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

In the Matter of the Accusation against:	)	
	)	
JOSE J. AVILA 640 Cinnabar Street Imperial, CA 92251	)))	Case No. 911-A
	)	
Civil Engineer License No. C 66706,	)	
	)	
Respondent.	)	
	)	

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board for Professional Engineers and Land Surveyors as its Decision in the above-entitled matter.

This Decision shall become effective on September 10, 2010.

IT IS SO ORDERED August 11, 2010.

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

By Original Signed

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

In the Matter of the Accusation Against: **JOSE J. AVILA** 640 Cinnabar Street Imperial, CA 92251 **Civil Engineer License No. C 66706** Respondent.	Case No. 911-A OAH No. 2010041427 **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

In the interest of a prompt and speedy settlement of this matter, consistent with the public interest and the responsibility of the Board for Professional Engineers and Land Surveyors of the Department of Consumer Affairs, the parties hereby agree to the following Stipulated Settlement and Disciplinary Order which will be submitted to the Board for approval and adoption as the final disposition of the Accusation.

PARTIES

1. David E. Brown (Complainant) is the Executive Officer of the Board for Professional Engineers and Land Surveyors. He brought this action solely in his official capacity and is represented in this matter by Edmund G. Brown Jr., Attorney General of the State of California, by Marichelle S. Tahimic, Deputy Attorney General.

2. Respondent Jose J. Avila (Respondent) is representing himself in this proceeding and has chosen not to exercise his right to be represented by counsel.

3. On or about June 25, 2004, the Board for Professional Engineers and Land Surveyors issued Civil Engineer License No. C 66706 to Jose J. Avila (Respondent). The Civil Engineer License was in full force and effect at all times relevant to the charges brought in Accusation No. 911-A and will expire on September 30, 2010, unless renewed.

JURISDICTION

4. Accusation No. 911-A was filed before the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs, and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on March 26, 2010. Respondent timely filed his Notice of Defense contesting the Accusation. A copy of Accusation No. 911-A is attached as exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

5. Respondent has carefully read, and understands the charges and allegations in Accusation No. 911-A. Respondent has also carefully read, and understands the effects of this Stipulated Settlement and Disciplinary Order.

6. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

7. Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

CULPABILITY

8. Respondent understands that the charges and allegations in Accusation No. 911-A, if proven at a hearing, constitute cause for imposing discipline upon his Civil Engineer License.

9. For the purpose of resolving the Accusation without the expense and uncertainty of further proceedings, Respondent agrees that, at a hearing, Complainant could establish a factual basis for the charges in the Accusation and that Respondent hereby gives up his right to contest that cause for discipline exists based on those charges.

10. Respondent agrees that his Civil Engineer License is subject to discipline and he agrees to be bound by the Board for Professional Engineers and Land Surveyors (Board)'s imposition of discipline as set forth in the Disciplinary Order below.

CONTINGENCY

11. This stipulation shall be subject to approval by the Board for Professional Engineers and Land Surveyors. Respondent understands and agrees that counsel for Complainant and the staff of the Board for Professional Engineers and Land Surveyors may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

12. The parties understand and agree that facsimile copies of this Stipulated Settlement and Disciplinary Order, including facsimile signatures thereto, shall have the same force and effect as the originals.

13. This Stipulated Settlement and Disciplinary Order is intended by the parties to be an integrated writing representing the complete, final, and exclusive embodiment of their agreement. It supersedes any and all prior or contemporaneous agreements, understandings, discussions, negotiations, and commitments (written or oral). This Stipulated Settlement and Disciplinary Order may not be altered, amended, modified, supplemented, or otherwise changed except by a writing executed by an authorized representative of each of the parties.

14. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Civil Engineer License No. C 66706 issued to Respondent Jose J. Avila (Respondent) is revoked. However, the revocation is stayed and Respondent is placed on probation for four (4) years on the following terms and conditions.

1. **Obey All Laws.** The Respondent shall obey all laws and regulations related to the practices of professional engineering and professional land surveying.

2. **Submit Reports.** The Respondent shall submit such special reports as the Board may require.

3. **Tolling of Probation.** The period of probation shall be tolled during the time the Respondent is practicing exclusively outside the state of California. If, during the period of probation, the Respondent practices exclusively outside the state of California, the Respondent shall immediately notify the Board in writing.

4. **Violation of Probation.** If the Respondent violates the probationary conditions in any respect, the Board, after giving the Respondent notice and the opportunity to be heard, may vacate the stay and reinstate the disciplinary order which was stayed. If, during the period of probation, an accusation or petition to vacate stay is filed against the Respondent, or if the matter has been submitted to the Office of the Attorney General for the filing of such, the Board shall have continuing jurisdiction until all matters are final, and the period of probation shall be extended until all matters are final.

