Repair Act may have far reaching implications and could have unintended negative consequences to consumers and homebuilders alike. Indeed, if this Court sanctions the judicial creation of a parallel tort system of both common law and the Right to Repair Act for resolution of construction defects, it would lead to inconsistent results for liability arising out of the same alleged defect.

The brief will also address the potential impact of the Court's decision on thousands of project documents throughout the State of California. Such documents are recorded in the numerous homeowners' chains of title and include, without limitation, CC&Rs, SB800 recordable notices, and purchase and sale agreements. Many of them have been approved by the California Bureau of Real

Estate as legally compliant under the Right to Repair Act. Altering the applicable law by abrogating the Right to Repair Act or any part of it would result in tremendous uncertainty regarding the enforceability and proper interpretation of these otherwise clear documents.

///

///

///

///

///

///

///

///

///

///

///

///

///

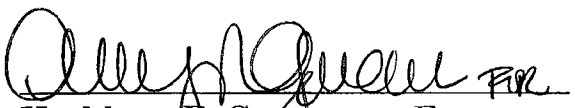
California Rules of Court, Rule 8.520(f)(4) Disclosure

No party or counsel for a party in this review authored the proposed Amicus Curiae Brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief. For the foregoing reasons, Amici Curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: 7/13/16

Respectfully Submitted,

Donahue Fitzgerald LLP



Kathleen F. Carpenter, Esq.
Attorneys for Amici Curiae
California Building Industry Association,
Building Industry Legal Defense
Foundation and California Infill
Federation

AMICUS CURIAE BRIEF

I. INTRODUCTION

There are two central issues presented by Real Parties in Interest ("Real Parties") in their Opening Brief on the Merits ("Opening Brief"): (1) What is the scope of causes of action that are precluded by SB800 for residential construction defects in non-condominium conversion homes; and (2) Does SB800 require compliance with the statutory prelitigation procedure set forth at Civil Code section 910 et seq., if the homeowner does not state any claim for relief under SB800? (Opening Brief, p. 2.) Real Parties assert that the Legislature did not intend to take away homeowners' rights to common law causes of action for damage-causing defects in their home, but rather to set up a system whereby a builder could inspect and repair defects that had not yet caused damage. (*Id.* at p. 3.) Further, Real Parties argue that to the extent SB800 was intended to abrogate common law causes of

action, it is limited to the ability to bring tort claims based upon defects that violate SB800's building standards. (*Id.*) Real Parties assert that homeowners are free to bring tort claims based upon damage-causing defects not addressed in SB800 standards and the right to sue for contract or warranty claims is completely unaffected by SB800. (*Id.*)

California Building Industry Association ("CBIA"), Building Industry Legal Defense Foundation ("BILD"), and California Infill Federation ("CIF") (collectively, "Amici Curiae") respectfully assert that Real Parties are wrong. Petitioners and the Fifth District Court of Appeal correctly stated that the intent of the Legislature was for SB800 to abrogate common law tort causes of action and act as the exclusive remedy for homeowners who seek to bring any defect-related action against the builder involving their home. If this Court permits the system that Real Parties propose, it would result in a parallel tort system of both common law and the Right to Repair Act

for resolution of construction defects, and would lead to inconsistent results for liability arising out of the same alleged defect.

II. BACKGROUND

Before passage of the Right to Repair Act, the building industry in California was under siege. California had become a fertile breeding ground for construction defect litigation[1]. As a result, insurance companies providing liability coverage to Amici Curiae members for construction defects were becoming increasingly scarce. *See,* Kelly Zito, *Insurance Nightmare: Flood of Lawsuits Alleging Defective Construction Leaves Builders Scrambling to Find Coverage for New Projects*[2]

---

[1] Ricardo Sandoval, *When the Roof Falls In, Construction Defect Litigation is Becoming a California Cottage Industry* (September 1992) California Lawyer <http://aguirrelawapc.com/global_pictures/Attachment_1.pdf> (Last Visited, July 6, 2016.)

[2] http://www.sfgate.com/business/article/Insurance-nightmare-Flood-of-lawsuits-alleging-2797712.php (Last Visited, July 6, 2016.)

(July 11, 2002) S.F. CHRON., noting that in 2000, insurers collected $15.2 million in premiums from contractors' liability policies in California and paid out $44.8 million for construction defects as well as other types of losses. By comparison, insurers in 1998 collected $19.3 million and paid out about $36 million. In other words, carriers paid out $1.87 for every dollar they took in. In response to regular million-dollar awards against builders, many insurers stopped writing residential-development policies[3]. In 1996, twenty to thirty licensed California insurers offered defect liability coverage. By 2002, there was a significant reduction in available coverage. "There are a small handful of insurers that will provide programs," Greg Van Ness, managing director of Acordia of California Insurance Service Inc. in Rancho

---

[3] Ricardo Sandoval, *When the Roof Falls In, Construction Defect Litigation is Becoming a California Cottage Industry* (September 1992) California Lawyer <http://aguirrelawapc.com/global_pictures/Attachment_1.pdf> (Last Visited, July 6, 2016.)

Cordova, California, told local media. (McCarthy & Johnson, *Insurers' Rate Hikes Hammer Builders*[4] (May 4, 2003) Sacramento Business Journal.)

