

1  
2  
3  
4  
5 UNITED STATES BANKRUPTCY COURT  
6 EASTERN DISTRICT OF CALIFORNIA  
7 (FRESNO DIVISION)  
8

9  
10 In Re: ) Case No. 08-13589-B-7  
11 Shawn Deitz, )  
12 Debtor. ) Adv. No. 08-01217-B  
13 Wayne and Patricia Ford, ) TRIAL DATE:  
14 Plaintiff, ) APRIL 4, 5, & 11 2011  
15 vs. ) DEPT.: "F", CT. RM. 13  
16 Shawn Deitz, ) JUDGE: RICHARD T. FORD  
17 Defendant. )  
18

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

20 INTRODUCTION

21 1. Shawn Deitz, the Debtor and Defendant in the  
22 above-captioned case ("Defendant"), filed a Voluntary Petition  
23 for relief under Chapter 7 of the United States Bankruptcy Code  
24 on June 20, 2008.

25 2. The last day to file a complaint objecting to  
26 dischargeability of debts under 11 U.S.C. §§523(a)(2), (4) and  
27 (6) was September 22, 2008. This Adversary Proceeding was filed  
28 September 19, 2008.



1 the Eastern District of California has generally referred these  
2 matters to the Bankruptcy Court for hearing pursuant to 28  
3 U.S.C. §157(a) and United States District Court, Eastern  
4 District of California General Orders 182 and 223. This is a  
5 core proceeding within the meaning of 28 U.S.C. §157(b)(2)(I).  
6 This is a complaint objecting to the dischargeability of debt  
7 under 11 U.S.C. §§523(a)(2)(A), (a)(4), & (a)(6). Plaintiffs  
8 are creditors of the estate and have standing to bring this  
9 Adversary Proceeding.

10 **FINDINGS OF FACT**

11 8. Defendant testified that he is currently employed  
12 by Heald College on a part-time basis. According to his  
13 testimony, he served in the U.S. Marines for a number of years  
14 and another branch of the armed forces. His total service time  
15 was 14 years. During his time in the military, he was engaged  
16 in construction projects. Following his tenure in the military,  
17 Defendant testified that he followed his passion for building  
18 and became a general building contractor. According to  
19 Defendant's Contractors State License Board ("CSLB") Certificate  
20 of Records (Plaintiffs' Exhibit "4"), Defendant's "B" General  
21 Building Contractor's License was issued on September 10, 2004.  
22 Defendant testified that he built a number of projects,  
23 including a small tract of smaller homes, and that he  
24 successfully completed some other larger custom homes in what  
25 was identified as the "Applegate Project." (Plaintiff's Ex.  
26 "17", Deitz E-Mail September 9, 2007.) The Applegate Project is  
27 relevant in that it is where Plaintiffs and Defendant first met.

28 9. Wayne Ford was born April 8, 1948 and is 63 years

1 old. He is a disabled veteran. He testified that he served in  
2 the U.S. Army as a combat infantry soldier beginning in 1967.  
3 He served in Viet Nam. In June 1968, Mr. Ford was seriously  
4 injured when a vehicle in which he was a passenger ran over a  
5 land mine which detonated. He suffered significant, permanent,  
6 and obvious disabilities resulting from the land mine blast and  
7 must walk with the assistance of fore-arm Canadian Crutches on  
8 both arms. He will likely be confined to a wheelchair in the  
9 future. Mr. Ford has no college education and has not worked  
10 since being injured. He is permanently disabled.

11 10. Mrs. Ford is a registered nurse. She met her  
12 husband in a military hospital in Long Beach upon his return  
13 from Viet Nam. They eventually married and she has cared for  
14 him over the years.

15 11. In 2006, Plaintiffs had house plans drawn and  
16 submitted to the County of Fresno for approval. The plans were  
17 for a 4,170 square foot handicap accessible home to accommodate  
18 Mr. Ford's significant disabilities. It was designed to comply  
19 with the Americans With Disabilities Act ("ADA"), the Veterans  
20 Administration ("VA") requirements for handicap assisted  
21 housing, and of course, the County of Fresno building code  
22 requirements.

23 12. In late August or September 2006, Plaintiffs were  
24 driving around and by chance came upon the Applegate Project.  
25 Defendant was building three (3) custom homes at the Applegate  
26 Project. Mr. Ford testified that he asked permission to look  
27 around the three (3) custom homes that were in various states of  
28 construction as they were similar in size to what he and his

1 wife were planning to build. Defendant allowed Plaintiffs to  
2 look at these homes. Mr. Ford testified that each home had been  
3 rough framed, was weather tight, and still in need of drywall  
4 and finish carpentry. Two (2) of the Applegate Project houses  
5 had covered access porches, which is something Mr. Ford was  
6 required to have in order to comply with ADA requirements and to  
7 receive VA remuneration for handicap assisted housing.

8 13. After Plaintiffs viewed the Applegate Project,  
9 they spoke with Defendant regarding their plans to build a  
10 handicap assisted home. The undisputed testimony is that  
11 Defendant represented that he was familiar with ADA and VA  
12 requirements for handicap assisted housing and that he had, in  
13 fact, built to these guidelines before. Defendant represented  
14 that he could build to these standards for Plaintiffs.

15 14. The testimony by both Plaintiffs and Defendant  
16 was that Defendant met Plaintiffs at their property where the  
17 home was to be constructed on at least two (2) occasions. The  
18 unrefuted testimony adduced at trial was that during these  
19 meetings with Defendant, that Defendant also brought commonality  
20 between the parties relying on he and Mr. Ford's military  
21 experiences, the fact that Defendant worked as a pharmacy tech  
22 at the VA Hospital where Mr. Ford receives treatment, and that  
23 Defendant's mother was or is a nurse similar to Mrs. Ford. The  
24 Plaintiffs each testified that they asked Defendant if he was a  
25 licensed contractor in good standing and he replied that he was.  
26 Plaintiffs did testify that they were aware of a bonding issue  
27 that needed to be taken care of and that Defendant ultimately  
28 represented to them that he obtained a bond so that issue was

1 resolved. However, as the Court noted during trial, and as  
2 Defendant admitted on direct examination, his license remained  
3 suspended for other reasons at the time he contracted with  
4 Plaintiffs. The Court finds that Defendant's representations  
5 about the status of his contractor's license was a knowingly  
6 made material misrepresentation of fact and that Defendant's  
7 conduct was designed with the specific intent to deceive  
8 Plaintiffs, to fraudulently induce them to contract with him so  
9 he could obtain the job and substantial payments of money from  
10 Plaintiffs.

11 15. At some point, presumably prior to September 25,  
12 2006, Defendant was provided a set of plans that both he and Mr.  
13 Ford initialed while the Plaintiffs' plans were in plan check  
14 with the County of Fresno so Defendant could prepare a bid.  
15 (Plaintiff's Exhibit "2".)

16 16. On September 25, 2006 Defendant provided a Custom  
17 Home Bid/Proposal to Plaintiffs. (Plaintiffs' Exhibit "1") The  
18 home's square footage was 4,170 square feet. The total price  
19 under the bid for the project was \$444,105.00 or \$106.50 per  
20 square foot ( $4,170 \times \$106.50 = \$444,105.00$ ). According to  
21 Defendant's bid, the project also included garage square footage  
22 of 965 square feet, breeze-way square footage of 309 square  
23 feet, porch and patio square footage of 1,136 square feet, and  
24 the courtyard square footage of 470 for a total square footage  
25 of 7,050 square feet for the project. The bid indicated that it  
26 included the cost to build and furnish the materials for the  
27 home according to the plans as approved by the County of Fresno.  
28 There was a caveat that extra flat-work, such as the driveway

1 and retaining wall, would be an additional charge, not included  
2 in the \$444,105.00 contract price. In concluding the bid to  
3 Plaintiffs, Defendant signed the letter "Thanks" and "Semper  
4 fi". At trial, and on direct examination of Defendant,  
5 Defendant was provided a copy of the United States Marine Corps  
6 website home page. That home page was entered into evidence as  
7 Plaintiff's Exhibit "22". Plaintiffs' counsel had Defendant  
8 read the following into the record from the United States Marine  
9 Corps home page:

10 "Semper Fidelis  
11 More Than a Motto, a Way of Life.

12 *Semper Fidelis* distinguishes the Marine Corps bond  
13 from any other. It goes beyond teamwork—it is a  
14 brotherhood and lasts for life.

15 Latin for 'always faithful,' *Semper Fidelis* became the  
16 Marine Corps motto in 1883. It guides Marines to  
17 remain faithful to the mission at hand, to each other,  
18 to the Corps and to country, no matter what.

19 Becoming a Marine is a transformation that cannot be  
20 undone, and *Semper Fi* reminds us of that. Once made,  
21 a Marine will forever live by the ethics and values of  
22 the Corps.

23 There is no such thing as an ex-Marine."

24 The Court finds that the use of "Semper Fi" in the September 25,  
25 2006 bid was in furtherance of Defendant's intent to induce  
26 Plaintiffs to contract with him for the construction of their  
27 home.

28 17. Following the initial bid of September 25, 2006,  
a Proposal and Contract ("Contract") was drawn by Defendant  
dated October 10, 2006. (Plaintiffs' Exhibit "2" and  
Defendant's Exhibit "A".) The Contract contained the same total  
price of \$444,105.00 for the project. The Contract bore

1 Defendant's California State Contractor's License Number  
2 0846254. Regarding Defendant's bonding issue mentioned above,  
3 the evidence demonstrated that Mr. Ford executed the Contract on  
4 November 7, 2006, one day after Defendant's license suspension  
5 for the contractor's bond issue was lifted. (Plaintiffs Exhibit  
6 "4", a Certified Copy of Defendant's CSLB License History.)  
7 However, Plaintiffs' Exhibit "4" demonstrates that Defendant's  
8 license was not reinstated until January 3, 2007 due to an  
9 outstanding judgment, for which a suspension was issued on  
10 October 12, 2006. Defendant did offer evidence that he had paid  
11 this judgment. Nonetheless, Defendant's license remained  
12 suspended at the time of contracting. Mr. Ford testified that  
13 his only prior experience with a contractor was when he resided  
14 in Prescott, Arizona and that he had no problems with that  
15 remodel project. The Court finds Mr. Ford's testimony credible  
16 and that he justifiably relied upon Defendant's representations  
17 that his license issue was resolved prior to executing the  
18 Contract.

