

Case No. S231549

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

SUPREME COURT
FILED

v.

MAY 17 2016

COAST IRON & STEEL CO.,
Defendant and Respondent.

Frank A. McGuire Clerk
Deputy

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

Appeal from the Los Angeles County Superior Court,
Case No. VC062679
Honorable Thomas I. McKnew, Jr.

**ANSWER BRIEF ON THE MERITS OF
PLAINTIFF AND APPELLANT,
UNITED RIGGERS & ERECTORS, INC.**

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Question Presented

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?

Brief Answer

Under California's prompt payment statutes, a contractor may not withhold retention payments beyond the statutory time periods unless there is a good faith dispute related to the retention itself. Allowing a contractor to hold retention funds hostage when a dispute wholly unrelated to the retainage exists undermines the purpose of the retention, contradicts the intent behind the prompt payment statutes, and facilitates abuse of those whom the statutes were intended to protect.

Summary of Argument

One appellate court's faulty interpretation of a remedial statutory scheme meant to protect those vulnerable to abuse has led to a split of authority. Specifically, California appellate courts are split regarding interpretation of California's prompt payment statutes in the context of construction industry retentions.

The offending appellate court opinion, authored by Chief Justice Cantil-Sakauye when she was a Justice with the Third Appellate District, held that "any good faith dispute" between a contractor and a subcontractor entitled the contractor to withhold retention beyond the prompt payment deadlines without penalty. (*Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal. App.4th 1401, 1414 ("Martin Brothers").) This holding directly undermined the purpose of retention funds and the intent of the Legislature in enacting the prompt payment statutes. By disassociating the exception to the prompt payment requirements (the existence of a good faith dispute) from the retention that the statutes intended to address, the *Martin Brothers* opinion opened the door to abuse and invited unnecessary litigation. At the time *Martin Brothers* was decided, the issue of whether a dispute between the parties had to be related to the retention was one of first impression.

Since that decision, two Second Appellate District opinions have disagreed. The first, *East West Bank v. Rio School District* (2015) 235 Cal. App. 4th 742, opened with a contrary holding and specifically disavowed *Martin Brothers*. (*Id.* at 745.) The second was the appellate opinion in this case, *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2015) 243 Cal. App. 4th 151 ("United Riggers"). *United Riggers* agreed with *East West Bank* explaining that withholding of retention beyond the statutory prompt payment deadline "is justified only if the dispute is about the

retention itself.” (*Id.* at 156.) Otherwise, the prompt payment statutory framework would be overlooked, and the statutes’ purpose would be undermined. Only when a good faith dispute is related to the retention can a contractor withhold retention beyond statutory deadlines without penalty.

Even before this split in authority was established, the *Martin Brothers* holding triggered concern. According to this Court’s Docket for the *Martin Brothers* case, eleven distinct Requests for Depublication of the opinion were filed. Further, although this Court denied the petition for review, Justice Werdegar and Justice Kennard (retired) were of the opinion that the petition should have been granted. Not surprisingly, the interpretation of remedial statutory provisions aimed at protecting parties vulnerable to abuse has raised industry and public policy concerns.

With respect to withholding of retention beyond the statutory time limits, both the prompt payment statutes for public works projects and private works projects should be interpreted to require that a good faith dispute between the parties be related to the retention. Alternatively, because of distinctions between the language of the private works statutory scheme (Civil Code §§ 8810-8822) and the language for public works projects (Public Contracts Code § 7107), this Court should at a minimum rule that private works projects require a dispute to be related to the retention. To the extent Coast Iron claims that this litigation constituted a “dispute” relieving it of its obligation to pay retention, that does not explain the months of wrongful withholding *prior* to the filing of the action. Thus, United Riggers & Erectors, Inc. respectfully requests that this Court rule in favor of upholding the intent and purpose of the prompt payment statutes and affirm the appellate court in this case.

Statement of the Case

1. *Point of Agreement and Obvious Gaps*

United Riggers and Erectors, Inc. (“United Riggers”) agrees with Coast Iron & Steel Co. (“Coast Iron”) that this Court’s guidance is needed with respect to the split in authority on the question presented in this case, (OBM¹ 2) For the purposes of the review granted, the language of Civil Code §§ 8810-8822 (addressing retention within private works projects) and Public Contract Code § 7107 (addressing retention within public works projects), as well as the cases that discuss these sections, are instructive.

However, United Riggers cannot agree with Coast Iron’s “Summary of the Case” because it ignores facts about the withholding of retention funds that United Riggers earned but Coast Iron refused to pay. (OBM 4-7) Considering the limited scope of the review granted, and the relevance of the retention facts to construction of the prompt payment statutes, these omitted facts are crucial.

As indicated by the appellate court in *United Riggers*:

This case arises out of a payment dispute between a contractor, [Coast Iron], and its subcontractor, [United Riggers]. After the work on a project was finished, United sent a demand to Coast to pay for change orders and for damages that United claimed Coast caused by mismanaging the project. Coast refused to pay, and also delayed forwarding United’s share of retention payments Coast had received from the owner of the project.

¹For the purposes of this Answer Brief on the Merits, “OBM” means Coast Iron’s Opening Brief on the Merits; “AOB” means United Riggers’s Appellant’s Opening Brief; “RT” means Reporter’s Transcript; “CT” means the Clerk’s Transcript; and “MA” means Motion to Augment that was filed with the court of appeal.

(243 Cal. App. 4th at 153.) The facts that the parties contracted for retention to be withheld, and how Coast Iron handled that retention, are necessary to this Court's review.

2. *Coast Iron Failed To Meet Its Statutory Obligations*

United Riggers worked as a subcontractor to Coast Iron starting in January 2011. (3 RT 1000:14-28) At trial, there was no dispute that United Riggers timely completed all work required under its contract. (3 RT 663:7-14) Further, Coast Iron had no complaints about United Riggers's work. (5 RT 2234:22-2235:5) Counsel for Coast Iron confirmed United Riggers "did a good job on this job. Their performance was fine. There's no criticism of that . . . plaintiff performed in a timely fashion. The job finished on time, the ride opened on time. There was no problem with their performance in terms of timing." (5 RT, 2462:10-15)

In March 2012 when United Riggers completed its work, Coast Iron asked United Riggers to forward its final claims for extra work so Coast Iron could process the claims and "close out the project this week so final [change order] work and retention can be billed." (AOB, Appendix 1) United Riggers submitted its claims the same day Coast Iron asked for them, identifying \$78,384 in change order requests, and \$274,158.40 for expenses United Riggers incurred due to Coast Iron's mismanagement as the prime contractor. (AOB, Appendix 2-4) Even though it anticipated and asked for United Riggers's final bill and change orders, Coast Iron immediately and summarily denied all United Riggers's claims with an email stating, "I will see you in court!" (AOB, Appendix 5)

This rejection – Coast Iron's blanket denial of United Riggers's claims based on final change orders and additional expenses incurred – had

absolutely nothing to do with the quality or completion of United Riggers's work. The work was already finished and accepted. Also, Coast Iron never asserted any affirmative claims against United Riggers. Instead, Coast Iron was denying it owed United Riggers anything *more* than the funds withheld as retention.

