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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

11 MJB/BIXBY CONSTRUCTION, INC.,

12 Plaintiff,

13 v.

14 DAVID AND LYNN ERNCE,

15 Defendants.

Case No. 01AS07168

CROSS-COMPLAINT FOR:

- (1) BREACH OF CONTRACT;
- (2) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
- (3) INTENTIONAL MISREPRESENTATION;
- (4) NEGLIGENCE;
- (5) TRESPASS; AND
- (6) VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200

20 DAVID E. ERNCE and LYNN TRINKA
21 ERNCE,

22 Cross-Complainants,

23 v.

24 MJB/BIXBY CONSTRUCTION, INC.,
a corporation and MARK J. BIXBY,
individually and dba BIXBY
25 CONSTRUCTION,

26 Cross-Defendants.

SUMMONS ISSUED

1 For their cross-complaint, David E. Ernce and Lynn Trinka Ernce (together,
2 “the Ernces”) allege as follows:

3 **PARTIES**

4 1. The Ernces are the owners of and reside at real property located in the City
5 and County of Sacramento, 2811 3rd Avenue, Sacramento, California 95818, Assessor’s Parcel
6 Number 013-0052-026, further described as Lot 227 shown on the map entitled “Heilbron Oaks,”
7 recorded on April 23, 1923 in Book 17 of maps, page 17.

8 2. On information and belief, cross-defendant Mark J. Bixby is a California
9 resident who lives at 3531 San Ysidro Way, Sacramento, California 95864. On information and
10 belief, Mark J. Bixby is engaged in business under the fictitious name “Bixby Construction” in
11 the City and County of Sacramento.

12 3. Cross-defendant MJB/Bixby Construction, Inc. is a corporation organized
13 and existing under the laws of California, which has its offices at 1513 18th Street, Sacramento,
14 California 95814. On information and belief, Mark J. Bixby is the principal or sole shareholder
15 of MJB/Bixby Construction, Inc. and is the president and chief executive officer of MJB/Bixby
16 Construction, Inc. Cross-defendants MJB/Bixby Construction, Inc. and Mark J. Bixby are
17 collectively referred to herein as “Bixby.”

18 4. The Ernces are informed and believe and on that basis allege that at all
19 relevant times herein, each of the cross-defendants was the agent, servant and employee of the
20 other cross-defendant, and in doing the acts alleged herein, was acting within the scope of such
21 agency and employment.

22 5. The Ernces are informed and believe that at all times mentioned herein
23 there existed a unity of interest and ownership between Mark J. Bixby and MJB/Bixby
24 Construction, Inc. such that any individuality and separateness between cross-defendants have
25 ceased to exist and MJB/Bixby Construction, Inc. is the alter ego of Mark J. Bixby. Adherence to
26 the fiction of the separate existence of MJB/Bixby Construction, Inc. as an entity distinct from
27 Mark J. Bixby would permit an abuse of the corporate privilege and would sanction fraud and
28 promote injustice in that the Ernces are informed and believe, based on Bixby’s failure to pay

1 subcontractors and an outstanding judgment, among other things, that the corporation is
2 inadequately capitalized.

3 BACKGROUND

4 **Preliminary Negotiations For Bixby To Perform Kitchen Remodel**

5 6. In March 2001, the Ernces entered into negotiations with Bixby for a
6 kitchen remodel at their home. Bixby met with David at the Ernces' home for an initial
7 consultation and to take measurements in order to formulate a bid and proposal.

8 7. During that meeting, and at various times thereafter, Bixby told the Ernces
9 that Bixby manufactures custom kitchen cabinets locally. The Ernces provided Bixby with a set
10 of computer-generated drawings that showed, among other things, the dimensions for the custom
11 kitchen cabinets that they wanted to have installed in their kitchen.

12 8. On or about March 30, 2001, Bixby's office manager, Douglas Tillotson,
13 sent David an e-mail containing Bixby's preliminary bid and proposed contract for the remodel.
14 The original proposal quoted a price of \$17,364. The proposal included as an option that Bixby
15 would provide melamine interiors for the kitchen cabinets at an additional cost of \$600, which
16 would bring the total price to \$17,964.

17 9. During the first week of April 2001, the Ernces reviewed the bid and
18 proposal and arranged to meet with Bixby at Bixby's office to discuss the bid and proposal.

19 **Meeting To Discuss Kitchen Remodel And Hiring Of Bixby**

20 10. Shortly thereafter, at the meeting, Bixby told the Ernces that the proposed
21 kitchen remodel was a small job that could be completed quickly. Bixby told the Ernces that the
22 entire kitchen remodel should take approximately three weeks to complete from start to finish.

23 11. During the meeting, the Ernces asked Bixby how many jobs Bixby
24 generally had in progress at one time because they were concerned that, since their proposed
25 kitchen remodel was a small job, they might not receive enough of Bixby's attention and
26 resources. Bixby assured the Ernces that Bixby only had four to five crews working at any one
27 time and that, since the kitchen remodel was small, Bixby could easily complete the job in
28 approximately three weeks.

1 12. The Ernces also asked Bixby whether there would be a foreman on site at
2 their home to supervise the work and stated that they wanted the job to be supervised at all times.
3 Bixby assured the Ernces that Bixby would have a foreman supervising the job throughout the
4 entire remodel.

5 13. The Ernces also asked Bixby whether Bixby would subcontract any of the
6 kitchen remodel work. Bixby told the Ernces that, except for possibly the electrical work, Bixby
7 would not be hiring any subcontractors to perform the kitchen remodel. Instead, Bixby would
8 complete the job using Bixby employees.

9 14. The Ernces also asked a number of questions regarding the proposed
10 contract and told Bixby that they would be submitting requested changes to the proposed contract.
11 The Ernces asked Bixby to provide proof of Bixby's liability and workers' compensation
12 insurance coverage by providing the Ernces with current certificates of insurance.