19 18. The Court finds that Defendant executed the  
20 Contract on October 14, 2006, while his license was suspended in  
21 contravention of California Business and Professions Code  
22 §7028.5, which in pertinent part provides that, "It is unlawful  
23 for any person . . . to individually engage in the business or  
24 individually act in the capacity of a contractor without having  
25 a license in good standing." The Court also finds that  
26 Defendant failed to comply with the mandate of California  
27 Business and Professions Code §7030.1(a)&(b) requiring  
28 disclosure of Defendant's prior license suspensions as

1 Defendant's license was suspended three (3) times prior to  
2 submitting the Contract to Plaintiffs. California Business and  
3 Professions Code §7030.1(a)&(b) provides:

4 "(a) A contractor, who has his or her license suspended or  
5 revoked two or more times within an eight-year period,  
6 shall disclose either in capital letters in 10-point roman  
7 boldface type or in contrasting red print in at least 8-  
8 point roman boldface type, in a document provided prior to  
9 entering into a contract to perform work on residential  
10 property with four or fewer units, any disciplinary license  
11 suspension, or license revocation during the last eight  
12 years resulting from any violation of this chapter by the  
13 contractor, whether or not the suspension or revocation was  
14 stayed.

15 (b) The disclosure notice required by this section may be  
16 provided in a bid, estimate, or other document prior to  
17 entering into a contract."

18 The Court finds that Defendant offered no evidence that he  
19 complied with the mandate of California Business and Professions  
20 Code §7030.1(a)&(b). Plaintiffs offered no evidence of any such  
21 document presumably because they had none. Defendant's only  
22 disclosure relative to his license status was that it was in  
23 good standing with the exception of a bonding issue that he  
24 represented to Plaintiffs he had cured. The Court finds that  
25 this representation was material, false, intentional, and  
26 designed to induce Plaintiffs to contract with Defendant.

27 19. Included in the Contract was an attorney fees  
28 clause which provided:

"In the event it becomes necessary to refer said  
proposal/contract to an attorney, the undersigned agrees to  
pay attorneys' fees and all costs incurred in the  
collection of the monies due under the proposal/contract."

While Defendant's Exhibit "A" (the "Contract") does not contain  
a "Notice to Owner", a "Notice to Owner" page was attached to  
Plaintiffs' Exhibit "2" (the "Contract"). The "Notice to Owner"

1 in part provides:

2 "Under the California Mechanics' Lien Law, any  
3 contractor, subcontractor, laborer, supplier, or other  
4 person or entity who helps to improve your property,  
5 but is not paid for his or her work or supplies, has a  
6 right to place a lien on your home, land, or property  
7 where the work was performed and to sue you in court  
8 to obtain payment.

9 This means that after a court hearing, your home, land  
10 and property could be sold by a court officer and the  
11 proceeds of the sale used to satisfy what you owe.  
12 This can happen **even if you have paid your contractor  
13 in full if the contractors, subcontractors, laborers,  
14 or suppliers remain unpaid.**"

15 20. The Contract references the home was 4,170 square  
16 feet at \$106.50 per square foot, consistent with the September  
17 25, 2006 bid. It further provides line item budgeted amounts  
18 for things such as termite pre-treat, foundation, framing,  
19 lumber, roofing, plumbing, plumbing fixtures, HVAC, electrical,  
20 electrical fixtures, drywall, finish carpentry, labor, cabinets,  
21 flooring, tile/counter tops, paint, stucco, garage doors,  
22 doors/moulding/trim, appliances, mirrors/shower doors, cleanup  
23 and trash. The Contract refers to an Addendum which is set out  
24 as Defendant's Exhibit "A-4" that generally is an acknowledgment  
25 by Defendant and Plaintiffs of the ADA and VA requirements for a  
26 handicap assisted house. It also includes a schedule of  
27 payments attached as Defendant's Exhibit "A-3" calling for  
28 payments beginning October 15, 2006 and continuing thereafter.

29 21. The most comprehensive itemization of payments  
30 made, with corresponding receipt numbers, are set forth in  
31 Plaintiffs' Exhibit "8" showing payments made by Plaintiffs to  
32 Defendant corresponding with the line item allocations in the  
33 Contract. Plaintiffs also provided Exhibit "9" which included

1 front and back copies of each negotiated check and corresponding  
2 receipts. The total remuneration paid to Defendant was  
3 \$511,795.00. This includes a \$6,500.00 credit given by  
4 Defendant to Plaintiffs as set forth in Receipt No. 722754  
5 (Defendant's Ex. E-10; Plaintiffs' Ex. 9) for Plaintiffs'  
6 payment of \$6,500.00 paid directly to Pacific Door by Mr. Ford,  
7 and a \$4,100.00 payment paid by the VA for certain concrete work  
8 required by the VA. Defendant's Exhibit "D-4", which is a letter  
9 from Mr. Kennedy with the VA, indicates that the total amount  
10 paid to the builder was \$511,795.00.

11 22. Although the contract price was for \$444,105.00,  
12 on or about June 27, 2007, a handwritten document entitled "Ford  
13 Budget" was submitted to Plaintiffs in the amount of \$67,200.00.  
14 (Plaintiffs' Exhibit "3"; Defendant's Exhibit "A-5") The "Ford  
15 Budget" included amounts for roofing, fireplace, something that  
16 appears to be finish electric, cabinets, flooring, counter tops,  
17 tile, doors/trim, home theater, appliances, gutters, w/IT  
18 permit, an unreadable line item 13, utilities, stucco color and  
19 windows. There is also a notation for showers for \$6,500.00. A  
20 number of these items were included in the original Contract  
21 line item schedule. The evidence is that Plaintiffs paid  
22 \$63,595.00 of the \$67,200.00. (Defendant's Exhibit "A-10a".)  
23 When the Court adds the \$63,595.00 (which includes the \$6,500.00  
24 paid directly to Pacific Door and credited under Receipt No.  
25 722754 in the above-referenced paragraph) plus the \$4,100.00  
26 Veterans Administration check (Plaintiffs' Exhibit "8";  
27 Defendant's Exhibit "E-T"), and the original contract amount of  
28 \$444,105.00, the sum is \$511,800.00. The Court finds that the

1 total amount paid to Defendant according to Plaintiffs' Exhibit  
2 "8" was \$511,800.00 toward the completion of the project.

3           23. Despite Plaintiffs' payment of the \$511,800.00 to  
4 Defendant to build the custom home, to date, Defendant admitted  
5 that he failed to complete construction of the project and did  
6 not obtain a certificate of occupancy from the County of Fresno.  
7 The evidence before the Court was that Plaintiffs had on  
8 numerous occasions requested an accounting and specific  
9 itemization with receipts and invoices for the monies paid to  
10 Defendant for the construction of the home. Mr. Ford's  
11 testimony is that the accounting was not provided. Defendant,  
12 on the other hand, indicated that his accounting was provided in  
13 what are referred to as Defendant's Exhibits "A-7", "A-8" and  
14 "A-9". Exhibit "A-7" indicates that there was a total amount  
15 due as of September 8, 2007 of \$49,798.00. The Court took  
16 judicial notice of the Debtor's bankruptcy schedules that no  
17 account receivable in that amount was scheduled. The Court  
18 finds that Defendant never provided Plaintiffs an appropriate  
19 accounting. Rather, Defendant simply submitted asserted  
20 overages without proof, and unsigned change orders.

21           24. Regarding Defendant's Exhibit "A-8", this  
22 document is entitled a "Change Order for Custom Home page two".  
23 There is an over-budget amount listed at \$117,925.00. It is  
24 executed by Defendant, but not executed by Mr. Ford. Mr. Ford's  
25 testimony, which the Court finds is credible, was that he never  
26 executed any change order document. Defendant did not produce  
27 into evidence any executed change order document. The same  
28 holds true with Defendant's Exhibit "A-9" dated September 13,

1 2007 showing upgrades/additions on contract of \$118,975.00. It  
2 states that the total of upgrades/changes was \$73,187.00 or 16%.  
3 Again, this document is executed by the Defendant and not Mr.  
4 Ford.

5 25. Defendant was the first witness called by  
6 Plaintiffs. Defendant admitted knowing that it was unlawful to  
7 contract for work when his license was suspended. He admitted  
8 to contracting without a license. He also admitted that the  
9 Plaintiffs paid as required under the Contract and that the  
10 Contract contained an attorney fees clause.

11 26. Plaintiffs entered into evidence Exhibit "5", a  
12 Certified Copy of a Second Amended Felony Complaint captioned:  
13 The People of the State of California vs. Shawn Deitz. The  
14 Second Amended Felony Complaint was filed March 23, 2009 bearing  
15 Fresno County Superior Court Case No. F07908612 and DA File No.  
16 2006Z44747. There were five (5) counts set forth in the Second  
17 Amended Felony Complaint. Mr. Ford testified the Second Amended  
18 Felony Complaint was filed after he and his wife initiated a  
19 complaint with the District Attorney's office. Under Count Five  
20 (5) of the Second Amended Felony Complaint, Defendant was  
21 charged under Penal Code Section 487(a), that being the crime of  
22 grand theft of personal property for unlawfully taking money and  
23 personal property of a value exceeding \$400.00 of Wayne Ford.

24 27. This Court's Minutes of November 5, 2009 in this  
25 Adversary Proceeding indicate that the Adversary Proceeding was  
26 continued from time to time to allow the criminal matter to be  
27 tried. It was ultimately tried in October 2010 before a jury.  
28 The victims in the complaint under Counts One (1), Three (3),

1 Four (4) and Five (5) were persons named Andrea C. Burnett,  
2 Herbert Milton Chartley, Michael Angelo Dejusto, and Wayne Ford  
3 respectively. Ms. Burnett, Mr. Chartley and Mr. DeJusto were  
4 each scheduled in Defendant's bankruptcy schedules as general  
5 unsecured creditors and their claims discharged. Ms. Burnett  
6 and Mr. Chartley will be discussed further below. Count Two (2)  
7 was a misdemeanor count brought under California Business and  
8 Professions Code §7028 for contracting without a license on or  
9 about July 1, 2004.

