ABDC, Inc.

12345 Main Street
Anytown, California 94555

Phone: (925) 899-8444
Fax: (925) 899-84443
abdcinc@gmail.com

June 15, 2012

Mr. and Mrs. John Smith
1234 Elm Street
Anytown, California, 93333

Re: Commercial construction project

Dear Mr. and Mrs. Smith:

As more particularly described in more detail below, please consider this to be demand for the payment of the outstanding balance of $57, 400.00 for services rendered to your property. Enclosed is another copy of the currently outstanding invoice. I believe the amounts contained therein are self explanatory, especially in light of the numerous conversations we have had on the subject.

Let me get right to the point as to purpose of writing. My crew and I, in good faith, have a performed valuable construction services which has substantially improved the value of your property. As such, these amounts need to be paid forthwith. If not paid within ten days of receipt of this letter, we will have no choice but to take the next step for the preparation and filing of a superior court lawsuit to foreclose the mechanic's lien. According to law, that lawsuit must be filed within 90 days of recording the mechanic's lien or the lien will expire. For this reason, we have no choice but to proceed. Because such a suit cannot be brought in small claims court, the net effect for both of us is to incur thousands of dollars in attorneys' fees and court costs. Although I am prepared to do so, I think we would both agree that resolution of the matter at this juncture would be more productive.

So there can be no doubt of my commitment to bringing such action, and so there is no question as to what has transpired, here is a summary:

General Tenor of Working Conditions

Our principals and crew members will testify that in all their years of experience, they have never had a job in which the owners were as difficult, excessively demanding, rude, and unprofessional. Job foremen, Steve Johnson and Dave Linewright, will testify that in their joint 30 years' plus experience, they have never worked with owners this obnoxious. Almost without exception, it was an everyday occurrence in which they would be screamed at, hurled obscenities, and hit with a panoply of demands. Making matters worse, it interfered with the effective flow of the construction process because of the constant interruptions. It was not merely a situation in which they would be met with a new list of items to complete when they showed up in the morning, but they would be interrupted constantly during the balance of the day. Many times, this had to do with redirecting their work, not because it was deficient, but because the owners had their own agenda and preferences as to how it would progress. One of the most cardinal rules in construction is that the owner will not interfere with the ways and means of construction, especially since these owners did not have construction experience.

This had a direct effect on the construction process. Not only did the crew members abhor the idea of going to work each morning, but it interfered directly with their focus and diligent prosecution of the work.

Exacerbating the process was that the yelling and screaming was usually accompanied with obscenities, making the working conditions even more intolerable. To the contrary, our crew remained professional and did not raise their voices or orchestrate any confrontations.

Adding to this unrealistic tenor was the fact that the architect insisted that the project be to the "highest standards" in the industry. Neither the contract nor industry customs require such perfection. This was a veterinary clinic, not a traditional hospital, and requires only reasonable standards along with customary industry deviations. This is also reflected in

the incredulous estimates to repair by your back charge contractors which assumes that entire portions of the construction be redone from scratch.

MANNING THE JOB

There are general allegations of the failure to diligently prosecute this project. This is not the case. During construction, we manned the job according to the specific needs during the stages of construction. In the beginning of the project, they had anywhere from four to ten people on the job site due to the fact that most of the work was labor–intensive. Later in the middle of the project, we did not use as many personnel because the job became more specialized to the various subcontractor trades.

The subcontractors themselves were well experienced for this type of project. We had dealt with many of the subcontractors before and were comfortable with the quality of their work. This included excellent workmanship by Dennco (electrical subcontractor), L.M. Kruse (plumbing subcontractor), S & K Roofing (roofing subcontractor), Blue Label Contractors, Inc. (drywall), and Copeland HVAC (HVAC subcontractor). The subcontractors have been paid and there are no outstanding liens.

