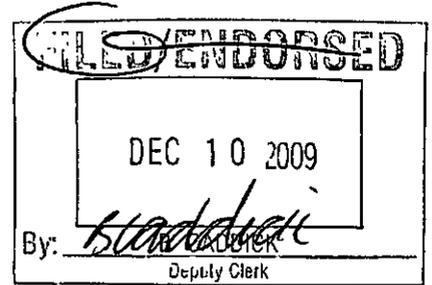


1 **PARSHALL & TWEEDY, LLP**
2 **Charles A. Tweedy [SBN 096234]**
3 **11341 Gold Express Drive, Suite 110**
4 **Gold River, California 95670**

5 **Telephone: (916) 631-8388**
6 **Facsimile: (916) 631-8188**

7 Attorneys for Plaintiff MJB/Bixby Construction, Inc.



8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SACRAMENTO

10 MJB/BIXBY CONSTRUCTION, INC.)	CASE NO. 34-2009-00066239
11 Plaintiff,)	FIRST AMENDED COMPLAINT FOR FORECLOSURE OF MECHANIC'S LIEN, BREACH OF CONTRACT AND QUANTUM MERUIT
12 vs.)	
13 ROY RUTHERFORD AND TANGIE) 14 RUTHERFORD; and DOES 1 through 100,) inclusive,)	
15 Defendants.)	

16
17
18 COMES NOW Plaintiff, MJB BIXBY CONSTRUCTION, INC. (hereinafter referred to as
19 "BIXBY") and alleges as follows:

20 **FIRST CAUSE OF ACTION**

21 1. Plaintiff at all times herein mentioned is and was a contractor doing business in the State
22 of California and duly licensed to act as a contractor under the laws of the State of California to perform
23 all works of improvement described hereinafter which were performed by Plaintiff.

24 2. Defendants ROY RUTHERFORD and TANGIE RUTHERFORD (hereinafter referred
25 to as the "RUTHERFORDS") at all times herein mentioned were the owners or reputed owners of that
26 certain property located in the County of Sacramento, State of California, and more particularly
27 described in Exhibit "A" hereto. Said property is hereinafter referred to as the "Real Property".

28 3. Plaintiff is unaware of the true names and identities of Defendants DOES 1 through 100,

1 inclusive, and has sued said DOE defendants by such fictitious names. Plaintiff is informed and believes
2 and thereon alleges that each of said Defendants claims an interest in the Real Property which is the
3 subject of this action. Plaintiff will seek leave to amend this Complaint to assert the true names and
4 identities of said DOE defendants at such time as those identities have been discovered.

5 4. Plaintiff is informed and believes and thereon alleges that each of said DOE defendants
6 is and at all times herein was the agent, servant, master, or principal of each and every other Defendant
7 named herein and is liable to Plaintiff for the damages sustained by Plaintiff either directly or indirectly,
8 vicariously or otherwise.

9 5. On or about February 19, 2009, BIXBY and the RUTHERFORDS, and DOES 1 through
10 10, entered into a written contract for the construction of certain works of improvement to be located
11 on the Real Property described herein, and to furnish and provide all necessary labor and materials
12 therefor in connection therewith, and to do all things in accordance with the terms and conditions of said
13 contract. Each of said Defendants agreed to pay to Plaintiff the sum of the contract price together with
14 such additional sums as may be subsequently agreed, either orally or in writing, in accordance with the
15 terms of the contract.

16 6. On August 4, 2009, the RUTHERFORDS stated in writing that they would make no
17 further payments under the contract until all work was completed, thereby repudiating the express terms
18 of the contract. On August 7, 2009, the RUTHERFORDS were presented with an invoice for contract
19 work that was due by August 17, 2009. On August 18, 2009, the RUTHERFORDS were given a notice
20 of breach for non-payment and were given ten (10) days to cure as provided in their contract. Plaintiff
21 continued to work, notwithstanding the RUTHERFORDS' breach.

22 7. Plaintiff is informed and believes that in late August, the RUTHERFORDS contacted the
23 Sacramento County Building Department and insisted that a Stop Work Order be issued because a
24 retaining wall to be constructed in their backyard had not been permitted properly. A Stop Work Order
25 was issued on August 27, 2009, citing, "need permits for grading and retaining wall", which prevented
26 and excused BIXBY from performing any further work.

27 8. On September 3, 2009, Plaintiff terminated the contract with the RUTHERFORDS in
28 writing for non-payment.

1 9. Notwithstanding the fact that the contract was terminated, Plaintiff continued to work
2 with the County Building Department on the Stop Work Order. The Stop Work Order was rescinded
3 in September, 2009, when the Building Department determined that the retaining wall was not required
4 to be engineered to be built as planned and no additional permit was required.

5 10. From and after the execution of the contract as described hereinabove, Plaintiff furnished
6 and supplied to the Real Property labor and materials used in the work of improvement constructed
7 thereon in accordance with the terms and conditions of the contract pursuant to the request of the
8 RUTHERFORDS. There is presently due, owing and unpaid pursuant to the contract, the sum of Fifty-
9 nine Thousand Nine and 23/100ths dollars (\$59,009.23), plus interest at the rate of ten percent (10%)
10 per annum from August 28, 2009, which sum represents the fair and reasonable value of the work and
11 materials performed and supplied by Plaintiff to the Real Property after all due credits for payments
12 made, credits, offsets, and adjustments.

13 11. On November 9, 2009, Plaintiff recorded with the County Recorder of the county in
14 which the Real Property is situated, Plaintiff's verified Claim of Mechanic's Lien, a copy of which is
15 attached hereto as Exhibit "B". Prior to the recording of said lien, thirty (30) days had not elapsed or
16 expired since the recordation of a valid Notice of Completion nor had ninety (90) days elapsed since the
17 completion of the work of improvement on the Real Property.

