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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SHELLI AZOFF AND IRVING AZOFF, TRUSTEES OF THE AZOFF FAMILY TRUST,

Petitioners,

v.

SCOTT MITCHELL, SCOTT MITCHELL STUDIO, INC., and DOES 1 through 50, inclusive,

Respondents.

Case No.: BS165131

[redacted] **JUDGMENT**

[*Filed Concurrently With: (1) Notice of Hearing on Petition to Confirm Arbitration Award; and (2) Memorandum of Points and Authorities in Support of Petition to Confirm Arbitration Award and Declaration Of David P. Schack in Support Thereof*]

[Assigned to Hon. Ruth Ann Kwan, Dept. 72]

JUDGMENT

Having read and considered the Petition of Shelli Azoff and Irving Azoff, Trustees of the Azoff Family Trust, to Confirm Arbitration Award, and finding good cause therefor, **IT IS HEREBY ORDERED AND ADJUDGED THAT:**

1. The final award issued by the Bruce A. Friedman, Esq. attached hereto as Exhibit 1 and incorporated herein by reference is hereby confirmed in all respects.

2. Judgment is entered in favor of Petitioners Shelli Azoff and Irving Azoff, Trustees of the Azoff Family Trust, and against Respondents Scott Mitchell Studio, Inc. and Scott Mitchell, jointly and severally, in the amount of $2,156,448.68 plus post-judgment interest at the rate of 10% per annum on the principal amount of this Judgment from and after September 14, 2016.

3. Petitioners Shelli Azoff and Irving Azoff, Trustees of the Azoff Family Trust, are awarded additional attorneys' fees from Respondents Scott Mitchell Studio, Inc. and Scott Mitchell in the amount of $_____ and additional costs from Respondents Scott Mitchell Studio, Inc. and Scott Mitchell in the amount of $_____ incurred in connection with the Petition, which fees and costs shall be added to the principal amount of this Judgment and for which fees and costs Respondents Scott Mitchell Studio, Inc. and Scott Mitchell shall be jointly and severally liable.

IT IS SO ORDERED.

Dated: Dec. 6, 2016

Honorable Ruth Ann Kwan
Judge of the Superior Court

BARNES & THORNBURG LLP
ATTORNEYS AT LAW
LOS ANGELES

EXHIBIT 1

JAMS ARBITRATION
No. 1210032549

Shelli Azoff and Irving Azoff, Trustees of the Azoff Family Trust, Claimants, v. Scott Mitchell and Scott Mitchell Studio, Inc., Respondents.	**FINAL AWARD**
AND RELATED COUNTERCLAIM	

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Parties:

Claimants

Irving and Shelli Azoff, Trustees of the Azoff Family Trust

Respondents

Scott Mitchell
Scott Mitchell Studio, Inc.

Place of Arbitration: Los Angeles, California

Date of Award: September 14, 2016

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with Section 7 of the Design Agreement, dated December 18, 2013 ("Agreement"), and having examined the submissions, documentary and testimonial proof and arguments and allegations of the parties, finds, concludes and issues this Final Award as follows:

I. Introduction and Procedural Statement

The dispute between the parties centers around the design and building of a residential structure on the Azoff's current property at 244 Ladera Drive. This case consists of claims by Irving and Shelli Azoff as trustees of the Azoff Family Trust against Scott Mitchell Studio, Inc. ("SMS") for breach of the Agreement and breach of the professional duty of care and against Scott Mitchell ("Mitchell") for breach of the professional duty of care/professional negligence. Claimants' Claims for Arbitration were filed on June 23, 2015.[1] Respondents' Response was filed on July 20, 2015, along with a counterclaim against Claimants, alleging quantum meruit recovery for unpaid fees pursuant to the Agreement. On November 11, 2015, Claimants

[1] The Arbitrator will refer to both SMS and Mitchell as either Respondents or Mitchell, unless otherwise described.

amended their demand to include a claim for conversion against Claimants, requesting punitive damages and injunctive relief.

Following the preliminary hearing of November 4, 2015, the Arbitrator issued a Report of Preliminary Hearing and Scheduling Order No. 1, dated November 16, 2015. In the Report, the Arbitrator ruled that the matter would be bifurcated, the first phase in which the entitlement to an award of punitive damages and fees and costs would be determined and the second phase in which the amount of punitive damages, where applicable, and the amount of fees and costs to which any party may be entitled would be determined.

The First Phase Evidentiary Hearing. The Hearing was conducted on May 11-13 and 24-25, 2016. Closing arguments were heard on June 15, 2016. In addition to the pre-hearing briefs submitted by the parties, each side offered documentary evidence at the hearing, and all such evidence was admitted (Exs. 1-633; 1001-1026; 2001-2064; Vlahos 1-12; Manion 1-9; O'Halloran 1-11; Schram 1; Zumbo 1-21). Each side called witnesses and cross-examined opposing witnesses: Irving Azoff, Shelli Azoff, Dennis Roach, Tom Goffigon. Sandy Gallin, Scott Mitchell, Rhett McKenzie and George Peper. Claimants submitted excerpts of the deposition testimony of Tom Goffigon, Mathieu Ribaut, Andrew Odom, Peter McCoy, James Gelfat and Richard Holz. Respondents submitted excerpts of the deposition testimony of Irving Azoff, Shelli Azoff, Dennis Roach, Tom Goffigon, Stacey Anderson, Mathieu Ribaut, Andrew Odom, James Gelfat and Richard Holz. Expert testimony was offered through either testimony at the Hearing or through excerpts of each respective expert's deposition testimony. Claimants presented the live testimony of Dean Vlahos and Respondents presented the live testimony of Richard Manion. Claimants submitted excerpts of the deposition testimony of Jeffrey Zumbo and Ciaran O'Halloran. Respondents submitted excerpts of the deposition testimony of Jeffrey Zumbo, James L. Schram, Richard Manion and Dean Vlahos. Respondents submitted the full transcript of Ciaran O'Halloran and Claimants submitted the full transcript of James L. Schram.