In 2002, the University of California at Berkeley ("U.C. Berkeley") published an article discussing the history behind California's groundbreaking Right to Repair Act and an October 17, 2002, report issued by The California Policy Research Center that examined the negative impact on the economy of construction defect litigation prior to enactment of the new law. (Russell Hoyle, *Study Unmasks Litigation Myths*[5] (November 13, 2002) Berkeleyan.) The report states that the California legal environment may have "facilitated more defect litigation than has occurred in other states." *(Id.)* The article also discussed the report's findings that defect

---

[4]http://www.bizjournals.com/sacramento/stories/2003/05/05/story3.html?page (Last Visited July 6, 2016.)
[5] http://www.berkeley.edu/news/berkeleyan/2002/11/13_.html (Last Visited July 6, 2016.)

litigation resulted in problems insuring residential construction due to construction carriers leaving the California market which contributed to a decline of new construction. (*Id.*)

The report was based upon the research study conducted by a team affiliated with the Fisher Center for Real Estate and Urban Economics at U.C. Berkeley's Haas School of Business and the Goldman School of Public Policy. Co-authored by Cynthia Kroll, then regional economist at U.C. Berkeley's Fisher Center for Real Estate and Urban Economics, the report discussed the debate over whether the key to California's problem may be in part the application of strict liability that left California builders and their insurers susceptible to costly lawsuits. (Kroll, et al., *Impact of Construction-Defect Litigation on Condominium Development* (2002) CPRC Brief, Vol 14,

No. 7[6].) Compounding the impacts of the litigious environment in California, the study noted that prior to passage of SB800 the substantive liability standards in California were more onerous than almost any state in the country. *(Id.)* Of the twenty-one jurisdictions studied, California was one of only five that applied the common law doctrine of strict products liability to claims of defective residential construction. *(Id.)*

It was in response to these problems that, over a decade ago, Amici Curiae and their members became active in advancing what was then known as Senate Bill 800. These tort reform efforts took years of contentious bargaining, and in the case of Title 7 of Part 2 of Division 2 of the Civil Code, (colloquially referred to herein as "SB800," the "Right to Repair Act," or the "Act") culminated in a consensus bill.

---

[6]http://www.novoco.com/low_income_housing/resource_files/research_center/Defect_Litigation_Effects.pdf (Last Visited July 6, 2016.)

While not a panacea, the Right to Repair Act implemented sweeping changes to California construction defect law. The Act radically altered the existing process of resolving residential construction defect claims, creating a pre-litigation opportunity to inspect and repair a home prior to a homeowner bringing a legal action. Before the Act, there was no clear definition of what constituted a "defect" under California law. To remedy this problem, the Legislature crafted over 45 detailed "functionality" standards, a uniform set of construction performance standards that must be met for all residential homes sold after January 1, 2003. The intent of enumerating these very detailed and specific standards was to increase certainty, facilitate agreement, and streamline construction defect disputes. Following the creation of SB800, builders across the state developed extensive implementation programs and structured their risk management practices to fit within the new regime of

construction defect claims resolution.

Also of interest is that, following the passage of California's Right to Repair Act, by 2006, approximately half the States in the country followed the "Right to Repair Revolution." (Darin T. Allen, Esq., *Construction Defects Litigation and the "Right to Cure Revolution"* (March 2006) Construction Briefings[7].) In fact, as recently as 2015 states continued to work to reform existing right to repair statutes in favor of home builders, to discourage frivolous litigation, and strengthen rebounding housing markets. (Glucksman, et al., *Right to Repair Reform: Revisions and Proposals to State's "Right to Repair Statutes"* (April 1, 2015) Construction Defect Journal[8].)

Without exception, California is the most

---

[7]https://www.yumpu.com/en/document/view/36630277/construction-briefings-national-arbitration-forum (Last Visited July 6, 2016.)

[8]http://constructiondefectjournal.com/archives/inside-issue/2015/04/right-repair-reform-revisions-and-proposals-state%E2%80%99s-%E2%80%9Cright-repair-statutes%E2%80%9D (Last Visited July 6, 2016.)

comprehensive of the Right to Repair statutes. Amici Curiae members report that since the Act was adopted in California, the implementation of the new law affected virtually every aspect of residential construction from land development, land planning, and risk management, to the purchase and sale process including governing documents such as Covenants, Conditions & Restrictions ("CC&Rs"). The California Department of Consumer Affairs (the "DCA") provides notice on its website to owners of new residential, single-family dwellings that prior to pursuing legal action or responding to a construction defect solicitation, homeowners must first contact their homebuilder. The DCA notes that "[u]nder SB 800 (Burton, 2002), homebuilders are given the opportunity to repair your home prior to a legal action being filed."[9] Also, the members of Amici Curiae report that several insurers

---

[9] http://www.dca.ca.gov/publications/construction_defects.shtml (Last Visited July 6, 2016.)

came back into the market after passage of the Act and helped pioneer new insurance programs designed to facilitate the right to repair process. Owner Controlled Insurance Policy administrators and risk managers created programs specific to compliance with SB800 as the new standard for liability in California, "replac[ing] existing tort law."[10] There has also been a greater availability of insurance to Amici Curiae subcontractor members, some of whom operate family owned businesses without the same access to the insurance of larger companies.

