

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation against:)	
)	
MICHAEL DAVID SCHWEITZER)	Case No. 1014-A
2367 Douglaston Glen)	
Escondido, CA 92026)	OAH No. 2012090142
)	
Civil Engineer License No. C 59658,)	
)	
Respondent.)	
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DECISION

Pursuant to Government Code section 11517, the Board for Professional Engineers, Land Surveyors, and Geologists of the State of California hereby adopts the attached Proposed Decision of the Administrative Law Judge as its Decision in the above-entitled matter.

In adopting this Proposed Decision as its Decision, the Board for Professional Engineers, Land Surveyors, and Geologists has reduced the penalty order pursuant to Government Code section 11517(c)(2)(B) as follows:

Condition 2 of the Order is revised as follows:

2. Respondent Michael David Schweitzer is hereby directed to pay to the Board for Professional Engineers, Land Surveyors, and Geologists the amount of \$1,000.00 for its cost of investigation and enforcement. Payment shall become due within 60 days after the effective date of the Board's Decision in this matter.

This Decision shall become effective on October 4, 2013.

IT IS SO ORDERED August 29, 2013.

Original Signed

BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
Department of Consumer Affairs
State of California

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND
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DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MICHAEL DAVID SCHWEITZER

Civil Engineer License No. C 59658

Respondent.

Case No. 1014-A

OAH No. 2012090142

PROPOSED DECISION

On May 21, 22, and 23, 2013, in San Diego, California, Alan S. Meth, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter.

Marichelle S. Tahimic, Deputy Attorney General, represented complainant.

Michael M. Edwards, Attorney at Law, represented respondent Michael David Schweitzer.

The matter was submitted on May 23, 2013.

FACTUAL FINDINGS

Jurisdiction

1. Richard B. Moore, PLS, Executive Officer, Board for Professional Engineers, Land Surveyors, and Geologists for the State of California (Board), filed Accusation No. 1014-A in his official capacity on June 22, 2012. Respondent filed a timely Notice of Defense dated July 17, 2012.

The accusation alleges that in 2008, respondent committed acts of deceit, misrepresentation or fraud, acts constituting breach of contract, and acts constituting unprofessional conduct in connection with his professional work on a project in National

City. The accusation further alleges that respondent committed acts of negligence in 2005 in connection with his professional work on a project in Temecula.

License History

2. On July 23, 1999, the Board issued Civil Engineer License number C 59658 to respondent, and at all relevant times, the license was in full force and effect.

3. Respondent obtained a B.S. degree in civil engineering from the University of Arizona in 1995 and then worked in San Francisco for several civil engineering firms until 2001 when he moved to San Diego and began working for Masson & Associates. He remained there until 2007 when he opened his own firm, SW Engineering (SW).

Butterfield Ranch Project--Temecula

4. In 2005, respondent, then employed by Masson & Associates, a civil engineering and surveying firm, was the senior project manager and the engineer of record for the Butterfield Ranch Shopping Center, a large commercial development at the intersection of Butterfield Stage Road and Temecula Parkway in Temecula, California (Butterfield Ranch project). Respondent prepared the Precise Grading Plans, Storm Drain Improvement Plans, Sewer Improvement Plans, and other plans.

5. In 2009, the Board was informed of a settlement in 2009 of a civil lawsuit filed by the owner of the Butterfield Ranch Project against Masson & Associates, and the settlement exceeded \$50,000.00. Accordingly, the insurer of Masson & Associates notified the Board of the settlement and the Board conducted an investigation.

6. As part of its investigation, the Board sent a letter to respondent, advised him of the allegations, and requested a response. In his response, respondent wrote a letter to the Board dated December 29, 2009 and indicated that he knew nothing of the lawsuit or the settlement until informed of these matters by the Board. Respondent provided the as-built drawings for the Grading Plans approved by the City of Temecula and the Sewer Plans approved by the Eastern Municipal Water District. Respondent wrote that he did not have access to the contracts, correspondence, and field notes for the project because they would be in the possession of Masson & Associates.

7. Regarding the claims of inadequate design of curb elevations at the parking lots, respondent wrote that there were three areas that required field revisions to achieve adequate flow, and there were cost impacts as a result of these changes. He wrote that he did not recall them being significant and he was not provided with any back charge information.

Respondent pointed to Grading Plan Sheet 3 of 14 and the area in front of Building E which was modified per Delta 3, and south of Building F which was modified per Delta 2 showing a two-foot valley gutter. On Grading Plan Sheet 4 of 14, respondent pointed to the

area north of future building G per Delta 2 showing a two-foot valley gutter in the parking lot.

National City Project

8. In 2007, LGI Delaware, LLC (LGI) owned industrial buildings located at 19th Street and Haffley Avenue in National City, California. Lee Gittleman was the principal of LGI. There were two old and deteriorating buildings on the property: a larger one on the north side of the property with an address on 19th Street (north building) and a smaller one on the south side of the property with a Haffley Street address (south building). There was an old railroad spur, fencing, and asphalt on the property. There was no retaining wall. Mr. Gittleman wanted to improve the land and the buildings by removing the railroad spur, remodeling the paved loading area, and remodeling the buildings.

LGI hired Ware Malcomb (Ware) as its architect on the project, Prevost Construction Inc. (Prevost) as the general contractor, and Miyamoto International, Inc. (Miyamoto) as the structural engineer to design a retaining wall. The project involved renovation and alterations of the north building and surrounding land. The interior work included upgrades and modifications to the bathrooms, walls, interiors, installation and demising of walls, painting, and so forth. Exterior work included construction and reconstruction of the loading dock, removal of the railroad spur, construction of a retaining wall, construction of some curbs, sidewalks, a fence, driveways, and so forth. The contract between LGI and Prevost provided that the cost of the project was \$985,502.00.

9. Mr. Gittleman needed a civil engineer to design grading plans and asked Ware to find one. Ware obtained a proposal but Mr. Gittleman was not satisfied with it and sought another proposal. Andrew Dzulynsky, a studio manager at Ware, contacted respondent by e-mail on October 25, 2007 and asked him to take a look at the National City project and provide a fee. Mr. Dzulynsky sent the prior proposal and the scope of work the prior engineer had used to respondent. The design for the north building provided for the construction of approximately 20 feet of additional driveway (AC Paving) alongside the existing concrete driveway of both the existing buildings, construction of a concrete masonry retaining wall with a maximum height of eight feet, construction of driveway entrances on the north side fronting the building, and construction of sidewalks. The proposal indicated a City of National City grading permit would be necessary for the construction of the proposed driveways. The proposal did not call for work to be done in the south building or behind it. Mr. Dzulynsky also provided a map of the work site.

Respondent and Mr. Dzulynsky spoke several times by phone, and respondent and Mr. Gittleman spoke by phone at length on December 17, 2007.

10. Brian Tisher was the project manager of the project for Ware. On October 22, 2007, he submitted a Permit and Plan Review Application to the City of National City (City) for the project. On January 22, 2008, the City issued a Building Permit. The building permit

also permitted the construction of the retaining wall. Work commenced on the retaining wall at approximately the beginning of February.