5. **Completion of Probation.** Upon successful completion of all of the probationary conditions and the expiration of the period of probation, the Respondent's license shall be unconditionally restored.

6. **Cost Recovery.** The Respondent is hereby ordered to reimburse the Board the amount of $4,100.00 within three and one-half (3-1/2) years of the effective date of this decision for its investigative and prosecution costs. Said reimbursement may be paid in installments.

7. **Examination.** Within 60 days of the effective date of the decision, the Respondent shall successfully complete and pass the California Laws and Board Rules examination, as administered by the Board.

8. **Ethics Course.** Within three and one-half (3-1/2) years of the effective date of the decision, Respondent shall successfully complete and pass a course in professionalism and ethics for engineers, approved in advance by the Board or its designee. Respondent shall provide the Board with official proof of completion of the requisite course.

9. **Notification.** Within 30 days of the effective date of the decision, Respondent shall provide the Board with evidence that he has provided all persons or entities with whom he has a contractual or employment relationship relating to professional civil engineering services with a copy of the decision and order of the Board and shall provide the Board with the name and business address of each person or entity required to be so notified. During the period of probation, the Respondent may be required to provide the same notification of each new person or entity with whom he has a contractual or employment relationship relating to professional civil engineering services and shall report to the Board the name and address of each person or entity so notified.

10. **Take And Pass Examinations.** Within three and one-half (3-1/2) years of the effective date of the decision, Respondent shall successfully complete and pass, with a grade of "C" or better, two (2) college-level courses related to the areas of violation. Said courses shall be approved in advance by the Board or its designee. Respondent shall provide the Board with official proof of completion of the requisite courses. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars.

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ACCEPTANCE

I have carefully read the Stipulated Settlement and Disciplinary Order. I understand the stipulation and the effect it will have on my Civil Engineer License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board for Professional Engineers and Land Surveyors.

DATED: 07/12/10

Original Signed
JOSE J. AVILA
Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board for Professional Engineers and Land Surveyors of the Department of Consumer Affairs.

Dated: July 14, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
JAMES M. LEDAKIS
Supervising Deputy Attorney General

Original Signed

MARICHELLE S. TAHIMIC
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

Accusation No. 911-A

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

In the Matter of the Accusation Against: **JOSE J. AVILA** 640 Cinnabar Street Imperial, CA 92251 **Civil Engineer License No. C 66706** Respondent.	Case No. 911-A **A C C U S A T I O N**

Complainant alleges:

PARTIES

1. David E. Brown (Complainant) brings this Accusation solely in his official capacity as the Executive Officer of the Board for Professional Engineers and Land Surveyors, Department of Consumer Affairs.

2. On or about June 25, 2004, the Board for Professional Engineers and Land Surveyors issued Civil Engineer License Number C 66706 to Jose J. Avila (Respondent). The Civil Engineer License was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2010, unless renewed.

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JURISDICTION

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

4. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

5. Section 6775 of the Code states:

> The board may receive and investigate complaints against registered professional engineers, and make findings, thereon.
>
> By a majority vote, the board may reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer registered under this chapter:
>
> . . .
>
> (c) Who has been found guilty by the board of negligence or incompetence in his or her practice.
>
> . . .
>
> (h) Who violates any provision of this chapter.

STATUTORY PROVISIONS AND REGULATIONS

6. Section 6749 of the Code states:

> (a) A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by professional engineer and the client, or his or her representative, prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:
>
> . . .
>
> (4) A description of the procedure that the professional engineer and the client will use to accommodate additional services.
>
> (5) A description of the procedure to be used by any party to terminate the contract. . . .

7. Title 16, Code of Regulations section 404 defines "negligence" as follows:

For the purpose of the rules and regulations contained in this chapter, the following terms are defined. No definition contained herein authorizes the practice of professional engineering as defined in the Professional Engineers Act.

. . .

w) 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....

8. Title 16, Code of Regulations section 404.1 defines "responsible charge" as follows:

(a) As used in the Professional Engineers Act, the term "responsible charge" directly relates to the extent of control a professional engineer is required to maintain while exercising independent control and direction of professional engineering services or creative work and to the engineering decisions which can be made only by a professional engineer.

(1) Extent of Control. The extent of control necessary to be in responsible charge shall be such that the engineer:

(A) Makes or reviews and approves the engineering decisions defined and described in subdivision (a)(2) below.

(B) In making or reviewing and approving the engineering decisions, determines the applicability of design criteria and technical recommendations provided by others before incorporating such criteria or recommendations.