At the conclusion of the presentation of evidence, the parties confirmed that they had no further evidence to offer. Closing briefs were filed on June 13, 2016, the cause was argued orally on June 15, 2016 and the matter was submitted for decision on that date.

II. Facts

The factual findings that follow are necessary to the Award. They are derived from admissions in the pleadings and the testimony and evidentiary exhibits presented at the hearing. To the extent that these findings differ from any party's position, that is the result of determinations by the Arbitrator as to credibility and relevance, burden of proof considerations, legal principles, and the weighing of the evidence, both oral and written.

The Azoffs have resided at the Ladera property since the mid-1980's. During that time, they performed two renovations on the home. In approximately 2011, based on the home's age and infrastructure, they decided to explore their options to again renovate the home and grounds, this time substantially. From 2011 through mid-2013, the Azoffs acquired quotes from more

than one contractor on the costs of renovating the property. Because the costs to renovate were significant, the Azoffs determined instead that, to get what they really wanted, it was more practical and cost-effective to build a new residence from the ground up. Once the decision was made to re-build sometime in mid-2013, Irving began performing due diligence, speaking with experienced real estate professionals in the Beverly Hills area to ascertain the maximum amount of potential expenditures on the property that would still yield a profit upon its re-sale. This information was important to the Azoffs, in large part because the home was owned by the family trust and the Azoffs felt a responsibility to their family to maintain the value of the property in the long-term.

On January 20, 2013, in anticipation of construction at the Ladera residence, the Azoffs purchased another residence at 10244 Charing Cross Road as alternate housing. According to Irving, it was more financially sound to purchase the Charing Cross property as an investment, rather than spend significant monthly rental rates for a similar alternative in the area. In mid-2013, the Azoffs hired Richard Holz of Richard Holz, Inc. to perform renovations to the Charing Cross residence for investment purposes. The Charing Cross house was livable during the renovations. The renovations to the main house and master bedroom at Charing Cross were finished in December 2014, after which renovations to a separate structure on the property were commenced. The Azoffs have always intended to re-sell the Charing Cross property once the Ladera construction is finished, even contemplating a current sale with a three year lease-back.

In deciding on the aesthetic of the new home on Ladera, the Azoffs contacted their long-time friend and well-known interior designer, Sandy Gallin, which led to conversations about considering Scott Mitchell to design the new Ladera home. The Azoffs already were impressed by Mitchell's designs, specifically the modern concrete architectural aesthetic of the Malibu residence of their friend, Kurt Rappaport. (Ex. 352.)

At the time he met the Azoffs, Mitchell had headed up his eponymous company Scott Mitchell Studio, Inc. for approximately 15 years, completing 40 plus projects in both the United States and Australia in the vein of "structural functionalism," working mainly with concrete, steel, wood and stone incorporated in modern design. Mitchell also was the former boyfriend of Gallin and had teamed up as a collaborator with Gallin on a number of residential projects in the past. Though he was not a licensed architect, he had joined the American Institute of Architects ("AIA") as an associate member and therefore was bound to the organization's Code of Ethics & Professional Conduct for architects. (Ex V-7.) The Azoffs ultimately decided to hire both Mitchell and Gallin, with Mitchell as building designer/architect and Gallin as interior designer and "executive producer/big picture guy" on the project. The Agreement with Mitchell was contingent upon a final binding contract with Gallin.[2]

The Azoffs had heard from Rappaport that his project with Mitchell had gone over budget and had run late. Because of this, the Azoffs determined to place "controls" in the Agreement and asked their attorney Dennis Roach to negotiate the contract with Mitchell.

[2] Technically, Mitchell's Agreement was not binding on the parties until February, 2014, when the contract between the Azoffs and Gallin was finalized. (Ex 93.)

Mitchell relied on Stacey Anderson, an employee of SMS, to negotiate on his behalf. After both sides made changes to the Agreement, the Azoffs and Mitchell as President of SMS signed the final version on December 18, 2013. (Ex. 354; 466A.) The Agreement did not specify a budget amount for the project. Instead, the Agreement delineated the project into four phases – a Conceptual Design phase, a Design Development phase, a Construction Documents phase and a Construction Supervision phase. (Ex. 354, Sections 3.1-3.4.) In order to move from one phase to the next, the Agreement required that Mitchell obtain the Azoff's approval in writing of the budget and the building plans. (*Id.*, Section 8.1.) Because the Azoff Family Trust owns the Ladera property, any approvals under the Agreement required the signatures of both Irving and Shelli Azoff.

Importantly, the terms of the Agreement made clear that, although Mitchell was not a licensed architect, he would "complete the Project in the same manner as if Client had engaged a licensed architect." (Ex 354, Section 1.) Thus, in conjunction with the AIA's Code of Ethics & Professional Conduct, Mitchell was bound to the standard of care of a licensed architect pursuant to the California Code of Regulations and the Business & Professions Code to act with the ordinary and reasonable care exercised by a licensed architect in the community. The Azoffs had full knowledge of Mitchell's qualifications and acknowledged so in the terms of the Agreement. (*Id.*) Unfortunately for Mitchell, he failed to review the Agreement, either upon signature or during the course of his work for the Azoffs, and was therefore not aware of his respective obligations.

Despite the lack of a signed contract with Gallin, Mitchell and the Azoffs met a number of times throughout the end of 2013 to discuss the Azoffs' ideas for their new house. The Azoffs gave Mitchell specific input as to their desires and requirements, including a larger great room and dining room, a separate screening room, an office/man cave for Irving, subterranean parking and storage and more bedrooms for their grandchildren. Neither of the Azoffs specified a minimum square footage for the new house.

On January 25, 2014, during a meeting with Mitchell, the Azoffs received the first set of schematic design plans of the new Ladera home. (Ex. 2005.) The home was approximately 40,000 gross square feet as represented in the plans (and would not change significantly in size over the course of the project). Over the next six months (on February 1, April 21, June 27 and July 3), the Azoffs received four additional sets of schematic design plans, each set building on the last. (Exs. 2006; 2008; 2009; 2.) During this time, the Azoffs repeatedly expressed their happiness with the design plans. (Ex. 89; 91.) However, there were no approvals of the plans by the Azoffs in writing pursuant to the Agreement.