Five months later in August 2012, Coast Iron received \$149,602.52 in retention funds that were supposed to be paid to United Riggers. (3 RT 663:19-25, 665:1-2) This amount represented ten percent of United Riggers's contractual earnings (earned from January 2011 through March 2012) that had been retained pending completion of the project. However, Coast Iron did not pay any portion of those funds to United Riggers until six months later, in February 2013, *after* United Riggers was forced to hire an attorney and file a civil complaint. (1 CT 6 (Complaint); 3 RT 664:16-28) Then, without explanation, Coast Iron paid United Riggers approximately two-thirds of the owed retention. (3 RT 665:8-14) Coast Iron then waited an additional ten months, until the eve of trial, before paying the remaining one-third. (3 RT 666:8-11)

In its Opening Brief on the Merits, Coast Iron again admits that it held onto retention funds that it owed United Riggers solely because it rejected claims unrelated to the retention. (OBM 16) Rather than being "compelling evidence" of a statutory good faith dispute, Coast Iron has placed all of its statutory interpretation eggs in the *Martin Brothers* basket.

3. *Arguments Beyond the Review Granted Should Be Ignored*

Even though this Court limited its review to a single statutory construction issue, Coast Iron included arguments about the propriety of the underlying trial court's award of attorney's fees (which was reversed by the court of appeal) (OBM 17-19), and about the "pragmatic test" being used to determine the prevailing party. (OBM 19-21).

United Riggers will only address these arguments to the extent they implicate the statutory construction of the prompt payment statutes at issue, or the purpose for which the statutes were enacted. Specific to this limitation, the underlying trial court award of \$150,000 in attorney's fees to Coast Iron, ostensibly pursuant to the prompt payment statutes², was an error the appellate court correctly rectified.

Based on these facts, and as explained more fully below, United Riggers respectfully requests that this Court affirm the opinion of the appellate court.

²The Statement of Decision drafted by Coast Iron and signed by the trial court referenced "*Public Contract Code* section 1717 and *Business and Professions Code* section 7108.5" as the only statutory bases for an award of attorney's fees to Coast Iron. (MA, Statement of Decision, p. 9, lines 4-7) In addition to the attorney's fee award in Coast Iron's favor undermining the purpose of the prompt payment statutes, these statutory references undermine the validity of the award because there is no section 1717 of California's Public Contract Code, and Business & Professions Code § 7108.5 has nothing to do with penalties associated with retention funds.

Law and Argument

I. The Appellate Court Correctly Construed Civil Code § 8814 to Require a Contractor Claiming Protection Under an Exception to the Rule of Prompt Payment of Retention Funds to Prove Its Refusal to Timely Pay Was Because of a Good Faith Dispute Related to the Retention.

This case turns on the interpretation of the statutes enacted to require prompt payment of retention funds to contractors and subcontractors who have already earned the money withheld as “retention,” but who have contractually agreed to wait until the completion of the project to receive those retained funds. While there are many statutes similar in nature to the question at issue in this case, the two main statutory schemes related to prompt payment requirements for retention funds are Civil Code §§ 8810-8822 (addressing retention within private works projects) and Public Contract Code § 7107 (addressing retention within public works projects).

The appellate court in this case addressed both, stating that Public Contract Code § 7107 functions identically to Civil Code § 8814 with respect to requiring a contractor to promptly pay a subcontractor the retention unless a good faith dispute exists. (*United Riggers*, 243 Cal. App. 4th at 156.) To facilitate discussion of these statutes, the inherent ambiguity within them, and the proper interpretation of the “good faith dispute” language, review of the nature and purpose of contractual retention is important.

A. The Purpose of Retention in Construction Projects Is to Secure Performance and Reduce the Owner's Risk.

This case requires a clear understanding of the nature and purpose of retention in the context of construction contracts. Construction contracts often include provisions for installment payments *and* retention of a percentage of funds earned by the contractor (and subcontractors) to protect an owner's construction funds. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 55 (*citing* 11 Cal. Jur. 3d Building and Construction Contracts, § 37, p. 54).) The retention of ten percent of money earned by contractor or subcontractor for work done on a construction project until final completion is common. (*See id.*; *Blois Construction, Inc. v. FCI/Fluor/Parsons* (2016) 245 Cal. App. 4th 1091, 1093; *Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc.* (2014) 232 Cal. App. 4th 808, 814; *Westamerica Bank v. City of Berkeley* (2011) 201 Cal. App. 4th 598, 601; *McAnrew v. Hazegh* (2005) 128 Cal. App. 4th 1563, 1566-1577; *Western Landscape Construction v. Bank of America* (1997) 58 Cal. App. 4th 57, 59.)

Even though retention is not paid until completion of the project, retention is not synonymous with the last installment payment owed to a contractor or subcontractor. (*Yassin v. Solis* (2010) 184 Cal. App. 4th 524, 533-534.) Rather, retention funds are distinct; they are comprised of a percentage of all installment payments already earned through the course of the construction contract. (*Id.*) Thus, "retention funds are not akin to contract payments either for contract work or extra work." (*Pittsburg Unified School District*, 232 Cal. App. 4th at 824.) Another reason retention funds are distinct from progress payments and payments for change order work is that "a contractor has no claim to retention funds until the project is

completed.” (*Id.*) Retainage is earned and withheld until completion of the project. (*Western Landscape Construction*, 58 Cal. App. 4th at 59 (“[R]etention’ payments [are] payments relating to work already done but which are not presently paid, which instead are withheld until completion of 100 percent of the subcontractor’s work.”).)

California courts have recognized multiple purposes for retention of earned funds. As explained by this Court in *Cates Construction, Inc.*, “[a] percentage of funds held until completion of all the work is called retainage and is intended to both reduce the risk of nonperformance by the contractor and to assure the completion of the work in accordance with the contract terms.” (21 Cal. 4th at 55.)

With respect to retention by an owner from a prime contractor in the public works arena, the court in *Westamerica Bank* explained: “[R]etained earnings serve as an incentive for timely completion of the contract. They are effective for this purpose precisely because they are under the control of the owner who can use them if the contractor defaults on his obligations.” (201 Cal. App. 4th at 610-611.) The court in *Pittsburg Unified School District* explained:

The purpose of retaining a percentage of the funds otherwise due the contractor until completion of the contract work is to encourage the contractor to complete the work in a timely and competent manner and to protect the owner against the risk of having to pay a replacement contractor to repair or complete defective or unfinished work.

(232 Cal. App. 4th at 812.) An owner may use retention funds to repair or complete a project, “but this does not preclude the contractor from

challenging that decision” under the provisions of Public Contract Code § 7107. (*Id.* at 823.)

