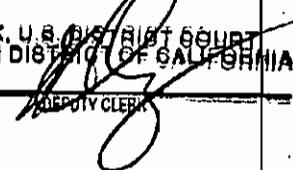


FILED

OCT 25 2011

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY 
DEPUTY CLERK

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12
13 UNITED STATES DISTRICT COURT FOR THE
14 EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

15 HILDA L. SOLIS, Secretary of Labor,) NO. 1:11-cv-00045-AWI-JLT
16 United States Department of Labor,)
17 Plaintiff,) CONSENT JUDGMENT
18) and ORDER
19 vs.)
20 FRANK MITACEK III, SUSAN MITACEK,)
and the FRANK'S INTERNATIONAL, INC.)
21 401(K) PLAN,)
22 Defendants.)

23
24 Plaintiff HILDA L. SOLIS, Secretary of Labor, United States Department of Labor
25 ("Secretary") pursuant to her authority under §§ 502(a)(2) and (5) of the Employee Retirement
26 Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (5), has filed a Complaint
27 against Defendants FRANK MITACEK III, an individual, SUSAN MITACEK, an individual,
28

1 and the FRANK'S INTERNATIONAL, INC. 401(K) PLAN, an employee pension benefit plan
2 ("the Plan").¹

3 A. The Secretary, Frank Mitacek III, Susan Mitacek, and the Plan (collectively, "the
4 parties") admit that the Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29
5 U.S.C. § 1132(e)(1), and that venue lies in the Eastern District of California pursuant to ERISA §
6 502(e)(2), 29 U.S.C. § 1132(e)(2).

7 B. The parties agree to the entry of this Consent Judgment & Order. The parties further
8 agree that this Consent Judgment & Order shall fully settle all claims of the Secretary asserted in
9 the Complaint.

10 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

11 1. Defendants Frank Mitacek III and Susan Mitacek are fiduciaries of the 401(k)
12 Plan within the meaning of Section 3(21), 29 U.S.C. § 1002(21), of the Employee Retirement
13 Income Security Act of 1974 ("ERISA").

14 2. Defendants Frank Mitacek III and Susan Mitacek breached ERISA Sections
15 403(a), 403(c)(1), 404(a)(1)(A), (B), and (D), 405(a)(3), 406(a)(1)(B) and (D), and 406(b)(1) and
16 (2), 29 U.S.C. §§ 1103(a), 1103(c)(1), 1104(a)(1)(A), (B) and (D), 1105(a)(3), 1106(a)(1)(B) and
17 (D), and 1106(b)(1) and (2), by failing to remit, and remit timely, employee contributions and
18 participant loan repayments to the 401(k) Plan.

19 3. As a result of the breaches set forth in Paragraph 2, supra, and as more fully
20 alleged in the Secretary's Complaint, Defendants Frank Mitacek III and Susan Mitacek caused
21 losses to the Plan of \$21,853.91, including lost-opportunity costs. Judgment is hereby entered
22 against them in that amount. The identified losses shall be restored to the Plan in accordance
23 with the payment schedule set forth in Paragraph 6, infra.

24 4. On November 19, 2010, a Plan of Reorganization was filed in the United States
25 Bankruptcy Court, Eastern District of California, and an Order Confirming Plan of
26 Reorganization was issued on November 23, 2010 ("November 23, 2010, Order"), by the United
27

28 ¹ The Plan is named in the Secretary's Complaint as a party necessary for complete relief

1 States Bankruptcy Court, Eastern District of California, in the case of In re Frank's International,
2 Inc., Case No. 09-17861-B-11. The Plan of Reorganization, inter alia, requires Frank's
3 International, Inc. to make monthly payments to the Plan of \$256.11 until the U.S. Department of
4 Labor's priority claim No. 26 of \$5,720.21 on behalf of the Plan is paid in full. Defendants shall
5 be credited for all amounts restored to the Plan pursuant to the November 23, 2010, Order. The
6 parties agree that, as of September 10, 2011, Defendants Frank Mitacek III and Susan Mitacek
7 have thereby restored \$2,864.99 due to the Plan. The total remaining due to the Plan is
8 \$18,476.70.

