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

01AS07640

DEBORAH DOTY and ROBERT DOTY,

NO. 01AM06877

Plaintiffs,

FIRST AMENDED COMPLAINT FOR
BREACH OF CONTRACT; FRAUD;
NEGLIGENT MISREPRESENTATION;
NEGLIGENCE; ASSAULT, BATTERY;
UNFAIR BUSINESS PRACTICES;
INJURY TO REAL PROPERTY;
INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS; NEGLIGENT
INFLICTION OF EMOTIONAL
DISTRESS; CLAIM ON
LICENSE/CONTRACTOR'S BOND; AND
INJUNCTION

MARK J. BIXBY, individually and dba
BIXBY CONSTRUCTION; MJB/BIXBY
CONSTRUCTION, INC., a corporation;
STEVE FLYNN, individually and dba
CAM-AM ROOFING; FRONTIER
PACIFIC INSURANCE COMPANY, a
corporation; STAR INSURANCE
COMPANY, a corporation; AMERICAN
BONDING COMPANY, a corporation; and
DOES 1 through 100, inclusive,

Defendants.

Amount Demanded Exceeds \$25,000.00

495
SUMMONS ISSUED
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I. GENERAL ALLEGATIONS

1. Plaintiffs Deborah Doty (hereinafter referred to individually as "Plaintiff Deborah" or collectively with all other plaintiffs as "Plaintiffs") and Robert Doty (hereinafter referred to individually as "Plaintiff Robert" or collectively with all other plaintiffs as "Plaintiffs") are individuals residing in the County of Sacramento, California.

2. Defendant Mark J. Bixby (hereinafter referred to individually as "Defendant Bixby" or collectively with MJB/Bixby Construction, Inc., as "Bixby Defendants") is an

FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT; FRAUD; NEGLIGENT MISREPRESENTATION; NEGLIGENCE; ASSAULT, BATTERY; UNFAIR BUSINESS PRACTICES; INJURY TO REAL PROPERTY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; CLAIM ON LICENSE/CONTRACTOR'S BOND; AND INJUNCTION

1 individual who is engaged in business under the fictitious name "Bixby Construction" in the
2 County of Sacramento, California. Plaintiffs are informed and believe, and thereupon allege, that
3 Defendant Bixby has filed the statement and published the notice required by Business and
4 Professions Code § 17918.

5 3. Plaintiffs are informed and believe that Defendant Bixby has complied with all of
6 the licensing requirements for a general contractor in the State of California and was licensed as
7 an individual until January 22, 1996.

8 4. Defendant MJB/Bixby Construction, Inc., (hereinafter referred to individually as
9 "Defendant Bixby Corporation" or collectively with Defendant Bixby as "Bixby Defendants") is
10 a corporation. Plaintiffs are informed and believe that Defendant Bixby is the principal or sole
11 shareholder and the president and chief executive officer of Defendant Bixby Corporation and
12 controls Defendant Bixby Corporation. Plaintiffs are informed and believe that Defendant Bixby
13 Corporation complied with all of the licensing requirements for a general contractor in the State
14 of California on or around January 22, 1996, and its responsible managing officer is Mark J.
15 Bixby.

16 5. Defendant Steve Flynn (hereinafter referred to as "Defendant Flynn") is an
17 individual engaged in business under the fictitious name "Cam-Am Roofing" in the County of
18 Sacramento, California. Plaintiffs are informed and believe that Defendant Flynn has filed the
19 statement and published the notice required by Business and Professions Code § 17918.

20 6. At all times relevant herein, Defendant Flynn has complied with all of the
21 licensing requirement for a general contractor in the State of California.

22 7. Defendant Frontier Pacific Insurance Company (hereinafter referred to as
23 "Defendant Frontier) is a corporation. Defendant Frontier is a licensed surety in the State of
24 California and is the surety company for Bixby Defendants.

25 8. Defendant Star Insurance Company (hereinafter referred to as "Defendant Star") is
26 a corporation. Defendant Star is a licensed surety in the State of California and was the surety
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1 company for Defendant Flynn from approximately October 1, 1994, through May 17, 1997.

2 9. Defendant American Bonding Company (hereinafter referred to as "Defendant
3 American") is a corporation. Defendant American is a licensed surety in the State of California
4 and was the surety company for Defendant Flynn from approximately July 16, 1993, through
5 October 1, 1994.

6 10. Plaintiff is ignorant of the true names of defendants Does 1 to 100 and prays that
7 when they are discovered the complaint may be amended by inserting them in place of the
8 fictitious names. Plaintiff further alleges that said fictitiously named defendants are in some
9 manner responsible for the damages alleged herein.

10 11. In performing the acts alleged in this First Amended Complaint, each of the
11 defendants named in each cause of action was the agent or employee of the other defendant(s)
12 named in that cause of action and was acting within the course and scope of said agency or
13 employment.

14 12. The agreements which are the subject of this First Amended Complaint were
15 entered into, were to be performed, and were ultimately breached in the County of Sacramento,
16 California. Also, the injuries complained of in this First Amended Complaint were sustained in
17 the County of Sacramento, California.

18 13. On or around October 1991 Plaintiffs and Defendant Bixby entered into an oral
19 agreement (hereinafter referred to as "First Agreement") whereby Defendant Bixby agreed to
20 construct an addition to Plaintiffs' master bedroom, including the roof, in a substantial and
21 workmanlike manner in accordance with industry standards and in accordance with the law and
22 appropriate ordinances and regulations.

