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DEPUTY

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MARTY DePAOLI AND ALLISON DePAOLI
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8 SUPERIOR COURT OF CALIFORNIA - COUNTY OF EL DORADO
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10

11 MJB BIXBY CONSTRUCTION, INC.)

12 Plaintiff,)

13 vs.)

14 MARTY DePAOLI, ALLISON DePAOLI,)
PLACER SIERRA BANK and DOES 1 through)
15 100, inclusive)

16 Defendants.)

17 MARTY DePAOLI and ALLISON DePAOLI.)

18 Cross-Complainants,)

19 vs.)

20 MJB BIXBY CONSTRUCTION, INC. and)
MOES 1 through 25, inclusive)

21 Cross-Defendants.)
22

CASE NO. PC 20030272

MARTY AND ALLISON DePAOLI'S
CROSS-COMPLAINT FOR:

- 1) BREACH OF CONTRACT
- 2) NEGLIGENCE
- 3) INTENTIONAL MISREPRESENTATION
- 4) NEGLIGENT MISREPRESENTATION
- 5) SLANDER OF TITLE
- 6) B&P 17200
- 7) TRESPASS
- 8) CONVERSION

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23 Defendants MARTY DePAOLI, ALLISON DePAOLI (hereinafter, collectively "the
24 DePAOLIS") cross-complain against plaintiff and cross-defendant MJB BIXBY
25 CONSTRUCTION, INC. ("BIXBY") and MOES 1-25 as follows:
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1 GENERAL ALLEGATIONS

2 1. The DePAOLIS at all times relevant to this litigation were the owners of
3 certain real property located at 31 Guadalupe Drive, El Dorado Hills, California ("REAL
4 PROPERTY").

5 2. The DePAOLIS are informed and believe and thereon allege that plaintiff
6 and cross-defendant BIXBY was at all times relevant to this litigation a licensed contractor in the
7 state of California.

8 3. The DePAOLIS are unaware of the true names and identities of Cross-
9 defendants MOES 1-25 inclusive, and have sued said MOE Cross-defendants by such fictitious
10 names. The DePAOLIS will amend this Cross-complaint to reflect the MOE Cross-defendants'
11 true names and capacities when they have been ascertained. The DePAOLIS are informed and
12 believe, and thereon allege, that each of MOES 1 through 25 is at fault in some manner for the
13 acts and omissions alleged in the Cross-complaint.

14 4. The DePAOLIS are informed and believe, and thereon allege, that at all
15 times herein mentioned, BIXBY and MOES 1 through 25, inclusive, were the principals, agents,
16 joint-venturers, partners, parents, subsidiaries, servants and employees of their Co-defendants
17 and in doing the things herein mentioned were acting in the scope of that relationship with
18 permission and consent from their Co-Cross-defendants.

19 5. Plaintiff and Cross-defendant BIXBY's Complaint is incorporated by
20 reference as if set forth in full for the purpose of illustrating, but not for the truth of, the
21 allegations set forth therein. The DePAOLIS have filed an Answer to the Complaint which
22 denies the material allegations thereof, and which further denies that the DePAOLIS are in any
23 way responsible or liable in any manner whatsoever for any damages alleged in the Complaint to
24 have been suffered by BIXBY.

25 6. On or about April 24, 2002, BIXBY entered into a written contract
26 ("Contract") with the DePAOLIS. Pursuant to the Contract, BIXBY was to furnish and provide
27 all necessary labor and material for certain works of improvement to the subject REAL
28

1 PROPERTY described therein. The DePAOLIS agreed to pay BIXBY in accordance with the
2 terms of the contract.

3 7. From and after the existence of the contract, the DePAOLIS paid BIXBY in
4 accordance with the terms of the contract. BIXBY without justification failed to deliver services
5 and labor to the DePAOLIS pursuant to the terms and conditions of the contract. Among the acts
6 and omissions that were material breaches to the contract, BIXBY 1) failed to perform the
7 contract within the time frame specified in the contract; 2) failed to pay subcontractors and
8 suppliers in a timely fashion pursuant to the terms of the contract after Bixby had been paid for
9 such subcontractors' work; 3) failed to coordinate with other work on the project; 4) failed to
10 follow the change order process enumerated in the contract; 5) failed to submit draw requests in
11 conformance with the loan documents; 6) failed to perform the work in a workmanlike manner;
12 and 7) failed to provide a proper accounting of the monies drawn.

13 8. On or after March 3, 2003, the DePAOLIS requested that BIXBY cease and
14 desist all construction until further notification by reason of the aforesaid breaches of contract,
15 and the failure to perform services as required by the contract.

16 9. On March 26, 2003, BIXBY recorded with the El Dorado County Recorder
17 a Mechanic's Lien in the sum of \$213, 500.

18 10. The DePAOLIS have made numerous requests to BIXBY to provide
19 accounting information which BIXBY claims supports the amount of the said Mechanic's Lien.
20 To date, BIXBY has disregarded these requests and has failed to provide such information.

21 11. On or about July 25, 2002, BIXBY purchased a video wall for \$7,500, using
22 construction funds, at the request of the DePAOLIS. Despite the DePAOLIS' requests that the
23 said video wall be returned to the DePAOLIS, the video wall remains in BIXBY's possession.

24 12. The DePAOLIS are informed and believe that on or about May 18, 2003,
25 BIXBY, without any permission or authorization, entered onto the subject REAL PROPERTY
26 and changed the locks, removed inspection cards and removed plans from the premises that were
27 the property of the DePAOLIS.

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1 13. The DePAOLIS have incurred significant damages as a result of BIXBY's
2 acts and omissions and will continue to incur damages while the said Mechanic's Lien remains.

3 **FIRST CAUSE OF ACTION**

4 **(Breach of Contract against BIXBY and MOES 1-25)**

5 14. The DePAOLIS re-allege paragraphs 1 through 13 above and incorporate
6 them by reference as if set forth in full.

7 15. A valid and binding written Contract exists or existed between the
8 DePAOLIS and BIXBY and cross-defendants MOES 1-25.

9 16. The DePAOLIS have fully discharged all of their obligations under the
10 Contract except those obligations that the DePAOLIS were otherwise excused from performing.

11 17. BIXBY and cross-defendants MOES 1-25 have failed to perform their
12 obligations under the contract, as alleged herein, including receipt of money in excess of
13 amounts owed and failure to perform in accordance with contract documents.

14 18. The DePAOLIS have suffered damages as a result of BIXBY's and MOES
15 1-25's breach in an amount in excess of \$35,500.00, and according to proof.

16 WHEREFORE, the DePAOLIS prays for judgment as set forth below.

17 **SECOND CAUSE OF ACTION**

18 **(Negligence as to BIXBY and MOES 1-25)**

19 19. The DePAOLIS re-allege paragraphs 1 through 18 above and incorporate
20 them by reference as if set forth in full.

21 20. BIXBY and cross-defendants MOES 1-25 had a duty to perform their
22 contract work, including, but not limited to 1) performing the contract within the time frame
23 specified in the contract; 2) paying subcontractors and suppliers within the time frame specified
24 in the contract; 3) coordinating other work on the project; 4) following the change order process
25 enumerated in the contract; 5) submitting draw requests in conformance with loan documents; 6)
26 performing the work in a workmanlike manner; and 7) providing proper accounting of the dollars
27 drawn.

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1 21. BIXBY and cross-defendants MOES 1-25 owed a duty to comply with the
2 plans and specifications, the prevailing building covenants and regulations and the applicable
3 standards of care to perform their work for the DePAOLIS as evidenced by the contract.

4 22. The DePaolis are informed and believe that BIXBY and cross-defendants
5 MOES 1-25 negligently failed to perform their work according to the plans and specifications
6 and in conformance with the Building Code and regulations and the applicable standard of care.
7 The DePAOLIS are further informed and believe that the work of BIXBY and cross-defendants
8 and each of them was defective, requiring repair, replacement and removal of portions of the
9 work.

10 23. As a direct and proximate result of the negligence and carelessness of
11 BIXBY and cross-defendants MOES 1-25 as set forth above, the DePAOLIS have sustained
12 damages according to proof at trial.

