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Board of Trustees of the Western
8 Independent Shops Pension Trust

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 BOARD OF TRUSTEES OF THE
WESTERN INDEPENDENT SHOPS
13 PENSION TRUST,

14 Plaintiff,

15 vs.

16 WESTERN METAL DECORATING CO.
COIL DIVISION; WESTERN METAL
17 DECORATING CO. CUCAMONGA
DIVISION,

18 Defendants.
19

Case No. C 10-02003 EDL

**STIPULATION FOR DISMISSAL AND
~~PROPOSED~~ ORDER**

20
21 IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff BOARD OF
22 TRUSTEES OF THE WESTERN INDEPENDENT SHOPS PENSION TRUST (the “Board” or
23 “Plaintiff”, and “Trust,” respectively) and Defendant WESTERN METAL DECORATING CO.
24 COIL DIVISION (“Coil”) and Defendant WESTERN METAL DECORATING CO.
25 CUCAMONGA (“Cucamonga”) (collectively, “Defendants”) as follows:

- 26 1. Plaintiff has brought the above-captioned action, *Board of Trustees of the Western*
27 *Independent Shops Pension Trust v. Western Metal Decorating Co. Coil Division;*
28 *Western Metal Decorating Co. Cucamonga Division*, Case No. C 10-02003 EDL

1 (the “Action”), seeking, *inter alia*, the payment of delinquent contributions to the
2 Western Independent Shops Pension Trust pursuant to section 502 and 515 of
3 ERISA, 29 U.S.C. §§ 1132 and 1145. Plaintiff sought an additional amount for
4 interest, liquidated damages, and attorney’s fees and costs incurred in connection
5 with this action, as well as equitable relief.

6 2. Defendants were and are presently bound to a written collective bargaining
7 agreement (the “CBA”) dated February 1, 2009 that requires them to submit hours
8 reports and make contributions to the Trust on behalf of employees covered by the
9 CBA for every hour worked by such employees no later than the 20th day of each
10 month following the month in which such hours were worked. The CBA also binds
11 Defendants to the provisions of the “Second Amended Trust Agreement of the
12 United Steelworkers of America, AFL-CIO, District #38 and the Participating
13 Employers in Contractual Relations with the Union in District #38 for a Pension
14 Plan” (the “Trust Agreement”), dated December 12, 1975, as amended.

15 3. Defendants have failed to make any contributions for any hours worked during the
16 period June 2008 through July 2010, in the case of Coil, and October 2008 through
17 July 2010, in the case of Cucamonga (the “Delinquency Periods”). Contributions
18 for months prior to the Delinquency Periods were often made late, and in some
19 cases Defendants have failed to pay interest or liquidated damages on such late
20 payments.

21 4. Based on hours reports provided by Defendants to Plaintiff in the course of this
22 lawsuit, the accuracy of which has not been verified by Plaintiff, the amount of
23 unpaid contributions owed by each Defendant for its respective Delinquency Period
24 is as follows: \$58,491.00 for Coil , and \$16,087.45 for Cucamonga. These amounts
25 are hereinafter referred to as the “Reported Delinquency Amounts.” The Trust also
26 sought in this Action interest and liquidated damages on the Reported Delinquency
27 Amounts; liquidated damages and interest on past contribution amounts that were
28 paid late; and attorneys fees.

1 Amount are fully paid off. Defendants may accelerate payment of any portion of
2 the Outstanding Contribution Amount and the Attorney Fee Amount at any time.

3 11. On or before December 31, 2011, Defendants shall submit to and fully cooperate in
4 the completion of an audit of its payroll and contributions for hours worked during
5 the period from October 1, 2007 to November 30, 2010. Such audit shall be
6 performed at the Trust's discretion and expense. Any unreported hours or
7 insufficient contribution amounts found in the course of such audit shall be added to
8 the Outstanding Contribution Amount, with liquidated damages of 12%. If, in the
9 course of any such audit, the Trust finds unreported hours or insufficient
10 contribution amounts, Defendants shall pay an additional amount of 7.25% of
11 accrued interest, commencing as of December 10, 2010, for contribution amounts
12 attributable to the unreported hours or such insufficient contribution amounts. Any
13 additional monetary obligation required under this Paragraph shall be made through
14 an amended Stipulation of Dismissal.

15 12. Defendants shall obtain and maintain in force for three years (through December 1,
16 2013) a performance bond in the amount of \$10,000.00 for the benefit of the Trust,
17 payment of which shall be triggered if either Defendant becomes delinquent on any
18 current contribution. A delinquent payment as contemplated in this Paragraph shall
19 refer to Defendants' failure to make payment on any current contribution within 15
20 days of its due date as required by the applicable Trust Agreement. Such bond shall
21 be secured and in force no later than 20 days following the entry of this Stipulation.

22 13. The failure of either Defendant to perform any obligation required by Paragraphs 6
23 through 12 of this Stipulation shall constitute a default of such Defendant's or
24 Defendants' obligations under this Stipulation. In the event that either, or both, such
25 Defendants are in default, and Defendants have failed to cure such default within
26 five business days of receipt of written notice, then the Outstanding Contribution
27 Amount, plus accrued interest thereon, the Attorney Fee Amount, plus accrued
28 interest thereon, any other payments required under this Stipulation, less any

1 payments made by Defendants with respect to such amounts after entering into this
 2 Stipulation, plus an additional \$1,658.13 (representing liquidated damages due on
 3 prior late payments), shall immediately be due and payable, and the Trust shall
 4 immediately thereupon have the right to enter a judgment against such Defendant or
 5 Defendants for all such amounts, and for such other relief as the Court may deem
 6 appropriate to enforce the terms of this Stipulation (including but not limited to the
 7 obligations set forth in Paragraphs 11 and 12). If Plaintiff provides notice to
 8 Defendants of default on two occasions, and such defaults are cured, then Plaintiff
 9 need not provide any further notice in the event of any future default, and may
 10 proceed immediately to obtain and enter the judgment upon any such future default
 11 without first providing notice. Defendants shall interpose no objections or
 12 opposition to the Trust's efforts to obtain and enter such a judgment, except as to the
 13 rights of Defendants as provided in this Stipulation. The Trust shall also be entitled
 14 to a reasonable attorney's fee and costs incurred in enforcing this Stipulation and
 15 obtaining the judgment. After entry of the aforementioned judgment, the Trust may
 16 take any legal action to collect the judgment, and do not waive any rights regarding
 17 collection of the judgment by entering into this Stipulation.

18 14. It is further stipulated and agreed that the terms of this Stipulation shall be binding
 19 on the heirs, successors, and assigns of the parties to this action.

20 15. The Trust agrees that Defendants' complete performance of all terms and conditions
 21 of this Stipulation, including completion of the audit provided for and any additional
 22 payment obligations that arise under Paragraph 11 and provision of proof of the
 23 bond requirement required under Paragraph 12, shall discharge its obligations and
 24 liabilities with respect to the Reported Delinquency Amount, the Outstanding
 25 Contribution Amount, and the Attorney Fee Amount, as well as liquidated damages
 26 on prior late payments. The Trust further agrees that it will not reinstitute legal
 27 proceedings against Defendants seeking payment of the Reported Delinquency
 28 Amount, the Outstanding Contribution Amount, the Attorney Fee Amount,

1 additional attorneys' fees, liquidated damages, or interest, or any other remedy that
2 it sought or could have sought in this lawsuit with respect to the specific allegations
3 and claims made in the Action; provided, however, that nothing herein shall
4 preclude the Trust from enforcing this Stipulation, including but not limited to
5 obtaining and enforcing the judgment (and additional fees and costs) contemplated
6 in Paragraph 13, or from initiating legal proceedings to collect any other amounts
7 that may become owed to the Trust subsequent to the date of this Stipulation, or to
8 obtain equitable and/or legal relief in the event of any further delinquencies.

9 16. Upon Defendants' completion of their obligations as required under paragraphs 1 to
10 12 of this Stipulation, the parties shall file a Stipulation for Dismissal with Prejudice
11 of the Action.

12 17. The parties acknowledge that they have each had the opportunity to be represented
13 by independent counsel of their own choice throughout all of the negotiations that
14 preceded the execution of this Stipulation. Plaintiff and Defendants further
15 acknowledge that they have had adequate opportunity to perform whatever
16 investigation or inquiry each deemed necessary in connection with the subject
17 matter of this Stipulation prior to its execution and agree with the delivery and
18 acceptance of the consideration specified in this Stipulation.

19 18. This Stipulation may be executed in counterparts, which taken together shall
20 constitute the Stipulation and be binding upon and effective as to all parties hereto.

21 19. The parties hereto mutually state that they have read the foregoing Stipulation and
22 are fully aware of its contents and legal facts. This Stipulation constitutes the entire
23 agreement of the parties and is entered into on the dates below as indicated.

24 20. Except as specifically set forth herein, each party shall bear its own costs and
25 attorney fees.

26 21. All Notices with respect to this Stipulation, including but not limited to any notice
27 contemplated under Paragraph 13, shall be sent to the Parties' respective counsel of
28 record in this Action – Alison Tsao for Defendants and Robert F. Schwartz for

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Plaintiff. Notice to such counsel by email, fax, hand delivery or overnight express mail shall constitute adequate notice under this Stipulation.

22. The Court will incorporate the terms of this Stipulation into its Order and retain jurisdiction to enforce this Stipulation.

IT IS SO STIPULATED.

DATED: November 17, 2010

TRUCKER ♦ HUSS

By: /s/Robert F. Schwartz
Robert F. Schwartz
Attorneys for Plaintiff
BOARD OF TRUSTEES OF THE
WESTERN INDEPENDENT SHOPS
PENSION TRUST

DATED: November 17, 2010

Carlton DiSante & Freudenberger LLP

By: /s/Alison L. Tsao
Alison L. Tsao
Attorneys for Defendants
WESTERN METAL DECORATING CO.
COIL DIVISION and WESTERN METAL
DECORATING CO. CUCAMONGA
DIVISION

I attest that my firm has obtained Ms. Tsao’s concurrence in the filing of this document.

DATED: November 17, 2010

TRUCKER ♦ HUSS

By: /s/Robert F. Schwartz
Robert F. Schwartz
Attorneys for Board of Trustees of the Western
Independent Shops Pension Trust

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~~PROPOSED~~ ORDER

The above-stated Stipulation is incorporated herein in its entirety and made an order of this Court. This action is hereby dismissed. The Court retain jurisdiction to enforce the above-stated Stipulation.

Dated: November 22, 2010

Elizabeth D. Laporte
UNITED STATES MAGISTRATE JUDGE
ELIZABETH D. LAPORTE

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