Likewise, with respect to retention by an owner from a prime contractor in the private works arena, the court in *Yassin* explained retention provides security against mechanics’ liens and ensures “that the contractor will complete the work properly and repair defects.” (184 Cal. App. 4th at 534.) In another private works case, the court explained retention provides incentive to complete the work “in a satisfactory fashion.” (*Western Landscape Construction*, 58 Cal. App. 4th at 59.) Likewise, the court of appeal in this case explained retention was used as “a guarantee of satisfactory performance” by contractors and subcontractors. (*United Riggers*, 243 Cal. App. 4th at 155.)

Thus, retention funds are the product of a contractual agreement whereby a prime contractor (or subcontractor) agrees to allow the owner (or prime contractor) to withhold a percentage of contractually earned funds for work on a construction project pending completion of the project. (*See, e.g.*, Pub. Contract Code § 7200(b)(2) (“In a contract between the original contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the public entity and the original contractor.”)) Upon satisfactory completion of the project, those funds, which by their nature are already owed to the contractor and subcontractor from whom they were withheld, must be paid. The party withholding retention has received the benefit of the bargain by the successful completion of the project. The party owed retention should not be denied payment if it met its contractual obligations.

The nature of retention funds is consistent with the purpose of such funds. When the project is satisfactorily completed, and there are no stop notices or mechanics' liens pending, the purpose of withholding the retention no longer exists. The owner or prime contractor does not need the retention funds to repair faulty work or to incentivize completion. The party who earned the retention has no further obligation with respect to the funds owed. Thus, the retention has served its purpose, and it should be promptly paid upon completion of the project. In fact, this is precisely the purpose of the prompt payment statutes. Under California law and as explained below, nothing in the prompt payment statutes should be read to undermine the nature or purpose of retention funds in construction contracts.

B. The Language of Public Contract Code § 7107 and Civil Code § 8814 That Led to Split of Authority.

1. *Public Works Projects*

The initial split of appellate authority occurred over the interpretation of Public Contract Code § 7107, subsections (d) and (e), and the impact they have on the penalty provisions of subsection (f) for the wrongful withholding of retention beyond statutory deadlines. These subsections, addressing retention in a public works project, state:

(d) Subject to subdivision (e), within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the

designated subcontractor, if the payment is consistent with the terms of the subcontract.

(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.

Based on this language, the *Martin Brothers* opinion held there was no ambiguity in the statute, and under the plain meaning of subsection (e), “any good faith dispute” qualified to excuse withholding of a subcontractor’s retention funds beyond the seven day time period. (179 Cal. App. 4th at 1414.)

Disagreeing with *Martin Brothers*, the appellate court in *East West Bank* held the dispute had to be related to the retention:

Section 7107’s purpose of ensuring the prompt release of retention funds would not be served if any dispute justified retaining the funds. There is no reason to allow a public entity to retain the funds once their purpose of providing security against mechanics liens and deficiencies in the contractor’s performance has been served. Unless the dispute relates to one of those purposes, the public entity will not be protected from the statutory penalty.

(235 Cal. App. 4th at 748-749.)

In short, the *Martin Brothers* interpretation disassociated the required good faith dispute from the retention funds, while the *East West Bank* interpretation considered both the remedial purpose of Public Contracts Code § 7107 and the purpose of retention in the context of public works construction contracts.

2. *Private Works Projects*

This Court granted review after a third appellate court weighed in on the split by agreeing with *East West Bank* in its rejection of *Martin Brothers*. The third decision, from the appellate court below, was premised on the similar statutory provisions for private works projects found in Civil Code §§ 8814 and 8818. Section 8814 states:

(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.

Section 8818, providing penalties for violations Civil Code § 8814, states:

If an owner or direct contractor does not make a retention payment within the time required by this article:

(a) The owner or direct contractor is liable to the person to which payment is owed for a penalty of 2 percent per month on the amount wrongfully withheld, in place of any interest otherwise due.

(b) In an action for collection of the amount wrongfully withheld, the prevailing party is entitled to costs and reasonable attorney's fees.

Because there were no published opinions directly addressing Civil Code §§ 8814 and 8818, the appellate court in this case relied on case law interpreting Public Contracts Code § 7107, specifically *Martin Brothers* and *East West Bank*, for guidance. (243 Cal. App. 4th at 156-158.) It found California's prompt payment statutes require a "good faith dispute" related to entitlement to retention funds for a contractor to avoid statutory penalties for wrongful withholding of retention. (*Id.*)

As explained below, the statutory interpretations of *East West Bank* (Public Contracts Code § 7107) and *United Riggers* (Civil Code §§ 8814, 8818) are consistent with the language and purpose of the prompt payment statutory schemes.

C. Interpretation of Prompt Payment Statutes Requires Looking at the Entire Statutory Scheme and Individual Provisions within the Context of the Statutory Scheme.

This Court has often explained that statutory interpretation begins with the text of the statutory language and its ordinary meaning, "as well as

the text of related provisions, terms used in other parts of the statute, and the structure of the statutory scheme.” (*Larkin v. W.C.A.B.* (2015) 62 Cal. 4th 152, 157-158; *see also In re Marriage of Davis* (2015) 61 Cal. 4th 846, 851; *In re R.V.* (2015) 61 Cal. 4th 181, 192.) The goal is to determine the proper interpretation in the context of the statutory scheme so as “to determine the Legislature’s intent so as to effectuate the law’s purpose.” (*Fluor Corp. v. Superior Court* (2015) 61 Cal. 4th 1175, 1198 (*quoting People v. Cornett* (2012) 53 Cal. 4th 1261, 1265).)

In cases where statutory language is ambiguous, and it is capable of more than one construction, a court must “give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.” (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 567 (*quoting In re Reeves* (2005) 35 Cal. 4th 765, 771, fn. 9).) “The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal. 4th 1111, 1122.)

Under these guidelines, a court should “consider the consequences of each possible construction,” and infer the legislative intent is consistent with the interpretation that promotes “practical and workable results” rather than an interpretation that produces “mischief or absurdity.” (*Gattuso*, 42 Cal. 4th at 567.) These guiding principles are consistent with California’s maxims of jurisprudence related to statutory construction: “An interpretation which gives effect is preferred to one which makes void,” and “[i]nterpretation must be reasonable.” (Civ. Code §§ 3541, 3542.)

Additionally, when statutory language can reasonably support more than one interpretation, a court may consider extrinsic aids including public policy and legislative history. (*Fluor Corp.*, 61 Cal. 4th at 1198 (citing *Cornett* (2012) 53 Cal. 4th at 1265).) This is particularly important when the “natural construction” of a statute’s language is inconsistent with its legislative history or its intended purpose. (*People v. Indiana Lumbermens Mutual Insurance Co.* (2010) 49 Cal. 4th 301, 308-312.) In such cases, the Legislature’s intent should be given effect. (*Id.* at 313.)

