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7
8 **ARBITRATION**

9
10 LANDRY & FOY BUILDERS, INC.,

11 Plaintiff,

12 vs.

13 KRISTIN DYER and ERIC LECHNER

14 Defendants.
15

Case No. CV 157690

POST ARBITRATION BRIEF OF ERIC
LECHNER AND KRISTIN DYER

16
17 **SUMMARY**

18 Boiled down, this is a rather straightforward matter. Did Landry & Foy (LF) provide
19 \$366,000 worth of labor, materials, profit and overhead to the Lechner/Dyer home? There is no
20 dispute that this figure is far beyond what either party initially anticipated. The real question is
21 whether the drastic increase was due to errors by LF or due to change orders due to poor plans
22 and requests for changes by the Lechners.
23

24 **LIABILITY**

25 **A. The Lechners have shown that the contract is void or voidable because of violations of**
26 **B&P Code §§7159 and 7159.5. Depending upon whether this tribunal finds the contract**
27 **void or voidable, LF is entitled to no compensation for the former and only the reasonable**
28 **value of services performed for the latter.**

1 The only evidence provided at the arbitration that the Time and Material contract was
2 legal was from Charles Allen, the plaintiff's expert. He opined that T&M contracts were legal.
3 This, of course, was not within his area of expertise and it is obviously in conflict with the cases
4 and law. Indeed, Andy Spring admitted that LF no longer uses T&M contracts because they are
5 aware that they are not legal.
6

7 The most significant requirements of B&P Code §7159 and 7159.5 that were not included
8 in Eric's and Kristin's contract (**Defendant's Exhibit 6 – DE6**) were:

- 9 • "The heading: "Contract Price," followed by the amount of the contract in dollars and
10 cents." 7159(d)(5)
- 11 • "The contract shall... include the agreed contract amount in dollars and cents. The
12 contract amount shall include the entire cost of the contract, including profit, labor, and
13 materials, but excluding finance charges." 7159.5(a)(1)
- 14 • "A statement that, upon satisfactory payment being made for any portion of the work
15 performed, the contractor shall, prior to any further payment being made, furnish to the
16 person contracting for the home improvement or swimming pool work a full and
17 unconditional release from any claim or mechanic's lien pursuant to Section 3114 of the
18 Civil Code for that portion of the work for which payment has been made." 7159(c)(4)
- 19 • "A change-order form for changes or extra work shall be incorporated into the contract
20 and shall become part of the contract only if it is in writing and signed by the parties prior
21 to the commencement of any work covered by a change order." 7159(c)(5)
- 22 • "The schedule of progress payments must specifically describe each phase of work,
23 including the type and amount of work or services scheduled to be supplied in each
24 phase, along with the amount of each proposed progress payment. IT IS AGAINST THE
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1 LAW FOR A CONTRACTOR TO COLLECT PAYMENT FOR WORK NOT YET
2 COMPLETED, OR FOR MATERIALS NOT YET DELIVERED. HOWEVER, A
3 CONTRACTOR MAY REQUIRE A DOWNPAYMENT.” 7159(d)(9)(C)

- 4 • “If, in addition to a downpayment, the contract provides for payments to be made prior to
5 completion of the work, the contract shall include a schedule of payments in dollars and
6 cents specifically referencing the amount of work or services to be performed and any
7 materials and equipment to be supplied.” 7159.5(a)(4)

- 8 • “A notice that provides the buyer with the following information about the performance
9 of extra or change-order work:

10 (A) A statement that the buyer may not require a contractor to perform extra or change-
11 order work without providing written authorization prior to the commencement of any
12 work covered by the new change order.

13 (B) A statement informing the buyer that extra work or a change order is not enforceable
14 against a buyer unless the change order also identifies all of the following in writing prior
15 to the commencement of any work covered by the new change order:

16 (i) The scope of work encompassed by the order.

17 (ii) The amount to be added or subtracted from the contract.

18 (iii) The effect the order will make in the progress payments or the completion date.”

19 7159(e)(3)

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23
24 As can be seen in the contract (DE6), none of the cost protections of the statutes were
25 included. Under *Asdourian v. Araj* (1985) 38 Cal.3d 276, the California Supreme Court declared
26 that home improvement contracts not in compliance with B&P Code §7159 are minimally
27 voidable, but could be void if the violation falls within an area the legislature intended as part of
28 the deterrence necessary to protect the public interest. “In each case, the extent of enforceability

1 and the kind of remedy granted depend upon a variety of factors, including the policy of the
2 transgressed law, the kind of illegality and the particular facts.” *Id.* at 292. (In *Asdourian*, the
3 contractor was suing for payment while the owner defended that the contract was illegal for not
4 following the dictates of B&P §7159. The court determined that the circumstances of *Asdourian*
5 made the contract enforceable to the extent to prevent unjust enrichment since the defendant was
6 a sophisticated investor and the contractor had fully performed.) *Vitek, Inc. v. Alvarado Ice*
7 *Palace, Inc.* (1973) 34 Cal.App.3d 586, 594 outlined the factors a court looks at to determine
8 whether a contract should be void or voidable for failing to follow statutory requirements. Did
9 the contractor perform in all other respects and without injury contemplated by the law? Would
10 the court be aiding an incompetent or dishonest artisan? Would the statutory purpose of public
11 protection be frustrated? Did the homeowner receive full value?