Perhaps the most important part of the Right to Repair Act is the builder's absolute right to repair. The Act provides for a pre-litigation dispute resolution process that permits a builder an opportunity to inspect and

---

[10] Paladin Risk Management, A Subcontractor's Guidebook for SB800 The "Fix It" Right to Repair Law (2009) <http://paladinriskmanagement.com/6_may_09_g0000a3.pdf> (Last Visited July 6, 2016.)

repair a claimed defect prior to filing a legal action. Over the last ten years, these new procedures have been effective in keeping claims out of court, giving a builder and its customer an opportunity to work together to resolve claims and repair a deficiency in a home without the need for litigation. The premise underlying the absolute right to repair is a simple one: lawyers don't fix homes, builders do. Albeit imperfect, the Act's informal inspect and repair process was working over the last ten years and prompted faster resolution of claims and more cooperation between builders and homeowners.

Now, over a decade after these successful tort reform efforts were implemented, along came a case that turned the Right to Repair Act on its head. Ironically the case involved a successful repair, but a quibble in the subrogation context over a dispute, largely over reimbursement of a luxury hotel stay while repairs were made. The Fourth District Court of Appeal's opinion in

Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC (2013) 219 Cal.App.4th 98 *("Liberty Mutual"),* if adopted throughout California for construction defect cases, threatens to single-handedly unravel California's Right to Repair Act. In fact, the Court's decision actually created a flurry of new construction defect cases, recreating the original problem.

The Court's holding in *Liberty Mutual* created, contrary to statute, two (2) parallel tracks of construction defect litigation in the State of California, one under the Right to Repair Act, and another under the pre-existing common law. This case has resulted in confusion, uncertainty, and unnecessary expense. Moreover, in another Court of Appeal decision, *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411 ("*Burch*"), the Second District Court of Appeal blindly, and without any analysis, extended the holding of *Liberty Mutual.* Amici Curiae members report that litigation over the viability of the

Right to Repair Act has resulted in a frenzy of law and motion and appellate work, much of which has produced contrary and inconsistent rulings. Ironically, litigation over the viability of the Right to Repair Act is now at an all-time high throughout the State of California.

The number of homes affected by a ruling in this matter is staggering and cannot be overstated. The Right to Repair Act "applies to original construction intended to be sold as an individual dwelling unit" after its effective date. (Civ. Code, § 896.[11]) That date was January 1, 2003. (§ 938.) Even in the recession-impacted period of calendar years 2005 through 2010, the Right to Repair Act applies to at least 360,000 dwellings that could be the subject of construction defect litigation.[12] Indeed, well

---

[11] All statutory citations herein are to the Civil Code unless cited otherwise.

[12] This statistic is drawn from the State total data published by the Construction Industry Research Board available at http://www.cbia.org/cirb-housing-statistics.html and http://www.cbia.org/uploads/5/1/2/6/51268865/original_historic

over a half a million residences are subject to the now over ten-year old law.[13]

Amici Curiae and their members have a vital interest in ensuring that the extensive tort reform efforts are not undone by unnecessary judicial activism that might undermine the very purpose for enacting the Right to Repair Act. Indeed, if the judicial unraveling of California's Right to Repair Act is permitted to continue, California will be one of the only states in the country whose construction defect tort "reform" law actually impairs the resolution of construction defect claims and generates MORE litigation.

The impact of increased construction defect litigation is familiar to California home builders – more litigation results in less carriers offering coverage, higher insurance

---

al_data_1954-2015.pdf (Last Visited July 6, 2016.)

[13] This presumes sales in 2003 and 2004 were below but in the ballpark of the 121,895 recorded in 2005, and sales in 2011 through the present continued at recession level.

premiums, increased housing costs and a decrease new residential development. Given the current crisis surrounding affordable housing in California, low-wage workers will be further priced out of home ownership if costs continue to rise. A March 2016 article published by The San Diego Union-Tribune discussed three studies commissioned by Next 10 that found, among all states, California currently ranks 49th in homeownership and last in overall housing affordability. (The San Diego Union-Tribune Editorial Board, *How California Should Fight Poverty: Add Housing Stock* (March 6, 2016) The San Diego Union-Tribune[14].) According to the Next 10 research, despite having the third highest rate of low-wage job creation in the nation, California could soon be faced with a shortage of low-wage workers, as housing costs are pushing residents out of state in search of affordability.

---

[14] http://www.sandiegouniontribune.com/news/2016/mar/06/housing-costs-too-high-california/ (Last Visited July 6, 2016.)

(Next 10, *Current State of the California Housing Market* (March 3, 2016)[15].) Even with large numbers of higher-wage earners arriving in California, more people are moving out than moving in. In the years 2007 to 2014 80,000 families with a household income of $150,000 or more moved into California, while 702,000 families with a household income of less than $99,000 moved out. (*Id.*) At $440,000, the average cost of a home in California is already two-and-a-half times the average national home price. (Taylor, Mac, *California's High Housing Costs Causes and Consequences* (March 17, 2015) Legislative Analyst's Office Report[16].) With every $1,000 increase in home prices, approximately 14,423 California households are priced out of the housing market. (Siniavskaia Ph.D, *State and Metro Area House Prices: the "Priced Out" Effect* (August 1, 2014) National Association of

[15] http://next10.org/ca-housing (Last Visited July 6, 2016.)
[16] http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf (Last Visited July 6, 2016.)

Homebuilders Special Studies, HousingEconomics.com[17].)

For those households that do remain in California, many face long commutes after moving further from job centers in search of cheaper housing. (Baldassari, Erin, *Housing Costs Push Commuters Outward, Expanding Definition of Bay Area, Study Finds* (June 30, 2016) East Bay Times[18].) Longer commutes mean an increase in air pollution and increase Green House Gas emissions.

