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No. S229762

In the Supreme Court of
The State of California

McMILLIN ALBANY, LLC, et al.,
Petitioners,

vs.

THE SUPERIOR COURT COUNTY OF KERN,
Respondent.

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

RELIEF SOUGHT FROM THE PUBLISHED OPINION OF THE COURT OF APPEAL, FIFTH APPELLATE DISTRICT
5TH Civ. No. F069370

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF MCMILLIN ALBANY, LLC AND MCMILLIN PARK AVENUE, LLC

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LEADING BUILDERS OF AMERICA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Proposed amicus curiae Leading Builders of America ("LBA") hereby requests the Court's permission to file an amicus curiae brief in support of McMillin Albany, LLC and McMillin Park Avenue, LLC's (collectively, "McMillin"). The issues before the Court raises important issues regarding the nature, purpose, and scope of California homebuilders' statutory right to repair pursuant to Civil Code sections 895 et seq. (the "Right to Repair Act" or the "Act").

AMICUS CURIAE

The LBA is an association of the top residential homebuilders in the United States, all doing substantial business in California, all of whom are significantly affected by the issues before the Court. For decades, the members of the LBA have designed, built and sold thousands of homes and hundreds of communities, including single family homes, condominiums, and townhomes in California.

Decades of rampant residential construction defect litigation prior to SB800 affected LBA's members, their trade partners, and consumers, in the form of skyrocketing construction costs, housing prices, litigation expenses, and insurance costs. The "Right to Repair" Act overhauled California's broken system of construction defect litigation after extensive negotiations between consumers, builders, and insurers, and provided, among other things, a mandatory Right to Repair that gave builders a chance to perform repairs before being sued. LBA members then structured their businesses around the requirements of the Act, including their sales documents, warranty procedures, and dispute resolution procedures – as required by the Act itself. Since the Right to Repair Act was enacted in 2003, LBA

members have utilized the procedures in the Act to perform *prelitigation* repairs that are satisfactory to homeowners and lead to resolution of issues in an economical manner outside of court. However, recent decisions limiting the Act's applicability have threatened to undermine the advances made in the last decade.

Our law firm was counsel for The William Lyon Company in *Aas v. Superior Court* (2000) 24 Cal.4th 627, which, along with the ever-increasing costs of construction defect litigation, resulted in the Legislature enacting the Right to Repair Act as a comprehensive reform of all construction defect litigation in California. We were also counsel for Standard Pacific in *Standard Pacific v. Superior Court* (2009) 176 Cal.App.4th 828. The appellate court in *Standard Pacific* confirmed that construction defect claimants must comply with Civil Code section 910 prior to filing a lawsuit even when only common law claims are asserted. (*Id.* at 830-34.)

The LBA and its members have a vital interest in the outcome of the issues before the Court because reversal of the Fifth Appellate District's Opinion will undermine the Right to Repair Act by permitting claimants to bypass a builders' statutory right to repair construction defects prior to litigation. The inevitable result is more litigation, the opposite of the Legislature's stated goal to reduce litigation via the Right to Repair Act. The LBA and its counsel participated in the briefing and oral argument of the underlying published Opinion of the Court of Appeal, Fifth Appellate District, have reviewed the Fifth Appellate District's published Opinion appealed herein, Van Tassel's Petition for Review, Opening Brief, and all related responses and briefing, and were involved in the Right to Repair Act's legislative process on behalf of the LBA's members. We are familiar

with the issues in this case and believe we can assist this Court by providing additional briefing that materially adds to and complements the parties' briefs and provides an industry perspective beyond the more limited interests of the specific litigants before the Court.

CERTIFICATE OF COMPLIANCE WITH CRC 8.520(F)(4)

No party or counsel for a party in the pending appeal authored this 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, the LBA respectfully requests permission to file an amicus curiae brief in support of McMillin. That brief is submitted concurrently.

Dated: July 15, 2016

Respectfully submitted,

NEWMEYER & DILLION LLP

By: ______________________

Alan H. Packer
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AMICUS CURIAE BRIEF

I.

