

Case No.: S231549

**IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA**

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UNITED RIGGERS & ERECTORS, INC.,  
Plaintiff and Respondent,

vs.

COAST IRON & STEEL CO.,  
Defendant and Appellant.

FILED

APR 18 2016

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After a Decision By the Court of Appeal,  
Second Appellate District, Division One  
Case No. B258860

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**OPENING BRIEF ON THE MERITS**

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**TO THE HONORABLE CHIEF JUSTICE AND HONORABLE  
ASSOCIATE JUSTICES OF THE SUPREME COURT OF  
CALIFORNIA:**

**QUESTION PRESENTED FOR REVIEW**

This case presents the following question for review:

May a contractor withhold retention payments when there is a good faith dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself?

**INTRODUCTION**

“Brief let me be.” Hamlet, Act 1, Scene 5.

There is a statutory scheme in California with regard to payment of retention and progress payments both with regard to public works and private construction projects. (*Public Contract Code* §7107, *Business and Professions Code* §7108.5, and *Civil Code* §8800 et seq.). Although these statutes are functional equivalents, there are no published decisions discussing *Business and Professions Code* §7108.5 or *Civil Code* §8800 et seq. There are two published opinions that address *Public Contract Code* §7107. The Trial Court in this case relied upon *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401 (“*Martin Brothers*”) for guidance. During the pendency of the appeal, a panel in the Second

District issued its opinion in the case of *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742 (“*East West Bank*”) which holding was completely contrary to the *Martin Brothers* opinion. The panel below, in this case, followed the *East West Bank* opinion.

This Court’s guidance in this case will provide the entire construction industry in California with insight into the statutory payment and retention rules for both public and private projects.

The appellant subcontractor in *Martin Brothers* argued that section 7107(e) "cannot be applied to allow withholding of undisputed retentions." *Martin Brothers, supra*, at 1411. The court there rejected the argument that section 7107(e) only allowed withholding where there is a dispute over retention, as opposed to a dispute over other matters such as claims for extra work. Justice Cantil-Sakauye explained:

The statute contains no language restricting the word "dispute" to any particular kind of dispute other than it must be "bona fide." The ordinary meaning of "dispute" is a "verbal controversy," a "debate," or "quarrel." (Merriam-Webster's Collegiate Dict. (11th ed.2006) p. 362, col. 1.) A controversy, debate or quarrel, i.e., a dispute, does not change its character depending on its subject. The subject is immaterial to its nature as a dispute. Indeed, in the context of construction litigation, a dispute may arise between a general contractor and a subcontractor concerning any number of subjects, including, but not limited to, nonperformance, improper or substandard performance, the timing of performance, or additional performance of work.

*Martin Brothers, supra*, at 1412.

In its opinion, the Court in the instant case stated:

The *Martin Brothers* court affirmed the trial court's judgment denying the subcontractor relief. (*Martin Brothers, supra*, 179 Cal.App.4th at pp. 1417-1418.) The court rejected the subcontractor's argument that, because the statute was intended to protect subcontractors, contractors were entitled to withhold retention payments only if there was a dispute over the amount of retention owed. (*Id.* at p. 1411.) It concluded that the statute was not ambiguous: "The statute contains no language restricting the word 'dispute' to any particular kind of dispute other than it must be 'bona fide.'" (*Id.* at p. 1412.)

In reaching that conclusion, the court in *Martin Brothers* failed to pay sufficient heed to our Supreme Court's instruction that, when interpreting the plain meaning of a statute, "[w]e do not examine [its] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) As the *Martin Brothers* court acknowledged, the remedial purpose of the prompt payment statutes is "'to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute.'" (*Martin Brothers, supra*, 179 Cal.App.4th at p. 1410, quoting *Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 720.) Yet its interpretation of "dispute" promoted the opposite result."

The court then adopted the *East West Bank* analysis. The *East West Bank* Court and the Court below both ignored the language in Section 7107(e) which states the right to withhold "150 percent of the estimated value of the disputed amount." (See also, Civil Code §8814(c).) The retention is a portion

of the total contract. If the contractor could not withhold a portion of the contract amount there would be no other fund from which to withhold, thus rendering Section 7107(e) and Civil Code §8814(c) meaningless.