13 15. During the meeting, or at a later meeting, Bixby told the Ernces that,
14 because the kitchen remodel was small and could be completed quickly, Bixby would only
15 require a \$1,000 deposit and would not require the Ernces to make any progress payments. The
16 balance owing on the contract would be paid upon completion of the kitchen remodel.

17 16. After the meeting, the Ernces submitted their requested changes to the
18 contract to Bixby. Among other things, the Ernces requested that the contract expressly provide
19 that: (a) Bixby would pay all charges incurred by Bixby for labor and materials as they became
20 due, including payments to subcontractors; (b) Bixby would indemnify and hold the Ernces
21 harmless for any damage or injury caused by Bixby in the performance of the contract; and
22 (c) Bixby would provide the Ernces with proof of the workers' compensation and liability
23 policies.

24 **Finalizing The Contract**

25 17. On April 13, 2001, Bixby's office manager sent David an e-mail with a
26 revised proposal. The revised proposal was dated March 28, 2001 and was entitled "Proposal
27 And Contract For Home Improvements." The revised proposal showed the Ernces' changes to
28 the contract in red ink, and Bixby's changes to the contract in green ink.

1 18. On or about April 17, 2001, David went to Bixby's office to finalize and
2 sign the proposed contract. At that meeting, Bixby had two original contracts. Bixby gave one
3 contract to David and asked him to sign it. Bixby signed the remaining contract and then traded
4 contracts with David so that each of them had a contract signed by the other. David asked Bixby
5 for a copy of the fully executed contract signed by both of them. Bixby told David that his copy
6 machine was not working and that he would have his office manager make a copy of the fully
7 executed contract and send it to the Ernces. Attached hereto as Exhibit A and incorporated herein
8 by this reference is a true and correct copy of the contract signed by Bixby on April 17, 2001.
9 The finalized contract was supposed to include and attach the kitchen drawings previously
10 provided to Bixby by the Ernces. Despite the Ernces' repeated requests, Bixby did not provide
11 them with a complete and fully executed copy of the contract as promised.

12 19. The kitchen remodel work to be performed by Bixby pursuant to the
13 contract included, but was not limited to, the following: (a) demolition of the entire kitchen,
14 including a wall between the kitchen and a then-existing laundry area; (b) demolition of an
15 exterior window, which would then be framed in and the exterior stucco patched; (c) installation
16 of a footing and post in the kitchen wall, which would provide structural support for a planned
17 future remodel project involving the extension of the Ernces' upstairs bedroom and the addition
18 of an upstairs bathroom; (d) installation of paint grade custom cabinets with melamine interiors
19 and crown molding; (e) installation of granite tile countertops; (f) installation of a new 220-amp
20 electrical panel and all electrical outlets, switches, and lighting; (g) painting the entire kitchen,
21 including cabinets; and (h) installation of all appliances, sinks and faucets and all plumbing as
22 needed. In addition to the drawings that were to be affixed to the contract, the Ernces provided
23 Bixby with printed manufacturers' specifications for all appliances that they were purchasing for
24 the kitchen remodel to be installed by Bixby.

25 20. The contract did not state the date on which the kitchen remodel work
26 would begin. Bixby told the Ernces that Bixby would notify them regarding when Bixby could
27 start the work. The Ernces understood that, once the start date had been determined, the contract
28 would be modified to include the start date and the end date for the kitchen remodel.

1 **The Ernces Obtain A Permit And Pay The Required Deposit**

2 21. On April 23, 2001, less than one week after the execution of the written
3 contract for the kitchen remodel, the Ernces obtained a building permit for the kitchen remodel
4 and for the future upstairs addition from the City of Sacramento Building Department.

5 22. On April 24, 2001, the Ernces met with Bixby at their home. At that
6 meeting, or shortly thereafter, Bixby told the Ernces that work would begin on May 2, 2001.

7 23. During the April 24, 2001 meeting, the Ernces paid Bixby the \$1,000
8 deposit that was required by the written contract.

9 **Bixby's Numerous Delays**

10 24. On May 2, 2001, Bixby started the kitchen remodel work and began
11 demolishing the kitchen. That same day, the Ernces asked Bixby and Bixby's office manager to
12 give them a completion date for the job. Neither Bixby nor Bixby's office manager would agree
13 to give the Ernces a completion date. Instead, they repeatedly told the Ernces that the job should
14 only take three weeks to complete.

15 25. During the week of May 7, 2001, after the kitchen had been completely
16 demolished, the Ernces learned that Bixby had failed to schedule a date for the Sacramento
17 Municipal Utility District ("SMUD") to turn off their power so that Bixby could install a new
18 electrical panel as required by the contract. After Bixby called SMUD to reserve a date on which
19 SMUD could turn off the power, Bixby told the Ernces that the first available date was May 22,
20 2001 – approximately two weeks later.

21 26. Bixby's office manager told the Ernces that, as long as SMUD was unable
22 to turn off the power so that the electrical panels could be changed over, Bixby would be unable
23 to proceed with the kitchen remodel. The Ernces told Bixby's office manager that there were
24 many other tasks that could be performed in the meantime, including, for example, building the
25 cabinets, doing the exterior stucco patching work, pouring the structural footing, and performing
26 interior electrical work such as installing switch boxes and outlets. Bixby's office manager
27 referred the Ernces to Bixby, who told them that it did not make sense for Bixby to send a crew to
28 work on the kitchen remodel until the electrical change-over was completed.

1 27. On May 10, 2001, Bixby informed the Ernces that Bixby had scheduled
2 SMUD to turn off the power on May 22, 2001. Bixby also informed the Ernces that, prior to May
3 22, as much plumbing and electrical work as possible would be completed and that, once the new
4 electrical panel was installed, Bixby could finalize the electrical and interior sheetrock work.