10 28. Following the criminal trial held in October  
11 2010, the jury acquitted the Defendant on Counts One (1), Three  
12 (3), Four (4) and Five (5). According to Defendant's testimony,  
13 the jury was polled and voted to acquit 11 to 1 on those counts.  
14 The Court notes that the standard of proof in the criminal  
15 proceeding is "beyond a reasonable doubt". Acquittal on those  
16 counts is not relevant to this Adversary Proceeding to determine  
17 dischargeability of a debt.

18 29. As to the second count of contracting without a  
19 license, Defendant was convicted of contracting without a  
20 license in July 1, 2004 in violation of California Business and  
21 Professions Code §7028. (Plaintiffs' Exhibit "6"). The Court  
22 finds this is relevant in light of Federal Rules of Evidence  
23 Rule 406 regarding the habit of a person. In this case, the  
24 Court finds that the Defendant knowingly, and repeatedly, in  
25 contravention of California law, contracted to construct  
26 multiple projects while not possessing a contractor's license in  
27 good standing.

28 30. The second witness called by Plaintiffs in the

1 case was John P. Thompson of Thompson Construction. His Resume  
2 was entered into evidence as Plaintiffs' Exhibit "10". He served  
3 in the United States Navy and is a Viet Nam Veteran. Mr.  
4 Thompson obtained his General Building Contractor's License in  
5 1979. He has worked in the construction industry for over 35  
6 years. His Resume indicates that he attained an Associate of  
7 Arts Degree in Business Administration and transferred to San  
8 Jose State University where he obtained a Bachelors of Science  
9 Degree in Criminal Justice with a Minor in English. In 1985 he  
10 was hired by the CSLB in Northern California to participate in a  
11 then new program called the Expert Witness Contractor Program.  
12 He served for five (5) years as an expert witness for the CSLB.  
13 Thereafter, he served for approximately 18 years as a senior  
14 investigator for the CSLB. He also served as a Deputy Labor  
15 Commissioner with the State of California Labor Commission  
16 Office serving in the Fresno Office. He retired from state  
17 service in October 2010, renewing his contractor's license, and  
18 currently works as an industry expert witness for the CSLB and  
19 does contracting work on the side.

20 31. Mr. Thompson's Report of Inspection and Estimate  
21 ("Report") was received into evidence as Plaintiffs' Exhibit  
22 "11". Regarding his Report, Mr. Thompson testified that he  
23 reviewed the Contract, and compiled the information contained in  
24 the Report by personally inspecting the custom home project on  
25 December 30, 2010. Mr. Thompson found generally that the  
26 construction performed by Defendant did not meet accepted trade  
27 standards for good and workman-like construction in numerous  
28 regards. He took numerous pictures and provided an estimate for

1 the cost to complete/correct the work listed in the Report at  
2 \$238,950.00. The cost includes labor, materials and services.  
3 Page two of the Report indicates that Mr. Thompson had  
4 personally performed and/or supervised over 100 projects similar  
5 to the Ford project. The Report lists the four (4) contracting  
6 licenses that he possesses, those being a General Building and  
7 Remodeling Contractor License, a C-15 Flooring Contracting  
8 License, a C-33 Painting Contracting License and a C-54 Ceramic  
9 Tile Contracting License. On page three of Mr. Thompson's  
10 Report, there is a statement that he prepared the Report based  
11 on his knowledge, skill, experience and training in the fields  
12 of general building and remodeling, flooring, painting and  
13 ceramic tile. He further discloses that he would not enter into  
14 any contract to perform the completion/correction of any work  
15 which was the subject of his Report. He certifies under penalty  
16 of perjury that he does not personally know Plaintiffs and that  
17 all statements, answers and representations in the Report,  
18 including the attachments, are true and accurate. Mr. Thompson  
19 testified that he has appeared and testified in numerous  
20 proceedings as an industry expert and on behalf of the CSLB.  
21 The Court finds his testimony credible.

22 32. Mr. Thompson lists 15 line item complaints in his  
23 Report. The first is that the appliances were not supplied and  
24 installed. The Report, Mr. Ford's testimony that the appliances  
25 had been paid for but not installed with the exception of one  
26 (1) double-oven, and Defendant's pictures received into evidence  
27 support a finding that the majority of the appliances were not  
28 installed. Mr. Thompson's cost to correct or complete this item

1 is \$9,245.00. The testimony at trial was that the Plaintiffs  
2 had paid for the appliances in the amount of \$3,000.00 under the  
3 initial bid (Plaintiffs' Exhibit "2") and an additional  
4 \$11,600.00 in June 2007 (Plaintiffs' Exhibit "3"). Thus, the  
5 total amount paid for appliances that were not supplied was  
6 \$14,600.00. The one caveat is that one appliance, a double  
7 oven, was the only appliance installed.

8 33. The second item in Mr. Thompson's Report was that  
9 the finish carpentry had not been completed. He indicates that  
10 the majority of the base boards had been installed but that the  
11 gaps had not been filled and no painting had been done. His  
12 observations in the Report were that most of the interior door  
13 openings had been finished with jambs and casings, however, the  
14 nails were not set and filled, nor were the gaps filled or the  
15 trims painted. He testified that a number of doorways were also  
16 out of square meaning significant work will be required to  
17 correct these deficiencies so doors will properly fit, open, and  
18 close. He also noted in his Report that with the exception of  
19 three doors that had been hung, there were a number of doors  
20 stacked in the garage that were painted but severely damaged  
21 needing to be replaced. He states in his Report that the finish  
22 carpentry was not completed to accepted trade standards and that  
23 the cause of the defect was abandonment by the Defendant. The  
24 cost to correct this item is \$12,900.00.

25 34. Regarding electrical work, a number of issues are  
26 listed in the Report. The Report indicates that the electrical  
27 work was not completed to accepted trade standards, that certain  
28 fixtures are not installed as called for under the plans, and

1 that the cause of the defect was abandonment and deviation from  
2 the approved plans. The recommended method of correction is to  
3 troubleshoot the entire electrical system by tracing each  
4 individual circuit from the power supply source and "Ringing out  
5 the system." His estimate to correct and complete the  
6 electrical items is \$10,000.00.

7 35. Item 4 in the Report regards two fireplaces.  
8 Although two gas fireplaces were installed, as indicated in  
9 photographs 14 and 20 of his Report, the grates, burners and  
10 valves remain in the cartons in which they were shipped and  
11 placed inside the fireplaces. The exterior trim around the  
12 fireplaces, hearths, and mantles were not installed. He  
13 indicates in the Report that Note No. 3 of the approved plans  
14 called for tight-fitting closeable glass or metal doors  
15 installed. While glass doors were installed, he indicates in  
16 his Report that the outside air-intake and dampers were not  
17 installed, nor was the flue damper or control installed. He  
18 again indicates that the complaint items fail to meet accepted  
19 trade standards with the cause of defect being abandonment,  
20 deviation from plans and specifications, and departure from  
21 acceptable trade standards. The cost to resolve these problems  
22 is \$3,100.00.

23 36. Item 5 in his Report regards plumbing. While the  
24 top-out rough plumbing was inspected and signed off by the  
25 County of Fresno on February 23, 2007, Mr. Thompson indicates  
26 that the tankless water heaters were set in place but not  
27 completed, having no water supply or return plumbing. Item 5 of  
28 Plaintiffs' Exhibit "24", the Department of Veterans Affairs

1 Compliance Inspection Report dated March 5, 2008 prepared by  
2 Paul Kennedy, the VA Building Inspector, further corroborates  
3 that the water heater lacked venting and required a 3/4" copper  
4 pressure relief valve. Mr. Thompson also states that the toilets  
5 installed were not the brands selected by Plaintiffs and that  
6 less expensive models or brands were utilized. He further  
7 indicates that the sinks and fixtures were not installed, and  
8 the Court observed in Defendant's pictures, which Defendant  
9 moved into evidence, that there were boxes of plumbing supplies  
10 sitting in open cabinetry in at least one of the bathrooms of  
11 the home. The Report indicates that the fiberglass bathtubs had  
12 been set on plywood frames and that despite the Contract with  
13 the Plaintiffs for installation of cast iron tubs, the Defendant  
14 deviated from the Contract and merely set in place, but did not  
15 install, the fiberglass bathtubs. Again, the cause of the  
16 defect is Defendant's abandonment. Mr. Thompson testified that  
17 the cost to troubleshoot the plumbing system is a time-consuming  
18 and costly venture. His estimate to correct and/or complete the  
19 plumbing issues is \$30,000.00. The Court also finds that  
20 Defendant failed to pay Ferguson Enterprises, Inc. in an amount  
21 of \$1,585.14 which is evidenced by the Ferguson Enterprises,  
22 Inc.'s Mechanic's Lien filed with the Fresno County Recorder's  
23 Office on January 22, 2008 as Document No. 2008-0007896 in the  
24 amount of \$1,585.15. (Plaintiffs' Exhibit "N".) The Court  
25 finds this Mechanic Lien to be damages attributable to  
26 Defendant's conduct and that with interest allowed under  
27 California Code of Civil Procedure §685.010(a), that interest  
28 accrued at the rate of 10% up to the time of trial in the amount

1 of \$504.24 and thus the total as of April 4, 2011 owing to  
2 Ferguson Enterprises, Inc. on this Mechanic's Lien is \$2,087.39.