23 14. On or around September 1993, Plaintiffs and Defendant Bixby entered into
24 another oral agreement (hereinafter referred to as "Second Agreement") whereby Defendant
25 Bixby agreed to replace approximately one-half of Plaintiffs' roof in a substantial and
26 workmanlike manner according to standard industry practices and in accordance with the law and
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1 appropriate ordinances and regulations.

2 15. Plaintiffs are informed and believe that Defendant Bixby hired Defendant Flynn
3 as a subcontractor to perform some or all of the work required by Second Agreement, and that
4 Defendant Flynn did said work under the control and supervision of Defendant Bixby.

5 16. Plaintiffs are informed and believe that Defendant Bixby Corporation
6 incorporated on or around June 27, 1995, after Plaintiffs entered into First Agreement and
7 Second Agreement with Defendant Bixby. Plaintiffs are further informed and believe that upon
8 incorporation, Defendant Bixby Corporation assumed all of the construction business activities
9 and all of the assets and liabilities of Defendant Bixby's construction business. Plaintiffs never
10 agreed that Defendant Bixby would be relieved of liability resulting for his dealings and actions
11 with Plaintiffs.

12 17. Bixby Defendants never informed Plaintiffs of Defendant Bixby Corporation's
13 incorporation but continued to operate seamlessly with Plaintiffs under the same or a
14 substantially similar name as Defendant Bixby had done all along. Defendant Bixby thereby
15 inextricably combined, mixed, and confused his personal construction business and activities
16 with the construction business and activities of Defendant Bixby Corporation in such a manner
17 that the construction business and activities of Defendant Bixby and Defendant Bixby
18 Corporation were indistinguishable from one another. Unbeknownst to Plaintiffs, Plaintiffs
19 continued to do business with Defendant Bixby, both as an individual and as an agent of
20 Defendant Bixby Corporation.

21 18. On or around October 1991 through November 1991 Defendant Bixby breached
22 First Agreement by not performing the work in a substantial and workmanlike manner in
23 accordance with industry standards and by improper construction of the roof including improper
24 overhangs and improper felting, among other things.

25 19. Plaintiffs are informed and believe that on or around September 1993 through
26 November 1993 Defendant Flynn and Defendant Bixby breached Second Agreement by not
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1 performing the work in a substantial and workmanlike manner according to standard practices by
2 causing or failing to repair leaks in the roof, improper nailing and installing loose shakes, not
3 installing shakes under part of the air conditioning and heating unit, leaving exposed felting and a
4 hole under the air conditioning and heating unit, and failing to move the large air conditioning
5 and heating unit mounted on Plaintiffs' roof as was necessary in order to properly discharge
6 Defendant Bixby's and Defendant Flynn's duties to Plaintiffs, among other things; and by failing
7 to comply with the legal requirement of obtaining a permit prior to performing the work under
8 the Second Agreement and having the work inspected by the appropriate government authorities
9 after completion.

10 20. However, the defects in the work performed by Defendant Bixby under the First
11 Agreement and by Defendant Bixby and Defendant Flynn under the control and supervision of
12 Defendant Bixby under the Second Agreement constituted latent defects in that they were hidden
13 or concealed and could not be discovered by reasonable and customary observation or inspection.

14 21. The defects in the work performed by Defendant Bixby under the First Agreement
15 constituted latent defects and were hidden or concealed and could not be discovered by
16 reasonable and customary observation or inspection because, among other things, there was no
17 exterior evidence of these defects nor was there any reason for Plaintiffs to suspect that the work
18 was defective. The defects were hidden from reasonable and customary observation or
19 inspection under the surface of the roof.

20 22. The defects in the work performed under Second Agreement by Defendant Bixby
21 and Defendant Flynn under the supervision and control of Defendant Bixby constituted latent
22 defects and were hidden or concealed and could not be discovered by reasonable and customary
23 observation or inspection because, among other things, the air conditioning and heating unit was
24 mounted close to the roof, its lowest point being only approximately three inches about the
25 sloping roof. Neither Bixby Defendants nor Defendant Flynn told Plaintiffs that the air
26 conditioning and heating unit was not moved in order for the repairs to be done. Furthermore,
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1 since the air conditioning and heating unit was mounted so close to the roof, it hid from
2 reasonable and customary observation or inspection the actual leak and missing shakes and
3 exposed felting.

4 23. In or around the Fall of 1996 and the Fall 1997, Bixby Defendants and their agent,
5 Chris Calderone, repeatedly assured Plaintiffs that Bixby Defendants wished to help Plaintiffs,
6 had Plaintiffs' best interests at heart, and would do what was necessary to locate and remedy any
7 leak in Plaintiffs' roof.

8 24. In or around the Fall of 1996, Chris Calderone, the project manager for Bixby
9 Defendants, told Plaintiff Deborah that key employees of Bixby Defendants had conducted a
10 thorough investigation of Plaintiffs' roof and did not find any leak. Plaintiff Deborah understood
11 those key employees to be agents of Bixby Defendants and that they were acting within the
12 course and scope of this agency when they conducted the investigation. In communicating this
13 information to Plaintiff Deborah, Chris Calderone was acting as the agent of Bixby Defendants.