INTRODUCTION

Proposed amicus curiae Leading Builders of America ("LBA") submits this Amicus Brief in support of McMillin Albany, LLC and McMillin Park Avenue, LLC's (collectively, "McMillin"). The plain language of Civil Code section 895, et seq. (the "Right to Repair Act" or the "Act") confirms that the Act was intended to be, and is, the exclusive remedy for residential construction defects in California, subject only to its enumerated exceptions, and that the Act provides an absolute right for builders to repair homes prior to the filing of any litigation.

Real Parties in Interest Carl & Sandra Van Tassel, et al.'s ("Van Tassel") briefing obfuscates the language, intent, scope and effect of the Act. If, as Van Tassel claims, the Right to Repair Act was designed only to supplement the common law by creating ***more causes of action and remedies*** for construction defects, then the Legislature would not have stated its goals as "reforming" the older system and "reducing litigation." Further, Van Tassel's claim that the Act was designed only to allow for the recovery of pure economic losses is belied by the scope of Actionable Defects and damages covered by the Right to Repair Act, as set forth in Chapter 2 (Civ. Code, §§ 896 and 897). The Right to Repair Act categorically covers construction defects that have resulted in property damage.

Moreover, Real Parties' construction of the statute would virtually eliminate the "Right to Repair" that is a critical cornerstone of SB800. Van Tassel contends that the builder's statutory Right to Repair is utterly at the claimant's whim whether to proceed directly to litigation or to provide a

Notice of Claim, rendering this right illusory. The ultimate impact would undermine the clear language of SB800 and the Legislature's express intent by increasing (rather than decreasing) litigation, eliminating (rather than affording) the opportunity for quick and fair resolution of claims without litigation, and making it harder (not easier) for construction participants to obtain insurance coverage.

II.

BACKGROUND OF LEGISLATION AT ISSUE

LBA's members suffered through decades of uncontrolled residential construction defect litigation, with homes they built heading straight to litigation without ever having a chance to repair the homes. After assessing the impact of this broken system, the California Legislature enacted SB800, the Right to Repair Law, as a means of comprehensive reform of the broken construction defect litigation system.

Under SB800, conditions constituting actionable construction defects were categorized into defined actionable functionality standards, plus a catch-all provision for any unspecified conditions causing damage. Homeowners were provided a remedy for conditions that caused damage, as well as certain conditions that had not yet caused any damage, with causes of action restricted to those expressly permitted under the act. Mandatory pre-litigation procedures afforded the home builders and trades a statutory Right to Repair prior to any litigation. By specifying what is actionable and what is not, and by requiring a mandatory pre-litigation attempt to resolve claim, the Legislature took aim at comprehensive tort reform and reducing long-increasing litigation and insurance costs.

Over a decade after these successful tort reform efforts were implemented, an unusual Court of Appeal decision turned the Right to Repair Act on its head. Ironically, the home at issue in the case had already

been fully repaired by the builder after a catastrophic leak, and went up on appeal over a quibble in the subrogation context 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 two parallel tracks of construction defect litigation in 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, the Second District Court of Appeal blindly, and without any analysis, extended the holding of *Liberty Mutual*.

LBA members have seen these decisions result in volleys of new lawsuits and 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 simple bottom line is that the Fifth Appellate District got it right in this case. Rather than following *Liberty Mutual* blindly, the Fifth Appellate District examined the statutory language and requirements, and took a more complete view of the Legislative history. It concluded that *Liberty Mutual* was wrongly decided, and that except as expressly set forth in the Right to Repair Act, the Act functions as the exclusive remedy for residential construction defect claims, regardless of whether defects are alleged to have resulted in damage.

The number of homes affected by a ruling in this matter 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, January 1, 2003. (Civ. Code, §§ 896, 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. Indeed, well over a half a million residences are subject to the now ten-year old law.

LBA and its members have a vital interest in ensuring that the extensive tort reform efforts are not undone by unnecessary judicial activism that undermines 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. For these reasons and the reasons set forth in Respondent's Brief, LBA respectfully requests that this Court affirm the Fifth Appellate District's Opinion, rather than embark on a course that would render meaningless the reform of SB800 and result in an increase of construction defect lawsuits.

