
FINE FIX MEDIATION

Confidential Information for Fran Finley, CEO of Fine Arts Fabricators, Inc.

You are outraged by this lawsuit. You started your business, Fine Arts Fabricators (“FAF”) with Mark Manley, a college classmate who majored in mechanical engineering. You were a fine arts major with a passion for the theater. Your lack of acting talent made you a set designer and a techie, building props and sets.

Over the past 25 years, you and Mark have built a successful specialty design and construction engineering business, adding capacity when your father “sold” his general contracting business to you. 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). You are the CEO and Mark is FAF’s head of engineering, but you have direct management responsibility for the art stage and recreation mechanicals, and Mark 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.

You had always been proud that FAF had never been sued. That is because you never over-promise and have 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 a tight timeline. It is typical for FAF 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. You always work to meet opening night, even if things have to be pieced together temporarily.

You view the Culture Bubble debacle as proof that “no good deed goes unpunished.” After the original RFP went out and you submitted an initial bid, Culture Bubble began to get creative with the specs. They weren’t sure what they needed. You anticipate Culture Bubble will argue that the contract began by mid-March, when Culture Bubble’s operation manager, Ian Marcu, told you (by letter and by phone) they would go with FAF. Even though you agreed to start working on preliminary designs, you couldn’t have signed a contract or started the 12-week clock at that point because you had no deposit money and Culture Bubble 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 told Marcu it had begun conceptualizing the design before then, FAF’s policy is NOT to commit significant resources until a deal is signed. You have been burned too many times by expending significant work before a contractual commitment, and then having the customer go with a competitor.



You are *outraged* that the Culture Bubble is alleging that after June 7, FAF was late and thus in breach of the contract. It is even more incredible that they would seek delay damages. These issues were specifically negotiated between you and Ian Marcu. He had pushed you for commitment to a delivery date of June 7 – only 8 weeks after the contract was signed. You told Marcu that you would use “best efforts” and that you would set up the design and fabrication schedule to *try* 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. You specifically told him you couldn’t commit to making that date because experience has taught you that things do not always go smoothly. You explicitly 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. (You didn’t really need extra \$ incentives. FAF would have used best efforts simply because the customer wanted the earlier delivery date.) You insisted that forfeiture of that incentive would be the sole consequence of delivery after June 7 but before July 5. While you may have told Marcu early on that things were “proceeding according to schedule” and that you thought you’d meet the June 7 date, that did NOT change your agreement, and he knows it.

Unfortunately, FAF’s fabrication and engineering work did NOT go smoothly after the design and initial fabrication phase – when you tested an unfinished prototype. The chief design engineer who should have had responsibility was on “Sabbatical”. He subcontracted the design to an Australian engineering firm, with whom FAF had subcontracted work for a complex lift system in the new Australian opera house. The Australian firm worked up 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. You don’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, you have 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.

You do 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.

You reviewed these plans at your lawyer’s request when he was preparing FAF’s Answer to the Complaint in the lawsuit. You told him that the lifts delivered would have “just” fit. 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 (just sufficient to accommodate 2 lifts, even at the new dimension). However, if pressed, you would have to admit that the



fit would not have been very good. Mobility and ease of use would have been significantly better with the first stated base dimensions of 7'x 9'.

You are adamant that on June 7, delivery was not late under the contract. And, if Culture Bubble thought FAF was in breach because of the base dimension, they should have allowed FAF to fix it. You might have succeeded, with some creative engineering, and perhaps made Culture Bubble's June 22 opening date.

After all of those initial meetings and months of faxes and phone calls, you are personally offended that no one called you and asked you to come and fix the problem. You just got an irate voicemail message from Marcu accusing FAF of incompetence. It was embarrassing to deal with the truck driver who returned the lifts "because the Culture people said they were defective" (and demanded double the shipping cost). It was humiliating to receive the lawyer's letter and then to be served with a suit.