Throughout this process, based on the information Irving had gleaned from real estate professionals in Beverly Hills, Irving had determined that he could spend somewhere in the range of $25-31 million on the hard costs of new construction plus contingency, not including soft costs and interior decorating, and still make a profit on the resale of the property. In fact, Irving had told Mitchell repeatedly that this amount was a target budget number for the project and Mitchell had heard it "loud and clear." Other members of Mitchell's team, as well as others

involved with the Azoffs, were also aware of Irving's budget number. (Ex. 366; Odom Deposition; Holz Deposition.)

It also was known by all involved that Irving was in charge of the budget and finances and Shelli was in charge of the design and aesthetics of the home. Despite these roles, Shelli often told both Mitchell and Gallin that she could convince Irving to be more flexible with the budget. However, it was undisputed that Irving had the final say when it came to the cost of the project. In fact, Irving likely would have gone a few million dollars over his limit to have the house built based on Mitchell's plans because the Azoffs loved Mitchell's design but he was not willing to outspend the value of the property. Nevertheless, there were unequivocally no budget presentations made by Mitchell as to the potential or estimated cost of the home according to the schematic design plans during this time. There were undoubtedly no approvals of any budgets by the Azoffs in writing pursuant to the Agreement.

The Azoffs had determined to hire a general contractor to act as their project manager in the pre-construction design phase of the home. They had decided to hire Holz, the contractor who had been performing renovation work on the Charing Cross property. However, having worked with Fort Hill/George Peper on a number of occasions in the past, Mitchell wanted the Azoffs to hire Peper as their pre-construction contractor. The Azoffs hired Fort Hill/George Peper on February 3, 2014, with the understanding that they would bid the plans out to other contractors (including Holz) when it was time to build. (Ex. 1.) The agreement between Peper and the Azoffs required Peper to act as the owners' representative, assist in the development and coordination of consultants and reflect costs and schedules as they developed, essentially performing budget analysis.

Not long after, Mitchell hired a business consultant, Larry Murphy, to assist and improve Mitchell's business practices. (Ex. 313.) During his work auditing Mitchell's pending projects, Murphy had a conversation with Peper in August 2014 regarding the cost of the Ladera project. Peper had performed a rough order of magnitude cost estimate and determined that, based on the square footage of the project and the standard per square foot approximation of construction cost on a house like Ladera ($1,000/square foot), the Ladera project would cost approximately $38 million.[3] (Exs. 363; 42.) Less than a week later, Murphy communicated this information to Mitchell. (Ex. 355.) Mitchell failed to communicate it to the Azoffs.

In September 2014, at the Azoff's directive and because Shelli had difficulty conceptualizing the layout of the house based solely on the plans, the July 2014 schematic design plans were laid out using tape in a vacant lot at the Van Nuys airport. During the walk-through, the Azoffs requested that certain changes be made to the existing plans, including increasing the size of Irving's closet and bathroom. (Ex. 99.) Following the walk-through, Mitchell revised the schematic design plans to include those changes and presented the revised plans to the Azoffs on October 29, 2014. (Ex. 8.) The Azoffs' requested changes slightly increased the overall square

[3] Other witnesses and experts, including Vlahos, Schram, Gallin and Mitchell himself, testified that $1,000 per square foot was an accepted number for high-end modern, concrete architectural luxury homes in Beverly Hills similar to the Ladera project.

footage of the house, although this fact was not presented to the Azoffs as increasing the construction costs of the house.

At this point, the Azoffs' attorney, Dennis Roach, sent an email to Peper and Ribaut requesting a "current budget estimate" on behalf of the Azoffs. (Ex. 366.) There had been no conversations or presentations by Mitchell of any potential budget based on the changes to the plans following the walk-through (or at any time up to this point). On November 7, 2014, Irving sent an email to Roach, Peper and Mathieu Ribaut (an employee at SMS and a licensed architect in France), making it clear that if the cost of building the house was anywhere near $30 million, it was time to make the house smaller. (Ex. 366.) Significantly, days later, Mitchell sent an urgent email to his team that the Ladera project was high-priority until they could get it "under control and on schedule." (Ex. 367.)

It was not until December 3, 2014, during a meeting between Irving, Peper and Peper's associate Rhett McKenzie, that the first budget presentation was made, almost one year following the initiation of the contract. Mitchell did not attend the meeting. Despite the conversation between Murphy and Peper estimating the cost of the project at $38 million, the "Conceptual Budget Summary" presented to Irving by Peper listed the preliminary budget at $31,694,000.00 with a surprisingly low 2% contingency, given the status of the plans as still conceptual at this point. (Ex. 370.) Irving did not approve the budget, instead requesting that changes be made to bring the cost of the project down and demanding back-up for the numbers presented by Peper to reach his estimate. Peper did not present the requested back-up information to Irving.

Approximately a month and a half after the December 3, 2014 meeting with Peper, Irving sent three emails to Mitchell between January 19 and 20, 2015, again indicating that he needed certainty as to the budget before he would move forward with the project and again mentioning the already expressed budget limit. (Exs. 374; 375.) A day later, Mitchell sent an email to Peper in response to the emails from Irving regarding the budget, in which he stated: "I want to tell these bastards to either trust us or let us go. There are plenty of appreciative people out there we could be doing this for instead of these people....At least I can take joy at the fact I've got you by my side...which I so value!!!" (Ex. 376.) In spite of Peper's contractual obligation to serve as the Azoffs' owner's representative, Mitchell's conclusion was correct. Peper was "by his side" as far as failing to provide the Azoffs with budget information for almost a year after Mitchell's preparation of the first schematic drawing, as well as presenting an unsupported budget when he finally provided Irving with the "Conceptual Budget Summary" in December 2014.

During this time, the Azoffs turned to Holz for his opinion on the potential cost of the project. Determining that the plans represented over 40,000 square feet of building space, he estimated that the cost to build would be somewhere between $40 and $45 million. Concerned about this number, the Azoffs contacted Mitchell, who explained that Holz was calculating the gross square footage rather than the net square footage for cost purposes, which would account for the allegedly less expensive building costs of garage and basement space and high ceilings.

