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15 Attorneys for Plaintiffs and Counter-Defendants
 JILL CAKEBREAD and STEVE CAKEBREAD
 16

17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**

20 JILL CAKEBREAD and STEVE CAKEBREAD,

21 Plaintiffs,

22 v.

23 BERKELEY MILLWORK AND FURNITURE
 24 CO., INC.,

25 Defendant.
 26

Civil Case No.: 16-cv-00083-RS

**BERKELEY MILLWORK’S STIPULATED
 REQUESTS TO FILE AMENDED
 ANSWER, VOLUNTARILY DISMISS
 COUNTERCLAIMS WITH PREJUDICE,
 AND WITHDRAW JURY TRIAL
 DEMAND; ~~[PROPOSED]~~ ORDER**

27
 28 BERKELEY MILLWORK’S STIPULATED REQUESTS TO FILE AMENDED ANSWER, VOLUNTARILY
 DISMISS COUNTERCLAIMS WITH PREJUDICE, AND WITHDRAW JURY TRIAL DEMAND; [PROPOSED]
 ORDER

1 IT IS HEREBY STIPULATED by and between Berkeley Millwork & Furniture Co., Inc. and
2 Jill and Steve Cakebread that:

3 1. Pursuant to Federal Rule of Civil Procedure 41(b), Berkeley Millwork will dismiss its
4 Counterclaims and Prayer for Relief, Dkt. 8, in their entirety with prejudice.

5 2. Pursuant to Rule 15, Berkeley Millwork may file the Amended Answer attached hereto as
6 Exhibit A.

7 3. Pursuant to Federal Rule of Civil Procedure 38(d), Berkeley Millwork withdraws its jury
8 trial demand.

9 * * *

10 Per Local Rule 5-1(i)(3), the filer of this document hereby attests that the concurrence to the
11 filing of this document has been obtained from the other signatory.

12 DATED: December 9, 2016

COVINGTON & BURLING LLP

13 By: /s/

14 Clara J. Shin
15 Ethan Forrest

16 Attorneys for Plaintiffs and
17 Counter-Defendants
18 JILL CAKEBREAD and
19 STEVE CAKEBREAD

20 DATED: December 9, 2016

LAW OFFICE OF MELVIN D. HONOWITZ
& ASSOCIATES

21 By: /s/

22 Melvin D. Honowitz
23 Eric C. Shaw

24 Attorneys for Defendant and Counter-
25 Claimant BERKELEY MILLWORK
26 AND FURNITURE CO., INC.


27 BERKELEY MILLWORK'S STIPULATED REQUESTS TO FILE AMENDED ANSWER, VOLUNTARILY
28 DISMISS COUNTERCLAIMS WITH PREJUDICE, AND WITHDRAW JURY TRIAL DEMAND; [PROPOSED]
ORDER

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ORDER [~~PROPOSED~~]

Pursuant to stipulation, IT IS SO ORDERED.

DATED: 12/12/16



HONORABLE RICHARD G. SEEBORG
UNITED STATES DISTRICT JUDGE

BERKELEY MILLWORK'S STIPULATED REQUESTS TO FILE AMENDED ANSWER, VOLUNTARILY DISMISS COUNTERCLAIMS WITH PREJUDICE, AND WITHDRAW JURY TRIAL DEMAND; [PROPOSED] ORDER

Exhibit A

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8 **BERKELEY MILLWORK**
9 **AND FURNITURE CO. INC.**

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

12 **JILL CAKEBREAD et al.,**
13 Plaintiffs,
14 vs.
15 **BERKELEY MILLWORK**
16 **AND FURNITURE CO. INC. ,**
17 Defendants.

CASE NO. C-16-00083 DMR

AMENDED ANSWER OF DEFENDANT
BERKELEY MILLWORK
AND FURNITURE CO. INC.