CHANGE ORDERS

As you know, there were five (5) formal change orders addressed during the course of the project. Change Orders 1 and 4 were a “wash” so there was no net deduction or increase in price. No. 1 has been signed by you and No. 4 has not.

The remaining three (3) change orders were either directed by you as additional work outside the scope. For example, Change Order No. 2 occurred after paint had originally been applied to the office area. You changed their mind as far as coloring and authorized it to be repainted. Change Order No. 3 related to laminate shelving which was added at your request. Change Order No. 5 was for the addition of chain link fencing on the stairway leading up to the dog run which was not provided for in the plans and specifications. The first two were signed, but the last one was not.

During the course of construction, it was not uncommon for you to have direct communication with our crew members and to ask for “freebies” outside the scope of the contract. On a number of occasions, this was done without charge. At a certain point, our management told the crew members not to do anything additional unless there was a formal change order. Coincidentally, these were the times you would complaint about other work being incomplete, almost as if they were retaliating for the loss of such free services.

Probably the major item of dispute as to change orders relates to the T-Bar ceiling. The drawings provided (except for the waiting and reception room) for an exposed sprinkler system, ducting for the HVAC, and electrical. The ceilings would be covered with Armstrong tile. As a result of ongoing discussions, it was decided that a T-Bar ceiling would be installed instead to cover up these features. There was an increased cost for this new ceiling, but the architect thought there would be a reduction in the cabinet cost because the height would be shortened. On April 24, 2001, the parties executed Change Order No. 1 which “swapped” the T-bar ceiling for the Armstrong tile and created a wash with no net effect for either client. A controversy then ensued as to whether or not there was more of an expense in installing the T-bar ceiling and whether there should have been an overall deduction on the contract because of the shortening of the height of the cabinets. This is really a moot discussion because the cabinetry subcontractor would not have charged less for one or two feet shorter cabinets since the same fabricating process would be involved and the loss of material would be minimal. In other words, you would have to manufacture them substantially the same anyway, and the cost would not be much different. It would be like the difference between a size 8 and size 10 shoe – both are the same price.

Thereupon, the architect came up with a whooping $21,727.91 change order deletion because of the shortening of the cabinets. This official A.I.A. change order was never agreed by us.

In the meantime, we did some calculations and determined they actually installed more net cabinetry even with the shortened lengths. The actual as-built cabinetry was 123 linear feet with the original bid being for 120. So, on both accounts, there should not be a change order deduction at all and if still insisted upon by owners, they must assume the additional cost of a T-bar ceiling.

Building Inspection Sign-Off

During the course of the project, the notes from the City of Pacifica Building Inspection Department indicated that **all** inspections resulted in "work passes – authorized to proceed". The only impediment to the finalization on the building inspection permit is the fact that the owners have not completed their landscaping (outside the contract). There were no red lines or correction lists issued by the Building Inspection Department.

Alleged Delays

You claim a substantial delay in completion. The weather and physical circumstances of the construction primarily caused any such delay. This was a particularly wet winter for Pacifica and correspondingly, slowed matters down in the neighborhood of three to four months.

The original plan was to do the construction while you were still in occupancy. In other words, allow you to continue their active operations as a veterinary hospital. We did our best to accommodate this demand by working in certain areas while relocating them to others. Unfortunately, this caused a nightmare of scheduling, since most subcontractors wish to do their work all at once as opposed to mobilization and demobilization. Because of these inherent scheduling difficulties, it was decided by all that operations be moved into a modular facility on site. However, delays had already been occasioned prior to that temporary move.

Budget

Although this was an A.I.A. lump sum contract, there was a detailed budget prepared. One of the reasons was the requirements mandated by construction lender, Heritage Bank. It was administered by Builders Control. Even though there were multiple instances of work beyond the scope, the project did not exceed "one dime" of the original budget (other than the change orders). This required us to "eat" a number of items in order to accomplish this financial result.

