

3. Fisher & Partners Structural Engineers, Inc. (“FPSE”) established the Fisher & Partners Structural Engineers, Inc. SIMPLE IRA Plan (“Plan”) to provide retirement benefits to the Plan’s participants.

4. The Plan is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), which is subject to the provisions of Title I of ERISA pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a).

5. Venue of this action lies in the Northern District of Illinois, Eastern Division, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because, at all relevant times, the Plan was administered in Chicago, Cook County, Illinois, within this district and division.

DEFENDANTS

6. The Plan is named as a defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

7. At all relevant times, Defendant David Fisher (“Fisher”) was the sole owner and President of FPSE. Fisher had authority, control, and responsibility over the assets of the Plan.

8. Based on Fisher’s authority and control over the Plan’s assets, he is a fiduciary to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and, based on his fiduciary status, 100% ownership of FPSE and position of President of FPSE, he was a party in interest to the Plan within the meaning of ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E), and (H).

9. At all relevant times, FPSE was the Plan Sponsor and Plan Administrator. FPSE had authority, control, and responsibility over the assets of the Plan.

10. Based on FPSE's authority and control over the Plan's assets, FPSE was a fiduciary to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and was a party in interest to the Plan within the meaning of ERISA § 3(14)(A) and (C), 29 U.S.C. § 1002(14)(A) and (C).

VIOLATIONS

COUNT I: UNTIMELY AND UNREMITTED EMPLOYEE CONTRIBUTIONS

11. Paragraphs 1 through 10 above are hereby re-alleged and incorporated herein.

12. The Plan allows for participants to have elective deferrals withheld from their pay as contributions to the Plan.

13. During the period from January 1, 2008 through December 31, 2008, Defendant FPSE withheld \$9,640.96 in participant contributions from its employees' pay and failed to remit the withheld participant contributions to the Plan.

14. During the period from January 1, 2008 through December 31, 2008, Defendant Fisher caused FPSE to retain, in its general accounts, participant contributions and Defendant Fisher failed to ensure that the withheld participant contributions were remitted to the Plan.

15. During the period from August 15, 2008 through March 31, 2009, FPSE withheld an additional \$1,605.24 in participant contributions and failed to remit the amounts withheld to the Plan in a timely manner.

16. During the period from August 15, 2008 through March 31, 2009, Defendant Fisher caused FPSE to retain participant contributions in its general assets and

failed to ensure that the withheld participant contributions were deposited timely in the Plan's accounts.

17. By the conduct described in paragraphs 13 through 16 above, Defendants Fisher and FPSE:

- a. permitted the assets of the Plan to inure to the benefit of an employer in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);
- b. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries in violations of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);
- c. caused the Plan to engage in transactions that they knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the Plan in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);
- d. dealt with assets of the Plan in their own interest or for their own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1); and
- e. acted in a transaction involving the Plan on behalf of a party whose interests were adverse to the interest of the Plan and to the interest of the Plan's participants and beneficiaries in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

18. As a direct and proximate result of these breaches committed by defendants, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA section 409, 29 U.S.C. § 1109.

**COUNT II:
UNREMITTED EMPLOYER CONTRIBUTIONS**

19. Paragraphs 1 through 10 above are hereby re-alleged and incorporated herein.

20. The Plan provided for a non-discretionary 100% employer match of participant contributions not exceeding 3% of the participant's total compensation.

21. Defendants Fisher and FPSE failed to collect employer contributions owed to the Plan from December 31, 2008 through January 1, 2011, resulting in a loss of \$21,852.94 to the Plan.

22. By the conduct described in paragraph 21 above, Defendants Fisher and FPSE failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries in violations of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

23. As a direct and proximate result of these breaches committed by Defendants Fisher and FPSE, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA section 409, 29 U.S.C. § 1109.

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment against Fisher and FPSE ("Defendants"):

A. Permanently enjoining Defendants from violating the provisions of Title I of ERISA;

B. Ordering Defendants to correct the prohibited transaction in which they engaged;

- C. Ordering Defendants to restore to the Plan any losses, including lost opportunity costs, resulting from fiduciary breaches committed by them or for which they are liable;
- D. Removing the Defendants from any position they now hold as fiduciaries to the Plan;
- E. Ordering any plan assets in the Defendants' name be used to off-set any losses owed to the Plan;
- F. Awarding the Secretary the costs of this action; and
- G. Ordering such further relief as is appropriate and just.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

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U.S. Department of Labor,
Attorneys for THOMAS E. PEREZ
Secretary of Labor
Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

**U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
ATTORNEY APPEARANCE FORM**

NOTE: In order to appear before this Court an attorney must either be a member in good standing of this Court's general bar or be granted leave to appear *pro hac vice* as provided for by Local Rules 83.12 through 83.14.