12 With no viable evidence to contradict that the contract was illegal, the only real question
13 is whether it was void or merely voidable. It would be difficult to find a case that more perfectly
14 illustrates the protections these statutes were meant to provide. T&M contracts do not give a
15 contractor an incentive to adequately assess a job or pay attention to the job thereby making
16 homeowners particularly vulnerable to massive cost overruns. Contrary to LF’s representation
17 that a T&M contract will save over a fixed price contract, the contractor’s incentive is to ignore
18 such projects and simply bill as costs roll in. This was precisely the case. Change orders were
19 not, in fact, changes but were provided for in the plans; there were substantial mistakes by LF
20 that were charged to Eric and Kristin; and there was very little effort by LF to decrease the costs
21 as promised. Had the statutory protections been followed by LF, Eric and Kristin would not now
22 be in danger of losing their house and all the equity they built up the past 10 years. Indeed, as
23 testified to by Eric and Kristin, there is no way they can keep their house and pay LF the
24 additional \$165,000 (plus miscellaneous costs, fees, etc.) LF seeks.

25 The contract should be declared void to advance the public protection purposes of the
26 statute. Under such a scenario, LF is not entitled to recover under any theory. “No right or claim
27 can be derived from [void contracts].” *Id.*

28 Alternatively, should this tribunal decide that the contract is voidable, the contractor is

1 only entitled to the fair value of the work performed. An analysis of the fair value of the work
2 reveals that a fair and reasonable value of the work performed is \$201,000 (see Section **B.3.**
3 below.)

4 For the most part, it is not too relevant whether this court declares the contract void or
5 voidable. The Lechners do not seek a windfall and believe that they should pay the fair market
6 value of the services rendered. But since they have paid just in excess of \$228,000, they seek an
7 award reimbursing them their payments to the level of \$201,000 (plus any other damages
8 available under the law).

9
10 **B. Breach of contract and breach of the implied covenant of good faith and fair**
11 **dealing.**

12
13 Eric and Kristin are also seeking compensation under a theory of breach of contract. LF
14 was to build the project according to the plans and specifications, but the evidence shows that it
15 was not built per the plans and specifications. (By the way, all the cases hold that the offending
16 party cannot use the argument that the contract is void or voidable as a shield to avoid liability
17 under the contract.)

18 Additionally, in every contract, there is an implied covenant of good faith and fair dealing
19 that neither party will do anything that will injure the right of the other to receive the benefits of
20 the agreement. *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658. The
21 implied covenant is limited to assuring compliance with the express terms of the contract.
22 *Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032.

23 1. Failure to inspect

24 The first of the contractual requirements that were broken were the multiple requirements
25 to inspect the premises to assure that the plans were appropriate for the site. I have attached, as
26 **Exhibit A** to this brief, a summary of the various warnings on the plans. On nearly every page
27 of the plans, there is a warning to inspect the foundation or walls before demolition. Sheet S1
28 went even further providing, “the submission of a bid is conclusive evidence that the contractor

1 has investigated and is satisfied as to the conditions to be encountered, the character, quality, and
2 scope of work to be performed, the quantities of materials to be furnished, and as to the
3 requirements of the plans and these specifications.” This, of course, is critical because had
4 problems been found beforehand, Eric and Kristin could have scuttled or revised the project
5 rather than being trapped with a project that was hundreds of thousands of dollars more than
6 initially represented. Likewise, an inspection would have told LF what was necessary to carry
7 out the plans so would have prevented multiple errors by LF. For example, they would have
8 known not to put in a pad and pier foundation. Rather, they would have known that a perimeter
9 foundation was necessary.

10 It is evident that LF was worried about their failure to inspect, otherwise they would not
11 have anxiously instructed Mr. Campbell to not point out the inspection requirements on the plans
12 to Eric and Kristin after LF discovered the foundation problems.

13 Charles Allen’s testimony that contractors don’t inspect beforehand, despite requirements
14 that they do so, simply has no credibility. Although Mr. Corley testified to the opposite, even a
15 layman understands that a businessman needs to know what he is getting into before signing a
16 contract. Even if Mr. Allen is correct that contractors never check out the jobsite beforehand, it
17 is irrelevant in this situation because the plans very specifically required that LF look at the
18 foundation and walls beforehand. As the photographs show, even a cursory investigation would
19 have revealed a post and pier foundation at the rear of the house and cripple walls under the
20 house that didn’t even come close to meeting the plan requirements. Mr. Campbell testified that
21 he found the problems with the foundation the first hour or so he was on the job. But, of course,
22 the demolition had already taken place.