III.

THE RIGHT TO REPAIR ACT COVERS CLAIMS FOR RESULTANT PROPERTY DAMAGE

Despite Van Tassel's contentions, the Right to Repair Act is not a mechanism for homeowners to recover only for "defects that have not caused physical damage" or "purely economic losses." Unlike the *Liberty Mutual* decision, the decision of the Fifth Appellate District in this matter correctly found that SB800 applied both to defects causing damage, as well as specified conditions that have not yet caused damage.

Van Tassel argues first that the Act does not cover claims for resultant property damage and second, therefore, that the Act cannot be the exclusive remedy for such claims. To the contrary, the Act exhaustingly covers claims for resultant property damage. Chapter 2 (Civ. Code, §§ 896 and 897) sets forth the "Actionable Defects" allowed under the Right to Repair Act:

Section 896(a)(3) – "Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure **and cause damage to another component**."

Section 896(a)(6) – "Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves **and cause damage to the systems**."

Section 896(a)(7) – "Foundation systems and slabs shall not allow water or vapor to enter into the structure **so as to cause damage to another building component**."

Section 896(a)(9) – "Hardscape, including paths and patios, irrigation systems, landscaping systems, and drainage systems, that are installed as part of original construction, shall not be installed in such a way as to cause water or soil erosion to enter into or come in contact with the structure **so as to cause damage to another building component**."

Section 896(a)(11) – "Stucco, exterior siding, and exterior walls shall not allow excessive condensation to enter the structure **and cause damage to another component**."

Section 896(a)(12) – "Retaining and site walls and their associated drainage systems shall not allow unintended water to pass beyond, around, or through its designed or actual moisture barriers, including, without limitation, any internal barriers, **so as to cause damage**."

Section 896(a)(18) – "The waterproofing system behind or under ceramic tile and tile countertops shall not allow water into the interior walls, flooring systems, or other components **so as to cause damage**."

Section 896(c)(1) – "Soils and engineered retaining walls shall not cause, in whole or in part, **damage to the structure** built upon the soil or engineered retaining wall."

Section 897 – "To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable **if it causes damage**."

As demonstrated above, the Legislature intended that the Right to Repair Act cover all claims for construction defects, including claims that result in property damage. Civil Code section 944, further confirms that the Right to Repair Act occupies the field of resultant property damage claims:

> If a claim for damages is made under this title, the homeowner is only entitled to damages for . . . the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards.

LBA does not dispute that **one** of the purposes of the SB800 Legislation was to provide a statutory basis for relief for certain construction defects that have not yet caused resultant damage. (Such defects were held by this Court not to be actionable in tort in *Aas v. Superior Court* (2000) 24 Cal.4th 627.) However, to portray this as the only basis of SB800 would require ignoring the entirety of the legislation and its history, as well as its stated intent to implement comprehensive reform of the residential construction defect litigation system. It would also require ignoring the statutory implementation of pre-litigation procedures that provided a mandatory Right to Repair to builders, allowing builders to

perform repairs to defects (regardless of damage) before litigation is commenced.

This distinction is critical to LBA's members, who prior to SB800 were routinely subjected to litigation over purported defect claims without having an opportunity to perform repairs. Real Parties in Interest's position transparently implies that claimants may always bypass the statutorily mandated pre-litigation right to repair, and go straight to litigation. This would be detrimental to LBA's members and the public alike. An interpretation of the Right to Repair Law that allows consumer attorneys to bypass the mandatory Right to Repair at their whim undermines the purposes of the Act itself.

IV.

THE LEGISLATURE'S STATED GOAL OF THE RIGHT TO REPAIR ACT WAS TO AMEND THE COMMON LAW AND REDUCE LITIGATION

The legislative history of the Right to Repair Act[1] makes abundantly clear the purpose of the Act was to reduce litigation and change the common law:

> The Legislature finds and declares, as follows:
>
> (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

[1] On June 15, 2016, McMillin Albany, LLC requested this Court take judicial notice of the legislative history of SB 800.

