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LEGAL PROCESS #10

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6 FIRST AMERICAN PROPERTY &
CASUALTY INSURANCE COMPANY and
7 FIRST AMERICAN SPECIALTY
INSURANCE COMPANY

8
9
10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SACRAMENTO – UNLIMITED JURISDICTION

12 FIRST AMERICAN PROPERTY &
CASUALTY INSURANCE COMPANY, a
13 corporation; and FIRST AMERICAN
SPECIALTY INSURANCE COMPANY,
14 a corporation,

15 Plaintiffs,

16 v.

17 MARK BIXBY, individually and dba
18 BIXBY CONSTRUCTION; MJB/BIXBY
CONSTRUCTION, INC., a corporation;
and DOES 1 through 50,

19 Defendants.
20

Case No. **02AS02975**

COMPLAINT FOR DAMAGES

- 1. **Fraud;**
- 2. **Negligent Misrepresentation;**
- 3. **Violation of the Unfair Competition Law;**
- 4. **Negligence; and**
- 5. **Breach of Contract**

BY FAX

DEMAND FOR JURY TRIAL

21 COME NOW PLAINTIFFS FIRST AMERICAN PROPERTY & CASUALTY
22 INSURANCE COMPANY and FIRST AMERICAN SPECIALTY INSURANCE
23 COMPANY and allege against defendants, and each of them, as follows:

PARTIES

24
25 1. Plaintiff First American Property & Casualty Insurance Company is and at
26 all times material herein was a corporation existing under the laws of the State of
27 California, was and is qualified to do business therein, and was at times material to the
28 subject matter of this action doing business under the name Great Pacific Insurance

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1 Company.

2 2. Plaintiff First American Specialty Insurance Company is and at all times
3 material herein was a corporation existing under the laws of the State of California, was
4 and is qualified to do business therein and was at times material to the subject matter
5 of this action doing business under the name Five Star Insurance Company.
6 (Hereinafter, plaintiffs First American Specialty Insurance Company and First American
7 Property & Casualty Insurance Company are collectively referred to as "FIRST
8 AMERICAN.")

9 3. Defendant Mark Bixby is an individual engaged in business under the
10 fictitious name of "Bixby Construction" in the County of Sacramento, State of California.

11 4. Defendant MJB/Bixby Construction, Inc., is a corporation. Plaintiffs are
12 informed and believe that defendant Mark Bixby is the principal or sole shareholder and

1 defendants.

2 7. Plaintiffs are informed and believe and thereon allege that, at all times
3 mentioned herein, each defendant was the agent, servant, employee and/or co-
4 conspirator of all remaining defendants and was at all times acting in the course and
5 scope of such agency, employment or conspiracy and with the permission of, consent
6 from, and ratification of all remaining defendants.

7 **VENUE**

8 8. Venue is proper in this county because a substantial part of the events or
9 omissions on which the claim is based occurred in the County of Sacramento; the
10 INSURED HOMES are located in the County of Sacramento; and the written contracts
11 at issue were entered into and were to be performed in the County of Sacramento.

12 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

13 9. FIRST AMERICAN caused to be issued policies of homeowners'
14 insurance, one bearing policy number NH000010385 and covering Douglas and
15 Michelle Hawkins and another bearing policy number NH0010097 and covering Sabina
16 Moyer, for homes located in the County of Sacramento, State of California.
17 (Hereinafter, these policies are collectively referred to as the "POLICIES"; the property
18 covered under these policies are collectively referred to as the "INSURED HOMES,"
19 and Douglas and Michelle Hawkins and Sabina Moyer are collectively referred to as the
20 "INSUREDS.")

21 10. During the period that the POLICIES were in effect, the INSURED
22 HOMES sustained damage by, among other things, water intrusion, as a result of which
23 the INSUREDS submitted a claim for benefits to FIRST AMERICAN.

24 11. FIRST AMERICAN was contractually obligated to indemnify the
25 INSUREDS for losses covered under the POLICIES.

26 12. After the INSURED HOMES sustained damage, BIXBY and DOES 1
27 through 50 inspected the INSURED HOMES to assess the damage, determine the
28 cause of the damage and to prepare estimates and bids for the repair work. BIXBY

1 and DOES 1 through 50 at all times held themselves out as having the education,
2 experience and training needed to perform this work. In fact, they represented
3 themselves as specialists.