23
24 **2. Failure to employ skilled workers**

25 The contract expressly provides, “Contractor agrees to use good efforts, judgment, and
26 skills to complete the work according to the Contract Documents referred to in this Agreement.
27 Contractor agrees to furnish competent construction management and administration and to
28 adequately supervise the work in progress....Contractor represents and warrants the following to

1 Owner: ...2. Contractor is able to furnish the tools, materials, supplies, equipment, and labor
2 required to complete the work and perform his obligations hereunder and has sufficient
3 experience and skills to do so. 3. Contractor will employ only skilled and properly trained staff
4 for the performance of the work.

5 As Charles Campbell, the site foreman, testified, LF failed to hire carpenters that were
6 properly skilled and trained such that work took substantially longer than it should. A substantial
7 amount of work had to be redone and there is no indication that a credit for the repairs were
8 given to Eric and Kirstin. There was a suggestion by Mr. Foy that LF may not have billed for the
9 errors, but no hard evidence in the way of time sheets to show that time was written off was
10 produced. In addition, Mr. Campbell testified that he never heard anything from the workers
11 about their pay being docked for the errors.

12 3. Failure to properly manage the project

13 The timesheets show that Mr. Foy spent a total of 10.25 hours on this project.
14 Meanwhile, Mr. Landry spent 11 hours on this seven month project. (**DE 78** – I have also
15 attached as **Exhibit B** a summary of all the management hours which summary was
16 authenticated by Eric at the arbitration.) Although both Mr. Landry and Mr. Foy said that Mr.
17 Foy spent more time that wasn't reflected on the invoices, Kristin testified that she rarely saw
18 Mr. Foy at the jobsite and Mr. Campbell testified that he only saw Mr. Foy during the month of
19 September. This correlates precisely with the invoices which show five visits during the month
20 of September and then only one during the remainder of the project.

21 Rather than manage the project, Mr. Foy turned communications over to Mr. Spring.
22 When added up, Mr. Spring spent, on average, 26 minutes a day on the project. But it wasn't
23 Mr. Spring's duty to determine what was required by the plans or whether a change was, in fact,
24 called for. That call was for Mr. Foy, according to his own testimony, as the project manager.

25 The greatest problem that occurred as a result of not paying close enough attention to the
26 plans or the project was multiple mistakes that translated into tens of thousands of dollars. The
27 largest mistakes were:

- 28
- Tearing down the first floor walls even though the plans called for the first floor walls to

1 remain;

- 2
- 3 • Installing a redundant and unnecessary post and pad foundation;
 - 4 • Tearing down the porch although the plans called for it to remain;
 - 5 • Altering the braced wall panels such that they were not in compliance with the plans;
 - 6 • The labor for applying the simple exterior trim was grossly excessive;
 - 7 • Not assigning enough skilled workers so as to allow the work to proceed efficiently;
 - 8 • Accounting errors in favor of LF to the tune of thousands of dollars that show up when
- 9 analyzing each of the line items.

10 Except for the skill of the workers on the job, Mr. Corley testified about each of the
11 above matters. First, neither the existing framing nor the braced wall panel design required that
12 the first floor walls be torn down. Although Mr. Allen testified that the braced wall panels
13 required plywood on both sides, therefore requiring the first floor walls to be torn down, his
14 testimony again lacks credibility. Even a layman can read the building code. **(DE 20)** It states
15 under UBC (Now called the California Building Code) section 2320.11.3 that braced wall panels
16 with plywood on one side is 100% acceptable for this application. The plans themselves say that
17 UBC section 2320.11.3 is the operative code section (See sheets A4 and A8 under Braced Wall
18 Line Notes). Despite this, Mr. Allen insisted that UBC section 2320.11.4, entitled “Alternate
19 braced wall panels” was the correct section. Even when it was pointed out that section
20 2320.11.4 says, “Any braced wall panel required by Section 2320.11.3 *may be replaced* by an
21 alternate braced wall panel constructed in accordance with the following...” (emphasis added) he
22 stubbornly insisted that this section was mandatory. He needed to testify this way, of course, to
23 try to excuse LF’s departure from the plans that required that the braced wall panels be sheathed
24 on only one side. It should be noted that although two different methods of doing the braced
25 wall panels (sheathed one side versus sheathed two sides) were shown on detail A9, elsewhere
26 the plans specifically say to use sheathing on only one side. See sheets A1, A4 and A5.¹

27 His insistence that braced wall panels must be sheared on both sides has no support in the

28 ¹ The plans say to use the “alternate braced wall panel” shown on sheet A9. The alternate on sheet A9 is ¾” plywood on just one side. The designer called plywood on just one side the “alternate” which is in juxtaposition to the code which calls plywood on both sides an “alternate.”