What bothers you the most is that Culture Bubble is just plain lying about the contract. You specifically discussed the deadline issue with Marcu and told him you would "use best efforts" to get it sooner but could not commit to delivery sooner than 12 weeks.

You took a quick look at Culture Bubble's ridiculous damages figures (attached as Exhibit A to these Confidential Instructions). 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. Culture Bubble simply can't prove that more tickets would have been sold if your lifts were there. Moreover, any damages should start AFTER July 5 – and realistically after the end of July, because it would have taken Marcu and the Culture Bubble players some time to install and practice with them.

When you consider that the contract provided 14 days to cure any defect, you could have delivered them on July 5, and you would have had until July 19 to cure.

You don't understand why FAF should pick up the tab for the replacement lifts: they were too expensive. Marcu deliberately went with the highest bidder – and they used an entirely different design.

Your lawyer told you that you had better start thinking of solutions to the problem, including some sum of money to be paid to FAF. At this point, you're not happy with your lawyer. He has said that attorneys' fees through trial will be at least \$60,000 but you had to beg him to file a counterclaim for the monies owed to FAF on the contract. At this point, you are sitting with four lifts in a warehouse – they're "over-spec'd" – designed for much too much weight and speed (obviously since Culture Bubble agreed to reduce these specs for the replacement lifts). You estimate 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. You might be able to sell them for \$30,000, but there are no buyers lined up.



Unfortunately, FAF is quite cash-strapped at present. The Creative Creature Mechanics entered into a large contract with the new Argentinean Children's Zoo and Museum Center, for which it designed and created the mechanics for 25 enormous dinosaurs and other prehistoric creatures. Just as these creatures were about to be shipped, Argentina's economy collapsed. FAF had invested \$750,000 in this project and stands to lose it all. The insides of the mechanical dinosaurs are sitting in a warehouse at present. They have no outside covering "skin" because that was to be done by a commercial art firm in Argentina. For FAF to find a buyer, it would have to pay an estimated additional \$250,000 for exterior coverings for the creatures. Your marketing people have been instructed to contact potential buyers but have not begun the search. The longer the delay in finding a buyer, the longer FAF has to cover the financial loss. For that reason, FAF does not want to throw money away on litigation or give it to Culture Bubble.

You really wish that you could come out of this mess with some payment from Culture Bubble, for the monies owed under the contract. If you *have* to pay "damages" to Culture Bubble because of the lift base dimension problem, you'll be darned if you'll pay for the delay before late July or for Culture Bubble's speculative profit projections. If the lifts really could not have been fixed, you'd understand picking up *some minimal* damage number for what they lost after July, to let Culture Bubble save face. But you don't see why FAF should take the fall because Culture Bubble's idea didn't fly.

Bottom line: you are angry at the way you were treated by Culture Bubble. FAF invested \$140,000 in materials and labor on those lifts and lost gross profits in excess of \$100,000 on the \$240,000 contract.

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. You want to avoid that because you know the bank will demand that you and your partner secure the credit line with personal guarantees and your homes as collateral. You would feel more comfortable about FAF's financial circumstances if there were relief in sight on the Argentinean project or at least a way to sell or lease these lifts. Within these real economic constraints, you'll settle for what seems right and reasonable. If it doesn't seem right or reasonable, you won't.

Your lawyer does not seem optimistic about FAF's chances of "winning" the lawsuit. He seems worried that there will be a liability finding against FAF because the lifts delivered weren't exactly as described. He said that he doubts a jury would sock you with *all* of the damages claimed by Culture Bubble, though it is possible. (That might bankrupt FAF, or awfully close, depending on how business goes over the next year or so). He has advised you not to count on receiving anything on your counterclaim.

Whatever the outcome, your lawyer has emphasized that you and many FAF employees (plus the Australian engineers) will have to appear for depositions and trial at FAF's expense - in dollars and in 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.

Deposit Payment to Fine Arts Fabricators	\$80,000
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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	\$60,000
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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 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>
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Total claim: \$1,880,000

¹ Alleged to be attributable to bad reviews.