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9 UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 F. G. CROSTHWAITE, et al., as Trustees of
 of the OPERATING ENGINEERS' HEALTH
 12 AND WELFARE TRUST FUND, et al.

Case No.: C12-6567 WHA

13 Plaintiffs,
 v.

**NOTICE OF ACKNOWLEDGEMENT
 AND JUDGMENT PURSUANT TO
 STIPULATION**

14 ZAYAS INCORPORATED, a California
 15 Corporation, *aka* ZAYAS EXCAVATING, INC.,
aka ZAYAS EXCAVATING, and *fka* ALBERT
 16 ZAYAS EXCAVATING, INC., *aka* ALBERT
 ZAYAS EXCAVATING, a dissolved California
 17 Corporation,

18 Defendant.

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20 IT IS HEREBY STIPULATED and AGREED (the "Stipulation" or "Judgment") by and
 21 between the parties hereto, that Judgment shall be entered in the within action in favor of the
 22 Plaintiffs OPERATING ENGINEERS' HEALTH AND WELFARE TRUST FUND, et al.
 23 (collectively "Plaintiffs" or "Trust Funds") and against Defendant ZAYAS INCORPORATED, a
 24 California Corporation, *aka* ZAYAS EXCAVATING, INC., *aka* ZAYAS EXCAVATING, and
 25 *fka* ALBERT ZAYAS EXCAVATING, INC., *aka* ALBERT ZAYAS EXCAVATING, a
 26 dissolved California Corporation, and/or alter egos and/or successor entities (collectively
 "Defendant"), as follows:

- 27 1. Defendant entered into a valid Collective Bargaining Agreement with the Operating
 28

1 Engineers Local 3 Trust Funds (hereinafter “Bargaining Agreement”). This Bargaining Agreement
2 has continued in full force and effect to the present time.

3 2. MICHAEL ALBERT ZAYAS hereby acknowledges that he is authorized to
4 receive service and has received the following documents in this action on behalf of all named
5 Defendant: Summons; Complaint; Dispute Resolution Procedures in the Northern District of
6 California; Order Setting Initial Case Management Conference and ADR Deadlines; Standing
7 Order – Magistrate Judge Elizabeth D. Laporte; Standing Order re Case Management Conference;
8 Standing Order for All Judges of the Northern District of California; Instructions for Completion
9 of ADR Forms Regarding Selection of an ADR Process; Stipulation and [Proposed Order]
10 Selecting ADR Process; Notice of Need for ADR Phone Conference; ADR Certification by Parties
11 and Counsel; ECF Registration Information Handout; Welcome to the U.S. District Court; Notice
12 of Assignment to a Magistrate Judge, Consent, Declination; Certification of Interested Entities or
13 Persons Pursuant to Civil Local Rule 3-16; Declination to Proceed Before a Magistrate Judge and
14 Request for Reassignment to a United States District Judge.

15 3. Defendant has become indebted to the Trust Funds as follows:

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		Principal	Liquidated Damages	Interest	Totals
1					
2	8/12	Contribution balance	\$4,904.29		
		20% Liquidated Damages	\$2,503.61		
3		10% p/a Interest (9/26/12-1/30/13)		\$280.50	
					\$7,688.40
4	9/12	Contribution balance	\$16,447.16		
		20% Liquidated Damages	\$3,823.71		
5		10% p/a Interest (10/26/12-1/30/13)		\$319.10	
					\$20,589.97
6	10/12	Contribution balance	\$20,035.03		
		20% Liquidated Damages	\$4,657.84		
7		10% p/a Interest (11/26/12-1/30/13)		\$218.94	
					\$24,911.81
8	11/12	Contributions	\$18,827.28		
		20% Liquidated Damages	\$3,765.46		
9		10% p/a Interest (12/26/12-1/30/13)		\$185.69	
					\$22,878.43
10	12/12	Contributions	\$6,514.08		
		20% Liquidated Damages	\$1,302.82		
11		10% p/a Interest (1/26/13-1/30/13)		\$8.92	
					\$7,825.82
		Liquidated damages (8/10-2/12, 4/12-6/12)	\$35,966.37		\$35,966.37
12		10% p/a Interest (8/10-2/12, 4/12-6/12)		\$7,483.81	\$7,483.81
		SUB-TOTALS	\$66,727.84	\$52,019.81	\$8,496.96
13					\$127,244.61
14		Attorneys' fees (12/17/12-2/11/13)		\$1,779.50	
		Costs of filing suit		\$350.00	
					\$2,129.50
15		SUB-TOTAL			\$131,503.61
		Credit (Lawson Mechanical payment)			<\$26,599.16>
16		TOTAL			\$104,904.45