1 code or amongst the other witnesses. Indeed, even Mr. Foy had to admit that he rarely sees
2 braced wall panels sheared on both sides. Mr. Corley, who has built hundreds of residential
3 projects, testified that he had never seen braced wall panels sheared on both sides. A layperson
4 can also see that this is so. When you go to hang a picture and the nail penetrates the drywall,
5 does it go into a hollow space (assuming you don't place the nail over a stud) or is there solid
6 plywood everywhere behind the drywall?²

7 Mr. Corley also testified that although the framing wasn't standard, it was readily
8 rectified so needn't be torn down. One merely had to shim out the 3 inch studs with 1/2" furring
9 to match up with the 4 x4 posts that were to be inserted at the end of each braced wall panel.
10 The walls also required a second top plate, but with the roof torn off, this was a simple task.

11 There was testimony from LF trying to lay the blame of the braced wall panels on Hugh
12 Zike and trying to bootstrap him into the engineer on the project. Even if Mr. Zike had been the
13 engineer of record rather than an architect, there was still never a directive or change order from
14 the city deleting the approved plan requirement to use a single sheet of plywood. Further, and as
15 Mark Corley testified, the communication from Hugh Zike about plywood on one side versus
16 plywood on two sides came in the context of re-engineering the existing bathroom walls so as to
17 save the existing tile, not the exterior walls. (See emails 9/25/06 and 9/26/06 between Greg Foy,
18 Hugh Zike and Kristin. Plaintiff's Exhibit 6.)

19 LF employees testified that they placed the pier and pad foundation because they had to
20 hold up the floor. They testified about, but did not produce, an estimate that temporary shoring
21 would cost nearly \$5000. This, they claim, is the same as the price of the pier and pad
22 foundation. Mr. Corley cast doubt on this assertion since temporary shoring does not require
23 excavation, concrete, steel and seismic connectors. If we assume \$1000 for shoring materials
24 (which can be re-used), this still means 80 man hours at \$50/hour to construct approximately 75
25 lineal feet of temporary shoring which, as Mr. Corley testified, is nothing more than a simple
26 cripple wall. It is hard to imagine that any carpenter, regardless of how inexperienced, would

27
28 ² Although a homeowner would not likely know where his/her braced wall lines are, they are usually the exterior walls along with a few interior walls.

1 take 80 hours to frame and secure the temporary shoring.

2 LF then testified that they were merely placing extra support for some over-spanned floor
3 joists. This, too, was brought into doubt since the plans did not call for extra support for the
4 floor and any support would have been placed mid-span. In this case, the beams were all placed
5 at the outer edge of the joists thereby providing little or no additional support. In other words,
6 the pier and pad foundation was utterly redundant.

7 How the porch came to be torn down remains something of a mystery. There is little or
8 no paperwork between when the decision to tear the porch down was made and the work of
9 tearing it down was performed. The plans clearly call for it to remain and photographs show that
10 this is what occurred initially. Mr. Foy testified that the foundation under the porch was
11 inadequate and that this is what drove his decision to tear down the porch. But under cross
12 examination, he had to admit that since the plans do not call for braced wall panels at the porch,
13 there was no need to tie anything to the existing foundation (braced wall panels require a
14 connection to the foundation). Hence, the existing foundation was fine for the walls being
15 framed on the porch.

16 There is no clear understanding how the exterior trim ballooned from an estimate of just
17 over \$6000 to just over \$40,000 for both labor and materials. (**DE 75.** See Mark Corley's report
18 which includes LF's spreadsheet of estimated costs and actual costs.) The only justification for
19 an increase above the original estimate found by Mr. Corley was the three way wrap of shingle
20 mold and a sill to replace the flat stock at the bottom of the window trim detail. The cost for this
21 addition was estimated at \$1167. (See attachment C to Mr. Corley's report, DE 75, explaining
22 how he determined these costs.)

23 Mr. Foy initially testified that exterior trim went up because of the wainscot siding. But
24 it was revealed in cross examination that siding has its own accounting code and only a single
25 strip of siding on the South side had been applied at the time LF left the job. Mr. Foy then
26 admitted that the \$1289 of siding carpentry (code 660) that had been charged represented the
27 billing for this work, not trim carpentry (code 650). He then suggested that watertable molding
28

1 may have increased the cost.³ Photographs, however, showed only a single side of watertable
2 molding applied at the time LF left the job. He also suggested that the foundation vents added to
3 the trim budget. But foundation vents were on the original plans.

4 Another suggestion by Mr. Foy as to why the exterior trim costs ballooned so high was
5 the gable end detail on the porch. Mr. Foy originally estimated that this was constructed on the
6 ground by 2 or 3 men over the course of about 5 days, but Mr. Campbell testified that he did it
7 by himself over a day to a day and a half in place. Even so, one has to remember that this detail
8 would not have been necessary if the porch had not been torn down. All other suggestions on
9 why the trim costs went up so dramatically were tied to the porch having been torn down.

10 There is one other distinct possibility why trim carpentry ballooned so dramatically:
11 Other than Mr. Campbell, the workers were not skilled enough to do finish carpentry at an
12 efficient pace. Finish carpentry requires more care and attention to detail than demolition or
13 rough carpentry. As an example, let's look at the \$1289 charged for siding carpentry. This
14 means that LF journeyman spent over 23 hours doing siding carpentry at \$55/hour. Recall that
15 the photos showed just more than a single course of siding applied on the South wall of the house
16 by the time LF left the job. In addition, the wainscot area had been wrapped with felt paper
17 around the whole house and some amount of time has to be allocated to assuring that the siding
18 will line up properly all around the house, in other words, shooting a level base line around the
19 house. But 23 hours of journeyman time to do this work? This means that it took one
20 journeyman three days to wrap the wainscot area with felt, do a bit of layout and install just over
21 a single course (38 feet) of siding.

22 When we look closely at other line items, we see further evidence of overcharging. Mr.
23 Corley went into detail on why he adjusted each line item. **DE 75.** For example, LF charged
24 Eric and Kristin \$3,413 for rental equipment (code 160). But when Mr. Corley went through
25 every invoice produced by LF in discovery, he came across only a single invoice for a rental: a
26 jack hammer rented for \$253 for a few hours to knock out the existing perimeter foundation. No
27 evidence was produced to contradict this finding.

28 _____
³ Watertable molding is the transition molding that goes between the stucco and siding.

1 Another item was mobilization (code 197). LF stated in the itemized breakdown to Eric
2 and Kristin that the increase in the original budget (from \$668 to \$1,376) was due to suddenly
3 pulling off the job. From the timesheets, however, we see that this isn't true. All mobilization
4 charges accrued in the first two days of the project so should not have exceeded the original
5 estimate.

6 There's also no explanation for the \$9,156 for "leveling and squaring" the existing first
7 floor (DE 75, attachment H to Mark Corley's valuation report). This was never approved by Eric
8 and Kristin since the first floor was to remain, whatever bumps and bruises it may have had.

9 Rather than repeat every other item here, I refer the arbitrator to Mr. Corley's findings on
10 value and the bases for these values found in Defendant's Exhibit 75. I wish to point out,
11 however, that Mr. Corley proceeded, as much as possible, from LF's own numbers. He assumed
12 that the line item estimate was accurate and adjusted the value depending upon whether it was
13 the result of a mistake by LF, was subtracted from the project, added no value to the project, or
14 was a legitimate addition beyond the scope of the plans. Of note, he did not assume that the
15 carpenters were inefficient as testified to by Mr. Campbell. He merely applied the numbers and
16 hourly rates ascribed by LF. Thus, it can be legitimately argued that his number on value, a total
17 of \$201,540, is generous to LF.

18 4. LF must bear the burden of these mistakes

19 We now reach the bottom line question of this arbitration: Who should bear the burden
20 of the above mistakes? Why must Eric and Kristin pay for work that was utterly useless or to
21 replace items that were never supposed to be torn out? It is only appropriate and legally correct
22 that the perpetrator bear the cost of the mistakes. But we shouldn't weep for Mr. Landry & Mr.
23 Foy. Despite actually working on this project a total of 21.25 hours, they have thus far sought to
24 charge Eric and Kristin \$61,032 in overhead and profit⁴. If allowed, this would be a tidy income
25 of \$2,872/hour.

26 As mentioned above, Eric and Kristin can certainly make the argument that this contract
27 is void and, therefore, LF is not entitled to any compensation. They are not, however, seeking

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⁴ This is the amount charged, not collected.

1 disgorgement. They are willing to pay the value of the work to date. Even then, they are left
2 with much less than the benefit of the bargain they were hoping for. They were originally
3 promised a remodel that would cost less than \$592,000. The fair value of the work performed to
4 date is \$201,540 (testimony of Mark Corley). It is undisputed that to finish will cost about
5 \$405,000 (testimony of Marc Boudart and Andy Spring) for a total of about \$606,000. Thus,
6 Eric and Kristin will be paying a higher than anticipated mortgage, as well as property taxes for
7 the rest of their time in the house.

8
9 **C. Landry and Foy's claims.**

10 LF is claiming that there was a breach of contract by the Lechners and that they are
11 entitled to 100% of the time and materials they have charged out. The three reasons they cite for
12 the increased costs are:

- 13 1. Poor plans;
- 14 2. Request for changes by the Lechners, and;
- 15 3. Refusal by Eric and Kristin to choose the cheapest methods.

16 Allegedly Poor Plans

17 An examination of the claim of poor plans yielded few concrete examples from LF. All
18 that Mr. Landry was able to identify was a lack of cross sections, some confusion on what the
19 porch was to look like and problems with the window schedule. But Mr. Landry wasn't able to
20 clearly articulate why a cross section was necessary on a simple rectangular remodel.

