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LEGAL PROCESS #8

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO



12 MJB/BIXBY CONSTRUCTION, INC.,

Case No. 01AS07168

13 Plaintiff,

**VERIFIED ANSWER TO FIRST
AMENDED COMPLAINT FOR
FORECLOSURE OF MECHANICS'
LIEN**

14 v.

15 DAVID AND LYNN ERNCE,

Complaint Filed: November 26, 2001

16 Defendants.

Amended
Complaint Filed: May 1, 2002

17
18 For their Verified Answer to the First Amended Complaint For Foreclosure Of
19 Mechanics' Lien ("Complaint") of plaintiff MJB/Bixby Construction, Inc. ("Bixby"), defendants
20 David E. Ernce and Lynn Trinka Ernce (together, "the Ernces") hereby respond as follows:

- 21 1. The Ernces admit the allegations of paragraph 1.
- 22 2. The Ernces are without knowledge or information sufficient to admit or
- 23 deny that Bixby was a general contractor duly licensed to do business in the State of California
- 24 at all times mentioned in the Complaint and therefore deny the same.
- 25 3. The Ernces admit the allegations of paragraph 3.
- 26 4. The Ernces admit the allegations of paragraph 4.

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23 deny that Bixby was a general contractor duly licensed to do business in the State of California
24 at all times mentioned in the Complaint and therefore deny the same.

25 3. The Ernces admit the allegations of paragraph 3.

26 4. The Ernces admit the allegations of paragraph 4.

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Third Defense

As a separate defense to the Complaint, the Ernecs allege that to the extent that Bixby alleges that the Ernecs have an obligation to which full performance has not been rendered or excused, there has been a failure of consideration in that, among other things, Bixby failed to complete the kitchen remodel as required by the contract between the parties. Thus, Bixby is barred from recovering any damages or other relief by reason of the failure of consideration that defeats the effectiveness of the contract between the parties which forms the basis for the lien which is the subject of the Complaint.

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Fourth Defense

As a separate defense to the Complaint, the Ernecs allege that to the extent that Bixby alleges that the Ernecs have an obligation to which full performance has not been rendered or excused, not all conditions to said obligations occurred. Specifically, among other things, Bixby failed to complete the kitchen remodel as required by the contract between the parties which forms the basis for the lien which is the subject of the Complaint.

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Fifth Defense

As a separate defense to the Complaint, the Ernecs allege that Bixby, by its acts and omissions, breach of duty, failure to perform, and by its own breaches of the implied covenant of good faith and fair dealing, breached the contract Bixby alleges to have existed and therefore is not entitled to relief under that alleged contract which forms the basis for the lien which is the subject of the Complaint.

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Sixth Defense

As a separate defense to the Complaint, the Ernecs allege, by conduct, representations and omissions, as more fully alleged in the cross-complaint filed herewith and incorporated herein, Bixby has waived, relinquished and/or abandoned any claim for relief against the Ernecs respecting the matters which are the subject of the Complaint.

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1 **Seventh Defense**

2 As a separate defense to the Complaint, the Ernces allege that, by conduct,
3 representations and omissions, as more fully alleged in the cross-complaint filed herewith and
4 incorporated herein, Bixby is equitably estopped to assert any claim for relief against the Ernces
5 respecting the matters which are the subject of the Complaint.

6 **Eighth Defense**

7 As a separate defense to the Complaint, and without conceding that Bixby is
8 entitled to any payment under the contract or the lien or waiving any rights of setoff, recoupment
9 or otherwise, the Ernces allege that they paid Bixby \$13,000 of the \$17,964 contract price

10 **Ninth Defense**

11 As a separate defense to the Complaint, and without conceding that Bixby is
12 entitled to any payment under the contract or the lien or waiving any rights of setoff, recoupment
13 or otherwise, the Ernces allege that, based on their payment of \$13,000 of the total \$17,964
14 contract price, Bixby's lien in the amount of \$35,000 is excessive in violation of Civil Code
15 section 3123 and should be forfeited pursuant to Civil Code section 3118.

16 **Tenth Defense**

17 As a separate defense to the Complaint, and without conceding that Bixby is
18 entitled to any payment under the contract or the lien or waiving any rights of setoff, recoupment
19 or otherwise, the Ernces allege that, based on their payment of \$13,000 of the total \$17,964
20 contract price, Bixby has failed to state facts sufficient to support an award of \$35,000 of
21 principal and/or interest on such sum.

22 **Eleventh Defense**

23 As a separate defense to the Complaint, and without conceding that any act by
24 the Ernces caused damage to Bixby in any respect, the Ernces allege that they are entitled to
25 setoff and recoup against any judgment that may be entered against them all obligations of Bixby
26 owing to the Ernces by reason of Bixby's misrepresentations, breach of duty, breach of contract,
27 violation of the covenant of good faith and fair dealing, and other wrongful conduct and breaches
28 as more fully alleged in the cross-complaint filed herewith and incorporated herein.

1 **Twelfth Defense**

2 As a separate defense to the Complaint, the Ernces allege that Bixby, by its acts
3 and omissions, is barred by the doctrine of unclean hands from asserting the claim upon which
4 Bixby seeks relief.

5 **Thirteenth Defense**

6 As a separate defense to the Complaint, the Ernces allege that Bixby would be
7 unjustly enriched if allowed to recover on the Complaint.

8 **Fourteenth Defense**

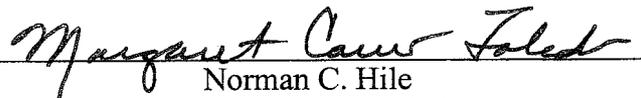
9 As a separate defense to the Complaint, the Ernces allege that Bixby's request for
10 an award of "interest at the rate of nine percent (9%) per day from the date of termination to date
11 of entry of judgment" is improper and violates the Court's April 24, 2002 minute order granting
12 the Ernces' motion to strike the prejudgment interest in the prayer of the Complaint.

13 WHEREFORE, the Ernces pray for relief as follows:

- 14 1. That the Complaint be dismissed with prejudice and that Bixby take
15 nothing thereby;
- 16 2. that the mechanic's lien recorded against the Ernces' home, upon which the
17 Complaint is based, be released forthwith;
- 18 3. that they be awarded their costs of suit, including attorney fees; and
19 4. that they be awarded such other and further relief as the Court may deem
20 just and proper.

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22 Dated: June 4, 2002

ORRICK, HERRINGTON & SUTCLIFFE LLP

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24 

25 Norman C. Hile
26 Margaret Carew Toledo
27 Attorneys for Defendants
28 David E. Ernce and Lynn Trinka Ernce

VERIFICATION

I, Lynn Trinka Ernce, am one of the defendants herein. I have read the foregoing Verified Answer To First Amended Complaint For Foreclosure Of Mechanics' Lien and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe them to be true.

Executed this 3rd day of June, 2002, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California and these United States that the foregoing is true and correct.


Lynn Trinka Ernce

