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FILED
JUN 28 11 34 AM
LEGAL PROCESS #2

10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SACRAMENTO

13 MARK BIXBY and MJB/BIXBY
14 CONSTRUCTION, INC.,

CASE NO. 04 AS 02768

15 Plaintiffs,

**ANSWER TO PLAINTIFFS'
UNVERIFIED COMPLAINT**

16 vs.

17 EDWARD R. BRENNER and LAW
18 OFFICES OF EDWARD R. BRENNER,
19 and DOES 1 through 100, inclusive,

20 Defendants.



21 Defendant, Edward R. Brenner, in answer to the unverified Complaint of
22 plaintiffs herein, denies each and every, all and singular, of the allegations of the
23 Complaint, and in this connection defendant denies that plaintiffs have been injured
24 or damaged in any of the sums mentioned in the Complaint, or in any sum, or at all,
25 as the result of any act or omission of this answering defendant.

26 **AFFIRMATIVE DEFENSES**

27 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
28 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
CONTAINED THEREIN, this answering defendant alleges that the Complaint fails to
state facts sufficient to constitute a cause of action or claim for relief against this
answering defendant.

1 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
2 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
3 CONTAINED THEREIN, this answering defendant alleges that plaintiffs were
4 themselves careless and negligent in and about their duties and the matters alleged
5 in the Complaint, and that this carelessness and negligence on plaintiffs' own part
6 proximately contributed to the incidents, injuries, losses and/or damages complained
7 of, if any there were, and plaintiffs' negligence diminishes their recovery, if any, in
8 direct proportion to the extent of their negligence.

9 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
10 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
11 CONTAINED THEREIN, this answering defendant alleges that at all times and
12 places mentioned in the Complaint plaintiffs failed to use reasonable diligence to
13 mitigate their alleged damages. Plaintiffs are barred from recovery under the
14 Complaint, because the damages alleged by plaintiffs could have been mitigated by
15 due diligence on their part.

16 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
17 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
18 CONTAINED THEREIN, this answering defendant alleges that each of plaintiffs'
19 claims is barred by the applicable statutes of limitations, including without limitation
20 California Code of Civil Procedure sections 340.6, 339 and 338.

21 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
22 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
23 CONTAINED THEREIN, this answering defendant alleges that plaintiffs, by their
24 conduct, are barred from recovery in this matter on the grounds of ratification.

25 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
26 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
27 CONTAINED THEREIN, this answering defendant alleges that plaintiffs, by their
28 conduct, are barred from recovery in this matter on the grounds of waiver.

1 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
2 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
3 CONTAINED THEREIN, this answering defendant alleges that plaintiffs, by their
4 conduct, are barred from recovery in this matter on the grounds of estoppel.

5 AS AN FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
6 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
7 CONTAINED THEREIN, this answering defendant alleges that plaintiffs, by their
8 conduct, are barred from recovery in this matter on the grounds of unclean hands.

9 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
10 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
11 CONTAINED THEREIN, this answering defendant alleges that plaintiffs, by their
12 conduct, are barred from recovery in this matter on the grounds of laches.

13 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
14 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
15 CONTAINED THEREIN, this answering defendant alleges on information and belief
16 that the sole and proximate cause of the damages complained of by plaintiffs in their
17 Complaint was due to the act and/or omission of persons and entities other than this
18 answering defendant, and these acts and omissions were the intervening and
19 superceding causes of these damages, if any.

20 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
21 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
22 CONTAINED THEREIN, this answering defendant alleges on information and belief
23 that plaintiffs cannot assert any contractual claims set forth in the Complaint because
24 they prevented performance of and rejected tendered payment under any contracts.

25 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
26 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
27 CONTAINED THEREIN, this answering defendant alleges on information and belief
28 that the causes of action asserted in the Complaint were settled, satisfied,

1 extinguished and supported by adequate consideration, and an accord of all claims
2 reached, and the prior settlements, satisfactions, and extinguishments operate to bar
3 the claims in this lawsuit.

4 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
5 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
6 CONTAINED THEREIN, this answering defendant alleges that there was a failure of
7 consideration for any alleged agreement plaintiffs seek to enforce, caused by
8 plaintiffs, and that the failure of consideration bars plaintiffs' rights to relief.