11. On December 19, 2007, Mr. Gittleman of LGI and respondent of SW entered into a contract for SW to provide professional services on the National City project. The contract provided:

“1. IMPROVEMENT PLANS

a.) Street Plans

Engineer shall design and coordinate the locations of five (5) proposed driveways on Haffley Street with the Client [LGI], Ware Malcomb and the City. The Engineer shall process the plans with National City in order to obtain an encroachment permit.

2. GRADING PLANS

a.) Grading and Drainage Plan

Engineer shall design the proposed site improvement and process the Grading Permit through the City of National City’s public works department.

b.) SWPPP

Engineer shall prepare a Stormwater Pollution Prevention Plan per National City and State of California requirements.

c.) SUSMP

Engineer shall preparea [sic] SUSMP per the City and State of California requirements.”

The cost of respondent’s services totaled \$11,500.00. The contract provided for a fixed fee of \$5,500.00 for the improvement plans and a fixed fee of \$6,000.00 for the grading plans.

The contract also provided that “If authorized by the Client, or if required because of changes in the Project, Engineer shall furnish services in addition to those set forth above.”

12. Mr. Gittleman arranged to have a topographical map (topo) sent to respondent in order for him to commence work on the grading plans, and respondent received them on December 20, 2007 and January 18, 2008. The topo, dated October 17, 2007, contained rough contours, was inaccurate, and was insufficient for respondent to prepare grading plans. Respondent notified Mr. Gittleman that the topo was inadequate.

13. In February 2008, Prevost contacted Ciremele Surveying Inc. (Ciremele) to prepare a topographical survey for the wall area around the north building using an assumed benchmark as vertical datum.

On February 25, 2008, respondent received the topo from Ciremele on assumed datum.

14. Respondent knew or should have known that the City required the benchmark to be per National City datum. Respondent knew or should have known that the City's checklist for grading plans and retaining walls included working drawings of:

“Profiles and cross-sections of all non-building retaining walls/crib walls shown. These include the top of wall and bottom of wall elevations, lengths, and finish grade and existing grade profiles at front of wall as well as back of wall. The elevations at all changes in wall grade (stepping sections) and corresponding lengths shown.”

Charles Nissley was a senior engineer technician for the City in 2008. He spoke to respondent or other engineers at SW and said where grading plans did not include the construction of buildings, the City would accept elevations on assumed datum.

15. On March 20, 2008, SW submitted a Precise Grading Plan of the 19th Street and Haffley Avenue project to the City. It was based on assumed datum contained in the Ciremele topo of February 25.

On April 1, 2008, respondent received the first plan check from the City.

On April 3, respondent notified Mr. Gittleman that the City will have the plans finished the following week.

16. On April 3, 2008, SW prepared a Contract Change Order (CCO # 1) and described the work in part as follows:

“1. TOPO AND BASE FILE COORDINATION

Engineer shall prepare field topo request and solicit bids for supplemental topo of surface improvement at east edge of site. Engineer shall create contours from supplemental field topo shots. Engineer shall edit existing CAD files to create a base topography file for grading plan preparation. Engineer shall modify architectural base files to match new topography file.”

The cost of these services was a fixed fee of \$2,500.00. Prevost on behalf of LGI approved CCO #1 and paid SW for the work set forth on the change order.

17. The work SW performed as described in CCO #1 was for work that had already been performed and was part of the original contract. Furthermore, the Ciremele

topo was adequate to prepare a grading plan and SW used it for that purpose. Respondent knew that the topo was done on assumed datum and even though the City's checklist required the use of the City's benchmark, SW submitted its grading plan on assumed datum and the grading plan was accepted by the City as of early April. Respondent through SW therefore breached his contract with LGI by charging LGI in CCO #1 and receiving \$2,500.00 for these services.

18. By e-mail on April 8, 2008, the City informed SW that it could submit its mylars which indicated that the City had approved the plans. The City had approved these plans based on a non-SUSMP form and also based upon grading plans that utilized a topographic survey with assumed benchmarks as vertical datum. Upon approval, the plans were to be sent to the City Engineer.

19. On April 17, 2008, Mr. Nissley made a routine inspection of the project before signing off on the grading and improvement plans that the City had approved. He observed illegal and unpermitted grading occurring behind the south building, and he had concerns about the retaining wall already built. In Mr. Nissley's opinion, the retaining wall should not have been permitted through the building plans because it was not part of the building and therefore required a grading permit or separate retaining wall permit before it could be constructed. Mr. Nissley advised Prevost, Ware, and SW that the retaining wall needed to be added to the grading plan. He then placed a "Stop Work" notice on the site.

A meeting was held in the City's offices that day. Mr. Nissley, along with other City staff attended, as did representatives from Prevost and Ware. Respondent attended by telephone. Mr. Tisher took notes and prepared minutes. The minutes reflect the following action taken during the meeting:

- a. The grading plan to include the retaining wall design and associated details was to be submitted in one document;
- b. Wall elevations (top and bottom of wall) had to be included in the grading plan documents;
- c. The retaining wall design sheet prepared by Miyamoto was to be included in the grading plan submittal;
- d. Ware was to forward retaining wall design to SW;
- e. The grading plan was to include a plan and profile elevation of the retaining wall;
- f. A SUSMP was to prepared and submitted; and
- g. A storm water maintenance agreement needed to be recorded and submitted to the City.

20. A second meeting was held on April 23, and a third was held on April 30, 2008. Among the items contained in the minutes of the April 30 meeting are the following:

- a. Ciremele was to provide a topo behind the south building, top and bottom of retaining as directed by respondent, and all topo to be tied to USGS monumentation;
- b. Mr. Tisher was to send revised site plans to respondent;
- c. Upon receipt of the site plan from Ware and the topo from Ciremele, SW was to prepare grading solutions for the area behind the south building; and
- d. SW was to meet with City staff to review grading solutions to the area behind the south building.

21. On May 1, 2008, SW prepared Contract Change Order #2 to include the following grading plan revisions:

“1. RETAINING WALL COORDINATION

Engineer shall revise the grading plan set to include detail sheet(s) for the retaining wall (to be prepared and signed by others). The structural engineer shall prepare a wall plan and profile sheet that will be coordinated into the set.

2. TOPO COORDINATION

Engineer shall coordinate with surveyor to obtain necessary survey information. Engineer shall integrate the topo shots into the revised Grading Plan. *Topo surveying is excluded from this contract.*

3. SUSMP

Engineer shall revise the NPDES coordination and prepare s SUSMP for a priority project. This will include the area of work behind the Haffley [south] building and the retaining wall.

4. GRADING PLAN REVISIONS

Engineer shall revise the grading plan to show the proposed work to be done behind the Haffley [south] Building. This revision will be processed through the City of National City for approvals.

5. DRAINAGE REPORT AND CALCULATION REVISIONS

Engineer shall revise the Drainage Report to include the area behind the Haffley [south] building, the drainage from the Haffley Building roof and the adjacent site to the south.”

