S203561

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE THE MARRIAGE OF JULIE R. GREEN

and TIMOTHY P. GREEN

JULIE R. GREEN,

Petitioner/Appellant,

vs.

TIMOTHY P. GREEN,

Respondent/Respondent.

NOTICE OF INTENTION TO RELY ON COURT OF APPEAL BRIEF [AND ACCOMPANYING RESPONDENT'S BRIEF]

On Appeal from the Contra Costa County Superior Court, Case no. DR 41290, Hon. Charles B. Burch, Presiding, following a May 16, 2012 Opinion of the First District Court of Appeal, Division Four, in Case no. A129436

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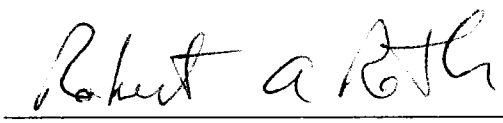
NOTICE OF INTENTION TO RELY ON COURT OF APPEAL BRIEF

Pursuant to California Rules of Court, rule 8.520(a)(1), Timothy P. Green, the Petitioner in this Court and Respondent in the Court of Appeal, hereby provides notice that he intends to rely on his Respondent's Brief (attached) in lieu of an Opening Brief on the merits.

Respectfully Submitted,
TARKINGTON, O'NEILL, BARRACK
& CHONG

Date: September 25, 2012



By: Robert A. Roth

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

Date: September 25, 2012

Robert A. Roth

No. A129436

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

IN RE THE MARRIAGE OF JULIE R. GREEN

and TIMOTHY P. GREEN

JULIE R. GREEN,

Petitioner/Appellant,

vs.

TIMOTHY P. GREEN,

Respondent/Respondent.

RESPONDENT'S BRIEF

On Appeal from the Contra Costa County Superior Court,
Case no. DR 41290, Hon. Charles B. Burch, Presiding

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I. INTRODUCTION

Respondent Timothy Green ('Husband') served in the U.S. Air Force during 1982 to 1986, prior to becoming a firefighter for a public agency that was part of the California Public Employees' Retirement System ('CalPERS') retirement system. (AA 143-144; RT 3.) Immediately upon his employment as a firefighter, in 1989, Husband became eligible to purchase four years of service credits based on his military service, at his choice either through a lump sum payment or in installment payroll deductions. (Govt. Code § 21050, subd. (a); Cal. Code Regs., tit. 2, § 575.1.) Husband was free to exercise that right for several years prior to his marriage to appellant Julie Green ('Wife'), or could have waited until after their separation to procure the retirement credits. (Gov. Code §§ 21024, subd. (e); 21032.) Wife candidly acknowledges that during the marriage, Husband "could have opted to pay in a lump sum using separate funds," but instead chose to pay in installments. (AOB 14.)

Yet, merely because about one-third ($11,462.56) of the purchase amount came from payroll deductions during marriage, Wife claims that 'injustice' will result unless she is awarded half of the

retirement credit years derived from Husband's premarital military service. (AOB 1, 11, 13; AA 143-144.) Wife's analysis, which accords no value whatsoever to the actual military service that CalPERS is crediting, is the result of blind self-interest.

The trial court properly rejected Wife's theory, and correctly limited her interest in the military retirement credits to reimbursement of her share ($5,737.28) of the community's cash contribution, plus interest. (AA 143-144.) As that is all that Wife is entitled to under the circumstances here, the Judgment should be affirmed.

II. STATEMENT OF THE FACTS

Respondent Timothy Green ('Husband') served in the U.S. Air Force from July 23, 1982 to May 1, 1986. (AA 112, 143; RT 3.) On June 16, 1989, Husband was hired as a firefighter for the Dougherty Regional Fire Authority ('DRFA'), in Dublin, California. (AA 143; RT 3.)

DRFA was a public agency member of the California Public Employees' Retirement System ('CalPERS') that had contracted to offer members the military service credit option. (AA 143; RT 3;

Govt. Code § 21024, subd. (a).) On July 1, 1997, DRFA merged with the Alameda County Fire Department. This did not change Husband's military service credit option, as the Alameda County Fire Department had contracted for the same benefit. (AA 143; RT 3; Govt. Code §§ 20508, 21025.)

Immediately upon the start of Husband's employment as a firefighter in 1989, years before his marriage to appellant Julie Green ('Wife'), he became eligible to purchase four years of CalPERS service credits on account of his military service. (Govt. Code § 21024, subd. (e); AA 143.) The purchase could be made, at Husband's election, in either a lump sum or in installments (which can **only** be made by payroll deduction). (Govt. Code § 21050, subd. (a); Cal. Code Regs., tit. 2, § 575.1.)