4 13. At all times material to the matters alleged herein, BIXBY and DOES 1
5 through 50 were aware that the INSURED HOMES were covered by policies of
6 homeowners' insurance.

7 14. Plaintiffs are informed and believe that BIXBY and DOES 1 through 50,
8 during the course of inspecting the INSURED HOMES and assessing the damage
9 therein, prohibited representatives from FIRST AMERICAN from conducting similar
10 inspections and assessments until such time as BIXBY and DOES 1 through 50 had
11 materially altered the condition of the INSURED HOMES and thereby made it difficult, if
12 not impossible, for representatives of FIRST AMERICAN to inspect, assess, quantify
13 and evaluate the damage and its cause.

14 15. After claiming to have thoroughly inspected the damage to the INSURED
15 HOMES, BIXBY and DOES 1 through 50 prepared reports and test results purporting to
16 accurately describe and assess the damage to the INSURED HOMES, represented to
17 the INSUREDS and FIRST AMERICAN that the INSURED HOMES were severely
18 infested with mold, and described the cause of the mold infestation and other damage
19 in such a manner as to cause the damage to be covered under the POLICIES, thereby
20 obligating FIRST AMERICAN to indemnify the INSUREDS for the damage.

21 16. FIRST AMERICAN relied on the representations of BIXBY and DOES 1
22 through 50 as to the cause of the damage and considered the damage to be a covered
23 loss under the POLICIES.

24 17. BIXBY and DOES 1 through 50 prepared bids and proposals that
25 purported to accurately reflect the scope of the damage to the INSURED HOMES and
26 the cost to remedy same and held these reports, test results, bids and proposals out as
27 accurate, reliable and truthful.

28

1 18. BIXBY and DOES 1 through 50 submitted documents to the INSUREDS
2 and FIRST AMERICAN wherein BIXBY and DOES 1 through 50 offered to undertake
3 the work needed to repair the damage, as defined by defendants, to the INSURED
4 HOMES at specified costs and hourly rates.

5 19. FIRST AMERICAN relied on the representations of BIXBY and DOES 1
6 through 50 as to the scope of the damage to the INSURED HOMES and the cost to
7 remedy same, and FIRST AMERICAN accepted the bids and proposals of BIXBY and
8 DOES 1 through 50 and authorized defendants to undertake the work specified therein.

9 20. Plaintiffs are informed and believe that the inspections and assessments,
10 together with the reports, test results, bids and proposals, performed and prepared by
11 BIXBY and DOES 1 through 50 were misleading and did not accurately reflect the
12 actual cause and scope of the damage and the accurate cost to repair same.

13 21. By reason of the premises and as a direct and proximate result thereof,
14 FIRST AMERICAN sustained substantial economic loss, including, but not limited to,
15 indemnifying the INSUREDS for losses not covered under the POLICIES, the payment
16 of moneys for work that was unnecessary, and the payment of wages to its employees
17 to adjust and administer the claims of the INSUREDS.

18 **FIRST CAUSE OF ACTION**
19 **FRAUD**
20 **Alleged Against All Defendants**

21 22. Plaintiffs re-allege paragraphs 1 through 21 inclusive, and by this
22 reference, fully incorporate into this cause of action, each of the allegations contained
23 therein.

24 23. Plaintiffs are informed and believe that BIXBY and DOES 1 through 50
25 made material misrepresentations in advising the INSUREDS and FIRST AMERICAN
26 as to the cause of, scope of, and the cost to repair the damage to the INSURED
27 HOMES.

28 24. Plaintiffs are informed and believe that BIXBY and DOES 1 through 50, by
way of example and not by way of limitation, falsely described the origin of the mold

1 infestation and other damage in such a manner as to cause the damage to be covered
 2 under the POLICIES and then inflated in the scope and significance of the infestation
 3 for the express purpose securing their retention to perform the highly profitable work
 4 associated with "extracting" the mold from the INSURED HOMES.