Respondent charged a fee of \$950 for the retaining wall coordination, \$2,300 for the topo coordination, \$1,000 for the SUSMP, \$3,450 for the grading plan revisions, and \$1,000 for the drainage report. The total was \$8,700. Mr. Gittleman agreed to the change order and paid the fee.

22. On May 2, 2008, Ciremele prepared a second supplemental wall topo and driveway topo, and a third supplemental topo including survey shots of the proposed driveway locations.

23. SW prepared a SUSMP dated May 7, 2008, and revised it on May 27 and June 3, 2008. They were all submitted to the City.

24. The retaining wall designed by Miyamoto and permitted under the building permit was not within respondent’s scope of work. Nevertheless, the information the City required at the April 17, 2009 meeting regarding the retaining wall is information that should have been included in the grading plans, and respondent knew or should have known that. While the structural engineer prepared the plans for the wall, respondent as the civil engineer was not absolved of his responsibilities regarding the parameters of the wall. Respondent is required by the Professional Engineers Act to include items in a grading plan that are required by a city. The City on April 17 did not require changes to the plans, and there were no changes in the field conditions or changes by Mr. Gittleman. Accordingly, the grading plans LGI hired SW to prepare under the original contract should have included the information the City required at the April 17, 2008 meeting, and it was improper for respondent to charge LGI an additional \$950 in CCO #2 for revision of the grading plans.

25. The City on April 17 also required the preparation of a SSUMP. In order to determine if a SSUMP must be prepared, the City uses a document entitle “National Pollutant Discharge Elimination Systems (NPDES) Project Applicability Form.” The form in Section 1—Permanent Storm Water BMP Requirements—asks if the project is a new development and if the project redevelopment adds or creates 5,000 square feet of impervious surface. The form provides that if there is a yes answer to either of these questions, then nine other questions must be answered. The form provides that if any of the nine answers are Yes, then the project is a “Priority Project” and must meet the requirements of the City’s SUSMP ordinance. However, if none of the answers is Yes, then the project is considered not to be a priority project and a SUSMP is not required.

Tracy Santucci, a licensed civil engineer employed by SW, completed a NPDES for the National City Project. She indicated that the project added or created 5000 square feet of impervious water, but answered No to the nine questions. As a result of those answers, the project was not considered a priority project and a SUSMP was not required.

Question 8 of the NPDES asked if the project: “Parking lot greater than or equal to 5,000 square feet OR with at least 15 parking spaces and potentially exposed to urban runoff?” Ms. Santucci checked the No box.

The City determined at the April 17, 2008 meeting that a SUSMP was required, which meant that it concluded that the project was a priority project. The consultant for the City who reviewed the NPDES concluded the project was a priority project under the category of parking lots.

There may have been some confusion on Ms. Santucci’s part whether the project involved a parking lot. There was no question that the development included substantially more than 5,000 square feet.

SW’s contract with LGI required the preparation of a SUSMP. The NPDES is not a SUSMP but a means by which it may be determined if a SUSMP is required. When the City required the preparation of a SUSMP, and respondent then prepared one, respondent did no more than perform one of the obligations required by the contract. There was no new work required even though more area of the property had to be considered. Respondent was therefore not entitled to charge LGI an additional \$1,000 for the preparation of a SUSMP.

26. The original contract provided that SW would prepare a Stormwater Pollution Prevention Plan per National City and State of California requirements. A SWPPP is required when the “disturbed area” (the surface area that is being graded or stripped of its existing surface) is greater than one acre. The disturbed area for the project was less than one acre and therefore a SWPPP was not required and not prepared. However, respondent never reduced his fee or showed a credit on the extra work he charged LGI to take this into account.

Mr. Gittleman’s Complaint

27. Mr. Gittleman signed a Complaint Form on June 16, 2009 and submitted it to the Board, which received it on June 22. Mr. Gittleman provided a timeline of the events. He complained that respondent did not act promptly, and respondent charged him extra for work on CCO #1 at a time when Mr. Gittleman had no choice but to pay and that the work was within the original scope of work. Mr. Gittleman described this as extortion. Mr. Gittleman further complained that respondent charged him an additional \$7,600 to fix his mistakes, and raised that to \$8,700 to include the SSUMP. Mr. Gittleman felt he had no choice but to pay because of deadlines in connection with the lessee (Costco) of the property. Mr. Gittleman believed that the quality of respondent’s work was poor and he did not provide some of the services included in the original contract.

Respondent’s Written Response

28. Respondent submitted a written response to Mr. Gittleman’s complaint by letter dated July 28, 2009. In connection with CCO #1, respondent explained “The existing

topography was to be provided by the Client, Mr. Gittleman. A file was received but upon field investigation it was learned by SW Engineering that the topo provided was not on the City datum as required by the City and the contour lines appeared to be faked in. SW Engineering had to prepare a 3D file from the information provided.”

In a letter dated September 29, 2009 to the Board, respondent wrote in connection with CCO #2 that the charges were for extra work required by the City after the illegal grading was identified on April 17, 2008. He also wrote that the original grading plans used contour data created by SW from the first topo and that due to the disturbed nature of the dirt behind the buildings when Ciremele performed its supplemental topo and the ongoing construction activity, it was decided to use the point information and not to regenerate contours.

Complainant's Expert Witness

29. Robin B. Hamers served as the Board's expert. He was first licensed as a civil engineer in California in 1980. He operates a small firm in Costa Mesa and specializes in land development including subdivisions, boundaries, parcel maps, tract maps, condominium plans, street improvement plans, grading plans, and so forth. He has served as a consultant for the Board for more than ten years and has also provided consulting services to other public agencies.

Mr. Hamers reviewed the Board's investigation reports and supporting exhibits and wrote reports analyzing the Butterfield Ranch project and the National City project, and testified at the hearing.

Butterfield Ranch—Report

30. Mr. Hamers reviewed, among other things, a full set of 14 sheets of the Precise Grading Plans, sewer improvement plans, and respondent's response to the investigation. Based upon respondent's admission in his letter to the Board that he committed three errors and based upon his review of the grading plans, Mr. Hamers concluded that the errors in the grading plans constituted negligence. He pointed out that the errors resulted in inadequate slopes to drain the parking lot water. He determined that respondent was not negligent with regard to his work on the sewer improvement plans and the storm drain improvement plans.

Butterfield Ranch—Testimony

31. In his testimony at the hearing, Mr. Hamers reiterated that respondent was negligent in preparing his grading plans because the area did not drain properly, resulting in damages. He reasoned that the plans should not have had any deficiencies that required reconstruction of improvements or changes after the plan was issued, as occurred here. The changes required included the addition of a concrete valley gutter and revising the path for water to flow.

On cross examination, Mr. Hamers testified the standard of care required that the plans be perfect and do the job for which they were created. He recognized there were different kinds of errors, but the professional design had to be perfect.