3 37. Item 6 of the Report involves cabinetry. In the  
4 Court's view, cabinetry is a significant item showing  
5 Defendant's abandonment of the project. The testimony in the  
6 case by Mrs. Ford was that she had met with Defendant initially  
7 regarding one type of cabinets. The Defendant instructed her to  
8 go to a website that had certain types of cabinetry. Mrs. Ford  
9 testified that she did as the Defendant instructed. She went to  
10 the appropriate website and decided on a Shaker-style cabinet,  
11 downloaded pictures of the same, and met with Defendant at  
12 Defendant's house to look at similar type cabinetry doors.  
13 Defendant represented that he could and would build the  
14 cabinetry. Defendant did not dispute this testimony. The  
15 Defendant's own pictures show that in the kitchen and multiple  
16 bathrooms, the cabinetry is far from complete. Despite  
17 Plaintiffs paying for the cabinetry, all that has been installed  
18 are frames with no backing, shelves, holes for shelves to go on,  
19 and no cabinet doors or drawers. The cabinetry is far from  
20 complete. In Mr. Thompson's Report, the cause of the defect,  
21 again, is abandonment and departure from trade standards. The  
22 Court finds abandonment is the cause of the cabinetry issues.  
23 The method of correction in Mr. Thompson's Report is to remove  
24 all temporary framing and build and install new cabinetry at a  
25 cost of \$38,950.00. The Court also reviewed Defendant's Exhibit  
26 "W" which is a construction bid dated May 14, 2008 from JCL  
27 Construction ("JCL") to complete the work at Plaintiff's house.  
28 JCL's bid to complete the house was \$122,014.00. However, in

1 the Court's view, the JCL bid is not as comprehensive as the  
2 Thompson Report, as it fails to account for such items as the  
3 appliances Plaintiffs paid for, does not account for counter-  
4 tops in bathrooms and other areas besides the kitchen, only  
5 contemplates 3,000 square feet of tile while Defendant testified  
6 there is 3,600 square feet of tile, and in general, is less  
7 comprehensive as the Report. The JCL bid for cabinetry with  
8 maple Shaker style cabinets, which the Court finds was the  
9 agreed-upon type of cabinets between the parties, was  
10 \$36,000.00. In addition, under the JCL bid the installation  
11 cost for the cabinets is an additional \$4,600.00, and the cost  
12 to stain and finish the cabinets is \$3,450.00 bringing the total  
13 to \$44,050.00. The Court finds Mr. Thompson's cost to complete  
14 and install the cabinetry in the amount of \$38,950.00 is  
15 credible.

16 38. Another significant item not completed and  
17 totally absent in the home are the counter tops. There was  
18 testimony by Mrs. Ford, Mr. Ford, Mr. Thompson, and the  
19 Defendant specifically regarding the counter tops. The Court  
20 finds the undisputed evidence is that the counter tops were to  
21 be granite. Defendant's pictures in particular, as well as  
22 Plaintiffs' pictures, are very representative of the way the  
23 home sits today. The Defendant's pictures show no granite  
24 counter tops installed in the home. Defendant testified that no  
25 granite was ever delivered to the house. He further testified  
26 that he did not know where the granite was. The allowance in  
27  
28

1 the October 6, 2006 Contract for tile<sup>2</sup>/counter tops was  
2 \$15,000.00. While it is undisputed that Plaintiffs paid that  
3 amount, there are no granite counter tops or back splashes in  
4 the home. According to Mr. Thompson's Report, and his  
5 testimony, the cause of the defect was abandonment by Defendant,  
6 the failure to appropriately prepare the substrate support for  
7 the counter tops, and the failure to provide and install the  
8 granite counter tops after the material was selected at DAL Tile  
9 and paid for by Plaintiffs. Mrs. Ford testified that when she  
10 spoke with the representative at DAL Tile, he indicated that the  
11 Defendant never paid any money toward the granite counter tops  
12 and that the granite was put back into inventory for sale to  
13 other customers. Mr. Thompson's cost to complete this abandoned  
14 item is \$24,550.00. This includes preparation of the substrate  
15 structures so they will properly hold the weight of the granite  
16 upon its installation. The Court finds this to be a reasonable  
17 cost to complete the counter tops.

18 39. The next item concerns the tile floors. Tile  
19 floors are very significant due to Mr. Ford's disability. The  
20 floors must be smooth so as not to constitute a safety hazard.  
21 According to Defendant's testimony, there is approximately 3600  
22 square feet of tile flooring that needed to be provided for the  
23 home to accommodate Mr. Ford's needs. Mr. Thompson observed in  
24 his Report, and testified, that the tile floors were not

---

25  
26 <sup>2</sup> Defendant's Exhibit "W", the JCL Construction Bid dated May 14, 2008,  
27 includes \$10,800 for standard grade granite and an additional \$1,690.00  
28 for kitchen tile back splash. The Court finds the "tile/counter tops"  
in Defendant's October 6, 2006 Contract was for tile back splash and  
granite counter tops.

1 completed, that different dye lots and colors of tile were  
2 installed, and that the tile that was installed was uneven and  
3 cracked. His observations were that the tile that was cracked  
4 due to the slab foundation being incorrectly poured. In his  
5 Report, under item eight, Mr. Thompson notes that Note #12 of  
6 the approved plans called for the slab foundation to be three  
7 and one-half inches thick with a 6 x 6-pound 10X welded mesh  
8 wire installed mid-point in the slab. The Report indicates that  
9 the Plaintiffs observed the pouring of the slab foundation and  
10 no wire mesh was installed. The Defendant did not rebut this  
11 evidence. Mr. Thompson's Report indicates that the failure to  
12 follow the approved plans in the pouring of the slab foundation  
13 was not within acceptable trade standards, and alone, was  
14 sufficient to cause the severe cracking of the slab, which  
15 ultimately contributes to the cracking of the tiles. He further  
16 observed that there was a significant problem with "lippage".  
17 Lippage is the difference in height between the edge of one tile  
18 and another adjacent tile. Excessive lippage results in a trip  
19 hazard, especially dangerous where someone is handicapped, as is  
20 Mr. Ford. Mr. Thompson testified that the industry standard for  
21 tile lippage is 1/6". The pictures accompanying his Report show  
22 that the lippage between the tiles in some instances is 3/16" to  
23 5/16". He testified that this occurs throughout the home where  
24 tiles were set. Regarding the slab floor, Mr. Thompson  
25 testified, and his Report indicates, it deviates from industry  
26 accepted standards of a "plus or minus" of 1/4" over ten feet.  
27 Some of his photos, for example, photos 24 and 25 to his Report,  
28 show a severely cracked concrete slab floor which is the result

1 of no steel reinforcement in the concrete slab floor and 5/16"  
2 displacement between the two cracked edges. Photo number 26  
3 shows the concrete slab floor is out of level 3/8" over six  
4 feet. Photo number 27 shows tile lippage of 3/16", while photo  
5 number 28 shows cracked tile that has "telegraphed" from the  
6 cracked concrete slab floor under the tile.

7 40. The cause of the defect with respect to the  
8 concrete slab floor was deviation from accepted trade standards.  
9 Regarding the tiles, the Court finds that Defendant failed to  
10 order all tiles at the same time so they would be matching and  
11 from the same dye lot, and this in turn resulted in Defendant  
12 being unable to install sufficient tile of a single dye lot to  
13 complete the entire project. Mrs. Ford testified that the  
14 specific tiles selected had a slip resistance comparable to  
15 commercial grades of tile especially selected due to her  
16 husband's disability. The tiles have now been discontinued,  
17 thus making ordering additional matching tile impossible.  
18 Defendant corroborated Mrs. Ford's testimony. The Defendant did  
19 offer, however, that he was able to find similar tiles and if  
20 they were set in another room, one would not be able to tell the  
21 color differentiation. The Court finds Defendant deviated from  
22 the plans and specifications by failing to install the wire mesh  
23 in the foundation which resulted in excessive cracking of the  
24 concrete slab foundation which then telegraphed into the tile  
25 floors which caused excessive cracking of the tile floors. The  
26 Court further finds that Defendant failed to install the tile  
27 flooring level between the tiles in conformity with trade  
28 standards causing excessive and unsafe lippage. The Court finds

1 this perhaps is the most costly item to complete. As Mr.  
2 Thompson testified, the best corrective action short of razing  
3 the entire structure and removing and replacing the entire  
4 foundation, would be to remove all of the tiles from the floor,  
5 clean the floor of all thin-set adhesive, grind the exposed  
6 cracks with a "B" diamond tool and fill the cracks with epoxy.  
7 From there the floors must be floated out so they will be level,  
8 and Plaintiffs will have to re-purchase and install new equal in  
9 value 20" x 20" tiles and grout as required. His estimate of  
10 cost to fix this portion of the job is \$60,350.00.

11 41. Item No. 9 regards insufficient insulation in the  
12 attic. Mr. Thompson observed that the approved plans called for  
13 blowing insulation under the work platform for the heating and  
14 air conditioning unit in the attic. His estimate to complete  
15 the insulation installation was \$1,600.00. The rain gutters,  
16 which were a \$2,600.00 line item paid for in Plaintiffs' Exhibit  
17 "3", were never installed. Mr. Thompson's estimate to install  
18 galvanized gutters and a new drip edge metal and down spouts is  
19 \$5,600.00. On cross-examination he testified that the  
20 difference in price from the \$2,600.00 cost Defendant allocated  
21 and Mr. Thompson's cost of \$5,600.00 was because the roof tiles  
22 would have to be lifted in order to place the drip edge and rain  
23 gutters under the roof tiles and adhere them to the fascia  
24 board.

25 42. The next complaint was that there was debris left  
26 on the roof and that the monetary cost to clean the debris from  
27 the roof is \$350.00.

28 43. Mr. Thompson observed in his Report that one air

1 conditioning unit was missing as called for in the approved  
2 plans. The original plans called for three. However, the  
3 contract signed by the Plaintiffs only indicates two air  
4 conditioning units. The Defendant testified the two air  
5 conditioning units would supply the same output as the three  
6 called for under the approved plans. However, it is unclear as  
7 to whether the output of the two installed air conditioning  
8 units would equate to the same output as the three called for  
9 under the plans. What is clear and the Court so finds, is that  
10 Defendant again deviated from the approved plans. The Court  
11 does note that on Exhibit "B" to Mr. Thompson's Report  
12 (Plaintiffs' Exhibit "11"), that the refrigeration unit/furnace  
13 required to be inspected and signed off by the County of Fresno  
14 inspector, has not been signed at all.