14 25. At the same, Mr. Calderone told Plaintiff Deborah that Bixby Defendants had run
15 water on Plaintiffs' roof while other employees of Bixby Defendants were in the attic searching
16 for any leak. Mr. Calderone reported that none were found.

17 26. Thereafter, in or around the Fall of 1996, Defendant Bixby, acting on behalf of
18 himself as an individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff
19 Robert that Bixby Defendants would conduct additional thorough inspections of Plaintiffs' attic
20 and roof. Defendant Bixby assured Plaintiff Robert that no leak was visible from the attic.

21 27. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
22 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
23 Bixby Defendants would conduct additional inspections of the roof and attic using a video
24 camera.

25 28. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
26 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
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1 Bixby Defendants would water test the roof again.

2 29. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
3 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
4 the sources of the leaks were the skylight and the roof on the front of Plaintiffs' house. When
5 Plaintiff Robert asked Defendant Bixby how water could move from the front of the house to the
6 interior locations at the rear of the house, Defendant Bixby said that water moves in strange
7 ways.

8 30. In or about the Fall of 1997, Defendant Bixby, acting on behalf of himself as an
9 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
10 Defendant Bixby had videotaped Plaintiffs' subsequent roofer performing repairs to the front
11 portion of Plaintiffs' roof and that the roofer said on the videotape that the portion of the roof that
12 had been installed by Defendant Bixby and Defendant Flynn looked fine and that the chances of a
13 leak occurring in the main body of the roof was highly unlikely.

14 31. At no time did Defendant Bixby or any one acting on behalf of Defendant Bixby
15 Corporation advise Plaintiffs that: 1) Defendant Bixby and Defendant Flyn had failed to move
16 the air conditioning and heating unit in the course of their work under Second Agreement and the
17 work under Second Agreement was substandard, poor, and not in accordance with industry
18 standards; 2) Defendant Bixby and Defendant Flynn had failed to obtain building permits or
19 governmental inspections for the work under Second Agreement; 3) Bixby Defendants did not
20 make videos of the attic or roof as a part of their inspections; 4) the inspections conducted by
21 Bixby Defendants were not conducted with due care in accordance with prevailing industry
22 standards; 5) the source of the leakage was the roof that was the subject of the work of Defendant
23 Bixby and Defendant Flynn under Second Agreement; and 6) Defendant Bixby did not videotape
24 Plaintiffs' subsequent roofer conducting the roofing work on the front of Plaintiffs' house stating
25 that the portion of the roof that had been installed under Second Agreement by Defendant Bixby
26 and Defendant Flynn looked fine nor did the roofer state on the videotape that the chances of a
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1 leak in the main body of the roof which included the air conditioning and heating unit was highly
2 unlikely.

3 32. In fact, Plaintiffs are informed and believe that Bixby Defendants misled
4 Plaintiffs and suppressed and hid from Plaintiffs: 1) the failures of Defendant Bixby and
5 Defendant Flynn to move the air conditioning and heating unit in the course of their work under
6 Second Agreement and the poor and substandard quality of the work by Defendant Bixby and
7 Defendant Flynn under Second Agreement and the failure of Defendant Bixby and Defendant
8 Flynn, in performing that work, to conform to industry standards; 2) the failures of Defendant
9 Bixby and Defendant Flynn to obtain building permits and governmental inspections for the
10 work performed under Second Agreement; 3) the failure of Bixby Defendants to record on
11 videotape the attic or roof as a part of the inspections; 4) the failures of Bixby Defendants to
12 conduct inspections of the attic and roof of Plaintiffs' house with respect to the work of
13 Defendant Bixby and Defendant Flynn under Second Agreement with due care in accordance
14 with prevailing industry standards; 5) the source of the leakage was the roof that was the subject
15 of the work of Defendant Bixby and Defendant Flynn under Second Agreement, and 6)
16 Defendant Bixby did not videotape the roofer conducting the roofing work on the front of
17 Plaintiffs' house stating on videotape that the portion of the roof that had been installed under
18 Second Agreement by Defendant Bixby and Defendant Flynn looked fine and the chances of a
19 leak in the main body of the roof which included the air conditioning and heating unit was highly
20 unlikely.

21 33. Each one of the above representations by Bixby Defendants or their agents was
22 false. The true facts are that Bixby Defendants did not wish to help Plaintiffs, did not have
23 Plaintiffs' best interests at heart, were not willing to do what was necessary to locate and remedy
24 any leak, did not run water on Plaintiffs' roof in adequate water tests while Bixby Defendants'
25 employees were in the attic searching for any leaks, did not conduct adequate investigations of
26 Plaintiffs' roof and attic, did not conduct inspections of the roof and attic using a video camera
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1 and run adequate water tests on the roof again, the leak was not caused by the skylight or the roof
2 on the front of the house, and Plaintiffs believe that upon adequate investigation the facts will
3 show that Plaintiffs' subsequent roofer did not tell Defendant Bixby on videotape the statements
4 which Defendant Bixby attributes to the roofer.

5 34. Bixby Defendants and their agents knew or should have known that each of the
6 above representations was false and incomplete at the time they made them.

7 35. Bixby Defendants and their agents made the representations with the intent that
8 Plaintiffs rely on each and every one of them.