National City—Report

32. In his report, Mr. Hamers analyzed each of the complaints Mr. Gittleman made in his letter of complaint to the Board. He concluded respondent was not negligent or incompetent in the preparation of the grading plans, respondent was not negligent nor in breach of his contract for the time it took to prepare the grading plans after he received the topo from Ciremele, and he was not negligent or in breach of the contract for refusing to attend contractor meetings without compensation. Mr. Hamers did conclude that respondent was in breach of his contract with Mr. Gittleman for not reducing his fee for work in the original contract relating to the SWPPP that was not prepared, and for requiring additional fees for services that were included in the original contract. He also found respondent failed to provide engineering services that were consistent with the laws, codes, ordinance, rules, and regulations applicable to the project and attempted to use the occasion of the change of scope of the project to charge the client to bring his plans up to the City's requirements. He also found that respondent was guilty of deceit when he made misrepresentations to Mr. Gittleman and to the Board regarding the reason for the first change order and the topographic survey provided by Ciremele. He added that respondent or someone in his employ was guilty of deceit when the NPDES Project Applicability Form was submitted to the City and it contained false information.

National City—Testimony

33. Mr. Hamers testified at length at the hearing and reiterated the findings he reached that were contained in his report. He pointed out that a retaining wall holds back dirt and changes the grade in the preexisting land, and if a grading plan omits a retaining wall, it cannot be correct, and therefore the retaining wall had to be included respondent's grading plan. He further testified regarding the wall that the fact a structural engineer designed it does not relieve respondent as a civil engineer from reporting the parameters of the wall on the grading plan. The grading plan has to show how existing improvements work with new improvements. Consequently, Mr. Hamers believed respondent breached his contract with Mr. Gittleman by charging for the revision of the grading plan relating to the retaining wall in CCO #2.

Mr. Hamers testified preparation of the SWPPP was part of the original contract for which respondent charged Mr. Gittleman a fixed fee, but a SWPPP was not prepared because the area of the project was less than one acre. Once respondent determined that a SWPPP was not necessary, respondent, according to Mr. Hamers, was obligated to inform Mr. Gittleman that it was not necessary and not charge him for it, or refund the money for the SWPPP, or give Mr. Gittleman a credit. Mr. Hamers believed respondent's failure to do any of these things constituted a breach of contract.

Regarding the topo, Mr. Hamers testified that as early as the end of January 2008, respondent should have known based upon an e-mail and attached information received by SW from the City that the topo had to be on the City's datum. Respondent's contract with Mr. Gittleman did not require respondent to prepare a topo but rather it was anticipated that Mr. Gittleman would provide one. Respondent, however, needed one to prepare the grading plans. Mr. Hamers believed respondent should have contacted Mr. Gittleman to have him inform the surveyor not to use assumed datum. In any event, Mr. Hamers did not see the need for respondent to perform any field investigation in connection with the topo he received from Ciremele, nor did he see a change in the project that would require a change order and additional fees. Mr. Hamers added that the work respondent claimed to have done in connection with the topo from Ciremele was not necessary because the Ciremel survey provided all the elevations needed to respondent to prepare the grading plan, even on the wrong datum

As for the SUSMP, Mr. Hamers explained that the checklist prepared by Ms. Santucci was not a SUSMP and that it was required by the original contract, not by changes in the project or demands by the City. Mr. Hamers reasoned that the SUSMP was required solely because the project exceeded 5000 square feet.

Respondent's Expert Witness

34. Gary Pino was respondent's expert witness. He graduated from UCLA with a degree in civil engineering in 1971 and became a registered civil engineer in 1973. He has practiced civil engineering in San Diego County for more than 40 years. He worked for the County of San Diego for three years and for the last 37 years has had his own company in North San Diego County. He is active in a number of political, land development, and conservancy organizations, including the North County Civil Engineers and Land Surveyors Association. He met respondent through this organization, and they have attended meetings together over the years. They have known each other for 10 years. Respondent contacted Mr. Piro and asked him to serve as a consultant. He has served as an expert in the past and has testified in boundary disputes and construction defect cases.

Mr. Piro reviewed the Board's investigation report and Mr. Hamers' reports, and supporting exhibits and then conducted an independent investigation. He interviewed numerous people involved in the National City project and inspected the site. He did not write any reports but wrote a declaration dated April 4, 2013. He found the investigation of the National City project was difficult because the events occurred five years ago and some of the witnesses' memories had faded.

Butterfield Ranch

35. Mr. Piro testified he did not spend much time on the plans but reviewed them with respondent. He determined that respondent had made three elevation changes but could not determine if they were required because of design errors or they were staked incorrectly. He indicated that they were corrected in the field. Mr. Piro testified it is common to have

field meetings because there are things which cannot be known in advance, such as an underground spring or an unforeseen utility line or easement.

In Mr. Piro's opinion, respondent's plans met the standard of care and the changes in the plans were not due to deficiencies. He noted that there were hundreds of points on the plans and the plans were clear and concise. He read them as a whole.

Mr. Piro believed that the term standard of care was a legal term and that it meant that the engineer must do the best he or she can to make a project perfect, but he recognized that some of the work was done by employees and it was impossible to manage others to the extent necessary to insure complete accuracy. He believed that an engineer must be as accurate as possible. He testified he has never seen a perfect set of plans, and that is why there are revision blocks on plans. He did not believe the standard of care meant there could be no errors in the plans or that plans cannot be changed in the field.

National City

36. In Mr. Piro's view, the retaining wall was not within the scope of work and the grading plans only had to include the wall by reference because the wall was permitted as part of the building permit.

Mr. Piro testified that Mr. Nissley, by including the area behind the south building, which was not within respondent's scope of work, increased the amount of area that had to be considered in respondent's grading plans, and he was therefore entitled to charge extra for that work. He believed that the City by requiring additional work added work that was beyond the original contract and he was entitled to be paid for it.

Mr. Piro did not believe that Mr. Gittleman was entitled to a refund for the SWPPP because the fee was a lump sum, and respondent was required to perform work to determine if a SWPPP was necessary. He felt respondent was entitled to the fee whether he prepared a SWPPP or not. He added that Mr. Gittleman said he wanted respondent to include a SWPPP in the bid because he had obtained other bids which included the SWPPP and he wanted the bids to cover the same subjects.

Regarding the topo, Mr. Piro agreed with respondent that extra work was required after he received the Ciremele topo, including ascertaining elevation and contours, and preparing a 3D model. He believed it was appropriate for respondent to charge Mr. Gittleman for this extra work.

Mr. Piro did not believe respondent or SW submitted false information to the City in the NPDES checklist but acknowledged there might have been some confusion. He testified that a SUSMP was not originally required and the later decision to require respondent to prepare one was extra work for which respondent was entitled to additional compensation. Mr. Piro believed the \$1,000 respondent charged for the SUSMP was fair and the \$950 for work on the retaining wall was "cheap."

Allegations of Deceit, Misrepresentation, or Fraud

37. The accusation alleges respondent committed four acts of deceit, misrepresentation, or fraud in connection with the National City project. It is alleged that on April 3, 2008, respondent represented that the plan check would be completed in one week when in fact respondent had received the City's comments from the plan check on April 1.

On April 3, 2008, a Thursday, Ms. Santucci sent an e-mail to Mr. Gittleman and indicated they had received the plan check comments back from the City the day before and they were minor. She indicated SW was working with the City to address their comments and were attempting to submit the plans that day. She added they would have a better idea of the timeline for approval later in the day or on Monday.

A few minutes later on April 3, respondent sent an e-mail to Mr. Gittleman and indicated that they were set to get approvals the following week for their scope of work and they would be following up with the City to make sure this occurred. Respondent included a copy of CCO #1 for the coordination of the topographic survey and work related to another matter.

Based upon these e-mails, it was not established that respondent committed acts of deceit, misrepresentation, or fraud.

Respondent's Testimony

38. Regarding the National City project, respondent testified that he received a phone call from Ware and then received an e-mail that described the scope of work Mr. Gittleman wanted him to bid on. Respondent had several telephone conversations about the proposal before the contract was signed.

Respondent explained that he told Mr. Gittleman he needed a topo before he could prepare the grading plans, and Mr. Gittleman agreed to obtain one. In early January, Mr. Gittleman sent one first as a PDF and then as a CAD. Respondent told Mr. Gittleman the topo was insufficient for design work and asked Mr. Gittleman to contact a surveyor for additional points. At first they considered having SW perform the topo but eventually it was decided that another surveyor would prepare it, and on February 25, 2008, respondent received the Ciremele topo. Respondent felt the topo was not adequate to do the design work because it was not on the City datum. Respondent testified that Mr. Gittleman was adamant that he get the plans in, and consequently, he submitted them to the City on the assumed datum. He believed Mr. Gittleman knew that he had to do additional work to the topo in order to prepare the plans, including adjusting the points so they could use a 3D surface. He testified the plans were accepted by the City and approved, even though they were on assumed datum. He believed Mr. Hamers had the time line wrong and that it was appropriate for him to seek a change order and additional compensation for his work. He testified that CCO #2, not CCO #1, was because the City required the plans be based on the City's benchmark, and that required extra work.

As for the SUSMP, respondent testified that Ms. Santucci initially determined that one was not required because it was a low priority. He testified he did not refund any funds to Mr. Gittleman for the SWPPP.

Respondent described the changes in the field on the Butterfield Ranch project as minor alterations and were typical. He believed that the plans should be viewed as a whole.

Respondent denied that he was deceitful in his contacts with Mr. Gittleman, Prevost, Ware, and to the Board.

Respondent testified he has spoken to his corporate attorney about his contracts to ensure they are written properly.

Costs

39. The Board incurred costs of investigation and enforcement of this matter in the following amounts: Technical expert costs – \$3,262.50 and Attorney General costs – \$23,562.50. The total of \$26,825.00 is reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code section 6775 provides in part:

“The board may, upon its own initiative or upon the receipt of a complaint, investigate the actions of any professional engineer licensed under this chapter or any person granted temporary authorization pursuant to Section 6760 and make findings thereon.

By a majority vote, the board may publicly reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer licensed under this chapter or may revoke the temporary authorization granted to any person pursuant to Section 6760 on any of the following grounds:

...

(b) Any deceit, misrepresentation, or fraud in his or her practice.

(c) Any negligence or incompetence in his or her practice.

(d) A breach or violation of a contract to provide professional engineering services.”

2. Title 16, California Code of Regulations, section 404 provides in part:

“(dd) For the sole purpose of investigating complaints and making findings thereon under Sections 6775 and 8780 of the Code, “negligence” as used in Sections 6775 and

8780 of the Code is defined as the failure of a licensee, in the practice of professional engineering or land surveying, to use the care ordinarily exercised in like cases by duly licensed professional engineers and land surveyors in good standing.”

3. Title 16, California Code of Regulations, section 475 provides in part:

“To protect and safeguard the health, safety, welfare, and property of the public, every person who is licensed by the Board as a professional engineer, including licensees employed in any manner by a governmental entity or in private practice, shall comply with this Code of Professional Conduct. A violation of this Code of Professional Conduct in the practice of professional engineering constitutes unprofessional conduct and is grounds for disciplinary action pursuant to Section 6775 of the Code. This Code of Professional Conduct shall be used for the sole purpose of investigating complaints and making findings thereon under Section 6775 of the Code.

(a) Compliance with Laws Applicable to a Project:

A licensee shall provide professional services for a project in a manner that is consistent with the laws, codes, ordinances, rules, and regulations applicable to that project. A licensee may obtain and rely upon the advice of other professionals (e.g., architects, attorneys, professional engineers, professional land surveyors, and other qualified persons) as to the intent and meaning of such laws, codes, and regulations.”

4. In this proceeding, complainant bears the burden of establishing the charges by clear and convincing evidence to a reasonable certainty. *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853. This requires the evidence be “of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth” of the charges (BAJI 2.62), and to be “so clear as to leave no substantial doubt.” *In re Angelia P.* (1981) 28 Cal. 3d 908, 919; *In re David C.* (1984) 152 Cal.App.3d 1189, 1208. If the totality of the evidence serves only to raise concern, suspicion, conjecture or speculation, the standard is not met.

It is incumbent upon the trier of fact to determine the standard of professional learning, skill and care required of respondent only from the opinions of the witnesses, including respondent, who have testified as expert witnesses as to such standard. The trier of fact must consider each such opinion and should weigh the qualifications of the witness and the reasons given for his or her opinion. The trier of fact must give each opinion the weight to which it deems it entitled.

5. In assessing whether respondent violated the standard of care in the proceeding, the starting place is to determine the relative weight to be given to the two witnesses who testified as experts. Based on their qualifications, both Mr. Hamers and Mr. Piro are qualified to offer expert opinions on the matters raised in this proceeding. However,

their testimony raised questions about whether they knew how to properly assess whether respondent's work on the Butterfield Ranch project met the standard of care.

Section 475 of the Regulations requires professional engineers to exercise the care ordinarily exercised in like cases. Mr. Hamers and Mr. Piro construed that requirement in wildly different ways. Mr. Hamers virtually required perfection in the preparation of design plans, while Mr. Piro believed the engineer does the best he or she can, and mistakes or changes are expected. Based upon their testimony, it is difficult for a trier of fact to solely rely upon the opinions of either of them.

Mr. Piro's testimony suffers from a second problem. He and respondent are friends. They have known each other for 10 years through meetings of a local association. It was apparent throughout Mr. Piro's testimony that he felt he needed to defend respondent. It cannot be concluded that Mr. Piro offered his testimony in an unbiased way.

Mr. Hamers' testimony was the opposite. He approached the issues in a fair and impartial way. He did not know respondent. He was meticulous and only answered a question or expressed an opinion if the underlying facts were accurate as he knew them. He did not go out of his way to either criticize or defend respondent. He frequently gave respondent the benefit of the doubt and disagreed with many of the complaints Mr. Gittleman leveled against respondent. Indeed, he found respondent had not committed negligence on any issue relating to the National City project.

Based on these considerations, Mr. Hamers' opinions are entitled to greater weight, particularly as they relate to the National City project.

