



FOR PUBLICATION



E-FILED
CNMI SUPERIOR COURT
E-filed: Jun 13 2017 02:23PM
Clerk Review: N/A
Filing ID: 60722419
Case Number: 13-0144-CV
N/A

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARIANAS STAR CORPORATION,

CIVIL ACTION NO.: 13-0144

Plaintiff/Counter-Defendant,

vs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW; and
JUDGMENT

HAI YANG FENG, HAI QI XU FENG fka
YINAN XU TANG and DOES I-V,

Defendant/Third Party Plaintiff.

I. INTRODUCTION

THIS MATTER came before the Court for a bench trial on Wednesday, April 27, 2016, at 9:00 a.m. and concluded on Friday, June 17, 2016.¹ Plaintiff/Counter-Defendant, Marianas Star Corporation (“MSC”), represented by its president and owner, Jun Byung Soo (“Mr. Jun”), appeared with Attorneys Colin M. Thompson and Daniel T. Guidotti. Defendant/Counter-Plaintiffs Hai Yang Feng (“Mr. Feng”) and Hai Qi Xu Feng fka Yinan Xu Tang (“Ms. Tang”)

¹ On the whole, the trial lasted eighteen (18) days.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. The Parties

1. MSC is a construction company incorporated under the laws of the Commonwealth of the Northern Mariana Islands. Tr. 23. MSC has been in business as a building contractor since 1989. Tr. 20. Mr. Jun is the President and owner of MSC. Tr. 23. MSC employs approximately 60 employees. Tr. 25.
2. On or about May 4, 2010, Mr. Feng and his wife, Ms. Tang, married on Saipan, Commonwealth of the Northern Mariana Islands. Tr. 1091. Mr. Feng is a citizen and national of the People’s Republic of China. *Id.* Ms. Tang is a United States citizen and is presently residing in the State of Hawai’i. *Id.* At the time of trial, Mr. Feng remained in China. *Id.* Sometime in 2010 and subsequent to their marriage, Mr. Feng and his wife decided to build their dream home in As Matuis, Saipan. *Id.*
3. Mr. Feng is the current lessee of Lot 004 A 06 (“As Matuis Property”) by virtue of a lease assignment from his wife, dated May 5, 2011, and recorded at the Commonwealth Recorder’s Office on April 17, 2012 as File no. 12-01004. *See* Pl.’s Ex. 5.2. Based on the lease assignment, the Court finds that Ms. Tang has no interest in the As Matuis Property, except to the extent that the As Matuis Property is marital property under the Commonwealth Marital Property Act of 1990, codified at 8 CMC §§ 1811-1834. Because Ms. Tang was a party to this action, the Court has the power to dispose of the whole of the As Matuis Property, including Ms. Tang’s interest, whatever that may be.

B. The Contract

4. On or about April 17, 2012, MSC and Mr. Feng entered into an agreement wherein MSC was to construct a residential home for Mr. Feng on the As Matuis Property. Pl.’s Ex. 1.1; Tr. 25; 525. The parties agreed to a fixed total amount of \$164,300.00 for the

1 construction of a 411 square meter residential home. Pl.’s Ex. 1.1; Tr. 546. The total
2 payment of \$164,300.00 was to be paid in eleven increments based upon the payment
3 schedule set forth in the Contract. *See* Pl.’s Ex. 1.1.

4
5 5. The “Scope of Works,” attached along with the Contract, specified various details
6 pertaining to the construction of the residential home, including each of the party’s
7 obligations to secure labor, materials, licenses and permits, and providing quality of
8 service rendered. Pl.’s Ex. 1.1. Specifically, the parties mutually agreed that MSC was to
9 supply the labor and materials for the structure, supply tools and equipment, and satisfy
10 OSHA safety requirements. The work was to be performed in a good workmanlike
11 manner. *Id.* Mr. Feng likewise agreed to provide and supply all finishing materials, which
12 were to be installed by MSC. *Id.*

13
14 6. Pursuant to the “Scope of Works,” Mr. Feng was responsible to pay for the certification
15 of the architectural plans by a CNMI Professional Engineer as well as all permitting fees.
16 MSC was required to assist Mr. Feng in completing and applying for all the necessary
17 permits for construction. Pl.’s Ex. 1.1.

18 **C. Original Plan for the Construction of Mr. Feng’s Residential Home**

19 7. Sometime in April 2012, the parties met and conferred with Henry Pangelinan (“Mr.
20 Pangelinan”) to create an architectural drawing for the construction of Mr. Feng’s residential
21 home. Tr. 29. On or about April 25, 2012, Mr. Pangelinan completed the first architectural
22 drawing, which was paid for by Mr. Feng. Pl.’s Ex. 3.17. The first drawing was rendered pursuant
23 to the parties’ Contract. Tr. 29. The first drawing included the following specifications: the
24 ground floor was to be 117.50 square meters, the second floor was to be 218.94 square meters,
25 and the third floor was to be 75.44 square meters. In all, the final house was supposed to be
26 411.88 square meters. Pl.’s Ex. 3.17; Tr. 546.

1 8. On May 15, 2015, the Department of Public Works (“DPW”) approved Mr. Pangelinan’s first
2 drawing. *See* Pl.’s Ex. 22.1; Tr. 30. Throughout the period of construction, it became routine for
3 Mr. Pangelinan to prepare the drawings, after which, the plans would be submitted to DPW for
4 approval.

5 9. On or about July 2, 2012, MSC began construction of Mr. Feng’s residential home pursuant to the
6 Contract and Mr. Pangelinan’s first drawing. Tr. 798.

7 **D. Changes Made to the Residential Home Prior to November of 2012.**

8 10. Prior to October 27, 2012, MSC had billed Mr. Feng according to the payment schedule in the
9 Contract for a fixed price of \$164,300.00. Tr. 811; 814.

10 11. The monthly billings prepared by MSC were charged for costs and expenditures from the
11 previous month. The payments were to be paid as follows: \$32,860.00 as down payment;
12 \$49,290.00 for the months of April through July 2012; \$41,075.00 for the month of August 2012;
13 and \$41,075.00 for the month of September 2012, totaling \$164,300.00. Tr. 564. The down
14 payment was to satisfy the first increment; the August payment was to satisfy the second through
15 fourth increments; the September payment was to satisfy the fifth through sixth increments; and
16 the October payment was to satisfy the seventh through eleventh increments. Pl.’s Ex. 2.5; Tr.
17 661

18 12. From April 17, 2012 through October 27, 2012, Mr. Feng had paid MSC \$173,225.00, which is
19 \$8,925.00 in excess of the Contract price. Pl.’s Ex. 2.5. Mr. Feng made the following payments
20 to MSC: \$32,860.00 on April 17, 2012; \$49,290.00 on August 5, 2012; \$41,075.00 in September
21 8, 2012; and \$50,000.00 in October 27, 2012. *Id.*

22 13. Although MSC had billed Mr. Feng \$41,075.00 for costs and expenditures for the month of
23 September on October 6, 2012 according to the Contract price, Mr. Feng agreed to pay MSC an
24 additional \$8,925.00 on October 27, 2012 for material and structural changes on the residential
25 home. Pl.’s Ex. 11; Tr. 818.
26
27
28

1 14. MSC anticipated that the As Matuis house would be completed in August 2012. Sometime in
2 August of 2012, MSC had already completed the basic structure of the As Matuis house. Tr. 114.

3 15. Although MSC had billed Mr. Feng in accordance with the payment schedule in the Contract
4 from April 2012 through October 2012, the parties had agreed to and made numerous changes to
5 the residential structure outside the scope of the Contract. *See generally*, Pl.'s Ex. 3. For instance,
6 in the month of April, the parties agreed to extend the rear portion of the structure a few meters
7 and to reposition the window in the front facing portion of the structure; between April and
8 August, the parties agreed to extend the left facing portion of the structure, build an additional
9 column to the front facing portion of the structure, extend the balcony in the third floor, extend
10 the second floor balcony, and reconstruct and demolish several areas of the structure, including
11 the third floor roof; in September, more extensions were made throughout the structure, including
12 the left, right, and back facing portion of the structure, demolition and reconstruction to
13 accommodate additional columns, parking house extension, constructing additional support
14 beams, and demolishing the third floor. In other words, although the cost of construction had
15 increased substantially throughout this period, MSC had billed Mr. Feng according to the
16 payment schedule in the Contract up until November 2012 when the Contract price had been
17 satisfied and construction costs had increased. Tr. 691; 815-817.

18
19 16. Mr. Feng began making changes to the project as soon as the construction of Mr. Feng's house
20 started. Tr. 34; 1351. In all, Mr. Feng made more than 100 changes to the As Matuis house. Tr.
21 1368.

22 17. Mr. Feng would visit the job site every day before he moved into the partially constructed As
23 Matuis house sometime in November 2012. Tr. 893

24 18. Throughout April 2012 until September 2012, whenever Mr. Feng would request a change to the
25 structure of the house, MSC, through Mr. Jun, would meet with Mr. Pangelinan to discuss the
26 changes. Mr. Pangelinan would either accept or reject the proposed changes. Tr. 142. Whenever
27
28

1 Mr. Pangelinan accepted a change, MSC modified the structure based on the approved changes,
2 resulting in increased costs and labor. Tr. 159.

3 19. Because Mr. Feng proposed changes daily, MSC, through Mr. Jun, would visit with Mr.
4 Pangelinan every few days. Tr. 141-142.

5 20. Mr. Feng would make changes by making drawings on various sheets of paper and by delivering
6 these changes to Mr. Jun at the job site. Tr. 34; 36-37; 39. Mr. Feng was detailed with his
7 drawings, often specifying structural extensions in meters. Tr. 112; 114. Although Mr. Feng
8 would not date these drawings, Mr. Jun would date them when he received them from Mr. Feng.
9 Tr. 40.

10 21. When Mr. Feng would make changes to the drawings, Mr. Jun would speak with Mr. Feng
11 through Mr. Feng's interpreter, Mr. Lam. Tr. 43-44.

12 22. On or about August 10, 2012, Mr. Pangelinan completed a second drawing of Mr. Feng's
13 proposed residential home based on Mr. Feng's requested changes. Pl.'s Ex. 11. A DPW building
14 permit was subsequently issued on September 1, 2012. *Id.*; Tr. 1159.

15 23. On or about September 30, 2012, the minimum wage had increased from \$3.05 to \$3.55.