In the Matter of

Case Number:

AN APPEARANCE IS HEREBY FILED BY THE UNDERSIGNED AS ATTORNEY FOR:

NAME (Type or print)		
SIGNATURE (Use electronic signature if the appearance form is filed electronically) s/		
FIRM		
STREET ADDRESS		
CITY/STATE/ZIP		
ID NUMBER (SEE ITEM 3 IN INSTRUCTIONS)	TELEPHONE NUMBER	
ARE YOU ACTING AS LEAD COUNSEL IN THIS CASE?	YES	NO
ARE YOU ACTING AS LOCAL COUNSEL IN THIS CASE?	YES	NO
ARE YOU A MEMBER OF THIS COURT'S TRIAL BAR?	YES	NO
IF THIS CASE REACHES TRIAL, WILL YOU ACT AS THE TRIAL ATTORNEY?	YES	NO
IF THIS IS A CRIMINAL CASE, CHECK THE BOX BELOW THAT DESCRIBES YOUR STATUS.		
RETAINED COUNSEL	APPOINTED COUNSEL	

Defendants waive service of process and answer and admit to the jurisdiction of this Court over them and the subject matter of this action. Defendants neither admit nor deny the allegations of the Secretary's complaint in the action.

The Secretary and Defendants have agreed to resolve all matters in controversy in this action between them (except for the imposition by the Secretary of any penalty pursuant to ERISA §502(l), 29 U.S.C. §1132(l), and any proceedings related thereto), and said parties do now consent to entry of this Consent Order and Judgment ("Judgment") by this Court in accordance therewith.

The parties agree that, if the Secretary assesses a penalty pursuant to ERISA §502(l) in connection with the violations alleged in this matter, the "applicable recovery amount" shall include all amounts paid in accordance with this Judgment.

Upon consideration of the record herein, and as agreed to by the parties, the Court finds that it has jurisdiction to enter this Judgment.

WHEREAS, the Secretary and the Defendants, having agreed to the terms of this Judgment, subject to its approval by the Court, and with due consideration and being fully advised of the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. are permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C. §1001, *et seq.*

2. Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. are liable to the Plan in the total amount of \$33,409.80 (the "Entire Restitution Amount"), representing \$9,640.96 in unremitted employee contributions from January 1, 2008,

through December 31, 2008, owed to the Plan, \$21,852.94 in unremitted employer contributions from December 31, 2008, through January 1, 2011, owed to the Plan, and \$1,915.90 in lost opportunity costs related to the aforementioned fiduciary breaches calculated through August 15, 2013, plus interest accruing after August 15, 2013, calculated at the rate of interest as set forth at 26 U.S.C. § 6621(a)(2) (“Accruing Interest”).

3. In reliance on the representations made by Defendant David Fisher in the documents provided by him to the Secretary (including a financial declaration and tax returns), which show that he is currently unable to restore to the Plan the Entire Restitution Amount of \$33,409.80, the Secretary agrees to forbear immediate collection of the Entire Restitution Amount and Accruing Interest and agrees that Defendant David Fisher shall pay the Entire Restitution Amount plus Accruing Interest in accordance with the schedule set forth below:

a. Payment to the Plan of \$2,000.00 shall be made on or before August 15, 2013. Defendant David Fisher shall provide the Secretary with satisfactory proof of the payment.

b. On the fifteenth day of each month, starting on or before September 15, 2013, Defendant David Fisher agrees to make consecutive monthly payments to the Plan of \$500 per month until such time as the Entire Restitution Amount plus Accruing Interest is paid in full. Nothing herein shall prevent Defendant David Fisher from making payments to the Plan on an accelerated basis.

c. Defendant David Fisher agrees to pay 100% of any amounts over \$1,000 that he may receive in bequests, inheritances, gifts, lottery and gambling

winnings, and proceeds of all life insurance policies, per annum, until such time as the Entire Restitution Amount plus Accruing Interest is paid in full.

d. Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. agree to pay 100% of any amounts that Defendant Fisher & Partners Structural Engineers, Inc. and Defendant David Fisher, individually, may receive as a result of the collection of accounts receivable or other debts owed to Defendant Fisher & Partners Structural Engineers, Inc., until such time as the Entire Restitution Amount plus Accruing Interest is paid in full.