9 5. Defendants Frank Mitacek III and Susan Mitacek are hereby removed as trustees
10 and fiduciaries to the Plan subject to the exception set forth in Paragraph 6, infra.

11 6. Defendants Frank Mitacek III and Susan Mitacek shall restore to the Plan the
12 amount of \$18,476.70 in losses as follows:

13 (a) Defendant Frank Mitacek III and Susan Mitacek shall remit a certified
14 check in the amount of \$62.62 to Plan Participant Brian Witwick within ten (10) days of the
15 entry of an Order affirming this Consent Judgment:

16 (b) On or before October 25, 2011, Defendants Frank Mitacek III and Susan
17 Mitacek shall remit the monthly payment of \$256.11 owed pursuant to the Bankruptcy Court's
18 November 23, 2010, Order, and an additional \$766.89, a total of \$1,023.00, to Farrell Meek's
19 Simplified Employee Pension Individual Retirement Account (SEP IRA) held at Pershing, LLC.
20 Thereafter, beginning on November 25, 2011, Defendants Frank Mitacek III and Susan Mitacek
21 shall remit seventeen (17) consecutive monthly payments in the amount of \$1,023.00 to the SEP
22 IRA account of Farrell Meek on or before the same day of each succeeding month thereafter
23 until all installments have been paid.

24 7. Within fifteen (15) business days of making a payment set forth in Paragraph 6,
25 supra, Defendants Frank Mitacek III and Susan Mitacek shall provide to the Secretary a copy of
26 both sides of the remittance check or other appropriate evidence demonstrating that the payment
27

28 pursuant to Fed. R. Civ. P. 19(a).

1 has been made.

2 8. In the event of default by Defendants Frank Mitacek III and Susan Mitacek in the
3 payment of any of the monthly installments identified in paragraph 6, *supra*, the total balance
4 remaining unpaid shall then become due and payable and interest shall be assessed against such
5 remaining unpaid balance at the rate provided by 28 U.S.C. § 1961 from the date of this
6 judgment until the total amount is paid in full.

7 9. Defendants Frank Mitacek III and Susan Mitacek hereby forfeit any interest they
8 may have in any amounts restored to the Plan as a result of this Complaint and Consent
9 Judgment and Order. No amount restored to the Plan by Defendants Frank Mitacek III and
10 Susan Mitacek pursuant to this Consent Judgment and Order or to the Bankruptcy Court's
11 November 23, 2010, Order shall in any way be allocated to the Plan accounts of Defendants
12 Frank Mitacek III and Susan Mitacek.

13 10. The parties agree that Defendants Frank Mitacek III and Susan Mitacek's debts to
14 the Plan arising out of their fiduciary breaches are non-dischargeable pursuant to Section
15 523(a)(4) of the Bankruptcy Code, 11 U.S.C. § 523(a)(4). In the event that Defendants Frank
16 Mitacek III and Susan Mitacek fail to restore all losses caused to the Plan as identified herein,
17 including lost-opportunity costs, Defendants Frank Mitacek III and Susan Mitacek are prohibited
18 from raising their personal Chapter 7 bankruptcy petition filed in the United States Bankruptcy
19 Court, Eastern District of California, (In re Frank Mitacek III and Susan Mitacek, Case No. 10-
20 13252), as a defense to any action related to this Consent Judgment and Order, including the
21 amounts due under this Consent Judgment and Order.

22 11. Defendants Frank Mitacek III and Susan Mitacek are permanently enjoined and
23 restrained from violating the provisions of Title I of ERISA, 29 U.S.C. §§ 1001-1191c.

24 12. Defendants Frank Mitacek III and Susan Mitacek are hereby permanently
25 enjoined and restrained from future service as a fiduciary of, or service provider to, any ERISA-
26 covered employee benefit plan subject to the exception set forth in Paragraph 5, *supra*.