9 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
10 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
11 CONTAINED THEREIN, this answering defendant alleges that plaintiffs were not
12 parties to various alleged underlying actions and/or contracts and lack standing to
13 sue under the Complaint.

14 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
15 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
16 CONTAINED THEREIN, this answering defendant alleges that plaintiffs failed to
17 perform certain conditions precedent to any duty of defendant. These conditions
18 precedent were imposed upon plaintiffs by their alleged contracts. Plaintiffs' non-
19 performance of conditions excused defendant's obligations and has given defendant
20 the right of offset, disaffirmance, rescission and release. Plaintiffs are therefore
21 barred from recovery herein.

22 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
23 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
24 CONTAINED THEREIN, this answering defendant alleges that one plaintiff is not a
25 licensed contractor and another plaintiff has failed to comply with California's
26 Contractors License Law, including without limitation California Civil Code Business
27 & Professions Code section 7159, and plaintiffs may not therefore maintain the
28 contract claims set forth in the Complaint.

1 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
2 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
3 CONTAINED THEREIN, this answering defendant alleges on information and belief
4 that plaintiffs are barred from recovery in this case by the doctrines of res judicata or
5 collateral estoppel.

6 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
7 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
8 CONTAINED THEREIN, this answering defendant alleges that he is entitled to offset
9 plaintiffs' receipts and judgments, as well as the reasonable value of fees and costs
10 incurred by this answering defendant, arising from the underlying representations.

11 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE FIRST
12 AMENDED CROSS-COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED
13 CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that
14 the Complaint, and each purported cause of action alleged therein, fails to state a
15 cause or causes of action for attorney's fees against this answering defendant.

16 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE FIRST
17 AMENDED CROSS-COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED
18 CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that
19 any alleged representations made by defendant which form the basis of the
20 Complaint were true and honest at the time made, were made without knowledge of
21 any falsity, and were not made with the intent to deceive plaintiffs. Plaintiffs are
22 therefore barred from recovering punitive damages under the Complaint.

23 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE FIRST
24 AMENDED CROSS-COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED
25 CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that
26 the Complaint, and each purported cause of action alleged therein, fails to state a
27 cause or causes of action for punitive damages against this answering defendant
28 under California Civil Code sections 3294 and 3295.

1 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
2 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
3 CONTAINED THEREIN, this answering defendant alleges that in the matters
4 complained of in the Complaint, plaintiffs were and are equally at fault and culpable
5 for any loss or damage alleged in the Complaint.

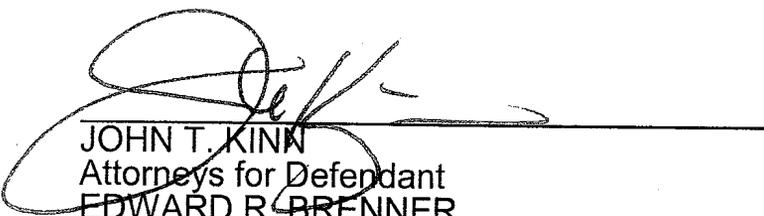
6 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
7 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
8 CONTAINED THEREIN, this answering defendant alleges that the causes of action
9 asserted in the Complaint are barred by the Civil Code of the State of California,
10 including without limitation Sections 1473, 1474, 1475, 1476, 1477.

11 AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
12 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
13 CONTAINED THEREIN, this answering defendant has insufficient knowledge or
14 information on which to form a belief as to additional, as yet unstated, affirmative
15 defenses available and reserves the right to assert additional affirmative defenses.

16 WHEREFORE, this answering defendant prays that plaintiffs take nothing by
17 their complaint; for costs of suit incurred herein; and for such other and further relief
18 as pleaded by this answering defendant and as the Court deems just and proper.

19 **SEGAL & KIRBY**

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21 Dated: January 28, 2005

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23 JOHN T. KINN
24 Attorneys for Defendant
25 EDWARD R. BRENNER
26 LAW OFFICES OF EDWARD R. BRENNER
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