However, unbeknownst to the Azoffs at the time, both Holz and Peter McCoy of McCoy Construction (one of the contractors bidding on the project in May 2015) testified during this arbitration that contractors determine cost based on what needs to be built, not simply on livable space.

In addition, around the same time, a new ordinance in the city of Los Angeles was scheduled to become effective that would have greatly reduced the amount of grading allowed on the project. As a result, the Azoffs were informed that it was imperative that the plans be submitted to the City on an expedited basis to avoid the ordinance restrictions and a potential moratorium on building the project. Irving allowed the process to continue as a show of faith, assuming that based on his emails, the team would get the necessary permits and then work to get the cost of the project down. On January 30, 2015, Mitchell submitted a more detailed permit set of plans to the City of Los Angeles, to be further revised once the permits were obtained. (Ex. 129; 559.)

At this point, the Azoffs still had not given Mitchell written approval of any of the plans or, more importantly, written approval of a budget. In February 2015, Irving sent another email regarding budget certainty, this time to Gallin. He stated that "[u]ntil we know we can build at a price we can afford, I cant [sic] be sure we are even going to build the house." (Ex. 102.) Around this time, the professional relationship between Gallin and the Azoffs was coming to an end – Gallin had suffered health problems that made it difficult to continue working on the project. Shelli replaced Gallin with another interior designer, Waldo Fernandez. In his February 12, 2015 email welcoming Fernandez to the team, Mitchell stated: "I find her unappreciative and mistrusting I will not tolerate a lack of appreciation or trust. Deal killers for me....Let's tag team her whiny ass into submission." (Ex. 378.) It is unclear what Mitchell meant by "submission" but one must ask – was he attempting to "tag team" her into submission of building an over 40,000 square foot house at a cost far in excess of the budget provided by Irving?

In March 2015, SMS completed a "bid set" of plans and sent out copies to the three contractors participating in the bid process – Holz, Peper and Peter McCoy. Irving allowed the process to move forward because, in light of the amount of money already spent on the project and his hope that the team would work to bring the project within budget following his recent directives, he wanted to see what the bids would come in at. In addition, the Azoffs loved Mitchell's design and wanted to make it work, if possible. As expected, Peper withdrew as the pre-construction project manager to participate in the bid process. In late April 2015, the Azoffs hired Tom Goffigan to replace him.

As the owner's representative and project manager, Goffigon made himself familiar with the project and the plans. Upon review, he immediately indicated to the Azoffs that the project could not be built for less than $40 million, based on a conservative estimation of $1,000 per square foot. Furthermore, his analysis of the plans concluded that, despite the year and a half of work performed by SMS, the plans were still significantly incomplete, missing proposals (and cost estimates) from a vast number of consultants relating to, among other fields, electrical, waterproofing, landscaping, audio/visual and lighting, the lack of which would have a significant

effect on the accuracy of the upcoming bids. (Ex. 381.) Thus, in his role as owner's representative, Goffigon attended a May 7, 2015 meeting with Peper, Mitchell and other consultants on the project and insisted that the scope of the project be reduced to meet the budget. (Ex. 404.) He also instructed the consultants to stop work on the project until the bids came in. (Ex. 427.) Following the meeting with Goffigon, Shelli set up a meeting between her, Mitchell and Fernandez to discuss downsizing the scope of the project, which included eliminating the guest house and golf simulator, among other things. (Ex. 211.)

Still, on May 22, 2015, the bids came in significantly outside of the budget range consistently expressed by Irving throughout the process, ranging from approximately $38 million (from Fort Hill/Peper) to $45 million. (Exs. 383-385.) Interestingly, Peper's bid was almost identical to the number he had estimated back in August 2014 on his call with Larry Murphy and contained significant contingencies with respect to items not specified on the plans. In addition, neither Holz nor McCoy agreed with Mitchell's gross versus net square footage argument, as evidenced by their bid amounts. Nevertheless, all of the contractors had to qualify their bids based on the incompleteness of the plans and the missing information from the subcontractors. Despite the high bid numbers, Mitchell did not contact the Azoffs. Instead, a week later, on May 29, 2015, he sent Irving an unprofessional email, effectively quitting the project:

> Hi Irving-
>
> ***Despite your lack of confidence and faith, I think we've got this thing in at the number you want.***
>
> ...
>
> I'm also seriously not happy about your wife's attitude. She's a gorgeous human being 65% of the time, and a mean, unappreciative, self-entitled cunt the remaining 35%. God bless you, but not favorable enough odds for me. ***She and I need to have a little heart-to-heart about her level of appreciation before I even want to go forward with this for you guys.***
>
> ...
>
> ***If you want to discuss moving forward with me, I insist on a mtg at 250 Delfern...just you and me and George.*** Okay? If you would rather pass, no hard feelings and wish you guys the best! (Ex. 387.) (emphasis added)

Mitchell conditioned his continued work in a way that was unacceptable to the Azoffs – Shelli had no intention of engaging in a "heart to heart" regarding her level of appreciation and Irving had no intention of continuing on with the project without Shelli's involvement.

As a result, on June 1, 2015, the Azoffs and their attorneys sent a default letter to Mitchell and SMS, providing him five days to cure pursuant to the Agreement. (Ex. 1016.) On June 5, 2015, Mitchell delivered "cure plans" to the Azoffs, consisting of six pages of schematic design drawings. (Ex. 586.) The designs were unacceptable to the Azoffs – the plans included

aspects that contradicted the Azoffs' requests (essentially starting over from square one), they contained no engineering and, again, there was no construction budget. In fact, according to Mitchell, despite doing what he could within the five days provided under the Agreement, he would never have allowed his clients to build a residence based on those plans. Following the delivery of the cure plans, the Azoffs terminated the Agreement for cause, approximately a year and a half after work on the project had begun. The Azoffs had to start over on a re-build of the Ladera property and currently are working with a new architect, along with Goffigon, to design and build a new residence.

All additional facts necessary to the Arbitrator's analysis are addressed in the discussion that follows.