5 25. Plaintiffs are informed and believe that BIXBY and DOES 1 through 50, by
 6 way of further example and not by way of limitation, agreed to undertake specific work
 7 in the INSURED HOMES, represented to the INSUREDS and FIRST AMERICAN that
 8 they had in fact performed specific tasks, and thereafter submitted invoices to the
 9 INSUREDS and FIRST AMERICAN for the costs and labor associated with this work,
 10 when in fact BIXBY and DOES 1 through 50 knew that each of these representations
 11 were false, that they had not, nor had the ever intended to, perform all or some of these
 12 specific tasks, and that their invoices were fraudulent.

13 26. Plaintiffs are informed and believe that BIXBY and DOES 1 through 50, by
 14 way of further example and not by way of limitation, made other misrepresentations in
 15 the billings and invoices they submitted to FIRST AMERICAN and the INSUREDS. As
 16 part of these misrepresentations, defendants inflated the amount of time they spent
 17 performing repair work, the costs they incurred in the repair work, the amount and
 18 quality of work they actually performed and deceptively charged FIRST AMERICAN and
 19 the INSUREDS at a hourly and/or daily rate that was higher than the agreed-upon price
 20 for this work.

21 27. Plaintiffs are informed and believe that, when BIXBY and DOES 1 through
 22 50, made said material misrepresentations and concealed said material facts,
 23 defendants knew of the misrepresentations and concealment, knew of their materiality,
 24 and intended to induce the INSUREDS and FIRST AMERICAN into relying on the
 25 misrepresentations and concealments.

26 28. FIRST AMERICAN and the INSURED were justified in relying on
 27 representations of when BIXBY and DOES 1 through 50.

28

1 29. By reason of the premises and as a direct and proximate result thereof,
2 plaintiffs sustained damage as set forth above, including payment of moneys for
3 invoices submitted by defendants that were fabricated to depict work not performed,
4 cost not actually incurred or work or costs billed at rates that were improper.

5 WHEREFORE, plaintiffs pray for judgment against defendants, and each of
6 them, as hereinafter set forth.

7 **SECOND CAUSE OF ACTION**
8 **NEGLIGENT MISREPRESENTATION**
9 **Alleged Against All Defendants**

10 30. Plaintiffs re-allege paragraphs 1 through 29, inclusive, and by this
11 reference, fully incorporate into this cause of action, each of the allegations contained
12 therein.

13 31. Plaintiffs are informed and believe and thereon allege that BIXBY and
14 DOES 1 through 50 negligently, carelessly and recklessly made the representations
15 previously noted and did not have any reasonable basis for believing them to be true.

16 32. By reason of the premises and as a direct and proximate result thereof,
17 plaintiffs sustained damage as set forth elsewhere in this pleading.

18 WHEREFORE, plaintiffs pray for judgment against defendants, and each of
19 them, as hereinafter set forth.

20 **THIRD CAUSE OF ACTION**
21 **VIOLATION OF THE UNFAIR COMPETITION LAW**
22 **[Business and Professions Code § 17200]**
23 **Alleged Against All Defendants**

24 33. Plaintiffs re-allege paragraphs 1 through 32, inclusive, and by this
25 reference, fully incorporate into this cause of action, each of the allegations contained
26 therein.

27 34. Defendants BIXBY and DOES 1 through 50 are engaged in the business
28 of construction in the State of California and as part of their business are required to
obtain and maintain a license through the California Contractors State License Board,
Department of Consumer Affairs.

1 35. As more specifically set forth elsewhere in this pleading, defendants
2 BIXBY and DOES 1 through 50 are engaged in unlawful or unfair or fraudulent
3 business acts or practices.

4 36. Without limiting the generality of the allegations in paragraph 35, plaintiffs
5 are informed and believe that BIXBY and DOES 1 through 50 are, and have been,
6 engaged in a business practice of falsely describing the cause of damage to homes
7 they inspect in such a manner as to obligate insurers in this state to indemnify their
8 insureds for this such damage when if fact the cause of the damage was such that the
9 insurers would not have been obligated to make such repairs had the true cause of the
10 damage been disclosed.

11 37. Without limiting the generality of the allegations in paragraph 35, plaintiffs
12 are informed and believe that BIXBY and DOES 1 through 50 are, and have been,
13 engaged in a business practice of falsely describing the origin of mold infestation in
14 homes they inspect in such a manner as to cause the resultant damage to be covered
15 under the policies of homeowners' insurance and then inflating the scope and
16 significance of the infestation for the express purpose securing their retention to
17 perform the highly profitable work associated with "extracting" the mold from these
18 homes.

19 38. By reason of the premises and as a direct and proximate result thereof,
20 plaintiffs sustained damage as set forth elsewhere in this pleading.

21 WHEREFORE, plaintiffs pray for judgment against defendants, and each of
22 them, as hereinafter set forth.

23 **FOURTH CAUSE OF ACTION**
24 **NEGLIGENCE**
Alleged Against All Defendants

25 39. Plaintiffs re-allege paragraphs 1 through 21, inclusive, and by this
26 reference, fully incorporate into this cause of action, each of the allegations contained
27 therein.

28

1 40. BIXBY and DOES 1 through 50 owed plaintiffs, and the INSUREDS, a
2 duty to inspect, report on, submit bids for, and repair the damage to the INSURED
3 HOMES accurately and in a workmanlike manner, consistent with the applicable
4 standard of care.

5 41. BIXBY and DOES 1 through 50 did so negligently, carelessly and
6 recklessly undertake and perform the work mentioned herein as to cause additional
7 mold infestation and additional property damage to the INSURED HOMES.

8 42. As a direct and proximate result of the above, plaintiffs sustained damage
9 as set forth elsewhere in this pleading and incurred additional costs associated with
10 continuing claims of property damage and other such loss, all in excess of the
11 jurisdiction of this Court.

12 WHEREFORE, plaintiffs pray for judgment against defendants, and each of
13 them, as hereinafter set forth.

14 **SIXTH CAUSE OF ACTION**
15 **BREACH OF CONTRACT**
Alleged Against All Defendants

16 43. Plaintiffs re-allege paragraphs 1 through 21, inclusive, and by this
17 reference, fully incorporate into this cause of action, each of the allegations contained
18 therein.

19 44. At all times mentioned herein, a contract existed between plaintiffs and
20 the INSUREDS on the one hand and BIXBY and DOES 1 through 50 on the other
21 hand, wherein defendants, and each of them, agreed to undertake the repair of the
22 INSURED HOMES for the express purpose of removing both existing mold infestation
23 and repairing the cause of same at an agreed upon hourly and daily rate and
24 defendants further agreed to perform the work in a workmanlike manner and to keep all
25 parties to the contracts apprised of the work and the scope of the repair.

26 45. Plaintiffs and the INSUREDS performed all obligations required of them
27 under the terms of said contracts.

28

1 46. Plaintiffs are informed and believe that BIXBY and DOES 1 through 50
2 failed to remove mold infestations from the INSURED HOMES, failed to remedy the
3 cause of the mold infestations, charged plaintiffs in amounts and for work that was
4 inconsistent with the agreed upon price, and did not perform the work in a workman like
5 manner.

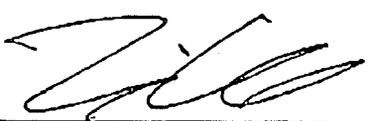
6 47. As a direct and proximate result of the above, plaintiffs sustained damage
7 as set forth elsewhere in this pleading and incurred additional costs associated with
8 continuing claims of property damage and other such loss, all in excess of the
9 jurisdiction of this Court.

10 WHEREFORE, plaintiff pray for judgment against defendants and each of them
11 as follows:

- 12 1. General damages according to proof;
- 13 2. Special damages according to proof;
- 14 3. For pre-judgment interest according to proof;
- 15 4. Costs of suit incurred herein;
- 16 5. Exemplary damages; and
- 17 6. For such other and further relief as the court may deem just and proper in
18 the premises.

19
20 Dated: May 17, 2002

AARON & WILSON, LLP

21
22 By 

23 TIMOTHY C. WILSON
24 Attorneys for Plaintiff
25 FIRST AMERICAN PROPERTY &
26 CASUALTY INSURANCE
27 COMPANY and FIRST AMERICAN
28 SPECIALTY INSURANCE
 COMPANY