4. In return for the Secretary's forbearance, Defendant David Fisher agrees to submit on or before May 15th of each year for the prior year, until the Entire Restitution Amount plus Accruing Interest is paid, to the Regional Director of the Employee Benefits Security Administration, 230 South Dearborn, Suite 2160, Chicago, Illinois 60604 ("EBSA Regional Director"), a current completed annual financial declaration for the preceding calendar year, 1099 IRS Form(s), W-2 form(s), and his annually filed federal tax return, beginning with his federal income tax return for 2013 which is to be provided by May 15th of the year the tax return is filed.

5. In return for the Secretary's forbearance, Defendant Fisher & Partners Structural Engineers, Inc. further agrees to submit to the EBSA Regional Director on or before May 15th of each year for the prior year, until the Entire Restitution Amount plus Accruing Interest is paid, a current completed annual financial declaration for Defendant Fisher & Partners Structural Engineers, Inc. for the preceding calendar year and Defendant Fisher & Partners Structural Engineers, Inc.'s annually filed federal tax return, beginning with Defendant Fisher & Partners Structural Engineers, Inc.'s federal income

tax return for 2013 which is to be provided on or before May 15th of the year the tax return is filed.

6. If it is found that the documents Defendant David Fisher provided regarding his financial status are untrue, the Entire Restitution Amount plus Accruing Interest (minus payments made pursuant to this Judgment) shall immediately become due and payable by him.

7. In restoring monies to the Plan, Defendant David Fisher has agreed to retain PenChecks, Inc. ("PenChecks") for the purpose of locating and making distributions to the Plan participants and for the establishment of IRA accounts for such Plan participants that cannot be located. Defendant David Fisher shall:

a. Forward all agreements with PenChecks entered into pursuant to this Judgment to the EBSA Regional Director within seven (7) calendar days of executing said agreements.

b. Establish an account with PenChecks ("PenChecks Account") to hold any monies to be restored to the Plan pursuant to this Judgment. Defendant David Fisher shall forward all restorative payments to the PenChecks Account for allocation among the Plan participants, proportionally, based on the amounts actually due to each participant. See Exhibit A. Under no circumstances will defendant David Fisher benefit in any way from the amounts he pays into the Plan pursuant to this Judgment.

c. Provide PenChecks with any requested assistance and/or documentation necessary in locating the Plan participants, in distributing restorative payments to each participant, or which may otherwise be necessary for the operation and administration of the PenChecks Account.

d. Pay all of PenChecks' fees associated with actions required by this Judgment. The Plan shall not pay any such fees.

e. Provide, on a quarterly basis, within seven (7) calendar days of the end of the quarter, to the EBSA Regional Director written satisfactory proof that the Penchecks Account has received all of the restorative payments made by Defendant David Fisher during the quarter.

8. Should Defendant David Fisher fail to pay any of the installment payments described in Paragraph 3 above on or before the dates set forth therein, the Entire Restitution Amount plus Accruing Interest (minus payments made pursuant to this Judgment) shall become due and payable immediately with no further notice or demand required by the Secretary to Defendant David Fisher.

9. Defendant David Fisher agrees that he will notify the EBSA Regional Director in writing within seven (7) days of any change of his name, residential address, mailing address, telephone numbers (home, work, and cell phone numbers) email addresses, and employment; filing for bankruptcy by Defendant David Fisher; and receipt of any amount over \$1,000 in bequests, inheritances, gifts, lottery and gambling winnings, and proceeds of all life insurance policies, per annum, until such time as the Entire Restitution Amount plus Accruing Interest is repaid in full.

10. Defendant Fisher & Partners Structural Engineers, Inc. agrees that it will notify the EBSA Regional Director within seven (7) days of any change of its name, business address, mailing address, telephone numbers, and email addresses; filing for bankruptcy by Defendant Fisher & Partners Structural Engineers, Inc.; collection of accounts receivable owed to Defendant Fisher & Partners Structural Engineers, Inc.; and

changes in Defendant Fisher & