

FILED

SEP 23 2015

**JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: B. Jones, Deputy**

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6 Attorneys for Cross Complainant and Cross-
Defendant CITY OF NOVATO

EXEMPT FROM FILING FEES
per Gov. Code § 6103

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF MARIN

11 VOLPE COMPANY, INC., a California
corporation,

12 Plaintiff,

13 v.

14 SAUSAL CORPORATION, NORTH
AMERICAN SPECIALTY INSURANCE
15 COMPANY, LIBERTY MUTUAL
INSURANCE COMPANY; and
16 DOES 1-100, inclusive,

17 Defendants.

Case No. CV 1402511
Judge:

CITY OF NOVATO'S CROSS-COMPLAINT
AGAINST SAUSAL CORPORATION,
LIBERTY MUTUAL INSURANCE
COMPANY, AND ROES 101-150, inclusive,
FOR BREACH OF CONTRACT, BREACH
OF EXPRESS WARRANTY, BREACH OF
IMPLIED WARRANTY, EXPRESS
INDEMNITY, AND VIOLATION OF THE
CALIFORNIA FALSE CLAIMS ACT

18 SAUSAL CORPORATION

19 Cross-Complainant,

20 v.

21 VOLPE COMPANY, INC., a California
corporation, CITY OF NOVATO, and
ROES 1-100, inclusive,

22 Cross-Defendants.

Complaint filed: June 30, 2014
Trial Date: Not Set

23 CITY OF NOVATO

24 Cross-Complainant,

25 v.

26 SAUSAL CORPORATION, LIBERTY
MUTUAL INSURANCE COMPANY, and
ROES 101-150, inclusive,

27 Cross-Defendants.

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1 Cross-Complainant City of Novato (“City” or “Cross-Complainant”) alleges as follows:

2 **GENERAL ALLEGATIONS**

3 1. Cross-Complainant is, and at all times material to this Cross-Complaint was, a
4 municipal corporation organized and existing under the laws of the State of California, located in
5 Marin County, California.

6 2. Cross-Complainant is informed and believes and thereupon alleges that Cross-
7 Defendant Sausal Corporation (“Sausal”) is, and at times material to this Cross-Complaint was, a
8 California corporation, conducting business in Marin County, California.

9 3. Cross-Complainant is informed and believes and thereupon alleges that Cross-
10 Defendant Liberty Mutual Insurance Company (“Liberty Mutual”), as surety, issued Performance
11 Bond No. 070014017, naming City as beneficiary and Sausal as principal, in connection with the
12 public work of improvement that is the subject of this litigation known as the City Civic Center
13 Administrative Office Building (“Project”).

14 4. Cross-Complainant does not know the true names or capacities of Cross-
15 Defendants Roes 101 through 150, inclusive, and therefore sues these persons or entities by their
16 fictitious names. Cross-Complainant will amend this Cross-Complaint to allege their true names
17 or capacities when they have been ascertained. Cross-Complainant is informed and believes and,
18 on that basis, alleges that each fictitious Cross-Defendant is in some manner responsible for the
19 acts or omissions alleged, and the damages claimed, in this Cross-Complaint.

20 5. Cross-Complainant is informed and believes and, on that basis, alleges that each
21 named Cross-Defendant, including Roes 101 through 150, was the agent, servant, employee,
22 partner, or joint venturer of each other Cross-Defendant, and that each Cross-Defendant was
23 acting within the course and scope of such agency, employment, partnership, or joint venture, and
24 with the consent or the ratification of each other in doing the things alleged here.

25 6. Sausal Corporation filed a First Amended Cross-Complaint in the above-captioned
26 action with this court on or about August 11, 2015, alleging liability against City for breach of
27 contract, breach of implied warranty and prompt payment penalties in connection with the
28 Project. The allegations of the First Amended Cross-Complaint are incorporated by reference as

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LAW OFFICES OF
BEST BEST & KRIEGER LLP
500 CAPITOL MALL, SUITE 1700
SACRAMENTO, CALIFORNIA 95814

1 though fully set forth, but City does not admit the truth of any fact or allegation therein, and
2 denies any resulting liability to Sausal. The First Amended Cross-Complaint demands, among
3 other things, recovery of damages against City.

4 **FIRST CAUSE OF ACTION**

5 **Breach of Contract**

6 **(Against Cross-Defendants Sausal and Roes 101-150)**

7 7. Cross-Complainant realleges and incorporates by reference each and every
8 allegation of paragraphs 1 through 6 inclusive, as if fully set forth herein.

9 8. On or about July 30, 2012, City entered into a written contract (the "Contract")
10 with Sausal for construction of the Project. The Contract is comprised of voluminous documents,
11 including plans and specifications, which are incorporated into this Cross-Complaint by this
12 reference.

13 9. The Project included construction of a two-story building, underground parking,
14 and associated site improvements.

15 10. Among other things, the Contract provided that Sausal would:

16 a. Construct the Project in accordance with the plans and specifications
17 incorporated into the Contract (the "Contract Documents") and in a good and
18 workmanlike manner.

19 b. Proceed expeditiously with adequate forces and complete construction of
20 the Project within the time established in the Contract (15.6).

21 c. Provide a competent project manager and construction superintendent
22 (6.2).

23 d. Provide a critical path schedule for construction of the Project (10.1) and
24 monthly updates to the construction schedule (10.2).

25 e. Guarantee and warrant all work on the Project against defects for one year
26 after completion, and promptly repair or replace any defective work or materials within
27 that time (14.1).

28 f. Notify City in writing of any claim for an increase in the contract price or

1 contract time not later than ten (10) days after the event giving rise to the claim, and on or
2 before twenty (20) days after giving notice of the claim file with the City an itemized
3 statement of the details and amounts of its claim, and waive any claim for which it did not
4 give the required notice.

5 g. Pay all amounts due to subcontractors within ten (10) days of the date
6 Sausal received payment from City (19.5).

7 h. Certify all change orders pursuant to the California False Claims Act,
8 Government Code section 12650 *et seq.* (the "Act") (17.9.4).

9 i. Be responsible for the quality of subcontractor work and the
10 subcontractors' compliance with the Project schedule.

11 j. Accept as payment in full for performance of the Contract the amount
12 calculated in accordance with the Contract.

13 11. Sausal failed to perform its obligations under the Contract, including but not
14 limited to:

15 a. Failing to construct the Project in accordance with the Contract
16 Documents.

17 b. Failing to construct the Project in a good and workmanlike manner, such
18 that water has entered the building and the garage, causing damage to the building and
19 other City property.

20 c. Failing to complete construction of the Project within the time provided in
21 the Contract.

22 d. Failing to provide consistent, qualified management and supervision of the
23 Project.

24 e. Failing to maintain and update an accurate Project construction schedule.

25 f. Failing and refusing to correct defective work.

26 g. Demanding payments of amounts not due under the Contract, such as
27 change orders for which Sausal failed to give the required notice and supporting
28 information, despite City's repeated requests to do so.

1 h. Failing to pay subcontractors in accordance with the Contract or as
2 required by law.

3 i. Failing to certify its proposed change orders under the Act.

4 12. City performed all terms and conditions required of it under the Contract, except
5 those obligations that were excused by Sausal's failure to perform.

6 13. As a direct result of Sausal's failure to perform the Contract requirements, City
7 suffered damages, including, but not limited to, the cost of completing and correcting defective
8 work, the cost of repairing property damaged by defects in the Project, the cost of investigating
9 defective work, and other costs and expenses.

10 14. The precise amount of City's damages is not yet known, but the amount exceeds
11 \$500,000, subject to proof at trial.

12 WHEREFORE, City seeks judgment as set forth below.

13 **SECOND CAUSE OF ACTION**

14 **Breach of Express Warranty**

15 **(Against Cross-Defendants Sausal and Roes 101-150)**

16 15. Cross-Complainant realleges and incorporates by reference each and every
17 allegation of paragraphs 1 through 6, inclusive, as if fully set forth herein.

18 16. In entering into the Contract, Cross-Defendants Sausal and Roes 101-150, and
19 each of them, expressly guaranteed and warranted that all work, labor, materials, equipment or
20 services furnished or performed for the Project (the "Work") would be free of defects for a period
21 of one year after completion, and that Cross-Defendants would repair or replace any Work that
22 was defective in workmanship and/or materials without cost to City, and that Cross-Defendants
23 would commence and pursue the repairs or replacement with diligence within ten (10) days after
24 written notice from City.