Punch List Items

This case can be resolved into a simple matter of alleged unfinished items on a punch list. In fact, almost all the factual issues of this case relate to such a punch list. There are no substantial construction defects, in the strict sense of the word. For example, there have been no allegations of lack of structural integrity, resulting property damage (there was a leak to the roof system during construction, but this was covered by insurance), component failures, or other large-ticket items.

It is our position that we have worked and reworked the punch list to death. As far as we are concerned, we have not only long since achieved substantial performance, but except for trivial matters, have completed the punch list itself and should be paid the balance under the contract. You on the other hand, claim there are still a number of items on the punch list not yet completed.

It would be counter-productive to list all of the contested punch list items to the arbitrator in this brief. However, some general comments would be helpful at this point.

We have never refused to finish items on the punch list. It has not only worked on that list with our crew, but hired two neutral contractors who, with a three-man crew, spent approximately two weeks scouring the list and making numerous corrections. These individuals, Frank Silva and John Cummings, are both License B contractors that have extensive construction experience. They are so well respected that the owners themselves asked them to testify on their behalf. They will state that they not only completed the punch list items, but the ones that are still allegedly outstanding, they feel they are within construction practices.

As to some of the specific items on the punch list, the following comments are made:

1. **Wall texturing**. You allege that essentially all the interior walls must be stripped down and completely retextured and painted. This is completely unjustified and is an example of why the estimates received to date by defendants are so high. Apparently, it is based on the allegation that there are multiple textures and paint types on the walls. This is not true. A “light knockdown” texture was called out. The texturing, which initially has the consistency of pancake batter, is sprayed and splattered on the walls. It is then finished off with a flat trowel. Only one such process was used. The only exception would be the hand-

texturing in the stairwell after the railings were moved. Further, the interior was flat latex with the exception of semi-gloss on the door casing. Flat and semi-gloss were not mixed for the same surfaces.

2. **Painting**. You claim multiple "thin" areas, as well as the mixing of gloss and flat. Perhaps a site inspection will be most demonstrative on this subject, but we deny these allegations. In many cases, areas have been repainted at the request of the owners.

3. **Cabinet Doors and Drawers**. The cabinets were installed by our crew as well as Mr. Silva and Mr. Cummings. The allegations of the failure to align or plumb the cabinets are unjustified. The cabinets were fine when installed, and if there has been any changes, it is because of use over time. This may have been exacerbated by the heavy use of the drawers because of this commercial facility. The cabinets have a built-in adjusting mechanism which can be fine tuned by a simple screwdriver. This adjusts them horizontally and vertically. In other words, it would adjust not only the gap but the vertical alignment on either side of a closing door. You refused to listen to the simple instructions that could have been given for the adjustment of the doors and, quite simply, expect perfection for an indefinite period of time for adjustable cabinets.

4. **Doors**. Messrs. Silva and Cummings checked and adjusted the doors throughout the building. There is no problem with screws not being into a solid backing, since they are metal framed. The real bone of contention are the double doors which lead to the kennel area. These doors have extensive use and traditionally cannot be guaranteed as to complete alignment, especially over time. You wanted them sound-proof so the barking of dogs could not be heard in other areas of the facility. There will be testimony that this cannot be done with the type of doors that were installed and merely adding weatherproofing will not accomplish this result.

5. **Dumbwaiter**. This was installed by a contractor with a direct contract with you. From all appearances, this individual had trouble doing the installing, especially since he used his 15-year-old son. We were responsible for framing in the opening and supplying the power. Our crew, as well as Silva and Cummings, also made sure that the mechanism stopped flush and was in good working condition at that point.

6. **HVAC System**. On December 14, 2011, Copeland Mechanical (HVAC subcontractor) measured all the air volumes in the kennel, cat ward, and reception area. He then air balanced the building completely. The ventilation of the cat ward was designed according to the Uniform Mechanical Code. However, you insisted on going beyond, because of alleged buildup of cat smells. We, without charge, agreed to provide an additional exhaust fan for that room which has solved the problem as best, under the circumstances.