### **SUMMARY OF THE CASE**

Coast is a licensed contractor and steel fabricator. United Riggers is a licensed contractor and erector. Both Coast and United Riggers submitted competing bids for a project at Universal Studios known as Project Dervish. Universal, the owner of the project, accepted Coast's bid, and on October 18, 2010, entered into a contract (the "Construction Contract") with Coast to provide Miscellaneous Metals Work for the project. (Volume 1 of Clerk's Transcript "CT" pages 26-128). Coast then hired United Riggers as a subcontractor on or about May 31, 2011 for the project by way of a purchase order. (1 CT 129). The parties entered into the lump sum purchase order in which Coast agreed to pay United Riggers \$722,742.00 for its work.

Under the purchase order between Coast and United Riggers, United Riggers agreed to "furnish all labor, supervision, equipment, supplies, tools, scaffolding, hoisting, layout, unloading and handling, incidentals, permits, licenses, taxes and everything else required to perform and complete the work required to install all Miscellaneous Steel per the Subcontract Agreement between Coast Iron & Steel Co. and Universal City Studios LLLP dated



10-18-10 (USH-10-6313-AMJ), which is attached and made a part of this agreement. All work is to be performed in accordance with the General Contract and the Contract Documents referred to in the General Contract. . . .All work is to be performed per the project schedule which is subject to change." (1 CT 129).

The purchase order also states that United Riggers "agrees to be bound to Coast Iron & Steel Co. as Coast Iron & Steel Co. is bound to the Contractor and as the Contractor is bound to the Owner." (1 CT 129).

There were several issues that affected the project at Universal Studios; Both parties were well aware of these potential exigencies which were detailed in the Construction Contract. (1 CT 37: 1.4) First, the project could be shut down on a moment's notice due to filming, as Universal Studios is a functioning film studio. (Volume 4 of Reporter's Transcript "RT" page 1527, lines 23-26). Parking and storage at the job site was extremely limited since the project was located in a functional film studio and amusement park. Each contractor was limited to one parking pass. (4 RT 1526:26-1527:20).

The original lump sum purchase order called for Coast to pay United Riggers \$722,742.00. However, through a series of change orders, Coast paid an additional \$773,237.50 to United Riggers. (3 CT 922:1-4). *See also*, Trial Court's Statement of Decision page 2, lines 18-21, Exhibit 1 to Appellant's

Motion to Augment the Record "MA"). This additional amount more than doubled the purchase order price to a total of \$1,495,979.50 that was paid to United Riggers. The additional amount was paid through a series of change orders authorized by the Construction Contract. (Paragraph 12.2 of the Construction Contract, which is incorporated into the purchase order, covers "Claims for Increases in the Contract Sum" 2 CT 125.) That provision specifically requires that written notice of claims for extra compensation be given no "later than three (3) days after the occurrence of the event giving rise to the claim..." (Id.)

Throughout the duration of the project, United Riggers utilized the process of submitting change order requests when the scope of work changed. United Riggers was compensated accordingly when those change orders were approved by Universal, which represented the additional \$773, 237.50 paid to United Riggers.

Shortly after work was completed at Project Dervish, on or about March 27, 2012, United Riggers sent Coast a "claim" for payment for extra work. United Riggers demanded that Coast pay an additional \$352,542.40 by claiming that Coast lost parts, failed to communicate properly, made fabrication errors, caused delays, and failed to pay outstanding change orders. (Exhibit 3 to AOB). Coast disputed these claims. United Riggers filed its

complaint on January 24, 2013.

United Riggers sued Coast (in part) under *Civil Code* §§ 8814, 8818 (wrongful withholding of retention) and *Business and Professions Code* §7108.5 (delayed progress payments). See Complaint Third Cause of Action, (1 CT 19).

After a nine day bench trial between May 12 and 22, 2014, the Trial Court found that United Riggers' claims for money as set forth in its complaint were not submitted for approval via the change order process required by Paragraph 12.2 of the Construction Contract. (Exh. 1 to MA 2:22-27). Notably, United Riggers' own expert witness testified that any extra work by United Riggers was the "direct result of disruption caused by [Universal]'s scope changes" (4 RT 1232:21-25). The Trial Court entered its Statement of Decision on July 15, 2014 (Exh. 1 to MA). Coast then moved for its attorney fees on July 29, 2014 (2 CT 272-287), to which United Riggers filed an opposition on August 14, 2014 (2 CT 288-307), and Coast filed a reply on August 21, 2014 (2 CT 325-330). United Riggers filed a motion to strike or tax costs on August 15, 2014 (2 CT 312-324), to which Coast filed an opposition on August 28, 2014 (2 CT 338-351). After carefully considering written briefs and oral arguments, the Trial Court awarded Coast \$150,000 in attorney fees. United Riggers filed its notice of appeal on September 11, 2014.