25 17. On numerous dates, including, but not limited to, November 4, 2013, City gave
26 Cross-Defendants written notice of the defects in the Work, including, but not limited to, water
27 leaks, uneven pavers, damaged or incomplete finishes, missing items including soap dispensers,
28 ceiling tiles, and trim plates, and non-conforming aerators. Despite the notices, Cross-Defendants

1 failed and refused to perform the appropriate repairs or to replace the defective work.
2 Accordingly, Cross-Defendants are liable to Cross-Complainant for all damage suffered as the
3 result of the defects and deficiencies in the Work.

4 18. Cross-Defendants breached the express warranties provided in the Contract in that
5 the Work was not done in a workmanlike manner, and material and workmanship provided by or
6 on behalf of Cross-Defendants were defective for the reasons more fully alleged in the First
7 Cause of Action.

8 19. Cross-Defendants further breached the express warranties by failing to compensate
9 or to make good all defects in material or workmanship that were reported to Cross-Defendants.

10 20. As a direct and proximate result of the Cross-Defendants' breach of express
11 warranties, City has incurred and continues to incur costs to complete and correct the Work, and
12 has been damaged in an amount according to proof at trial, but not less than \$500,000.

13 WHEREFORE, City seeks judgment as set forth below.

14 **THIRD CAUSE OF ACTION**

15 **Breach of Implied Warranty**

16 **(Against Cross-Defendants Sausal Corporation and Roes 101-150)**

17 21. Cross-Complainant realleges and incorporates by reference each and every
18 allegation of paragraphs 1 through 6, and 8 through 20, inclusive, as if fully set forth herein.

19 22. In entering into the Contract, Cross-Defendants Sausal and Roes 101-150, and
20 each of them, impliedly warranted that the services, construction work, and installation of
21 material would be reasonably fit for the purposes intended, and done in a good and workmanlike
22 manner.

23 23. Each Cross-Defendant breached these implied warranties as the Work was
24 defective or not fit for the purposes intended, and not performed in a good and workmanlike
25 manner.

26 24. As a direct and proximate result of the above-described breach of express
27 warranties, City has been damaged in an amount according to proof, but not less than \$500,000.

28 WHEREFORE, City seeks judgment as set forth below.

1 **FOURTH CAUSE OF ACTION**

2 **Negligence**

3 **(Against Cross-Defendants Sausal and Roes 101-150)**

4 25. Cross-Complainant realleges and incorporates by reference each and every
5 allegation of paragraphs 1 through 6, and 8 through 20, inclusive, as if fully set forth herein.

6 26. Cross-Defendants Sausal and Roes 101-150, and each of them, had a duty to City
7 to use reasonable care in constructing, handling, installing, cutting, supervising, building,
8 improving, repairing, inspecting, and assembling the Work.

9 27. Cross-Defendants breached their duty to City by constructing, handling, installing,
10 manufacturing, cutting, supervising, building, improving, repairing, inspecting, and assembling
11 the Work without reasonable care so that, among other things, the Project was not water tight and
12 water entered the building, damaging the structure, interior finishes and other City property.

13 28. As a direct and proximate result of Cross-Defendants' negligence, City has been
14 damaged in an amount according to proof, but not less than \$500,000.

15 WHEREFORE, City seeks judgment as set forth below.

16 **FIFTH CAUSE OF ACTION**

17 **Violation of the California False Claims Act**

18 **(Against Cross-Defendant Sausal and Roes 101-150)**

19 29. City incorporates the allegations set forth in Paragraphs 1 through 6, inclusive, as
20 though fully set forth herein.

21 30. Beginning in or around March 27, 2013, and continuing through the present,
22 Cross-Defendants have violated the provisions of the Act, by, among other things, knowingly
23 submitting and pursuing claims that were false claims within the meaning of the Act.
24 Specifically, Cross-Defendants have submitted claims to City and this Court in which it:

25 a. Seeks compensation from City for claims that have been waived under the
26 express terms of the Contract.

27 b. Seeks compensation from City, although under the terms of the Contract
28 between Sausal and City, for which City has no liability to Cross-Defendants for the

1 claimed costs.

2 c. Made no effort to determine whether the claims and the documents
3 supporting them are accurate, and failed and refused to provide documents necessary to
4 support its claims despite repeated requests from City.

5 31. City is informed and believes, and on that basis alleges, that Cross-Defendants
6 submitted these false claims knowingly or in either (a) deliberate ignorance, or (b) reckless
7 disregard of the truth or falsity of the information in its claims. City continues to investigate and
8 analyze Cross-Defendants' claims and may discover further violations of the Act. If so, City will
9 seek leave to amend this complaint to include those additional false claims.