17 4. Defendant shall *conditionally* pay the amount of **\$52,884.64**, representing all of the
18 above amounts, less conditionally waived liquidated damages in the amount of **\$52,019.81**. *This*
19 *conditional waiver is expressly conditioned upon timely compliance with all of the terms of this*
20 *Stipulation*, as follows:

21 (a) Beginning on or before February 25, 2013, and continuing on or before the
22 25th day of each month thereafter, for a period of twelve (12) months, through and including
23 January 25, 2014, Defendant shall pay to Plaintiffs the amount of **\$5,000.00** per month.

24 (b) Payments may be made by joint check, cashier's check or other irrevocable
25 form of payment, which shall be endorsed by Defendant prior to submission to Plaintiffs. Any and
26 all joint checks received for amounts owed under the Stipulation shall be applied to reduce the
27 balance due. Any payments made by joint check, made based on amounts found due by certified
28 payroll or other manner and/or any payment for which a lien release is required shall not take the

1 place of a regular monthly stipulated payment unless agreed to by the parties.

2 (c) Defendant shall have the right to increase the monthly payments at any
3 time, without penalty.

4 (d) Payments shall be applied first to unpaid interest and then to unpaid
5 principal. The unpaid principal balance shall bear interest at the rate of 10% per annum from
6 January 31, 2013, in accordance with the Collective Bargaining Agreements and Plaintiffs' Trust
7 Agreements.

8 (e) Checks shall be made payable to the *Operating Engineers Local 3 Trust*
9 *Funds*, and delivered on or before each due date to Michele R. Stafford at Saltzman & Johnson
10 Law Corporation, 44 Montgomery Street, Suite 2110, San Francisco, California 94104, or to such
11 other address as may be specified by Plaintiffs, to be received on or before the 25th day of each
12 month.

13 (f) At the time that Defendant makes its 11th payment, Defendant may submit
14 a written request for waiver of liquidated damages directed to the Board of Trustees, but sent to
15 Saltzman and Johnson Law Corporation with the 11th payment. Defendant will be advised as to
16 whether or not the waiver has been granted prior to the final payment hereunder. Such waiver will
17 not be considered until and unless all other amounts are paid in full and Defendant's account is
18 current.

19 If the waiver is granted, upon bank clearance of Defendant's last payment of the
20 conditional balance and confirmation that Defendant's account is otherwise current, Plaintiffs will
21 file a Notice of Satisfaction of Judgment with the Court. However, if the waiver is denied,
22 monthly payments will continue until all liquidated damages not waived have been paid.

23 (g) Defendant shall pay all additional attorneys' fees and costs incurred by
24 Plaintiffs in connection with collection and allocation of any amounts owed by Defendant to
25 Plaintiffs, regardless of whether or not Defendant defaults herein. All additional amounts due
26 pursuant to the provisions hereunder shall also be paid in full with the January 25, 2014 stipulated
27 payment.

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1 (h) Prior to the last payment pursuant to this Stipulation, Plaintiffs shall advise
2 Defendant, in writing, as to the final amount due, including interest and all additional attorneys'
3 fees and costs incurred by Plaintiffs in connection with collection and allocation of the amounts
4 owed to Plaintiffs under this Stipulation.

5 (i) Failure to comply with any of the above terms shall constitute a default of
6 the obligations under this Agreement and the provisions of ¶11 shall apply.