21 Meanwhile, the window schedule didn't affect the price. It merely needed correction, which
22 Kristin did with help from Mr. Spring. Finally, there was testimony that Kristin worked out a
23 sketch of the porch *before* Mr. Spring provided a bid on August 14, 2006.

24 Mr. Spring stated that he could work with the plans but was initially confused by the two
25 foundations. He also said that a deck railing did not have a detail. In cross examination, it was
26 pointed out to Mr. Spring that the plans did include a detail for the deck railing on page A9. The
27 foundation, of course, has been discussed in detail, but the bottom line is that a foundation was
28 chosen to bid on before the bid came out (even if it was the incorrect foundation for the project).

1 Mr. Allen testified that it was confusing to have two foundations on the plan. Again, an
2 examination of the residence before bid would have taken care of this problem. He generally
3 stated that the plans were incomplete but had difficulty articulating why, if the plans were so
4 incomplete, did the building department issue a permit.

5 Meanwhile, Mr. Campbell testified that there wasn't anything about the plans that he
6 couldn't figure out, even if they weren't the highest quality. This opinion was echoed by Mr.
7 Corley: there wasn't anything that couldn't be figured out plus the two or three vague items had
8 been figured out *before* Mr. Spring presented a bid.

9 Alleged Changes by Eric and Kristin

10 The big argument from LF as to why costs increased was allegedly because of massive
11 changes by Eric and Kristin. But when the changes are looked at one by one, it can be seen that
12 virtually all the "changes" were either due to mistakes by LF or resulted in little or no cost.
13 Please refer to the spreadsheet, collated by Eric and presented by Kristin, which is part of DE 75,
14 outlining every change from the plans, the cause, and some notes. The following is a summary
15 of all the changes initiated by Eric and Kristin:

- 16 • Change kitchen window height. Mr. Campbell testified that this took him one to two
17 hours. (Yet LF produced a change order for \$710 before markup which equates to more
18 than 10 hours of Mr. Campbell's time. See DE75, attachment H to Mark Corley's
19 valuation report.)
- 20 • Requested laminate countertops rather than granite. This resulted in a savings from the
21 original estimate that had granite.
- 22 • Changed siding to stucco and wainscot from triple lap siding. This resulted in an alleged
23 savings of \$25,347 (See DE75, attachment H to Mark Corley's valuation report), but the
24 exterior trim costs wiped out all of these savings.
- 25 • No garage. Depending upon which LF estimate you refer to, this saved \$50,000 to
26 \$68,000.
- 27 • Added stairway alcoves. This added some framing costs but only a few hours according
28 to Mr. Campbell.

- 1 • Added a shelf in the shower. This added no more than an hour of framing according to
- 2 Mr. Campbell. (Yet LF produced a change order for \$458 before markup which equates
- 3 to just under 7 hours of Mr. Campbell's time. See DE75, attachment H to Mark Corley's
- 4 valuation report.)
- 5 • Moved an upstairs wall. This added a couple of hours according to Mr. Campbell.
- 6 • Changed upstairs flooring to plywood. This will ultimately result in a savings over
- 7 hardwood.
- 8 • Lowered ceiling while changing to uniform joist heights for second floor. No cost impact
- 9 according to Mr. Spring.
- 10 • Re-engineered the stairs to accommodate the new ceiling height. Extra cost for
- 11 engineering.
- 12 • Removed roof skirt on North side. Resulted in savings.
- 13 • Revise cabinets. Savings of \$5000 from original bid.

14 All other changes/additions were driven either by mistakes by LF or were necessary to
15 clarify the plans, the chief amongst them an error in the width of the building from 23 feet to 22
16 feet. The revisions to the plans to accommodate the new width, however, were all done before
17 construction in these areas, so resulted in no increased costs. The big ticket items that resulted in
18 increased costs were all as a result of LF mistakes: the foundation, tearing down the first floors
19 walls, tearing down the porch, etc.

20 Mr. Allen kept saying that the emails prove that Kristin "took over the job", "couldn't
21 make a decision" and "made constant changes." But a very significant number of emails were
22 *before* the bid so were communications meant to clarify things before Mr. Spring submitted a
23 bid. And as noted earlier from the invoices, Mr. Spring only spent, on average, 26 minutes a day
24 on this job once it started. And it should be pointed out that he largely kept his time in half hour
25 increments, so it is quite likely that actual time spent was even less than 26 minutes per day.

26 Mr. Allen's testimony also traps Eric and Kristin into a "damned if you do and damned if
27 you don't" situation. On the one hand, LF presented the T&M contract under the guise of
28 flexibility and being able to make changes as one goes. Hence, one would expect an increased

1 volume of communication between LF and Kristin as different methods of saving money were
2 discussed. Despite these expectations, Mr. Allen condemns Kristin and Mr. Spring for having
3 these conversations. Of course, if Kristin had declined to keep communications flowing, what is
4 the bet that Mr. Allen's testimony would have been that she was uncooperative, causing delays
5 and not trying to save money?