Husband and Wife married on May 16, 1992. On August 1, 2002, Husband exercised his right to purchase four years of CalPERS service credits on account of his premarital military service. He arranged to make the purchase through bi-monthly payroll deductions of $92.44 over a 15 year (180 month) period, in a total amount of $33,278.40. The record does not indicate whether in 2002, ten years

after the marriage, Husband had separate property resources sufficient to fund a lump sum purchase. Husband's last installment payment for the military service credit purchase is scheduled for July 20, 2017. (AA 143; RT 3; Cal. Code Regs., tit. 2, § 575.1.)

The parties separated on October 1, 2007. At that time, the community had made 62 months worth of installment payments, in an amount totaling $11,462.56. (AA 143-144.) No evidence was introduced at trial regarding the actuarial value of the disputed retirement credits.[1] (RT 1-125; AA 143-144.)

Following briefing and trial, the superior court awarded Wife half of the service credits in Husband's CalPERS retirement account for the years of the marriage. The military service credits were awarded to Husband as his sole property; with Wife to be reimbursed

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[1] This Court should disregard Wife's claim that "[t]he credit, worth approximately $140,000, has substantial financial value." (AOB 12.) No evidence was presented at trial on the value of the disputed credits, and the $140,000 figure is derived from Wife's *pro per* trial briefs, with no documentation or indication of any source for this purported value. (See AA 105, 120.) It is axiomatic that such unsworn claims in trial briefs are not evidence, and are properly disregarded. (*In re Zeth Z.* (2003) 31 Cal. 4th 396, 414; *Witchell v. De Korne* (1986) 179 Cal.App.3d 965, 975.)

for half the installment payments made during marriage (i.e. $5,737.28), plus interest at the six percent interest rate that CalPERS pays employees for refunded contributions. Including accumulated interest, Husband was ordered to pay Wife $6,699.54. (AA 144, 156; RT 40-43; Gov. Code § 20178.)

III. STATEMENT OF THE CASE

On March 12, 2008, appellant Julie Green ('Wife') filed a petition for dissolution of her marriage to respondent Timothy Green ('Husband'). (AA 1.) Following various preliminary proceedings, the matter came to trial in April 2010, before the Hon. Charles B. Burch. (AA 149.)

At issue in this appeal is the trial court's division of military service credits in Husband's CalPERS retirement account. The parties each briefed the issue prior to trial, and stipulated to the relevant facts. (AA 112-131, 143-144; RT 3.)

Judgment was entered on June 28, 2010. (AA 149.) As to Husband's CalPERS retirement account, the court awarded Wife half the service credits for the years of the marriage, and the remainder of

the service credits to Husband. Wife was additionally awarded $6,699.54, on account of community payroll deductions for the purchase of Husband's premarital military service credits. The parties were ordered to execute a retirement account division order to be prepared by actuary Eric Moon. (AA 144, 156.)

On June 30, 2010,[2] the court entered a Stipulation and Order re Modification of Dissolution of Marriage, which modified personal property and real property dispositions of the Judgment; and incorporated an attached and later-filed stipulated retirement account division order that confirmed the military service credits as Husband's separate property and required Wife to make a segregated account election. (RA 1-10.) On August 10, 2010, the stipulated retirement account division order that had been attached to the June 30, 2010 Order was filed. (AA 166-167.)

On August 18, 2010, using Judicial Council Form APP-002, Wife filed notice of appeal from a June 28, 2010 "order or judgment

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On April 1, 2011, the superior court entered a *sua sponte* Order vacating a duplicate (but incomplete) copy of the Stipulation and Order re Modification of Dissolution of Marriage, which had been filed on June 28, 2010. (RA 11.)

under Code of Civil Procedure section 904.1 (a) (3)-(13)." (AA 172.) Notice of appeal was not filed from the June 30, 2010 or August 10, 2010 orders. On March 17, 2011, this Court denied Husband's motion to dismiss the appeal on account of the June 30, 2010 and August 10, 2010 orders.

IV. STANDARD OF REVIEW

The superior court's characterization of retirement benefits as is "a mixed question of law and fact that is predominantly one of law." Such characterization is reviewed *de novo*. (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 124; AOB 5.)