5 28. On information and belief, during the week of May 14, 2001, electricians
6 from CLP Resources, Inc., a labor supplier hired by Bixby, performed a live change-over of the
7 new electrical panel, *i.e.* they did not have SMUD shut down the power during the installation of
8 the new electrical panel.

9 29. Shortly thereafter, Bixby informed the Ernces that there was an engineering
10 problem with the structural footing drawings. Over the course of the next few days, the Ernces
11 and Bixby spoke with the Ernces' structural engineer and, by May 23, 2001, they resolved the
12 engineering issue. During this time, although numerous tasks other than structural work could
13 have been performed, Bixby did not do any work on the kitchen remodel.

14 30. On or around May 23, 2001, Bixby poured the structural footing and
15 performed related structural work. On information and belief, Bixby contacted the building
16 department and requested an inspection of the structural work be conducted on May 25, 2001.

17 31. On May 25, 2001, a city inspector arrived at the Ernces' home. Because
18 the structural work was not yet completed, the inspector told the Ernces that he would return the
19 next day.

20 32. On May 26, 2001, another city inspector arrived at the Ernces' home and
21 inspected the structural footing and electrical work. The inspector approved the work and told the
22 Ernces to let Bixby know that the kitchen walls could be sealed with sheetrock and the kitchen
23 remodel could proceed. On the Ernces' building permit, the inspector wrote, "5-26-01 Frame in
24 kitchen OK."

25 33. On a number of days after May 26, 2001, Bixby failed to show up at the
26 Ernces' home and work on the project was sporadic.

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1 **Bixby's Improper Payment Demands And Broken Promises To Complete**
2 **The Kitchen Remodel**

3 34. Although the contract does not provide for progress payments, and
4 although Bixby told the Ernces that no progress payments would be required, on May 30, 2001,
5 Bixby's office manager sent David a fax requesting that the Ernces make a progress payment of
6 \$7,000 and that such amount be paid by June 1, 2001. In addition to the fact that the contract did
7 not require progress payments, the Ernces did not believe that Bixby had performed \$8,000 worth
8 of work (the \$7,000 demanded plus the \$1,000 already paid as a deposit) on the \$17,964.00
9 contract. Thus, it appeared that Bixby was demanding advance payment contrary to the contract
10 and California law.

11 35. On June 1, 2001, Bixby told David that the kitchen cabinets would be
12 installed on Monday, June 4, 2001, and that Bixby's workers would be at the Ernces' home every
13 day that week so that the Ernces would have a functional kitchen by Friday, June 8, 2001.

14 36. On June 4, 2001, Bixby's office manager arrived at the Ernces' home
15 to speak with an electrician who was then on site. David was home when Bixby's office manager
16 arrived. Bixby's office manager demanded immediate payment of the \$7,000. David asked
17 Bixby's office manager what work the \$7,000 related to. Bixby's office manager refused to give
18 David any information and then threatened to pull Bixby's workers from the job unless the Ernces
19 paid the \$7,000 immediately.

20 37. David called Lynn at work and told her of Bixby's latest payment demand
21 and threats to walk off the job. Lynn spoke with Bixby's office manager on the phone and
22 explained that the Ernces simply wanted information about what the \$7,000 covered so that they
23 would know what work had been completed. Lynn also explained that the Ernces had received a
24 Preliminary Lien Notice in the amount of \$10,000 from CLP, and asked whether the \$7,000
25 would include payment to CLP because, if it would, the Ernces wanted to obtain a release from
26 CLP upon payment. Bixby's office manager refused to give the Ernces any information about
27 what work the \$7,000 related to and told Lynn that he believed that Bixby had paid CLP.
28 Because of Bixby's threat to immediately abandon the kitchen remodel, at a time that the kitchen

1 was entirely gutted, Lynn left work and went to Bixby's office at 11:00 a.m. on June 4, 2001 to
2 deliver a \$7,000 check.

3 **Bixby Agrees To Complete The Kitchen Remodel By June 15th**

4 38. On June 7, 2001, frustrated with the lack of progress on the kitchen
5 remodel despite Bixby's promise that the Ernces would have a functional kitchen by June 8, and
6 frustrated that Bixby failed to show up on June 7 despite the \$7,000 payment, David sent Bixby a
7 letter by e-mail stating the Ernces' concerns. In that letter, the Ernces set a June 13 deadline by
8 which Bixby was to provide the Ernces with a functional kitchen and a June 15 deadline for
9 Bixby to complete the entire kitchen remodel.

10 39. On June 8, 2001, Bixby again failed to appear to work on the kitchen
11 remodel. Bixby's receptionist informed the Ernces that Bixby and the person in charge of
12 building and installing the kitchen cabinets were both on vacation through June 11, 2001. Upon
13 learning that no work would be performed until at least June 11, Lynn called the Contractors State
14 License Board ("Board") for advice on how to proceed. The Board representative instructed the
15 Ernces to send Bixby a certified letter that stated the Ernces' concerns and set a deadline by
16 which the kitchen remodel must be completed.

17 40. Immediately after speaking with the Board representative, Lynn drafted a
18 letter to Bixby which repeated the June 13 and June 15, 2001 deadlines set forth in David's June
19 7th e-mail. As Lynn was drafting the letter, David reached Bixby by phone. During their
20 telephone call, Bixby promised that the Ernces would have a working kitchen by June 13 and that
21 the job would be completed by June 15, 2001. Lynn revised her letter to confirm Bixby's
22 promise and sent the letter, and a copy of the June 7th e-mail, to Bixby by messenger and by
23 certified mail.

24 41. During the week of June 11 through June 15, 2001, Bixby had various
25 workers at the Ernces' home. Mark Bixby performed some physical labor at the Ernces' home
26 during that week.