California currently ranks near the bottom in terms of its supply of housing relative to the population growth. Indeed, the cost of development and stringent regulations imposed on developers has contributed to the lack of homebuilding in California. (Next 10, "Current State of the California Housing Market," March 3, 2016.) In order

---

[17]https://www.nahb.org/~/media/Sites/NAHB/SupportingFiles/6/Met/Metro2014_HEO_20140801070547.ashx?la=en (Last Visited July 6, 2016.)

[18] http://www.eastbaytimes.com/breaking-news/ci_30075098/housing-costs-push-commuters-outward-expanding-definition-bay (Last Visited July 6, 2016.)

to alleviate the housing affordability crisis plaguing low-income and middle income households in California more housing construction needs to take place. (*Id.*) Given the history of construction defect litigation's impact on new construction, if tort liability is permitted to increase, home building is sure to decrease, resulting in lower rates of homeownership and even less affordable housing for low and middle income earners – directly in conflict with one of the legislature's goals with SB800.

For these reasons and the reasons set forth in Petitioner's Brief, Amici Curiae respectfully request that this Court affirm the Fifth District Court of Appeal's decision, rather than embark on a course that would render meaningless the reform of SB800 and encourage an upsurge of unnecessary construction defect lawsuits.

III. SUMMARY OF ARGUMENT OF AMICI CURIAE

The Fifth District correctly found that SB800 abrogates common law and limits a homeowner's causes of

action to those permitted under the Right to Repair Act.

Real Parties ask this Court to conclude that the Right to Repair Act did not, in fact, reform construction defect litigation and permit homeowners to choose whether to proceed under SB800 or common law. The Fifth District soundly concluded the reasoning and outcome of *Liberty Mutual* are not consistent with the express language of the Right to Repair Act and that it would make no sense to reform construction defect litigation without actually limiting it in any way. Allowing old common law causes of action, despite the clear statutory mandate to the contrary, completely undermines the comprehensive legislative reform. Doing so would expand, not limit, construction defect litigation claims. It also threatens to seriously impair the mandatory right to repair process, the hallmark of the Right to Repair Act. In reaching its conclusion, the Fifth District, unlike the Court in *Liberty Mutual*, analyzed the

full text of the statute, as well as the legislative history. As discussed in greater detail herein, this Court should affirm the Fifth District's decision for the following independently compelling reasons:

- SB800's Legislative History makes it clear that the fundamental intended purpose of SB800 was to reform residential construction defect law in California.
- Stripping the Right to Repair Act of the mandatory right to repair is nonsensical and has far reaching implications.

For these reasons, as discussed below, Amici Curiae respectfully request that the Fifth District's decision be affirmed.

///

///

///

IV. DISCUSSION

1. SB800's Legislative History Makes it Clear that the Fundamental Intended Purpose of SB800 was to Reform Residential Construction Defect Law in California

The Legislature, by enacting SB800, intended to both abrogate portions of the decision in *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*"Aas"*) as well as reform and limit, *not expand*, tort law. The Legislature created a system whereby plaintiffs could not sue a builder for residential construction defects except as the result of a violation of specific construction standards set forth therein, or as *specifically* set forth elsewhere in the SB800 statutory scheme, such as claims of a contractual nature, personal injury, fraud, or class action. (See §§ 931 and 943.)

a. SB800's Legislative History Explicitly States that it is the Exclusive Remedy for Residential Construction Defects

SB800's legislative history makes clear that it was the intent of the Legislature to narrow, not to expand, construction defect claims:

> This bill would also specify the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed pre-litigation procedure, and the obligations of the homeowner.

(Legislative Counsel Digest, Amended August 25, 2002, pg. 2 (Amici Curiae Request for Judicial Notice, Ex. 2, Bates No. 000033[19]).)[20]

This language is not qualified at all; it clearly states that SB800 is the law that will apply when a "homeowner bring[s] an action for construction defects, including applicable standards for home construction."

---

[19] All Bates Numbers referenced herein are to the complete copy of SB800's Legislative history which was judicially noticed by the Fifth District Court of Appeal in connection with McMillin's Petition for Writ of Mandate. Amici Curiae has filed a similar Request for Judicial Notice with this Court, bates numbered identically.

[20] The specific language cited here is repeated in every Legislative Counsel Digest contained in the legislative history (See Legislative Counsel Digests, Amended August 26, 2002 (Bates No. 000059), Amended August 28, 2002 (Bates No. 000087), and in the Final Legislative Counsel's Digest included in the version of the bill approved by the Governor (Bates No. 000118).)

Kaufman & Broad Communities, Inc. v. Performance Plastering (2005) 133 Cal.App.4th 26, 29 discusses the use of the intent of the Legislature in this context:

> Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.] *(Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000, 90 Cal.Rptr.2d 236, 987 P.2d 705.) Thus, "[o]nly when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning. *(Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055, 80 Cal.Rptr.2d 828, 968 P.2d 539.)

The Enrolled Bill Memorandum to Governor dated September 19, 2002, states in relevant part:

> [T]he builder will be held to various performance standards rather than the requirements of building codes in

> determining liability and compensation. For any performance standards not set out in the bill, the legislation provides that the standard established in *Aas v. Superior Court* (24 Cal.4th 627) will control.