15           44. Item No. 13 in the Report regards the footing for  
16 the columns that support the front portico. The Report  
17 indicates they are too small. There was no cost to complete that  
18 deviation from the plans. Item No. 14 in Mr. Thompson's Report  
19 is a belly band on the exterior of the structure. The plans  
20 called for the belly band, which is a decorative feature, to be  
21 installed around the entire structure. It was only installed in  
22 the front of the home. The corrective measure to install the  
23 belly band around the remaining three sides of the home would be  
24 to install a foam belly band around those three exterior walls,  
25 re-stucco them as required, and painting. The cost to do that  
26 would be \$3,700.00. The cause is again abandonment by  
27 Defendant.

28           45. The last item in the Report regards incomplete

1 painting. Mr. Thompson's Report indicates that the industry  
2 standard regarding painting is that painting of a completed home  
3 is a final opportunity to enhance the workmanship of the  
4 builder. The Report states that the lack of paint, or "botched"  
5 painting, tends to enhance the poor workmanship this contractor  
6 performed on the job. The cause of this defect as well as that  
7 of the belly band, the footing for the columns that support the  
8 front portico, and the air conditioning, the roof, rain gutters  
9 and insulation in the attic are abandonment of the project.

10 46. The total cost to complete the project, according  
11 to Mr. Thompson's Report, is \$238,950.00. The Court finds this  
12 cost to be realistic.

13 47. Mr. Thompson also testified regarding his  
14 investigation, as the senior investigator for the CSLB, of the  
15 Andrea Burnett and Herbert M. Chartley jobs. Defendant was the  
16 contractor on these jobs. Plaintiffs' Exhibit "12" has the CSLB  
17 Licensee Investigation Reports that were assigned to Mr.  
18 Thompson for investigation. Mr. Thompson testified that he  
19 prepared these reports in the ordinary course of business while  
20 he was an investigator for the CSLB. In each one of these  
21 cases, similar problems existed. For example, as Plaintiffs'  
22 Exhibit "14" demonstrates, with respect to the Burnett property,  
23 the Defendant contracted without a license, took a \$15,000.00  
24 check when he was supposed to be paid \$1,500.00, cashed the same  
25 claiming that it was a mistake, failed to exercise reasonable  
26 diligence to complete the job, exceeded the contract amount for  
27 the project as is the case herein, and then abandoned that job  
28 as well. With respect to the Chartley project, the Defendant

1 lacked reasonable diligence in building the project, departed  
2 from accepted trade standards in the building that was done,  
3 took monies in excess of the amount of the contract, required an  
4 excessive down payment and ultimately abandoned the project. In  
5 the Burnett case, Mr. Thompson determined Ms. Burnett suffered  
6 damages in the amount of \$17,168.50. (Plaintiffs' Exhibit "12",  
7 CSLB Complaint No. NB2006-560 at paragraph 9 synopsis of section  
8 violated.) Mr. Chartley was also a disabled veteran. CSLB  
9 Complaint No. NA2005-327 regards the Chartley project, which is  
10 Plaintiffs' Exhibit "13". The established injury to Mr. Chartley  
11 was \$22,671.84.

12           48. The Court also notes that the CSLB on its own  
13 behalf had assigned Mr. Thompson to file a complaint with the  
14 District Attorney's office for numerous violations by the  
15 Defendant. Plaintiffs' Exhibit "14" shows a complaint by "L.  
16 Registrar" with various Business Code violations including  
17 abandonment of project, diversion of funds, willful and  
18 fraudulent acts, contracting without a license and exceeding the  
19 contract amount. The Court finds that Defendant has exhibited  
20 this type of conduct for a significant portion of his  
21 contracting license history and with respect to Plaintiffs'  
22 project, exhibited similar conduct.

23           49. Terry Freeman also testified at the trial. Terry  
24 Freeman is the manager of Pacific Door. Pacific Door supplied  
25 the doors for Plaintiffs' home. Mr. Freeman has worked at  
26 Pacific Door for 23 years and held the position as manager for  
27 20 years. As the position of manager, he is familiar with the  
28 books and records and intimately familiar with receivables due

1 to Pacific Door. He also is familiar with the pre-liens and  
2 mechanics liens filed by Pacific Door.

3 50. Mr. Freeman testified that the contract amount  
4 for doors for Plaintiffs' house was \$22,508.26. (Plaintiffs'  
5 Exhibit "9"). He testified that the only monies paid to Pacific  
6 Door by Defendant was \$2,500.00. He also testified that  
7 Defendant did tender two other checks each in the amount of  
8 \$5,000.00 to Pacific Door. However, those checks were non-  
9 negotiable due to non-sufficient funds. Pacific Door sent these  
10 checks to the District Attorney for collection. The Court finds  
11 that Defendant failed to pay the contract balance due to Pacific  
12 Door. Pacific Door ultimately filed a state court action to  
13 perfect its mechanic's lien under California law. After  
14 Plaintiffs paid \$6,500.00 to Pacific Door, they were ultimately  
15 able to settle the remaining balance after hiring another  
16 attorney. The case was then settled between the parties with  
17 regard to the mechanic's lien filed by Pacific Door by paying an  
18 additional \$8,000.00. As stated above, the Court notes that  
19 Ferguson Enterprises, Inc. still retains an unsatisfied properly  
20 perfected mechanic's lien due to Defendant's failure to pay for  
21 plumbing supplies. (Plaintiffs' Exhibit "9"). The Court  
22 further notes that Defendant scheduled Pacific Door as a general  
23 unsecured creditor in his Schedule "F" in the amount of  
24 \$12,505.00. This corresponds to the Pacific Door Amended Claim  
25 of Mechanic's lien in the amount of \$12,505.26 filed against  
26 Plaintiffs and included in Plaintiffs' Exhibit "9".

27 51. Mr. Freeman further testified that prior to  
28 Plaintiffs' project, he had two other dealings with the

1 Defendant. Those cases regarded two homes in the Applegate  
2 Project where Plaintiffs and Defendant first met. Mr. Freeman  
3 testified that Mr. Deitz never paid for doors he ordered for  
4 those homes and that ultimately Pacific Door was forced to  
5 collect from the owners of those homes as was the case herein.

6 52. Mr. Ford testified next in this Adversary  
7 Proceeding. He testified about a number of items that have  
8 previously been discussed. Significantly, Mr. Ford compiled the  
9 information set forth in Plaintiffs' Exhibit "7". Plaintiffs'  
10 Exhibit "7" concerns monies paid to Defendant while his  
11 contractor's license was suspended. The Court finds this amount  
12 is \$324,800.00. Exhibit "7" is also supported by Exhibit "8"  
13 which is Plaintiffs' compilation of all funds paid to Defendant.  
14 It shows that Defendant was paid \$511,800.00 as set forth which  
15 includes \$4,100.00 being paid directly to Defendant by the VA  
16 for certain concrete work, and \$6,500.00 paid on July 9, 2007  
17 directly to Pacific Door by Plaintiffs which Defendant credited  
18 Plaintiffs in Receipt No. 722754 in Plaintiffs' Exhibit "9".  
19 Exhibit "9" is another compilation prepared by Mr. Ford, who  
20 admittedly could not construct a house. Exhibit "9" consists of  
21 items that were paid for but Defendant failed to finish or needs  
22 to be replaced or repaired with respect to the project. The  
23 total, as computed by Mr. Ford in Exhibit "9", is \$154,307.48.  
24 In support of Exhibits "7", "8" and "9", and included in  
25 Plaintiffs' Exhibit "9", are fronts and backs of the negotiated  
26 checks by Defendant and receipts issued by Defendant. At the  
27 time of trial, Plaintiffs' counsel and Mr. Ford randomly  
28 selected checks and receipts from Exhibit "9" and matched the

1 same to checks set forth in Exhibits "7" and "8".

2 53. The purpose of Plaintiffs' Exhibits "7", "8" and  
3 "9" is to establish Plaintiffs' injury and damages. The Court  
4 finds that due to the Defendant's intentional and knowing false  
5 material misrepresentations upon which the Plaintiffs  
6 justifiably relied, that Plaintiffs were injured. The Court  
7 further finds that Defendant's failure to exercise reasonable  
8 diligence in constructing the home, to build within accepted  
9 trade standards, and abandonment of the project proximately  
10 caused Plaintiffs' damages. Plaintiffs offered Exhibits "7",  
11 "8" and "9" as evidence of the damages sustained by them at  
12 Defendant's hands.

13 54. The Court finds that the evidence set forth in  
14 Exhibits "7", "8" and "9" is a true and accurate representation  
15 prepared by Mr. Ford of all monies paid to Defendant and that  
16 damages sustained by Plaintiffs may be computed from these  
17 exhibits, if necessary.

18 55. Of particular note in this case are a number of  
19 emails set forth in Plaintiffs' Exhibit "17". The email  
20 correspondence serves as a significant illustration of the  
21 problems experienced by Plaintiffs, and the communications  
22 between Plaintiffs and Defendant. Some of the important emails  
23 in Plaintiffs' Exhibit "17" begin with an email dated January 7,  
24 2008 from Defendant to Mr. Ford. In that email, Defendant  
25 states that if he understood his paralegal correctly, they would  
26 get Plaintiffs dismissed from the Pacific Door mechanic's lien  
27 action based upon the fact that in the papers filed by Pacific  
28 Door it was a contract between Defendant's company and not the

1 Plaintiffs. This is in absolute contradiction to the "Notice to  
2 Owner" set forth on page two of Plaintiffs' Exhibit "2" wherein  
3 Defendant specifically advised that if he failed to pay any  
4 supplier who helped to improve Plaintiffs' property, that the  
5 supplier has a right to place a lien on the home and sue the  
6 Plaintiffs in court to obtain payment. The Court finds that as  
7 late as January 7, 2008, Defendant continued making knowing  
8 misrepresentations in contravention with his contract that he  
9 executed with Plaintiffs. Defendant further indicates in that  
10 email that, "I don't see why you need a different attorney on  
11 the same case and I will pay for it." This is significant in  
12 that there are additional damages in the form of attorney fees  
13 suffered by Plaintiffs due to Defendant's failure to pay  
14 suppliers.