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1 **Bixby's Additional Payment Demands**

2 42. On the morning of June 15, 2001, Bixby's office manager arrived at the
3 Ernces' home and gave Lynn an invoice for an additional draw and "change orders" totaling
4 approximately \$8,000. Bixby's office manager initially refused to leave without a check.
5 Lynn confirmed that Bixby would be on site later that day and said she would discuss it then.

6 43. At the end of the day on June 15, 2001, the kitchen remodel was not
7 completed as Bixby promised. At this point, over six weeks had passed since Bixby demolished
8 the kitchen and the Ernces had been living without a functional kitchen for that period of time.
9 Among other things, as described in further detail below, the kitchen cabinets were incomplete,
10 the cabinets that had been installed were of poor quality and workmanship and the Ernces'
11 appliances were improperly installed. Nevertheless, Bixby asked David for payment on the
12 \$8,000 invoice. David told Bixby that, among other things, the Ernces had concerns about the
13 alleged "change orders" on the invoice. Bixby demanded \$5,000 and agreed that amount would
14 be applied as payment on the contract, not towards the disputed "change orders." The Ernces
15 paid Bixby \$5,000 because they were afraid that, if they did not comply with Bixby's demand,
16 Bixby would abandon the job, as Bixby previously threatened.

17 44. In total, the Ernces have paid Bixby \$13,000 of the \$17,964 contract price.
18 Although the Ernces and Bixby discussed certain additional work to be performed in connection
19 with the kitchen remodel, they did not agree on specific details or the price for such additional
20 work. Bixby did not present to the Ernces, nor did the Ernces sign, any written change orders.

21 45. On June 15, 2001, Bixby told the Ernces that Bixby would have a worker
22 on site on Saturday, June 16. However, no worker arrived on June 16.

23 **Bixby's Failure To Complete The Job**

24 46. On June 18, 2001, David worked from home to monitor Bixby's progress.
25 In the morning, Bixby told David that all work would be completed by the end of the day, except
26 perhaps for some minor touch-ups that would be completed on June 19, 2001.

27 47. At 5:30 p.m. on June 18, after it was evident that the kitchen remodel work
28 would not be completed as promised, David told Bixby that the Ernces would accept no more

1 delays or extensions and that all work had to be completed by the end of the day on June 19, as
2 Bixby had promised. If Bixby was not finished by then, David told Bixby that they would have
3 to discuss what work was unfinished and agree to an amount to be deducted from the contract so
4 that the Ernces could pay Bixby for the work that was completed. Bixby became extremely
5 belligerent and shouted at David that Bixby would finish the job, whether it be on June 19, June
6 20 or as long as it took Bixby to complete the job. Although the Ernces had not said they would
7 withhold payment, Bixby threatened to sue the Ernces and to place a lien on their home among
8 other threats.

9 48. On June 19, 2001, Lynn contacted CLP to ask whether Bixby had paid
10 CLP for the work CLP performed. Lynn learned that, as of that date, CLP had six outstanding
11 invoices to Bixby totaling approximately \$2,700, the first invoice was issued during the first week
12 of May, and Bixby has not made any payment on the invoices.

13 49. On June 19, 2001, at approximately 1:00 p.m., Lynn went home to check
14 on Bixby's progress. Some of Bixby's workers were eating lunch and there were two open beers
15 – one on the dining table, and one in the kitchen. Lynn asked Bixby's workers whether it was
16 their normal practice to drink on the job. One of the workers told Lynn that it was his beer, that
17 Bixby knew all about it and that Lynn should talk to Bixby if she had questions. The workers left
18 their four remaining beers in the Ernces' refrigerator.

19 50. By the end of the day on June 19, 2001, significant work remained to be
20 completed on the kitchen remodel, and much of the work that had been performed was of poor
21 quality and workmanship. Among other things, the following work was not completed or was not
22 performed satisfactorily: installing cabinets, sanding and painting cabinets, installing handles and
23 pulls on all cabinet doors, repairing badly assembled drawers, drilling holes for shelves and
24 installing shelves in cabinets, fixing a leak in the new kitchen sink plumbing, painting the exterior
25 stucco, obtaining a gas line inspection, installing roof shingles around roof vent flashing, sanding,
26 painting and reinstalling basement door, sanding and painting the exterior door to the driveway
27 and repairing damage that Bixby had caused to the ceiling in the Ernces' bedroom while
28 performing structural work.

1 **Bixby's Violent Behavior And Refusal To Leave The Ernces' Home**

2 51. On June 19, 2001, at approximately 6:00 p.m., Lynn was home alone when
3 Bixby arrived to check on the progress. Bixby told Lynn that workers would be back the next day
4 to finish the job. Lynn told Bixby that all work was supposed to be completed by June 19 and
5 that she wanted to speak with David about how to proceed.

6 52. Bixby then flew into a tirade, shouting that Bixby was finished with the
7 Ernces and that Bixby was not going to do any more work on the kitchen remodel. Bixby ordered
8 the sole employee on site at the time, Alphonso Perez, to immediately pack up all of Bixby's tools
9 and materials because they were leaving. Bixby also had the employee bring a camera from
10 Bixby's truck, and Bixby began taking pictures of the kitchen.

11 53. In a rage, Bixby yelled at Lynn and made numerous and various threats.
12 Because of Bixby's erratic and threatening behavior, Lynn told Bixby to leave the house and that
13 she would put all of Bixby's tools and materials outside. Bixby refused to leave, shouting that
14 they were not going to leave, that Bixby knew the law and had every right to be in the Ernces'
15 home because of the signed contract. Concerned for her physical safety, Lynn told Bixby that she
16 would call the police if Bixby did not leave. Bixby told Lynn to go ahead and call the police
17 because Bixby had every right to remain in the Ernces' home.