13 WHEREFORE, the DePAOLIS prays for judgment as set forth below.

14 **THIRD CAUSE OF ACTION**
15 **(Fraud - Intentional Misrepresentation as to BIXBY and MOES 1-25)**

16 24. The DePAOLIS re-allege paragraphs 1 through 23 above and incorporate
17 them by reference as if set forth in full.

18 25. The DePAOLIS allege on information and belief that Mark Bixby and cross-
19 defendants had authority to act on behalf of BIXBY and cross-defendants MOES 1-25. The
20 DePAOLIS further allege that at the time Mark Bixby made the representations herein alleged,
21 he was acting in the course and scope of his authority.

22 26. Prior to entering into the contract with the DePAOLIS, Mark Bixby and
23 MOES 1-25 represented that BIXBY and cross-defendants MOES 1-25 would perform all work
24 in a timely and workmanlike manner on budget and in conformance with the terms of the
25 contract.

26 27. The representations made were false. The true facts are that BIXBY and
27 cross-defendants MOES 1-25 did not adhere to the terms agreed upon in contract, nor did they
28 perform their duties agreed upon by BIXBY and cross-defendant MOES 1-25 with the

1 DePAOLIS for the price stated in the contract.

2 28. The DePAOLIS allege on information and belief that when Mark Bixby and
3 MOES 1-25 made the representations, they knew them to be false and made them with the intent
4 to deceive and defraud the DePAOLIS and to induce the DePAOLIS to act in reliance on these
5 representations in the manner hereinafter alleged or with the expectation that BIXBY and cross-
6 defendants MOES 1-25 would so act.

7 29. The DePAOLIS, at the time these representations were made and at the time
8 the DePAOLIS acted, were ignorant of the falsity of representations and believed them to be
9 true. In reliance on these representations, the DePAOLIS were induced to and did pay BIXBY
10 and cross-defendants MOES 1-25 pursuant to the requests for payment, including payment for
11 materials supplied. Had the DEPAOLIS known the actual facts, they would not have taken such
12 action. The DePAOLIS' reliance was justified because they had no reason to believe that the
13 representations were false.

14 30. As a proximate result of the fraudulent acts of BIXBY and cross-defendants
15 MOES 1-25, the DePAOLIS were induced to enter into a contractual relationship with BIXBY
16 based on estimates which were false and overstated. Had the true facts been known, the
17 DePAOLIS would not have contracted with BIXBY, and would not have incurred the expenses
18 alleged herein. The DePAOLIS have also been forced to expend sums to protect the underlying
19 property from BIXBY's fraudulent lien and have been forced to defend the underlying action on
20 behalf of themselves regarding damages according to proof.

21 31. BIXBY intentionally misrepresented the facts, deceived the DePAOLIS and
22 concealed material facts known to BIXBY and cross-defendants MOES 1-25 with intent on the
23 part of BIXBY and cross-defendants MOES 1-25 to deprive the DePAOLIS of their legal rights
24 and otherwise cause injury, and it was despicable conduct that subjected the DePAOLIS to cruel
25 and unjust hardship in conscious disregard of the DePAOLIS rights so as to justify an award of
26 exemplary and punitive damages.

27 WHEREFORE, the DePAOLIS pray for judgment as set forth below.
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FOURTH CAUSE OF ACTION

(Negligent Misrepresentation as to BIXBY and MOES 1-25)

32. The DePAOLIS re-allege paragraphs 1 through 27 above and incorporate them by reference as if set forth in full.

33. When BIXBY and cross-defendants MOES 1-25 made the representations alleged above, they had no reasonable grounds for believing them to be true.

34. BIXBY and cross-defendants MOES 1-25 made the representations alleged herein with the intent of inducing the DePAOLIS to act in reliance on the representations in the manner above alleged or with the expectation that the DePAOLIS would so act and the DePAOLIS suffered damages thereby in an amount according to proof at trial.

WHEREFORE, the DePAOLIS pray for judgment as set forth below.