Also, as this Court explained in *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*,

‘A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject.’ [Citation.] Thus, when “two codes are to be construed, they ‘must be regarded as blending into each other and forming a single statute.’ [Citation.] Accordingly, they ‘must be read together and so construed as to give effect, when possible, to all the provisions thereof.’ [Citation.]”

((2012) 55 Cal. 4th 783, 805.)

Applying these principles to this case and the language of California’s prompt payment statutes, a contractor may not withhold retention payments beyond the statutory time periods unless there is a good faith dispute related to the retention itself. This is shown by the inherent ambiguity in the prompt payment statutes, consideration of the language of the entire statutory scheme, and the remedial purpose of former Civil Code § 3260, the original prompt payment statute.

1. *An Ambiguity Exists Regarding the Type of Dispute Required for a Contractor to Avoid Penalties for Violating the Prompt Payment Statutes.*

As indicated by the divergent opinions of *Martin Brothers* on one hand, and *East West Bank* and *United Riggers* on the other, California appellate courts have determined that the subject statutory language can reasonably support more than one interpretation. A split of authority among appellate courts as to the meaning of statutory language “reflects uncertainty over th[e] reading of the statute” and establishes the existence of ambiguity. (*Indiana Lumbermens Mutual Insurance Co.*, 49 Cal. 4th at 308.)

Here, reading Civil Code § 8814(c) in isolation might allow *any* good faith dispute to trigger an exception to the statutory penalties of Civil Code § 8818. (*See, e.g., Martin Brothers*, 179 Cal. App. 4th at 1412 (“There is simply nothing in the language of section 7107(e) that evinces a legislative intent to limit the types of honest dispute that will justify the holding of retentions.”).) A contrary, and more compelling reading, however, considers § 8814(c) (as well as Public Contracts Code § 7107(e)) as part of a prompt payment statutory scheme that requires the dispute to be related to the retention. Because an ambiguity exists, California law requires consideration of the entire statutory scheme, the individual provisions within the context of the entire statutory scheme, and other extrinsic aids such as public policy and legislative history.

2. *The Entire Statutory Scheme for Prompt Payment of Retention Funds Is Relevant.*

The statutory scheme of California's private works prompt payment provisions supports holding that the dispute must be related to the retention. California's "Prompt Payment" chapter in the Civil Code is found under Division 4 (General Provisions), Part 6 (Works of Improvement), Title 2 (Private Works of Improvement). (Civ. Code §§ 8800 *et seq.* (Chapter 8 entitled "Prompt Payment").) This Prompt Payment chapter is then broken down into three articles, with Article 2 focusing on "retention payments." (Civ. Code §§ 8810-8822.) In this private works case where the contractor withheld retention funds undisputedly owed to the subcontractor, Article 2 of the Prompt Payment provisions applies.

Article 2 ("retention payment") contains seven related statutory provisions, including Civil Code §§ 8814 and 8818, quoted above. Section 8812 addresses prompt payment of retention funds by an owner withholding payment from a prime contractor. Then, the following three sections (§§ 8814, 8816, and 8818) expand to include prompt payment of retention funds by a prime contractor withholding from a subcontractor. Sections 8812 and 8816, when read in conjunction with §§ 8814 and 8818, support the interpretation that a dispute must be related to the retention.

For its part, § 8812 (governing prompt payment requirements between an owner and a prime contractor) independently shows that good faith disputes within the Prompt Payment chapter are those related to the retention. Specifically, subsection (c) of § 8812 states, "[i]f there is a good faith dispute between the owner and direct contractor **as to the retention payment due**, . . ." (Emphasis added.) This restriction of the type of dispute that can trigger an exception to the prompt payment requirements,

one related to the retention payment due, is without controversy. It is expressly stated in this provision.

The fact that § 8812 contains a plain language restriction, while § 8814 does not, should not be construed against conformity within the statutory scheme. First, it would not make sense for the Legislature to restrict the kind of dispute that would trigger a prompt payment exception for owners withholding retention from prime contractors, but not equally restrict the kind of dispute for prime contractors withholding retention from subcontractors. If such a disparity is read into the statutory scheme, then a prime contractor would be entitled to prompt payment protections that it need not pass down to its subcontractors. Certain types of disputes implicating owners, prime contractors, and subcontractors would adversely affect the interests of owners and subcontractors, but protect the interests of prime contractors.

For example, if a third party premises liability case is filed against an owner, prime contractor, and subcontractor for injuries sustained at the project site after the work is completed but before retention has been paid, § 8812 would require the owner to pay the prime contractor the owed retention within the statutory time limit. The exception of § 8812(c) would not be triggered because the “good faith dispute” would not be about the retention payment due.

On the other hand, the prime contractor who timely received the retention from the owner (under a *Martin Brothers* construction of § 8814(c)) could keep the subcontractor’s share of the retention pending resolution of the third party case because a “dispute” about liability unrelated to the retention exists. In this example, even though the prime contractor and subcontractor both earned their retention funds, and neither

has a claim against the other related to the retention, they would be treated differently pursuant to a “natural construction” reading of § 8812(c) and § 8814(c). Namely, § 8812(c) would protect the prime contractor’s right to prompt payment, but § 8814(c) would not protect the subcontractor’s equivalent interest. Such a reading is neither reasonable nor the product of commonsense.

Second, the language of § 8816, immediately following § 8814, qualifies the type of dispute contemplated by the Legislature. Specifically, § 8816 establishes timing guidelines for providing notice and releasing retention funds after the “work in dispute has been completed in accordance with the contract.” (Civ. Code § 8816(a).) In other words, the “good faith dispute” in § 8814 is described in § 8816 as related to contractually required work that must be completed before a retention can be paid. Pursuant to the plain language of § 8166, the dispute must be related to the retention:

(a) If the direct contractor gives the owner, or a subcontractor gives the direct contractor, notice that work in dispute has been completed in accordance with the contract, the owner or direct contractor shall within 10 days give notice advising the notifying party of the acceptance or rejection of the disputed work. Both notices shall comply with the requirements of Chapter 2 (commencing with Section 8100) of Title 1.

(b) Within 10 days after acceptance of disputed work, the owner or direct contractor shall pay the portion of the retention relating to the disputed work.

By describing the “work in dispute” as contract work for which retention was withheld, § 8816 shows the Legislature meant to limit the type of dispute that could trigger delayed payment of retention. Thus, § 8816, when

read in conjunction with §§ 8814 and 8818, confirms that the dispute must be related to the retention.

Even if § 8814(c), read in isolation, does not clearly indicate what type of “good faith dispute” is contemplated, the entire statutory scheme considered as a whole provides a clear answer. Because Civil Code § 8814 is part of Article 2, because of its parallel purpose to § 8812, and because it is qualified by § 8816, it should be read to require that the dispute between a prime contractor and subcontractor be related to retention. The appellate court below was correct in overturning the trial court and disagreeing with *Martin Brothers*.

