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Attorney for Defendant MARK J. BIXBY, Individually and dba MJB/BIXBY CONSTRUCTION

EL DORADO CO. SUPERIOR CT.

FILED SEP 12 2003

BY Joseph & Boshilean

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

CALIFORNIA WHOLESALE MATERIAL ) SUPPLY, INC. dba CALPLY, a Corporation)

Plaintiff,

VS.

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MARK J. BIXBY, individually and dba MJB/BIXBY CONSTRUCTION; MARTY DEPAOLI, individually, and DOES 1 through 50, inclusive,

Defendants.

CASE NO. PCL20030376

ANSWER BY MARK J. BIXBY, INDIVIDUALLY AND DBA MJB/BIXBY CONSTRUCTION TO PLAINTIFF'S UNVERIFIED COMPLAINT

COMES NOW Defendant, MARK J. BIXBY, Individually and dba MJB/BIXBY CONSTRUCTION (hereinafter referred to as "Answering Defendant") and files its Answer to the unverified Complaint of Plaintiff CALIFORNIA WHOLESALE MATERIAL SUPPLY, INC. dba CALPLY, a Corporation, as hereinafter set forth.

Pursuant to the provisions of California Code of Civil Procedure, section 431.30, said Answering Defendant denies generally that Plaintiff was or will be damaged in any sums, whatsoever. Furthermore, said Answering Defendant denies generally each and every of the allegations set forth in Plaintiff's Complaint.

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## AFFIRMATIVE DEFENSES

- 1. As a first, separate, distinct and affirmative defense, this Answering Defendant alleges that Plaintiff's Complaint, and each cause of action alleged therein, fails to state facts sufficient to constitute a cause of action.
- 2. As a second, separate, distinct and affirmative defense, this Answering Defendant alleges that it at no time breached any contract with Plaintiff, but that if such a breach did occur, Plaintiff, by its own conduct, waived any such breach and waived any alleged damages resulting from such breach.
- 3. As a third, separate, distinct and affirmative defense, this Answering Defendant alleges that Plaintiff failed to mitigate its damages, which damages, if any, should therefore be proportionately reduced.
- 4. As a fourth, separate, distinct and affirmative defense, this Answering Defendant alleges that if any damages have been sustained by Plaintiff as a result of the acts complained of herein, those damages were proximately caused by acts and omissions of its agents over which this Answering Defendant has no control or responsibility.

WHEREFORE, this Answering Defendant prays for judgment as follows:

- 1. That Plaintiff take nothing by way of its complaint;
- 2. That this Answering Defendant be awarded reasonable attorneys fees in an amount according to proof; and,
- 3. For such other and further relief as the court may deem just and proper.

DATED: September 11, 2003

MOYER, PARSHALL & TWEEDY, LLP

By:

CHARLES A. TWEEDY
Attorneys for Defendant
MARK J. BIXBY, individually and
dba MJB/BIXBY CONSTRUCTION