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## FINE FIX MEDIATION

### **Confidential Information Attorney for Fine Arts Fabricators, Inc.**

You are a young partner in a fifteen-lawyer firm in Louisville, Kentucky, representing Fine Arts Fabricators (“FAF”) in the litigation originally filed against FAF by Culture Bubble, Inc. Your client contact is Fran Finley, CEO and co-founder of FAF. He explained that he started FAF with a college classmate who majored in mechanical engineering. He was a fine arts major with a passion for the theater and learned set design and techie work building props and sets.

You view Finley as a somewhat “difficult client,” emotional rather than logical, sometimes unwilling to listen to reason and accept your advice. Sometimes he acknowledges that FAF may have made a mistake, but then he comes up with excuses, reasons why it didn’t matter, and expresses unwillingness to face the consequences.

Finley and FAF must be good at what they do. Over the past 25 years, FAF has become a successful specialty design and construction engineering business, adding capacity when Finley’s father “sold” his general contracting business to Finley (through FAF). The business now has three major divisions: Industrial Conveyance Systems, Art Stage and Recreation Systems, and Mechanical Creatives (fabricating the mechanical systems for complex simulated creatures, such as mechanical dinosaurs in museum exhibits). Finley is the CEO and his college roommate, Mark Manley, is FAF’s head of engineering. Finley has direct management responsibility for the art stage and recreation mechanicals and Manley for industrial plant systems. The Mechanical Creatives Division is smaller and is overseen by A.J. Tripp, a senior mechanical engineer. FAF employs a team of 10 engineers and has 35 employees. While engineers and other employees nominally work for one division or another, they are a single labor pool, assigned to different projects as needed.

Finley emphasized that he had always been proud that FAF has never been sued. That is because he never over-promises and FAF has always done whatever it takes to satisfy the customer. It is common for FAF to be brought into a project that is already behind schedule, forcing FAF to produce on an even tighter timeline. In the Art Stage and Recreation System division, it is typical to work with a performance manager who has spent too much time designing a show, then recognizes that the opening is looming, and tries to get FAF to make up for its lost time. FAF always works to meet opening night, even if things must be pieced together temporarily.

Finley told you that he views the Culture Bubble debacle as proof that “no good deed goes unpunished.” After the original RFP went out and FAF submitted an initial bid, Culture Bubble began to get creative with the specs. They weren’t sure what they needed. Based upon the Complaint, you told Finley that Culture Bubble would probably argue that the contract really began by mid-March, when Culture Bubble’s operation manager, Ian Marcu, told Finley (by letter and by phone) they would go with FAF. Finley maintains strongly that, although he might have agreed to start working on preliminary designs, FAF wouldn’t have signed a contract or



started the 12-week clock at that point because it had no deposit money and Culture Bubble's artistic director was still working on performance specs.

Details were not finalized, and no contract was signed until a month later, on April 13. Even though FAF had begun conceptualizing the design before then, FAF's policy is NOT to commit significant resources until a deal is signed. FAF has been burned too many times by expending significant work before a contractual commitment and then having the customer go with a competitor.

Finley is perhaps most *outraged* that the Culture Bubble is alleging that after June 7, FAF was late and thus in breach of the contract. He sees it as incredible that they would seek delay damages. He and Marcu specifically negotiated this issue. Marcu had pushed for commitment to a delivery date of June 7 – only 8 weeks after the contract was signed. Finley told Marcu that he would use “best efforts” and that FAF would set up the design and fabrication schedule to achieve delivery on June 7. (Those words were written in and initialed on the contract.) In other words, *if all went well*, FAF would make the June 7 date. Finley specifically told Marcu that he couldn't commit to making that date because experience has taught him that things do not always go smoothly. Finley refused to abandon the 12-week allowance that is FAF's standard contract term. That is why Marcu came up with his incentive scheme, offering to pay an extra \$10,000 per lift incentive to meet the June 7 date. Finley insisted that forfeiture of that incentive would be the sole consequence of delivery after June 7 but before July 5. While Finley may have told Marcu early on that things were “proceeding according to schedule” and that FAF might meet the June 7 date, that did NOT change the agreement, and Marcu should know it.