Also, this reading of the entire statutory scheme is consistent with the nature and purpose of retention in construction contracts. Further, it is the only reading that is consistent with former Civil Code § 3260, the precursor to Civil Code §§ 8810-8822.

3. *Former Statutory Framework Supports Reading Civil Code §§ 8812, 8814, 8816, and 8818 in Context of the Statutory Scheme as a Whole.*

In 1990 the California Legislature passed and Governor George Deukmejian signed Senate Bill 2515, the first meaningful prompt payment protections for prime contractors and subcontractors in private works projects. The bill was enacted as (former) Civil Code § 3260, and it required prompt payment of retention by owners and prime contractors on private works projects at the completion of the project. (Civ. Code § 3260 (1990) (repealed July 1, 2012); see also *Denver D. Darling, Inc. v. Controlled Environments Const., Inc.* (2001) 89 Cal. App. 4th 1221, 1241; 1990 Cal. Legis. Serv. 1536 (Stats. 1990, ch. 1536, § 1).)

As explained by one court, prompt payment statutes were enacted in California because “the Legislature found there was a continuing problem with subcontractors receiving timely payment for their work,” and the prompt payment statutes were intended “to provide an incentive for contractors to pay subcontractors in a timely manner by providing remedies to the unpaid subcontractor.” (*Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal. App. 4th 712, 717 (addressing Public Contract Code § 7107).) Specific to former Civil Code § 3260, the Senate Committee Notes regarding Senate Bill 2515 (1990) stated: “This bill would . . . correct the more blatant abuses and would ensure that subcontractors are paid promptly for their completed work.” (*Denver D. Darling, Inc.*, 89 Cal. App. 4th at 1241.)

As formerly enacted, the prompt payment provisions related to retention in private works projects was found in a single statutory provision, Civil Code § 3260:

(a) This section is applicable with respect to all contracts entered into on or after July 1, 1991, relating to the construction of any private work of improvement. . . .

(b) The retention proceeds withheld from any payment by the owner from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) Within 45 days after the date of completion, the retention withheld by the owner shall be released.

. . .

In the event of a dispute between the owner and the original contractor, the owner may withhold from the final

payment an amount not to exceed 150 percent of the disputed amount.

(d) Subject to subdivision (e), within 10 days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract.

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

(f) Within 10 days of receipt of written notice by the owner from the original contractor or by the original contractor from the subcontractor, as the case may be, **that any work in dispute has been completed in accordance with the terms of the contract, the owner or original contractor shall advise the notifying party of the acceptance or rejection of the disputed work.** Within 10 days of acceptance of the disputed work, the owner or original contractor, as the case may be, shall release the retained portion of the retention proceeds.

(g) In the event that retention payments are not made within the time periods required by this section, the owner 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 his or her attorney's fees and costs.

(h) It shall be against public policy for any party to require any other party to waive any provision of this section.

....

(Emphasis added.)

Given the history of former Civil Code § 3260, given the Legislature's recognition of the need for remedial measures to correct blatant abuses of subcontractors, and given the fact that former § 3260(f) (bolded above) specifically references "disputed work" in relationship to completion of work for which retention proceeds were withheld, there should be no dispute that current Civil Code §§ 8812 and 8816 provide guidance when considering the meaning of Civil Code § 8814's reference to a "good faith dispute between the direct contractor and a subcontractor." The disputes contemplated by former Civil Code § 3260 were those related to the work for which the retention was held; the same should be true for the disputes contemplated by current Civil Code § 8814.

In fact, as noted by the court in *East West Bank*, when the prompt payment statutes were recodified, the term "good faith" replaced the term "bona fide" with respect to the type of dispute that created an exception to the prompt payment requirements. (235 Cal. App. 4th at 749.) Nonetheless, even with this revision, the Law Revision Commission Comments indicated the changes were nonsubstantive. (*Id.*) In other words, whether a "bona fide" dispute or a "good faith" dispute, the dispute was one that former § 3260(f) and current § 8816 described as related to work required by the contract that was not satisfactorily completed, *i.e.*, work related to the retention.

Therefore, the purpose for the original private works prompt payment statute, to protect subcontractors from abuses of contractors, did

not change with the re-numbering of the provisions. The statutory scheme as a whole, and the individual provisions within the context of the entire statutory scheme, support finding that a prime contractor may not withhold retention from a subcontractor based on *any* good faith dispute; rather the dispute must be related to the retention itself. This interpretation is the only interpretation that supports the remedial purpose of the prompt payment statutes.

D. The Remedial Purpose of the Prompt Payment Statutes Is Undermined By Allowing “Any Dispute” to Trigger Protections After Failing to Promptly Pay Retentions.

When statutory language is ambiguous, it should be construed to advance, not thwart, a remedial purpose. (*Hightower v. Farmers Ins. Exchange* (1995) 38 Cal. App. 4th 853, 861-862.) With respect to the ambiguity inherent in the prompt payment statutes, both *East West Bank* and *United Riggers* recognized the remedial nature of the prompt payment statutes in ruling that a dispute must be related to the retention. (*East West Bank*, 235 Cal. App. 4th at 748 (“The statute is remedial. . . . A remedial statute must be liberally construed to promote its purpose.”); *United Riggers*, 243 Cal. App. 4th at 157 (criticizing the *Martin Brothers* interpretation of “dispute” as undermining remedial purpose of statutes).)

Other courts have likewise recognized the prompt payment statutes serve a remedial purpose. (See, e.g., *FEI Enterprises, Inc. v. Kee Man Yoon* (2011) 194 Cal. App. 4th 790, 795; *S&S Cummins Corp. v. W. Bay Builders, Inc.* (2008) 159 Cal. App. 4th 765, 777.) 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.” (*Morton Engineering & Const., Inc.*, 87 Cal. App. 4th at 720.)

Here, the Opening Brief on the Merits points out that Coast Iron and United Riggers “submitted competing bids” to be the prime contractor. (OBM 4) They were direct competitors for a local construction project. The project’s owner accepted Coast Iron’s bid, and Coast Iron hired United Riggers as a subcontractor. Under these facts, the prompt payment statutes were meant to protect United Riggers from Coast Iron’s delayed payment of retention funds.