III. Analysis

Claimants bear the burden of proof by a preponderance of the evidence. The substantive law of California, the California Arbitration Act and the JAMS Comprehensive Arbitration Rules apply, as provided in Section 7 of the Agreement. (Ex. 354.)

A. Breach of Professional Responsibility Claims

Claimants' breach of professional responsibility claims include the following alleged violations of the professional standard of care by both Mitchell and SMS in failing to: (1) establish the budget and obtain written budget approvals from the Azoffs throughout the life of the project; (2) keep the Azoffs apprised of the status and progress of the project; (3) maintain control over and properly manage the progress of the project; (4) obtain approval from the Azoffs of any schedule extensions; (5) properly establish the square footage of the project for cost of building; and (6) prepare drawings to a level of completion to allow for accurate bids from the contractors.

Acting as an associate member of the AIA and as a licensed architect per the Agreement, Mitchell was required to comply with the standard of care of a licensed architect in California under the AIA Code of Ethics & Professional Conduct (the "Code"), the California Code of Regulations Architects Practice Act (the "Act") and the California Business & Professions Code (the "B&P Code") in performing his services for the Azoffs. (Ex. V-7, p. 6 (signature on the AIA Associate Member Application binds the signatory "to abide by the AIA Bylaws, the AIA Code of Ethics and Professional Conduct and agree to the Terms & Conditions for membership.")) In conjunction with the applicable statutes and guidelines, the parties' expert testimony was instructive on this issue. *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal. App. 3d 278, 313.

Under the Architects Practice Act, California Code of Regulations, Section 160(a)(2), "when practicing architecture, an architect shall act with reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing, practicing in this state under similar circumstances and conditions." Similarly, under

the AIA Code, Canon I – General Obligations, Rule 1.101, "[i]n practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality."

Surprisingly, Mitchell testified that he never read the Act and was not familiar with it. According to Claimants' expert, Dean Vlahos, all architects must be familiar with the Act in order to sit for their Supplemental Exam for licensure in the state of California. As to the AIA Code, Mitchell testified that he tries to adhere to those guidelines of which he is aware. Acting as a "licensed" architect under the Agreement, Mitchell's willful ignorance fell below the standard of care here. This pattern of failing to stay informed of his obligations under the professional regulations is in keeping with Mitchell's failure to read the Agreement or concern himself with his obligations under that instrument. Even Respondents' own expert, Richard Manion, opined that this failure fell below the standard of care, as a licensed architect has the duty to review any contracts with the client prior to the start of a project, as well as throughout the life of the project to confirm compliance with the terms of the contract.

Perhaps the most important and pertinent professional standard of care guideline in this case, the AIA Code, Canon III – Obligations to the Client, Ethical Standard 3.3, "Candor and Truthfulness" states clearly that "[m]embers should be ***candid and truthful in their professional communications*** and ***keep their clients reasonably informed*** about the clients' projects." (emphasis added). According to Vlahos, a large part of an architect's role is to consistently be explaining the project to one's clients and correcting the project based on their feedback. The evidence clearly shows that Mitchell failed to obtain budget approvals from the Azoffs in this case or keep his clients informed of the development of the design, the scope progression or the cost of the project as it progressed.

Still, Respondents argue that the Azoffs were sophisticated business people who had been involved with numerous building projects in the past relating to their other properties and that they should have been aware of the potential cost of a project of this nature. Respondents also argue that Shelli could (and did) attend the design meetings with the contractors and that she had access to the meeting minutes to obtain information about the progress of the project. Regardless, Mitchell's professional obligations remain unchanged. A client's personal experience does not diminish an architect's obligations to comply with the applicable standard of care. Furthermore, providing the client with meeting minutes does not meet the standard of care to keep one's clients reasonably informed of the status of a project.

To somehow skirt the issue, Respondents claim that Shelli was consistently instructing Mitchell and others on his team to avoid talking with Irving about the costs of the project because she would be able to convince him to go higher with the budget. This argument is inconsequential. Mitchell had an obligation to request approval from his clients to solidify the budget and the plans and confirm that each of them were on the same page. In fact, Manion, Respondents' expert, testified that, in his practice as an architect, he would communicate with

both parties if he were getting conflicting ideas about design or cost of the project and would require both to sign off on the budget and plans.

Manion also testified that he would do his best to obtain budgets from the clients and cost estimates from his contractors throughout the life of the project, involving a contractor experienced with similar projects to provide feedback during the process and to act as a cost estimator. Vlahos offered a similar opinion regarding the use of a contractor as a cost estimator. Mitchell had such a contractor in George Peper. Peper was hired by the Azoffs at Mitchell's insistence to act as the pre-construction contractor and owner's representative. By all accounts, Mitchell and Peper had a solid working relationship and had worked well together on numerous past projects. Yet, Mitchell never asked Peper to provide the Azoffs with any sort of rough estimate of cost, even after Peper's August 2014 conversation with Larry Murphy in which Peper actually did provide a rough order of magnitude cost based on a standard industry approximation of $1,000 per square foot. Even worse, armed with this knowledge, Mitchell failed to inform the Azoffs himself.

Mitchell's failure to keep his clients informed was coupled with repeated follow-up on the part of Irving to determine the approximate cost to build the Ladera residence as designed. Here again, Mitchell violated the standard of care. Mitchell was required to provide budget information to his clients and he had full access to Peper at Fort Hill to formulate cost estimates/analysis. The Azoffs should not have had to repeatedly ask for information about either the plans or, more importantly, the cost estimates at any point during the project.

Still, Respondents argue that the December 2014 estimate from Peper/Fort Hill was the first time Mitchell and Peper were able to provide an accurate cost estimate of the project, suggesting that estimating cost any sooner would have been impossible and highly inaccurate because the project was not sufficiently detailed at that point, lacking the inclusion of a number of the integral contractors whose quotes would have a serious effect on the bottom line cost to build.[4] Respondents refuse to accept that it was entirely possible as of January 2014 to provide the Azoffs with a rough cost estimate based upon an average per square foot cost accepted in the industry, as a starting point at the very least.[5]

According to the evidence and expert and witness testimony, including Mitchell's, it seems to be well-accepted that the per square foot rough order of magnitude of hard construction costs for a high-end house of this type (*i.e.*, modern architectural concrete) in the Beverly Hills area would average approximately $1,000 per square foot. Using this industry standard, based

[4] Respondents also tenuously argue that Irving accepted the Peper/Fort Hill estimate at the December 2014 meeting with Peper. However, the evidence clearly shows otherwise – Irving sent three emails in January 2015 mentioning the already expressed budget limit and indicating that he needed certainty as to the budget before he would continue forward with the project. (Exs. 374; 375.)