6. The next step in determining whether respondent violated the standard of care and committed negligence is to assess the documentary evidence and relevant opinion relating to the Butterfield Ranch project against the burden of proof placed on complainant.

Work on this project took place eight years ago. The only evidence offered in this proceeding beyond the opinions of the two experts were the plans and respondent's written statement that there were three areas that required field revisions to achieve adequate flow, and there were cost impacts as a result of these changes. There was no evidence offered by complainant to corroborate or bolster the opinion of Mr. Hamers, nor was there such evidence offered by respondent. There was nothing to demonstrate why one opinion was more reasonable than the other or why one should be accepted over the other.

Complainant bears a heavy burden in this proceeding to prove by clear and convincing evidence to a reasonable certainty that respondent committed negligence in the preparation of grading plans on the Butterfield Ranch project. Complainant did not meet that burden.

7. Cause to impose discipline on respondent's license pursuant to Business and Professions Code section 6775, subdivision (c), and Title 16, California Code of Regulations,

section 404(dd), negligence in connection with the Butterfield Ranch project, was not established by reason of Legal Conclusions 4 through 6.

8. Cause to impose discipline on respondent's license pursuant to Business and Professions Code section 6775, subdivision (d), breach of contract in connection with the National City project, was established by reason of Factual Findings 17, 24, 25, 26, 32, and 33.

9. Business and Professions Code section 6775, subdivision (d), does not define the terms fraud, deceit, or misrepresentation. Civil Code section 1572 provides:

“Actual fraud, what. Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.”

Civil Code section 1710 provides:

“Deceit, what. A deceit, within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it.”

10. Cause to impose discipline on respondent's license pursuant to Business and Professions Code section 6775, subdivision (b), deceit, misrepresentation, or fraud, was not established by reason of Factual Finding 37.

11. The accusation alleges respondent committed three additional acts of deceit, misrepresentation, or fraud. Two of the allegations related to respondent's reasons for the two change orders. It was evidently his belief that he performed additional work beyond the scope of the original contract and for that additional work, he was entitled to additional compensation. The original contract is vague in its scope of work and is subject to interpretation. Respondent interpreted it in one way, and while the weight of the evidence established that his interpretation was wrong and that it did not justify the additional compensation, it cannot be concluded that his interpretation was deceitful or fraudulent as those terms are typically defined. Nor can it be concluded that respondent misrepresented anything. This was nothing more than a difference of opinion and interpretation, and that does not rise to the level of misconduct requiring the imposition of disciplinary action.

Another allegation of deceit, misrepresentation, or fraud relates to respondent's written response to the Board dated July 28, 2009 regarding CCO #1. Factual Finding 28. It appears that is this response, made more than a year after respondent worked on the National City project, respondent confused two topographical surveys. One survey provided to SW by Mr. Gittleman in January 2008 had contour lines that could be construed as appearing to be "faked in." Factual Finding 12. It was because of this topo that respondent requested a better one. The second topo was prepared by Ciremele; this topo was not prepared on the City datum. Factual Finding 13. It was respondent's view that the work he needed to do on the Ciremele topo, including preparing a 3D file, was extra work beyond the scope of the original contract. That his opinion was wrong does not mean it constituted deceit, misrepresentation, or fraud.

12. Cause to impose discipline on respondent's license pursuant to Business and Professions Code section 6775, subdivision (b), deceit, misrepresentation, or fraud, was not established by reason of Legal Conclusion 11.

13. Cause to impose discipline on respondent's license pursuant to Business and Professions Code section 6775, subdivision (g), and Title 16, California Code of Regulations, section 475, subdivision (a), unprofessional conduct in connection with the National City project, was established by reason of Factual Findings 17, 24, 25, 26, 32, and 33 and Legal Conclusion 8.

14. After three days of hearing, the testimony of 11 witnesses including two expert witnesses, and consideration of hundreds of pages of documents, this case turned out simply to involve interpretation of a poorly drafted contract written by respondent. That was probably respondent's biggest mistake. Mr. Gittleman's National City project cost in excess of one million dollars. This matter involved a few thousand dollars in disputed fees. The evidence established respondent should have refunded a portion of his original fee or offered a credit to Mr. Gittleman on additional fees because he did not prepare a SWPPP.

Respondent should not have charged Mr. Gittleman additional fees for work that was already required by the original contract. This all happened more than five years ago. Respondent has no history of prior disciplinary actions.

Based upon these consideration, a revocation or suspension of respondent's license, or a period of probation with terms and conditions, are disciplinary orders that are excessive and would serve no public purpose. The only reasonable and appropriate disciplinary order for this matter is a public reproof.

15. Cause to require respondent to reimburse the Board for its costs of investigation and prosecution of this matter pursuant to Business and Professions Code section 125.3 was established because complainant established cause for discipline.

The amount of the costs must be considered. The evidence established the Board incurred costs in the amount of \$26,825.00. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32, 45, the Supreme Court rejected a constitutional challenge to a cost regulation similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure the cost provision did not deter individuals from exercising their right to a hearing: An agency must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the agency must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the agency must consider a respondent's ability to pay; and the agency may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engage in relatively innocuous misconduct.

The accusation contained allegations of misconduct committed by respondent in connection with two projects. Allegations of negligence in connection with one of them, the Butterfield Ranch project, was not established. In connection with the National City project, it was established that respondent committed a breach of contract but did not commit other acts of misconduct alleged in the accusation. Thus, more than half of the case against respondent was not established, and what remained simply involved the interpretation of a contract. Under these circumstances, it would be appropriate to reduce the amount of the investigation and prosecution costs to \$5,000.00.

ORDER

1. The Decision in this matter constitutes the Public Reproof of respondent Michael David Schweitzer.

2. Respondent Michael David Schweitzer is hereby directed to pay to the Board for Professional Engineers, Land Surveyors, and Geologists the amount of \$5,000.00 for its

costs of investigation and enforcement. Payment shall become due within 60 days of the effective date of the Board's Decision in this matter.

DATED: June 12, 2013

Original Signed

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

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8
9 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND
GEOLOGISTS
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA
11

12 In the Matter of the Accusation Against:

Case No. 1014-A

13 **MICHAEL DAVID SCHWEITZER,**
CIVIL ENGINEER
14 **2367 Douglaston Glen**
Escondido, CA 92026

A C C U S A T I O N

15
16 **Civil Engineer License No. C 59658**

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

21 1. Richard B. Moore, PLS (Complainant) brings this Accusation solely in his official
22 capacity as the Executive Officer of the Board for Professional Engineers, Land Surveyors, and
23 Geologists, Department of Consumer Affairs.

24 2. On or about July 23, 1999, the Board for Professional Engineers, Land Surveyors,
25 and Geologists issued Civil Engineer License Number C 59658 to Michael David Schweitzer
26 (Respondent). The Civil Engineer License was in full force and effect at all times relevant to
27 the charges brought herein and will expire on December 31, 2013, unless renewed.
28

1 **JURISDICTION AND STATUTORY PROVISIONS**

2 3. This Accusation is brought before the Board for Professional Engineers, Land
3 Surveyors, and Geologists (Board), Department of Consumer Affairs, under the authority of the
4 following laws. All section references are to the Business and Professions Code unless otherwise
5 indicated.