16 24. By October 2012, the cost of construction had already exceeded the Contract price, at which
17 point, Mr. Jun met with Mr. Feng to discuss the possibility of drafting another contract to detail
18 the additional costs and changes to the house. Tr.1324. Mr. Feng instructed Mr. Jun to continue
19 working and stop worrying about the increased costs. *Id.* Mr. Feng and Mr. Lam would also tell
20 Mr. Jun's workers at the job site not to worry about the money because Mr. Feng would pay for
21 the changes. *Id.*

22 25. Beginning in November 2012, MSC began billing Mr. Feng on a cost-by-cost basis for
23 expenditures made in October and the months following. Tr. 820. MSC's monthly billings were
24 based on costs for labor, materials, and miscellaneous expenses. Pl.'s Ex. 7.1.

25 26. Mr. Jun kept daily reports of the construction occurring at the construction site. Tr. 71. Mr. Jun
26 tracked manpower, materials, equipment, and other tools in the daily reports. *Id.* The daily reports
27
28

1 were prepared by Mr. Jun or MSC's staff on or about the dates and times referred to in each of
2 the daily reports. *See, e.g.*, Tr. 95-96. Photographs often accompanied MSC's daily reports.
3 These photographs showed the daily progress at the job site. *See, e.g.*, Tr. 99.

4 27. Mr. Jun kept Mr. Feng's drawings of the changes he requested on the house. When Mr. Feng
5 made changes to the design of the house, Mr. Feng often provided directions to MSC in writing.
6 *See, e.g.*, Tr. 220. Mr. Feng would either write the changes himself, give the written changes to
7 MSC, or Mr. Feng would stand near Mr. Jun and Mr. Jun would write down the changes under
8 Mr. Feng's direction. *See, e.g.*, Pl.'s Ex. 4.3; 4.4; Tr. 203; 205. There were at least 70 documented
9 drawings created by Mr. Feng, which affected every aspect of the construction of Mr. Feng's
10 house. *See, e.g.*, Pl.'s Ex. 2.8 (changing rebar sizes); 4.11 (changes to ground floor windows and
11 doors; and 4.13 (changes from American-style toilets to Chinese-style toilets); Tr. 231; 241-242;
12 246. MSC kept these drawings to document the changes as well as the increases in construction
13 costs. Tr. 256-247. These changes were also used by MSC to create its month-to-month billing.

14
15 28. The monthly billing for November 2012 and the months subsequent were typically communicated
16 through email to Mr. Lam and included general expenses for the month being billed. *See, e.g.*,
17 Pl.'s Ex. 2.16. The daily log sheets and day-to-day costs included itemized expenses that were
18 factored into the monthly billings, but these reports were created for MSC's internal use to keep
19 track of the company's expenses. Tr. 810; 820; 1396. Mr. Feng had never requested a copy of
20 MSC's daily report until March 2013. Tr. 820-21.

21 29. The monthly billings provided general expenditures and costs and did not take into account all
22 demolition and reconstruction costs because these changes were occurring on a day-to-day basis,
23 making it impossible for MSC to track all the changes and provide an accurate estimate for all
24 expenses. Tr. 777.

25 30. Mr. Feng's changes affected the size of the house. The original house, as contracted, was
26 supposed to be 411 square meters. Tr. 1272. By September 17, 2012, the total size of the house
27 increased to 515 square meters; by October 6, 2012, it increased to 800 square meters; by early
28

1 November of 2012, it increased to 1,000 square meters; and then by November 20, 2012, the total
2 square meters of the house increased to 1,300. *Id.*

3 31. Mr. Feng's changes required MSC to demolish parts of the house that MSC had already
4 constructed. For example, Mr. Feng requested that MSC move a staircase that was already
5 partially constructed. Pl.'s Ex. 4.26; Tr. 289. The concrete forms and rebar were finished, but
6 MSC tore them out at Mr. Feng's direction. Pl.'s Ex. 4.26; Tr. 290. In another instance, MSC had
7 partially constructed doors, but Mr. Feng wanted the doors moved. Tr. 301. As a result, MSC had
8 to build new support structures for the doors. Pl.'s Ex. 4.33; Tr. 301. On the third floor, Mr. Feng
9 wanted to change window sizes. Tr. 317. MSC had to break down the walls on the third floor to
10 accommodate Mr. Feng's request. Pl.'s Ex. 3.102-3.105; 4.38-4.39; Tr. 317-318. MSC spent
11 three or four days working on the changes to the third floor. Tr. 322.

12 32. On or about November 16, 2012, Mr. Jun sent an email to Mr. Lam requesting that Mr. Feng pay
13 a partial payment of \$150,000.00 because the purchase of construction materials, equipment
14 rentals, and labor had exceeded approximately \$300,000.00. Mr. Lam responded the following
15 day that Mr. Feng would prepare a \$100,000.00 check as an advance partial payment for the
16 October costs and expenses. Pl.'s Ex. 2.14. On November 17, 2012, Mr. Feng issued two checks
17 to MSC in the amount of \$100,000.00. Pl.'s Ex. 2.15. By November 16, 2012, Mr. Feng had paid
18 MSC a total of \$273,225.

19
20 **E. MSC's November 12, 2012 Estimation of Construction Costs**

21 33. Sometime in November 2012, Mr. Lam requested that Mr. Jun prepare a cost estimate of the total
22 construction price. Tr. 541. Mr. Jun had informed Mr. Lam that it was impossible to provide an
23 estimate with all the changes occurring on the house and suggested that the construction be halted
24 for a couple of days so that MSC could prepare a final plan and an exact estimation could be
25 given to Mr. Feng. Tr.541-543; 820. Nevertheless, on or about November 12, 2012, Mr. Jun
26 prepared a handwritten estimate of the construction cost as of the date and informed Mr. Lam that
27
28

1 it was only a temporary estimate because it was impossible to calculate the exact costs without a
2 final plan. Tr. 542.

3 34. On November 17, 2012, Mr. Lam sent an email to MSC acknowledging that there was no final
4 quotation on the construction amount. Pl.'s Ex. 2.14. Another email sent by Mr. Lam to MSC
5 acknowledged that Mr. Feng understood that there was no final price quotation as of March 16,
6 2013. Pl.'s Ex. 12.81.

7 35. Mr. Lam was present while Mr. Jun prepared the temporary amount of the cost of construction.
8 Mr. Jun expected Mr. Lam to provide Mr. Feng a copy of the estimation.

9 36. Mr. Jun estimated that the total construction price as of November 12, 2012 was \$597,841. This
10 figure accounts for the increase of square meters of the housing structure, the increase of the
11 minimum wage and gasoline costs, and additional costs for civil work and equipment. Pl.'s Ex. 6.

12 37. In preparing the temporary estimate for Mr. Feng, Mr. Jun considered the size of the house based
13 on the Contract, which was for a 411.88 square meter home, priced at \$398.90 per square meter
14 for a total value of \$164,300.00. However, as of November 12, 2012, based on all the sketches
15 that Mr. Feng drew pertaining to changes he requested, Mr. Jun estimated that the house size
16 would increase to 1,329.40 square meters. Because labor and material costs had gone up ten
17 percent during this time, multiplied by the original price per square meter, Mr. Jun estimated that
18 the renewed price per square meter was \$438.79. Although the estimated amount for the
19 construction at the renewed price per square meter totaled \$583,327.00, Mr. Jun factored in the
20 difference between the original price per square meter and the increased price to determine an
21 estimate cost of \$566,486.00. Furthermore, because MSC expended additional costs for civil
22 work and equipment from September 2012 through November 2012 totaling \$31,355.00, Mr. Jun
23 estimated that the total construction price as of November 12, 2012 was \$597,841.00. Pl.'s Ex. 6.

24
25 **F. Mr. Feng's Additional Requests for Total Construction Price**

26 38. By March 2013, Mr. Feng, through Mr. Lam, made its first request to MSC seeking additional
27 information on the total price of construction. Pl.'s Ex. 12.82; Tr. 909. Sometime in March 2013,
28

1 Mr. Jun met with Mr. Lam at MSC's office to discuss the price for the construction of Mr. Feng's
2 residential home. Tr. 614. At the meeting, Mr. Jun presented Mr. Lam with a total construction
3 price of \$897,388.00. Pl.'s Ex. 8; Tr. 761. However, after contacting Mr. Feng who had relocated
4 to China at that time, Mr. Lam pressed Mr. Jun for a discount on the total construction amount,
5 informing Mr. Jun that Mr. Feng was willing to only pay \$800,000. Tr. 761; 781-782; 851.

6 39. The \$897,388.00 valuation contemplated the total completion of the construction of Mr. Feng's
7 residential home. Tr. 1071-1072. However, sometime in April 2013, Mr. Feng's personal
8 representative, Steven Hiney ("Mr. Hiney"), ordered MSC to stop its construction. *Id.*

9 40. Because Mr. Feng would question the total construction price for the residential home, MSC
10 furnished its daily reports to Mr. Lam whenever a request was made, showing the actual costs of
11 the construction on a daily basis. Pl.'s Ex. 7; Tr. 1397. MSC provided Mr. Lam copies of the
12 daily log sheets in order to help Mr. Feng understand MSC's monthly billings. Tr. 1398.

13 **G. Additional Work/Changes Affecting Construction Price**

14 41. Sometime in April 2013, MSC provided a detailed summation computing all other additional
15 work completed between August 2012 and April 2013. Pl.'s Ex. 15; Tr. 590; 785; 872. The
16 additional work accounted for the changes made to the first, second, and third floors, as well as
17 electrical and plumbing changes. The total amount expended for these works amounted to
18 \$279,563.00. *See generally*, Pl.'s Ex. 15. The final construction price for all works completed on
19 Mr. Feng's residential home was \$877,404. Pl.'s Ex. 8.

20 42. The summary of additional work was prepared on April 27, 2013 after MSC's completed its
21 construction of the residential home. Pl.'s Ex. 15.1. The summation was presented to Mr. Lam
22 and Mr. Hiney sometime in April 2013 intending to be the final construction price for the work
23 completed on Mr. Feng's residential home. Tr. 621-622.

24 43. Although Mr. Feng had received several billings with different estimates in the \$800,000.00
25 range, the low range estimate encompassed actual construction costs, whereas, the April 2013,
26
27
28

1 final construction price accounted for a profit of approximately \$12,646.17 for MSC's equipment
2 and tool rentals and Mr. Jun's hourly salary of \$25.00. *See* Pl.'s Ex. 3.1; 15; Tr. 52.

3 44. Notwithstanding the additional works detailed in MSC's final quotation to Mr. Feng amounting
4 to \$279,563.00, occurring between August 2012 and April 2013, the final contract price factored
5 in employee wages based on Mr. Feng's request for additional manpower from November 2012
6 through March 2013 and about thirty to forty changes after December 20, 2012. Tr. 53; 603;
7 1384.

8 45. Beginning September 2012, MSC began assessing its charges for manpower as labor costs had
9 increased. MSC began charging Mr. Feng \$7.00 per hour per each worker at the construction site.
10 Tr. 769-770.