Complaint Filed: January 8, 2016

18
19 Defendant BERKELEY MILLWORK AND FURNITURE CO. INC. (“Berkeley
20 Millwork”) answers the Complaint of Plaintiffs JILL CAKEBREAD and STEVE CAKEBREAD
21 (“Plaintiffs”) as follows:

22 **INTRODUCTION**

- 23 1. Berkeley Millwork denies the allegations of paragraph 1.
24 2. In response to paragraph 2, Berkeley Millwork admits that it made an offer to
25 compromise, but such offer was not an admission, and is inadmissible as a purported admission
26 under Federal Rule of Evidence 408. Berkeley Millwork avers that inclusion of such offer in the
27

1 complaint is both improper and should be stricken. Berkeley Millwork denies that any refund is
2 owed to the Plaintiffs, and therefore denies that it has “used” Plaintiffs’ money.

3 3. Berkeley Millwork denies the allegations of paragraph 3.

4 **JURISDICTION AND VENUE**

5 4. Berkeley Millwork admits that it is a resident of California. Berkeley Millwork
6 has no information or belief as to the current residence of Plaintiffs and therefore can neither
7 admit nor deny that this action is between citizens of different states. Berkeley Millwork admits
8 the amount in controversy exceeds \$75,000.

9 5. Berkeley Millwork admits the allegations of paragraph 5.

10 6. Berkeley Millwork admits the allegations of paragraph 6.

11 **INTRADISTRICT ASSIGNMENT**

12 7. In response to paragraph 7, Berkeley Millwork admits that the events surrounding
13 this claim largely occurred in Alameda County. Berkeley Millwork has no objection to the
14 assignment of the case to the Oakland Division of the Court.

15 **PARTIES**

16 8. In response to paragraph 8, Berkeley Millwork has no information or belief as to
17 the Plaintiffs residence and therefore denies this allegation.

18 9. Berkeley Millwork admits the allegations of paragraph 9.

19 **FACTS ENTITLING THE CAKEBREADS TO RELIEF**

20 **Berkeley Mills and the Cakebreads’ Agreements**

21 10. Berkeley Millwork admits the allegations of paragraph 10.

22 11. Berkeley Millwork admits the allegations of paragraph 11.

23 12. Berkeley Millwork admits the allegations of paragraph 12.

24 13. Berkeley Millwork admits the allegations of paragraph 13.

25 **Berkeley Mills Owes the Cakebreads Nothing**

26 14. In response to paragraph 14, Berkeley Millwork denies that the “request to
27 postpone” occurred prior to commencement of work. At that time, August 2007, fabrication had
28 already commenced. Berkeley Mills admits that it agreed to place “cabinet making” then already

1 underway on hold as of August 22, 2007 and to store the fabricated materials pending instructions
2 to proceed.

3 15. In response to paragraph 15, Berkeley Millwork admits receiving a statement
4 from the Cakebreads in June 25, 2015 acknowledging that they had previously cancelled the
5 transaction the purchase order. Berkeley Mills denies that the Plaintiffs had any right to cancel
6 “again” the previously cancelled project. Berkeley Millwork further avers that no right to cancel
7 would have existed in 2015 as fabrication had commenced in the Spring of 2007, thereby
8 terminating any contractual right to cancel the project. Cancellation of the initial purchase order
9 had occurred in or around May 2008 when the Cakebreads had the project redesigned, and the
10 parties agreed and understood that the goods as originally designed, priced and ordered would
11 never be manufactured, and that a second, independent purchase order would be required for the
12 purchase of goods.

13 16. Berkeley Millwork denies the allegations of paragraph 16, no refund is due to the
14 Plaintiffs.

15 **Because Berkeley Mills Owes Plaintiffs Nothing, It Has Declined a Issue Refund**

16 17. In response to paragraph 17, Berkeley Millwork admits that it has refused to issue
17 a refund. Except as admitted, Berkeley Millwork denies the allegations of paragraph 17.