9 36. Plaintiffs believed that each and every one of the representations were true and in
10 reliance upon them replaced the skylight and the roof in front of the house and did not undertake
11 additional investigation of the leaking other than through Bixby Defendants until after additional
12 leaking occurred, which was within two years of the filing of this complaint. Also, Plaintiffs
13 relied on each and every one of the representations in delaying filing suit against Bixby
14 Defendants. Furthermore, Plaintiffs expended considerable sums of money unnecessarily in an
15 effort to remedy the leaking.

16 37. Once the additional leaking occurred withing two years before the filing of the
17 complaint, Plaintiffs acted with diligence to locate and repair leaking, to make demand upon
18 Bixby Defendants, and to file this lawsuit.

19 38. The leaking damaged the interior of Plaintiffs' attic and the interior of the house
20 and caused growth in Plaintiffs' attic and house of dangerous toxic molds.

21 39. Bixby Defendants assumed duties to Plaintiffs to locate, report to Plaintiffs
22 regarding, and repair leaks and other defects in Plaintiffs' roof, and to inform Plaintiffs of the
23 inadequacies and defects in Defendant Bixby's and Defendant Flynn's work in the procedures
24 used in the performance of Second Agreement and the failure to obtain the necessary building
25 permits and job inspections. Bixby Defendants failed to discharge these duties, and actively
26 disguised and hid from Plaintiffs information regarding improper construction methods and
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1 procedures by Defendant Bixby and Defendant Flynn, failures to obtain necessary permits and
2 inspections, and the existence of a leak and defects in Plaintiffs' roof.

3 40. Plaintiffs' reliance on each and every one of the Bixby Defendants' and their
4 agents' representations was reasonable because Defendant Bixby owed a contractual duty to
5 perform work under First Agreement and Second Agreement in a substantial and workmanlike
6 manner in accordance with industry standards. Moreover Bixby Defendants assumed the duties
7 described above in paragraph 39. Based on these duties, the fact that Plaintiffs actively pressed
8 Bixby Defendants for inspections and reports, and the fact that Bixby Defendants' provided
9 numerous reports to Plaintiffs; Plaintiffs reasonably did not believe Bixby Defendants and their
10 agents were not telling the truth.

11 41. None of the defendants should be allowed to assert the defense of statute of
12 limitations because of their fraudulent concealment of causes of action from Plaintiff in
13 accordance with the holding in San Bernardino County v. Sapp (1958) 156 Cal.App.2d 55.

14 42. Furthermore, all defendants should be estopped from asserting the defense of
15 statute of limitations based upon the representations of Bixby Defendants and their agents, Bixby
16 Defendants' intention that Plaintiffs' rely on these representations, Plaintiffs' ignorance of the
17 true facts, and Plaintiffs' reliance upon these representations.

18 II. FIRST CAUSE OF ACTION

19 (BREACH OF CONTRACT AGAINST BIXBY DEFENDANTS AND DOES 1 THROUGH
20 100)

21 43. Plaintiffs incorporate here the allegations in paragraphs 1 through 42.

22 44. Plaintiffs did and performed each and every act and thing incumbent on them to
23 be performed fully and completely in accordance with the terms and provisions of First
24 Agreement, except in so far as such performance has been prevented by the acts and omissions of
25 Bixby Defendants, and each of them.

26 45. Plaintiffs are informed and believe that Defendant Bixby Corporation
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1 incorporated on or around June 27, 1995, after Plaintiffs entered into First Agreement with
2 Defendant Bixby. Plaintiffs are further informed and believe that upon incorporation, Defendant
3 Bixby Corporation assumed all of the construction business activities and all of the assets and
4 liabilities of Defendant Bixby's construction business. Plaintiffs never agreed that Defendant
5 Bixby would be relieved of liability resulting for his dealings and actions with Plaintiffs.

6 46. Bixby Defendants never informed Plaintiffs of Defendant Bixby Corporation's
7 incorporation but continued to operate seamlessly with Plaintiffs under the same or a
8 substantially similar name as Defendant Bixby had done all along. Defendant Bixby thereby
9 inextricably combined, mixed, and confused his personal construction business and activities
10 with the construction business and activities of Defendant Bixby Corporation in such a manner
11 that the construction business and activities of Defendant Bixby and Defendant Bixby
12 Corporation were indistinguishable from one another. Unbeknownst to Plaintiffs, Plaintiffs
13 continued to do business with Defendant Bixby as both an individual and as an agent of
14 Defendant Bixby Corporation.

15 47. As a legal result of the breach of First Agreement, Plaintiffs have been damaged
16 in a sum in excess of \$25,000.00 according to proof.

17 Wherefore, Plaintiffs pray as set forth below.

18 III. SECOND CAUSE OF ACTION

19 (BREACH OF CONTRACT AGAINST BIXBY DEFENDANTS AND DEFENDANT FLYNN
20 AND DOES 1 THROUGH 100)

21 48. Plaintiffs incorporate here the allegations in paragraphs 1 through 42.

22 49. Plaintiffs did and performed each and every act and thing incumbent on them to
23 be performed fully and completely in accordance with the terms and provisions of Second
24 Agreement, except in so far as such performance has been prevented by the acts and omissions of
25 Bixby Defendants, Defendant Flynn, Does 1 through 100, and each of them.