(2) Engineering Decisions. The term "responsible charge" relates to engineering decisions within the purview of the Professional Engineers Act.

Engineering decisions which must be made by and are the responsibility of the engineer in responsible charge are those decisions concerning permanent or temporary projects which could create a hazard to life, health, property, or public welfare, and may include, but are not limited to:

(A) The selection of engineering alternatives to be investigated and the comparison of alternatives for the project.

(B) The selection or development of design standards or methods, and materials to be used.

(C) The decisions related to the preparation of engineering plans, specifications, calculations, reports, and other documents for the engineered works.

(D) The selection or development of techniques or methods of testing to be used in evaluating materials or completed projects, either new or existing.

(E) The review and evaluation of manufacturing, fabrication, or construction methods or controls to be used and the evaluation of test results, materials, and

workmanship insofar as they affect the character and integrity of the completed project.

(F) The development and control of operating and maintenance procedures.

(3) Reviewing and Approving Engineering Decisions. In making or reviewing and approving engineering decisions, the engineer shall be physically present or shall review and approve through the use of communication devices the engineering decisions prior to their implementation.

(b) Responsible Charge Criteria. In order to evaluate whether an engineer is in responsible charge, the following must be considered: The professional engineer who signs engineering documents must be capable of answering questions asked by individuals who are licensed by the Board in the appropriate branch of professional engineering relevant to the project and who are fully competent and proficient by education and experience in the field or fields of professional engineering relevant to the project. These questions would be relevant to the engineering decisions made during the individual's participation in the project, and in sufficient detail to leave little question as to the engineer's technical knowledge of the engineering performed. It is not necessary to defend decisions as in an adversarial situation, but only to demonstrate that the individual in responsible charge made, or reviewed and approved, them and possessed sufficient knowledge of the project to make, or review and approve, them.

Examples of questions to be answered by the engineer could relate to criteria for design, methods of analysis, methods of manufacture and construction, selection of materials and systems, economics of alternate solutions, and environmental considerations. The individual should be able to clearly express the extent of control and how it is exercised and to demonstrate that the engineer is answerable within said extent of control.

. . .

(e) The term "responsible charge" does not refer to any of the following:

(1) the concept of financial liability;

(2) management control in a hierarchy of professional engineers except as each of the individuals in the hierarchy exercises independent engineering judgment and thus responsible charge

(3) such administrative and management functions as accounting, labor relations, personnel performance standards, marketing of services, or goal setting. While an engineer may also have such duties in this position, it should not enhance or decrease one's status of being in responsible charge of the engineering.

COST RECOVERY

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

FACTS

10. On or about February 14, 2005, Respondent entered into a contract with Kenneth and Yvonne Calderas for $2,800.00 to provide "structural calculations and details as required for a two story home" to be constructed at 2814 Powell Court in the City of Imperial, California. The contract did not contain any provision regarding the procedure to use to accommodate additional services or the procedure to use to terminate the contract. The services to be provided by Respondent excluded the preparation of a soils report, grading plans, energy calculations and architectural drafting. The homeowners hired an independent draftsperson to prepare the architectural and electrical plans. Respondent stamped and signed the architectural and electrical plans, as well as the structural plans.

11. The homeowners contacted Performance Construction Co. and requested an estimate to build the home. After reviewing the plans signed and stamped by Respondent, Hector Herrera, the owner of Performance Construction, Co., noted discrepancies and missing information.

12. A meeting was arranged by the homeowners between Respondent and employees of Performance Construction, including Mr. Herrera. Mr. Herrera advised Respondent of the discrepancies he noted in the plans and that the Building Department will only accept the engineer's recommendations regarding any issues concerning the engineer's plans. He requested that Respondent provide clarification. In response, Respondent stated that he charged very little for this project and that he didn't care about any issues regarding it. Mr. Herrera told Respondent that Performance Construction was willing to type or provide the drafting needed for Respondent's review and approval. Respondent replied that he was not going to be told what to do and left.

13. After the meeting, Mr. Herrera advised the homeowners of Respondent's comments and stated that at that point, Performance Construction could not deal with Respondent and that the homeowners would have to address all issues directly with Respondent. Later, the homeowners contacted Performance Construction and advised that Respondent agreed to address the issues during the course of construction. Mr. Herrera advised the homeowners that this was not good practice because it may cause delays and result in extra costs to complete the project.

14. The homeowners chose to proceed with construction and hired Performance Construction as their contractor. During the framing stage of construction, several issues arose.