11 46. Sometime between October and December 2012, other than utilizing its smaller equipments for
12 the construction of Mr. Feng's residential house, MSC would rent heavy equipments from other
13 companies, i.e. dump truck, excavator, and compactor. Tr. 693-697. MSC would often pay for
14 these equipments and seek reimbursement from Mr. Feng in its monthly billing. Tr. 698; 719-720.
15 Additionally, as the house increased in size and many changes were being made, MSC began
16 charging Mr. Feng for use of its tools. Tr. 792; 799.

17 47. By November 2012, Mr. Feng had moved into the partially constructed residential home. Tr.
18 1388. During that month, Mr. Feng had requested an additional thirty workers. Tr. 1389. The
19 amount of workers at the project site increased to forty from December 2012 through March
20 2013. Pl.'s Ex. 11; Tr. 53; 1389. Prior to November 2012, MSC would have approximately
21 sixteen workers at the job site. Tr. 690.

22 48. By December 20, 2012, Mr. Feng had left Saipan and returned to China. Tr. 1114; 1135.

23
24 **H. MSC's Request For Partial Payments For Months Following the November 12, 2012**
25 **Estimate**

26 49. On December 12, 2012, MSC sent an email to Mr. Lam requesting a partial payment of
27 \$150,000.00. The email also specified that MSC's vendors and suppliers relied heavily on cash
28 transactions. The email additionally informed Mr. Feng of the various expenses for equipment

1 rental for the months of October through December and paint materials totaling \$26,354.21. Pl.'s
2 Ex. 2.16.

3 50. On December 13, 2012, the following day, Mr. Lam responded, informing Mr. Jun that upon Mr.
4 Feng's direction, he would prepare a \$50,000.00 check to MSC. Pl.'s Ex. 2.16.

5 51. On December 13, 2012, MSC received a check from Mr. Feng in the amount of \$50,000.00. Pl.'s
6 Ex. 2.17. Subsequently, on January 7, 2013, MSC received another check from Mr. Feng in the
7 amount of \$100,000.00. By January 7, 2013, Mr. Feng had paid MSC a total of \$423,225.00.

8 52. On January 1, 2012, MSC emailed Mr. Feng a partial payment request for \$70,000.00 for labor
9 and materials and readymade concrete costs expended throughout the month of December 2012.
10 Pl.'s Ex. 2.19.

11 53. On January 18, 2013, MSC received a check from Mr. Feng in the amount of \$70,000. Pl.'s Ex.
12 2.20. As of January 18, 2013, Mr. Feng had paid MSC a total of \$493,225.00.

13 54. The last payment MSC received from Mr. Feng was in January 18, 2013. Ex. 2.20

14 55. MSC made additional requests for partial payments in March and April 2013, totaling
15 \$303,088.00. Particularly, MSC requested that Mr. Feng pay partial payments of \$185,000.00 for
16 costs expended between January and February 2013, and \$118,088.00 for costs expended for the
17 remaining construction works. Pl.'s Ex. 2.22; 2.23.

18 56. On April 15, 2013, Mr. Hiney ordered MSC to cease construction. On April 27, 2013, MSC
19 stopped working on the As Matuis house. Tr. 1261. The house was incomplete on April 27, 2013.
20 Tr. 1261.

21
22 **I. DPW's December 21, 2012 Notice of Violation and Final Order to Stop Work**

23 57. Prior to DPW's December 21, 2012 Notice of Violation, Mr. Jun insisted that Mr. Feng obtain
24 another drawing from Mr. Pangelinan to account for all the changes made to Feng's residential
25 home. Tr. 788. However, Mr. Feng continued to urge MSC to carry on with construction. *Id.*
26 These changes occurred sometime after Mr. Pangelinan's second approved drawing. Tr. 190-191.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

58. In order to attain a permit from DPW, Mr. Pangelinan would have to have completed a stamped architectural drawing. Tr. 28. Mr. Feng failed to pay for a third architectural drawing and was consequently unable to obtain a DPW permit for the ongoing construction. Tr. 190.
59. Throughout the course of the construction, Mr. Feng would usually make payments to Mr. Pangelinan for the architectural drawings, thereafter, Mr. Pangelinan would prepare the necessary paperwork for DPW's approval. Tr. 388; 668-669; 1406-1407.
60. Although MSC was unable to obtain a DPW permit to construct the additional changes Mr. Feng requested, Mr. Feng insisted that MSC continue with the construction. Tr. 788. Mr. Jun cautioned Mr. Feng that any structural or material change to the construction would require a DPW permit. Tr. 390. According to Mr. Feng, some changes, i.e. repositioning of windows, did not require a DPW permit. Tr. 1405. Notwithstanding Mr. Jun's warning, Mr. Feng borrowed MSC's workers to construct an additional structure not included in the approved plans. Tr. 328; 390.
61. On December 21, 2012, DPW issued a notice of violation to MSC requiring MSC to submit revised plans with a structural engineer stamp of approval for all of the changes and an order to stop work for the construction of an additional kitchen area until the plan was submitted to DPW. Def.'s Ex. D.
62. The stop work order was for the structure that Mr. Feng built. Tr. 389.
63. Sometime while the changes were being implemented on the residential structure, Mr. Pangelinan visited the jobsite and expressed his concerns about the changes. Tr. 1433. Both Mr. Feng and Mr. Pangelinan agreed that Mr. Feng would assume personal responsibility for those changes. *Id.*
64. Because Mr. Feng failed to obtain an architectural drawing accounting for the changes made to the residential structure, MSC received another Notice of Violation from DPW on March 28, 2013. Def.'s Ex. E. Eventually, on April 16, 2013, DPW issued MSC a Notice of Stop Work for failure to obtain a building permit and for violation of the building safety code.
65. Before MSC received DPW's Notice of Stop Work Order, Mr. Jun had informed Mr. Lam through email that the March 2013 Notice of Violation had already been in effect for ten days and

1 that the temporary revised plan for the third drawing prepared by Mr. Pangelinan, because Mr.
2 Pangelinan had not been paid for the drawing, was disapproved by DPW. Pl.'s Ex. 9.1.
3 Additionally, Mr. Jun informed Mr. Lam that a final revised plan pertaining to the architectural,
4 structural, electrical, and plumbing must be submitted by April 11, 2013 or else MSC would be
5 ordered to stop construction. Pl.'s Ex. 10. Mr. Lam responded the following day informing MSC
6 that it was MSC's responsibility to submit the final plan to DPW. Pl.'s Ex. 9.1. Mr. Jun
7 acknowledged that while it was MSC's responsibility to submit the final plan to DPW, it was Mr.
8 Feng's responsibility to pay Mr. Pangelinan for the third revised drawing because many changes
9 have been made to the residential structure since the last approved drawing. Mr. Jun additionally
10 informed Mr. Lam that although MSC had, in the past, advanced payments to Mr. Pangelinan to
11 complete the first two architectural drawings, and would seek reimbursement from Mr. Feng
12 later, MSC was financially unable to come up with \$3,000.00 for the final third drawing and
13 stamp fee because Mr. Feng has withheld payments to MSC. Tr. 9.1.

14
15 66. Contrary to Mr. Lam's testimony that he only found out two weeks prior to trial that Mr.
16 Pangelinan had completed a final third drawing, but withheld it because MSC had not paid for it
17 and that Mr. Feng had not received any billing for it, Mr. Lam acknowledged receipt of an email
18 communication from MSC addressed to him requesting a fee of \$3,000.00 for the final drawing,
19 as indicated in the previous paragraph. Tr. 962-963; 1006-1014. The email was addressed to Mr.
20 Lam on April 10, 2013. Pl.'s Ex. 9.1.

21 **J. Mr. Lam's Agency Relationship with Feng**

22 67. Mr. Lam has lived on Saipan for about 30 years. Tr. 881. A friend introduced Mr. Lam to Mr.
23 Feng approximately 10 years ago in Shanghai, China. Tr. 882. Mr. Lam became involved with
24 Mr. Feng's house project in March or April 2012. Tr. 884. Mr. Lam assisted Mr. Feng with
25 looking for a contractor and with reviewing documents pertaining to the house, including the
26 initial construction agreement. Tr. 885; 1093. Mr. Lam was involved with both negotiating and
27 revising the contract. Tr. 887; 960; 995; 1093. Mr. Lam speaks English well. Tr. 63.

- 1 68. Mr. Lam would both translate for Mr. Feng and would communicate with people at Mr. Feng's
2 direction. Tr. 885. Mr. Feng instructed Mr. Jun to speak with Mr. Lam regarding the house
3 construction and payment matters. Tr. 63. Mr. Lam would discuss everything with Mr. Feng
4 before doing anything. Tr. 887.
- 5 69. Although Mr. Lam testified that he had no interest in the house, Mr. Lam testified that he had
6 invested approximately \$100,000.00 of his own money in finishing materials for the house. Tr.
7 951. Mr. Lam is currently living in the house rent free. Tr. 952.
- 8 70. Mr. Lam and Mr. Feng frequently communicated regarding the house using a messaging service
9 knows as WeChat. Tr. 925; 1136. Because the project was Mr. Feng's, Mr. Lam had no
10 independent authority to make any payments on the project without Mr. Feng's approval. Tr.
11 1119-1110; 1187-1188.

12 **K. The Weight of Mr. Feng's Testimony & Credibility**

- 13 71. Mr. Feng essentially agrees that he had entered into a contract with MSC on April 17, 2012 to
14 construct a 411 square meter residence in As Matuis for approximately \$160,000.00. Tr. 1094;
15 1145; 1177. Additionally, Mr. Feng agrees that Mr. Lam, who served primarily as his interpreter,
16 assisted him in selecting MSC's bid to construct his house. Tr. 1093. Mr. Lam also assisted in
17 reviewing and amending Mr. Feng's contract with MSC. Tr. 1094.
- 18 72. Although Mr. Feng acknowledges that at some point the size of the house increased from 411
19 square meters to about 1,300 square meters, Mr. Feng testified that it was Mr. Jun who convinced
20 him to construct a bigger a house. Tr. 1096. Mr. Feng agreed to increase the size of the house
21 because he considered Mr. Jun to be a close friend and did not want Mr. Jun to lose out on
22 money. Tr. 1097; 1158.
- 23 73. Mr. Feng disagrees that the November 12, 2012 quotation was a temporary estimate, but rather a
24 final contract price agreed to by both parties. According to Mr. Feng, Mr. Jun promised him that
25 the construction price would not exceed \$590,000.00, which Mr. Feng testified that he agreed to.
26 Tr. 1103; 1112; 1180. Despite this, Mr. Feng testified that when he received the November final
27
28

1 contract price for approximately \$590,000.00, he expected the price to be higher because he had
2 made additional requests to enlarge the water tank and the road way, and to demolish the third
3 floor of the house. Tr. 1104; 1106-1107. Mr. Feng testified that he was willing to pay for the
4 additional changes, but Mr. Feng insisted that the November estimate was final. Tr. 1106.
5 Notwithstanding Mr. Feng's testimony that the final contract price was \$590,000.00 and Mr.
6 Jun's promise that the construction price would not exceed that amount, Mr. Feng maintained that
7 he owed MSC an additional \$50,000.00 for the additional work completed on the house because
8 he wanted to be fair to Mr. Jun as he believed that they were close friends. Tr. 1120-1122; 1193.