26 50. Plaintiffs are informed and believe that Defendant Bixby Corporation
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1 incorporated on or around June 27, 1995, after Plaintiffs entered into Second Agreement with
2 Defendant Bixby. Plaintiffs are further informed and believe that upon incorporation, Defendant
3 Bixby Corporation assumed all of the construction business activities and all of the assets and
4 liabilities of Defendant Bixby's construction business. Plaintiffs never agreed that Defendant
5 Bixby would be relieved of liability resulting for his dealings and actions with Plaintiffs.

6 51. Bixby Defendants never informed Plaintiffs of Defendant Bixby Corporation's
7 incorporation but continued to operate seamlessly with Plaintiffs under the same or a
8 substantially similar name as Defendant Bixby had done all along. Defendant Bixby thereby
9 inextricably combined, mixed, and confused his personal construction business and activities
10 with the construction business and activities of Defendant Bixby Corporation in such a manner
11 that the construction business and activities of Defendant Bixby and Defendant Bixby
12 Corporation were indistinguishable for one another. Unbeknownst to Plaintiffs, Plaintiffs
13 continued to do business with Defendant Bixby as an individual and as an agent of Defendant
14 Bixby Corporation.

15 52. As a legal result of the breach of the Second Agreement, Plaintiffs have been
16 damaged in a sum in excess of \$25,000.00 according to proof.

17 Wherefore, Plaintiffs pray as set forth below.

18 IV. THIRD CAUSE OF ACTION

19 (FRAUD AGAINST BIXBY DEFENDANTS AND DOES 1 THROUGH 100)

20 53. Plaintiffs incorporate here the allegations in paragraphs 1 through 42.

21 54. Plaintiffs are informed and believe that, when leaking occurred in the portion of
22 the roof on Plaintiffs' house on which Defendant Bixby and Defendant Flynn had worked under
23 Second Agreement, Bixby Defendants commenced a course of dealing involving fraud,
24 recklessness, gross negligence, and negligence in order to avoid liability on the party of
25 Defendant Bixby relating to the work under Second Agreement. That course of dealing included,
26 among other things, improper and inadequate inspections of the roof and attic of Plaintiffs'
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1 house, untrue statements, misleading statements, suppression of information, and omissions to
2 provide information that Bixby Defendants had assumed a duty to provide to Plaintiffs.

3 55. Thus, in or about Fall 1996 and Fall 1997, Bixby Defendants intentionally and
4 negligently, to Plaintiffs' detriment and damage 1) made statements to Plaintiffs which Bixby
5 Defendants knew were false or for which Bixby Defendants had no reasonable grounds for
6 believing them to be true, 2) omitted important information from statements made to Plaintiffs
7 while having duties to Plaintiffs to disclose such information; 3) mislead Plaintiffs; 4) suppressed
8 facts from Plaintiffs that Bixby Defendants were bound to provide; 5) provided information that
9 was likely to mislead Plaintiffs for lack of communication of other facts; or 6) made promises
10 and gave assurance to Plaintiffs without the intention of performing said promises and assurances
11 appropriately.

12 56. In or around the Fall of 1996 and the Fall 1997, Bixby Defendants and their agent,
13 Chris Calderone, repeatedly assured Plaintiffs that Bixby Defendants wished to help Plaintiffs,
14 had Plaintiffs' best interests at heart, and would do what was necessary to locate and remedy any
15 leak in Plaintiffs' roof.

16 57. In or around the Fall of 1996, Chris Calderone, the project manager for Bixby
17 Defendants, told Plaintiff Deborah that key employees of Bixby Defendants had conducted a
18 thorough investigation of Plaintiffs' roof and did not find any leak. Plaintiff Deborah understood
19 those key employees to be agents of Bixby Defendants and that they were acting within the
20 course and scope of this agency when they conducted the investigation. In communicating this
21 information to Plaintiff Deborah, Chris Calderone was acting as the agent of Bixby Defendants.

22 58. At the same, Mr. Calderone told Plaintiff Deborah that Bixby Defendants had run
23 water on Plaintiffs' roof while other employees of Bixby Defendants were in the attic searching
24 for any leak. Mr. Calderone reported that none were found.

25 59. Thereafter, in or around the Fall of 1996, Defendant Bixby, acting on behalf of
26 himself as an individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff
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1 Robert that Bixby Defendants would conduct additional thorough inspections of Plaintiffs' attic
2 and roof. Defendant Bixby assured Plaintiff Robert that no leak was visible from the attic.

3 60. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
4 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
5 Bixby Defendants would conduct additional inspections of the roof and attic using a video
6 camera.

7 61. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
8 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
9 Bixby Defendants would water test the roof again.