7 5. Beginning with contributions due for hours worked by Defendant's employees
8 during the month of January 2013, which are due by February 15, 2013, and delinquent if not
9 received by February 25, 2013, and for every month thereafter, Defendant **shall remain current**
10 **in reporting and payment of any contributions** due to Plaintiffs under the current Collective
11 Bargaining Agreements and under all subsequent Collective Bargaining Agreements, if any, and
12 the Declarations of Trust as amended. **Defendant shall submit a copy of the contribution report**
13 **for each month, together with a copy of those payment checks, either by email to both**
14 **mstafford@sjlawcorp.com and vanessa@sjlawcorp.com, or by facsimile to Michele R.**
15 **Stafford at 415-882-9287, or to such other email or fax number as may be specified by**
16 **Plaintiffs, concurrently with sending the payment to the Trust Fund office.** Failure by
17 Defendant to timely submit copies of current contribution reports and payments or report of "no
18 employees," if applicable, to Michele R. Stafford as described above shall constitute a default of
19 the obligations under this agreement and the provisions of ¶11 shall apply.

20 This requirement shall be in effect, regardless of whether or not Defendant has work for
21 any particular month. If Defendant has no employees working, Defendant shall submit the
22 monthly report stating "no employees" or "no work." The reporting requirement shall apply to all
23 accounts that Defendant has with the Trust Fund. A contribution report must be submitted for each
24 account, every single month, unless an account is confirmed as closed by the Trust Fund and/or
25 Union.

26 6. Defendant shall make full disclosure of all jobs on which they are working by
27 providing Plaintiffs with an ongoing and updated list of jobs by using copies of the attached
28 *Exhibit A*, including, but not limited to, the name and address of job, general contractor

1 information, certified payroll if a public works job, and period of work. **Defendant shall submit**
2 **said updated list each month together with the contribution report (as required in above ¶5,**
3 **by fax or email) to Michele R. Stafford.** This requirement remains in full force and effect
4 regardless of whether or not Defendant has ongoing work. In this event, Defendant shall submit a
5 statement stating that there are no current jobs. To the extent that Defendant is working on a
6 Public Works job, or any other job for which Certified Payroll Reports are required, at Plaintiffs'
7 request, copies of said Reports will be emailed or faxed to Michele R. Stafford, concurrently with
8 their submission to the general contractor, owner or other reporting agency. Failure by Defendant
9 to timely submit updated job lists shall constitute a default of the obligations under this agreement.

10 7. Failure by Defendant to remain current in reporting or payment of contributions
11 shall constitute a default of the obligations under this agreement. Any such unpaid or late paid
12 contributions shall violate the condition for waiver of liquidated damages and shall be added to
13 and become part of this Judgment, together with 20% liquidated damages and 10% per annum
14 interest accrued on contributions, and shall be subject to the terms herein. Plaintiffs reserve all
15 rights available under the applicable Bargaining Agreements and Declarations of Trust of the
16 Trust Funds for collection of current and future contributions, and for any additional past
17 contributions not included herein as may be determined by Plaintiffs, pursuant to employee
18 timecards or paystubs, by audit, or other means, and the provisions of this agreement are in
19 addition thereto. Defendant specifically waives the defense of the doctrine *res judicata* as to any
20 such additional amounts determined as due.

21 8. Audit: Should the Trust Funds request an audit of Defendant's payroll records in
22 order to confirm proper reporting and payment of contributions pursuant to the Bargaining
23 Agreement, any failure by Defendant to comply with said request or with an audit in progress, if
24 any, shall constitute a default of the obligations under this Agreement.

25 (a) In the event that Defendant has an audit in progress, but not yet complete
26 (and thus not included herein), and amounts are found due, Plaintiffs shall send a written demand
27 to Defendant by first class mail for payment in full of the amounts found due in the audit,
28 including contributions, liquidated damages, interest and audit fees.

1 (b) Defendant will be provided with ten (10) days in which to review the audit,
2 and provide any evidence to contest the findings in the event that Defendant does not agree with
3 the total found due. Once the ten (10) day review period expires, in the event that the audit is not
4 contested, payment in full shall be delivered to Michele R. Stafford, made payable to “*Operating*
5 *Engineers’ Trust Funds*”.

6 (c) If the audit is contested, and Defendant provides documentation in support
7 of the dispute, Defendant shall be notified as to whether revisions will be made to the audit. If
8 revisions are not made, payment will be immediately due.

9 (d) If revisions are made to said audit as a result of the dispute, payment in full
10 of the revised amount shall be due within ten (10) days of the revised billing.

