

SUPREME COURT COPY

SUPREME COURT
FILED

No. S229762

JUL 29 2016

IN THE SUPREME COURT
STATE OF CALIFORNIA

Frank A. McGuire Clerk

Deputy

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

**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.**

Attorneys for Proposed Amici Curiae
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REQUEST FOR JUDICIAL NOTICE

Pursuant to Rules 8.54 and 8.252 of the California Rules of Court and Evidence Code sections 452 and 459, Amici Curiae California Building Industry Association (“CBIA”), Building Industry Legal Defense Foundation (“BILD”) and California Infill Federation (“CIF”) (collectively, “Amici Curiae”) hereby move for judicial notice of the legislative history of Title 7 of Part 2 of Division 2 of the Civil Code (hereinafter referred to as the “Right to Repair Act,” “SB800,” or the “Act”).

BASIS FOR REQUEST

SB800’s legislative history is acutely relevant to the issues before this Court because it speaks directly against the notion that “[n]owhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage,” as stated in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC* (2013) 163 Cal.Rptr.3d 600,

604. In addition to considering the entire text of the Act, the legislative history of SB800 was judicially noticed and cited to by the Fifth District Court to support the Court's conclusion that "[w]here the complaint alleges deficiencies in construction that constitute violations of the standards set out in Chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with the prelitigation procedures, regardless of whether the complaint expressly alleges a cause of action under the Act." (*McMillin Albany LLC v. Superior Court* (2015) 239 Cal. App. 4th 1132, 1146.)

SB800's legislative history is subject to judicial notice by this Court under Evidence Code sections 452 and 459, as all of the portions of the legislative history upon which the Amicus Brief makes reference, are "[o]fficial acts of the legislative, executive, and judicial departments" of California. (See Evidence Code section 452(c).)

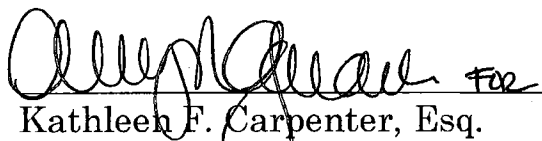
This request is based on this motion, the supporting

memorandum of points and authorities that follow,
Exhibits 1 and 2 filed concurrently herewith, and any
other documentaries or oral evidence this Court sees fit to
consider.

Dated: 7/13/16

Respectfully Submitted,

Donahue Fitzgerald LLP

A handwritten signature in black ink, appearing to read "Kathleen F. Carpenter" with a flourish at the end.

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

MEMORANDUM OF POINTS AND AUTHORITIES

This motion seeks judicial notice of the legislative history of California's "Right to Repair Act," also known as SB800. Numerous parts of SB800's legislative history support the position of Petitioner and Amici Curiae that the intent of SB800 was to abrogate common law claims for residential construction defects, which is consistent with the Fifth District Court's holding that "[w]here the complaint alleges deficiencies in construction that constitute violations of the standards set out in Chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with the prelitigation procedures, regardless of whether the complaint expressly alleges a cause of action under the Act." (*McMillin Albany LLC v. Superior Court* (2015) 239 Cal. App. 4th 1132, 1146.) The legislative history of the Act also directly contradicts one of the main premises of the holding in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove*

LLC (2013) 163 Cal.Rptr.3d 600, wherein it is stated that “[n]owhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage.” (*Id.* at 604.) A motion for judicial notice is the appropriate procedure for bringing the above mentioned legislative history before this Court. (See Evidence Code §§ 452, 459; California Rules of Court, Rule 8.252.)

**CALIFORNIA COURTS ARE AUTHORIZED TO TAKE
JUDICIAL NOTICE OF LEGISLATIVE HISTORY BY
EVIDENCE CODE SECTIONS 452 AND 459**

If this Court does not interpret the SB800 statutory scheme on its face to abrogate common law claims for construction defect actions, the Legislature’s intent in enacting SB800 may become material to the ultimate determination of whether those claims are actually abrogated as argued. Evidence Code section 452(a) states that judicial notice may be taken of “[t]he decisional, constitutional and statutory law of any state of the United

States and the resolutions and private acts of the Congress of the United States and of the Legislature of this State.” Evidence Code section 452(c) also states that judicial notice may be taken of “official acts of the Legislature, Executive, and Judicial Departments of the United States and of any state of the United States.” Additionally, Evidence Code section 459 allows reviewing courts to take judicial notice of matters specified under Evidence Code section 452. Further, the legislative history of the Right to Repair Act was presented to the Fifth District Court of Appeal and judicial notice was taken of these documents. Thus, the documents concerning the legislative history of SB800 (Civ. Code § 895 et seq.) are items that this Court may properly judicially notice under Evidence Code sections 452 and 459.

“It is settled that a person has a constitutional right to a judicial determination of questions of law such as those dealing with the interpretation and application of

statutes.” (*Superior Strut & Hanger Co. v. Port of Oakland* (1977) 72 Cal.App.3d 987, 1000.) “As emphasized time and again, the fundamental rule of statutory interpretation is to ascertain the intent of the Legislature so as to affect the purpose of the law. (*County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 199.) The legislative intent may be ascertained not only by considering the words used but also by taking into account other matters as well, such as the object in view, the evils to be remedied, the legislative history, public policy and contemporaneous administrative construction.” (*English v. County of Alameda* (1977) 70 Cal.App.3d 226, 233-234, internal citations omitted.)

There is direct support and authorization by this Court for judicial notice of materials compiled by the Legislative Intent Service (such as those offered here). (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 218-219; for examples of its use by

the appellate courts see, *Frio v. Superior Court* 203 (1988) Cal.App.3d 1480, 1487 at fn. 3, “We utilize certain documents regarding legislative history furnished by the Legislative Intent Service, a commercial service which provides documents relating to the origin of California statutes; and, *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (1993) 12 Cal.App.4th 1371, 1381, Judicial notice of legislative materials for purpose of determining legislative intent.)

The California Supreme Court has acted in conformity with these well-established principles of law by taking notice of and considering legislative materials when necessary for a determination of what the Legislature intended by passing or amending a particular provision of law. (See *Martin v. Szeto* (2004) 32 Cal. 4th 445, “We therefore consider the legislative history of section 1021.7 in order to identify the construction that comports most closely with the Legislature's actual

intent.”; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700, Statements about pending legislation are entitled to consideration to the extent they constitute “a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion.”; *Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272, “If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.”) Consequently, this Court may justifiably grant this request.

Attached as Exhibit 2 to this Motion is the entire legislative history as produced by Legislative Intent Service, Inc., Bates numbered 000001 to 000428 (Vol. 1 000001-000295, Vol. 2 000296-000428).

Attached as Exhibit 1 is the Declaration of Maria A. Sanders, describing the method by which Legislative

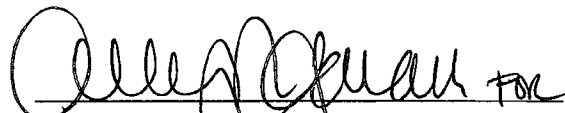
Intent Service, Inc. gathered the documents contained in Exhibit 2 and authenticating the same.

In their Amicus Curiae Brief, Amici Curiae cite to less than all documents contained in Exhibit 2. However, the entirety of the results of Legislative Intent Service, Inc.'s compilation is included in Exhibit 2 so as to avoid the appearance of selectively including only the documents favorable to the position of Amici Curiae.

Dated: 7/13/14

Respectfully Submitted,

Donahue Fitzgerald LLP

A handwritten signature in black ink, appearing to read 'Kathleen F. Carpenter for', written over a horizontal line.

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