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September 7, 2005

The Honorable Arthur G. Scotland
The Honorable Richard M. Sims, III
The Honorable Rodney Davis
Court of Appeal
Third Appellate District
900 N. St., Room 400
Sacramento, CA 95814-4869

Re: *Kaufman and Broad Communities, Inc. v. Performance Plastering, Inc.*, No. C049391

Dear Justices Scotland, Sims and Davis:

The California Academy of Appellate Lawyers, a non-profit organization of experienced appellate practitioners, asks this Court to modify its August 30, 2005 "Opinion Ruling on Motion for Judicial Notice" in the above-referenced case.

While we applaud the Court's effort to provide guidance to parties as to which legislative history documents are properly subject to judicial notice, we respectfully suggest that the Court modify its opinion to address three Supreme Court decisions that suggest that judicial notice need not be sought of "published" legislative history materials.

In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998), the Supreme Court remarked that it is unnecessary to request judicial notice of "published materials" such as bills introduced in the Legislature. *Id.* at 571 n.9. The Court expanded this rule in *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26 (1998), indicating that a "request for judicial notice of published material is unnecessary" as to "various materials assertedly related to the enactment of" statutes, including reports of Senate and Assembly committees, and that it would "consider the request for judicial notice as a citation to

those materials that are published." *Id.*

Similarly, in *Sharon S. v. Superior Court*, 34 Cal. 4th 17 (2003), the Court declined to take judicial notice of "legislative history materials generally available from published sources" dealing with a bill proposed in the Legislature, on the ground that these requests were "unnecessary" under *Quelimane*. *Id.* at 440 n.18.

The Court's opinions in *Stop Youth Addiction, Quelimane*, and *Sharon S.* do not explicitly describe the legislative history materials that had been "published," thus making judicial notice unnecessary. But because there is no California equivalent of the U.S. Code Congressional and Administrative News, none of the legislative history material of which judicial notice was sought in *Quelimane* and *Sharon S.* could have been "published" in the traditional sense. However, as the Court is undoubtedly aware, much of this material, such as legislative committee reports, has been made publicly available on the Internet by the Legislative Counsel pursuant to Government Code Section 10248. Accordingly, under the three Supreme Court cases cited above, it may well be unnecessary for parties to file a motion seeking judicial notice of such documents—which the Court and opposing parties can readily review—if the party who cites such documents provides an appropriate citation to the Legislative Counsel's website.

We understand that the Supreme Court's statements in this area, contained as they are in somewhat cryptic footnotes, are less than a model of clarity. For that reason, the Academy respectfully suggests that the Court could provide needed guidance in this area, by (1) modifying its opinion to address the Supreme Court's comments regarding judicial notice in *Stop Youth Addiction, Quelimane*, and *Sharon S.*; and (2) indicating for the benefit of litigants and counsel whether it is necessary in the Third Appellate District to file a motion for judicial notice of legislative history materials that are publicly available on the Legislative Counsel's website.

Thank you for considering the Academy's views.

Respectfully submitted,

Paul D. Fogel

First Vice-President, California Academy of Appellate Lawyers

cc: Per attached proof of service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 2 Embarcadero Center, Suite 2000, San Francisco, CA 94111.

On September 7, 2005, I served the foregoing document described as: **LETTER TO COURT OF APPEAL** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

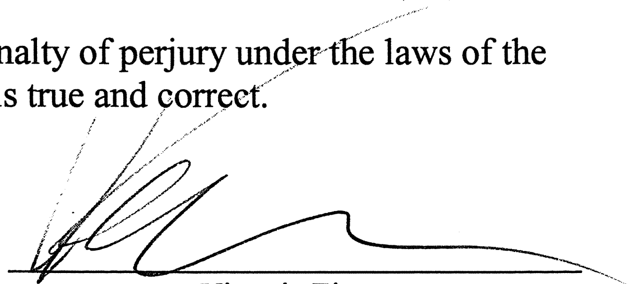
SEE ATTACHED SERVICE LIST

I deposited such envelope(s) in the mail at San Francisco, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 7, 2005, at San Francisco, California.

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



Victoria Eisenmann

KAUFMAN AND BROAD COMMUNITIES, INC. v.
PERFORMANCE PLASTERING, INC.
No. C049391

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