9
10 74. Instead of the agreed upon amount that Mr. Feng testified both parties had accepted, it is Mr.
11 Feng's testimony that despite their agreement, he now owed MSC \$640,000.00, \$50,000.00 of
12 which is owed for the extension of the water tank and roadway, and the demolition of the third
13 floor. Tr. 1120-1122; 1200. From the \$50,000.00, Mr. Feng estimates that it cost MSC about
14 \$5,000.00 to tear down the third floor; \$30,000.00 for the water tank enlargement; and
15 \$15,000.00 to enlarge the roadway. Tr. 1194; 1198-1199; 1207; 1209. Mr. Feng estimates are
16 based on his personal belief on what the fair prices for these changes were. Tr. 1198. Mr. Feng
17 has neither construction experience nor a degree in architecture aside from a three month course
18 in residential construction in 2008 when he served as a general manager at a construction
19 company. Tr. 1152-1153; 1196.

20 75. Additionally, while Mr. Feng changed his testimony that the construction price would not exceed
21 \$640,000.00, his testimony was contradicted by Mr. Lam who testified that Mr. Feng was willing
22 to pay MSC \$750,000.00 based on MSC's March 2013 quotation. Tr. 1017. Although Mr. Lam's
23 testimony contradicted Mr. Jun's assertion that Mr. Feng accepted its reduced offer of
24 \$800,000.00, Mr. Lam's testimony demonstrates that no final quotation was made and that Mr.
25 Feng was willing to pay MSC more than what Mr. Feng alleged to be the final contract price.

26 76. Although Mr. Feng testified that Mr. Jun convinced him to construct a larger house, Mr. Feng
27 admitted that he would suggest changes to the residential structure while he was still living on
28

1 Saipan. Tr. 1148; 1157. Despite initially being incapable of recalling whether he had asked MSC
2 to make these changes and whether he had communicated these changes by writing on the
3 architectural plans, Mr. Feng later acknowledged that he, at the very least, wrote changes on the
4 plan pertaining to the demolition of the third floor because he personally felt that a third story
5 house would be unsafe in Saipan. Tr. 1162-1163; 1190.

6 77. Mr. Feng also asserted that sometimes Mr. Jun made mistakes while constructing the As Matuis
7 house. Tr. 1149. Mr. Feng said that he knew Mr. Jun was making mistakes because Mr. Jun was
8 not following the architectural plans prepared by Mr. Pangelinan. Tr. 1150. However, Mr. Feng
9 has no appreciable background in construction or architecture. Tr. 1150; 1154.

10 78. Mr. Feng claimed that when he moved into the As Matuis house, the house had already been 80
11 to 90 percent completed, but when he moved out of the house and left Saipan, MSC had only
12 managed to accomplish 5 to 10 percent of the work. Tr. 1129; 1133. According to Mr. Jun, Mr.
13 Feng had moved into the As Matuis property in November 2012. Mr. Feng left Saipan the
14 following month. Throughout the time Mr. Feng resided in the As Matuis house, Mr. Feng
15 observed the construction progress everyday and witnessed numerous construction activities
16 occurring at the job site. Tr. 1132. Mr. Feng testified that he requested MSC to include additional
17 workers on the job site to speed up the construction. Tr. 1130; 1132. At some point, Mr. Feng
18 observed more than 30 workers employed at the job site. Tr. 1133. When pressed on cross
19 examination about the amount of changes that were occurring at the house during the time he
20 resided in the As Matuis property, Mr. Feng conceded that there were a lot of changes being
21 made to the house. Tr. 1143.

22 79. According to Mr. Feng, when he left Saipan in December 2012, he would communicate with Mr.
23 Lam about the progress of the construction “every day.” Tr. 1137; 1140. Mr. Lam would often
24 visit the As Matuis house while Mr. Feng was in China. Tr. 1136. According to Mr. Feng, MSC
25 was not supposed to make any more changes to the As Matuis house after he had left Saipan. Tr.
26 1115. However, Mr. Feng admitted that he would not be surprised to find out that MSC had
27
28

1 employed over 30 workers at the jobsite in March 2013, although remaining adamant that he
2 could not recall whether he instructed Mr. Lam to add more workers in the construction site in
3 January, February, or March 2013. Tr. 1140-1142.

4 80. When Mr. Feng left Saipan in December 2012 and moved back to China, Mr. Feng authorized
5 Mr. Lam to make payments to MSC on his behalf. Tr. 1188. Every payment Mr. Lam made to
6 MSC was approved by Mr. Feng. Tr. 1187. However, Mr. Feng does not recall whether he made
7 payments to MSC from October 2012 through January 2013. Tr. 1182. Additionally, Mr. Feng
8 was unable to recall the month and year when MSC requested additional money from him. Tr.
9 1128.

10 81. Additionally, throughout Mr. Feng's cross-examination, Mr. Feng exhibited substantial memory
11 lapses regarding the details of the As Matuis construction. Mr. Feng had issues recalling details
12 about the project despite allegedly speaking with Mr. Lam about the project "every day." Tr.
13 1140. Mr. Feng could not recall the year in which he moved into the As Matuis house. Tr. 1128.
14 Neither could Mr. Feng recall ever telling Mr. Lam to convey instructions to Mr. Jun. Tr. 1171.
15 Mr. Feng could not recall whether there were any other written agreements between himself and
16 MSC. Tr. 1177. Mr. Feng stated that he and Mr. Jun orally agreed that MSC would not charge
17 more than \$600,000.00 for the As Matuis house, but could not recall the day, month, or year
18 when the oral agreement allegedly occurred. Tr. 1181; 1183; 1185.

19
20 82. During Mr. Jun's rebuttal testimony, Mr. Jun states that he was not Mr. Feng's friend and that he
21 and MSC had an owner/contractor relationship. Tr. 1365. Mr. Jun flatly denied ever making any
22 changes to Mr. Feng's house without Mr. Feng's permission or that he ever asked Mr. Feng for
23 permission to make the As Matuis house any larger. Tr. 1367-1368. Moreover, Mr. Jun denied
24 that he had ever agreed to limit the project cost to \$600,000.00 based on Exhibit 6 or via another
25 oral agreement with Mr. Feng. Tr. 1391.
26
27
28

1 83. Based on the foregoing, the Court finds that Mr. Feng was not a credible witness and will
2 disregard Mr. Feng’s testimony wherever it contradicts Mr. Jun’s testimony or the documentary
3 evidence supplied to the Court by MSC.

4 III. CONCLUSIONS OF LAW

5 A. Breach of Contract

6 To prove a breach of contract claim, a plaintiff must establish: (1) an enforceable
7 contract; (2) a failure to perform by defendant; and (3) defendant’s non-performance caused the
8 plaintiff to suffer damages. *PRC, LLC v. Chang Shin Resort Saipan Corp.*, Civ. No. 12-0163
9 (NMI Super. Ct. Mar. 8, 2013) (Order Granting in Part and Den. in Part Pl.’s Mot. for Summ. J.
10 at 4).

11 1. *A Valid Contract Exists between the Parties.*

12 The elements of a contract are offer, acceptance, and consideration. *Isla Financial*
13 *Services v. Sablan*, 2001 MP 21 ¶ 13 (citing RESTATEMENT (SECOND) OF CONTRACTS § 17
14 (1981). “An offer is the manifestation of willingness to enter into a bargain, so made as to justify
15 another person in understanding that his assent to that bargain is invited and will conclude it.”
16 RESTATEMENT (SECOND) OF CONTRACTS § 24. “Acceptance of an offer is a manifestation of
17 assent to the terms thereof made by the offeree in a manner invited or required by the offer.” *Id.*
18 § 50. Consideration is a bargained-for exchange in which one party’s performance or promise
19 was made in exchange for a promise by the other party. *Id.* § 71.

20 There is no dispute that a contract for the construction of Mr. Feng’s residential home
21 existed between the parties. Here, both parties signed a construction agreement whereas MSC
22 made a promise to construct a 411 square meter residential home in As Matuis, Saipan. In return,
23 Mr. Feng promised to pay MSC \$164,300.00 for the construction project. Additionally, the
24 parties bilaterally agreed to various “Scope of Works” detailing each of the party’s obligations
25
26
27
28

1 under the contract. For instance, MSC was to supply the labor and materials for the structure and
2 tools, equipments, and satisfy OSHA safety requirements. Mr. Feng was to provide and supply
3 all furnishing materials, as well as to pay for the certification of the architectural plans by a
4 Professional Engineer and accompanying permitting fees.

5
6 Based on the foregoing, the requisite offer, acceptance, and consideration were present to
7 make a valid, enforceable contract between the parties.

8 *a. Modification of the Original Contract*

9 Although the parties initially agreed to construct a 411 square meter home in As Matuis
10 for a fixed sum of \$164,300.00, by the time Mr. Feng ordered MSC to stop construction, MSC
11 had already constructed a house larger than 1,300 square meters. The total construction price had
12 also increased to \$877,404.00. Prior to MSC's order to stop construction on Mr. Feng's home,
13 numerous and substantial changes to the construction project had occurred, which affected every
14 aspect of the construction, including the "Scope of Works" attributed to the Contract and the
15 total price of construction for Mr. Feng's home. While the parties do not dispute that the original
16 contract was subsequently modified, their understanding as to what those modifications were are
17 at odds with each other. MSC maintains that it is entitled to \$877,404 for the total construction
18 costs because Mr. Feng agreed to pay for the additional change orders. Specifically, Mr. Feng
19 has made additional payments beyond the original contract thereby evidencing Mr. Feng's assent
20 to those changes. Contrarily, Mr. Feng claims that the November 12, 2012 estimate is the final
21 quotation that modified the Contract. Mr. Feng alleges that, at most, he should be liable to MSC
22 for \$597,841.00, plus an additional \$50,000, which he estimates were the cost of the extensions
23 to the water tank and roadway, and the demolition of the third floor.

