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LEGAL PROCESS #4

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

10 **'96 AS 00752**

11 MARK J. BIXBY,)
12 Plaintiff,)
13 vs.)
14 MARK WIRSING and DOES 1)
15 through 10,)
16 Defendants.)

Case No.
COMPLAINT FOR DECLARATORY
RELIEF AND MONEY DAMAGES

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18 Plaintiff Mark J. Bixby complains as follows:

19 **GENERAL ALLEGATIONS**

- 20 1. Plaintiff Mark J. Bixby (Bixby) is an adult resident of
21 Sacramento County, California.
22 2. Defendant Mark Wirsing (Wirsing) is an adult resident of
23 Sacramento County, California.
24 3. Plaintiff is ignorant of the true names and capacities of
25 Defendants sued herein as Does 1 through 10, inclusive, and
26 therefore sues these Defendants by fictitious names. Plaintiff
27 will amend this Complaint to allege their true names and capacities
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1 when ascertained. Plaintiff is informed and believes and thereon
2 alleges that each of the fictitiously named Defendants is
3 responsible in some manner for the occurrences herein alleged, and
4 that Plaintiff's damages as herein alleged were proximately caused
5 by their conduct.

6 4. In approximately February 1995 Bixby conceived of an idea
7 for a battery operated convenience light (the Product). Bixby
8 approached Wirsing, who was at that time a business and social
9 acquaintance, to discuss the idea in general terms and to elicit
10 Wirsing's reactions with respect to feasibility, marketability and
11 the like. Also present during the initial discussions was an
12 individual named Wayne Crawford.

13 5. Bixby and Wirsing discussed the possibility of
14 establishing a partnership relationship for development of the
15 Product, but no specific terms were discussed with respect to
16 rights and duties of the parties, nature of each party's ownership
17 interest or the amount of each party's contribution of cash,
18 services or other valuable consideration. No agreement was reached
19 as a result of such discussions, although Bixby did promise that in
20 the event the Product could be successfully manufactured and
21 marketed, he would purchase a new automobile for both Wirsing and
22 Crawford.

23 6. During the course of such discussions, Wirsing indicated
24 to Bixby that Wirsing had a substantial net worth and the prospect
25 for obtaining additional money as a result of certain mining
26 interests which Wirsing claimed to own. Wirsing indicated that he
27 would be able to invest in excess of \$300,000 for development of
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1 the Product. However, no firm commitment was made by either Bixby
2 or Wirsing with respect to Wirsing's investment of cash. Moreover,
3 no discussions were held with respect to Wirsing's procurement or
4 solicitation of funds from third party investors, and no specific
5 authority was given Wirsing in that regard.

6 7. Such general discussions did not result in or constitute
7 an oral agreement between Bixby and Wirsing since the parties
8 failed to agree upon any or all material terms.

9 8. Notwithstanding the fact that no partnership or other
10 agreement arose between Bixby and Wirsing (except for Bixby's
11 gratuitous agreement to buy Wirsing an automobile in the event the
12 Product could be successfully manufactured and marketed), Bixby and
13 Wirsing did undertake certain preliminary steps to explore the
14 feasibility of the Product. Such preliminary steps included
15 entering into an agreement with Keck-Craig, Inc., (Keck) a product
16 engineering and development firm in the form of Exhibit A hereto
17 (the Keck Agreement). In the Keck Agreement, Bixby and Wirsing
18 were jointly identified as "client". Although at the time the Keck
19 Agreement was executed by Bixby and Wirsing, no partnership or
20 other joint ownership agreement, oral or written had been entered
21 into between Bixby and Wirsing.

22 9. At the time of entering into the Keck Agreement, Bixby
23 and Wirsing did agree that Wirsing would pay all amounts owed Keck
24 under the Keck Agreement, including the deposit amount.
25 Notwithstanding his agreement, Wirsing was unable to pay the entire
26 deposit, and Bixby contributed \$1,500 of the \$3,000 initial
27 deposit. Further in breach of his agreement to pay all amounts
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1 coming due under the Keck Agreement, Wirsing's only additional
2 payment was \$700, representing one-half of the first bill presented
3 from Keck. Thereafter Wirsing refused to make any further payments
4 to Keck in violation of his agreement. To date, Bixby has paid in
5 excess of \$12,000 to Keck under the Keck Agreement.