18 18. In response to paragraph 18, Berkeley Mills acknowledges engaging in settlement
19 negotiations. Any further reference to such negotiations is improper under Federal Rule of
20 Evidence 408 and should be stricken.

21 19. In response to paragraph 19, Berkeley Mills acknowledges engaging in settlement
22 negotiations. Any further reference to such negotiations is improper under Federal Rule of
23 Evidence 408 and should be stricken.

24 20. In response to paragraph 20, Berkeley Millwork admits it has properly refused to
25 provide Plaintiffs a return of the money when the order was cancelled in or around May 2008.
26 Except as expressly admitted, Berkeley Millwork denies the allegations of paragraph 20.

27 21. Berkeley Mills denies the allegations of paragraph 21.
28

1 **Berkeley Mills Stood on Its Contractual Rights With Regard to Arbitration**

2 22. Berkeley Mills admits the allegations of paragraph 22.

3 23. Berkeley Mills admits the allegations of paragraph 23.

4 24. In response to paragraph 24, Berkeley Mills admits that the AAA requested that
5 the parties waive the attorneys' fees clause as a condition to proceeding with the arbitration.

6 25. In response to paragraph 25 Berkeley Mills admits that it declined to waive the
7 attorneys' fees clause. Berkeley Mills further avers that the terms and conditions were prepared
8 prior to the adoption of California Code of Civil Procedure 1284.3, and further that it did not view
9 its contract with the Cakebreads for Cakebread Ranch, which Berkeley Mills understands to be a
10 commercial venture, as a "consumer" transaction.

11 26. Berkeley Mills admits the allegations of paragraph 26.

12 **FIRST CAUSE OF ACTION**
13 **BREACH OF CONTRACT**

14 27. In response to paragraph 27, Berkeley Mills incorporates its responses to
15 paragraphs 1 through 26, above.

16 28. Berkeley Mills admits the allegations of Paragraph 28.

17 29. Berkeley Mills denies the allegations of paragraph 29.

18 30. Berkeley Mills denies the allegations of paragraph 30.

19 31. In response to paragraph 31, Berkeley Mills admits that it has retained the
20 Plaintiffs' nonrefundable deposit as it has no legal obligation to return it.

21 32. Berkeley Mills denies the allegations of paragraph 32.

22 **SECOND CAUSE OF ACTION**
23 **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

24 33. In response to paragraph 33, Berkeley Mills incorporates its responses to
25 paragraphs 1 through 32, above.

26 34. Berkeley Mills admits the allegations of paragraph 34.

27 35. Berkeley Mills denies the allegations of paragraph 35.

28 36. Berkeley Mills denies the allegations of paragraph 36.

1 37. Berkeley Mills denies the allegations of paragraph 37.

2 38. Berkeley Mills denies the allegations of paragraph 38.

3 **THIRD CAUSE OF ACTION**
4 **CONVERSION**

5 39. In response to paragraph 39, Berkeley Mills incorporates its responses to
6 paragraphs 1 through 38, above.

7 40. Berkeley Mills denies the allegations of paragraph 40.

8 41. Berkeley Mills denies the allegations of paragraph 41.

9 42. Berkeley Mills denies that it had any obligation to secure the Plaintiffs' "consent"
10 with regard to its usage of the deposit and thus avers that their "consent" is irrelevant.

11 43. Berkeley Mills denies the allegations of paragraph 43.

12 44. Berkeley Mills denies the allegations of paragraph 44.

13 WHEREFORE Defendant Berkeley Mills prays for judgment as set forth below:

14 **AFFIRMATIVE DEFENSES**

15 Berkeley Mills alleges the following matters as Affirmative Defenses:

16 **FIRST AFFIRMATIVE DEFENSE**

17 Complaint fails to state facts sufficient to state a cause of action against Berkeley Mills.

18 **SECOND AFFIRMATIVE DEFENSE**

19 California law does not recognize the Second Cause of Action as a separate claim for
20 breach of contract.

21 **THIRD AFFIRMATIVE DEFENSE**

22 All claims alleged against Berkeley Mills are barred by the provisions of California Civil
23 Code sections 337, 338, or other applicable statute of limitations such as Cal. U.C.C., section 2-
24 725.