24
25
26 A promise to modify a duty under a contract that is not fully performed on both sides is
27 binding "(a) if the modification is fair and equitable in view of circumstances not anticipated by
28

1 the parties when the contract was made; (b) to the extent provided by statute; or (c) to the extent
2 that justice requires enforcement in view of material change in position in reliance on the
3 promise.” RESTATEMENT (SECOND) OF CONTRACTS § 89. Modification of an executory contract is
4 binding even if consideration is lacking so long as the parties have mutually assented to the
5 modification. *Commercial Contractors, Inc. v. United States Fidelity & Guaranty Co.*, 524 F.2d
6 944, 952 (5th Cir. 1975). “The existence of the mutual understanding, the proposal and
7 acceptance, may be implied from conduct and circumstances. These may be shown by
8 circumstantial evidence, or by the admission of the party to be charged. Acceptance may be
9 shown by conduct or by performance communicated to the promisor.” *Siebring Mfg. Co. v.*
10 *Carlson Hybrid Corn Co.*, 70 N.W. 2d 149, 153 (Iowa 1955); *see also Rao v. International*
11 *Licensing Indus. Merchandisers’ Assoc.*, 2015 N.Y. Misc. LEXIS 2615 *15 (N.Y. Sup. Ct. July
12 20, 2015) (“A written agreement can be changed by the parties’ course of conduct. . . . Consent
13 to contract modification may be shown by the parties’ conduct.”) (citations omitted).

14
15
16 In light of the above, MSC and Mr. Feng had agreed to numerous changes to the
17 residential structure of the house. These changes occurred frequently between April and October
18 2012. MSC estimates that Mr. Feng had made more than 100 change requests during this time.
19 By August 2012, the basic structure of the house had been built, but because of these numerous
20 change orders, the construction project continued until April 2013 when Mr. Feng ordered MSC
21 to cease construction. Notwithstanding the parties initial agreement that the structure of the
22 house shall be completed within sixty calendar days after all permits have been issued, which
23 should have been some time in September 2012, Mr. Feng’s change requests before and after
24 September, made it impractical for MSC to complete the construction of Mr. Feng’s house on or
25 around September 2012. Mr. Feng’s house was substantially completed on April 2013 when Mr.
26 Feng ordered MSC to stop construction.
27
28

1 Based on the foregoing, the Court concludes that MSC has not fulfilled its Contract
2 obligation to complete the house structure at or around September 2012 because Mr. Feng’s
3 numerous change requests had significantly altered MSC’s obligation under the existing contract.
4 As a result, MSC substantially completed construction of Mr. Feng’s house in April 2013,
5 whereupon MSC expended \$877,404.00 for costs associated with building an exponentially
6 larger home of approximately 1,329.40 square meters in size. Because of the remarkably large
7 difference between the outcome of the resulting construction and the one initially contemplated
8 for by the parties, the Court must determine whether the course of conduct between Mr. Feng
9 and MSC effectively modified the original contract, causing MSC to reasonably rely on Mr.
10 Feng’s repeated promise to pay for the construction of an extremely larger house. *See*
11 *RESTATEMENT (SECOND) OF CONTRACTS* § 89(c) (A promise to modify a duty under a contract is
12 binding “to the extent that justice requires enforcement in view of material change of position in
13 reliance on the promise.”); *Id.* cmt. d. (“Even though the promise is not binding when made, it
14 may become binding in whole or in part by reason of action or forbearance by the promise . . . in
15 reliance on it.”); *see also T. R. Miller Mill Co. v. Johns*, 75 So. 2d 670 (Ala. Ct. App. 1954)
16 (“[E]ven if a party does not actually assent to a change or modification made by the other party,
17 she may so act as to estop herself from denying that she assented; and will do so if her conduct
18 after the change or modification is such as to be inconsistent with a right to stand on the old
19 contract.”).

20
21
22
23 *i. Course of Dealing between the Parties May Effectively Modify the Contract*

24 Because the contract had not been completed before MSC incorporated the numerous
25 change requests submitted by Mr. Feng, the Court must determine to what extent the original
26 contract has been modified. The Court considers the course of dealing between Mr. Feng and
27 MSC to determine whether the contract has been modified.
28

1 “A course of dealing is a sequence of previous conduct between the parties to an
2 agreement which is fairly to be regarded as establishing a common basis of understanding for
3 interpreting their expressions and other conduct.” RESTATEMENT (SECOND) OF CONTRACTS §
4 223(1); *see Underground Constr. Co. v. United States*, 16 Cl. Ct. 60, 67 (Cl. Ct. 1988) (holding
5 that a single transaction is uncharacteristic of a course of dealing). “A course of dealing between
6 the parties gives meaning to or supplements or qualifies their agreement.” *Id.* § 223(2). Evidence
7 of course of dealing may be used to annex an agreed but unstated term. *Id.* cmt. b; *see also*
8 *Matanuska Valley Farmers Cooperating Ass’n v. Monaghan*, 188 F.2d 906 (9th Cir. 1951) (“It is
9 well established that . . . an agreement to change the terms of a contract may be shown by the
10 conduct of the parties.”) (citing RESTATEMENT OF CONTRACTS § 408 (1932)). Additionally, a
11 course of dealing may be introduced even though an agreement is unambiguous or despite it
12 being inconsistent with the meaning the agreement would have. *Id.*; *see, e.g., Song & Song Corp.*
13 *v. Fine Art Constr. Co., LLC*, 2012 Tenn. App. LEXIS 381, *30 (Tenn. Ct. App. June 14, 2012)
14 (“A party’s agreement to a modification need not be express, but may be implied from a course
15 of conduct; this is true even where the agreement expressly specifies, as in this case, that the
16 parties may only modify the agreement in writing.”).

17
18
19 Furthermore, mutual intent to modify the terms of the contract is necessary for the
20 modification of a contract to become effective. *Cardinal Dev. v. Stanley Constr. Co.*, 497 S.E.2d
21 847, 851 (Va. 1998). Such intent may be shown by a course of dealing between the contracting
22 parties. *Id.*; *Daugherty Co. v. Kimberly-Clark Corp.*, 92 Cal. Rptr. 120, 124 (Cal. Dist. Ct. App.
23 1971) (“An agreement to modify a written contract will be implied if the conduct of the parties is
24 inconsistent with the written contract so as to warrant the conclusions that the parties intended to
25 modify it.”). “The circumstances surrounding the conduct of the parties must be sufficient to
26 support a finding of mutual intention that the modification be effective and such intention must
27
28

1 be shown by clear, unequivocal, and convincing evidence, direct or implied.” *Stone v. Golden*
2 *Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 192 (E.D.N.Y. Sept. 30, 2004); *Third Fed. S&L*
3 *Ass’n of Cleveland v. Formanik*, 64 N.E.3d 1034, 1044 (Ohio Ct. App. Oct. 27, 2016) (“A
4 contract can be modified when there is clear and convincing evidence of the parties’ mutual
5 intent to modify the contract through their course of dealing. . . . Parties may implicitly modify
6 an agreement by their actions.”); *Zumwinkel v. Leggett*, 345 S.W.2d 89, 95 (Mo. 1961) (“It is
7 competent for the parties to a contract to vary its terms by a subsequent course of dealing.”); *T.*
8 *R. Miller Mill Co. v. Johns*, 75 So. 2d 670 (Ala. Ct. App. 1954) (“Parties to a contract may
9 modify or alter the terms of the agreement so long as it is executor with or without doing so in
10 writing. Such assent may be express or it may be implied from the conduct of the parties. . . .”).

11
12
13 Based on the abovementioned rules, the Court makes the following determination that the
14 course of dealing between the parties had effectively modified the scope of work associated with
15 the construction of Mr. Feng’s residential home and the pricing and payment methods contained
16 within the Contract.

17 i) *Mr. Feng’s Numerous Change Requests that were Implemented by MSC Effectively Modified*
18 *the Scope of Work for the As Matuis Property.*

19 When a property owner or his agent orally directs a contractor to perform additional work
20 outside the scope of the contract, and it is performed by the contractor, and the benefits are
21 accepted by the owner, the owner is liable to pay the contractor the reasonable value of the
22 additional work. *See Keahon Cros. v. Blank*, 161 Misc. 874, 876 (N.Y. Count. Ct. 1936)
23 (“[W]hen the owner, or his authorized agents, require and direct a contractor to do extra work not
24 called for by the contract, and knowingly receives and accepts the benefits thereof, such owner is
25 equally bound to pay the reasonable value of such extra work”); *C.F. Halstead Contractor,*
26 *Inc. v. Dirt, Inc.*, 320 So. 2d 657, 659-660 (Ala. 1975); *United States use of Falco Constr. Corp.*
27 *v. Summit General Contracting Corp.*, 760 F. Supp. 1004, 1010 (E.D.N.Y. 1991). The oral
28

1 directions of the owner to perform the additional work and the course of dealing between the
2 parties that are inconsistent with the scope of works in the underlying contract may serve as a
3 modification of the contract terms. *Barsotti's, Inc. v. Consolidated Edison Co.*, 254 A.D.2d 211,
4 212 (N.Y. App. Div. 1st Dep't 1998); *In re Levingston*, 119 B.R. 935, 942 (Bankr. N.D. Miss.
5 1990); *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.*, 152 Cal. Rptr. 19, 24
6 (Cal. Dist. Ct. App. 1979) (“[P]articular circumstances may provide waivers of written change
7 order requirements. If the parties, by their conduct, clearly assent to a change or addition to the
8 contractor’s required performance, a written change order requirement may be waived.”).