18 54. Lynn dialed 911 to report that Bixby would not leave the house and a
19 police officer (J.E. Benton) was dispatched. It took about 15 to 20 minutes for the officer to
20 arrive and, during that time, Bixby continued to yell at Lynn in a threatening manner, including
21 using profanity such as telling Lynn that "we will see who is going to get fucked here," that the
22 Ernces did not know what they were getting themselves into, that Bixby would see the Ernces in
23 court and that the Ernces "would be sorry."

24 55. During the tirade, Bixby claimed that the Ernces had not paid Bixby
25 anything for the kitchen remodel, despite the fact that they had paid Bixby \$13,000 by that time.
26 Bixby also yelled repeatedly about how much money the Ernces owed Bixby. At first, Bixby
27 claimed the Ernces owed \$10,000. By the time the police arrived, Bixby was shouting that the
28 Ernces owed \$20,000. Bixby repeatedly threatened to lien the Ernces' home and to sue them, all

1 the while refusing to leave despite Lynn's repeated and constant requests that Bixby leave. When
2 the officer arrived, he permitted Bixby to remove tools and materials, and stayed with Lynn until
3 Bixby left.

4 **Bixby's Threatening Letter**

5 56. On June 20, 2001, Bixby sent a threatening letter to the Ernces in which
6 Bixby demanded to return to the Ernces' home to complete the kitchen remodel. The Ernces
7 received the letter on June 25, 2001. In the letter, Bixby gave the Ernces 48 hours within which
8 to respond and again threatened, among other things, to record liens against their home and to sue
9 them.

10 57. In the June 20 letter, Bixby stated, "Let me make this perfectly clear, I will
11 spare no money, time, energy or effort to prove we at, MJB Bixby Construction Inc., believe we
12 are one hundred percent correct in this matter." Bixby admitted in the letter that Bixby had
13 "suggested to any and all unpaid sub-contractors to immediately pre-lien and lien your house . . ."

14 58. Bixby further threatened to interfere with the Ernces' credit and stated that
15 Bixby would "pull a credit report on [the Ernces] immediately" and "contact all credit agencies
16 and services to make them aware of [the Ernces' alleged] non-payment." Bixby also made
17 disparaging remarks and insults about the Ernces' appearance, financial status and motivations,
18 among other things.

19 59. On or about June 21, 2001, the Ernces had all of the exterior locks at their
20 home replaced out of concern that Bixby might attempt to return to their home.

21 60. On June 26, 2001, the Ernces sent a letter to Bixby responding in part to
22 the June 20 letter. In that letter, the Ernces informed Bixby that "[b]ased on your hostile and
23 completely irrational behavior on June 19, and the continued threats, insults and intimidation
24 contained in your June 20 letter, we consider you a danger and a threat. We have no intention of
25 letting you back into our house and reject your demand."

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1 **The Ernces File A Complaint With The Contractors' State License Board**

2 61. On or about June 21, 2001, the Ernces filed a consumer complaint against
3 Bixby with the Board. The Ernces' complaint, among several others filed against Bixby,
4 currently is being investigated by Senior Investigator Kimberly Hansen. On information and
5 belief, Bixby has not cooperated with the Board in its investigation of the Ernces' consumer
6 complaint. On information and belief, the Board has determined that Bixby's work on the kitchen
7 remodel at the Ernces' home was not performed according to accepted trade standards or in a
8 good and a workmanlike manner.

9 **Bixby Records Liens Against The Property And Urges CLP To Record Lien**

10 62. On June 22, 2001, Bixby recorded a \$20,000 lien against the Ernces' home
11 in the Official Records of the County of Sacramento, Book 20010622, Page 1543 ("First Lien").
12 A copy of the First Lien is attached hereto as Exhibit B and incorporated herein by this reference.

13 63. On information and belief, Bixby refused to pay CLP and instead urged
14 CLP to record a lien against the Ernces' home. The Ernces asked CLP not to record a lien
15 because, among other things, there appeared to be a dispute between CLP and Bixby regarding
16 the work performed and because the Ernces had already paid Bixby \$13,000. Nevertheless, on
17 July 24, 2001, CLP recorded a \$3,158.13 lien in the Official Records of the County of
18 Sacramento, Book 20010724, Page 600. A true and correct copy of CLP's lien is attached hereto
19 as Exhibit C and incorporated herein by this reference. CLP has since recorded a release of lien.

20 **The Ernces Obtain A Judgment Releasing The First Bixby Lien**

21 64. On September 21, 2001, because Bixby failed to file an action to foreclose
22 the First Lien within the 90-day limitations period set forth in Civil Code section 3144, the Ernces
23 filed a Petition To Release Property From Mechanic's Lien in this Court in Case No. 01CS01368.

24 65. On September 26, 2001, Bixby filed with the Court a letter stating, among
25 other things, that "Bixby will not be opposing the petition to withdraw the [First Lien]." The
26 Court entered its Judgment Decreeing Property Released From Mechanic's Lien on November 6,
27 2001. On April 25, 2002, the Court awarded the Ernces their costs of \$292.50 in connection with

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1 their petition, and inserted the amount of costs into the judgment. A true and correct copy of the
2 judgment is attached hereto as Exhibit D and incorporated herein by this reference.

3 **Bixby Records A Second Lien And Urges Inline Plumbing To Record A Lien**

4 66. On September 27, 2001, Bixby recorded a second mechanic's lien against
5 the Ernces' home in the Official Records of the County of Sacramento, Book 20010927, Page
6 710 ("Second Lien"), which is the subject of Bixby's complaint in this action. Although Bixby
7 had not performed any work at the Ernces' home after June 19, 2001, the Second Lien is in the
8 amount of \$35,000 – almost twice the amount of the First Lien. The Second Lien also claims
9 interest at the rate of 9% per annum – an increase of 2% over the interest rate stated in the First
10 Lien. A true and correct copy of the Second Lien is attached hereto as Exhibit E and incorporated
11 herein by this reference.