15           56. The Court also considered Defendant's December  
16 27, 2007 email to Mr. Ford. In that email he states that he  
17 paid over \$7,000.00 to Pacific Door when Mr. Freeman testified  
18 that Defendant only paid them \$2,500.00 of the contract balance.  
19 Defendant further states in that email that his license issue  
20 had been cleared and the record reflects in Plaintiffs' Exhibit  
21 "4" that Defendant's license was reinstated on December 27,  
22 2007. The Court finds that the representation of the payment to  
23 Pacific Door was yet another intentional misrepresentation made  
24 by Defendant to Plaintiffs. In Defendant's October 12, 2007  
25 email to Mr. Ford, he indicates that he would give a credit for  
26 the cabinets but wanted closure on the project so he could  
27 finish the house and move on. He states that, "The more time we  
28 delay it keeps costing me both more time and money!" He further

1 states that he had been honest with Plaintiffs since the  
2 beginning and was not sure where he had not been more clear on  
3 all of the Plaintiffs' budget and items that were added to  
4 improve the home. The Court finds first, that Defendant had not  
5 been honest with the Plaintiffs since the beginning of the  
6 project. Further, that the Defendant never provided an  
7 appropriate accounting of all costs and expenses incurred in the  
8 construction of the home. This email tends to further discredit  
9 Defendant in the eyes of the Court and lends credence to the  
10 Defendant's pattern of conduct to abandon jobs prior to  
11 completion. This email is also significant when compared to the  
12 September 8, 2007 email from Defendant to Mr. Ford. On the  
13 second page of that email, the Defendant states:

14 "I have budgeted the house very well and I'm not going  
15 to be left in the dust as with my Applegate projects.  
16 I was left with over \$120,000.00 still left unpaid."

17 He also states further down in that email that:

18 "I don't want you thinking I'm taking advantage of you  
19 any further. We have had great communication up until  
20 the end of July and if I have led [sic.] you to  
21 believe in any way that I'm dishonest or have given  
22 you false information then we will clear it up. All I  
23 have tried to do was build your home and give you what  
24 I want."

25 The Court finds that in the fall of 2007, after the home was  
26 supposed to have been completed, that Defendant was actively  
27 pursuing an exit strategy from the project without having  
28 completed the work contracted for. These actions, in the  
Court's view, constitute a wilful act that is certainly designed  
to cause injury to Plaintiffs. It was wrongful, intentional,  
the cause of Plaintiffs' injury and/or damages, and was done

1 without just cause or excuse.

2           57. On August 15, 2007 Defendant emailed Mr. Ford  
3 indicating that they would be ready for inspection in about two  
4 or three weeks. As set forth in the Thompson Report, the  
5 inspection card was never signed off for a Certificate of  
6 Occupancy and Defendant admitted on direct testimony that the  
7 home never received a final inspection and Certificate of  
8 Occupancy. This again is simply another misrepresentation of  
9 material fact in this case. In Defendant's August 5, 2007  
10 email, Defendant states that he ordered 3,600 square feet of  
11 tile. Defendant testified that DAL Tile told him he did not  
12 need to order all of the tile at once as it was readily  
13 available. This is contrary to his August 5, 2007 email  
14 correspondence. Defendant continues in his August 5, 2007 email  
15 that he was unsure how DAL Tile only ordered 1,000 square feet  
16 as the person at DAL Tile told him the same tile was readily  
17 available. He professes to again have done his job. He also  
18 acknowledges that the entry tiles needed repair and states that  
19 he would fix the entry tiles when he received more tiles.  
20 Defendant never fixed the tiles. He also professes in his  
21 August 5, 2007 email that his contractor's license was in force.  
22 However, on August 5, 2007, Defendant's license remained  
23 suspended by reason of a judgment obtained in a court action  
24 bearing Case No. 06 CE SC 01566 from June 29, 2007.  
25 (Plaintiffs' Exhibit "4"). The license was not reinstated until  
26 September 4, 2007. Accordingly, the Court finds that the  
27 Defendant's statements in the August 5, 2007 email are not  
28 credible and continue the pattern of intentional

1 misrepresentations in this case.

2           58. The June 27, 2007 email from Defendant to Mr.  
3 Ford is also revealing. It indicates that he received a  
4 telephone call from the appliance supplier and the appliances  
5 had arrived. Although the appliances had already been paid for,  
6 Defendant states in that email that he will need to get  
7 \$15,000.00 for the rest of the appliances when the appliances  
8 only cost \$14,600.00 and were paid for with \$3,000.00 under the  
9 original budget, and \$11,600.00 on June 27, 2007. (Plaintiffs'  
10 Exhibit "3"). Moreover, the testimony by Mr. Ford was that  
11 they had received numerous phone calls from the appliance  
12 supplier and despite the fact the appliances had been received,  
13 the Defendant never picked them up. The Defendant, on the other  
14 hand, testified that he did not pick the appliances up because  
15 the house was not secure. Mr. Ford testified that as the  
16 appliances were not picked up, his understanding was that the  
17 appliance dealer was levied upon by the Internal Revenue Service  
18 and the appliances were sold pursuant to that levy. The Court  
19 finds that the Defendant's failure to pick the appliances up in  
20 a timely fashion directly resulted and proximately caused injury  
21 to Plaintiffs due to Defendant's inaction. Additionally, the  
22 Court finds that this is simply another instance in which the  
23 Defendant, by failing to account, as he should have, to  
24 Plaintiffs for these appliances, as well as other items in the  
25 construction project, exhibits another action by Defendant to  
26 obtain money from Plaintiffs for which they had already paid.

27           59. The Defendant's email of October 18, 2007 also  
28 indicates Defendant had enough money to pay the remaining

1 balance due to Pacific Door. However, the evidence before the  
2 Court is, and the Court finds, that the Defendant only paid  
3 \$2,500.00 to Pacific Door and this controverts his assertion of  
4 having enough money to pay the remaining balance to Pacific  
5 Door. The Court finds it significant in that email of October  
6 18, 2007 that Defendant stated:

7 "When I issued a receipt for the doors didn't mean they  
8 were paid in full!! Never did I give you the impression  
9 that you paid me in full for those vendors. Again, I  
didn't misuse your funds for your home in any way, shap  
[sic.] or form!"

10 The Court finds this assertion to be false and consistent with  
11 Defendant's pattern of conduct in this case as well as the cases  
12 of Chartley and Burnett.

13 60. Exhibit "18" are the attorney fees of Scott C.  
14 Hawkins incurred by Mr. Ford in defense of the Pacific Door  
15 lawsuit. Those attorney fees are in the amount of \$5,670.00.  
16 Exhibit "19" are the attorney fees incurred as of trial date by  
17 Mr. Armstrong in representing Plaintiffs. Those fees and costs  
18 total \$20,997.66. Counsel was permitted to supply additional  
19 documentation as to other fees and costs incurred. Those fees  
20 and costs include the time spent in trial and preparation of the  
21 Proposed Findings of Fact and Conclusions of Law. In total,  
22 with the cost of Mr. Thompson's, the total fees and costs as of  
23 May 6, 2011 are \$50,501.43.

24 61. Exhibit "20" references additional damages  
25 suffered by Plaintiffs. Those damages include estimates for the  
26 attorney fees mentioned immediately above. Plaintiffs request a  
27 return of the \$50,105.00 profit paid to Defendant. They also  
28 request damages of \$1,755.75 per month for 45 months as of the

1 time of trial, or \$79,008.75 for insurance, property taxes and  
2 payments on the first and second mortgage on the house that  
3 Plaintiffs would have sold back in 2007 had the project been  
4 timely completed. The Court finds that the Defendant abandoned  
5 or was fired and ordered not to return to the property in  
6 December 2007. In addition there was a new bid by JCL on May 14,  
7 2008, which indicates that the relationship between Plaintiff  
8 and Defendant had terminated. Therefore the Court finds that  
9 the claimed damages in this category beginning in August 2007  
10 and ending in April 2011 are NOT damages "resulting from " or  
11 traceable to" the fraud the Court has found. The Court will  
12 allow the sum of \$19,313.25 covering the months April 2007  
13 through June 2008. Additional claimed damages by Plaintiff is  
14 for the loss of market value of Plaintiffs' current home. In  
15 2007 Mr. Ford testified they had listed their home for sale for  
16 \$408,000.00 with the outstanding indebtedness of \$325,000.00.  
17 The listing of a home does not establish value. That home has  
18 depreciated from 2007 but the testimony of Mr Ford is not  
19 sufficient or convincing to allow this court to allow this item.

#### 20 21 **CONCLUSIONS OF LAW**

22 62. The burden of proof in nondischargeability cases  
23 is by a preponderance of the evidence. Grogan v. Garner, 498  
24 U.S. 279, 289, 111 S. Ct. 654, 651, 112 L.Ed. 2d 775 (1991).

25 63. This adversary proceeding alleges claims under 11  
26 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6).

27 64. 11 U.S.C. §523(a)(2)(A) provides in pertinent  
28 part that:

1        "... a discharge under Section 727, ... does not  
2 discharge an individual debtor from any debt - ... (2)  
3 for money, property, services, or an extension,  
4 renewal, or refinancing of credit to the extent  
5 obtained, by - (A) false pretenses, false  
6 representation, or actual fraud, other than a  
7 statement respecting the debtor's or an insider's  
8 financial condition;"

9                65. To prove a debt non-dischargeable pursuant to 11  
10 U.S.C. §523(a)(2)(A) a creditor must prove by a preponderance of  
11 the evidence the following:

12                A. The debtor made the representation;

13                B. That at the time the representation was made, the  
14 debtor knew it was false;

15                C. That the debtor made the misrepresentation with  
16 the intent and purpose of deceiving the creditor;

17                D. That the creditor justifiably relied on the  
18 representation; and

19                E. The damages sustained as a result of the  
20 misrepresentations were proximately caused by the debtor's  
21 conduct.

22                See In re Slyman, 234 F.3d 1081, 1085 (9<sup>th</sup> Cir. 2000);  
23 In re Britton, 950 F.2d 602, 604 (9<sup>th</sup> Cir. 1991); In re Kirsh,  
24 973 F.2d 1454 (9<sup>th</sup> Cir. 1992); In re Sabban, 384 B.R. 1, (9<sup>th</sup>  
25 Cir. B.A.P. 2008); In re Martinez, 49 Bankr. Ct Dc 173 (2008  
26 Bankr. LEXIS 470) (C.D. Cal. 2008).

