
FINE FIX MEDIATION

Confidential Information Attorney for Culture Bubble, Inc.

You are a junior partner in a relatively large firm in Worcester, Massachusetts, about an hour west of Boston and an hour and a half from the Berkshire Mountain area in Western Massachusetts. You would like to be promoted to full partner soon, so it is important to you to be a “go-getter” and to build relationships with prestigious clients.

You were delighted to receive a call from Ian Marcu, operations manager at Culture Bubble in Western Massachusetts, asking if you would file a lawsuit on Culture Bubble’s behalf. Everyone knows that Culture Bubble, Inc. is a wholly owned corporate subsidiary of the large corporation, Club Jed, Inc. Culture Bubble’s construction of an enormous entertainment, educational, and resort facility has created employment and excitement in the area. You desperately want to make this client happy, by representing its interests well.

Your initial dealings in the case were with Ian Marcu, Culture Bubble’s operations manager. It was clear to you that Marcu’s interest was in getting as much money as possible from Fine Arts Fabricators (“FAF”) – a Kentucky company that designed and eventually delivered four mechanical lifts to Culture Bubble. You suspect that Marcu and his friend, the artistic director, were embarrassed when the lifts were much too big to be useable and had to be rejected and shipped back. After all, Marcu was the one who originally accepted FAF’s bid and negotiated the contract.

Before filing suit, you talked to Marcu about his negotiations with FAF’s Fran Finley over the timing of delivery. Marcu admitted that Finley had explained FAF’s policy not to commit to delivery sooner than 12 weeks before a contract. Marcu said:

I thought I had a contract by March 10 or so, based upon Finley saying that they were starting to work on the design in early March – that would have made June 7 about 12 weeks out. Finley said he would use “best efforts” to get the lifts here by June 7, and I suggested a \$10,000 incentive per lift so that he would meet the deadline. I couldn’t have been clearer with Finley that Culture Bubble’s opening was on June 22, and we needed two weeks to install and work with the lifts before opening. Why would I want a contract with no promise of delivery until July 5? Yes, we did tinker with the exact written specs, so the paperwork wasn’t done, and the contract wasn’t signed until April 13, but I didn’t think Finley would hold me on a technicality. He said he would schedule the design and fabrication work to be done by June 7.

Accepting Marcu’s story, you have taken the legal position (on Culture Bubble’s behalf) that the lifts were delivered late: they were promised on June 7, weren’t delivered until June 15, and then had to be returned. For the purposes of litigation and negotiation, you have made the most aggressive argument: that Culture Bubble is entitled to delay damages from June 7



until replacement lifts were obtained in December, plus a return of the \$80,000 deposit and the \$120,000 additional cost of the new lifts.

Based upon this argument, Marcu worked with the business office to come up with calculations of delay damages: losses that resulted from the lack of the four lifts from June 7 through the 2011 summer season. These calculations are outlined in Exhibit A and were provided to FAF. The mediator has not yet seen them. (To be reasonable and compromise, you did not carry these projections out until December when the new lifts were installed. You would do so at trial.) The calculations were based upon the shortfall between revenue projections and actual revenues during the period: in general admissions to Culture Bubble as well as the shortfall in ticket revenues for the Opulent Opera performances. Prices of admission to the Culture Bubble are packaged in different ways. People can buy tickets to specific performances, coupon books for day or event admissions, or a weekend or week's pass to the entire Bubble, or limited areas of interest. The local area residents tend to buy coupon books or tickets to specific performances.

Since your initial contact with Marcu, you have met with Culture Bubble's President, C.J. Bassin, in preparation for the mediation. Bassin conceded that not all the shortfall (from projections) in general admissions or Opulent Opera tickets are attributable to the lack of four lifts. It is impossible to calculate with any precision how many people elected not to come to Culture Bubble or its Opera because certain performances or experiences were not as spectacular as originally intended. On the other hand, if the Culture Portal and the Opera had been more of a "wow," Bassin does believe that attendance might have been higher that first season. It's hard to say how much higher because other areas of the Bubble have been completed or enhanced since August.

Bassin is more confident that he suffered damages from ticket sales at the Opulent Opera. Culture Bubble had sold approximately \$60,000 in tickets for a week of "preview" performances of the Magic Flute Opera to area residents (\$20 per ticket, 1,000 seats, 3 performances) which had to be returned. Unfortunately, after your conversation with Bassin, you rethought the preview performance loss issue and remembered that previews would have been before July 5, when the delay damages claim is weakest.

Bassin seems to agree with his artistic director that reviews of the performance were less enthusiastic than they would have been had the lifts been installed. Thus, you estimated that \$180,000 – calculated as 50% of the \$360,000 shortfall - in opera house revenues over 8 weeks in July and August was attributable to the less-than-spectacular staging (as indicated in Exhibit A). You recognize that even this would be hard to prove. It is also possible that some of the people whose preview tickets were returned eventually came to the Opera after its official opening.