11 (e) If Defendant is unable to make payment in full, Defendant may submit a
12 written request to revise this Judgment, modifying the payment plan (by monthly amount and/or
13 payment term), to add the amounts found due in the audit to this Judgment, subject to the terms
14 herein. If the Judgment is so revised, Defendant shall execute the Amended Judgment or
15 Amendment to Judgment within ten (10) days of Plaintiffs’ preparation of said Amended
16 Judgment or Amendment to Judgment. Failure to execute the revised agreement shall constitute a
17 default of the terms herein.

18 (f) Failure by Defendant to submit either payment in full or a request to add the
19 amounts due to this Judgment within ten (10) days of the date of Plaintiffs demand shall constitute
20 a default of the obligations under this agreement. All amounts found due on audit shall
21 immediately become part of this Judgment.

22 9. Individual Defendant MICHAEL ALBERT ZAYAS (“Guarantor”) acknowledges
23 that he is the RMO/CEO/President of Defendant ZAYAS INCORPORATED, a California
24 Corporation, *aka* ZAYAS EXCAVATING, INC., *aka* ZAYAS EXCAVATING, and *fka* ALBERT
25 ZAYAS EXCAVATING, INC., *aka* ALBERT ZAYAS EXCAVATING, a dissolved California
26 Corporation, and that all successors in interest, assignees, and affiliated entities (including, but not
27 limited to parent or other controlling companies), and any companies with which Defendant joins
28 or merges, if any, shall also be bound by the terms of this Stipulation as Guarantors. This shall

1 include any additional entities in which MICHAEL ALBERT ZAYAS is an officer, owner or
2 possesses any ownership interest. Defendant, and all such entities, specifically consents to the
3 Court's jurisdiction, in writing at the time of any assignment, affiliation or purchase, as well as all
4 other terms herein.

5 10. In the event that any check is not timely submitted, is submitted by
6 Defendant/Guarantor but fails to clear the bank, or is unable to be negotiated for any reason for
7 which Defendant/Guarantor is responsible, Defendant/Guarantor shall be considered to be in
8 default of the Judgment entered. If Defendant/Guarantor fails to submit its contribution reports,
9 and/or certified payroll reports (if any) and/or job lists, and/or fails to comply with *any* of the
10 terms of the Stipulation herein, this too shall constitute a default. If this occurs, Plaintiffs shall
11 make a written demand by both email and regular U.S. Mail to Defendant/Guarantor to cure said
12 default *within seven (7) days of the date of the notice from Plaintiffs*. If caused by a failed check,
13 default will only be cured by the issuance of a replacement *cashier's check*, delivered to Saltzman
14 and Johnson Law Corporation within the seven (7) day cure period. If Defendant/Guarantor elects
15 to cure said default, and Plaintiffs elect to accept future payments, *all such future payments shall*
16 *be made by cashier's check* at Plaintiffs' request. In the event default is not cured, all amounts
17 remaining due hereunder shall be immediately due and payable on demand by Plaintiffs.

18 11. In the event that Defendant/Guarantor fails to make any payment required under ¶4
19 above, or fail to remain current in any contributions under ¶5 above or fail to timely provide the
20 monthly documents required by ¶¶5 and 6 herein, and that such default is not timely cured, the
21 following will occur:

22 (a) The entire balance of **\$104,904.45**, as specified in ¶3, plus interest, but
23 reduced by principal payments received from Defendant/Guarantor, in addition to any unpaid
24 contributions then due, plus 20% liquidated damages and 10% per annum interest on the unpaid or
25 late paid contributions, shall be immediately due and payable, together with any attorneys' fees
26 and costs incurred during the term of this Stipulation;

27 (b) A Writ of Execution may be obtained against Defendant/Guarantor and all
28 related entities without further notice, in the amount of the unpaid balance, plus any additional

1 amounts under the terms herein. The declaration of a duly authorized representative of the
2 Plaintiffs setting forth any payment theretofore made by or on behalf of Defendant, and the
3 balance due and owing as of the date of default, shall be sufficient to secure the issuance of a Writ
4 of Execution;

5 (c) Defendant/Guarantor waives notice of Entry of Judgment and any Request
6 for a Writ of Execution upon default, and expressly waives all rights to stay of execution and
7 appeal.

8 (d) Defendant/Guarantor shall pay all additional attorneys' fees and costs
9 incurred by Plaintiffs in connection with collection and allocation of the amounts owed by
10 Defendant/Guarantor to Plaintiffs under this Stipulation, whether or not a default occurs herein.