## DISCUSSION OF LEGAL PRINCIPALS

**THE TRIAL COURT WAS CORRECT IN HOLDING THAT COAST DID NOT VIOLATE THE PROMPT PAYMENT STATUTES.**

### A. The Prompt Payment Statutes

"California has a series of so-called 'prompt payment' statutes that require general contractors to pay their subcontractors within specified, short time periods, and that impose monetary penalties for violations. *Civil Code* section 8814 and *Public Contract Code* section 7107 are two of those statutes." *Martin Brothers. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401, 1409 (quoting *Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal.App.4th 780, 800).

#### 1. California Civil Code section 8814:

(a) If a direct contractor has withheld a retention from one or more subcontractors, the direct contractor shall, within 10 days after receiving all or part of a retention payment, pay to each subcontractor from whom retention has been withheld that subcontractor's share of the payment.

(b) If a retention received by the direct contractor is specifically designated for a particular subcontractor, the direct contractor shall pay the retention payment to the designated subcontractor, if consistent with the terms of the subcontract.

(c) If a *good faith dispute* exists between the direct contractor and a subcontractor, the direct contractor may withhold from the retention to the subcontractor an amount not in excess of 150 percent of the estimated value of the disputed amount.

*Civil Code* §8814 (emphasis added).

2. California Public Contract Code section 7107

*California Public Contract Code* section 7107 states in relevant part:

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

[...]

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a *bona fide dispute* exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in *any action* for the collection of funds wrongfully withheld, the *prevailing party* shall be entitled to attorney's fees and costs.

*Pub. Contract Code*, §7107 (emphasis added).

**B. The Prompt Payment Statutes Are Analogous to One Another**

*Civil Code* §8814 and *Public Contract Code* section 7107 are functional equivalents of each other. Both statutes award attorneys fees and costs to the prevailing party in an action to collect amounts wrongfully withheld. (*Civil Code* §8814; *Pub. Contract Code*, §7107, subd. (f)."

The prompt payment statutes' share the same intent. In essence, the statutes contain nearly identical provisions that permit the withholding of retention payments in the event of a bona fide good faith dispute. Coast is unaware of, and United Riggers did not cite to, any authority that states the intent or interpretation of *Public Contract Code* section 7107(e) is different than that of *Civil Code* section 8814. In interpreting analogous statutes, courts have interpreted "bona fide dispute" to mean "good faith dispute." See, e.g., *Taylor v. Van-Catlin Construction* (2005) 130 Cal.App.4th 1061, 1069 with respect to *Civil Code* section 3260(e). See also, *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1339 (stating that "good faith dispute" to mean " 'that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.' ")

**C. *Martin Brothers v. Thompson Pacific Const., Inc.* Sets Forth The Correct Interpretation of the Prompt Payment Statutes.**

The concept of *East West Bank* case's limitation of the term "dispute" in section 7107(c) was expressly considered and rejected in *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401. The California Supreme Court denied petition for review of *Martin Brothers* on March 24, 2010. In that case, the subcontractor, Martin Brothers, submitted change order requests for compensation for extra work that it alleged the

contractor, Thompson Pacific directed or that were otherwise required. *Id.* at 1406. The dispute was about additional compensation that the subcontractor contended was owed over and above the agreed contract price for work that was allegedly outside the scope of the contract. The appellate court ruled that a general contractor could withhold retention without violating the prompt-payment statutes if there exists a good faith dispute between the parties. *Id.* at 1414.

The appellant subcontractor in *Martin Brothers* argued that section 7107(e) "cannot be applied to allow withholding of undisputed retentions." *Martin Brothers* at 1411. The court there rejected the argument that section 7107(e) only allowed withholding where there is a dispute over retention, as opposed to a dispute over other matters such as claims for extra work. Justice Cantil-Sakauye explained:

Martin Brothers claims section 7107(e) cannot be applied to allow withholding of undisputed retentions. Actually, section 7107(e) specifically authorizes the withholding of "150 percent of the estimated value of the disputed amount. (Italics added.) By definition, 50 percent of the amount withheld will be proceeds that are undisputed. *Martin Brothers* at 1411.