10 32. As a result of these and other violations of the Act, City has incurred costs in
11 reviewing, analyzing, and investigating the false claims submitted by Cross-Defendants and is
12 entitled to recover from Cross-Defendants those costs, in addition to the penalties and treble
13 damages provided for in the Act, according to proof at trial, together with costs as provided for in
14 the Act.

15 33. In addition to the treble damages described above, Cross-Defendants is subject to a
16 civil penalty for each separate claim of not less than \$5,000 and not more than \$10,000. The
17 number of claims and amount of the civil penalty are subject to proof at trial.

18 WHEREFORE, City seeks judgment as set forth below.

19 **SIXTH CAUSE OF ACTION**

20 **Express Indemnity**

21 **(Against Cross-Defendants Sausal and Roes 101-150)**

22 34. Cross-Complainant realleges and incorporates by reference each and every
23 allegation of paragraphs 1 through 6, inclusive, as if fully set forth here.

24 35. In entering into the Contract, Cross-Defendants Sausal and Roes 101-150, and
25 each of them, expressly promised in writing to indemnify, defend, keep and hold harmless City
26 "against all suits, claims, damages, losses, and expenses, including but not limited to attorney's
27 fees, caused by, arising out of, resulting from, or incidental to, the performance of the Work...".

28 36. City has received claims and been sued in connection with the Project and the

1 Work by Cross-Defendant's subcontractors Volpe Construction, Inc. and Steve Berlin, Inc. in this
2 action and other actions pending before this court (the "Subcontractor Actions").

3 37. City has requested in writing that Sausal defend and indemnify City in the
4 Subcontractor Actions in accordance with the Contract, but Sausal has failed and refused to do so.

5 38. As a result, City has been required to hire experts to evaluate the subcontractor
6 claims and the law firm of Best Best & Krieger LLP to defend the Subcontractor Actions, bring
7 this indemnity action against Cross-Defendant, and preserve Cross-Complainant's rights on its
8 claims against Cross-Defendant.

9 39. City is entitled to complete indemnity from Cross-Defendant, including recovery
10 of any damages adjudged against Cross-Complainant in the Subcontractor Actions, plus litigation
11 expenses and costs, expert fees, and reasonable attorney fees incurred by City, in an amount
12 according to proof.

13 WHEREFORE, City seeks judgment as set forth below.

14 **SEVENTH CAUSE OF ACTION**

15 **On Performance Bond**

16 **(Against Cross-Defendant Liberty Mutual Insurance Company)**

17 40. City incorporates the allegations set forth in Paragraphs 1 through 28 and 34
18 through 39, inclusive, as though fully set forth herein.

19 41. On or about July 11, 2012, Liberty Mutual executed and delivered to City its bond
20 ensuring the faithful performance by Sausal of the Contract according to its terms, plans, and
21 specifications, and promising to pay to City, on Sausal's failure to so perform, all damages caused
22 by such a failure in a sum not exceeding \$10,780,800. A copy of the bond is attached to and
23 incorporated into this complaint as Exhibit A.

24 42. As set forth above, Sausal has failed and refused to faithfully perform the Contract,
25 including, but not limited to, indemnifying and defending City in litigation arising from the
26 Project.

27 43. No notice of completion for the Project has been filed.

28 44. Beginning on or about November 4, 2013, and repeatedly thereafter, City made

1 written demand on Cross-Defendant to faithfully perform the Contract, but Cross-Defendant has
2 failed, refused, and neglected to do so.

3 45. As a proximate result of Cross-Defendant's failure and refusal to faithfully
4 perform the contract, City has been damaged in an amount according to proof, but not less than
5 \$500,000. Liberty Mutual is liable to City on the bond to pay these damages, as well as any and
6 all other damages or loss sustained by City by reason of Sausal's breach of the contract.

7
8 WHEREFORE, City seeks judgment against Sausal Corporation and Liberty Mutual
9 Insurance Company as follows:

10 For the First, Second, Third, Fourth, Sixth and Seventh Causes of Action

- 11 1. For damages in amount subject to proof at trial, but in no event less than \$500,000.

12 For the Fifth Cause of Action (against Sausal Corporation only)

13 2. For civil penalties for each violation of the False Claims Act as prescribed by law,
14 subject to proof at trial.

15 3. For treble the amount of damages City has incurred on account of Sausal's false
16 claims.