Importantly, there is nothing in the record to suggest that there were any stop notices executed, or that there were any mechanics’ liens pending when the project was completed. Additionally, there was no dispute that United Riggers did a good job; there were no problems with its performance or its timely completion of the project. (5 RT, 2462:10-15) Under these circumstances, upon completion of the work, Coast Iron received its retention from the owner, as well as approximately \$150,000.00 of retention funds earned by and owed to United Riggers. (3 RT, 663:4-664:1) United Riggers expected Coast Iron to pay the retention as required by statute, and within the ordinary course of business. (3 RT, 663:15-18)

However, rather than paying United Riggers its earned retention within ten days as required by Civil Code § 8814(a), Coast Iron kept it. (3 RT, 664:7-13 (Despite repeated demands, Coast Iron did not pay the retention “for a long, long time.”)) The record shows that as the prime contractor to and direct competitor of United Riggers, and although there was no dispute, Coast Iron held on to United Riggers’s earnings without any explanation or indication of when it would release the funds. Coast Iron

thus used its superior position as the prime contractor to its financial advantage, keeping United Riggers's earnings until after United Riggers filed a lawsuit. (3 RT, 664:14-22)

Additionally, even though the lawsuit prompted some payment, Coast Iron initially only paid approximately two-thirds of the retention. (3 RT, 664:16-665:2) It held onto the remaining one-third of the retention for an additional ten months until the eve of trial. (RT 3, 666:10-20)

Despite having timely and properly completed its contractual obligations between January 2011 through March 2012, United Riggers was at the mercy of Coast Iron to release the retention. This scenario, where the prime contractor has unfair financial leverage over the subcontractor, is precisely the abuse the prompt payment statutes were intended to remedy.

Significantly, Coast Iron has never argued that it had a dispute about the retention funds owed to United Riggers. (*See, e.g.*, 3 RT, 665:18-23) Even though United Riggers had submitted claims for additional payment due to change orders and Coast Iron's mismanagement of the project, these claims were unrelated to the retention funds. (AOB, Appendix 2-4) In fact, Coast Iron never indicated *why* it kept United Riggers's retention beyond the statutory deadlines. It just did, even though it knew it owed the funds to United Riggers. (*See, e.g.*, 5 RT, 2705:15-20 ("we paid what we believed we owed them"))

Considering the prompt payment statutes were meant to encourage timely payment to subcontractors and protect them from abusive practices, and considering there was never any dispute that United Riggers was entitled to its full retention upon completion of the project, the underlying trial court erred in ruling Coast Iron was justified in keeping United Riggers's earnings.

The appellate court's opposite interpretation, finding that a dispute must be related to the retention, is the only interpretation that supports the remedial purpose of the prompt payment statutes.

E. The *Martin Brothers* Interpretation Created Mischief Rather than Good Law.

United Riggers respectfully suggests the *Martin Brothers* opinion authored by Chief Justice Cantil-Sakauye should be recognized by the Chief Justice and this Court as contrary to the nature and purpose of the prompt payment statutes, and as an invitation to needless litigation. The appellate courts in *East West Bank* and *United Riggers* were correct in finding an ambiguity in the prompt payment statutes, and fault in *Martin Brothers*. When a statute is uncertain, California supports consideration of "the consequences that will flow from a particular interpretation." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1165.) Also, California policy supports favoring a construction that leads to a more reasonable result:

[O]ur task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.

(*Copely Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272, 1291.)

In the context of this case and other cases like it, the *Martin Brothers* holding that "the exception of section 7107(e) applies to any good faith dispute between a general contractor and a subcontractor," (179 Cal. App. 4th at 1414) opens the door to financial abuse of subcontractors. If *any* good faith dispute triggers an exception to timely paying retention funds

against which no claims are made, the general contractor has a financial incentive to *create* a dispute unrelated to the retention, even if that “dispute” did not exist at the time the retention was held hostage. Whether motivated to place financial pressure on a competitor, or to obtain the functional equivalent of an interest free loan, or to exert leverage to gain other advantages, a general contractor can use the *Martin Brothers* holding to keep a subcontractor’s retention without consequence. As the general contractor is already in a superior position to the subcontractor, this creates mischief when prompt payment statutes were meant to protect subcontractors. This result does not comport with the Legislature’s apparent intent or the general remedial purpose of the prompt payment statutes.

Additionally, the *Martin Brothers* broad interpretation of the word “dispute” results in absolutely no limitation on the type of disagreement that could justify a general contractor withholding retention funds from a subcontractor. Thus, retention funds that are contractually owed could arguably be withheld whenever there is a “dispute” about:

- the duty to indemnify against third party personal injury claim related to the project or *unrelated* to the project;
- a contractual dispute from another project the general contractor and subcontractor are associated with;
- a personal injury claim after an altercation at the project, or away from the project;
- a personal property claim related to automobile collision in the project parking area, or anywhere else;
- the validity of contractual arbitration clause with respect to non-retention issue;

- intellectual property rights; or
- any “dispute” whether personal, transactional, or litigation based.

Allowing an exception to prompt payment penalties for *any* dispute invites unreasonable and arbitrary results, the scope of which cannot be defined.

Additionally, pursuant to the broad *Martin Brothers* interpretation, there is no need for the contractor to even inform the subcontractor of the reason(s) why the retention is being withheld. It is not difficult to imagine a savvy contractor creating an unlimited supply of “good faith disputes,” long after the prompt payment deadlines have passed, to justify holding a subcontractor’s retention funds beyond the prompt payment limitations.

Making matters worse, under *Martin Brothers* and the attorney’s fee provisions of the prompt payment statutes (*e.g.*, Civil Code § 8818(b) and Public Contract Code § 7107(f)), a contractor who creates or capitalizes on “any good faith dispute” as an excuse for not timely paying retention funds can collect attorney’s fees from the subcontractor that was denied prompt payment. For example, in this case, Coast Iron did not pay the entire retention it admitted it owed to United Riggers until the eve of the initial trial date. (3 RT, 666:8-11; 1 CT 5 (register of actions, 12/12/13 entry)) This final payment date, December 18, 2013, (AOB, Appendix 9) was 490 days after Coast Iron received the funds, and 480 days later than it was statutorily due. United Riggers had to wait well over a year to receive funds it had earned, and that were not subject to any counter-claims by Coast Iron, because *Martin Brothers* created a loophole to the prompt payment statutory provisions.

Then, by paying the retention funds to United Riggers on the eve of trial, Coast Iron placed United Riggers in the unpropitious position of

deciding whether to forego its statutory claim (based on delay of payment in violation of the prompt payment deadlines) or risk being held liable for Coast Iron's attorney's fees. United Riggers chose to pursue its statutory claim, which if successful entitled it to interest on the improperly withheld retention and an award of attorney's fees. (See Civ. Code § 8818(a) & (b).)

However, as indicated in the Opening Brief on the Merits, the trial court awarded attorney's fees to Coast Iron. (OBM 19) Adding insult to injury, the award, \$150,000, (2 CT 353) was almost exactly the same amount of retention funds that Coast Iron wrongfully withheld. Even though the appellate court reversed this award and ruled that the trial court, on remand, "shall determine and award attorney's fees to United, including attorney's fees for this appeal as it relates to the retention claim," (*United Riggers*, 243 Cal. App. 4th at 159) the *Martin Brothers* holding created the circumstances under which such a unjust and inequitable ruling was possible. For these reasons, and for the additional reasons outlined below, this Court should uphold the appellate court in this case and rule that *Martin Brothers* incorrectly interpreted the prompt payment statutes.