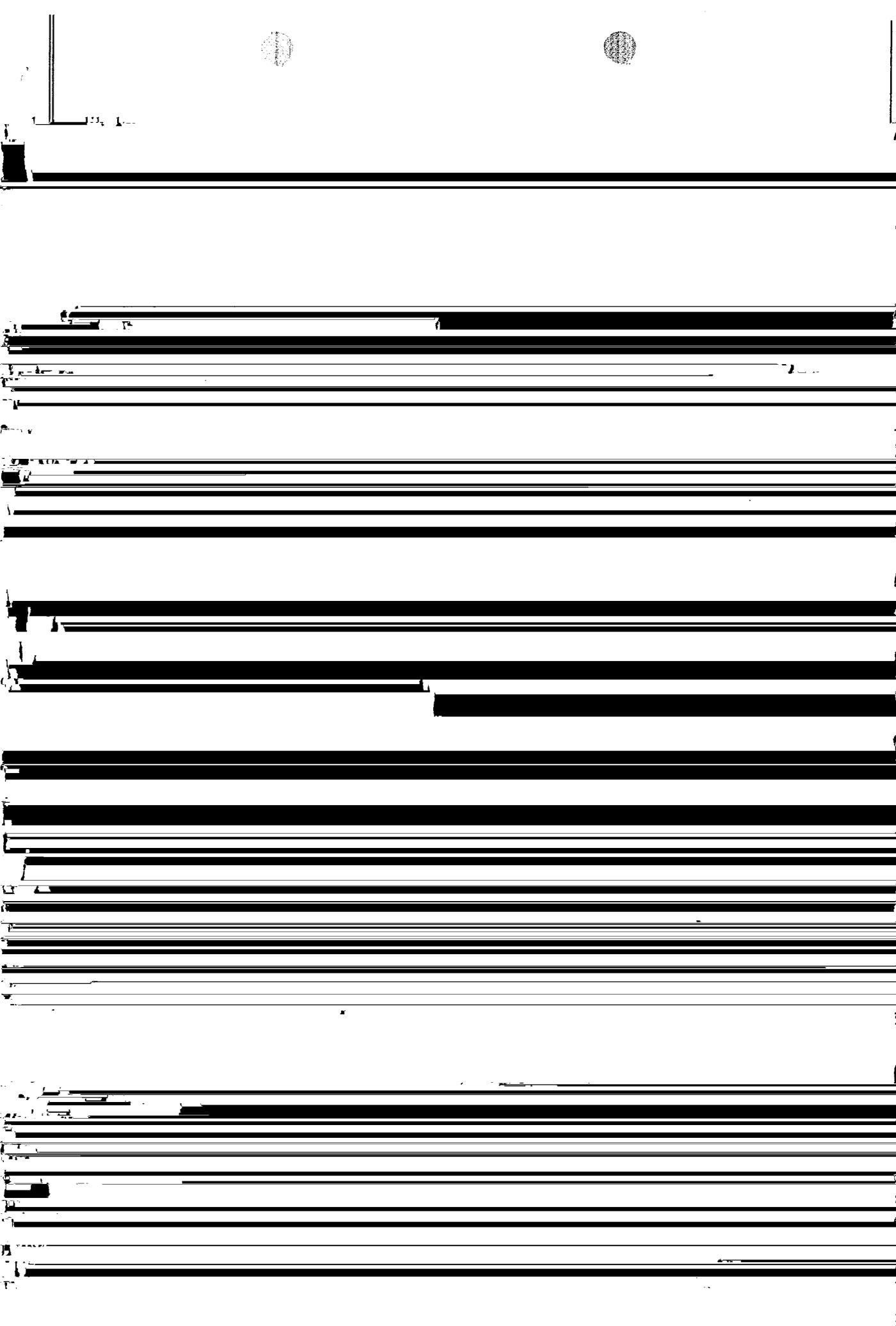
10 62. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
11 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
12 the sources of the leaks were the skylight and the roof on the front of Plaintiffs' house. When
13 Plaintiff Robert asked Defendant Bixby how water could move from the front of the house to the
14 interior locations at the rear of the house, Defendant Bixby said that water moves in strange
15 ways.

16 63. In or about the Fall of 1997, Defendant Bixby, acting on behalf of himself as an
17 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
18 Defendant Bixby had videotaped Plaintiffs' subsequent roofer performing repairs to the front
19 portion of Plaintiffs' roof and that the roofer said on the videotape that the portion of the roof that
20 had been installed by Defendant Bixby and Defendant Flynn looked fine and that the chances of a
21 leak occurring in the main body of the roof was highly unlikely.

22 64. At no time did Defendant Bixby or any one acting on behalf of Defendant Bixby
23 Corporation advise Plaintiffs that: 1) Defendant Bixby and Defendant Flynn had failed to move
24 the air conditioning and heating unit in the course of their work under Second Agreement and the
25 work under Second Agreement was substandard, poor, and not in accordance with industry
26 standards; 2) Defendant Bixby and Defendant Flynn had failed to obtain building permits or
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1 governmental inspections for the work under Second Agreement; 3) Bixby Defendants did not
2 make videos of the attic or roof as a part of their inspections; 4) the inspections conducted by
3 Bixby Defendants were not conducted with due care in accordance with prevailing industry
4 standards; 5) the source of the leakage was the roof that was the subject of the work of Defendant
5 Bixby and Defendant Flynn under Second Agreement; and 6) Defendant Bixby did not videotape
6 Plaintiffs' subsequent roofer conducting the roofing work on the front of Plaintiffs' house stating
7 on the videotape that the portion of the roof that had been installed under Second Agreement by
8 Defendant Bixby and Defendant Flynn looked fine or that the chances of a leak in the main body
9 of the roof which included the air conditioning and heating unit was highly unlikely.