> 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 administration of civil justice, including standards and procedures for early disposition of construction defects***.

(Section 1 of Stats. 2002, c. 722 (S.B.800), emphasis added.) The "current procedures and standards" the Legislature intended to amend were unquestionably common law construction defect claims. As such, the Act's stated purpose was to change, not supplement, the common law – a goal not secured if homeowners retained all common law construction defect claims.

This legislative intent has been consistently reaffirmed, along with the Legislature's goal of reducing litigation. The Assembly Committee's report on the penultimate version of the bill frames the "key issue" as "should construction defects be governed by specific standards and builders be given an opportunity to repair alleged violations before a homeowner may file a civil action in order to promote safe and affordable housing?" (Assem. Com. on Judiciary, Rep. on SB 800 as amended Aug. 26, 2002, p. 1.) The same report states:

> "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.*"

(Assem. Com. on Judiciary, Rep. on SB 800 as amended Aug. 26, 2002, p. 2, emphasis added.)

> "The bill establishes a mandatory process prior to the filing of a construction defect action. The major component of this process is the builder's absolute right to attempt a repair prior to a homeowner filing an action in court. Builders, insurers, and other business groups are hopeful that this right to repair will reduce litigation."

(Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug. 28, 2002, p. 5.)

In 2013, the Legislature again confirmed that a builder has the absolute right to repair, stating that:

> Current law requires a homeowner to follow a mandatory procedure (pursuant to [the Right to Repair Act]) prior to filing a construction defect lawsuit that includes a builder's absolute right to repair prior to a homeowner filing a lawsuit with the hopes that this will reduce litigation.

(Sen. Com. on Judiciary, Rep. on SB 652 as amended April 30, 2013, p. 2.)

The Legislature has maintained a consistent and clear position regarding the Act for more than a decade. Van Tassel's argument requires the Court to eviscerate the Right to Repair Act's purpose.

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V.

THE EXPRESS LANGUAGE OF THE RIGHT TO REPAIR ACT PRECLUDES COMMON LAW CLAIMS FOR CONSTRUCTION DEFECTS

The Right to Repair Act's comprehensive nature is confirmed by the express language of the Act. Where the Legislature intended to retain common law claims or other causes of action in the Right to Repair Act, it expressly set forth those exceptions to the Act's scope. Van Tassel's argument that the Legislature intended to retain common law claims ***not*** expressly carved out of the Act's scope is contradicted by the other express exemptions from the Act. The Legislature knew how to retain common law construction defect claims – as it did for condominium conversions – but chose not to retain common law construction defect claims for non-condominium conversions.

Right to Repair Act
In any action seeking recovery of damages arising out of, or related to deficiencies in . . . residential construction . . . the ***claimant's claims or causes of action shall be limited*** to a violation of . . . the following standards, except as specifically set forth in this title. (Civ. Code, § 896, emphasis added.)
To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage. (Civ. Code, § 897.)

Except as provided in this title, ***no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.*** (Civ. Code, § 943, subd. (a), emphasis added.)
In addition to the rights under this title, ***this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute.*** (Civ. Code, § 943, subd. (a), emphasis added.)
This title applies to original construction intended to be sold as an individual dwelling unit. ***As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.*** (Civ. Code, § 896, emphasis added.)

The scope of the Act is clearly articulated within Sections 896, 897, and 943. Van Tassel's briefing misinterprets Section 897, the "catch-all" provision of the Act, by arguing that Section 897 demonstrates that common law claims were retained by the Right to Repair Act. Contrary to Van Tassel's argument, ***Section 897 is not an exception or carve-out to the Act***. Instead, Section 897 is part of the functionality standards of the Act. (See *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1223 [135 Cal.Rptr.3d 557]; *Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 585 [121 Cal.Rptr.3d 465]; *Darling v. Superior Court* (2012) 211 Cal.App.4th 69, 75 [149 Cal.Rptr.3d 331]; *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471 [168 Cal.Rptr.3d 142]; *McCaffrey Group, Inc. v. Superior Court* (2014) 224 CalApp.4th 1330 [169 Cal.Rptr.3d 766].)