...  
The statute contains no language restricting the word "dispute" to any particular kind of dispute other than it must be "bona fide." The ordinary meaning of "dispute" is a "verbal controversy," a "debate," or "quarrel." (Merriam-Webster's Collegiate Dict. (11th ed.2006) p. 362, col. 1.) A controversy, debate or quarrel, i.e., a dispute, does not change its character depending on its subject. The subject is immaterial to its nature

as a dispute. Indeed, in the context of construction litigation, a dispute may arise between a general contractor and a subcontractor concerning any number of subjects, including, but not limited to, nonperformance, improper or substandard performance, the timing of performance, or additional performance of work. *Martin Brothers* at 1412.

The opinion in *Martin Brothers* confirmed the Legislature's intent was to make the test for liability under section 7107(c) whether there is a *bona fide dispute* between the parties, not whether there is a specific *type* of bona fide dispute.

The *Martin Brothers* court stated "[w]hen statutory language is clear and unambiguous there is no need for construction, and we will not indulge in it. We will not speculate that the Legislature meant something other than what it said. Nor will we rewrite a statute to posit an unexpressed intent." *Martin Brothers* at 1411 (internal citations omitted). See also, *People v. Gardeley* (1996) 14 Cal.4th 605, 621 (the words of the statute "generally provide the most reliable indicator of 'legislative intent' and when language of a statute is clear and unambiguous, there is no need for construction"); *People v. Connor* (2004) 115 Cal.App.4th 669, 678 (courts should give words in a statute their usual and ordinary meaning, and the plain meaning governs if there is no ambiguity.) A "bona fide dispute" means a "bona fide dispute," not a particular *type* of bona fide dispute. The term "dispute" is not ambiguous and not as limited as *United Riggers* would lead the Court to believe.



"When we 'scrutinize the actual words of the statute, giving them a plain and commonsense meaning', we conclude the exception of section 7107(e) applies to *any* good faith dispute between a general contractor and subcontractor." *Martin Brothers* at 1414 (citation omitted; emphasis added). *Any* good faith dispute qualifies, not just certain types of disputes such as mechanics' liens. Accordingly, the Trial Court herein did not err in applying the analogous *Civil Code* section 8814 when it held that there was a "good faith dispute" between the parties and that Coast did not violate the prompt payment statutes. The trial court correctly followed *Martin Brothers*.

**D. *East West Bank's* Narrow Definition of "Dispute" Is Incorrect**

The decision in *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742 cited by United Riggers ignores established California law, the realities of the construction industry, and the clear expression of the legislature.

The court in *East West Bank* erroneously held that "a dispute over the contract price does not entitle a public entity to withhold funds due a contractor." (*East West Bank* at 745). The court there held that "dispute" as stated in section 7107 is limited to only mean "mechanic liens and deficiencies in the contractor's performance." (*Id* at 749). This narrow reading of "dispute" finds no basis in the legislative history of the statute and departs from the plain

meaning of the statute. Further, it ignores the language permitting the withholding of 150% of the disputed amount. Logic dictates that at least 50% of the amount withheld would be undisputed. If the entire retention were released under the contract, there would be nothing to withhold. Thus, rendering the 150% statutory language meaningless.

If the Legislature had wanted to limit disputes covered under the prompt payment statutes to only those two types of disputes, it could have done so, but it did not. The court in *East West Bank* noted that the qualifier "good faith" was added in *Civil Code* section 8812, subdivision (c), the analogous prompt payment statute for private works projects. (Id at 749). The recodification of *Civil Code* section 3260(c) into *Civil Code* section 8812 became operative in July, 2012 - three years *after* *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401 was decided. However, the Legislature did not amend section 8814 to limit the withholding of retention to any limited purpose. Clearly, the Legislature reviewed the statutes and had every opportunity after the *Martin Brothers* decision to expressly limit the *type* of dispute to mechanic liens or contractor's performance, but declined to do so. The Legislature likewise could have added other limiting language to the term "dispute" but it did not. It is clear that the Legislature adopted the *Martin Brothers'* interpretation of the term "disputes" and decided not to disturb that

ruling by revising the prompt payment statutes. "When the legislature has employed a term or phrase in one place and excluded it from another, it should not be implied where excluded." *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576. *Tesco Controls, Inc., supra*, is instructive on the length to which the Legislature can go to address appellate cases with which it disagrees. There, the legislature changed the statutory language as a result of a specific holding in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233. The legislature addressed their concerns with the holding and changed the statute. It did not do so with regard to *Martin Brothers*.