27                **THE DEBTOR KNOWINGLY MADE FALSE REPRESENTATIONS**

28                66. California Business and Professions Code Sections  
7000, et seq., otherwise known as the Contractor's State License  
Law, requires contractors to be licensed at all times when they  
contract to perform construction work and while they are

1 constructing works of improvement. California Business and  
2 Professions Code Section 7028.5.

3 67. California's strict statutory guidelines are  
4 designed in significant part to protect consumers from the  
5 perils incident to contracting with incompetent and unlicensed  
6 contractors. In re Martinez, 49 Bankr. Ct. Dec. 173 (2008  
7 Bankr. LEXIS 470) (CD Cal.2008) approvingly citing Davis Co. v.  
8 Superior Court of San Diego County, 1 Cal. App. 3d 156, 158, 81  
9 Cal. Rptr. 453 (1969). It is a misdemeanor for any person to  
10 engage in the business or act in the capacity of a contractor  
11 without having a license, with certain exceptions that are not  
12 applicable herein. California Business and Professions Code  
13 Section 7028.

14 68. Court California Business and Professions Code  
15 Section 7031 prohibits unlicensed contractors from maintaining  
16 actions to recover compensation. Additionally, parties  
17 utilizing the services of unlicensed contractors may recover all  
18 compensation paid to the contractor even where the person for  
19 whom the work was performed knew that the contractor was  
20 unlicensed. Please see Hydrotech Sys. Ltd. v. Oasis Water Park,  
21 52 Cal.3d 988, 1007, 277 Cal. Rptr. 517, 803 P.2d 370, 376  
22 (1991).

23 69. Defendant was licensed as a general contractor  
24 September 10, 2004, but had at least nine (9) suspensions of his  
25 license due to various reasons. He failed to disclose these  
26 suspensions to Plaintiffs as statutorily required. California  
27 Business and Professions Code Section 7030.1(a)&(b). He was  
28 convicted of contracting without a license previously, and

1 admitted at trial that although he represented to Plaintiffs  
2 that his license issues were resolved and therefore in good  
3 standing as a contractor, he knew when he contracted with  
4 Plaintiffs that his license was not in effect. Additionally,  
5 Defendant represented that he could and would complete the  
6 construction of the home to ADA, VA, County of Fresno building  
7 code requirements which he did not do.

8           70. This case bears great similarity to what the  
9 creditors in In re Martinez, supra, experienced. In this case,  
10 as in Martinez, the Defendant knowingly represented that he was  
11 a licensed contractor when he was not, received funds directly  
12 from Plaintiffs, and then failed to apply all of the funds so  
13 received for construction of Plaintiffs' home. The evidence  
14 clearly and amply demonstrates Defendant failed to apply all of  
15 Plaintiffs' funds to the project.

16           71. The Court concludes that Defendant knowingly made  
17 a false representation that he was a licensed contractor in  
18 October 2006 when he contracted with Plaintiffs. The evidence  
19 clearly demonstrates that while Defendant had procured a bond  
20 and represented to Plaintiffs that his contractor's license was  
21 then in good standing, his contractor's license was not  
22 reinstated until January 3, 2007 due to being suspended for an  
23 adverse judgment. Thus, his license was not in effect until  
24 approximately two months after contracting with Plaintiffs.  
25 Defendant admitted at trial he knew the representations were  
26 false when they were made to the Plaintiffs. Defendant was also  
27 convicted of the crime of contracting without a license  
28 previously, and admitted at trial that he knew he contracted

1 with Plaintiffs when his license was not in effect.  
2 Additionally, the Defendant previously represented that he would  
3 complete the construction of the home to ADA, Val and the County  
4 of Fresno building code standards.

5 72. Accordingly, the Court concludes that Defendant  
6 knowingly made material false representations to Plaintiffs  
7 about  
8 the status of his contractor's license and his ability to  
9 construct the home which Plaintiffs hired him to build.

10 **DEFENDANT'S MISREPRESENTATIONS WERE INTENTIONAL AND MADE TO**  
11 **DECEIVE PLAINTIFFS**

12 73. Intent to deceive may be inferred from the facts  
13 set forth in the case. In re Rubin, 875 F.2d 755 (9<sup>th</sup> Cir.  
14 1989). Defendant's misrepresentations were intentional and  
15 designed specifically to deceive and induce Plaintiffs for the  
16 sole purpose of being retained to build Plaintiffs' home and  
17 profit thereby.

18 74. Plaintiffs testified that they believed  
19 Defendant's license issues were resolved upon his obtaining the  
20 contractor's bond to which both Plaintiffs and Defendant  
21 testified. In fact, Defendant was convicted of a misdemeanor in  
22 the Fresno County Superior Court of contracting without a  
23 license in July 1, 2004, pursuant to California Business and  
24 Professions Code Section 7028. Defendant's Contractor's Licence  
25 history (Plaintiffs' Exhibit "4"), shows numerous suspensions  
26 resulting from judgments and lack of bonding. Evidence of the  
27 habit of a person or of a routine of practice is relevant to  
28 prove that the conduct of the person on a particular occasion

1 was in conformity with their habit or routine practice. Federal  
2 Rules of Evidence Rule 406. The Court may only conclude from  
3 the evidence presented, that as early as July 1, 2004 and  
4 continuing up to and through the time when Defendant contracted  
5 with Plaintiffs, that he had intentionally acted on numerous  
6 occasions to contract to build in the State of California while  
7 his license was suspended. The evidence also shows he abandoned  
8 or, failed to complete, at least two (2) other construction  
9 jobs. Thus, the Court may only infer and conclude, based upon  
10 these circumstances, the testimony, and documentary evidence  
11 before the Court, that Defendant acted with the intent to  
12 deceive Plaintiffs.

13 **PLAINTIFFS JUSTIFIABLY RELIED UPON DEFENDANT'S**  
14 **MISREPRESENTATIONS**

15 75. Justifiable reliance is the standard that must be  
16 proven in complaints objecting to the dischargeability of  
17 particular debts under 11 U.S.C. §523(a)(2)(A). Field v. Mans,  
18 516 U.S. 59, 71, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995).  
19 "Justification is a matter of the qualities and characteristics  
20 of the particular plaintiff, and circumstances of the particular  
21 case rather than of the application of the community standard of  
22 conduct to all cases." Field v. Mans, supra, 516 U.S. at 71  
23 citing Restatement Second of Torts §540 (1976). Defendant  
24 knowingly and repeatedly, in contravention of California law,  
25 contracted to construct multiple projects while not possessing a  
26 contractor's license in good standing. See Paragraph 29 above.  
27 "A person is justified in relying on a representation of fact  
28 'although he might have ascertained the falsity of the

1 representation had he made an investigation.'" Field v. Mans,  
2 supra, 516 U.S. at 70. The Court concludes that the appropriate  
3 standard is a "subjective standard", and whether the reliance  
4 was justifiable under the circumstances in this case. See also  
5 In re Martinez, supra.

6 76. The Ninth Circuit holds that to determine  
7 "justifiable reliance", the court must look to all of the  
8 circumstances surrounding the particular transaction, and must  
9 necessarily consider the subjective effect upon the creditor.  
10 In re Kirsh, 973 F.2d 1454, 1460 (9<sup>th</sup> Cir. 1992); see also In re  
11 Martinez, supra.

12 77. In this case, the Defendant exploited the  
13 commonality between himself and the Plaintiffs to gain their  
14 trust. He utilized his military career and position as a  
15 pharmacy tech at the VA Hospital where Mr. Ford receives  
16 treatment to promote a common bond with Mr. Ford. He utilized  
17 the fact that his mother is a registered nurse to promote  
18 commonality with Mrs. Ford. He was forthcoming about the need  
19 to first acquire a bond to reinstate his contractor's license,  
20 which he then represented he acquired before contracting and  
21 that his license was then in good standing when it was not. He  
22 also represented that he was knowledgeable regarding VA and ADA  
23 building requirements for handicapped persons, and the County of  
24 Fresno building code. Additionally, Mr. Ford testified that  
25 Defendant had cured his license issues and that Plaintiff's had  
26 only one (1) prior experience with a contractor in Prescott,  
27 Arizona and that remodel job went well. As Judge Naugle held in  
28 In re Martinez, supra, citing the Restatement Second of Torts

1 §540 (1976):

2 "A person is justified in relying on a representation of  
3 fact although he might have ascertained the falsity of the  
4 representation had he made an investigation."

5 The Court concludes that Plaintiffs were not obliged to  
6 investigate Defendant's contractor's license history prior to  
7 executing the Contract.

8 78. When the Court considers these facts and  
9 circumstances, the Court may only conclude that Plaintiffs'  
10 reliance was justifiable.

11 **PLAINTIFFS' DAMAGES WERE PROXIMATELY CAUSED BY DEFENDANT'S  
12 INTENTIONAL MISREPRESENTATIONS**

13 79. Proximate causation,

14 "Is sometimes said to depend on whether the conduct  
15 has been so significant and important a cause that the  
16 defendant should be legally responsible. But both  
17 significance and importance turn upon conclusions in  
18 terms of legal policy, so that they depend on whether  
19 the policy of the law will extend the responsibility  
20 for the conduct to the consequences which have in fact  
21 occurred."

22 In re Britton, 950 F.2d 602, 604 (9<sup>th</sup> Cir. 1991); In re Martinez,  
23 supra, approvingly citing W. Page Keeton et al., Prosser and  
24 Keeton on The Law of Torts, §42 at 273 (5<sup>th</sup> Ed. 1984).

25 80. The damages incurred by Plaintiffs are equally a  
26 foreseeable consequence of being defrauded by Defendant just as  
27 much as the damages were in Britton, supra, and Martinez, supra.  
28 Defendant's intentional misrepresentations discussed above  
provide a firm foundation from which the many damages discussed  
below occurred and ultimately harmed Plaintiffs. Additionally,  
the California Business and Professions Code referred to above  
express a policy that consumers and citizens in the State of

1 California be protected from the perils of contracting with  
2 incompetent and unlicensed contractors. Davis Co. V. Superior  
3 Court of San Diego County, supra, 1 Cal. App. at 158.