(Bates No. 000278; see also, Business, Transportation and Housing Agency, California Housing Finance Agency, Enrolled Bill Report, pg. 3 (Bates No. 000320), "Any function or component not specifically spelled out in the bill would continue to be actionable if actual damages occur [i.e. via section 897]."") This is reflective of and consistent with the final codified version of SB800 in which defects that are not addressed by the specific standards set forth in section 896 remain actionable *only* under section 897 "if they cause damage."

The Governor's Signing Message to the members of the California Legislature announcing his signature to SB800 declares expressly that the then new construction defect law would replace the old regime:

> Senate Bill 800... govern[s] construction defect lawsuits by a new standard. Under this bill, homeowners and builders would be required to negotiate and consider offers to repair, possibly even by mediation, before an expensive lawsuit could be brought to trial. This bill would establish a workable set of common sense standards to govern these lawsuits. Only a violation of these standards by a builder would merit a trial. I applaud the homeowner and builder representatives that have produced this compromise approach to needed tort reform.

(Signing Message, SB800/Burton, Construction Defect Litigation, Limits on Tort Actions (Bates No. 000317) (emphasis added).) The governor goes on to refer to "the bill's list of actionable defects" as "the gatekeeper for allowable tort actions." (*Id.,* emphasis added.)

The Department of Housing and Community Development Enrolled Bill Report states:

> This bill would enact new limits on filing actions against builders alleging defects in residential construction. Under this bill, defects would only be actionable in tort if they meet a new set of

> performance-based building standards, which would exist only to govern tort law.

(Business, Transportation and Housing Agency, Department of Housing and Community Development, Enrolled Bill, pg. 1 (Bates No. 000306) (emphasis added).) The report also refers to "this bill's performance-based threshold for tort actions." (*Id.*, at pg. 3 (Bates No. 000308) (emphasis added).) And finally, this bill would "provide that any defect not listed in this bill shall be actionable in tort only if it causes actual property or bodily damage." (*Id.*, at pg. 5 (Bates No. 000310) (emphasis added).) It is difficult to imagine a more explicit expression of the exclusivity of SB800 to all construction defect claims brought after its enactment.

The Senate Judiciary Committee Report, As Amended August 28, 2002, recognizes that SB800 would make major changes to "existing law" from

"rights of action [available] under tort" via Code of Civ. Proc. sections 337.1 and 337.15, to "actions against a builder" being "governed by detailed standards set forth in the bill relating to the various functions and components of the building." (Senate Judiciary Committee Report, As Amended August 28, 2002, pgs. 1-2 (Bates Nos. 0000172-000173).) It also states:

> 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 a homeowner's ability to recover for defects that cause damage that are not otherwise covered by the standards [whereas, implicitly, that "ability" is *not* otherwise "preserved"].

(*Id.*, at page 3 (Bates No. 000174) (emphasis and

bracketed language added).)

Each of these excerpts in a different way make clear that SB800 was intended to be the exclusive remedy for residential construction defects.

b. A Fundamental Intention of SB800 was to Facilitate "Prompt," "Quick," and "Early" Resolution of Residential Construction Defect Claims in Order to Encourage Increased Construction of Safe and Affordable Housing Through Lower Construction Costs and Greater Availability of Insurance, and also to Preempt Contentions about Technical Deviations from Building Codes

The Legislature's reasons for making SB800 the exclusive remedy for residential construction defects are made clear by several reports contained in SB800's legislative history.

The Legislative Counsel's Digest, Amended August 25, 2002, states the following:

> (a) The California system for the administration of civil justice is one of the fairest in the world, but certain procedures and standards should be amended to ensure fairness to all parties.

> (b) The prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state's continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need clear standards and mechanisms for the prompt resolution of claims.
>
> (c) It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects.

(Legislative Counsel Digest, Amended August 25, 2002, pg. 2 (Bates No. 000033).)[21] This statement makes clear that SB800 was intended to facilitate "prompt," "quick," and "early" resolution of construction defect claims, which were expected to, in turn, facilitate "the state's continuing

---

[21] The specific language cited here is repeated in every Legislative Counsel Digest contained in the legislative history (See Legislative Counsel Digest, Amended August 26, 2002 (Bates No. 000059), Legislative Counsel Digest, Amended August 28, 2002 (Bates Nos. 000087-000088), and in the Final Legislative Counsel's Digest included in the version of the bill approved by the Governor (Bates Nos. 000118-000118.)

growth and vitality."

A report from the Senate Judiciary Committee states the following:

> (a)...this bill represents groundbreaking reform for construction defect litigation. As many prior bill analyses on this subject have noted, the problem of construction defects and associated litigation have vexed the Legislature for a number of years, with substantial consequences for the development of safe and affordable housing. This bill reflects extensive and serious 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.

(Senate Judiciary Committee, As Amended August 28, 2002, pg. 3 (Bates No. 000174); see also, substantially identical language at Assembly Committee on Judiciary, As Amended August 25, 2002, pg. 2 (Bates No. 000200), Assembly Committee on Judiciary, As Amended August 26, 2002, pg. 2 (Bates No. 000203),

Senate Judiciary Committee, Senate Third Reading, pgs. 1-2 (Bates Nos. 000225-000226), Senate Rules Committee, Unfinished Business Report, pg. 3 (Bates No. 000237), Senate Republican Commentaries, pg. A-3 (Bates No. 000242), California State and Consumer Services Agency, Department of Consumer Affairs, Enrolled Bill Report, pg. 2 (Bates No. 000333).)