6 4. Section 6775 of the Code states, in pertinent part that:

7 The board may receive and investigate complaints against
8 registered professional engineers, and make findings, thereon.

9 By majority vote, the board may reprove, suspend for a period not
10 to exceed two years, or revoke the certificate of any professional
11 engineer registered under this chapter:

12 . . .

13 (b) Who has been found guilty by the board of any deceit,
14 misrepresentation, or fraud in his or her practice.

15 (c) Who has been found guilty by the board of negligence or
16 incompetence in his or her practice.

17 (d) Who has been found guilty by the board of any breach or
18 violation of a contract to provide professional engineering services.

19 . . .

20 (g) Who in the course of the practice of unprofessional engineering
21 has been found guilty by the board of having violated a rule or
22 regulation of unprofessional conduct adopted by the board.

23 5. Section 118, subdivision (b), of the Code provides that the suspension, expiration,
24 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
25 disciplinary action during the period within which the license may be renewed, restored, reissued
26 or reinstated. Pursuant to Code section 6797, certificates of registration as a professional
27 engineer may be renewed at any time within three years after expiration.

28 **REGULATORY PROVISIONS**

6. Title 16, California Code of Regulations, section 404, defines “negligence” as
follows:

(dd) For the sole purpose of investigating complaints and making
findings thereon under Sections 6775 and 8780 of the Code,
'negligence' as used in Sections 6775 and 8780 of the Code is

1 defined as the failure of a licensee, in the practice of professional
2 engineering or land surveying, to use the care ordinarily exercised
3 in like cases by duly licensed professional engineers and land
4 surveyors in good standing. . . .

5 7. Title 16, California Code of Regulations, section 475, provides in part:

6 To protect and safeguard the health, safety, welfare, and property of
7 the public, every person who is licensed by the Board as a
8 professional engineer, including licensees employed in any manner
9 by a governmental entity or in private practice, shall comply with
10 this Code of Professional Conduct. A violation of this Code of
11 Professional Conduct in the practice of professional engineering
12 constitutes unprofessional conduct and is grounds for disciplinary
13 action pursuant to Section 6775 of the Code. This Code of
14 Professional Conduct shall be used for the sole purpose of
15 investigating complaints and making findings thereon under
16 Section 6775 of the Code.

17 (a) Compliance with Laws Applicable to a Project:

18 A licensee shall provide professional services for a project in a
19 manner that is consistent with the laws, codes, ordinances, rules,
20 and regulations applicable to that project. A licensee may obtain
21 and rely upon the advice of other professionals (e.g., architects,
22 attorneys, professional engineers, professional land surveyors, and
23 other qualified persons) as to the intent and meaning of such laws,
24 codes, and regulations....

25 **COST RECOVERY**

26 8. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
27 administrative law judge to direct a licentiate found to have committed a violation or violations of
28 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
enforcement of the case.

29 **THE NATIONAL CITY PROJECT**

30 9. In or about December, 2007, LGI Delaware, LLC (hereinafter "LGI") sought to
31 remodel an existing industrial building site located in National City, California (hereinafter
32 "National City Project"). The remodel consisted of remodeling an existing paved loading area
33 into a parking area and grading and paving an area along the east property line that had been used
34 for railroad tracks. There were two existing buildings on the site. Ware, Malcomb was the
35 contractor for the project.

36 ///

37 ///

1 **The Contract:**

2 10. On December 19, 2007, LGI, through its Principal, Lee Gittleman, and Respondent,
3 President of SW Engineering (hereinafter “SW”), entered into a contract for the preparation of
4 street plans and grading plans for \$11,500 as follows:

5 a. **Street Plans.** “Engineer shall design and coordinate locations of five (5) proposed
6 driveways on Haffley Street with the Client, Ware, Malcomb, and the City. The Engineer shall
7 process the plans with National City in order to obtain an encroachment permit.”

8 b. **Grading and Drainage Plan.** “Engineer shall design the proposed site
9 improvements and process the Grading Permit through the City of National City’s public works
10 department.”

11 c. **SWPPP.** “Engineer shall prepare a Stormwater Pollution Prevention Plan per
12 National City and State of California requirements.”

13 d. **SUSMP.** “Engineer shall prepare a [sic] SUSMP per the City and State of California
14 requirements.

15 11. According to the contract, the Engineer shall furnish additional services “if authorized
16 by Client, or if required because of changes in the Project.” Furthermore, according to the
17 contract, the standard of care for all professional services performed under the contract would be
18 the care and skill ordinarily used by members of the profession practicing under similar
19 circumstances.

20 12. A Storm Water Pollution Prevention Plan (“SWPPP”) is required when the disturbed
21 area, which is the surface that is being graded or stripped of its existing surface, is greater than 1
22 acre. The disturbed area for this project was less than 1 acre therefore preparation of a SWPPP
23 was not required and Respondent never prepared one. LGI paid the entire contract amount.
24 However, Respondent never reduced his fee or showed a credit on the extra work he charged LGI
25 as a result of not preparing the SWPPP.

26 13. A Standard Urban Stormwater Management Plan (“SUSMP”) is required when,
27 among other things, the project is new development or if redevelopment adds or creates 5,000
28

1 square feet of impervious surface. Based on the criteria for preparation of this report, an SUSMP
2 was required.

3 14. The project proceeded according to the following timeline:

4 12/19/2007	Contract signed.
5 12/20/2007 and 6 1/18/2008	Respondent received pdf of approved American Land Title Association Survey (ALTA survey) prepared in 2005.
7 1/22/2008	Respondent received Tentative Parcel Map (TPM) in CAD format.
8 2/25/2008	Respondent received first supplemental topographic survey of site conditions from Ciremele Surveying based upon assumed datum, which did not include 9 contour lines.
10 3/20/2008	First submittal of grading plans to City by Respondent.
11 4/1/2008	Respondent received first plan check back from City
12 4/3/2008	Respondent submitted Change Order #1 to Gittleman
13 4/17/2008	Meeting with City representatives, architect, contractor and Respondent. Grading plan rejected by City because incomplete and retaining wall not shown.
14 5/1/2008	Respondent submitted Change Order #2 to Gittleman regarding retaining wall and SUSMP.
15 5/2/2008	Second supplemental topographic survey was prepared based upon City's benchmark and included retaining 16 wall.
17 5/2/2008	Third supplemental topographic survey included survey shots of the proposed driveway locations.
18 6/8/2008	Construction begins.

19 **Change Order #1:**

20 15. On April 1, 2008, Respondent received the plan check back from the City but on
21 April 3, 2008, Respondent notified Gittleman that the City will have the plans finished "next
22 week" and then issued Change Order #1 to the contract, which was for the following scope of
23 work:

24 Engineer shall prepare field topo request and solicit bids for
25 supplemental topo of surface improvements at east edge of site.
26 Engineer shall create contours from supplemental field top shots.
27 Engineer shall edit existing CAD files to create a base topography
28 file for grading plan preparation. Engineer shall modify
architectural base files to match new topography file....