10 65. In fact, Plaintiffs are informed and believe that Bixby Defendants mislead
11 Plaintiffs and suppressed and hid from Plaintiffs: 1) the failures of Defendant Bixby and
12 Defendant Flynn to move the air conditioning and heating unit in the course of their work under
13 Second Agreement and the poor and substandard quality of the work by Defendant Bixby and
14 Defendant Flynn under Second Agreement and the failure of Defendant Bixby and Defendant
15 Flynn, in performing that work, to conform to industry standards; 2) the failures of Defendant
16 Bixby and Defendant Flynn to obtain building permits and governmental inspections for the
17 work performed under Second Agreement; 3) the failure of Bixby Defendants to record on
18 videotape the attic or roof as a part of the inspections; 4) the failures of Bixby Defendants to
19 conduct inspections of the attic and roof of Plaintiffs' house with respect to the work of
20 Defendant Bixby and Defendant Flynn under Second Agreement with due care in accordance
21 with prevailing industry standards; 5) the source of the leakage was the roof that was the subject
22 of the work of Defendant Bixby and Defendant Flynn under Second Agreement, and 6)
23 Defendant Bixby did not videotape the roofer conducting the roofing work on the front of
24 Plaintiffs' house stating on videotape that the portion of the roof that had been installed under
25 Second Agreement by Defendant Bixby and Defendant Flynn looked fine and the chances of a
26 leak in the main body of the roof which included the air conditioning and heating unit was highly
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1 and caused growth in Plaintiffs' attic and house of dangerous toxic molds.

2 72. As a legal result of said fraud, Plaintiffs have suffered damages in an amount in
3 excess of \$25,000.00 according to proof.

4 73. Bixby Defendants, and each of them, acted wilfully, intentionally, knowingly, and
5 recklessly in misrepresenting and omitting the facts alleged above in paragraphs 56 through 65.
6 Bixby Defendants, and each of their, misrepresentations and omissions to Plaintiffs were
7 oppressive and malicious and done for the intentional and wrongful motive inducing Plaintiffs
8 into contracting with Bixby Defendants to perform additional work that was unnecessary and to
9 cover up Bixby Defendants defective work and incompetence. Therefore, Plaintiffs are entitled
10 to punitive damages in an amount in excess of \$25,000.00 according to proof.

12 Wherefore Plaintiffs pray as set forth below.

13 V. FOURTH CAUSE OF ACTION

14 (NEGLIGENT MISREPRESENTATION AGAINST BIXBY DEFENDANTS AND DOES 1
15 THROUGH 100)

17 74. Plaintiffs incorporate here the allegations of paragraphs 1 through 42 except for
18 paragraph 34.

19 75. Plaintiffs are informed and believe that, when leaking occurred in the portion of
20 the roof on Plaintiffs' house on which Defendant Bixby and Defendant Flynn had worked under
21 Second Agreement, Bixby Defendants commenced a course of dealing involving fraud,
22 recklessness, gross negligence, and negligence in order to avoid liability on the party of
23 Defendant Bixby relating to the work under Second Agreement. That course of dealing included,
24 among other things, improper and inadequate inspections of the roof and attic of Plaintiffs'
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1 house, untrue statements, misleading statements, suppression of information, and omissions to
2 provide information that Bixby Defendants had assumed a duty to provide to Plaintiffs.

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4 76. Thus, in or about Fall 1996 and Fall 1997, Bixby Defendants intentionally and
5 negligently, to Plaintiffs' detriment and damage 1) made statements to Plaintiffs which Bixby
6 Defendants knew were false or for which Bixby Defendants had no reasonable grounds for
7 believing them to be true, 2) omitted important information from statements made to Plaintiffs
8 while having duties to Plaintiffs to disclose such information; 3) mislead Plaintiffs; 4) suppressed
9 facts from Plaintiffs that Bixby Defendants were bound to provide; 5) provided information that
10 was likely to mislead Plaintiffs for lack of communication of other facts; or 6) made promises
11 and gave assurance to Plaintiffs without the intention of performing said promises and assurances
12 appropriately.
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15 77. In or around the Fall of 1996 and the Fall 1997, Bixby Defendants and their agent,
16 Chris Calderone, repeatedly assured Plaintiffs that Bixby Defendants wished to help Plaintiffs,
17 had Plaintiffs' best interests at heart, and would do what was necessary to locate and remedy any
18 leak in Plaintiffs' roof.
19

20 78. In or around the Fall of 1996, Chris Calderone, the project manager for Bixby
21 Defendants, told Plaintiff Deborah that key employees of Bixby Defendants had conducted a
22 thorough investigation of Plaintiffs' roof and did not find any leak. Plaintiff Deborah understood
23 those key employees to be agents of Bixby Defendants and that they were acting within the
24 course and scope of this agency when they conducted the investigation. In communicating this
25 information to Plaintiff Deborah, Chris Calderone was acting as the agent of Bixby Defendants.
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1 79. At the same, Mr. Calderone told Plaintiff Deborah that Bixby Defendants had run
2 water on Plaintiffs' roof while other employees of Bixby Defendants were in the attic searching
3 for any leak. Mr. Calderone reported that none were found.
4

5 80. Thereafter, in or around the Fall of 1996, Defendant Bixby, acting on behalf of
6 himself as an individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff
7 Robert that Bixby Defendants would conduct additional thorough inspections of Plaintiffs' attic
8 and roof. Defendant Bixby assured Plaintiff Robert that no leak was visible from the attic.
9

10 81. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
11 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
12 Bixby Defendants would conduct additional inspections of the roof and attic using a video
13 camera.
14