However, characterization is distinct from apportionment. When a property right is earned partly during marriage and partly before or after marriage, the question of the extent to which it belongs to either the community or separate estates "is one of apportionment and not characterization." (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 180; *In re Marriage of Rossin* (2009) 172 Cal. App. 4th 725, 733.) The court's apportionment of retirement benefits is reviewed for abuse of discretion, and will be affirmed "so long as the

method produces a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates.'" (*Sonne, supra,* 48 Cal.4th at 129; *Lehman, supra,* 18 Cal.4th at 187.)

V. ARGUMENT

A. HUSBAND'S CALPERS RETIREMENT CREDITS FOR PREMARITAL MILITARY SERVICE ARE CORRECTLY CHARACTERIZED AS HIS SEPARATE PROPERTY

Both parties agree that Husband's military service credits were procured pursuant to Government Code § 21024. (AOB 6-7.) Under that statute, Husband was entitled to purchase retirement credits based on his premarital military service immediately upon becoming a CalPERS member. (Govt. Code § 21024, subd. (e). Cf. Govt. Code § 20909, subd. (a).) At that point, three years before marriage, this retirement asset became indelibly 'stamped' with a separate property characterization. (See *Lehman, supra,* 18 Cal.4th at 183; *Rossin, supra,* 172 Cal.App.4th at 773.) The happenstance that Husband did not exercise his right to procure CalPERS service credits for his premarital military service until years later, during the marriage, does

not alter the characterization of the underlying retirement credit rights.

It is well settled that "nonvested pension rights are not an expectancy[3] but a contingent interest in property." (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 841-842.) Such contingent property rights are recognized as cognizable property that is subject to characterization and division in a dissolution of marriage action. (*Id.* at 847-848; *In re Marriage of Castle* (1986) 180 Cal.App.3d 206, 214; *In re Marriage of Pace* (1982) 132 Cal.App.3d 548, 551 fn. 3. See also *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529, 1532-1534.) The separate or community character of a contingent retirement interest is established when it has become subject to conditions that are wholly within the employee's control. (*Brown, supra*, 15 Cal.3d 844, 846 fn. 8. See also *In re Marriage of Gillmore* (1981) 29 Cal.3d 419, 422 fn. 2; *In re Marriage of Spengler* (1992) 5 Cal.App.4th 288, 297-298.)

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[3] An 'expectancy' is a foreseeable but unenforceable possibility of a future beneficence or gift, which is not a community asset subject to division and in fact "is not to be deemed an interest of any kind." (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 844-845, 847 fn. 8.)

Characterization of the underlying retirement credit rights does not change, regardless of whether the rights are labeled with such descriptors as 'vested,' 'matured,' 'conditional,' or 'unconditional.' (See *Lehman, supra,* 18 Cal.4th at 177 Cf. RT 42; AA 119.) Nor does it alter characterization whether employee payments are a 'condition precedent' to obtaining the service credits. (*Sonne, supra,* 48 Cal.4th at 125. See also *Joaquin, supra,* 193 Cal.App.3d at 1532.) Rather, "a contingent future interest is property, no matter how improbable the contingency;" and "[t]he fact that a contractual right is contingent upon future events does not degrade that right to an expectancy." (*Brown, supra,* 15 Cal.3d at 847 fn. 8; *In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1092.)

"What is determinative is not any 'abstract terminology' of this sort, but rather a single concrete fact – time." (*Lehman, supra,* 18 Cal.4th at 177.) If retirement credit rights "derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." *(Brown, supra,* 15 Cal.3d at 842.) But if, as here, a retirement credit right was separate property at the time of marriage, "it continues to remain so with the exception of such

increase thereof as may have been due to the contributions of the community by virtue of capital or industry." (*Rossin, supra,* 172 Cal.App.4th at 183.) Thus, the property rights resulting from Husband's premarital military service were not transmuted into community property simply because he chose to exercise those rights during marriage. (Family Code § 852.)

As tacitly acknowledged by Wife, if Husband had made the purchase with separate funds "the recouped service credit would unquestionably have been his separate property." (*Sonne, supra,* 48 Cal.4th at 126; AOB 14 ["Mr. Green could have opted to pay in a lump sum using separate funds but he chose not to"].) There is no evidence whether Husband had separate resources in 2002 that could have funded a lump sum purchase of the credits. Regardless, the circumstance that Husband's community property salary contributed 'capital,' in the form of installment payroll deductions made during the marriage, does not change the fundamental characterization of the retirement credit rights from separate to community. (*Rossin, supra,* 172 Cal.App.4th at 183.)