[5] In addition, Peper had already performed a rough cost estimate of the project in August 2014 using the same average per square foot number of $1,000, which incidentally ended up being almost exactly the same as Fort Hill's bid amount in May 2015, almost one year later. Respondents' "more accuracy later in the project" arguments are lost on this point.

on the January 2014 plans, the rough cost estimate would have indicated a cost of approximately $40 million to build the residence as designed. Nevertheless, Respondents claim that the cost of the garage and basement areas would have been much less expensive than the average $1,000 per square foot figure, in part because those parts of the structure are unfinished and not livable space. Thus, according to Respondents, cost of construction should be based on net square footage rather than gross square footage.

However, virtually all of the knowledgeable witnesses, including Holz, McCoy and Goffigon, as well as some of the experts, including Vlahos, Jim Schram and Respondents' expert Ciaran O'Halloran, disagreed with Respondents' assessment, indicating that gross square footage should be used to represent the cost to build for the simple and logical reason that those unfinished spaces still cost money to build. The per square foot cost for specific spaces can be adjusted to reflect actual numbers from subcontractors, as more information becomes available throughout the process. Furthermore, in this project, Vlahos opined that the garage and basement areas (and the systems to be installed in those areas of the structure) were extremely complex and required a significant amount of engineering, rendering those spaces likely not much less expensive to build (if at all) relative to the livable spaces.

In conjunction with Ethical Standard 3.3, Rule 3.301 of the AIA Code states that "[m]embers shall not intentionally or recklessly mislead existing or prospective clients about the results that can be achieved through the use of the Members' services, nor shall the Members state that they can achieve results by means that violate applicable law or this Code." Mitchell knew that Irving had set a budget within the $25-31 million range. Yet, despite all evidence to the contrary, he continually reassured the Azoffs that he could design the project within Irving's budget. Even in his final email to Irving in May 2015, after the bids came in significantly over-budget, Mitchell was still asserting that he could complete the project within budget. (Ex. 387.)

Finally, in addition to the Act and the Code, Mitchell was obligated to comply with B&P Code, Section 5500.1, which states "[t]he practice of architecture within the meaning and intent of this chapter is defined as offering or performing, or being in responsible control of, professional services which require the skills of an architect in the planning of sites, and the design, in whole or in part, of buildings, or groups of buildings and structures." Claimants argue that Mitchell failed to maintain control over the project and properly manage the project team, specifically that the process with the subcontractors was uncoordinated and the conceptual design phase of the project never really finished despite the advancement of the project to permitting and project bidding. As such, the plans were never completed to the level required for accurate bidding by the contractors at the bidding phase.

There is every indication that Mitchell was unable to properly control the project, even as of November 2014, almost one year into the process. (Ex. 367.) According to Vlahos and Schram, the evidence indicated that truly accurate bids were impossible, given the incompleteness of the plans that were available to the contractors. Each of the contractor witnesses testified that the more information they had, the more accurate their bids/estimates could be. But, according to Vlahos and Schram, the bid set of plans was missing any sort of

waterproofing or coordination of systems details on the structure, as well as building sections, wall types and sections, window and door details, electrical drawings and a number of input from important subcontractors that would have increased the cost of the project significantly. (Ex. 381.) As a result, the bidding contractors had to make a number of cost assumptions and qualifications to the bids.

Based on the evidence, the Arbitrator finds that Mitchell's failures as discussed above were a violation of the standard of care of a licensed architect, pursuant to California law and the AIA Code, and that he negligently breached his professional responsibilities in his service to the Azoffs.

B. Breach of Contract Claim

The conduct engaged in by Mitchell that led to his violations of his professional obligations to comply with the standard of care of a licensed architect also translated into a violation of the terms of the Agreement. Claimants' breach of contract claims include the following alleged violations of the Agreement by SMS: (1) failing to obtain client approval of a budget, any of the project plans or any extensions of deadlines; (2) delegating obligations to design and draft construction documents to Jim Gelfat at Equinox Architecture; (3) initiating activities in the different phases of the Agreement without client approval; (4) failing to complete the landscape and hardscape design; and (5) failing to deliver the project documents to the clients upon termination of the Agreement.

As the Arbitrator has stated and the parties have agreed, the crux of this dispute and the focus of Claimants' arguments rest on Mitchell's failure to obtain approval from the Azoffs of a budget to move forward with the project. The vast majority of Claimants' damages stem directly from this failure.[6] While the remainder of Claimants' breach of contract claims may in fact be violations of the Agreement, Claimants have not shown that they were harmed specifically by Mitchell's delegation of the drafting of the plans to Gelfat, his failure to complete the landscape or hardscape design, his failure to obtain client approval to initiate activities in different phases of the Agreement or his alleged failure to deliver the project documents to the clients upon termination of the Agreement. As such, the Arbitrator finds these breaches to be non-material.

