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UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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12 OPERATING ENGINEERS HEALTH AND
13 WELFARE TRUST FUND FOR NORTHERN
14 CALIFORNIA, et al.,

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Plaintiffs,

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v.

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SPILKER ASSOCIATES dba SPILKER, INC.,
18 A California Corporation; MARK P. SPILKER,
an individual; and MICHELLE SPILKER, an
individual,

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Defendants.

Case No.: C08-4520 SI

**NOTICE AND ACKNOWLEDGMENT
and JUDGMENT PURSUANT TO
STIPULATION**

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IT IS HEREBY STIPULATED by and between the parties hereto, that Judgment may be entered in the within action in favor of the plaintiffs BOARDS OF TRUSTEES FOR OPERATING ENGINEERS HEALTH AND WELFARE TRUST FUND, et al. (collectively "Plaintiffs" or "Trust Funds") and against Defendants SPILKER ASSOCIATES dba SPILKER, INC., a California Corporation, or successor entities; MARK P. SPILKER, an individual; and MICHELLE SPILKER, an individual, (collectively "Defendants"), as follows:

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1. Defendants entered into a valid Collective Bargaining Agreement with the Operating Engineers Local 3 Trust Funds (hereinafter "Bargaining Agreement"). This Bargaining Agreement has continued in full force and effect to the present time.

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JUDGMENT PURSUANT TO STIPULATION

CASE NO.: C08-4520 SI

1 2. Mark Philip Spilker, RMO/CEO/President of Defendant Spilker Associates dba
 2 Spilker, Inc., on behalf of all named Defendants, hereby acknowledges that he is authorized to
 3 receive service and has received the following documents in this action: Summons; Complaint;
 4 Dispute Resolution Procedures in the Northern District of California; Order Setting Initial Case
 5 Management Conference and ADR Deadlines; Case Management Conference Order; Standing
 6 Order for All Judges of the Northern District of California, Judge Illston's Standing Order;
 7 Instructions for Completion of ADR Forms Regarding Selection of an ADR Process; Stipulation
 8 and [Proposed Order] Selecting ADR Process; Notice of Need for ADR Phone Conference; ADR
 9 Certification by Parties and Counsel; Notice of Availability of Magistrate Judge to Exercise
 10 Jurisdiction; Consenting to a Magistrate Judge's Jurisdiction in the Northern District of California,
 11 ECF Registration Information Handout; and Welcome to the U.S. District Court, San Francisco.

12 3. Defendants have become indebted to the Trust Funds as follows:

13	December 2007	Reported contributions	\$9,580.80	
14		Liquidated Damages	\$1,268.24	
15		Interest (to 9/08/08)	\$68.26	
16				\$10,917.30
17	January 2008	Reported contributions	\$6,347.28	
18		Liquidated Damages	\$892.89	
19		Interest (to 9/08/08)	\$132.68	
20				\$7,372.85
21	February 2008	Reported contributions	\$7,405.16	
22		Liquidated Damages	\$1,012.53	
23		Interest (to 9/08/08)	\$186.51	
24				\$8,604.20
25	March 2008	Reported contributions	\$10,538.88	
26		Liquidated Damages	\$1,381.06	
27		Interest (to 9/08/08)	\$284.25	
28				\$12,204.19
29	April 2008	Reported contributions	\$8,800.36	
30		Liquidated Damages	\$1,176.33	
31		Interest (to 9/08/08)	\$1,080.14	
32				\$11,056.83
33	SUB-TOTAL			\$50,155.37
34		Attorneys Fees (to 12/4/08)		\$4,671.00
35		Cost of Suit, etc.		\$440.81
36	TOTAL			\$55,267.18

1 4. Defendants shall *conditionally* pay the amount of **\$49,536.13**, representing all
 2 above amounts, less liquidated damages in the amount of **\$5,731.05** *conditioned upon Trustees*
 3 *approval and timely compliance with all of the terms of this Stipulation*, as follows:

4 (a) On or before December 25, 2008, and no later than the 25th day of each
 5 month thereafter for a period of 18 months, through and including March 25, 2009, Defendants
 6 shall pay to Plaintiffs the amount of **\$3,021.00**. These payments may be made by joint check, to
 7 be endorsed prior to submission;

8 (b) Defendants shall have the right to increase the monthly payments at any
 9 time;

10 (c) Payments shall be applied first to unpaid interest and then to unpaid
 11 principal. The unpaid principal balance shall bear interest at the rate of 12% per annum in
 12 accordance with Plaintiffs' Trust Agreements.

13 (d) Payments shall be made payable to the Bay Area Painters and Tapers Trust
 14 Funds, and delivered to Michele R. Stafford at Saltzman & Johnson Law Corporation, 44
 15 Montgomery Street, Suite 2110, San Francisco, California 94104, **to be received on or before**
 16 **the 1st day of each month**, or to such other address as may be specified by Plaintiffs.

17 (e) At the time that Defendants makes their 17th monthly payment, Defendants
 18 may submit a written request for waiver of liquidated damages directed to the Board of Trustees,
 19 but sent to Saltzman and Johnson Law Corporation with the 17th payment. Defendants will be
 20 advised as to whether or not the waiver has been granted prior to the final payment hereunder.

21 5. In the event that any check is not timely submitted or submitted by Defendants but
 22 fails to clear the bank, or is unable to be negotiated for any reason for which Defendants are
 23 responsible, this shall be considered to be a default on the Judgment entered. If this occurs,
 24 Plaintiffs shall make a written demand to Defendants to cure said default. Default will only be
 25 cured by the issuance of a replacement, **cashier's check**, delivered to Saltzman and Johnson Law
 26 Corporation within seven (7) days of the date of the notice from Plaintiffs. If Defendants elect to
 27 cure said default, and Plaintiffs elect to accept future payments, all such payments shall be made

1 by cashier's check. In the event default is not cured, all amounts remaining due hereunder shall be
 2 due and payable on demand by Plaintiffs.

3 6. An audit of Defendants records has occurred in this matter. The audit report has not
 4 been completed to date. In the event that amounts are found due on audit, all such amounts will
 5 become part of this Judgment. In the event that this occurs, defendants have the right to request
 6 that the term of the payment plan be extended until all amounts are paid in full.

7 7. Beginning with contributions due for hours worked by Defendants' employees
 8 during the month of September 2008, to be postmarked no later than October 15, 2008, and for
 9 every month thereafter that the Bargaining Agreement remains in effect, Defendants **shall remain**
 10 **current in contributions** due to Plaintiffs under the current Collective Bargaining Agreement and
 11 under all subsequent Collective Bargaining Agreements, if any, and the Declarations of Trust as
 12 amended. **Defendants shall fax a copy of the contribution report for each month, together**
 13 **with a copy of that payment check, to Michele R. Stafford at 415-882-9287, prior to sending**
 14 **the payment to the Trust Fund office. To the extent that Defendants are working on a Public**
 15 **Works job, or any other job for which Certified Payroll Reports are required, copies of said**
 16 **Reports will be faxed to Michele R. Stafford concurrently with their submission to the**
 17 **general contractor, owner or other reporting agency.**

18 8. Failure by Defendants to remain current in its contributions shall constitute a
 19 default of the obligations under this agreement and the provisions of ¶12 shall apply. Any such
 20 unpaid or late paid contributions, together with 15% liquidated damages and 12% per annum
 21 interest accrued on the total contributions and liquidated damages, shall be added to and become a
 22 part of this Judgment and subject to the terms herein. Plaintiffs reserve all rights available under
 23 the applicable Bargaining Agreement and Declarations of Trust of the Trust Funds for collection
 24 of current and future contributions, and for any additional past contributions not included herein as
 25 may be determined by Plaintiffs, pursuant to employee timecards or paystubs, by audit, or other
 26 means, and the provisions of this agreement are in addition thereto. Defendants specifically waive
 27 the defense of the doctrine res judicata as to any such additional amounts determined as due.

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1 9. Defendants shall make full disclosure of all jobs on which they are working by
 2 providing Plaintiffs with an ongoing and updated list of jobs including, but not limited to, name
 3 and address of job, general contractor, certified payroll if a public works job, and period.
 4 **Defendants shall fax said updated list each month together with the contribution report (as**
 5 **required by ¶7 of this Stipulation) to Michele R. Stafford at 415-882-9287.**

6 10. Mark Philip Spilker acknowledges that he is the RMO/CEO/President, of Spilker
 7 Associates dba Spilker, Inc., and Michelle Spilker acknowledges that she is the spouse of Mark
 8 Philip Spilker, and both acknowledge that all successors in interest to Spilker Associates dba
 9 Spilker Inc., as well as assigns and affiliated entities, shall be bound by the terms of this
 10 Stipulation as Guarantors. All such entities specifically consent to the Court's jurisdiction as well
 11 as all other terms herein.