15 82. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
16 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
17 Bixby Defendants would water test the roof again.
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19 83. In or around the Fall of 1996, Defendant Bixby, acting on behalf of himself as an
20 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
21 the sources of the leaks were the skylight and the roof on the front of Plaintiffs' house. When
22 Plaintiff Robert asked Defendant Bixby how water could move from the front of the house to the
23 interior locations at the rear of the house, Defendant Bixby said that water moves in strange
24 ways.
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26 84. In or about the Fall of 1997, Defendant Bixby, acting on behalf of himself as an
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1 individual and on behalf of Defendant Bixby Corporation as its agent, told Plaintiff Robert that
2 Defendant Bixby had videotaped Plaintiffs' subsequent roofer performing repairs to the front
3 portion of Plaintiffs' roof and that the roofer said on the videotape that the portion of the roof that
4 had been installed by Defendant Bixby and Defendant Flynn looked fine and that the chances of a
5 leak occurring in the main body of the roof was highly unlikely.
6

7 85. At no time did Defendant Bixby or any one acting on behalf of Defendant Bixby
8 Corporation advise Plaintiffs that: 1) Defendant Bixby and Defendant Flynn had failed to move
9 the air conditioning and heating unit in the course of their work under Second Agreement and the
10 work under Second Agreement was substandard, poor, and not in accordance with industry
11 standards; 2) Defendant Bixby and Defendant Flynn had failed to obtain building permits or
12 governmental inspections for the work under Second Agreement; 3) Bixby Defendants did not
13 make videos of the attic or roof as a part of their inspections; 4) the inspections conducted by
14 Bixby Defendants were not conducted with due care in accordance with prevailing industry
15 standards; 5) the source of the leakage was the roof that was the subject of the work of Defendant
16 Bixby and Defendant Flynn under Second Agreement; and 6) Defendant Bixby did not videotape
17 Plaintiffs' subsequent roofer conducting the roofing work on the front of Plaintiffs' house stating
18 on the videotape that the portion of the roof that had been installed under Second Agreement by
19 Defendant Bixby and Defendant Flynn looked fine or that the chances of a leak in the main body
20 of the roof which included the air conditioning and heating unit was highly unlikely.
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25 86. In fact, Plaintiffs are informed and believe that Bixby Defendants mislead
26 Plaintiffs and suppressed and hid from Plaintiffs: 1) the failures of Defendant Bixby and
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1 Defendant Flynn to move the air conditioning and heating unit in the course of their work under
2 Second Agreement and the poor and substandard quality of the work by Defendant Bixby and
3 Defendant Flynn under Second Agreement and the failure of Defendant Bixby and Defendant
4 Flynn, in performing that work, to conform to industry standards; 2) the failures of Defendant
5 Bixby and Defendant Flynn to obtain building permits and governmental inspections for the
6 work performed under Second Agreement; 3) the failure of Bixby Defendants to record on
7 videotape the attic or roof as a part of the inspections; 4) the failures of Bixby Defendants to
8 conduct inspections of the attic and roof of Plaintiffs' house with respect to the work of
9 Defendant Bixby and Defendant Flynn under Second Agreement with due care in accordance
10 with prevailing industry standards; 5) the source of the leakage was the roof that was the subject
11 of the work of Defendant Bixby and Defendant Flynn under Second Agreement, and 6)
12 Defendant Bixby did not videotape the roofer conducting the roofing work on the front of
13 Plaintiffs' house stating on videotape that the portion of the roof that had been installed under
14 Second Agreement by Defendant Bixby and Defendant Flynn looked fine and the chances of a
15 leak in the main body of the roof which included the air conditioning and heating unit was highly
16 unlikely.

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21 87. Each one of the above representations by Bixby Defendants or their agents was
22 false. The true facts are that Bixby Defendants did not wish to help Plaintiffs, did not have
23 Plaintiffs' best interests at heart, were not willing to do what was necessary to locate and remedy
24 any leak, did not run water on Plaintiffs' roof in adequate water tests while Bixby Defendants'
25 employees were in the attic searching for any leaks, did not conduct adequate investigations of
26

1 Plaintiffs' roof and attic, did not conduct inspections of the roof and attic using a video camera
2 and run adequate water tests on the roof again, the leak was not caused by the skylight or the roof
3 on the front of the house, and Plaintiffs believe that upon adequate investigation the facts will
4 show that Plaintiffs' subsequent roofer did not tell Defendant Bixby on videotape the statements
5 which Defendant Bixby attributes to the roofer.
6

7 88. Said misrepresentations were made without reasonable grounds for believing
8 them to be true.
9

10 89. Bixby Defendants and their agents made the representations with the intent that
11 Plaintiffs rely on each and every one of them.

12 90. Plaintiffs believed that each and every one of the representations were true and in
13 reliance upon them replaced the skylight and the roof in front of the house and did not undertake
14 additional investigation of the leaking other than through Bixby Defendants until after additional
15 leaking occurred, which was within two years of the filing of this complaint. Also, Plaintiffs
16 relied on each and every one of the representations in delaying filing suit against Bixby
17 Defendants. Furthermore, Plaintiffs expended considerable sums of money unnecessarily in an
18 effort to remedy the leaking.
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21 91. Once the additional leaking occurred within two years before the filing of the
22 complaint, Plaintiffs acted with diligence to locate and repair leaking, to make demand upon
23 Bixby Defendants, and to file this lawsuit.
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25 92. The leaking damaged the interior of Plaintiffs' attic and the interior of the house
26 and caused growth in Plaintiffs' attic and house of dangerous toxic molds.
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