6 Mr. Allen's testimony is also belied by Mr. Campbell's testimony that Kristin was not a
7 problem to work with. In fact, despite coming into the project with preconceived notions, he
8 found out that she was a pleasure to work with. He also testified that she was just the opposite of
9 indecisive and that she never once delayed him. Indeed, the only delay he testified to was
10 because of a consistent lack of help from the office. Although Mr. Spring attempted to help out,
11 Mr. Foy neglected to make timely decisions and order materials. As a result, Mr. Campbell had
12 to pull off construction to attend to management duties that were more properly the role of the
13 project manager.

14 Mr. Allen's testimony is further belied by the line item for supervision (code 1980).
15 Although LF had budgeted \$15,600 for supervision, by the time they left the job, they had only
16 charged out \$4,849, much less than half the budget.

17 LF's final argument on why costs increased was because Eric and Kristin wouldn't make
18 the cheapest choices. Simply looking at the changes they agreed to, one can see that this is
19 blatantly untrue. They immediately agreed to cutting out the garage which should have resulted
20 in a savings in excess of \$50,000. They also agreed to change the siding from triple lap to stucco
21 which, theoretically, was going to save them \$25,000. LF asked them to get different cabinets.
22 Although Eric and Kristin weren't able to find other cabinetmakers, they got their cabinetmaker
23 to re-design the kitchen at a savings of \$5,000. Removing the Northern roof skirt saved a few
24 thousand. Clarifying that they were content with laminate countertops rather than the granite
25 that was specified saved several thousand. Going with plywood flooring rather than hardwood
26 upstairs will result in a savings of thousands. Hence, Eric and Kristin made decisions that should
27 have knocked about \$100,000 off the price.

28 As both testified, though, they were trying to achieve a certain architectural style and

1 some of the suggestions by LF would have reduced the house to a simple stucco box. This was
2 even admitted to by Messrs. Landry and Spring. It isn't reasonable to expect Kristin and Eric to
3 agree to every suggestion, especially if it was going to seriously compromise the architectural
4 style they were trying to maintain.

6 **DAMAGES**

7 **Contract damages.**

8 Civil Code §3300 provides, "For the breach of an obligation arising from contract, the
9 measure of damages, except where otherwise expressly provided by this code, is the amount
10 which will compensate the party aggrieved for all the detriment proximately caused thereby, or
11 which, in the ordinary course of things, would be likely to result therefrom."

12 Eric provided documentation of loss during his testimony. (This documentation was not
13 in the evidence binders, but handed out during Eric's testimony.) Damages sustained by the
14 Lechners include:

- 15 1. Payments in excess of the fair market value of the work. Paid to date: \$228,054.20
16 (undisputed). Fair market value of the work to date: \$201,540 (See **DE 75**, Mark
17 Corley's valuation). **Total for these damages: \$26,514.20**
- 18 2. Excess interest payments on construction loan and excess rent payments. Eric and
19 Kristin expected to pay rent and construction interest for only 10 months (the anticipated
20 time to complete the project according to LF). For every month beyond 10 months, the
21 Lechners suffered damages from these double payments. To determine damages, one
22 adds up all interest and rent to date plus an additional four months (the time it is
23 anticipated to finish). From this, subtract the double payments for the first 10 months and
24 anticipated mortgage payments for the other 14 months. Anything in excess is damages.

25 Rent for 10 months is \$1800/month = \$18,000.

26 Construction loan payments for the first 10 months = \$14,311.41.

27 To date, Eric and Kristin have paid, on the construction loan, \$33,400.78.

28 It has been 10 additional months of rent so far = \$18,000.

1 Since completion of the project is another 4 months away, another \$7,200 in rent
2 and \$5,674.88 in loan payments (presently \$1418.72/month) must be added to the
3 total charges, or another \$12,874.88

4 Total rent and interest = \$82,275.66

5 Minus 10 months of rent and interest = -\$32,311.41

6 Subtotal = \$49,964.25

7 Minus anticipated mortgage payments ($\$592,000 \times 5.7\%^5 / 12 \text{ months} \times 14$
8 months) = -\$39,368

9 **Total damages for excess rent and interest: \$10,596.25**

- 10 3. Port-a-potty/power pole in excess of 10 months: \$162.75/month [plus four months yet to
11 complete]: **\$2,278.50.**
- 12 4. Excess utilities for two dwellings, water and garbage: **\$152.43**
- 13 5. Unnecessary charges for engineering/architecture. Since two foundations were not
14 necessary nor was it necessary to tear down the first floor walls, the review of change
15 orders billed on 10/3/06 by the architect was not necessary. This bill was for **\$783.75.**
16 **DE 48**, invoice 2292 from Streeter Group.
- 17 6. The weather proofing installed by LF failed and the hardwood floor was ruined. Cost to
18 **replace the hardwood floor is \$7,815** (\$15/square foot x 521 square feet). We are
19 mindful that Kristin has admitted that she was willing to take the risk that the floor would
20 be ruined, but we question whether an adequate effort was made to waterproof the
21 hardwood since \$10,000 was allocated for weatherproofing (code 705) while only \$1,618
22 was expended. (Then again, why spend \$10,000 to save \$7,800 of hardwood?)
- 23 **7. Cost to remediate exterior mechanical closet per Marc Boudart's testimony: \$2,200**
- 24 **8. Cost to fix windows left out in weather per Marc Boudart's testimony: \$3,000 to \$8,000**
- 25 **9. There is also landscape damage** which LF was supposed to protect. Unfortunately, we
26 cannot know the exact cost to fix until the project is completed. Although the law allows
27