Unfortunately, FAF's fabrication and engineering work did NOT go smoothly after the design and initial fabrication phase – when FAF tested an unfinished prototype. The chief design engineer who should have had responsibility was on “Sabbatical”. He had subcontracted the design to an Australian engineering firm, with whom FAF had also subcontracted work for the complex lift system in the new Australian opera house. The Australian firm prepared the design and the estimated “weights and measures” that went to Culture Bubble under FAF's letterhead. When FAF fabricators tested the prototype, it became clear that the Australians had miscalculated the dimensions of the base and the number of steel supports needed to support the weight and height of the design. Finley doesn't know what engineering miscalculation caused the errors. To ensure stability in motion and distribute weight, the design had to be modified, by adding steel supports and increasing the lifts' base dimensions from 7' x 9' to 10' x 12'. FAF did not inform Culture Bubble of the design modifications and increased base dimensions.

At the time, FAF had been provided with Culture Bubble's original architectural plans for the Culture Portal and Opera House. Since then, Finley has learned that these plans were not the “as-builts.” The staging area in the Culture Portal was reduced from 30' to 28' in the “as-builts”; the back ramps and stage trap doors in the Opera House and the Portal staging area were reduced from 11' to 10'. No one informed FAF of these changes.

Finley admits that he does not know whether the Australian engineers or FAF reviewed the original plans (the only plans they would have had) when they enlarged the base dimensions.



Finley did review these plans at your request when you were preparing FAF's Answer to the Complaint in the lawsuit. He told you that the lifts delivered would have "just" fit under the original plans. The back entrances, loading ramps, and stage trap doors on the original plans were 11 feet wide; the Culture Portal's narrowest staging area was 30 feet wide (sufficient to accommodate 2 lifts, even at the new dimension). Although you didn't press Finley on the point, it seems obvious to you that the fit would not have been very good. Mobility and ease of use would have been significantly better with first base dimensions of 7'x 9'.

Finley is adamant that on June 7, delivery was not late under the contract. He insists that if Culture Bubble thought FAF was in breach because of the base dimension, they should have given FAF an opportunity to fix it. Finley maintains that he might have succeeded, with some creative engineering, and perhaps made Culture Bubble's June 22 opening date.

Finley has told you that he is personally offended that no one called him and asked him to come and fix the problem, after all of those initial meetings and months of faxes and phone calls. He just received an irate voicemail message from Marcu accusing FAF of incompetence. He was embarrassed by the truck driver who returned the lifts "because the Culture people said they were defective" (and demanded double the shipping cost). He was "humiliated" by the lawyer's letter and then by service with the suit.

What seems to bother Finley most is Culture Bubble's "just plain lying about the contract." Finley specifically discussed the deadline issue with Marcu and said he would "use best efforts" to get it sooner but could not commit to delivery before the 12 weeks.

Finley doesn't understand why he should pick up the tab for the replacement lifts. He maintains that they were much too expensive – Culture Bubble deliberately went with the highest bidder – and they used an entirely different design.

You think Finley has a good point (and a strong defense) on the delivery date and delay issues, at least until July 5, with 2 additional weeks to cure any defect. At least until July 5, you see the contract document as clear that any "delay" between June 7 and July 5 was to be covered by forfeiture of the "incentives," and FAF committed to "use best efforts" for June 7, but not to be bound to deliver before July 5. You accept that it would have taken some time for the lifts to be installed and for Culture Bubble to decorate and learn to work with them, so perhaps any "damages" should start a week or so later.

Your legal opinion differs from your stubborn clients on the issue of performance and breach. It is hard for you to believe (and you think it will be hard for a jury to believe) that FAF could have modified the lift over the next 14 days after delivery, or even 14 days after July 5 to reduce the base dimensions and meet the performance specs. If it was so simple, why didn't they do it before delivery? Moreover, the fact that the replacement lifts used an entirely different design concept tells you that the FAF design couldn't have been so easily adjusted. Unless an expert can convince you (or a jury) differently, your best guess is that FAF would have had to scrap the four lifts and start from scratch. It seems unlikely that they could have done this within any reasonable interpretation of the cure period.