27 13. Whenever a submission is required to be made to the Secretary under the terms of
28 this Consent Judgment & Order, such submission shall be made to:

1 Regional Director
2 U.S. Department of Labor
3 Employee Benefits Security Administration
4 1055 E. Colorado Blvd., Suite 200
5 Pasadena, CA 91106-2357
6 Telephone number: (626) 229-1000
7 Facsimile number: (626) 229-1098

8 The Secretary and Defendants shall each bear their own costs, expenses, and attorneys'
9 fees incurred to date in connection with any stage of this proceeding, including but not limited to
10 attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

11 14. Defendants expressly waive any and all claims of any nature which they have or
12 may have against the Secretary, the Department of Labor, or any of its officers, agents, attorneys,
13 employees or representatives, arising out of or in connection with the allegations contained in the
14 Complaint on file in this action, any other proceedings or investigation incident thereto or based
15 on the Equal Access to Justice Act, as amended.

16 15. Upon Defendants' restoration of \$21,853.91 in losses to the Plan, Defendants
17 shall be assessed a penalty under ERISA § 502(l), 29 U.S.C. § 1132(l) in the amount of twenty
18 percent of the applicable recovery amount, or \$4,370.78 ("Penalty Amount"). Defendants waive
19 the notice of assessment and service requirement of 29 C.F.R. § 2570.83 and, unless the
20 Defendants file a petition for waiver or reduction of the penalty as provided for in 29 C.F.R. §§
21 2570.83-2570.87, and the Secretary agrees to waive or reduce the penalty, within sixty (60) days
22 following the last payment date outlined in Paragraph 6, supra, Defendants shall pay the Penalty
23 Amount to the U.S. Department of Labor, by sending a certified or cashiers check payable to the
24 United States Department of Labor (please write EBSA Case No. 72-033065 on the check) to:

25 Regular U.S. Mail
26 U.S. Department of Labor
27 ERISA Civil Penalty
28 P.O. Box 71360
Philadelphia, PA 19176-1360

16. Nothing in this Consent Judgment and Order is binding on any governmental
agency other than the United States Department of Labor, Employee Benefits Security
Administration.

1 17. This Court retains jurisdiction of this action for purposes of enforcing compliance
2 with the terms of this Consent Judgment and Order.

3 18. By signing their names to this Consent Judgment and Order, the parties represent
4 that they are informed and understand the effect and purpose of this Consent Judgment and
5 Order.

6 The Court directs the entry of this Consent Judgment & Order as a final order.

7 IT IS SO ORDERED.

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9 Dated: 10-25-11



District Court Judge

1 Entry of this Consent Judgment is hereby consented to:

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Dated: 10/24/2011

M. PATRICIA SMITH
Solicitor of Labor

LAWRENCE BREWSTER
Regional Solicitor

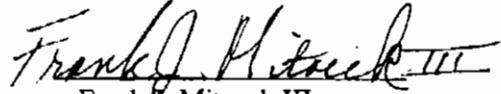
DANIELLE L. JABERG
Counsel for ERISA

By /s/ Cheryl L. Adams
Cheryl L. Adams
Trial Attorney

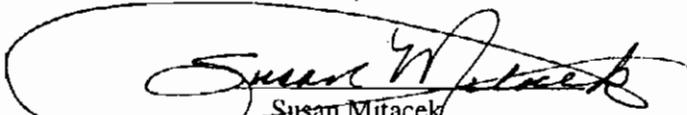
Attorneys for the Plaintiff

Defendants consent to the entry of this Consent Judgment and Order.

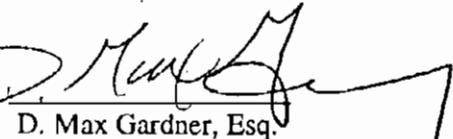
Dated: 10-24-11


Frank J. Mitacek III

Dated: 10-24-11


Susan Mitacek

Approved as to form:


D. Max Gardner, Esq.
The Law Offices of Young Wooldridge, LLP
1800 30th Street, Fourth Floor
Bakersfield, CA 93301

Attorneys for the Defendants