18 12. As the result of the RUTHERFORDS' breach of the contract, Plaintiff suffered damages
19 for lost overhead and profits in an amount in excess of \$25,000, according to proof, in addition to the
20 amounts owed for work performed and unpaid.

21 13. There is now due, owing and unpaid from Defendants, and each of them, the sum in
22 excess of Eighty-five Thousand dollars (\$85,000) after all due and just credits for claims of offset, credit
23 and payments made subsequent to the recording of the mechanic's lien, together with interest thereon
24 at the legal rate of ten percent (10%) per annum from and after August 28, 2009.

25 14. Plaintiff's contract with the RUTHERFORDS provides for the recovery of all reasonable
26 attorney's fees incurred in the enforcement of Plaintiff's contract; and therefore, Plaintiff is entitled to
27 recover, in addition to all sums set forth hereinabove, Plaintiff's reasonable attorney's fees incurred
28 herein.

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WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. Against the RUTHERFORDS in an amount in excess of Eighty-five Thousand dollars (\$85,000), according to proof, together with interest thereon at the rate of ten percent (10%) per annum from and after August 27, 2009;
2. For costs of suit incurred herein;
3. For judgment as against all Defendants that the sum of Fifty-nine Thousand Nine and 23/100ths dollars (\$59,009.23), plus interest at the rate of ten percent per annum from August 28, 2009, be adjudged to be a lien on the Real Property described in Exhibit "A" hereto, and that said land be adjudged and decreed to be sold by the Sheriff of the County of Sacramento, State of California, in accordance with the laws and practices of this Court, and that the proceeds of sale be applied to satisfy the costs of sale, the costs of these proceedings, and Plaintiff's claim and judgment;
4. That the interests and claims and the estates of all Defendants named herein, and each of them, be determined to be of inferior priority to that of Plaintiff and subject to Plaintiff's lien. That the Court further order that the Plaintiff, or any party to this action, may become a purchaser at sale;
5. As against the RUTHERFORDS, for reasonable attorney's fees to be awarded pursuant to Code of Civil Procedure, §1717; and,
6. For such further relief as the Court may deem just and proper.

DATED: December 10, 2009

PARSHALL & TWEEDY, LLP

By: _____

CHARLES A. TWEEDY

Attorneys for Plaintiff MJB/Bixby Construction

EXHIBIT "A"

Legal Description

The real property in Sacramento County, California, located at 8600 Gunner Way, Fair Oaks, California 95628, Assessors Parcel Number 246-0640-035-0000.

Recording Requested by:
MJB/BIXBY CONSTRUCTION, INC.
5852 88th Street, #800
Sacramento, CA 95828

Sacramento County Recorder
Craig A. Kramer, Clerk/Recorder
BOOK 20091109 PAGE 0752

Check Number 5890
Monday, NOV 09, 2009 12:17:31 PM
Ttl Pd \$11.00 Nbr-0006115935

TML/85/1-1

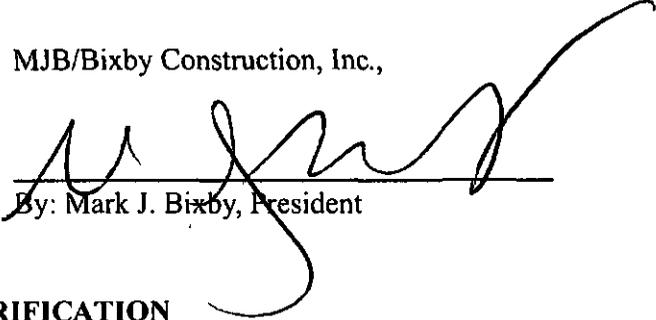
WHEN RECORDED MAIL TO:
CHARLES A. TWEEDY
PARSHALL & TWEEDY, LLP
11341 Gold Express Drive, Suite 110
Gold River, California 95670

CLAIM OF LIEN

MJB/Bixby Construction, Inc., hereby claims a mechanics' lien on the real property in Sacramento County, California, located at 8600 Gunner Way Fair Oaks, CA 95628, Assessors parcel number 246-0640-035-0000, owned or reputed to be owned by Roy and Tangie Rutherford for the sum of \$59,009.23, plus interest at the rate of ten percent per annum from August 28, 2009, which is due and unpaid, after deducting all just credits and offsets, for labor, service, equipment, material furnished by claimant and consisting of the addition to, remodel, and renovation of the home located at 8600 Gunner Way Fair Oaks, CA 95628. Claimant furnished the same to Roy and Tangie Rutherford under contract with them.

MJB/Bixby Construction, Inc.,

Date: 11/9/2009

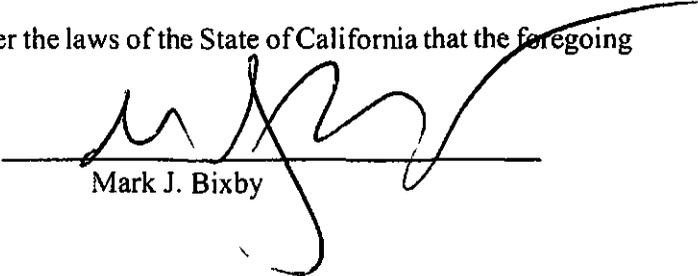

By: Mark J. Bixby, President

VERIFICATION

I am the president of MJB/Bixby Construction, Inc., authorized to make this verification on the claimant's behalf and the foregoing Claim of Lien is true of my own knowledge.

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

Date: 11/9/2009


Mark J. Bixby

*Rutherford