Aside from the reports wherein this language is restated almost verbatim, the intent that SB800 address the concern of California's lack of safe and affordable housing and concern over the costs of construction defect litigation and its impact on housing costs is specifically mentioned by the Senate Rules Committee's Unfinished Business Report (pg. 3 (Bates No. 000237).), The Department of Housing and Community Development Enrolled Bill Report (pgs. 10-11 (Bates No. 000315-000316).), The Department of Consumer Affairs Enrolled Bill Report (pg. 5 (Bates No.

000336).), and a Letter from Assemblyman Ed Chavez, 57th District, to Governor Davis urging the Governor's signing of SB800 (Bates No. 000350).

The Department of Housing and Community Development Enrolled Bill Report states:

> The Department Supports the prevailing argument that housing costs remain high in part because of construction defect litigation. When builders cannot reliably predict the frequency or extent to which they face construction defect suits, they remain reluctant to enter the residential market. Builders are particularly reluctant to build affordable housing, which limits their profits while exposing them to the same or greater risk of being sued as with market rate housing. A high risk of expensive lawsuits also leads insurers to raise premiums for builders. These factors all raise the cost of housing construction. SB800 in effect would make it more difficult to sue builders in tort.

(Business, Transportation and Housing Agency, Department of Housing and Community Development, Enrolled Bill Report, pg. 2 (Bates No. 000307).)

The California Housing Finance Agency Enrolled Bill Report States:

> (a) There is a growing need for affordable housing in California. California currently rates 48th among the 50 states in homeownership, with only New York and Hawaii having lower homeownership rates. The California Association of Realtors recently reported that the percentage of households in California able to afford a median priced home has decreased to 28 percent, down by four percentage points (from 32 percent) from July 2001 to July 2002. It has become increasingly difficult for many builders to obtain reasonably priced liability insurance because of increased litigation related to construction defects. This is especially problematic for builders of condominiums or attached structures, where homeowner associations often encourage large numbers of owners to join class-action suits, even if only a limited number of owners have experienced problems. Existing law encourages disputes to be resolved by the courts. SB800 will have a positive impact on the construction of housing by giving builders the ability to correct construction defects that do not meet specific performance or design standards, thereby eliminating the need

> to litigate these issues. This system adds additional consumer benefits by requiring a component that is not performing properly to be replaced or repaired, regardless of whether or not actual damages have occurred.

(Business, Transportation and Housing Agency, California Housing Finance Agency, Enrolled Bill Report, pgs. 1-2 (Bates Nos. 000318-000319) (emphasis added); see also *Id.* at pg. 10 (Bates No. 000327), "This should reduce the number of cases that actually go to court, and should also reduce insurance costs that have escalated because of that litigation."; Enrolled Bill Memorandum to Governor of September 19, 2002 (Bates No. 000278), "The bill may bring some insurers back into the market to provide liability coverage to builders of homes and condominiums.".)

Finally, the Assembly Committee on Judiciary analysis states the following:

> (a) A principal feature of the bill is the codification of construction defects. 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.

(Assembly Committee on Judiciary, As Amended August 25, 2002, pg. 2 (Bates No. 000200) (emphasis added); see also, substantially similar language at Assembly Committee on Judiciary, As Amended August 26, 2002, pg. 2 (Bates No. 000203), Senate Judiciary Committee, Senate Third Reading, pg. 2 (Bates No. 000226), Senate Rules Committee, Unfinished Business Report, pg. 3 (Bates No. 000237), California State and Consumer Services Agency, Department of Consumer Affairs, Enrolled Bill Report, pg. 2 (Bates No. 000333).)

In sum, the intent of SB800 was to facilitate resolution of residential construction defect claims, which was expected to, in turn, facilitate "the state's

continuing growth and vitality" by encouraging increased construction of safe and affordable housing as the result of lower construction costs, made possible by greater availability of insurance for builders and subcontractors. Another of SB800's purposes was to avoid altogether contentions about the significance of technical deviations from building codes by its imposition of specific "standards that building systems and components must meet."

None of these intentions could possibly be expected to become a reality unless SB800 replaced existing residential construction defect law. To assert that the only intention of SB800 was to impose liability on a builder for defects that have not caused actual damage is to assert that SB800 was intended to expand builders' liability under tort law rather than limit it. If SB800 expands builders' tort liability, then it creates a disincentive for insurers to re-enter the market and,

consequently, creates and/or maintains higher risk and higher costs associated with building residential units. If SB800 increases builders' tort liability, then it fails in all of its fundamental, explicitly stated purposes.

If SB800 does not now exclusively govern residential construction defect claims, then it also fails at its stated purpose of preempting contentions about the significance of technical deviations from building codes. If general common law claims are still available to a plaintiff there is nothing preventing the parties from arguing over building code technicalities instead of determining whether there is violation of SB800's functionality and construction standards.

To summarize, in accordance with basic principles of statutory construction that courts "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of

the statute, and avoid an interpretation that would lead to absurd consequences" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003), and the principle that consideration should be given by the court to the consequences that will flow from a particular interpretation (See *Mount Sutro Defense Committee v. Regents of University of California* (1978) 77 Cal.App.3d 20, 35, disapproved on other grounds in *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116, 131 FN 10), this Court should interpret SB800 as the statutory scheme which governs residential construction defect claims.