12 67. Also on September 27, 2001, Inline Plumbing, a subcontractor Bixby hired
13 to perform work on the kitchen remodel, recorded a \$5,000 mechanic's lien against the Ernces'
14 home in the Official Records of the County of Sacramento in Book 20010927, Page 709. A true
15 and correct copy of the Inline Plumbing lien is attached hereto as Exhibit F.

16 68. On information and belief, Bixby refused to pay Inline Plumbing and
17 urged Inline Plumbing to record a lien against the Ernces' home. On information and belief, the
18 owner of Inline Plumbing told Bixby that he was going to contact the Ernces to try to arrange for
19 payment directly from them, but Bixby urged Inline Plumbing not to contact the Ernces because
20 Inline Plumbing's contract was with Bixby and because the Ernces were not happy with the work
21 that Inline Plumbing had performed.

22 69. On information and belief, Bixby told Inline Plumbing that the Ernces
23 owed Bixby \$22,000 and that Bixby could not pay Inline Plumbing anything until the Ernces paid
24 Bixby. On information and belief, Bixby did not tell Inline Plumbing that the Ernces had paid
25 Bixby \$13,000. On information and belief, Inline Plumbing recorded its lien based on Bixby's
26 urging that Inline Plumbing not contact the Ernces and instead record a lien.

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1 **The Lawsuit**

2 70. On November 26, 2001, Bixby filed a verified complaint to foreclose the
3 Second Lien. Bixby served the complaint on David on February 23, 2002. On February 28,
4 2002, the Court issued an Order to Show Cause based upon Bixby's failure to file a diligence
5 statement pursuant to Local Rule 11.04.

6 71. On March 25, 2002, the Ernces filed their Motion to Strike Complaint For
7 Foreclosure Of Mechanic's Lien based on the false verification of the complaint by Bixby's
8 counsel. In its tentative ruling on April 23, 2002, the Court ordered Bixby to file and serve an
9 amended complaint by May 1, 2002.

10 72. On April 30, 2002, Bixby filed and served its First Amended Complaint To
11 Foreclose Mechanic's Lien.

12 **Bixby's License Is Suspended**

13 73. On May 23, 2002, the Ernces sent the Board a copy of the November 6,
14 2001 judgment, as modified to include the April 25, 2002 award of costs. On May 24, 2002, the
15 Board issued a Notice of Automatic Suspension For Unpaid Judgment, which immediately
16 suspended Bixby's contractor's license, a true and correct copy of which is attached hereto as
17 Exhibit G and incorporated herein by this reference.

18 **FIRST CAUSE OF ACTION**

19 **[Breach of Contract As To Both Cross-Defendants]**

20 74. The Ernces incorporate the allegations of paragraphs 1 through 73 as if
21 fully set forth herein.

22 75. The kitchen remodeling contract between Bixby and the Ernces, as
23 described above, constitutes a valid and binding contract.

24 76. The Ernces performed all conditions, covenants and promises required to
25 be performed on their part in accordance with the terms and conditions of the kitchen remodeling
26 contract, except for any conditions, covenants and promises that were excused, or for which
27 Bixby prevented performance. At all times prior to Bixby's breaches of the contract the Ernces
28 were ready, willing and able to perform under the contract.

1 77. Bixby breached the kitchen remodeling contract, without justification or
2 excuse, by (a) failing to complete kitchen remodel as required by contract; (b) failing to complete
3 work in a workmanlike manner according to standard practices; (c) failing to pay subcontractors
4 as required by the contract; (d) failing to use proper materials specified for cabinets; and
5 (e) failing to provide proof of insurance.

6 78. Bixby has further unjustifiably and inexcusably breached the kitchen
7 remodeling contract by not completing the installation of the custom cabinets Bixby was
8 supposed to build and install in the Ernces' kitchen. Among other things: (a) although the Ernces
9 provided Bixby with printed manufacturers' specifications for all appliances, the cabinet above
10 and around the washer and dryer were not built to the proper height, and the refrigerator did not
11 fit under the cabinet that Bixby built for it; (b) Bixby had to saw off part of the cabinets to get the
12 refrigerator installed. The height of the cabinets still is incorrect, however, because the cabinet
13 doors cannot be fully opened. Instead, they are stopped by the hinges on the refrigerator doors;
14 (c) cabinet drawers are not cut to the appropriate depth as specified in the kitchen drawings, are
15 not uniform in appearance and size and cut edges are not sanded so that rough saw marks are
16 visible; (d) some drawers are shoddily constructed with rough plywood, while other drawers are
17 constructed of melamine and laminated plywood, as required by the contract; (e) screws protrude
18 through the inside of face plates on several drawers, and the grain on panels of three doors is set
19 horizontally rather than vertically like the rest of doors; (f) some of the cabinet doors are not
20 square and several drawer and door faces are chipped or splintered; (g) the cabinets were not
21 sanded or otherwise properly prepared before Bixby painted them; and (h) some doors and
22 drawers are missing, as well as cabinet shelves. On information and belief, the building material
23 Bixby used to construct the cabinets was not the material specified in the contract.

24 79. Bixby has further unjustifiably and inexcusably breached the kitchen
25 remodeling contract by failing to properly install the appliances. On June 15, 2001, Bixby
26 admitted to the Ernces that Bixby had not read the installation instructions for the Ernces'
27 appliances. Nevertheless, on that day, Bixby attempted to install all of the Ernces' appliances.
28 The washer and dryer were not installed properly. Bixby did not remove the shipping bolts, and

1 the washer, dryer and stacker were not properly bracketed together so that when the Ernces used
2 the washer for the first time, the appliances bounced around dangerously. The electrical outlet for
3 the stove was placed in the wrong place and had to be moved, and a number of outlets and light
4 switches also were not installed correctly and had to be repaired or repositioned.