At your client's insistence, you also claimed damages for estimated additional losses of \$440,000 in general admission revenue (20% of the shortfall from projections) as well as \$1,000,000 in loss of reputation. Bassin maintains that if the Culture Portal and the Opera



had been more of a “wow”, more people would have come to Culture Bubble in that first season.

Leaving aside the delay issue, you know that FAF will raise the contract provision of 14 days to cure any defect and argue that Culture Bubble was in breach due to its failure to provide FAF with an opportunity to cure. You have spent considerable time with the operations manager, Ian Marcu, to understand how the 4 FAF lifts delivered were “defective” and why he didn’t think the defect could be cured. You think FAF’s argument on this issue is hyper-technical. You believe a jury will be swayed by Marcu’s testimony about the ridiculous size of the base and the need to open the show. He could not afford to wait when common sense told him there was no cure, except replacement – which clearly would have taken more than two weeks. In preparation for the mediation, you informally consulted with an engineering expert (and friend) who confirmed, based upon a quick look, that the FAF lift base dimensions could not have been significantly reduced without removing some steel support and impacting the lift’s ability to meet weight and stability requirements.

Marcu wasn’t sure whether FAF had been provided with the original architect’s plans or the “as-builts” when they began the design work. If FAF had only the originals, you suspect they will make much of the fact that the dimensions of the staging area at the Culture Portal, and the stage trap doors and back entrance ramps at the Opera House and the Portal were reduced in later design and construction. (The difference between the original architectural plans and the “as-builts” were reductions from 11’ to 10’ for the entrances and trap doors, and 30’ to 28’ for the staging area at the Portal.)

In your view, this is a “red herring,” because the ‘7 x 9’ original lift base dimension would have been fine in the Portal and the Opera House, as built. *The 10’ x 12’ base dimensions of the lifts delivered on June 15 would not have been workable even under the original architectural dimensions.* Everyone knew that the lifts were intended to be modular, easy to move flexibly within performances, and easy to move between Culture Bubble facilities. With a 10’ x 12’ base dimension, the lifts failed to fulfill their intended purpose. *FAF should have informed Culture Bubble as soon as it realized the base dimensions would grow to 10’ x 12’. They failed to do so.*

You anticipate that FAF will whine about Marcu’s replacing the lifts with the highest of the four original bidders. He did so because the two other bid designs were similar to FAF’s design. Marcu was not confident that these would end up any better (or any smaller) than FAF’s lifts. His conversations with the chief engineer at the highest bidder convinced Marcu that an entirely different design approach was needed. Marcu agreed to adjust his performance specs for weight and speed to keep the cost down.

Given the strength of Culture Bubble’s legal case, you were a bit surprised that Bassin didn’t seem terribly interested in taking it all the way to trial if FAF won’t pay a great deal in settlement. You are certainly confident that any jury award would include Culture Bubble’s \$80,000 deposit, plus the \$120,000 difference in the cost of the replacement lifts and pick up a sizeable percentage of lost revenues. (That’s why you’d like to “blackboard” as high a lost



revenue figure as possible in the mediation and at trial.) In other words, you see a bare minimum recovery of \$200,000 plus significant lost revenues. You advised Bassin that your fee through trial would be \$50,000, which you think makes the litigation a good investment for Culture Bubble. You estimated that the trial would take place a year to a year and a half from now. You told Bassin that he, Marcu, the artistic director, and the other Culture Bubble managers you have met will make excellent witnesses at deposition and trial. You weren't sure if Bassin was convinced. It could be that he has bigger fish to fry, or that he just doesn't have the instincts of a litigator. That's what people hire you for.



Exhibit A

Damages Claimed in complaint filed by Culture Bubble, Inc. vs. Fine Arts Fabricators, Inc.

Deposit Payment to Fine Arts Fabricators	\$80,000
Additional Cost of Replacement Lifts (Price of Replacement Lifts - \$360,000 – less the Price of FAF lifts - \$240,000)	\$120,000
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Lost Ticket Revenues – Preview Performances (3 performances, sold out, scheduled for week of June 15 @ \$20 per ticket. 1000 tickets each were returned or had to be honored. during regular performances, when regular ticket prices were higher)	\$60,000
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Lost Opera Ticket Sales¹	
Projected ticket sales (\$25 per ticket, 1,000 tickets, 4 performances, \$100,000 per week for 8 weeks)	\$800,000
Actual ticket sales	<u>\$440,000</u>
Shortfall	\$360,000 (50%)
	\$180,000
Lost General Admission Revenues	
Projected General Admission Revenues (based upon market survey data, 8-week summer season, week & weekend packages)	
\$1,000,000 per week, 8 weeks	\$8,000,000
Less General Admission Revenues	<u>\$5,800,000</u>
Difference	\$2,200,000
Est. 20% attributable to lifts	\$440,000
Loss of reputation:	<u>\$1,000,000</u>
Total claim: \$1,880,000	

¹ Alleged to be attributable to bad reviews.