17 For all Causes of Action against Sausal and Liberty Mutual

- 18 4. For costs of suit as allowed by law.
19 5. For attorneys' fees as allowed by law.
20 6. For such other and further relief as the Court deems just and proper.

21 Dated: September 22, 2015

BEST BEST & KRIEGER LLP

22
23 By: 

24 KEVIN K. WANG
25 LINDA R. BRCK
26 Attorneys for Cross-Complainant
27 CITY OF NOVATO
28

Exhibit A

Exhibit A

Executed in Five (5) Counterparts

Bond No. 070014017
Premium: \$76,497.00

00 61 13 - CONSTRUCTION PERFORMANCE BOND

PERFORMANCE BOND

PUBLIC WORKS

KNOW ALL PERSONS BY THESE PRESENT that the CITY OF NOVATO ("City") a municipal corporation located in the COUNTY OF MARIN, State of California, has awarded a contract to and has entered into an agreement with Sausal Corporation, hereinafter designated as "Principal" whereby Principal agrees to complete the improvements more particularly described in all documents forming the complete contract entitled: "NOVATO CIVIC CENTER ADMINISTRATIVE OFFICE BUILDING," which said agreement is hereby referred to and made a part hereof; and

WHEREAS, said PRINCIPAL is required under the terms of said agreement to furnish a bond for the faithful performance of said agreement.

NOW, THEREFORE, we, the PRINCIPAL and Liberty Mutual Insurance Company as Surety, are held and firmly bound unto the CITY OF NOVATO (hereinafter called City), in the penal sum of: Ten Million, Seven Hundred Eighty Thousand, and Eight Hundred DOLLARS (\$10,780,800) lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such that if the above bounded PRINCIPAL, his/her/its heirs, executors, administrators, successors, or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, therein provided, on his/her/their part, to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify, defend, and save harmless CITY OF NOVATO, its officers, agents and employees, as therein stipulated, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As a part of the obligation secured hereby and in addition to the face amount specified therefore, there shall be included costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The surety hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the agreement or to the work to be performed thereunder or the specifications accompanying the same shall in anywise affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the agreement or to the work or to the specifications.

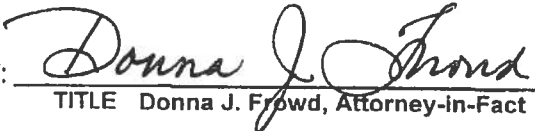
IN WITNESS WHEREOF, this instrument has been duly executed by the PRINCIPAL and surety above named, Sausal Corporation and Liberty Mutual Insurance Company July 11, 2012.

NOTE: To be signed by Principal and Surety and acknowledgment and notarial seal attached.

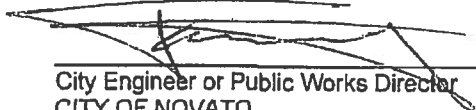
Sausal Corporation
PRINCIPAL

BY: 
TITLE James E Ward, President

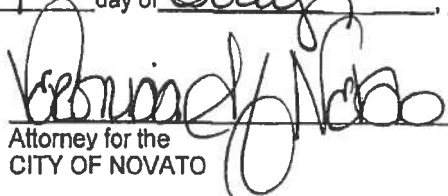
Liberty Mutual Insurance Company
SURETY

BY: 
TITLE Donna J. Frowd, Attorney-in-Fact

It has been confirmed that Surety is admitted by the Department of Insurance to transact business in the State of California and has a Best's rating of at least AXV.


City Engineer or Public Works Director
CITY OF NOVATO

The form of the above bond is approved this 24TH day of July, 2012.


Attorney for the
CITY OF NOVATO

-END OF SECTION-

ACKNOWLEDGMENT

State of California
County of Alameda)

On July 19, 2012 before me, Kathy Bartlett / Notary Public
(insert name and title of the officer)

personally appeared James E. Ward
who proved to me on the basis of satisfactory evidence to be the person(~~s~~) whose name(~~s~~) is/~~are~~
subscribed to the within instrument and acknowledged to me that he/~~she~~/~~they~~ executed the same in
his/~~her~~/~~their~~ authorized capacity(~~ies~~), and that by his/~~her~~/~~their~~ signature(~~s~~) on the instrument the
person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Kathy Bartlett (Seal)

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of MARIN

On July 11, 2012 before me, Donna L. Welsh, Notary Public, personally appeared Donna J. Frowd who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

(seal)

Signature