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

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

21 14. This Stipulation is limited to the agreement between the parties with respect to the
22 delinquent contributions and related sums enumerated herein, owed by Defendant/Guarantor to the
23 Plaintiffs. This Stipulation does not in any manner relate to withdrawal liability claims, if any.
24 Defendant/Guarantor acknowledges that the Plaintiffs expressly reserve their right to pursue
25 withdrawal liability claims, if any, against Defendant and all of their control group members, as
26 provided by the Plaintiffs' Plan Documents, Trust Agreements incorporated into their Collective
27 Bargaining Agreement, and applicable laws and regulations.

28 15. Should any provision of this Stipulation be declared or determined by any court of

1 competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, and
2 enforceability of the remaining parts, terms or provisions shall not be affected thereby and said
3 illegal, unenforceable or invalid part, term, or provision shall be deemed not to be part of this
4 Stipulation.

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

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

10 18. ~~The parties agree that the Court shall retain jurisdiction of this matter until this~~
11 ~~Judgment is satisfied.~~

12 19. Defendant/Guarantor represents and warrants that it has had the opportunity to be
13 or has been represented by counsel of its own choosing in connection with entering this
14 Stipulation under the terms and conditions set forth herein, that it has read this Agreement with

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1 care and is fully aware of and represents that it enters into this Stipulation voluntarily and without
2 duress.

3 Dated: February 13, 2013

**ZAYAS INCORPORATED, a California Corporation,
aka ZAYAS EXCAVATING, INC., aka ZAYAS
EXCAVATING, and fka ALBERT ZAYAS
EXCAVATING, INC., aka ALBERT ZAYAS
EXCAVATING, a dissolved California Corporation**

6 By: /S/ Michael Albert Zayas

7 Michael Albert Zayas
8 Its RMO/CEO/President

9 Dated: February 13, 2013

MICHAEL ALBERT ZAYAS

10 /S/ Michael Albert Zayas

11 Michael Albert Zayas
12 Individually, as Personal Guarantor

13 Dated: February 19, 2013

**OPERATING ENGINEERS' HEALTH &
WELFARE TRUST FUND, et al.**

14 By: /S/David E. Hayner

15 David E. Hayner
16 Collections Manager
17 Operating Engineers' Health & Welfare Trust Fund, et al.

18 Dated: February 19, 2013

SALTZMAN & JOHNSON LAW CORPORATION

19 By: /S/Michele R. Stafford

20 Michele R. Stafford
21 Attorneys for Plaintiffs
22 Operating Engineers' Health & Welfare Trust Fund, et al.

23 IT IS SO ORDERED.

24 IT IS FURTHER ORDERED that the calendar in this matter is vacated, ~~and that the Court shall~~
25 ~~retain jurisdiction over this matter.~~ The clerk shall **CLOSE** the file.

26 Dated: February 25, 2013



27 THE HONORABLE WILLIAM H. ALSUP
28 UNITED STATES DISTRICT COURT JUDGE

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EXHIBIT A

JUDGMENT PURSUANT TO STIPULATION

JOB REPORT FORM

*** Updated report must be faxed ((415) 882-9287) or emailed (mstafford@sjlawcorp.com) to Michele R. Stafford, Esq., at on the 30th day of each month ***

NOTE: Please spell out the names of projects, owners and general contractors (no abbreviations).

Employer Name: ZAYAS EXCAVATING, INC.

Report for the month of _____ Submitted by: _____

Project Name:			
Project Address:			
General Contractor:			
General Contractor Address:			
General Contractor Telephone #:		Project Manager Name:	
Project Manager Telephone #:		Project Manager email address:	
Contract #:		Contract Date:	
Total Contract Value:			
Work Start Date:		Work Completion Date:	
Project Bond #:		Surety:	

Project Name:			
Project Address:			
General Contractor:			
General Contractor Address:			
General Contractor Telephone #:		Project Manager Name:	
Project Manager Telephone #:		Project Manager email address:	
Contract #:		Contract Date:	
Total Contract Value:			
Work Start Date:		Work Completion Date:	
Project Bond #:		Surety:	

*** Attach additional sheets as necessary ***