12 11. Prior to the last payment pursuant to this Stipulation, Plaintiffs shall advise
 13 Defendants, in writing, of the amount of the final lump sum payment and any additional amounts
 14 claimed pursuant to the Stipulation, which shall include, but not be limited to, any additional
 15 attorneys fees and costs incurred in this matter. Said amount shall be paid with the last payment,
 16 on or before September 1, 2009. Plaintiffs shall also advise whether the conditional waiver of
 17 liquidated damages have been granted in whole or in part. If liquidated damages remain due, these
 18 amounts will be included in the final payment. If Defendants are unable to do so, Defendants will
 19 continue to make monthly payments in the amount of \$4,165.00 until paid in full.

20 12. In the event that Defendants fail to make any payment required under ¶4 above, or
 21 fail to remain current in any contributions under ¶7 above, then,

22 (a) The entire amount of **\$55,267.18** plus interest, reduced by principal
 23 payments received by Plaintiffs, but increased by any unpaid contributions then due, plus 15%
 24 liquidated damages and 12% per annum interest thereon, shall be immediately due, together with
 25 any additional attorneys' fees and costs under section (d) below.

26 (b) A writ of execution may be obtained against Defendants without further
 27 notice, in the amount of the unpaid balance, plus any additional amounts under the terms herein,
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1 upon declaration of a duly authorized representative of the Plaintiffs setting forth any payment
 2 theretofore made by or on behalf of Defendants and the balance due and owing as of the date of
 3 default. Defendants specifically consent to the authority of a Magistrate Judge for all proceedings,
 4 including, but not limited to, Plaintiffs' obtaining a writ of execution.

5 (c) Defendants waive notice of entry of judgment and expressly waive all rights
 6 to stay of execution and appeal. The declaration or affidavit of a duly authorized representative of
 7 Plaintiffs as to the balance due and owing as of the date of default shall be sufficient to secure the
 8 issuance of a writ of execution.

9 (d) Defendants shall pay all additional costs and attorneys' fees incurred by
 10 Plaintiffs in connection with collection and allocation of the amounts owed by Defendants to
 11 Plaintiffs under this Stipulation.

12 13. Any failure on the part of the Plaintiffs to take any action against Defendants as
 provided herein in the event of any breach of the provisions of this Stipulation shall not be deemed
 14 a waiver of any subsequent breach by the Defendants of any provisions herein.

15 14. In the event of the filing of a bankruptcy petition by any of the Defendants, the
 16 parties agree that any payments made by Defendants pursuant to the terms of this judgment, shall
 17 be deemed to have been made in the ordinary course of business as provided under 11 U.S.C.
 18 Section 547(c)(2) and shall not be claimed by Defendants as a preference under 11 U.S.C. Section
 19 547 or otherwise. Defendants nevertheless represent that no bankruptcy filing is anticipated.

20 15. Should any provision of this Stipulation be declared or determined by any court of
 21 competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, and
 22 enforceability of the remaining parts, terms or provisions shall not be affected thereby and said
 23 illegal, unenforceable or invalid part, term, or provision shall be deemed not to be part of this
 24 Stipulation.

25 16. This Stipulation contains all of the terms agreed by the parties and no other
 26 agreements have been made. Any changes to this Stipulation shall be effective only if made in
 27 writing and signed by all parties hereto.

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1 17. This Stipulation may be executed in any number of counterparts and by facsimile,
2 each of which shall be deemed an original and all of which shall constitute the same instrument.

3 18. The parties agree that the Court shall retain jurisdiction of this matter until this
4 Judgment is satisfied.

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1 19. All parties represent and warrant that they have had the opportunity to be or have
2 been represented by counsel of their own choosing in connection with entering this Stipulation
3 under the terms and conditions set forth herein, and that they enter into this Stipulation voluntarily.

Dated: December 17, 2008

SPIKER ASSOCIATES dba SPIKER, INC.

By: /s/ Mark P. Spilker

Mark Philip Spilker, RMP/CEO/President

Dated: December 17, 2008

By: /s/ Mark P. Spilker

Mark Philip Spilker, Individually

Dated: December 18, 2008

By: /s/ Michelle Spilken

Michelle Spilker, Individually

Dated: December 22, 2008

SALTZMAN & JOHNSON
LAW CORPORATION

By: /s/ Michele R. Stafford

Michele R. Stafford

Attorneys for Plaintiffs

IT IS SO ORDERED

Dated: , 2008

Susan Minton

UNITED STATES DISTRICT COURT JUDGE