10 In the case at bar, the parties had originally agreed that MSC was to construct a 411.88
11 square meter house for Mr. Feng at a fixed price of \$164,300.00. The total construction cost was
12 calculated based on an agreed upon price of \$398.90 per square meter. Based on these terms, the
13 parties were able to secure a stamped architectural drawing from Mr. Pangelinan that was
14 subsequently approved by DPW. Two months later, MSC began construction of Mr. Feng’s
15 home according to the first pre-approved plan, which incorporated the agreed upon terms of the
16 original Contract. From April through October 2012, MSC periodically billed Mr. Feng pursuant
17 to the payment schedule set forth in the Contract. These payments were requested and
18 subsequently made in eleven increments. Each increment established a portion of completed
19 work performed by MSC.
20

22 Notwithstanding MSC’s conformance to the payment schedule set forth in the contract,
23 Mr. Feng’s October 2012 payment, which was intended for the eleventh and final installment of
24 payment, had already surpassed the total construction price originally agreed to by the parties.
25 By October 2012, Mr. Feng had paid MSC a total of \$173,225.00, which was \$8,925.00 in
26 excess of the Contract price. Mr. Feng acknowledged that the additional payments were for
27 change orders he requested MSC to perform. In fact, MSC, upon order from Mr. Feng, made
28

1 more than 100 changes to the As Matus house, which began almost immediately after MSC
2 began constructing Mr. Feng's residential home. These changes significantly altered every aspect
3 of the construction project and enhanced the scope of works to be completed by MSC.
4 Specifically, these changes affected the size of the house, required MSC to continuously consult
5 with Mr. Pangelinan regarding a revised architectural plan, increased the cost and expenditures
6 associated with constructing a larger home, and extended the timeline for completion of the
7 project.
8

9 As stated above, Mr. Feng first acknowledged that he had to make additional payments in
10 October 2012 for changes he requested on the project. The incremental payments were charged
11 for expenses accumulated the previous month. The parties had originally agreed that the
12 construction project was to be substantially completed within two months after all permits were
13 issued by DPW. Although the bare structure of the house had been completed by August 2012,
14 the change orders requested by Mr. Feng required MSC to perform additional work. These
15 change orders were submitted to Mr. Pangelinan. On August 10, 2012, Mr. Pangelinan
16 completed a second revised architectural plan. A subsequent DPW building permit was issued on
17 September 1, 2012. The construction based on the second architectural drawing expanded MSC's
18 obligation to perform under the original contract because MSC was now obligated to complete a
19 larger sized house.
20
21

22 MSC, through Mr. Jun, would constantly remind Mr. Feng that the house was much
23 larger than what they had agreed to. By September 17, 2012, the total size of the house increased
24 to 515 square meters; by October 6, 2012, it increased to 800 square meters; by early November
25 of 2012, it increased to 1,000 square meters; and then by November 20, 2012, the total square
26 meters of the house increased to 1,300. The monthly billings prepared by MSC for Mr. Feng
27 would often indicate that the construction expenses had reached a certain amount. However, Mr.
28

1 Feng and sometimes Mr. Lam would often assure MSC to not worry about the money and to
2 continue with the construction of the house. Mr. Feng was also reminded that labor and gasoline
3 prices would increase by September 2012 in accordance with the local labor law. Mr. Feng
4 acknowledged these conditions and was aware that the total construction price would increase. In
5 fact, when MSC began charging Mr. Jun monthly billings against the payment schedule in the
6 original contract as the price of construction had exceeded the contract amount, Mr. Feng would
7 pay MSC the amount that it requested.
8

9 Although the fixed price under the contract was surpassed by October 2012, Mr. Feng
10 continued to pay additional monies to MSC in accordance with the monthly billings prepared by
11 MSC or its staff. By November 2012, MSC's billings to Mr. Feng evolved into a cost-by-cost
12 basis instead of a lump sum payment scheme initiated by the first Contract. The November
13 billings as well as the billings for the subsequent months included charges for equipment rentals,
14 manpower and labor/civil work, and reimbursement for finishing materials. These charges
15 contradicted the "Scope of Works" included in the contract. Despite MSC's contractual
16 obligations to provide these works at its own expenses, Mr. Feng would satisfy MSC payments
17 requests from November 2012 until its last payment to MSC on January 18, 2013. Accordingly,
18 Mr. Feng paid MSC \$100,000.00 in November 16, 2012; \$50,000.00 in December 13, 2012;
19 \$100,000.00 in January 7, 2013; and \$70,000.00 in January 18, 2013. By January 18, 2013, Mr.
20 Feng had paid MSC a total of \$493,225.00. MSC made additional requests for partial payments
21 for the months of February through April 2013, totaling \$303,088.00, but Mr. Feng refused to
22 make any further payments.
23
24

25 Mr. Feng contends that he had forgone additional payments to MSC because the parties
26 had modified the Contract when MSC presented him with a final quotation price of \$597,841.00
27 on November 12, 2012. Mr. Feng argues that the payment requests for the months of February
28

1 through April 2013 exceeded the modified contract price. MSC, on the other hand, contends that
2 the November 12, 2012 quotation was actually a temporary estimate requested by Mr. Feng. The
3 Court agrees with MSC and finds that the November 12, 2012 quotation was a temporary
4 estimate and not the modified contract price, and that Mr. Feng understood it to be as such.
5

6 Although the November estimate considered the costs of changes that had been
7 incorporated into the construction project, Mr. Feng's contention that the parties agreed to not
8 surpass the modified contract price of \$597,841.00 is contrary to the course of dealing between
9 the parties. First, although Mr. Feng agreed that the parties intended the November quote to be
10 the final price, Mr. Feng testified that he believed that he owed MSC more money for additional
11 work expended on the project after November 2012. Mr. Feng acknowledged that his request to
12 enlarge the water tank and roadway and to demolish the third floor of the house would cost MSC
13 an additional \$50,000.00 in expenses. Mr. Feng recognized that the total construction price
14 would amount to approximately \$640,000.00. Second, the email sent by Mr. Lam on behalf of
15 Mr. Feng acknowledged that there was no final quotation. These emails were sent to MSC on
16 November 17, 2012 and March 16, 2013, each occurring after the purported final construction
17 price was made. Third, Mr. Feng was aware of the day-to-day activities occurring in the
18 construction site because he had moved into the As Matuis property in November 2012. Mr.
19 Feng witnessed the daily progression of the construction and ordered MSC to add more workers
20 to the job site. When Mr. Feng moved into the As Matuis property, he requested for 30 additional
21 workers. By the time Mr. Feng left to China on December 2012, there were approximately 40
22 workers employed at Mr. Feng's house. Mr. Feng conceded that at the time he moved into his
23 partially constructed house, there were many changes being made to the house. Mr. Feng also
24 admitted that he would not be surprised to find out that MSC had employed over 30 workers at
25 the jobsite in March 2013 although initially testifying that he expected the project to be
26
27
28

1 completed by the time he left Saipan in December 2012. Finally, Mr. Lam claimed that after
2 MSC presented him with another quotation in March 2013 for more than \$800,000.00, Mr. Feng
3 was willing to negotiate a lower amount of \$750,000.00.

4 Based on the foregoing, the course of dealing between the parties indicate that the parties
5 mutually understood that the November 12, 2012 quotation was only a temporary estimate and
6 that the additional work performed or to be performed would cost considerably more.

7 Indeed, by April 2013, when Mr. Feng ordered MSC to stop construction, additional
8 changes had been implemented since November 2012. These changes were made to the first,
9 second, and third floors, as well as electrical and plumbing changes. The costs of these changes
10 were requested by MSC in each billing since November 2012 often indicating that those requests
11 were for partial payments. For instance, on December 12, 2012, MSC sent an email requesting a
12 partial payment of \$150,000.00 to reimburse its vendors for equipment rental. On January 1,
13 2012, MSC requested partial payment for \$70,000.00 for labor and materials and the pouring of
14 ready-made concrete. Finally, on April 27, 2013, MSC presented Mr. Lam with the total
15 construction price of \$877,404.00, which included costs associated with the additional work
16 performed since April 2012 until MSC was ordered to stop construction on April 2013.

17 Based on the abovementioned reasons, the Court concludes that the parties' course of
18 dealing established that the parties mutually intended to expand the scope of works associated
19 with the original contract. Further, MSC's expanded obligation to perform additional work
20 outside the scope of the contract affected every aspect of the construction, including the size of
21 the house and the pricing and payment methods originally approved by the parties. Mr. Feng's
22 oral promises to pay MSC for the additional work and MSC's subsequent performances
23 constituted modifications of the Contract. It was foreseeable that MSC would make changes to
24 Mr. Feng's house in reliance on Mr. Feng's repeated promises to pay. RESTATEMENT (SECOND)
25
26
27
28

1 OF CONTRACTS § 89 cmt. d. In sum, justice requires enforcement of the modifications to the
2 Contract because MSC changed its position in reliance on Mr. Feng’s numerous promises to pay.

3 **b. MSC has Established that Mr. Feng Breached the Contract**

4 Non-performance of a duty owed under a contract constitutes a breach of contract. *Triple*
5 *J. Saipan, Inc. v. Agulto*, 2002 MP 11 ¶ 9; RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981).
6 “It is a condition of each party’s remaining duties to render performances to be exchanged under
7 an exchange of promises that there be no uncured material failure by the other party to render
8 any such performance due at an earlier time.” *Id.* § 237. The non-performance of a duty
9 constitutes a material failure of performance and has the effect of discharging another’s duties if
10 the material failure of the other remains uncured. *Id.* cmt. a.

11
12 Here, Mr. Feng was obligated to pay MSC’s monthly cost-basis invoices for sums
13 attributable to construction of the As Matuis house. Prior to February 2013, MSC received a total
14 of \$493,225.00 from Mr. Feng. After February 2013, Mr. Feng refused to make any further
15 payments to Mr. Jun, despite Mr. Feng’s admission that he owes MSC at least \$640,000.00.
16 Based on the foregoing, the Court concludes that Mr. Feng breached the Contract by failing to
17 pay MSC for work it performed pursuant to the modifications to the Contract, in the manner
18 established by Mr. Feng and MSC’s course of dealing.

19
20 Further, because Mr. Feng had repeatedly failed to pay MSC even though MSC has made
21 multiple requests for him to do so, Mr. Feng’s failure to cure such breach effectively discharged
22 MSC’s duty to perform. As such, Mr. Feng’s failure to pay relieved MSC of any duty to
23 complete the As Matuis house. In any event, Mr. Feng asked Mr. Jun to stop construction of the
24 As Matuis house. MSC could not have breached the Contract by failing to complete the As
25 Matuis house given that Mr. Feng asked MSC to stop construction.

1 c. *Mr. Feng's Interference with MSC's Ability to Perform under the Contract Made it Impossible*
2 *for MSC to Complete the As Matuis House in a "Workmanlike Manner."*

3 Mr. Feng's counterclaim alleges that MSC breached the Contract because it failed to
4 complete the project as specified in the Contract. Mr. Feng additionally claims that MSC poorly
5 constructed the house that resulted in numerous citation violations by DPW. Although the
6 original contract provided that MSC was to complete the house in a good workmanlike manner,
7 Mr. Feng's incessant orders to implement excessive changes to the construction of the house
8 prevented MSC from fully satisfying its altered obligations to construct a larger and more
9 expensive home.

10 Generally, "[b]efore a plaintiff can recover for breach of [] contract, he must have
11 proven his full performance of it." *Hunter v. Carnation Co.*, 239 S.W.2d 766, 769 (Mo. Ct. App.
12 1951). Further, "[i]f a party, by his conduct, charge[s] himself with an obligation possible to be
13 performed, he must make it good unless its performance is rendered impossible by . . . the other
14 party. *Id.* at 770; *see also Paterno & Sons, Inc. v. New Windsor*, 43 A.D.2d 863, 864 (N.Y. App.
15 Div. 1974) (holding that it is well-settled law that the contractor, on a breach of contract claim,
16 has the right to maintain an action for work completed, materials supplied, and for other damages
17 resulting from the owner's interference in allowing the contractor to complete the contract);
18 *Gray v. Bekins*, 199 P. 767, 769 (Cal. 1921) ("A party who contracts to perform an act for an
19 agreed consideration can maintain an action upon the contract even though the party fails to fully
20 perform if performance on the party's part is prevented by . . . the act of the other party to the
21 contract.").