6 **FIRST CAUSE OF ACTION**
7 **(Declaratory Relief)**

8 10. Plaintiff realleges and incorporates by reference all the
9 allegations of paragraphs 1 through 9 above as if set forth in
10 fully.

11 11. An actual controversy exists between Bixby and Wirsing as
12 follows:

13 a. Bixby contends as follows: Wirsing has no rights in
14 the Product, or in the Keck Agreement. No partnership relationship
15 or other form of joint ownership ever arose between Bixby and
16 Wirsing with respect to the Product. In the event a partnership or
17 other relationship ever arose between Bixby and Wirsing with
18 respect to the Product, Wirsing has materially breached his
19 obligations under any such agreement, thereby excusing Bixby from
20 any further obligations to Wirsing whatsoever. Wirsing's non-
21 performance of his obligations under any purported agreement
22 constitutes a failure of consideration. Accordingly, all rights in
23 the Product and in the Keck Agreement reside solely and exclusively
24 in Bixby and Wirsing has no interest therein whatsoever.

25 b. Wirsing contends as follows: An oral partnership was
26 formed between Bixby and Wirsing with respect to the Product.
27 Wirsing further contends that he and Bixby are either partners or
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1 joint owners with respect to rights under the Keck Agreement.

2 12. A judicial declaration of the rights of the parties is
3 appropriate herein, since money damages constitute an inadequate
4 remedy. Further, the parties are equitably entitled to a judicial
5 declaration with respect to their rights and duties for their
6 mutual guidance with respect to future conduct.

7 **SECOND CAUSE OF ACTION**
8 **(Money Damages Against Wirsing)**

9 13. Plaintiff realleges and incorporates by reference all the
10 allegations of paragraphs 1 through 12 above as if set forth in
11 fully.

12 14. In the event the Court should determine that Bixby and
13 Wirsing had in fact formed an oral partnership or other joint
14 ownership form of agreement with respect to the Product, Wirsing
15 materially breached his obligations thereunder by failing to invest
16 the sum of \$300,000, or any other sum over and above the amount of
17 \$2,200 which Wirsing advanced under the Keck Agreement, and certain
18 incidental expenses associated with travel, hotel and taxi fare,
19 which constitutes a material breach of contract by Wirsing.

20 15. As a proximate and foreseeable result of Wirsing's
21 breach, Bixby has incurred damages, including the requirement that
22 he advance his own funds for development of the Product. In
23 addition, Bixby has experienced delays in development of the
24 product, additional costs, including additional attorney's fees
25 incurred in connection with resolution of the ongoing dispute with
26 Wirsing and potential loss of market position due to delays in
27 production. The exact amount of damages incurred by Bixby as a
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1 result of such breach will be itemized at trial.

2 Accordingly, Bixby prays as follows:

3 A. On the First Cause of Action for a judicial declaration
4 as follows:

5 1. No oral or other partnership relationship ever arose
6 between Bixby and Wirsing with respect to the Product;

7 2. Wirsing has no further rights under the Keck
8 Agreement due to material breach of his obligation to pay all
9 amounts arising thereunder, and that any and all rights which
10 Wirsing may have otherwise held with respect to the Keck Agreement
11 have been terminated due to material breach by Wirsing.

12 B. On the Second Cause of Action for a money judgment in
13 favor of Bixby and against Wirsing for all amounts of damages
14 proven at trial.

15 C. For costs of suit.

16 D. For such other and further relief as the Court may deem
17 just and proper.

18 DATED this 6 day of February, 1996.

19 LAW OFFICES OF MICHAEL L. HANKS

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22 Michael L. Hanks, Esq.
23 Attorney for Plaintiff Bixby
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