2. Stripping the Right to Repair Act of the Mandatory Right to Repair is Nonsensical and Has Far Reaching Implications

It is estimated that more than half a million residences are subject to the Right to Repair Act today. As such, the importance of the law to "consumers,

homeowners, and the builders of homes" (Stats. 2002, ch. 722, § 1, subd. (b)) is paramount.

For the more than ten years, it has been clear to homeowners, builders, subcontractors, insurers and the courts that California homebuilders possess a pre-litigation "Right to Repair" any claimed defects in residential construction first sold on or after January 1, 2003. California trial courts have consistently recognized that the Right to Repair Act is the exclusive remedy for construction defects. Superior Court judges in San Diego County (Judges Vargas (Ret.), Prager, and Styn), Fresno County (Judge Donald Black), San Bernardino County (Judge Donna Garza), Orange County (Judge Gregory Munoz), Riverside County (Judge John Evans), Tulare County (Judge Melinda Reed) and Contra Costa County (Judge Thomas Maddock) have all held that common law claims for negligence are barred by the Right to Repair Act. These judges came to the correct result. They each recognized

that the comprehensive nature of the Right to Repair Act occupies the field of construction defect litigation and, by its express language, is the exclusive remedy for construction defects, subject only to its defined exceptions.

Another recent appellate decision similarly concluded that a claim subject to SB800 is limited by the statute as expressly set forth in the Right to Repair Act. In *KB Home v. Superior Court* (Allstate) (2014) 223 Cal.App.4th 1471 ("*KB Home*"), the Second District Court of Appeal, Division 4, correctly ruled that a homeowner's failure to give the builder an opportunity to inspect and repair a construction defect excused the builder's liability under the Act. In so holding, the Court of Appeal in *KB Home* unequivocally stated it had ruled earlier in the case that, since its enactment in 2002, the Right to Repair Act is the exclusive remedy for such claims.

Few homeowners sue homebuilders based solely upon claimed technical violations of the building standards that

have not yet caused property damage. However, under the rationale proposed by Real Parties, a homebuilder's right to repair would be preserved only in this small minority of cases. In effect, almost all construction defect actions will claim some property damage and, by elevating form over substance, bypass the Act's notice, inspection and right to repair requirements.

Here, Real Parties advance a theory that homeowners should be permitted to file a common law tort action for damages, without complying with the requirements of the Right to Repair Act. This could permit claimants to immediately proceed with dual track litigation: one a tort lawsuit for damages because of construction defects under negligence and strict liability causes of action, and another by separately serving a Notice of Claim under the Right to Repair Act for construction defects that have not caused damage. Real Parties believe that a consumer would prefer

to spend years litigating their claim rather than simply fixing the problem.

In Real Parties' world, the Right to Repair Act did not at all reform construction defect litigation. It did not create a mandatory right to repair. Instead, Real Parties urge this Court to conclude that the statute effectively creates a dual-track of multiple rights and remedies in every construction defect action. Under the Real Parties' rationale, the two tracks need not even proceed at the same time. Encouraging homeowners and their insurers to cherry-pick their causes of action would invite procedural complications and headaches for litigants. It will and already has perpetuated more litigation at the trial court and the appellate level, and with it comes an attendant increase in time and expense. Real Parties' position would essentially eviscerate SB800 and open the floodgates for further construction defect litigation — a crucial issue SB800 was enacted to address. Such a result is expressly

inconsistent with the Legislature's stated goals in reforming construction defect litigation.

This concern that plaintiff lawyers will "game" the system is not a theoretical concern. The members of Amici Curiae have reported seeing a consistent stream of cases, following the *Liberty Mutual* decision, in which:

- Claims are presented in litigation first, without any attempt to try a pre-litigation procedure;
- Plaintiffs' counsel are now often attempting to "plead around" SB800's requirements by asserting only tort claims, arguing that the Right to Repair no longer applies; and
- Trial courts are wrestling with the consequences of allowing common law claims.

These battles are taking place now, throughout the State of California. Homebuilders and other construction industry participants are finding themselves, repeatedly, the target of immediate lawsuits filed by lawyers who seek over and over again to evade the Right to Repair enacted by the Legislature. Allowing this result burdens the courts, and is to the detriment of both the construction industry and their homeowners, who should have recourse to repairs first, and litigation only as a last resort.

V. CONCLUSION

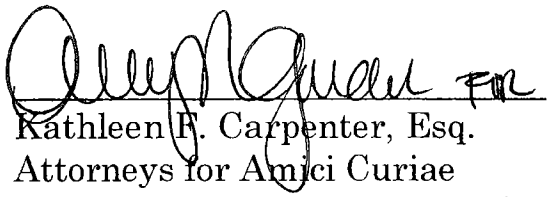
As outlined above, the issues before this Court are of vital importance to Amici Curiae and their members. The pivotal element of California's Right to Repair Act is the builder's absolute right under the Act to repair a construction defect relating to the construction standards painstakingly hammered out by the Legislature over a decade ago. The absolute right to repair is not absolute if it is an option and the whim of plaintiffs' counsel. If the

judicial unraveling of California's Right to Repair Act is permitted to continue, California will be one of the only states in the country whose construction defect tort "reform" law actually impairs the resolution of construction defects and generates more litigation and less consumer repairs. Although it goes without saying, and at the same time worth repeating, if a Court takes away the absolute right to repair out of the "Right to Repair Act," what becomes of the Act? The act becomes a complete nullity.