22 In the present case, Mr. Feng's numerous change orders required MSC to demolish and
23 reconstruct significant portions of the house. Because these changes were enormous, MSC had to
24 obtain revised architectural plans from Mr. Pangelinan, which must then be approved by DPW in
25 order for construction to continue. Under the Contract, it was Mr. Feng's responsibility to pay for
26
27
28

1 the architectural drawings. In fact, Mr. Feng made payments for the first and second drawings.
2 DPW approved Mr. Pangelinan's second drawing on September 1, 2012. However, because
3 additional changes were made since September 2012, MSC informed Mr. Feng sometime in
4 November 2012 that it should halt construction so it could prepare a final architectural plan. Mr.
5 Feng urged MSC to continue with the construction, promising that he would pay for the
6 additional work. Mr. Feng never obtained a third revised architectural plan from Mr. Pangelinan,
7 albeit MSC's warning that any structural or material change to the construction would require a
8 DPW permit. Notwithstanding MSC's warning, Mr. Feng borrowed MSC's workers to construct
9 an additional structure not included in the previous plans. Subsequently, on December 21, 2012,
10 DPW issued a notice of violation to MSC requiring a final approved plan and ordered MSC to
11 stop work on the additional structure that Mr. Feng built. Sometime while these additional
12 changes were being made, Mr. Pangelinan had visited the jobsite and expressed his concerns
13 about the changes. Both Mr. Feng and Mr. Pangelinan agreed that Mr. Feng would assume
14 personal responsibility for those changes. Because Mr. Feng failed to pay for and obtain a final
15 architectural plan, DPW issued MSC another notice of violation on March 28, 2013.

16
17
18 As a result of DPW's March 2013 notice of violation, MSC advised Mr. Feng, through
19 communications with Mr. Lam, that he needed to pay Mr. Pangelinan \$3,000.00 for the final
20 revised plan. Mr. Lam refused, responding that it was MSC's responsibility to submit the final
21 plan to DPW. Contrary to Mr. Lam's testimony that he was unaware that Mr. Pangelinan had
22 completed a final drawing only until two weeks before the trial, Mr. Lam did acknowledge
23 receipt of an email from MSC requesting payment of the fee for the third revised plan. Because
24 Mr. Feng failed to pay for the final drawing, DPW issued MSC a final order to stop work on
25 April 16, 2013, citing MSC for failure to obtain a building permit and for violation of the
26 building code. Thereafter, on April 27, 2013, upon order from Mr. Feng, MSC stopped working
27
28

1 on the As Matuis house. Mr. Feng’s hasty order to stop performance resulted in MSC inability to
2 complete the house by April 2013.

3 Based on the above reasons, the Court concludes that Mr. Feng’s repeated interferences
4 with the construction of his own home severely affected MSC’s ability to complete performance
5 of the Contract. Mr. Feng’s refusal to pay for and obtain the necessary drawings for permit
6 approval consequently prevented MSC from constructing the home in accordance with the
7 building code. As a result, MSC was cited for multiple violations and was required to stop work
8 at the As Matuis House. Thus, the Court finds that MSC was not at fault and did not breach the
9 contract.
10

11 ***d. MSC has Established Damages***

12 “The injured party has a right to damages for any breach by a party against whom the
13 contract is enforceable. . . .” RESTATEMENT (SECOND) OF CONTRACTS § 346. Generally, “the
14 injured party has a right to damages based on his expectation interest as measured by (a) the loss
15 in the value to him of the other party’s performance caused by its failure or deficiency, plus (b)
16 any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost
17 or other loss that he has avoided by not having to perform.” *Tano Group, Inc. v. Dept. of Public*
18 *Works*, 2009 MP 18 ¶ 30 (quoting Restatement (Second) of Contracts § 347). An alternative to
19 the general measure of damages is a recovery based on the injured party’s reliance interest,
20 which includes “expenditures made in preparation for performance or in performance, less any
21 loss that the party in breach can prove with reasonable certainty the injured party would have
22 suffered had the contract been performed.” RESTATEMENT (SECOND) OF CONTRACT § 349.
23 Damages are limited to only those amounts that can be established with reasonable certainty. *Id.*
24 § 352. In other words, the amount of damages claimed must be adequately proven. *Freund v.*
25 *Washington Square Press, Inc.*, 314 N.E.2d 419, 421 (N.Y. 1974).
26
27
28

1 During trial, MSC presented a substantial amount of evidence detailing MSC
2 expenditures for the construction of Mr. Feng's residential home. Although MSC had billed Mr.
3 Feng according to the payment schedule in the Contract up until October 2012, MSC kept daily
4 records of the daily expenses it incurred throughout the construction. From April 2012 through
5 April 2013, MSC kept a daily log sheet of the progression of the construction. The daily log
6 sheets tracked costs for manpower and labor as well as material, equipment, and miscellaneous
7 expenses. The daily records were kept in the ordinary course of MSC's business with Mr. Feng.
8 These logs were often accompanied by photos documenting the progression of the construction
9 and the changes that were implemented throughout the course of construction. Mr. Feng's
10 drawings of the changes he requested on the house also supplemented the daily log sheets.
11 Following the satisfaction of the October 2012 payment as per the schedule in the Contract, these
12 daily reports were the basis for calculating the monthly billings charged to Mr. Feng beginning in
13 November 2012 through April 2013 when MSC was ordered to stop work. The daily statements
14 were also compiled by MSC staff to inform Mr. Feng of the actual cost of the construction.
15

16 MSC had presented Mr. Feng with the total out-of-pocket expense to construct the house,
17 which amounted to \$864,757.83. MSC had also given Mr. Feng an adjusted summary of costs in
18 the amount of \$877,404.00, which accounted for lost profits of nearly \$12,646.17 for MSC's
19 equipment and tool rentals and Mr. Jun's hourly salary of \$25.00. The adjusted construction
20 price amount also considered all costs for additional work expended on the house. The Court
21 concludes that MSC's claim for damages was strongly substantiated by the evidence and has
22 been proven with reasonable certainty. As such, the Court finds that MSC is entitled to
23 \$877,404.00 in damages of which \$12,646.17 is for loss profits and \$864,757.83 is for
24 expenditures made in performance of the contract. Less the \$493,225.00 that Mr. Feng already
25 paid to MSC, MSC is entitled to recover \$384,179.00 from Mr. Feng. This sum represents
26
27
28

1 MSC's reliance on Mr. Feng's promises to pay for the additional work in the construction of the
2 As Matus house. The Court awards these sums pursuant to Section 349 of the Restatement
3 (Second) of Contracts.

4 Moreover, the Court has considered Mr. Feng's testimony, which was offered to show
5 that MSC's claim for damages should be limited. Mr. Feng testified that the parties had agreed to
6 a final construction price of \$597,821.00. However, as the Court found above, Mr. Feng
7 understood that the \$597,821.00 quotation was only a temporary estimate and was not intended
8 to be final. Mr. Lam twice acknowledged that there was no final quotation subsequent to Mr.
9 Feng's receipt of the \$597,821.00 quotation. Even so, although Mr. Feng was adamant that the
10 \$597,821.00 quotation was the final contract price and that the parties mutually agreed that
11 construction would not exceed that price, Mr. Feng agreed that he was responsible for paying
12 MSC an additional \$50,000 for work completed to expand the water tank and roadway and to
13 demolish the third floor of the As Matus house. Mr. Feng's estimate of an additional \$50,000
14 was based on his personal opinion of what these works cost and was not readily verified by a
15 trusted or appreciable source. Mr. Feng did not provide the Court with any documents
16 whatsoever on how he was able to substantiate the additional \$50,000.00. Additionally, Mr. Lam
17 testified that upon receiving a second quotation from MSC for over \$800,000.00, he negotiated a
18 relatively lower price in the amount of \$750,000.00, which Mr. Feng was willing to pay. Based
19 on the foregoing, the Court finds that Mr. Feng was unable to establish with reasonable certainty
20 why MSC's damages should be limited.

21 Finally, Mr. Feng argues that at worst, MSC's damages should be offset because Mr.
22 Feng paid approximately \$110,000.00 to another contractor to complete the project. The Court
23 finds a couple issues with this assessment. First, the parties agreed to expand the scope of works
24 of the project, affecting its completion time and MSC's obligation to perform the additional
25
26
27
28

1 works requested by Mr. Feng. MSC was faithfully executing its performance obligations when
2 Mr. Feng ordered MSC to stop construction. As a result, Mr. Feng now takes issue that it had to
3 hire another contractor to complete MSC's work for them. Second, even though Mr. Feng claims
4 that he had to hire another contractor to complete and fix MSC's poor and shoddy work, Mr.
5 Feng has not proven with reasonable certainty the damages he suffered and the cost he paid to fix
6 the defective and incomplete work.
7

8 "When there is a breach of contract due to incomplete and/or poor workmanship, the
9 plaintiff bears the burden to prove damages suffered and the cost to fix the defective or
10 incomplete work." *Decuir v. Sam Broussard, Inc.*, 459 So.2d 1375, 1379 (La.App. 3 Cir. 1984).
11 Damages must be "established with a reasonable certainty." *Nauru Local Gov't Council v.*
12 *United Micronesian Development Assoc., Inc.*, 8 TTR 474, 486 (1985) (quoting Restatement
13 (Second) of Contracts § 352).
14

15 Here, other than a few minutes of oral testimony, Mr. Feng offered no written contract or
16 evidence of billings or any other evidence as to who he hired, how much he paid, or what work
17 was undertaken to finish the As Matuis house. Again, this Court concludes that Mr. Feng has not
18 established with reasonable certainty why MSC's claim for damages should be limited.
19

20 In all, MSC is entitled to \$384,179.00 for out-of-pocket expenses and loss in profits. This
21 figure accounts for an adjustment for sums paid by Mr. Feng in the amount of \$493,225.00.

22 **B. Pre- and Post-Judgment Interests**

23 *1. Pre-Judgment Interest is Awarded to MSC.*

24 Although the Commonwealth provides no statutory right to prejudgment interest, the
25 Commonwealth Supreme Court unequivocally states that prejudgment interest is available to
26 Commonwealth plaintiffs. *Manglona v. Commonwealth*, 2005 MP 15 ¶ 43. In *Manglona*, the
27 Commonwealth Supreme Court acknowledged that the purpose of prejudgment interest is "to
28

1 compensate [the plaintiff] for the deprivation of the money due from the time the claim accrues
2 until judgment is entered, thereby achieving full compensation for the injury that damages are
3 intended to redress.” *Id.* (citing *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987)).
4 According to the Restatements, prejudgment interest “is recoverable from the time for
5 performance on the amount due less all deductions to which the party in breach is entitled.”
6 RESTATEMENT (SECOND) OF CONTRACTS §354(1) (1981).