4 **11 U.S.C. §523(a)(4)**

5 81. The second cause of action in Plaintiffs'  
6 Adversary Complaint is for embezzlement. Under Federal law,  
7 embezzlement has been defined as "the fraudulent appropriation  
8 of property by a person to whom such property has been entrusted  
9 or into whose hands it has lawfully come." In re Littleton, 942  
10 F.2d 551, 555 (9<sup>th</sup> Cir. 1991) citing Moore v. United States, 160  
11 U.S.268, 269 (1885).

12 82. To prove embezzlement requires the showing of  
13 three elements: (1) property rightfully in the possession of a  
14 non-owner; (2) the non-owner's appropriation of the property to  
15 a use other than which it was entrusted; and (3) circumstances  
16 indicating fraud." In re Littleton, supra.

17 83. The evidence clearly shows that Defendant was  
18 given significant monies and was rightfully in the possession of  
19 those funds for a particular purpose, the building of  
20 Plaintiffs' home. Defendant failed to utilize these funds to  
21 build and complete Plaintiffs' home for which these monies were  
22 entrusted. As stated above, Defendant's conduct clearly  
23 indicates fraud. Plaintiffs have proven embezzlement as  
24 contemplated under 11 U.S.C. §523(a)(4).

25 84. The Court makes no finding that Larceny exists in  
26 this case.

27 **11 U.S.C. §523(a)(6)**

28 85. Section 523(a)(6) in part provides that a

1 discharge under Section 727 does not discharge an individual  
2 debtor from any debt for willful and malicious injuries.

3 86. According to the United States Supreme Court, the  
4 willful requirement of Section 523(a)(6) "modifies the word  
5 injury, indicating that nondischargeability takes a deliberate  
6 or intentional *injury*, not merely a deliberate or intentional  
7 act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57,  
8 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90, 95 (1998). See also  
9 Ormsby v. First American, 591 F.3d 1199 (9<sup>th</sup> Cir. 2010)

10 87. Plaintiffs must prove the "willful injury"  
11 requirement under 11 U.S.C. Section 523 (a)(6) by demonstrating  
12 that the Debtor either had a subjective motive to inflict the  
13 injury, or believed the injury was substantially certain to  
14 occur as a result of the Debtor's conduct. In re Jercich, 238  
15 F.3d 1202, 1208, (9<sup>th</sup> Cir. 2001). The Court concludes that both  
16 situations exist.

17 88. The requirement of "malicious injury" is separate  
18 from the requirement of "willful". In re Su, 290 F.3d 1140,  
19 1146, (9<sup>th</sup> Cir. 2002.)

20 89. A malicious injury requires (1) a wrongful act,  
21 (2) done intentionally, (3) which necessarily causes injury, and  
22 (4) is done without just cause or excuse. In re Bammer, 131  
23 F.3d 788, 791 (9<sup>th</sup> Cir. 1997) (en banc).

24 90. Under California Civil Code Section 1572, a party  
25 to a contract with the intent to deceive another party to the  
26 contract, or to induce the other party to enter into the  
27 contract, acts with malice causing injury. In re Martinez,  
28 supra.



1 v. De La Cruz, 523 U.S. 213, 218, 118 S. Ct. 1212, 140 L.Ed. 2d  
2 341 (1998); In Re Sabban, supra, 384 B.R. at 6-7. First, the  
3 Court discusses the actual damages sustained by Plaintiffs.  
4 There are several considerations in this regard.

5 93. Plaintiffs' complaint prays for damages in an  
6 amount of at least \$154,307.48. (See also Plaintiffs' Exhibit  
7 9, Page 1). This amount was computed by Mr. Ford who testified  
8 that he has no experience in construction. Plaintiffs also  
9 request in the Adversary Complaint that the Court order the  
10 return of Defendant's profit in the amount of \$50,105.00 as  
11 Defendant failed to complete the construction and ultimately  
12 abandoned the project.

13 94. The Court concludes that while Mr. Ford  
14 diligently attempted to quantify the damages, the evidence is  
15 that Plaintiffs' damages far exceed his estimate. Plaintiffs'  
16 estimate fails to account for removal and replacement of the  
17 substantial tile flooring. It fails to account for the cost to  
18 repair the foundation, electrical and plumbing issues. It also  
19 fails to account for a number of other items as set forth in  
20 significant detail in Mr. Thompson's Report including the  
21 cabinetry.

22 95. Plaintiffs also offer Exhibit "7" which sets  
23 forth all monies paid to Defendant while his contractor's  
24 license was suspended. This amount is \$324,800.00. Under  
25 California law, Plaintiffs may recover the total of these funds.  
26 Business and Professions Code Section 7031(b).

27 96. While the Court concurs with Judge Pappas'  
28 dissent in In re Sabban, 384 B.R. 1 (9th Cir. B.A.P. 2008) that

1 Defendant should disgorge all payments made to him while he  
2 contracted without a valid license as contemplated under  
3 California Business and Professions Code §7031(b) as they were  
4 made due to Defendant's fraud, the Court feels constrained to  
5 follow the majority opinion in that Bankruptcy Appellate Panel  
6 decision and cannot utilize this as a measure of damages.

7           97. Damages are also set forth in the JCL  
8 Construction bid of May 14, 2008. (Defendant's Exhibit "W").  
9 The amount set forth in this bid is \$122,014.50. There are  
10 several caveats at the conclusion of the bid. There is the  
11 likelihood for at least a 10% overage on the quoted price due to  
12 the fact that other items are likely to be discovered as the  
13 project is being finished. Additionally, it fails to account  
14 for the appliances Plaintiffs' paid for that were not installed.  
15 It fails to provide for bathroom counter tops and back splashes.  
16 It also only contemplates replacement of 3,000 square feet of  
17 tile as opposed to 3,600 which Defendant testified was required.  
18 This bid, in the Court's view, however, is not as comprehensive  
19 as Mr. Thompson's Report.

20           98. Mr. Thompson's Report is quite comprehensive and  
21 prepared by Mr. Thompson who has significant experience as a  
22 contractor and as a Senior Investigator for the CSLB. In the  
23 performance of his duties as a Senior Investigator with the  
24 CSLB, he calculated damages sustained by parties in regards to  
25 various construction projects.

26           99. Mr. Thompson's Report calculates damages  
27 sustained by Plaintiffs at \$238,500.00, which the Court  
28 concludes is credible. The Court believes the deficiencies

1 needing correction and completion will easily cost this much.

2           100. Secondly, there are additional consequential  
3 and compensatory damages suffered by Plaintiffs "traceable to"  
4 and "resulting from" Defendant's fraud. These damages include  
5 the damages resulting from Defendant's failure to pay certain  
6 suppliers. The evidence before the Court is that after  
7 Plaintiffs paid Defendant for their doors, Defendant did not pay  
8 Pacific Door. Plaintiffs' then paid Pacific Door \$6,500.00 on  
9 July 9, 2007 (Plaintiffs' Exhibit "8") and according to Mr.  
10 Ford's testimony, an additional \$8,000.00 to settle the mechanic  
11 lien litigation. There also is the remaining Ferguson  
12 Enterprises, Inc. mechanic's lien in the amount of \$1,584.14 as  
13 of trial, and now calculated by the Court to be \$2,087.39.

14           101. Additional consequential and compensatory damages  
15 "traceable to" and "resulting from" Defendant's fraud include  
16 the payment by Plaintiffs of \$5,670.00 in attorney fees  
17 incurred by Scott C. Hawkins to defend the Pacific Door mechanic  
18 lien litigation. (Plaintiffs' Exhibit "18").

19           102. Exhibit "20" alleges that they are entitled to  
20 other consequential and compensatory damages suffered by  
21 Plaintiffs "traceable to" and "resulting from" Defendant's  
22 fraud. These damages are the \$50,105.00 in profit paid to  
23 Defendant for a construction project he abandoned, 45 months of  
24 payments of insurance, property taxes and payments on the first  
25 and second mortgage on Plaintiffs' current home that they would  
26 have sold in 2007 had the project been timely completed in the  
27 amount of \$79,008.75 (Plaintiffs' Exhibit "20"). The Court is  
28 only allowing 11 months of payments for a total of \$19,313.25

1 for the reasons set forth in paragraph 61. Ex "2" is also  
2 claiming \$60,000 for loss of value in their home over the years.  
3 The Court is not allowing any damages for the claimed loss of  
4 value of Plaintiffs current home as explained above for the  
5 reason that there was no credible proof offered.

6 103. Lastly, there are the attorney fees and costs  
7 including experts of \$55,917.12 (see the supplemental  
8 declaration filed by Armstong ) "resulting from" and "traceable  
9 to" Defendant's fraud. Defendant's contract includes an  
10 attorney fee clause and under California Civil Code Section  
11 1717, prevailing parties are entitled to recover attorney fees  
12 and costs. The Supreme Court holds that prevailing parties may  
13 recover such damages. Travelers Casualty and Surety Company of  
14 America v. Pacific Gas & Electric Co., 549 U.S. 443, 127 S. Ct.  
15 1199, 1203, 167 L.Ed.2d 178 (2007).

16 104. The Court concludes that damages in this case  
17 directly "resulting from" and "traceable to" the Defendant's  
18 fraud are as follows:

19	A. Cost of Repair and Completion:	\$238,500.00
20	B. Mechanic Lien Issues:	16,587.39
21	C. Mechanic Lien Attorney Fees:	5,670.00
22	D. Return of Profit:	50,105.00
23	E. Insurance, Property Taxes and	
24	House Payments:	19,313.25
25	F. Attorney Fees, Costs, Experts	<u>55,917.12</u>
26	Total Damages	\$386,092.76

27 105. The Court concludes that but for Defendant's  
28 fraud, embezzlement, larceny, and willful and malicious conduct,

1 that Plaintiffs would not have suffered these damages.  
2 Therefore, the Court concludes as a matter of law that the  
3 amount of \$386,092.76 is nondischargeable pursuant to 11 U.S.C.  
4 §§523(a)(2)(A), (4), and (6).

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: July \_\_, 2011

---

Richard T. Ford, United  
States Bankruptcy Judge