Rather, this merely presents an issue of apportionment, on account of the community's incremental cash contribution. (*Rossin, supra,* 172 Cal.App.4th at 183.) As discussed below, the court's apportionment was fair and appropriate under the circumstances. It was Wife's burden to demonstrate that the court's apportionment approach is erroneous, and she has failed. (*In re Marriage of Bowen* (2001) 91 Cal. App. 4th 1291, 1301.)

B. THE TRIAL COURT PROPERLY APPORTIONED THE CALPERS MILITARY SERVICE CREDITS

When a trial court concludes that property contains both separate and community interests, the court "has very broad discretion to fashion an apportionment of interests that is equitable under the circumstances of the case," and may use "whatever method or formula will 'achieve substantial justice between the parties.'" (*In re Marriage of Gowan* (1997) 54 Cal. App. 4th 80, 88. See also *Sonne, supra,* 48 Cal.4th at 129; *Lehman, supra,* 18 Cal.4th at 187.) The court properly exercised that discretion by awarding Wife half of the retirement credits for Husband's employment during marriage, plus

reimbursement with interest of her $5,737.28 share of the community's cash contribution toward the military credits. (AA 143.) The court's order is fair and reasonable, and should be affirmed.

1. WIFE'S RELIANCE ON CONCEPTS OF 'ENHANCEMENT' IS MISPLACED

Wife seeks to magically transform the entirety of Husband's four years of separate premarital labor in the military into community property by incanting the term 'enhancement' no less than 20 times. (AOB 1, 5, 10-13, 19.) Her analysis is misguided. The military service years are not a retirement 'enhancement,' but rather a credit for actual service time rendered by Husband before marriage.

Husband's exercise of his right to receive military service retirement credits did not improve the overall retirement benefit formula, or make the non-military years more valuable. (See Gov. Code § 21364.) Likewise, the procurement of the military retirement credits did not modify the preexisting retirement credits, add fictive service years, or provide any unearned early retirement incentive. (*Lehman, supra*, 18 Cal.4th at 184-186.) Instead, like a myriad of

other pre-employment endeavors recognized by CalPERS as creditable 'public service,'[4] Husband's employment with the military is reciprocally treated "as it would be credited if the member had been in state service during his or her public service," and thus is the equivalent of actual service in the CalPERS system. (Gov. Code §§ 20024, 21034. Cf. AOB 18 [erroneously claiming Husband's military service credits are "not... composed of any employment contributions from service prior to the marriage"].) As illustrated by its complete absence in *Sonne*, the concept of 'enhancement' has no application whatsoever to analysis of the acquisition of service credits. (*Sonne, supra,* 48 Cal.4th at 124-125.)

Moreover, even if the disputed CalPERS credits could be labeled as an 'enhancement,' this would not transform half of Husband's premarital military labor into community property. The community does not own an interest in an enhancement that is not derivative of community efforts, even if the community has some

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[4] See, e.g., Gov. Code §§ 21020, 21020.5, 21021, 21022, 21023, 21023.5, 21024.5, 21025, 21025.5, 21026, 21027, 21029, 21029.5, 21030, 21031.

interest in the underlying retirement account. (*Lehman, supra*, 18 Cal.4th at 180 fn. 2.) Likewise, even to the extent that the community owns some interest in 'enhanced' retirement benefits, that "does *not* mean that the enhancement is a community asset *in its entirety*.... [T]he question what extent such an enhancement belongs to the community and separate estates is one of apportionment and not characterization," and thus is reviewed for abuse of discretion. (*Lehman, supra*, 18 Cal.4th at 180 [emphasis in original].)

Any purported 'enhancement' interest that the community had in Husband's military service credits is fully and appropriately accounted for in the trial court's ruling apportioning the retirement account. Wife is not entitled to further recovery under either concepts of 'enhancement' or (as discussed below) under ordinary apportionment principles.

2. THE COURT PROPERLY APPORTIONED HUSBAND'S CALPERS RETIREMENT CREDITS

Trial courts have broad discretion to divide retirement account assets. The principal methods used in apportioning retirement

interests are the 'cash out' approach and the 'in kind' approach. (*In re Marriage of Cooper* (2008) 160 Cal. App. 4th 574, 580.) The trial court's order is proper, when viewed under either standard.