7. **Alleged gaps between bottom of door framing and the flooring**. You were concerned about the presence of animal waste and other materials that may accumulate in this area. Messrs. Cummings and Silva spent a considerable time sealing all such gaps with a cement substance known as rockite. They were then painted. This solved the issue.

There was also the extensive application of caulking throughout the interior.

8. **Light grids**. There are allegations of exposed conduit in the light grids, for example, in the reception area. The architect did not provide any details to hide the conduit behind the grid. According to the electrical subcontractor, there was no other way to install that conduit.

9. **Fire Sprinklers above the bookshelf in the lounge**. The City of Pacifica fire marshal has okayed the location of these fire sprinklers as long as nothing is stored on top of the bookshelves. You claim this is a fire violation and must be relocated which is not the case.

DAMAGES

The original lump sum contract was for $550,500.00. We have been paid $424,756.21 to date. Total unpaid change orders are $3,138.61. Further extra work has not been charged, although it was incurred. We contest the $21,787.91 deductive change order proposed by the architect. The final draw request, with retention, is $67,070.03. The past due amount is $38,675.96. This brings the total amount due to a principal of $108,885.20, plus prejudgment interest at 10% per annum.

You have vaguely alluded to a loss of income claim, on the theory they did not operate at one hundred percent efficiency. This would be expected because of the insistence on

staying open during construction and appears to be an unsubstantiated claim. You had also claimed a $500 per day penalty, but this is unsupported by the contract documents.

LEGAL ARGUMENT

The legal issues endemic to this case are not particularly complicated. Instead, most of the contested issues are factual. At the outset, however, we would like to outline some of the more common legal issues.

A. We have substantially performed it's duties and is therefore owed the balance under the contract.

The doctrine of substantial performance has been recognized in the construction context in California since at least 1921 with the seminal Supreme Court case of *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285. The court pronounced this rule as follows:

> . . . It is settled, especially in the case of building contracts where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price of allowed as a counter-claim, and the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance. (at pgs. 288-289)

We have complied with all these prerequisites. You have taken possession and enjoy the benefits of the newly-renovated space. The usefulness of the building has not been impaired, and the operations of this veterinary clinic continue unhampered. And, no one would seriously allege that the construction deviations were done intentionally or fraudulently.

Nor, is there any authority for the proposition, apparently espoused by you, that some kind of perfection must be accomplished in the construction project or that it be performed with the "highest standards". The analysis of whether there are any defects must be made in the customary sense of negligence, i.e., whether or not the contractor has reasonably performed under industry standards.

Since we have met the initial burden of showing substantial performance, the only remaining question would be what defects exist and their reasonable cost of repair. That also carries with it the reasoning that such repair costs be reasonable, under the circumstances, and not an over-reaching attempt to charge excessive amounts for relatively minor deviations.

B. Damages for failure to conform to the drawings may include a loss of fair market measure as well as the cost to repair

Although the usual measure of damages for alleged defective performance in a construction contract is the so-called "cost of correction" rule, there are cases where the repair of such defects involves a significant cost which exceeds the loss of market value. In those cases, the damages are more in tune with a diminution of value measure. See generally, California Construction Contracts and Disputes, CEB, 2nd Ed., §362.

It cannot yet be determined from the estimates submitted through your informal discovery as to the precise manner of calculating the damages. However, because of the large amounts, it is assumed these contractors are not just repairing alleged problems, but redoing entire components. For example, if because of some aesthetic variations in the texture of the interior walls, all walls were stripped down, retextured and repainted, this would be economic waste and the better measure would be diminution in value.

For the reasons more particularly described herein, demand is made that you pay within five days the sum of $57,700.00. If not, without further notice, we will proceed with the filing of a lawsuit to foreclosure the mechanic's lien.

Sincerely,

Phil Jones, President
ABDC, Inc.

Cc: Our attorney