This is further confirmed in Section 910, which provides that a homeowner must comply with the Right to Repair Act's prelitigation procedures for purported violations of Section 897:

> Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following prelitigation procedures:

(Civ. Code, § 910.) The prelitigation procedures of the Act are not limited to violation of Section 896. Instead, they encompass both Sections 896 ***and*** 897, thereby rendering Section 897 claims for damage within the Act's scope.

VI.

THE PROPER CONSTRUCTION OF THE RIGHT TO REPAIR ACT IS CRITICAL TO FUTURE RESIDENTIAL DEVELOPMENT IN CALIFORNIA

It is estimated that more than half a million residences are subject to the Right to Repair Act today. The importance to "consumers, homeowners, and the builders of homes" (Stats. 2002, ch. 722, § 1, subd. (b)) is paramount.

For more than ten years, it has been clear to homeowners, builders, subcontractors, insurers and the courts that California homebuilders possess a prelitigation "Right to Repair" any claimed defects in residential construction first sold on or after January 1, 2003. Prior to the erroneous *Liberty Mutual* and *Burch* decisions, California trial courts unanimously 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), to name only a few, all held that common law claims for negligence are barred by the Right to Repair Act and that builders who comply with the Act's requirements have a statutory right to repair.[2] These judges, who were immersed in construction defect lawsuits, came to the correct result. They each recognized that the comprehensive nature of the Right to Repair Act governed construction defect litigation and, by its express language, is the exclusive remedy for construction defect claims, subject only to its defined exceptions. As a result of *Liberty Mutual* and *Burch*, trial courts began issuing conflicting rulings when trying to reconcile appellate decisions that expressly contradict statutory language. The result is uncertainty and increased costs for all parties – the opposite of what the Legislature intended.

Regardless of whether a construction defect action claims property damage, attorneys are trying to bypass the Act's notice and right to repair requirements. The uncertainty surrounding the scope of the Act has ruined the Right to Repair Act and, if the Fifth Appellate District's opinion is not confirmed, homeowners, builders, courts and, ultimately, the California economy, will all suffer.

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[2] The case numbers for these decisions are as follows: San Diego County case nos. 37-2009-00087185, 37-2011-00092085, 37-2010-00102810; Fresno County case no. 11CECG03487; San Bernardino County case no. CIVDS1107168; Orange County case no. 30-2011-00498089; Riverside County case no. INC10006723; Tulare County case no. VCU243697; and Contra Costa case no. C0802409.

VII.

CONCLUSION

A builder has an absolute right to repair alleged construction defects prior to a homeowner initiating litigation. Both the Legislature and case law are clear on the issue. To hold otherwise – as Van Tassel argues – would eviscerate the scope, purpose, and intent of the Act. Therefore, LBA respectfully requests that the Court confirm the Court of Appeal Fifth Appellate District's opinion and find that the Right to Repair Act is the exclusive remedy for construction defects in California, subject only to its enumerated exceptions.

Dated: July 15, 2016

Respectfully submitted,

NEWMEYER & DILLION LLP

By:

Alan A. Packer
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Leading Builders of America

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c).)

The text of this brief consists of 4,575 words as counted by the Microsoft Word version 2010 word processor program used to generate the brief.

Dated: July 15, 2016

J. Nathan Owens

6224021.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1333 N. California Blvd., Suite 600, Walnut Creek, California 94596.

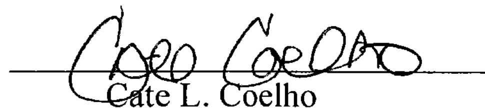
On July 15, 2016, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF McMILLIN ALBANY, LLC AND McMILLIN PARK AVENUE, LLC** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Newmeyer & Dillion's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 15, 2016, at Walnut Creek, California.



Cate L. Coelho

SERVICE LIST
McMillan Albany v. Superior Court of Kern County
(Van Tassel)
Fifth District Case No.: F069370 • Supreme Court Case No. 5229762

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