More importantly, however, is the court's reasoning for declining to imply missing terms from the bench like the court in *East West Bank*: "[W]e will not imply terms where the legislature has excluded them in both statutes." *Alpha Mechanical* at 1340 citing to *People v. Gardeley* (1996) 14 Cal.4th 605, 622 ["When the Legislature has used a term or phrase in one part of a statute but excluded it from another, courts do not imply the missing term or phrase in the part of that statute from which the Legislature has excluded it"]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725; *Citizens for Better Streets v. Board of Supervisors of San Francisco* (2004) 117 Cal.App.4th 1, 6 [court will not presume intention to legislate by implication]. The Court below

adopted the *East West Bank* analysis and applied it to private works projects.

In doing so, it declined to adopt the more sound analysis in *Martin Brothers*.

It's opinion is supported by neither law or logic.

**E. Coast Provided Compelling Evidence of the Good Faith Disputes With United Riggers' Claims**

Unlike the court in *East West Bank*, the court in *Martin Brothers* correctly understood the realities of construction litigation in that disputes may not be easy to characterize:

[T]he precise nature of the dispute may be difficult to characterize. For example, what may be additional performance in the eyes of a subcontractor may be performance of the terms of the contract or correction of inadequate performance in the eyes of the general contractor. There may be questions over double billing, excessive billing, or allocation of billing. Thus, the nature or subject of a dispute in construction litigation is open to many possibilities. *Martin Brothers* at 1412.

The disputes between United Riggers and Coast are precisely the types of disputes that the *Martin Brothers* court contemplated in reaching its decision. United Riggers considered its work "additional performance" while Coast successfully proved at trial that United Riggers' work was simply "the performance of the terms of the contract." There were also questions over double billing and excessive billing. Coast's witness Scott Sullivan testified at length about the dozens of change orders that United Riggers belatedly submitted. Mr. Sullivan testified to the satisfaction of the Trial Court that the

change orders were for work already done or change orders already paid.

**THE TRIAL COURT WAS CORRECT IN ITS AWARD OF REASONABLE ATTORNEYS FEES TO COAST**

The Legislature added the 2% per month penalty provisions to the prompt payment statutes to give contractors an effective weapon against anyone who wrongfully withheld retention funds on a construction project. However, the Legislature also added that the *prevailing party shall* be entitled to reasonable attorney's fees and costs in any action for the collection of wrongfully withheld funds. The language and the purpose of the attorneys' fee provision is clear: A contractor or sub-contractor who misuses the powerful 2% per month penalty as a threat against an innocent defendant may be liable for attorney fees. This reciprocal attorney-fee provision is a disincentive against the coercive misuse of the prompt payment statutes. In this case, United Riggers asserted violations of *Civil Code* sections 8814, 8818 and *Business and Professions Code* section 7108.5 against Coast based on Coast's alleged wrongful withholding of the retention funds and late progress payments. The Trial Court was correct in ruling that United Riggers did not prevail on its prompt payment claims. Because there was a good faith dispute between the parties that entitled Coast to withhold the retention. (Statement of Decision 5:1-2). United Riggers also did not prevail on its wrongful retention claims, because of the "good faith dispute" language in *Civil Code* §8814.

In *Martin Brothers*, the appellate court affirmed the trial court's conclusion that the defendant had not violated the applicable prompt payment statutes and was thus entitled to an award of \$150,000 in attorney fees. *Martin Brothers* at 1405. The Court of Appeal there noted that although section 7107 is a remedial statute designed to encourage timely payment of retention, section 7107 also contains the mandatory reciprocal attorney-fee provisions that "reflects the Legislature's balancing of the competing interests" of the parties to the construction contract. *Martin Brothers* at 1414. See also, *Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 102 (holding that the legislative history of *Civil Code* 8814 and 8818 (formerly section 3260.1) demonstrates a legislative intent that both the monthly two percent charge and reasonable attorney fees are available to a party prevailing on an action under that statute.)

The intent of the Legislature is clear: any contractor that tries to misuse the penalty provisions as a means to coerce payment of retention funds will be subject to paying an innocent defendant's attorney fees. "If the Legislature had intended only the successful demanding party to receive attorney fees, it would have so stated instead of permitting an award to the "prevailing party." There is simply no logical reason to punish the party who was not at fault-who *justifiably* retained payment in good faith-by denying that party attorney fees

for successfully defending against the other party's action for payment." *Taylor v. Van-Catlin Const.* (2005) 130 Cal.App.4th 1061, 1069. (emphasis in original).

Here, the Trial Court correctly concluded that Coast is the prevailing party because it did not violate the prompt payment statutes, and properly awarded it attorney fees.