5 80. Bixby has further unjustifiably and inexcusably breached the kitchen
6 remodeling contract by failing to perform the contract in a workmanlike manner. In addition to
7 the foregoing, additional workmanship problems include the following: (a) unrepaired damage to
8 the ceiling in the Ernces' bedroom caused by Bixby's structural work; (b) damage to existing
9 kitchen ceramic floor tiles; (c) incorrect installation of crown molding. On information and
10 belief, the clothes dryer duct was not installed correctly and Bixby did not utilize the proper
11 material required by the city building code for the dryer duct or the kitchen vent hood duct. On
12 information and belief, the gas line to the stove also was not properly installed per the city code.

13 81. As a direct and proximate result of Bixby's breaches of the kitchen
14 remodel contract, the Ernces have been damaged through the defective workmanship and loss of
15 use of their kitchen, not including incidental and consequential losses, in an amount to be
16 determined at trial.

17 SECOND CAUSE OF ACTION

18 **[Breach of Implied Covenant Of Good Faith And Fair Dealing** 19 **As To Both Cross-Defendants]**

20 82. The Ernces incorporate the allegations of paragraphs 1 through 81 by
21 reference as if fully set forth herein.

22 83. Separate and apart from, or in addition to, its performance under the
23 kitchen remodeling contract, Bixby had a duty to do nothing that would deprive the Ernces of
24 their rights and benefits of the kitchen remodeling contract. Bixby's actions, as described above,
25 constitute a breach of the covenant of good faith and fair dealing with the Ernces by depriving the
26 Ernces of the rights and benefits of the kitchen remodeling contract.

27 84. As a result of Bixby's breach of the covenant of good faith and fair dealing,
28 the Ernces have been damaged in an amount to be determined at trial.

1 THIRD CAUSE OF ACTION

2 **[Intentional Misrepresentation As To Both Cross-Defendants]**

3 85. The Ernces incorporate the allegations of paragraphs 1 through 84 by
4 reference as if fully set forth herein.

5 86. Prior to the execution of the kitchen remodeling contract, Bixby made the
6 following promises to induce the Ernces to enter the contract:

7 (a) Mark J. Bixby told the Ernces that the kitchen would take
8 approximately three weeks to complete.

9 (b) Mark J. Bixby told the Ernces that Bixby only had four to five
10 crews going at any one time and, since the job was small, Bixby could easily complete it.

11 (c) Mark J. Bixby told the Ernces that a foreman would supervise the
12 job throughout the entire remodel.

13 (d) Mark J. Bixby told the Ernces that Bixby would not hire
14 subcontractors to work on the kitchen remodel except possibly for electrical work.

15 (e) Mark J. Bixby told the Ernces that Bixby would only require a
16 \$1,000 deposit and would not require the Ernces to make progress payments.

17 87. At the time that Mark J. Bixby made these promises to the Ernces, Bixby
18 knew that they were false and that Bixby had no intention of performing the contract in
19 compliance with these promises. In fact, despite Bixby's promises to the Ernces, the following
20 occurred:

21 (a) By the time Bixby abandoned the kitchen remodel, approximately
22 seven weeks had passed, and the kitchen remodel was far from being complete.

23 (b) At various times during the kitchen remodel, Bixby claimed to have
24 at least ten jobs going at one time and, on June 18, 2001, Bixby told David that Bixby had 16 jobs
25 in progress.

26 (c) Bixby only had a foreman supervising the kitchen remodel during
27 the first couple of weeks of the job. After that, there was no foreman on site to supervise or direct

28 ~~Bixby's workers who were often confused due to Bixby's lack of direction and supervision~~

1 (d) Bixby hired a number of subcontractors to perform work at the
2 Ernces' home – two of whom Bixby then refused to pay and urged to record liens against the
3 Ernces' home.

4 (e) In addition to the \$1,000 deposit, Bixby demanded the payment of
5 \$7,000 from the Ernces and threatened to abandon the job if the Ernces did not immediately pay
6 such amount. Bixby later demanded additional payment of \$8,000, which the Ernces partially
7 paid out of fear that Bixby would abandon the kitchen remodel based on Bixby's prior threats.

8 88. Bixby made the promises set forth above with the intent to induce the
9 Ernces into signing the proposed kitchen remodeling contract.

10 89. The Ernces, at the time the promises were made and at the time they
11 executed the kitchen remodeling contract, were ignorant of Bixby's secret intention not to
12 perform and justifiably relied on Bixby's promises. The Ernces, in the exercise of reasonable
13 diligence, could not have discovered Bixby's secret intentions. In reliance on Bixby's promises,
14 the Ernces signed the kitchen remodeling contract. If the Ernces had known Bixby's actual
15 intention, the Ernces would not have entered into the kitchen remodeling contract with Bixby.

16 90. As set forth more fully above, Bixby failed to abide by Bixby's promises
17 which resulted in the kitchen remodeling project not being completed and, to the extent it was
18 performed, not being performed in a timely or workmanlike manner.

19 91. As a proximate result of Bixby's fraudulent conduct, the Ernces entered
20 into the kitchen remodeling contract with Bixby, which resulted in the Ernces allowing their
21 kitchen to be demolished, living for over seven weeks without a functional kitchen, incurring
22 expenses for restaurant meals, paying Bixby \$13,000 for substandard workmanship, and not
23 entering into a contract for the job with a different contractor. Thus, as a proximate result of
24 Bixby's fraudulent actions, the Ernces have been damaged in an amount to be determined at trial.

25 92. Bixby's fraudulent conduct was an intentional misrepresentation, deceit, or
26 concealment of a material fact known to Bixby with the intention on the part of Bixby to deprive
27 the Ernces of property or legal rights or otherwise causing injury. Bixby's intentional acts of
28 fraud were wanton and malicious, and thus justify an award of exemplary and punitive damages.