'Cash Out' Apportionment

Under the 'cash out' method, the court has broad discretion to "determine the present value of community property rights and award them to one spouse with offsetting community or other assets to the other." The means utilized by the court "will not be interfered with on appeal" if reasonable under the circumstances, and the method adopted properly "may vary with the facts in each case." (*Cooper, supra*, 160 Cal.App.4th at 580.)

As Wife herself admits, "CalPERS uses a present value method to calculate military service credit contributions." (AOB 8, 14; RT 27-28, 36; AA 129.) The lump sum or installment payment charged to purchase the service credits is the result of calculations of the present and future liabilities anticipated by CalPERS, as determined by its actuaries. (See, e.g., Gov. Code §§ 20466, 20516, subd. (d), 20532, 21024, subd. (b), 21050-20152.) The payment reflects "an

amount equal to the employee contribution *and* the employer contribution;" i.e. the entire value of the service credits.[5] (AOB 7 [emphasis in original]; Gov. Code §§ 21024, subd. (b), 21035, 21350, 21362.2, subd. (a), 21363.1, subd. (a), 21364; *Sonne, supra,* 48 Cal.4th at 121, 127.)

Although the present value calculations of CalPERS's actuaries were provided to the parties at the time of the purchase, Wife never introduced these actuarial calculations into evidence. (AOB 6; RT 8-9.) Nor did Wife retain an actuary to independently calculate the value of the military service credits, offer other admissible evidence regarding the value of the retirement credits, or otherwise challenge the accuracy of CalPERS's present value determination. (See fn. 1,

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[5] Husband can find no support for Wife's claim, without citation to authority, that "[t]he contribution a member makes to purchase military service credit is applied entirely to the annuity; pension funds are not used to fund military service credit benefits." (AOB 7. See also AOB 18.) To the contrary, by statute, an employee purchasing military and other public service retirement credits makes the contribution for both the annuity [the amount "the member would have made to the system for the period for which current service credit is granted"] and the pension ["an amount equal to the increase in employer liability"]. (Gov. Code §§ 21024, 21050-21052.) While erroneous, Wife's analysis would not affect the result here, in any event.

ante.) In sum, Wife offered no basis for the court to second-guess the CalPERS actuarial calculations.

On this record, it was more than appropriate for the court to regard the CalPERS actuarial calculation as reasonably reflecting the present value of the service credits as of the date of purchase, rather than to speculate with no evidentiary support on whether CalPERS undervalued the benefits. (*Bowen, supra,* 91 Cal. App. 4th at 1301; *In re Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 384. See also *In re Marriage of Heiner* (2006) 136 Cal App.4th 1514, 1523.)

Thus, the court's order properly credited the community with all years served during marriage, and additionally fully compensated Wife with interest for her $5,737.28 share of the community's payroll deductions for the military service credits. (AA 143-144.) Especially in light of the community's *de minimus* contribution to the military service credit purchase, and Wife's failure to produce evidence to support an appropriate alternative valuation method, the court's ruling produced a result that is "reasonable and fairly representative of the relative contributions of the community and separate estates," and was well within its discretion. (*Lehman, supra,* 18 Cal.4th at 187.)

'In Kind' Apportionment

Viewed under the 'in kind' apportionment methodology, the court's order was reasonable as well. 'In kind' apportionment generally uses the 'time rule' to allocate separate and community interests, "but it is not required to do so" and may modify the rule as appropriate. (*In re Marriage of Bergman* (1985) 168 Cal.App.3d 742, 750.)

As a threshold matter, while the time rule can be used to determine "the amount of any community interest" in a retirement asset, it "does not determine the character of the benefit." Therefore, the court "first looks to see if the right to the payment accrued during marriage. If so, the time rule determines the extent of the community interest in the payment. But if the right to the payment did not derive from employment [during marriage], it is separate property." (*Lehman, supra,* 18 Cal.4th at 182-183.) Here, since all conditions for procuring military service credits were wholly within Husband's control before marriage, "the right to the payment did not derive from employment" during marriage and the credits should be regarded as separate property. (See Argument A, *supra.*)

Moreover, applying the time rule here, it is proper for a court to exclude service years that do not contribute to the benefit at issue. (*Bowen, supra,* 91 Cal. App. 4th at 1295; *In re Marriage of Hughes* (1994) 26 Cal.App.4th 34, 37; *In re Marriage of Henkle* (1987) 189 Cal.App.3d 97, 99-100; *In re Marriage of Davis* (1980) 113 Cal. App. 3d 485, 488-490.) The community is only entitled to a share of the retirement account "based upon the length of service performed on behalf of the community in proportion to the total length of service **necessary to earn those benefits.**" (*Bowen, supra,* 91 Cal.App.4th at 1295-1297 [emphasis added]; *In re Marriage of Judd* (1977) 68 Cal. App. 3d 515, 522-523.)