15. **Floor system**. The plans prepared by Respondent called for a floor joist system (TJL 560), which could not meet the specification for a 32-inch span. In addition, Respondent's specification of a floor joist system did not make any provision for HVAC ductwork or plumbing. Performance Construction contacted Respondent and recommended a floor truss system to replace the floor joist system, which would facilitate the installation of HVAC ductwork and avoid the increased costs of having to use a larger joist system. Respondent authorized this change and charged Performance $200, which it paid. Respondent did not provide any detailing regarding blocking, shear transfer, beam/girder connections or other framing details as a result of this change.

16. **Front entry stairway**. At the homeowner's request, Respondent approved the re-framing of the front entry stairway wall system. But Respondent did not provide revised plans showing the framing and the details for the actual structural, architectural and electrical conditions.

17. **Hold downs.** Respondent specified a Simpson ST6224 on his plan detail 1/SD3 as a hold down but it was too short for the original roof truss design and more inadequate for the revised truss design that he approved.

18. **Shear wall and window locations.** The structural plans specified the shear wall lengths and locations and the architectural plans specified the window sizes and locations. The shear wall noted on sheet S4 Roof Framing Plan in the middle of the west wall between two windows showed a length of 6 feet but the available length was only 4 feet. Two shear walls requiring 4-feet 6 inches, left only 4 feet 7-1/8-inches for a 6-foot long window.

19. **Roof framing plan.** The detail call outs referenced on the second floor roof plan were not applicable to the condition referenced.

20. **Footing analysis.** Respondent used a footing analysis program without indicating the basis and assumptions he made about the soils characteristics when arriving at the foundation design. The footing analysis program did not take into consideration any soils pressures to

determine the appropriate footing size. He used a footing length of 60-1/2 feet in his footing analysis, which was longer than the length of any footing in the building. Respondent's calculations did not adequately address the distribution of point loads and seismic loads on the foundation.

FIRST CAUSE FOR DISCIPLINE

(Negligence)

21. Respondent is subject to disciplinary action under Code section 6775(c) in that he was negligent in performing his responsibilities as the professional engineer of record for the Calderas project in that:

a. Respondent had a duty to resolve discrepancies, errors and omissions in the contract documents that Respondent signed and stamped. Respondent failed to resolve these discrepancies, errors and omissions in a timely manner and in a way that gave adequate direction to the contractor to construct the project, as more fully set forth in paragraphs 10 through 20 above and incorporated by this reference as though set forth in full herein.

b. Respondent failed to review and proof his construction documents, change order approvals and communications for errors, omissions and inconsistencies, as more fully set forth in paragraphs 10 through 20 above and incorporated by this reference as though set forth in full herein.

c. Respondent failed to take into consideration the constructability of his design choices, as more fully set forth in paragraphs 10 through 20 above and incorporated by this reference as though set forth in full herein.

d. Respondent failed to provide appropriate detailing and documentation of design changes, as more fully set forth in paragraphs 15 through 16 above and incorporated by this reference as though set forth in full herein.

e. Respondent detailed a Simpson ST6224 hold down when this hold down was too small to be used for the truss design Respondent specified, as more fully set forth in paragraph 17 above and incorporated by this reference as though set forth in full herein.

f. The details Respondent referenced on the roof framing plan that did not apply to the condition referenced, as more fully set forth in paragraph 19 above and incorporated by this reference as though set forth in full herein.

g. Respondent's original submittal for the footing design failed to indicate the basis for the footing design and his calculations did not adequately address the distribution of point loads and seismic loads on the foundation, as more fully set forth in paragraph 20 above and incorporated by this reference as though set forth in full herein.

h. Respondent used a 60-1/2 feet footing length to justify a point load when there were no walls in the building of that length, as more fully set forth in paragraph 18 above and incorporated by this reference as though set forth in full herein.

i. Respondent was negligent in preparing a contract with no provisions to accommodate additional services or to terminate the contract.

j. Respondent signed and stamped architectural and electrical plans prepared by others over whom he did not have supervisory control and without being fully competent and proficient through education and experience in these areas.

SECOND CAUSE FOR DISCIPLINE

(Violation of Contract Content Requirements)

22. Respondent is subject to disciplinary action under Code section 6775(h) in conjunction with title 16, Code of Regulations section 404, subdivisions (a)(4) and (a)(5) in that he prepared a contract with no provisions to accommodate additional services or to terminate the contract.

PRAYER

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

1. Revoking or suspending Civil Engineer License Number C 66706, issued to Jose J. Avila.

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2. Ordering Jose J. Avila to pay the Board for Professional Engineers and Land Surveyors the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED: 3/17/10

Original Signed

DAVID E. BROWN
Executive Officer
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California
Complainant

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