1 **FOURTH CAUSE OF ACTION**

2 **[Negligence As To Both Cross-Defendants]**

3 93. The Ernces incorporate the allegations of paragraphs 1 through 92 by
4 reference as if fully set forth herein.

5 94. At all times relevant herein, Bixby, as a contractor licensed with the State
6 of California and as a construction company, owed the Ernces a legal duty to perform any
7 remodeling work with the ordinary care and skill of a licensed contractor and in a good and
8 workmanlike manner.

9 95. As set forth in detail herein, Bixby failed to exercise ordinary reasonable
10 care in remodeling the Ernces' kitchen.

11 96. Bixby's negligent performance of construction work on the Ernces' home
12 directly and legally caused damage to the Ernces' home including but not limited to their kitchen.

13 97. As a direct and proximate result of Bixby's negligence, the Ernces' home
14 has been damaged in an amount to be determined at trial. The Ernces will have to expend such
15 amount to repair the damage caused by Bixby's negligence.

16 **FIFTH CAUSE OF ACTION**

17 **[Trespass As To Both Cross-Defendants]**

18 98. The Ernces incorporate the allegations of paragraphs 1 through 97 by
19 reference as if fully set forth herein.

20 99. The Ernces are, and at all times herein mentioned, were the owners and in
21 possession of certain real property consisting of land and a single family house located at 2811
22 3rd Avenue, Sacramento, California.

23 100. As stated above, on June 19, 2001, Bixby remained in the Ernces' home,
24 without the Ernces' consent, after abandoning the kitchen remodeling project.

25 101. These acts were willful in that Bixby knew that the Ernces had not
26 consented to Bixby's continued presence in their home and on their property and that the Ernces
27 were and are the lawful owners in possession of the property.

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1 102. As a result of Bixby's acts of trespass, the Ernces have been damaged in an
2 amount to be determined at trial.

3 **SIXTH CAUSE OF ACTION**

4 **[Violation of Business and Professions Code Section 17200 As To Both Cross-Defendants]**

5 103. The Ernces incorporate the allegations of paragraphs 1 through 102 by
6 reference as if fully set forth herein.

7 104. On information and belief, Bixby has, or may have, violated a number
8 of provisions of the Contractors' State License Law (Cal. Bus. & Prof. Code § 7000 et seq.)
9 including, but not limited to, the following: (a) Section 7108.5 for failing to pay CLP and Inline
10 Plumbing despite the Ernces' payment of \$13,000 to Bixby; (b) Section 7109 for willfully
11 departing from accepted trade standards for good and workmanlike construction; (c) Section 7111
12 for refusal to comply with a written request by the Board to make records and contracts available
13 for inspection; (d) Section 7113 for breach of contract for Bixby's material failure to complete the
14 kitchen remodel; (e) Section 7115 for material noncompliance with the Contractors' State License
15 Law; (f) Section 7116 for willful or fraudulent injury caused by Bixby to the Ernces; (g) Section
16 7119 for failure to prosecute the kitchen remodel with reasonable diligence; (h) Section 7120 for
17 willful or deliberate failure to pay moneys when due for materials or services rendered in
18 connection with the kitchen remodel; and (i) Section 7030 for failure to include in the contract the
19 specified notice set forth in that section.

20 105. On information and belief, the contract between the Ernces and Bixby is a
21 "home improvement contract" as defined in Section 7151.2. On information and belief, Bixby
22 has, or may have, violated Section 7159 with respect to the contract requirements for home
23 improvement contracts by, including, but not limited to: (a) failing to state in the contract the
24 approximate dates when the work will begin and on which all construction is to be completed as
25 required by Section 7159(b); (b) failing to include plans and scale drawings in the contract as
26 required by Section 7159(c); and (c) failing to include a schedule of payments as required by
27 Section 7159(e).

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1 106. In violation of California Civil Code section 3123, Bixby's lien is not for
2 "the reasonable value of the labor, services, equipment or materials furnished or for the price
3 agreed upon . . . whichever is less."

4 107. In violation of California Civil Code section 3118, Bixby "willfully
5 include[d] in his claim of lien labor, services, equipment, or materials not furnished for the
6 property described in such claim."

7 108. By committing the acts alleged above and in the other causes of action,
8 Bixby has engaged in unlawful and unfair business practices which constitute unfair competition
9 within the meaning of Business and Professions Code section 17200.

10 **PRAYER**

11 WHEREFORE, the Ernces pray that the Court:

12 1. Enter judgment in the Ernces' favor on all causes of action;

13 2. Order that Bixby's lien be forfeited pursuant to Civil Code section 3118.

14 3. Award actual damages, including incidental and consequential damages, in
15 an amount to be determined at trial;

16 4. Enter such orders as "may be necessary to restore to any person in interest
17 any money or property, real or personal, which may have been acquired by means of" Bixby's
18 unlawful, unfair and fraudulent acts, as provided in Business and Professions Code section 17203
19 and other applicable laws.

20 5. Award the Ernces such other and further relief as the Court may deem just
21 and proper and to fully remedy the effects of Bixby's unlawful and improper acts complained of
22 herein including, but not limited to, piercing the corporate veil between Mark J. Bixby and
23 MJB/Bixby Construction, Inc. as necessary;

24 6. Award punitive and exemplary damages in an amount to be determined at
25 trial;

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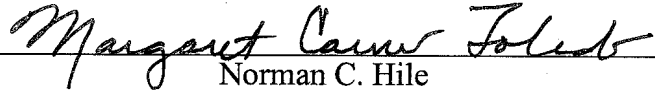
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- 1 7. Award the Ernces their costs of suit, including attorney fees; and
2 8. Grant such other and further relief as the Court deems just and proper.

3 Dated: June 4, 2002

ORRICK, HERRINGTON & SUTCLIFFE LLP

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Norman C. Hile

Margaret Carew Toledo

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