F. **Third Party Observers Agree *Martin Brothers* Created Bad Law.**

The negative impact of *Martin Brothers* has been recognized by attorneys, judicial officers, and the construction industry. For instance, the cover story for the January 2011 edition of Los Angeles Lawyer magazine addressed *Martin Brothers*. In the article, the authors (full-time arbitrators with JAMS) explained the reasons *Martin Brothers* was at odds with the purpose of California's prompt payment statutes:

Payments are always an issue in construction projects, and this is especially so in tough economic times. The speed of the flow of money from lender to owner to contractor becomes slower as the ability to borrow tightens. Profit margins shrink as contractors and subcontractors cut their bids in order to compete for what work is available. Everyone in the payment chain wants to hold on to cash for as long as possible, with the result that many smaller contractors and subcontractors complain that they are being forced to wait longer and longer for payments that should have been made more promptly. They in turn cannot pay their employees or for supplies – and in today’s financial climate, borrowing may not be an option. But recent state appellate decisions have cut back on the protections that the prompt payment statutes were meant to provide.

(Barbara Reeves Neal and Kenneth C. Gibbs, *Past due: Appellate courts appear to be limiting the reach of construction prompt payment laws*, (January 2011) *Los Angeles Lawyer*, p. 24.) Specific to the *Martin Brothers* holding, these authors found it “arguably defensible in terms of strict statutory construction without reference to legislative history,” but “at odds with the original intention of the prompt payment legislation.” (*Id.* at p. 26.) The article ended with criticism of *Martin Brothers* because it undermined the legislative determination that contractors should be paid promptly for their work. (*Id.* at p. 28.) This article shows that attorneys and others working within the construction industry immediately recognized the problems created by the *Martin Brothers* interpretation of California’s prompt payment statutes.

Additionally, in a recent national construction journal, an article addressed the possibility that the subject split in authority could lead to Chief Justice Cantil-Sakauye re-addressing the issue:

Should the Chief Justice come to agree with the rulings of *East West* and *United Riggers*, and reject her reasoning in *Martin Bros.*, she would join that roster of justices who, over the years, have disagreed with their earlier decisions. As eloquently stated by a New Jersey Supreme Court justice,

Much as I would prefer to announce that my change of position is attributable to some epiphany, to some deeply moving event that produced a sudden startling cerebral awakening, to some lightning bolt of cognitive awareness and intellectual enrichment, the plain truth of the matter is that I have thought more about it and have changed my mind. My awakening, however belated, puts me squarely in the Chief Justice's camp. For whatever ambivalence that progression demonstrates I refuse to commit myself to the psychiatrist's couch, content instead to resurrect-as apparently I must every couple of decades-that reassuring old turkey, 'The matter does not appear to me now as it appears to have appeared to me then.'
Bramwell, B., in Andrews v. Styrup, 26 L.T.R. (n.s.) 704, 706 (Ex.1872)[.]

Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349, 366-67, 640 A.2d 788, 797 (1994) (Clifford, J.).

(General Contractor Violates California's Prompt Payment Act Applicable to Private Works by Refusing to Release Retainage to Subcontractor Because of a Dispute Unrelated to the Retention Funds, (March 2016) 37 No. 3 Construction Litigation Reporter NL, p. 13.) Although this article did not directly criticize *Martin Brothers*, the recognition that the Chief Justice could disagree with her earlier decision, just as other justices have done, implicitly suggest the *Martin Brothers* decision needs, at a minimum,

careful reassessment.

Further, even though the Opening Brief on the Merits noted that this Court denied a petition for review of *Martin Brothers* (OBM 10), it did not mention that two Justices, Justice Werdegar and Justice Kennard (retired) were both of the opinion that the petition should have been granted. (179 Cal. App. 4th at 1401, fn.* (review den. Mar. 24, 2010).) This shows that *Martin Brothers*, even as a case of first impression, raised concerns that were believed worthy of further review.

Third party proponents of change to the law of *Martin Brothers* confirm that the appellate courts in *East West Bank* and *United Riggers* were correct. *Martin Brothers* was decided without proper regard for the Legislature's purpose in enacting the prompt payment laws, and without regard to the negative impacts it would have on the construction industry. This Court should affirm the appellate court and specifically disavow the holding of *Martin Brothers*.

G. *Martin Brothers* Is Legally and Factually Distinguishable from the Facts of This Case, and Distinctions Between the Civil Code and the Public Contract Code Support Different Treatment.

Even if this Court finds *Martin Brothers* to be good law with respect to public works projects, that case is distinguishable from the facts and law of this case. First, *Martin Brothers* involved a public works project. (179 Cal. App. 4th at 1405.) Public Contract Code § 7107 provided the framework for the court's consideration of whether the prime contractor could continue withholding retention beyond the statutory time limits when the dispute between the parties was unrelated to the retention. (*Id.* at 1409-1410.)

Second, the subcontractor in *Martin Brothers* finished its final punch list work and received its last progress payment in March 2004. At the time, the subcontractor “still had a number of disputed claims for additional payment,” and the “parties worked to resolve these claims.” (*Id.* at 1407.)

Third, the subcontractor’s claims for additional payment varied over time, and in June 2004 the subcontractor executed a stop notice claiming it was owed \$427,326.03, and the appellate court determined it “apparently includ[ed] retention.” (*Id.*) Based on this stop notice amount, the owner on the project withheld from the prime contractor a payment totaling 125% of the amount identified in the subcontractor’s stop notice. (*Id.* at 1407-1408.)

Two months later, the contractor obtained a release bond for the subcontractor’s stop notice, and the owner released the funds that it held; the owner paid the contractor these funds in August 2004. (*Id.* at 1408.) The parties continued to try to settle their dispute, and in November 2004, the attorney for the subcontractor provided a breakdown for the subcontractor’s claim against the contractor, claiming the subcontractor was owed \$394,193.26. (*Id.*) Nonetheless, the subcontractor filed its complaint the following month seeking \$938,183.40 in damages, statutory penalties, and attorney’s fees. (*Id.*)

Fourth, in January 2005 the parties entered a conditional settlement, and in March 2005 the parties agreed to settle all claims for \$632,792.36. (*Id.*) That settlement fell through, and the subcontractor filed an amended complaint claiming damages of \$635,292 plus statutory penalties, interest, and attorney’s fees. (*Id.* at 1409.) Before trial began, the contractor paid the subcontractor the full amount the parties had agreed to settle all claims for: \$632,792.36. (*Id.*) The subcontractor accepted the payment without objection and at trial sought only statutory late payment penalties, interest, and attorney’s fees. (*Id.*)

As discussed above, the *Martin Brothers* court found in favor of the contractor ruling that it was not liable for prompt payment penalties because *any* good faith dispute (even if not related to the retention funds) qualified as an exception. (*Id.* at 1414.)