While you might make much of the argument at trial that the lifts would technically have fit under the original architectural plans, the dimensions look awfully tight to you. You just aren't confident that you will get around FAF's failure to notify Culture Bubble of the change in dimension. After all, if these dimensions didn't matter, why would FAF provide them to a customer in the first place? Also, it hurts the defense that FAF will have to admit that it (or its sub) made initial errors in its engineering calculations.

You have explained these liability issues to your client, but he doesn't seem to want to hear them. You anticipate that FAF will be on the hook for a *minimum* of \$200,000 - most or all of the \$120,000 difference between its lift price (\$240,000) and the replacement lift price (\$360,000), plus the return of the \$80,000 deposit.

You do tend to agree with your client's assertion that Culture Bubble's consequential damages figures (attached as Exhibit A to these Confidential Instructions) are inflated and speculative. It is not FAF's fault that Culture Bubble's revenue projections were burst by reality. Whether or not some rich family decided to vacation at Culture Bubble could not have rested on whether they could float at the Portal or swoop at the Opera House. You have serious doubts about Culture Bubble's ability to prove lost revenues, but you have not seen their evidence. Any consequential damages will have to be proven and they should start AFTER July 5 – and realistically after mid-July.

You told Fran Finley that he had better start thinking of solutions to the problem, including some sum of money to be paid to Culture Bubble. You don't think he was too happy with you. You told him that your fees through trial will be at least \$60,000. You reluctantly agreed to file a counterclaim for the monies owed to FAF on the contract because it seemed like a waste of time and fees. FAF's counterclaim seeks lost profits of \$100,000 on the \$240,000 contract (after deducting \$140,000 in materials and labor).

You asked Finley about the value of the four lifts, and what has happened to them. He told you that they are in a warehouse but will be hard to sell because they're "over-spec'd" – designed for much too much weight and speed (obviously, given that Culture Bubble agreed to reduce these specs for the replacement lifts). Finley estimates that the parts of each lift are worth \$20,000 – a total of \$80,000. It would cost \$5,000 in labor costs to disassemble each lift to claim its components parts. He thinks FAF might be able to sell them for \$30,000 each, but there are no buyers lined up.

Finley explained to you that FAF is cash-strapped at present because of a large contract in Argentina, on which it has not been paid. FAF invested \$750,000 in this project and given the collapse of the Argentinean economy, stands to lose it all. You don't know any more details. It makes FAF unwilling and unable to throw large sums of money away on litigation or give it to Culture Bubble.

Finley told you in no uncertain terms that if FAF has to pay more than \$100,000 - \$125,000 in cash, it will have to borrow by increasing FAF's secured line of credit. He would prefer to avoid that because he knows the bank will demand that he and his partner secure the credit line with personal guarantees and their homes as collateral. He would feel more comfortable about his



financial circumstances if there were relief in sight on the Argentinean project or at least a way to sell or lease these lifts, now gathering dust in his warehouse. While these aren't Culture Bubbles' problems, they are FAF's economic realities.

You have emphasized to Finley that he and many FAF employees (plus the Australian engineers) will have to appear for depositions and trial at FAF's expense -- in dollars and productive days lost. The trial would take place in Western Massachusetts, for 5-10 days, a year to 18 months from now.



## Exhibit A

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

<b>Deposit Payment to Fine Arts Fabricators</b>	<b>\$80,000</b>
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#### **Additional Cost of Replacement Lifts**

(Price of Replacement Lifts - \$360,000 – less the Price of FAF lifts - \$240,000)	<b>\$120,000</b>
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<b>Lost Ticket Revenues – Preview Performances</b>	<b>\$60,000</b>
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(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)

#### **Lost Opera Ticket Sales<sup>1</sup>**

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%)	<b>\$180,000</b>

#### **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		<b>\$440,000</b>

<b>Loss of reputation:</b>	<b><u>\$1,000,000</u></b>
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**Total claim: \$1,880,000**

<sup>1</sup> Alleged to be attributable to bad reviews.