FIFTH CAUSE OF ACTION

(Slander of Title as to BIXBY and MOES 1-25)

35. The DePAOLIS re-allege paragraphs 1-28 above and incorporate them by reference as if set forth in full.

36. The DePAOLIS are, and at all times herein mentioned were, the owners of the subject REAL PROPERTY.

37. BIXBY and cross-defendants MOES 1-25 falsely claim that the DePAOLIS owe BIXBY and cross-defendants MOES 1-25 a sum of money in excess of \$200,000 and have recorded a Mechanic's Lien on the subject REAL PROPERTY, claiming an interest to the REAL PROPERTY in said amount.

38. The DePAOLIS have incurred damages as a result of the Mechanic's Lien being recorded on the subject REAL PROPERTY in the form of financing costs, interest costs and attorneys fees according to proof.

1 WHEREFORE, the DePAOLIS pray for judgment as set forth below.

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4 **SIXTH CAUSE OF ACTION**

5 (Violations of Business and Professions Code Section 17200 *et seq.*

6 [Unlawful, unfair, and fraudulent business practices] as to BIXBY and MOES 1-25)

7 39. The DePAOLIS re-allege paragraphs 1 through 31 and 36-38 above and
8 incorporate them by reference as if set forth in full.

9 40. California Business & Professions Code Section 17200 provides that
10 unfair competition means and includes "any unlawful, unfair or fraudulent business act or
11 practice and unfair, deceptive, untrue or misleading advertising."

12 41. By and through their conduct, including the conduct detailed above,
13 BIXBY and cross-defendants MOES 1-25 have engaged in activities which constitute unlawful,
14 unfair, and fraudulent business practices prohibited by Business & Professions Code Section
15 17200 *et seq.* including violations of Business & Professions Code section 17500 *et seq.* (false
16 advertising).

17 42. Beginning at an exact date unknown as yet and continuing up through the
18 present BIXBY and cross-defendants MOES 1-25 have committed acts of unfair competition,
19 including those described above, by engaging in a pattern of "unlawful" business practices
20 within the meaning of Business & Professions Code Section 17200 by, for example, regularly
21 violating the false advertising provisions of Business & Professions Code Section 17500 *et seq.*

22 43. Beginning at an exact date unknown as yet and continuing up through the
23 present, BIXBY and cross-defendants MOES 1-25 have committed acts of unfair competition,
24 including those described above, prohibited by Business & Professions Code Section 17200 *et*
25 *seq.*, by engaging in a pattern of "fraudulent" business practices that violate the wording and
26 intent of the statutes, by advertising which is unfair, deceptive, untrue and misleading in that
27 members of the public are likely to be deceived.

28 44. Beginning at an exact date unknown as yet and continuing up through the

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1 present, BIXBY and cross-defendants MOES 1-25 have committed acts of unfair competition,
 2 including those described above, prohibited by Business & Professions Code Section 17200 *et*
 3 *seq.* by engaging in a pattern of "unfair" business practices that violate the wording and intent of
 4 the statutes, by engaging in practices that are immoral, unethical, oppressive or unscrupulous, the
 5 utility (if any) of which conduct is far outweighed by the harm done to the public and public
 6 policy.

7 45. The unlawful, unfair and fraudulent business practices of BIXBY and
 8 cross-defendants MOES 1-25 set forth above present a continuing threat to members of the
 9 public in that defendants continue to engage in the conduct described above.

10 46. Such acts and omissions are unlawful and/or unfair and/or fraudulent
 11 and/or deceptive and/or misleading and/or untrue and constitute a violation of Business &
 12 Professions Code Section 17200 *et seq.* The DePAOLIS reserve the right to identify additional
 13 violations by BIXBY and cross-defendants MOES 1-25 as may be established through
 14 discovery.

15 47. As a direct and legal result of BIXBY's and cross-defendants MOES 1-
 16 25s' unlawful, unfair and fraudulent conduct described above, BIXBY and cross-defendants
 17 MOES 1-25 have been and will be unjustly enriched with ill-gotten gains. The DePAOLIS and
 18 the general public are entitled to reimbursement of the gains BIXBY and cross-defendants
 19 MOES 1-25 received because of the misdeeds described herein.

20 WHEREFORE, the DePAOLIS pray for judgment as set forth below.

21 **SEVENTH CAUSE OF ACTION**

22 (Trespass as to BIXBY and MOES 1-25)

23 48. The DePAOLIS re-allege paragraphs 1-31 and 36-47 above and
 24 incorporate them by reference as if set forth in full.