25 **FOURTH AFFIRMATIVE DEFENSE**

26 If any refund were owed under the contract, such claim arose no later than May 2008
27 when Plaintiffs were advised and acknowledged that the purchase order had been cancelled
28 pending new designs and new quote for the production of goods. A new quote was provided at

1 Plaintiffs request in September 2009 but not accepted within a reasonable time.

2 **FIFTH AFFIRMATIVE DEFENSE**

3 The Complaint is barred by the doctrine of waiver. To the extent that Plaintiffs had any
4 right to cancel the contract, such cancellation had to occur within a reasonable time of
5 commencement of the contract, and such reasonable time elapsed many years ago. As a result
6 Plaintiffs waive any right to cancel the contract..

7 **SIXTH AFFIRMATIVE DEFENSE**

8 Plaintiffs had no right to terminate the contract, and by their termination Plaintiffs have
9 caused Berkeley Mills damages measured by the profits Berkeley Mills would incurred in
10 completing that contract as well as for the custom materials milled for use in Plaintiffs' project.
11 All such damages, according to proof, would be an offset to any amounts Plaintiff would be
12 owed.

13 **SEVENTH AFFIRMATIVE DEFENSE**

14 Plaintiffs are estopped from asserting the allegations contained in the complaint by reason
15 of their its acts, omissions, representations, and conduct, upon which Berkeley Mills to believe
16 that Plaintiffs had cancelled the project after fabrication and acquiesced by their subsequent
17 conduct to the terms and conditions of the contract which made the deposit nonrefundable, and
18 that Berkeley Millwork has relied to its detriment on Plaintiffs failure over the ensuing seven
19 years to seek such a refund.

20 **EIGHTH AFFIRMATIVE DEFENSE**

21 Plaintiffs failed to mitigate their damage and losses, if any, and any recovery awarded
22 should be reduced by the amount of damages that could reasonably have been avoided.

23 **NINTH AFFIRMATIVE DEFENSE**

24 Plaintiffs could no longer cancel the order in July 2015 as fabrication commenced in 2007
25 prior to the project being placed on hold on or about August 22, 2007, and further because the
26 contract had already been cancelled in 2008.

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TENTH AFFIRMATIVE DEFENSE

Per the contract, the deposit was nonrefundable and accordingly Berkeley Millwork has no obligation to make any refund of monies to the Plaintiffs.

ELEVENTH AFFIRMATIVE DEFENSE

Withdrawn.

TWELFTH AFFIRMATIVE DEFENSE

In the event Plaintiffs prevail on any claim, Berkeley Mills is entitled to an offset pursuant to Code of Civil Procedure section 431.70 measured by the lost profits it would have earned had it been allowed to perform the contract. The project was unilaterally cancelled by Plaintiffs in 2008 after fabrication had commenced.

THIRTEENTH AFFIRMATIVE DEFENSE

To the extent not otherwise cancelled, the project was abandoned by the conduct of the parties and the contracts therefore canceled by operation of law no later than March 2011.

WHEREFORE, Berkeley Mills prays that:

- 1. That Plaintiffs take nothing by way or their complaint and that judgment be entered in favor of Berkeley Mills and against Plaintiffs;
- 2. Berkeley Mills be awarded costs of suit incurred herein, including reasonable attorneys' fees; and
- 3. Berkeley Mills be awarded such other and other further relief as the court may deem just and proper.

Dated: December 7, 2016

**MELVIN D. HONOWITZ
AND ASSOCIATES**

By /s/
Eric C. Shaw

Attorney for Defendant Counter-Claimant
**BERKELEY MILLWORK
AND FURNITURE CO. INC.**