1 The cost for this item is \$2,500. This work was purportedly “to perform work not included in the
2 original contract scope.”

3 16. According to Respondent, the “supplemental topo” referenced in Change Order #1
4 referred to the topographical survey provided by Ciremele Surveying on February 25, 2008 and
5 Change Order #1 was necessary because the existing topography provided to Respondent was
6 based on assumed datum and not based on the City’s vertical benchmark. The topographical
7 survey provided by Ciremele Surveying on February 25, 2008 stated that it was based on assumed
8 datum. Respondent knew, or should have known, that the topographical survey needed to be
9 based on the City’s benchmark, rather than on assumed datum, as early as February 25, 2008.
10 Yet, the grading plans submitted by Respondent to the City on March 20, 2008 erroneously used
11 contour data based on the assumed datum and not the City’s benchmark datum as required.

12 17. By using the wrong datum on the grading plans submitted on March 20, 2008, all the
13 elevations on the plans had to be revised to fix the error, including all the proposed finished grade
14 elevations. Therefore, by issuing Change Order #1, Respondent required LGI to pay extra fees to
15 correct the errors made by SW in using the wrong datum to prepare the grading plans.

16 18. On July 28, 2009, Respondent represented to the Board that the reason for Change
17 Order #1 was that “upon investigation it was learned by SW Engineering that the topo provided
18 was not on the City datum as required by the City and the contour lines appeared to be faked in,”
19 when field investigation was not necessary to determine that the topographic survey was based on
20 assumed datum because the survey itself stated it was based on assumed datum and it was SW
21 Engineering who prepared the contour lines.

22 **Change Order #2:**

23 19. The City’s plan check comments from the submittal on March 20, 2008 included the
24 requirement that the retaining wall needed an engineer’s stamp and calculations. On April 17,
25 2008, a meeting was held that was attended by representatives of the architect, the City of
26 National City, the contractor and Respondent, who attended telephonically. Among the action
27 items discussed was inclusion of the retaining wall design and details in the grading plans. The
28

1 grading plans were rejected by the City because they were incomplete and did not include the
2 entire property.

3 20. On May 1, 2008, Respondent prepared Change Order #2 in response to the changes
4 required by the City. Change Order #2 included the following scope of work:

5 a. Retaining wall coordination at an additional cost of \$950.00:

6 Engineer shall revise grading plan set to include detail sheet(s) for
7 the retaining wall (to be prepared and signed by others). The
8 structural engineer shall prepare a wall plan and profile sheet that
9 will be coordinated into the set.

10 b. SUSMP at an additional cost of \$1,000.00:

11 Engineer shall revise the NPDES coordination and prepare a
12 SUSMP for a priority project. This will include the area of work
13 behind the Haffley building and the retaining wall.

14 21. However, Respondent was given information in January 2008, before preparation of
15 the grading plans, which showed the proposed retaining wall. Therefore, Respondent knew, or
16 should have known, that the retaining wall was part of the original scope of work and that
17 retaining wall details were standard information required by the City in grading plans submitted
18 to it.

19 22. Likewise, in April, 2008, the City required preparation of an SUSMP, preparation of
20 which was included in the original contract, but had not been prepared or submitted to the City.
21 Respondent again attempted to charge extra fees for work that was part of the original contract.

22 23. On June 16, 2009, Gittleman filed a complaint against Respondent with the Board
23 because, among other things, the plans submitted by Respondent to the city were deficient
24 because they did not include the entire agreed upon scope of work; Respondent charged him for
25 revising the grading plans to incorporate topographical information that had been provided to SW
26 prior to the time the grading plans were prepared; and, Respondent did not provide some of the
27 services included in the original contract.

28 ///

///

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1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Deceit, Misrepresentation or Fraud - National City Project)**

3 24. Respondent is subject to disciplinary action under Code section 6775, subdivision (b)
4 for deceit, misrepresentation or fraud in his practice in that:

5 a. On April 3, 2008, Respondent represented that that the plan check would be
6 completed in one week when Respondent had received the city's comments from the plan check
7 on April 1, 2008.

8 b. Respondent represented that Change Order #1 was for extra work when it covered
9 work that was part of the original contract, as more fully set forth above in paragraphs 9-18 and
10 referenced herein as though set forth in full.

11 c. On July 28, 2009, Respondent misrepresented the reasons for Change Order #1 to the
12 Board, as more fully set forth above in paragraphs 9-18 and referenced herein as though set forth
13 in full.

14 d. Respondent represented that Change Order #2 was for extra work to cover City
15 required items when it was work that was part of the original contract and not due to project
16 changes, as more fully set forth above in paragraphs 9-14 and 19-23 and referenced herein as
17 though set forth in full.

18 **SECOND CAUSE FOR DISCIPLINE**

19 **(Breach of Contract - National City Project)**

20 25. Respondent is subject to disciplinary action under Code section 6775, subdivision (d),
21 for breach or violation of a contract to provide professional engineering services in that:

22 a. Respondent's contract with LGI included the preparation of a SWPPP, which was not
23 required and which was not prepared by Respondent, but was paid for by LGI. Respondent did
24 not reimburse LGI for the cost of preparing a SWPPP nor credit LGI this amount when
25 Respondent submitted extra charges, as more fully set forth above in paragraphs 9-12 and
26 referenced herein as though set forth in full.

1 drainage flow. Respondent further admitted that these field revisions resulted in added costs to
2 the owners. As such, Respondent fell below the standard of care for licensed civil engineers
3 because errors in the grading plan he prepared resulted in inadequate drainage.

4 **FOURTH CAUSE FOR DISCIPLINE**

5 **(Negligence – Temecula Project)**

6 30. Respondent is subject to disciplinary action under Code section 6775, subdivision (c),
7 for negligence, as defined in title 16, California Code of Regulations, section 404(dd), in that
8 Respondent failed to use the care ordinarily exercised in like cases by duly licensed professional
9 engineers when he prepared grading plans for the Temecula project that did not adequately drain
10 the parking lot, as more fully set forth above in paragraphs 26-28 and referenced herein as though
11 set forth in full.

12 **PRAYER**

13 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
14 and that following the hearing, the Board for Professional Engineers, Land Surveyors, and
15 Geologists issue a decision:

- 16 1. Revoking or suspending Civil Engineer License Number C 59658, issued to
17 Michael David Schweitzer;
- 18 2. Ordering Michael David Schweitzer to pay the Board for Professional Engineers,
19 Land Surveyors, and Geologists the reasonable costs of the investigation and enforcement of this
20 case, pursuant to Business and Professions Code section 125.3; and,
- 21 3. Taking such other and further action as deemed necessary and proper.

22
23 DATED: 6/22/12

Original Signed

24 RICHARD B. MOORE, PLS
25 Executive Officer
26 Board for Professional Engineers, Land Surveyors, and
27 Geologists
28 Department of Consumer Affairs
State of California
Complainant

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