Here, in contrast, the dispute stemmed from a private works project governed by the Civil Code provisions related to prompt payment of retention, §§ 8810-8822. This is unlike the public works dispute in *Martin Brothers* that was decided under Public Contract Code § 7107. The law is similar, but distinguishable as discussed above. Because the language of Civil Code §§ 8812, 8814, 8816, and 8818 when read in conjunction show that the type of dispute contemplated by the Civil Code is different from that of the Public Contract Code, the *Martin Brothers* holding is not controlling in the context of a private works project under Civil Code statutes.

Even though the appellate court in this case found that Public Contract Code § 7107 “functions identically to section 8814 with respect to contracts with public entities,” (*United Riggers*, 243 Cal. App. 4th at 156) the court was considering Civil Code § 8814 in isolation. As argued above, § 8814 is part of a statutory scheme, and reading it as functionally identical to Public Code § 7107 neglects the impact of Civil Code §§ 8812 and 8816 which specifically limit the type of dispute that qualifies to trigger an exception to prompt payment deadlines. When the entire statutory scheme for retention in the private works context is read, it shows that the Legislature provided far more guidance for the type of dispute needed. This is significant for *United Riggers*’s claim, and for any future subcontractors working in the context of a private works project.

Further, unlike in *Martin Brothers* where the parties attempted to resolve their dispute over time, and the parties there eventually agreed to a

settlement amount that encompassed the retention claims, here there were no similar attempts or settlement. Also, unlike in *Martin Brothers* where the subcontractor executed a stop notice forcing the contractor to obtain a release bond, here there were no stop notices executed or release bonds required. United Riggers completed its required work without problem or delay, and thus expected to receive its retention within the time limits of the prompt payment statutes.

These factual differences are significant because unlike in *Martin Brothers* where the appellate court found the parties had negotiated a settlement of all claims, yet the subcontractor still sued seeking prompt payment penalties, here United Riggers was forced to prosecute its claims because 1) Coast Iron refused to pay retention that it was not disputing, 2) Coast Iron immediately and summarily rejected United Riggers's claims for extra work and expenses, and 3) Coast Iron never responded to United Riggers's requests for payment until after a lawsuit was filed. (AOB, Appendix 2-5; 3 CT 664:7-20) Unless United Riggers sued, Coast Iron would never have paid the retention it owed United Riggers. Under the facts of this case, Coast Iron used the *Martin Brothers* holding as leverage and to justify keeping retention funds it knew it owed. Whether or not it disagreed with United Riggers's claims for extra work and expenses, there was no valid reason to hold onto United Riggers's retention other than to exert financial pressure over its direct competitor. Therefore, neither the *Martin Brothers* facts or law should be found to undermine the appellate court's ruling in this case.

Thus, and as an argument in the alternative, even if *Martin Brothers* is found to be good law, it should not be found to apply in the context of private works projects governed by Civil Code §§ 8810-8822 or the facts of this case.

Conclusion

As explained above, *Martin Brothers* created bad law. It is inconsistent with the nature and purpose of retention, and it disregards the Legislature's intent in enacting prompt payment statutes to protect subcontractors from abusive practices. Both *East West Bank* and the court of appeal in this case were correct in their split from *Martin Brothers*. This Court should affirm the court of appeal, and disavow the *Martin Brothers* holding with respect to the type of dispute that triggers an exception to the prompt payment statutes.

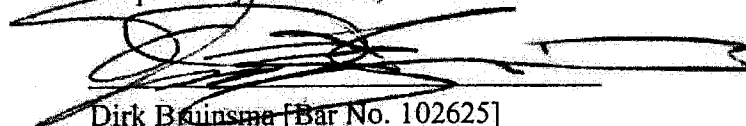
Alternatively, should this Court find that *Martin Brothers* still has value in the context of public works projects and Public Contract Code § 7107, the Court should find it distinguishable from the context of private works projects. Civil Code §§ 8812, 8814, 8816, and 8818, when read in conjunction and in the context of the entire statutory scheme, show that the type of dispute needed in a private works project is one related to the retention.

Further, under the facts of this particular case, Coast Iron withheld retention for six months (far longer than the statutory ten days) and only started piecemeal payments *after* United Riggers filed this action. Coast Iron *forced* the "dispute" it now relies upon to justify its failure to abide by the prompt payment statutory deadlines. Then, the trial court rewarded Coast Iron with a \$150,000 attorney's fee award pursuant to the very statutory scheme Coast Iron ignored. Allowing contractors to financially manipulate subcontractors, with the incentive of earning attorney's fees in the process, is blatantly inconsistent with the Civil Code's "prompt payment" objective.

Therefore, and based on the foregoing, United Riggers respectfully requests that this Court uphold the ruling of the appellate court in its entirety, rule that United Riggers is entitled to costs and attorney's fees associated with this proceeding, and for any other relief the Court deems proper.

Dated: May 16, 2016

Respectfully submitted,



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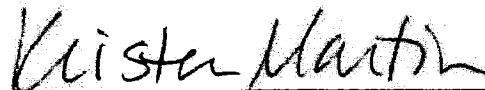
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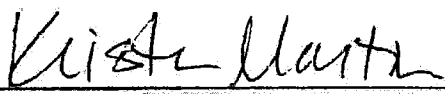
Attorneys for Plaintiff and Appellant

UNITED RIGGERS & ERECTORS, INC.

Certificate of Compliance with Rule 8.520(c)(1)

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I certify that this **ANSWER BRIEF ON THE MERITS OF PLAINTIFF AND APPELLANT UNITED RIGGERS & ERECTORS, INC.** contains 10,487 words, not including the table of contents, table of authorities, the caption page, signature blocks or this Certification page. In making this certification, I have relied on the word count of the computer program used to prepare this **ANSWER BRIEF ON THE MERITS OF PLAINTIFF AND APPELLANT UNITED RIGGERS & ERECTORS, INC.**

Dated: May 16, 2016



Kristen Martin

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

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 Orange, State of California. My business address is 1181 Puerta del Sol, Suite 120, San Clemente, California 92673.

On May 16, 2016, I served true copies of the following document(s) described as **ANSWER BRIEF ON THE MERITS OF PLAINTIFF AND APPELLANT UNITED RIGGERS & ERECTORS, INC.** on the interested parties in this action as follows:

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

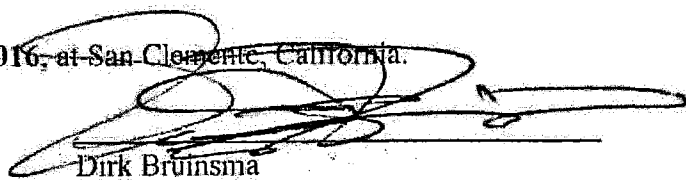
Clerk, Court of Appeals
Second District, Division 1
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Los Angeles Superior Court, Southeast District
Hon. Thomas I. McKnew
12720 Norwalk Boulevard
Norwalk, CA 90650

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with LAW OFFICE OF DIRK BRUINSMA'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 May 16, 2016, at San Clemente, California.



Dirk Bruinsma