28 ⁵ 5.7% was an average mortgage rate at the time of writing this brief.

1 damages that are difficult to determine,⁶ we recognize that Eric and Kristin were not able
2 to testify to a figure for the damaged landscaping so are unable to provide a reasonable
3 basis to compute these damages.

4 **Damages total: \$53,340.13 to \$58,340.13**

5
6 **ATTORNEY’S FEES, COSTS AND EXPENSES**

7 The prevailing party is entitled to “costs, fees and expenses” under the contract. Should
8 we prevail, we will provide the arbitrator with a complete breakdown of these expenses.

9
10 **CONCLUSION**

11
12 Had LF provided a fixed price contract as required by law, they would have paid much
13 closer attention to this project. But, since it was a time and materials contract, they paid very
14 little attention. The result was predictable. Rather than closely inspecting and analyzing
15 problems as they occurred, LF took the easy route which was to simply tear it out and charge to
16 build it anew. The precise reasons why T&M contracts are illegal in home improvement
17 contracts cannot be more clearly illustrated than in this case. As a result, the contract is either
18 void or voidable and LF is entitled to, at most, the reasonable value of their services.

19
20 Alternatively, LF breached the contract and the implied covenant of good faith and fair dealing.

21
22 An evaluation of the construction, utilizing LF’s own numbers for rates and materials,
23 shows that a fair value of the work performed is \$201,540. With a cost to complete of \$405,000,

24
25 _____
26 ⁶ “[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.
27 (citations omitted) The law requires only that some reasonable basis of computation of damages be used, and the
28 damages may be computed even if the result reached is an approximation. (citation omitted) This is especially true
where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss
of profits (citation omitted) or where it is the wrongful acts of the defendant that have caused the other party to not
realize a profit to which that party is entitled.”^{FN411} Furthermore, “[T]he wrongdoer cannot complain if his own
condition creates a situation in which the court must estimate rather than compute.”

Kairos Scientific Inc. v. Fish & Richardson, P.C. WL 21960687, 70 -71 (Cal.Superior,2003)

1 Eric and Kristin will not receive the benefit of the bargain they had hoped for, but at least the
2 final cost will be only \$14,000 more than the original fixed price bid. Overpayments and other
3 damages as explained above bring the Lechners' total damages to **\$53,340.13 to \$58,340.13**
4 depending upon the ultimate cost to repair the windows.
5

6
7 Respectfully submitted.

8
9 Dated: 6/6/2008

REDENBACHER & BROWN, LLP

10
11 By _____/s/_____
12 Gary F. Redenbacher, Attorney for Defendants and
13 cross complainants, Kristin Dyer and Eric Lechner
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1 PROOF OF SERVICE

2 1. I certify that I am over the age of 18, not a party to this cause, a resident or employed in
3 the county where the mailing took place, and my residence or business address is: P. O. Box
4 66134, Scotts Valley, CA 95067.

5 2.a _____ The following papers were deposited in the US Mail in Santa Cruz County after
6 enclosing them in a sealed envelope with first class postage fully prepaid or,

7 2.b XX By email

8 Papers served: Post Arbitration Brief and exhibits

9 2.c _____ Service by FAX: CCP§§1013(e) and (f), 2015.5, CRC 2008(e) I transmitted from fax
10 number (831) 438-3121 the above documents and an unsigned copy of this declaration.

11 Time of Fax:

12 The transmission was reported as complete without error by the electronic transmission log
13 immediately following the transmission. A true and correct copy of the transmission report is
14 attached to the original proof of service.

15 3. I am readily familiar with the business practice at my place of business for collection and
16 processing of correspondence for mailing with the United States Postal Service. Correspondence
17 so collected and processed is deposited with the USPS that same day in the ordinary course of
18 business. I certify under penalty of perjury that the foregoing is true and correct.

19 Dated: 6/6/08

20 _____
21 Declarant

22 Name and address and/or fax number of each person served:

Name and Address of Attorney	Phone and Fax Numbers	Representing
Anna DiBenedetto BURTON, VOLKMAN & SCHMAL 133 Mission St, Suite 102 Santa Cruz, CA 95060	831-425-5023 831-427-3159 (fax)	<i>Plaintiff Landry & Foy Builders, Inc.</i>