Here, none of the military service years "relevant to the calculation of the ... pension benefits" were provided by the community, so the trial court could reasonably conclude that the community was entitled to a 0% time share of those credits. (*Bowen, supra,* 91 Cal.App.4th at 1297-1298; citing *Henkle* and *Hughes, supra.*) Accordingly, it was appropriate for the court to count only employment during marriage in calculating timeshare, and exercise its discretion to modify the time rule and address Wife's cash

contribution of only $5,737.28 through reimbursement with interest. (*Bergman, supra,* 168 Cal.App.3d at 750.) Indeed, this was the only reasonable timeshare approach, as Wife provided the court with no evidentiary basis for equating the value of the cash payments to the value of the service years.

C. THE TRIAL COURT PROPERLY APPLIED THE PERTINENT AUTHORITIES

Wife's attempts to 'limit to their facts' or distinguish away *Sonne* and the other leading authorities are unconvincing. (AOB 15-18 ["The holding in *Sonne* is limited to it's facts"].) Her analytical and linguistic gymnastics fail to justify her claim that she is entitled to half of the disputed service credits.

Wife's entire case is premised on the unspoken supposition that Husband's requisite four years of perilous military service, entirely rendered prior to marriage, contributed **nothing** to the value the military service credits. This, of course, is clearly untrue. (*Sonne, supra,* 48 Cal.4th at 125 [error to accord "no weight whatsoever to the *service* Husband rendered ... preced[ing] the Husband-Wife

marriage"][emphasis in original].) Indeed, Husband's separate property premarital military service was **the sole basis** for his eligibility to purchase the credits. (Gov. Code § 21024.)

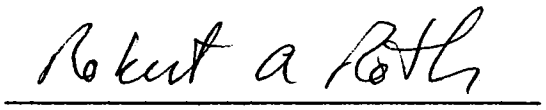
Wife's minimal $5,737.28 contribution toward the purchase was "merely a condition precedent to a credit for [Husband's] previously rendered service." (*Sonne, supra,* 48 Cal.4th at 125; Gov. Code §§ 20024, 21034.) The military retirement credits were not a community 'investment opportunity,' but "a form of deferred compensation for services rendered" before marriage. (*Sonne, supra,* 48 Cal.4th at 125-126.) Accordingly, the trial court correctly rejected Wife's claim that the community acquired the rights resulting from four years of Husband's premarital labor, and appropriately compensated the community.

VI. CONCLUSION

For the reasons stated herein, respondent Timothy Green respectfully requests that this Court affirm the Judgment; and grant such other relief as may be appropriate.

Date: April 11, 2011

Respectfully Submitted,
TARKINGTON, O'NEILL, BARRACK & CHONG

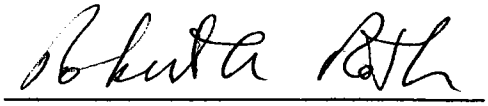


By: ROBERT A. ROTH
Counsel for Timothy Green

VII. CERTIFICATE OF WORD COUNT

The text of this brief consists of less than 14,000 words, as counted by the word-processing program used to generate the brief.

Date: April 11, 2011



ROBERT A. ROTH

PROOF OF SERVICE

I declare that I am a citizen of the United States, that I have attained the age of majority, and that I am not a party to this action. My business address is 2711 Alcatraz Avenue, Suite 3, Berkeley, CA 94705-2726. I am familiar with this firm's practice of collection and processing of correspondence to be deposited for delivery via the U.S. Postal Service as well as other methods used for delivery of correspondence. On the below stated date, in the manner indicated, I caused the within document(s) entitled:

RESPONDENT'S BRIEF

To be served on the parties or their attorneys of record in this action:

[x] Via Mail: I cause each envelope (with postage affixed thereto) to be placed in the U.S. mail at Berkeley, California.

[ ] Via Personal Service: I instructed each envelope to be hand-delivered via professional messenger service to the address listed below.

[ ] Via Overnight Courier: I caused each envelope to be delivered via professional overnight delivery service.

[ ] Via Facsimile: I instructed such to be transmitted via facsimile to the office(s) of the addressee(s).

addressed as follows

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

Date: April 14, 2011

Robert A. Roth