7
8 In *Manglona v. Commonwealth*, 2010 MP 10 (“*Manglona II*”), the Commonwealth
9 Supreme Court articulated the legal standard for determining an award of prejudgment interest:
10 the “trial court’s award of prejudgment interest must be equitable and compensate a party for its
11 actual losses.” *Manglona II*, 2010 MP 10 at ¶ 30. *Manglona II* enumerates several factors that the
12 Court might use to determine the appropriateness of a particular prejudgment interest rate: “(i)
13 the need to fully compensate the wronged party for actual damages suffered, (ii) considerations
14 of fairness and the relative equities of the award, (iii) the remedial purpose of the statute
15 involved, and/or (iv) such other general principles as are deemed relevant by the court.” *Id.* at ¶
16 29 (quoting *Wickham Contracting Co. v. Local Union No. 3, Int’l Brotherhood of Electrical*
17 *Workers*, 955 F.3d 831, 833-34 (2d Cir. 1992)). The plaintiff has the burden of proof. *See e.g.*,
18 *Bucheit v. PLO*, 388 F.3d, 351-52 (D.C. Cir. 2004) (holding that the plaintiff not entitled to
19 prejudgment interest in conversion case because the plaintiff submitted no proof as to entitlement
20 to prejudgment interest).

21
22 Although the Commonwealth Legislature established a 9 percent post-judgment interest
23 at 7 CMC § 4104, the Commonwealth Supreme Court in *Manglona II* ultimately concluded that
24 7 CMC § 4104 and other Commonwealth statutes are insufficient as a matter of law to establish
25 the prejudgment interest rate. *Manglona II*, 2010 MP 10 at ¶ 30. Instead, *Manglona II* holds that
26 prejudgment interest must be “equitable and compensate a party for its actual losses.” *Id.* In sum,
27
28

1 the Court, as instructed by the Commonwealth Supreme Court, use 7 CMC § 4104 or other
2 Commonwealth statutes to establish the prejudgment interest rate.

3 Here, the record establishes that MSC has carried its burden of proof with respect to the
4 prejudgment interest. The record indicates that MSC filed the initial complaint in this matter
5 nearly three and a half years ago, on July 9, 2013. During this time, MSC has been unable to use
6 the \$371,532.83 in unremunerated out-of-pocket expenses and \$12,646.17 in lost profits. The
7 long length of time between initiation and resolution of this matter favors the granting of
8 prejudgment interest to MSC.
9

10 The Court also finds that equity and fairness requires a substantial award of prejudgment
11 interest. Because of Mr. Feng's nonpayment, Mr. Jun was forced to sell his house in Korea so
12 that MSC could continue to pay its vendors. Tr. 632. Mr. Jun also used credit cards to pay for
13 some of the Feng-related debt and MSC incurred interests on those credit cards. Tr. 632.
14

15 The Court must now determine the appropriate rate of prejudgment interest. The Court
16 notes that MSC did not submit testimony or other evidence of prejudgment interest, nor is the
17 Court permitted to derive the prejudgment interest from Commonwealth Statutes. *Manglona II*,
18 2010 MP 10 at ¶ 30. Thus, the Court is compelled to turn to a source that is beyond reproach for
19 the source of prejudgment interest rate: the United States federal government. The federal
20 prejudgment interest rate is "the weekly average 1-year constant maturity Treasury yield." 28
21 U.S.C. § 1961. As of February 21, 2017, this rate is 0.66 percent. Selected Interest Rates (Daily)
22 – H.15, Board of Governors of the Federal Reserve System,
23 <https://www.federalreserve.gov/releases/h15/> (last visited June 2, 2017).
24

25 Because MSC has waited three and a half years to recover money from Mr. Feng, and
26 because of the adverse effects of Mr. Feng's nonpayment, the Court concludes that 0.66 percent
27 interest would confer a windfall upon Mr. Feng. *See Zenovic v. Crump*, BAP No. SC-15-1204-
28

1 FYJu, 2017 Bankr. LEXIS 270, *17-21 (B.A.P. 9th Cir. Jan. 31, 2017). Instead, the Court will
2 use the federal prime interest rate. The federal prime interest rate is generally higher than the
3 “weekly average 1-year constant maturity yield” rate set by the Federal Reserve. See Selected
4 Interest Rates (Daily) – H.15, Board of Governors of the Federal Reserve System,
5 <https://www.federalreserve.gov/releases/h15/> (last visited June 2, 2017) (compare the federal
6 funds (effective) which is .66 percent to the Bank prime loan which is currently 3.75 percent).
7

8 In light of the foregoing, the Court concludes that the federal prime rate is the appropriate
9 rate of prejudgment interest in this case. The federal prime rate will fairly compensate MSC for
10 the time that Mr. Feng refused to pay MSC.

11 The Court observes that the federal prime rate has changed over time.
12 FedPrimeRate.com, Prime Rate History,
13 http://www.fedprimerate.com//wall_street_journal_prime_rate_history.htm (last visited June 2,
14 2017). Thus, the Court must determine the relevant dates for calculating prejudgment interest.
15

16 Based on the record before the Court, the Court will fix the date for the computation of
17 prejudgment interest at April 29, 2013, the date MSC issued its final invoice to Mr. Feng. *See*
18 *generally*, Pl.’s Ex. 2. According to FedPrimeRate.com, on April 29, 2013, the federal prime
19 interest rate was 3.25 percent. The federal prime interest rate was raised to 3.5 percent on
20 December 17, 2015. The federal prime rate was raised to 3.75 percent on December, 15, 2016.
21

22 Based on the foregoing, the Court finds that 962 days elapsed between April 29, 2013
23 and December 17, 2015. The simple interest for this period is \$31,877.52 (applying the
24 $A=P(1+rt)$ calculation method). The Court finds that 364 days elapsed between December 17,
25 2015 and December 15, 2016. The simple interest for this period is \$13,000.00. The Court finds
26 that 179 days elapsed between December 16, 2016 and the date of this Order. The simple interest
27 for this period is \$6,826.92.
28

1 **2. Post-judgment Interest is Awarded to MSC.**

2 In the Commonwealth, “[e]very judgment for the payment of money shall bear interest at
3 the rate of nine percent a year from the date it is entered.” 7 CMC § 4101. This command is
4 mandatory. *Ishimatsu v. Royal Crown Ins. Corp.*, 2012 MP 17 ¶ 24. The Court therefore awards
5 MSC 9 percent interest per year on \$371,532.83, starting on the filing date of this Order.
6

7 **C. MSC is Entitled to a Mechanic’s Lien over Mr. Feng’s Leasehold Interest in Lot 004 A 06 in
8 the Amount of \$371,532.83.**

9 On December 4, 2013, this Court issued an order finding probable cause to permit a
10 mechanic’s lien over Mr. Feng’s leasehold estate in the amount of \$344,163.00. *MSC Corp. v.*
11 *Hai Yang Feng*, Civ. No. 13-0144 (NMI Super. Ct. Dec. 4, 2013) (Order at 3). MSC seeks a
12 modification of that award based on the evidence introduced during the trial, which partly
13 addresses the merits of the case as required by 4 CMC § 5805. Specifically, MSC requests that a
14 mechanic’s lien be granted in MSC’s favor in the amount of \$371,532.83.

15 During the course of the trial, spanning eighteen days, MSC provided a tremendous
16 amount of detail in support of its claim to a mechanic’s lien. MSC provided invoices and
17 payments that which show that the amounts paid and unpaid by Mr. Feng. *See* Pl.’s Ex. 2. It was
18 undisputed at trial that Mr. Feng paid a total of \$493,225.00 to MSC. MSC provided extensive
19 documentation via colored photographs of MSC’s progress at the construction site. *See* Pl.’s Ex.
20

21 3. Moreover, MSC provided an extremely detailed contemporaneously-kept written record of
22 MSC’s labor, materials, and equipment expenses which shows a day-by-day summary tally of
23 MSC’s expenses plus day-to-day record sheets. *See generally* Pl.’s Ex. 7; 15. Based on the
24 evidence submitted by MSC during the trial, MSC has satisfied its burden to establish that it is
25 entitled to a mechanic’s lien.
26

27 Although MSC initially claimed that the amount of the mechanic’s lien should be
28 \$344,163.00, the Court concludes that MSC’s proof at trial, including Plaintiff’s Exhibits 2, 3,

1 and 7, establish that MSC actually expended \$864,757 to construct the As Matuis house. For this
2 reason, the Court concludes that MSC actually proved that it is entitled to a mechanic's lien in
3 the amount of \$371,532.83. The Court hereby decrees that MSC has a mechanic's lien over Mr.
4 Feng's leasehold interest in Lot 004 A 06 in the amount of \$371,532.83.

5
6 In addition, the mechanic's lien law allows the Court to "[a]llow any fee or fees for legal
7 services rendered by the attorneys for any of the parties, and apportion the same as costs for
8 payment by and between the parties or any of them." 4 CMC § 5808(b). Because MSC
9 successfully sought and obtained a mechanic's lien over Lot 004 A 06, the Court hereby awards
10 attorney's fees to MSC. MSC shall submit its request for attorney's fees no later than the 14th
11 day after the day on which the Court issues this Order.

12
13 **D. MSC's Unjust Enrichment Claim**

14 Because the Court found that Mr. Feng was the breaching party and has awarded MSC
15 damages for the breach, the Court denies MSC's unjust enrichment claim.

16 **IV. CONCLUSION**

17 Based on the aforementioned reasons, the Court ORDERS as follows with respect to the
18 claims asserted by the parties:

- 19 1) MSC is awarded \$384,179 for its breach of contract claim, of which \$12,646 is for loss in
20 profits;
- 21 2) MSC is awarded prejudgment interest in the amount of \$51,704.44;
- 22 3) MSC is awarded post-judgment interest at 9 percent simple interest per year on \$371,532.82
23 plus the total amount of prejudgment interest;
- 24 4) MSC is awarded its costs in accordance with NMI Rule of Civil Procedure 54(d)(1);
- 25 5) MSC is awarded a mechanic's lien over Mr. Feng's leasehold interest in Lot 004 A 06 in the
26 amount of \$371,532.83;
- 27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 6) MSC is awarded reasonable attorney’s fees to the extent that those fees were necessary to litigate the mechanic’s lien against Mr. Feng;
- 7) MSC shall submit its claim for attorney’s fees no later than the 14th day after the day on which the Court issues this Order; and
- 8) Mr. Feng’s breach of contract claim is DISMISSED.

SO ORDERED this 13th day of June, 2017.

/s/
KENNETH L. GOVENDO
ASSOCIATE JUDGE