### **COAST WAS THE PREVAILING PARTY**

Generally, a trial court's determination of a "prevailing party," within the meaning of an attorney-fee award statute, "should be affirmed on appeal absent an abuse of discretion." *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.

When a prevailing-party attorney fee statute does not define the term "prevailing party," the courts apply a pragmatic test to determine if one party in fact prevailed. See, *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1508. ("undertaking a 'pragmatic inquiry' into whether the defendant prevailed," within the meaning of an attorney-fee statute, and finding that obtaining a technical dismissal with prejudice in fact amounted to "prevailing"); *Heather Farms Homeowners Ass'n*, supra, at 1574 (interpreting a prevailing party attorney fee statute and determining which party prevailed "on a practical level" using a pragmatic test.)

In *Winick*, the plaintiff subcontractor brought a stop-notice action against the defendant surety company. The defendant successfully moved to dismiss the action because the plaintiff had not served the summons within the statutory period. *Winick* at 1506. The Court of Appeal there considered the following language in *Civil Code* section 3250 which governs stop-notice actions against payment bond sureties: "In any action [on the payment bond], the court shall award the prevailing party a reasonable attorney's fee..." The court then applied the "pragmatic test" to determine the prevailing party and found that the surety defendant "had achieved one hundred percent" of what it sought to achieve as a defendant, because "the most...a civil defendant...ordinarily can hope to achieve is to have the plaintiff's claims thrown out completely." *Winick* at 1508. Here, Coast unequivocally prevailed at trial. United Riggers failed to establish any liability on the part of Coast. Moreover, Coast's victory was not procedural like the surety's in *Winick*. Instead, Coast successfully defeated all of United Riggers' claims on the merits after a nine-day trial. The Trial Court was well within its discretion to determine that Coast was the prevailing party as to the prompt payment statutes and as to the entire litigation. Rather, for the Trial Court to hold otherwise would be an abuse of discretion.

United Riggers' argument on appeal that it was the prevailing party



because Coast paid the retention during trial has no merit. If there was nothing left to litigate regarding the retention, United Riggers could have withdrawn the claim before trial. However, United Riggers continued to litigate the retention claim thus requiring Coast to vigorously defend itself.

### CONCLUSION

California's intermediate courts are in conflict with regard to the progress payment and retention payment statutes. Private works contractors, public works contractors, and governmental authorities need this Court's guidance as to how to conduct themselves in the thousands of construction disputes that occur every year in California. United forced Coast to pursue this appeal to defend its rights. Coast should be awarded its reasonable attorneys fees and costs on appeal.

Date: April 14, 2016

Respectfully submitted,

WESTRUP & ASSOCIATES

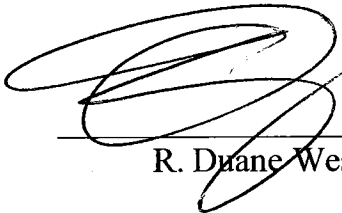
By: 

R. Duane Westrup  
Attorneys for Defendant,  
Respondent, and Petitioner Coast  
Iron & Steel Co.

**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, Rule 8.504(d)(1))**

I, R. Duane Westrup, an attorney at law duly admitted to practice before all the courts of the State of California and principal of the law firm of Westrup & Associates, attorneys of record herein for defendant, respondent, and petitioner Coast Iron & Steel Co., hereby certify that this Petition For Review document (including the memorandum of points and authorities, headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of Rule of Court 8.504(d)(1) in that it is set in a proportionally-spaced 13-point typeface and contains 4922 words as counted by the Corel Word Perfect version 10 word-processing program used to generate this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed April 14, 2016 in Long Beach, California.

  
\_\_\_\_\_  
R. Duane Westrup

**PROOF OF SERVICE**

At the time of service I was over 18 years of age and not a party to this action. My business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802-4524.

On **April 14, 2016**, I served the following documents described as **OPENING BRIEF ON THE MERITS**. I served the documents on all interested parties, as follows:

Dirk Bruinsma  
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Erectors, Inc.

Clerk, Court of Appeal  
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Fl. 2, N. Tower  
Los Angeles, CA 90013-1213

Clerk, Los Angeles Superior Court  
12720 Norwalk Blvd.  
Norwalk, CA 90650-3188

I am employed in the office of a member of the bar of this Court at whose direction the service was made. The documents were served by the following means (specify):

**By United States Mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above. I placed the envelope for collection and mailing, following our ordinary business practice. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that 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 am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Long Beach, California.

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

Date: **April 14, 2016**

  
\_\_\_\_\_  
JAMES VELOFF