Mitchell's failure to obtain approval from the Azoffs *as to the budget and project plans*, however, presents a different issue. The words of a contract should be understood in their "ordinary and popular sense" and in the context in which the agreement was made, unless their use connotes a special meaning or a technical interpretation was intended by the parties. Cal. Civ. Code §§1644, 1647; *City of Bell v. Superior Court* (2013) 220 Cal. App. 4th 236, 248. The Agreement clearly states that movement from the Conceptual Design phase to the Design Development phase is "[b]ased on the Client approved Conceptual Design and preliminary construction budget...." (*Id.*, Section 3.1.) Similarly, movement from the Design Development phase to the Construction Documents phase is "[b]ased on Client approved Design Development

[6] Regardless of the terms of the Agreement, Mitchell's failure to keep his clients informed of the budget, status and progress of the project was a clear violation of the professional standard of care, as discussed above.

drawings and updated construction budget...." (*Id.*, Section 3.2.) The Agreement required that approvals be obtained in writing or via email. (*Id.*, Section 8.1.) Yet, Respondents claim that client approval was only required of the plans and not of the budget/cost estimate, arguing that the term "Client approved" applied only to the design and drawings, and not the "construction budget." The Arbitrator does not see any ambiguity in the language of these terms. The "clear and explicit" language of the Agreement and the punctuation used (or lack thereof) condition movement between the project phases on written approval of both design plans and a project budget. Cal. Civ. Code §§1638-1639. The Arbitrator cannot unreasonably stretch the canons of construction to give the Agreement an alternate meaning, as Respondents would have him do.

Furthermore, the Azoffs specifically requested language in the contract to place restrictions on Mitchell and prevent the project from spiraling out of control, as they had heard his tendency often was. Importantly, Mitchell's own employee included the specific language over which Respondents are now arguing. (Ex. 466A.) If Respondents had not intended for budget approval to be required for moving between phases of the project, they easily could have drafted language to accomplish that result.

Without approval of either the plans or a budget from the Azoffs, the terms of the contract explicitly prevented Mitchell from moving forward with the project. Respondents argue that Irving did approve the initial schematic design plans in emails expressing his appreciation for and admiration of Mitchell's designs for the residence. (Exs. 89; 91.) However, the emails are simply that – expressions of appreciation and admiration – and do not rise to the level of written approvals pursuant to the Agreement's terms. More importantly, Respondents miss the point. Even if certain of Irving's emails could be characterized as approvals of specific sets of plans as Respondents argue, it is undisputed by all involved, including Mitchell, that the Azoffs never provided written approval of a budget following the Conceptual Design phase. As a result, the Arbitrator finds that Respondents violated both the standard of care as a licensed architect and the explicit terms of the Agreement relating to client approvals.

C. Conversion Claim

Pursuant to Section 8.8 of the Agreement, the Azoffs retain the ownership and copyrights to the "drawings, renderings, schedules, plans and specifications" of the project as "instruments of service." (Ex. 354.) As such, Claimants make a claim for conversion against Respondents, alleging that to date, Claimants have yet to receive a full and complete copy of the project documents. Claimants are seeking $16,000.00 in damages (Goffigon's fee for one month) based on his alleged attempts to collect these files from Respondents, along with punitive damages in connection with the alleged conversion.

Claimants presented very minimal evidence on this claim. There was no clear evidence that Claimants failed to receive everything they requested from Respondents. Most importantly, Claimants presented no evidence that they have sustained damages based on Respondents' alleged failure to return the entirety of the project documents. *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal. App. 4th 1489, 1507 (damages are a required element of a claim for conversion).

Irving testified that he had no use for the CAD files on the project because he did not intend to build the house that Mitchell designed without Mitchell on board. Goffigon testified that he was instructed to obtain the copies simply for archival, historical purposes. To that point, the evidence does show that Respondents were supplied, at the very least, with the final and complete version of the plans and thus have a comprehensive archival history of the project, particularly since, like Word files, each subsequent version of a CAD file builds upon the last. Moreover, there is insufficient evidence from which to determine how much time Goffigon spent in attempting to obtain these files that admittedly have no use to Claimants. Accordingly, the Arbitrator finds that Claimants have failed to prove a viable conversion claim.[7]

D. Counter-Claim under Quantum Meruit

Respondents argue that Mitchell has the right to recover the reasonable value of his services as of the date of termination based on the theory of quantum meruit. Specifically, Mitchell's fee for services under the Agreement was $1.4 million, which was broken down as follows: (1) an initial retainer of $70,000 (5% of the total fee) upon execution of the Agreement; (2) monthly installment payments of $35,000 for 36 months of the project (90% of the total fee); and (3) the balance of $70,000 (5% of the total fee) upon completion of the project. (Ex. 354, Section 5.1.) According to Respondents, the amount paid to Mitchell by the Azoffs ($560,000) represented only 40% of the total fee under the Agreement, while the services performed as of the termination date represented at least 60% of the total fee ($840,000). Thus, Respondents are claiming the difference between those numbers ($280,000) under quantum meruit.

Quantum meruit is equitable payment for services rendered, the recovery under which is measured as "the reasonable value of the services rendered *provided* they were of direct benefit" to the other party. *E.J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal. App. 4th 1123, 1128. "If one has received a benefit which one may not justly retain, one should 'restore the aggrieved party to his [or her] former position by return of the thing or its equivalent in money.'" *Id.* (citation omitted.)

Claimants cite to *Rowell v. Crow* (1949) 93 Cal. App. 2d 500 for the proposition that an architect's failure to design within an agreed-upon budget (such that a structure is never built) is evidence that his clients received no benefit from his work and therefore, he should not be compensated. Respondents argue that the *Rowell* case is distinguishable, since the agreed-upon budget in that case was an express condition of the oral contract between the parties. Respondents instead cite to *White v. Kanrich* (1962) 201 Cal. App. 2d 356, claiming that Mitchell is entitled to earn his fees for development of the Ladera project drawings, even though the drawings were not ultimately used because of cost concerns.

[7] Claimants' request for punitive damages is also denied. Even if Claimants had proven a viable conversion claim, there was no evidence presented that showed the requisite level of malice, fraud or oppression to award punitive damages.

However, Respondents fail to address significant facts in the *White* case that are vastly different from the facts in this matter. First, the architect in *White* told his clients that he *could* design a house within their budget but never agreed that he *would* design such house. Most importantly, on numerous occasions over several months, he presented his clients with amended designs increasing the square footage of the project as directed and *specifically informed them that he could not build the house they wanted within the budget they had originally stated.*

Here, Mitchell admitted that he was aware of Irving's budget range and that Irving made the budget range very clear to him and others. It is disingenuous for Mitchell to now argue that he never intended to design the project for the budget clearly expressed by Irving and the evidence does not warrant the argument. Furthermore, Mitchell's professional responsibilities involved consistently keeping his clients informed about the status and costs of the project as it progressed. The evidence clearly shows that Mitchell failed in his professional responsibilities on this front. Ultimately, the project designed by Mitchell will not be built because the costs to build are significantly higher than the Azoffs' stated budget. Thus, Mitchell's design plans are of no use or benefit to the Azoffs and, in fact, they have hired a new architect to design a new residence on the Ladera property. The Arbitrator finds that, as in *Rowell*, Mitchell should not be compensated under a quantum meruit theory for work that provided no benefit to his clients.