Dated: 7/13/16

Respectfully Submitted,

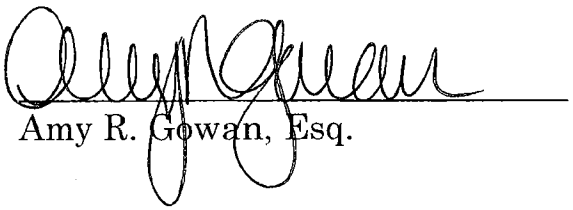
Donahue Fitzgerald LLP



Kathleen F. Carpenter, Esq.
Attorneys for Amici Curiae
California Building Industry Association,
Building Industry Legal Defense
Foundation and California Infill
Federation

CERTIFICATE OF COMPLIANCE

I, Amy R. Gowan, counsel for Amici Curiae, certify that the foregoing brief was prepared in proportionally spaced Century 14 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 7,610 words long.



Amy R. Gowan, Esq.

PROOF OF SERVICE

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen (18) years and not a party to the within action or proceeding. I am employed in the County of Contra Costa, State of California. My business address is 1646 N. California Blvd., Suite 250, Walnut Creek, CA 94596. On July 14, 2016, I caused to be served the following document(s):

APPLICATION FOR LEAVE TO FILE AND AMICUS CURIAE BRIEF UNDER CRC 8.520 BY APPLICANTS CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND CALIFORNIA INFILL FEDERATION IN SUPPORT OF PETITIONERS

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF [PROPOSED] AMICUS CURIAE BRIEF BY APPLICANTS CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND CALIFORNIA INFILL FEDERATION IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL

SUPPLEMENTAL MATERIALS IN SUPPORT OF [PROPOSED] AMICUS CURIAE BRIEF BY APPLICANTS CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND CALIFORNIA INFILL FEDERATION IN SUPPORT OF PETITIONERS MCMILLIN ALBANY, LLC, ET AL

addressed to each such addressee respectively as follows:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

BY ELECTRONIC SERVICE via electronic transmission to the Court by utilizing the Electronic Filing Service as provided by this Court. A copy of the filing receipt page will be maintained with the original document in this office and **VIA OVERNIGHT DELIVERY** by depositing the sealed envelope(s) in a Federal Express depository at Walnut Creek, California.

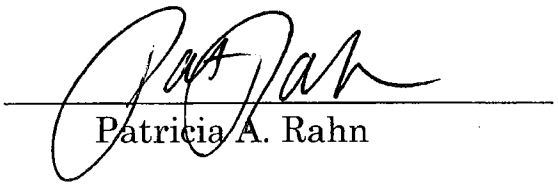
I then caused the addressee(s) to be served in the following manner:

[SEE ATTACHED SERVICE LIST]

VIA THE UNITED STATES POSTAL SERVICE by depositing the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

I declare under penalty of perjury, under the laws of the State of California and the United States of America

that the foregoing is true and correct. Executed on July 14, 2016 at Walnut Creek, California.



Patricia A. Rahn

Service List

Andrew M. Morgan, Esq. Calvin R. Stead, Esq. BORTON PETRINI, LLP 5060 California Avenue, Suite 700 Bakersfield, CA 93309 Tel: (661) 322-3051 Fax: (661) 322-4628 cstead@bortonpetrini.com mworthing@bortonpetrini.com	*Attorneys for Petitioners*
The Superior Court of Kern County Honorable David Lampe 1415 Truxtun Ave #212 Bakersfield, CA 93301 (661) 868-7204	Case No. CV279141DRL *Respondent*
California Court of Appeal Fifth Appellate District 2424 Ventura Street Fresno, CA 93721 (559) 445-5491	Case No. F069370
Aaron M. Gladstein, Esq. Mayo Lawrence Makarczyk MILSTEIN ADELMAN JACKSON FAIRCHILD AND WEDE LLP 10250 Constellation Boulevard Suite 1400 Los Angeles, CA 90405 Tel: (310) 393-9600 Fax: (310) 396-9635 agladstein@milsteinadelman.com	*Attorneys for Real Parties in Interest*

Alan H Packer Newmeyer and Dillion LLP 1333 North California Boulevard, Suite 6 Walnut Creek, CA 94596	*Attorneys for* Leading Builders of America
Donald William Fisher Ulich Ganion Balmuth Fisher and Feld LLP 4041 MacArthur Blvd, Suite 300 Newport Beach, CA 92660	*Attorneys for* Ulich Ganion Balmuth Fisher and Feld LLP : Amicus curiae
Daniel Joseph Gonzalez Horvitz and Levy LLP 15760 Ventura Blvd, 18th Floor Encino, CA 91436	*Attorneys for* MWI, Inc. : Amicus curiae
Anne Lorentzen Rauch Epsten Grinnell and Howell APC 10200 Willow Creek Rd, Suite 100 San Diego, CA 92131 Tyler P. Berding Berding and Weil 2175 North California Blvd, Suite 500 Walnut Creek, CA 94596	*Attorneys for* Consumer Attorneys of California : Amicus curiae
Bryan M Zuetel Kasdan Weber Turner LLP 19900 MacArthur Blvd, Suite 850 Irvine, CA 92612	*Attorneys for* Kasdan Lippsmith Weber Turner LLP : Amicus curiae