25 49. The DePAOLIS are, and at all times herein mentioned were, the owners of
 26 the subject REAL PROPERTY. The DePAOLIS are, and at all time herein mentioned were, the
 27 owners of various items on the subject REAL PROPERTY including, but not limited to, plans,
 28 locks and inspection cards.

1 50. On or about May 18, 2003, BIXBY and cross-defendants MOES 1-25
 2 wrongfully and unlawfully entered onto the DePAOLIS' REAL PROPERTY and changed the
 3 locks and removed the plans and inspection cards from the premises. The DePAOLIS property
 4 was damaged to such an extent that the locks must be replaced and the plans and inspection cards
 5 must be replaced.

6 WHEREFORE, the DePAOLIS pray for judgment as set forth below.

7 **EIGHTH CAUSE OF ACTION**

8 **(Conversion as to BIXBY and MOES 1-25)**

9 51. The DePAOLIS re-allege paragraphs 1-31 and 36-50 above and incorporate
 10 them by reference as if set forth in full.

11 52. The DePAOLIS at all times herein mentioned were, residents of El Dorado
 12 County, California.

13 53. On or about May 18, 2003, and at the subject REAL PROPERTY, the locks,
 14 plans and inspection cards were removed from the DePAOLIS property.

15 54. On or about May 18, 2003, BIXBY and cross-defendants MOE 1-25
 16 trespassed onto the DePAOLIS' property, removed and replaced the locks, and removed the
 17 plans and inspection cards and converted the same to their own use.

18 55. As a proximate result of BIXBY's and cross-defendants MOES 1-25s'
 19 conversion, the DePAOLIS have suffered the loss of use of the equipment and plans as well as
 20 the lost value of the equipment. The removal of plans and inspection cards also delayed the
 21 work at the REAL PROPERTY.

22 56. The DePAOLIS are, and at all relevant times were, the owners of a video
 23 wall purchased by BIXBY on or about July 25, 2002, on behalf of the DePAOLIS for \$7,500.

24 57. The DePAOLIS made numerous requests to BIXBY and cross-defendants
 25 MOES 1-25 to return the said video wall to the DePAOLIS, upon which BIXBY and cross-
 26 defendants MOES 1-25 refused to return the said video wall.

27 58. Between the time of BIXBY's and cross-defendants MOES 1-25s'
 28 conversion of the above mentioned property to its own use, the DePAOLIS have spent time and

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1 money properly in pursuit of the converted property. The DePAOLIS have suffered damages as
2 a result of these costs, according to proof.

3 WHEREFORE, the DePAOLIS pray for judgment as set forth below.

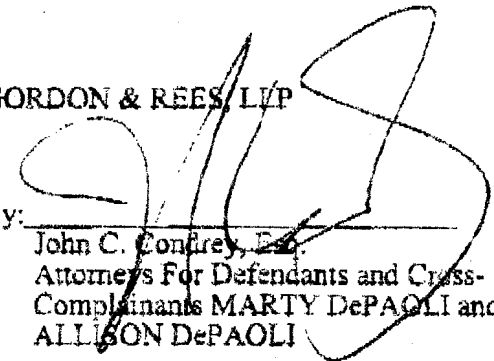
4 PRAYER

5 The DePAOLIS pray for judgment against BIXBY and cross-defendants MOES 1-25,
6 and each of them, as follows:

- 7 1. For damages according to proof;
- 8 2. For interest at the legal rate;
- 9 3. For costs of suit herein incurred;
- 10 4. For reasonable attorneys fees (Breach of Contract);
- 11 5. For Punitive damages. (Third Cause of Action only)
- 12 6. For the value of the converted property.
- 13 7. For foreseeable loss resulting from conversion.
- 14 8. For such other and further relief as the court may deem just and proper.

15
16 Dated: June 23, 2003

GORDON & REES, LLP

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19 By: 
20 John C. Confrey, Esq.
21 Attorneys For Defendants and Cross-
22 Complainants MARTY DePAOLI and
23 ALLISON DePAOLI
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