E. Damages

Claimants are claiming the following out-of-pocket damages as a direct result of Respondents' breaches of professional responsibility and contract:

1) $563,583.62 – the amount paid to Respondent pursuant to the terms of the Agreement up to the date of termination
2) $544,969.67 – the amount paid to other consultants and subcontractors working on Respondents' design up to the date of termination
3) $1,519,650.00 – the amount paid in total carrying costs for the Charing Cross property for the 18 months from the date of the signed Agreement with Respondents through the date of termination. Claimants claim that the monthly carrying cost on the Charing Cross property is $84,425.00 per month. This amount includes the mortgage payment, property taxes, insurance, gas, Department of Water & Power, maintenance of pool/living reef, gardening and security.

In addition, Claimants request pre-judgment interest at 10% per annum on these amounts from the date of the termination of the Agreement.

As stated above, the Arbitrator has found that Respondents breached the standard of care for professional responsibility, as well as the terms of the Agreement. The question then remains as to the foreseeability of certain of Claimants' damages under the contract. For the eighteen months lost working with Respondents, Claimants are seeking $1,519,650.00 in carrying costs on the Charing Cross property, which the Azoffs purchased almost a year before their dealings with Mitchell while they were exploring a potential renovation of the Ladera property. The

Azoffs chose to purchase alternate housing rather than rent because Irving testified that it made more sense financially. Further, Claimants argue that the Azoffs are entitled to these damages for loss of return on capital at 4% per year, which is the return they were earning on conservative bond investments. Respondents argue that Claimants failed to present evidence, expert or otherwise, that "but for the purchase of the Charing Cross property, any particular sum would have been earned by the Azoffs on that capital" and that the risk associated with the purchase of the property, rather than a rental property, should not be transferred to Respondents.

First, there is little evidence to indicate that Claimants removed funds invested in conservative bonds to pay for the Charing Cross property. There is also no evidence of the amount of the return that Claimants were receiving on the bonds that they liquidated to purchase the Charing Cross property. Finally, there is only speculation on both sides as to whether the Azoffs could gain or lose a significant sum upon the sale of the Charing Cross property, depending on the state of the real estate market once the Azoffs decide to put the property on the market.

The Azoffs made the choice to invest in alternate housing rather than rent. They invested further by spending additional money to renovate the property and increase its value. The Arbitrator regards the Azoffs' real estate investment as an alternative to the bond investment and, as such, concludes that the Azoffs have not suffered any damages with respect to the acquisition of the Charing Cross property.

IV. Case Findings and Award

The ultimate issue in this case centers on the complete breakdown of communication between Mitchell and his clients as to the cost and progress of the Ladera project. Unfortunately for all involved, had Mitchell simply engaged in open communication with the Azoff's with respect to the costs of the project, it is quite possible that the Mitchell designed home would be under construction on the Ladera property.

Based on the evidence presented at the hearing, the Arbitrator concludes that Mitchell and SMS did in fact violate the standard of care of a licensed architect in California. Based on those violations, Respondents also breached certain provisions of the contract. Respondents are ordered to pay damages in the amount of $1,108,553.29, together with interest thereon at the rate of 10% from June 6, 2015, the date of termination of the contract.

As stated above, the Arbitrator finds that the Azoffs have not suffered any damages related to the purchase of the Charing Cross property. In addition, the Arbitrator concludes that there is no evidence to support Claimants' claim for conversion and they did not meet their burden of proof of clear and convincing evidence of fraud, malice or oppression, entitling them to seek punitive damages.

V. Award of Attorneys' Fees and Costs

Pursuant to Section 8.6 of the Agreement, the Arbitrator finds that Claimants are the prevailing parties.

Following the issuance of the Interim Award on July 15, 2016, the Arbitrator received and reviewed Claimants' submission on recovery of attorneys' fees and costs as the prevailing party, including the accompanying declarations and exhibits. Claimants' counsel filed a timely application on August 5, 2016, seeking $803,334.58 in total fees and $133,559.50 in total costs and expenses for Barnes & Thornburg LLP, and $2,517.38 in total fees for The Law Office of Dennis A. Roach, PC. The Arbitrator also received and reviewed Respondents' opposition and Claimants' reply, as well as all accompanying declarations and exhibits. The parties argued their positions at a telephonic hearing with the Arbitrator on September 9, 2016.

The Arbitrator issued the Interim Award on Fees and Costs on September 9, 2016, which explained his positions on the parties' arguments in detail. Based on the evidence and arguments offered by the parties, the Arbitrator awards $779,902.58 in total attorneys' fees to Claimants' counsel for their services relating to this matter and $129,423.71 in costs and expenses.

As of the date of this Final Award, the pre-judgment interest owed on the award of $1,108,553.29 at the rate of 10% from June 6, 2015 equals $138,569.10.

The total award in favor of the Claimants and against the Respondents, including the award, attorneys' fees and costs, and pre-judgment interest is $2,156,448.68; post-judgment interest at the rate of 10% is awarded on this amount commencing on the date of this Final Award.

DATED: September 14, 2016

[signature]

Bruce A. Friedman, Esq.
Arbitrator

PROOF OF SERVICE BY E-FILING & U.S. MAIL

Re: Azoff, Shelli and Irving, Trustees for Azoff Family Trust vs. Scott Mitchell Studio, Inc., et al.
Reference No. 1210032549

I, Martha Peralta, not a party to the within action, hereby declare that on September 14, 2016, I served the attached FINAL AWARD on the parties in the within action by e- filing and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Los Angeles, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA on September 14, 2016.

Martha Peralta
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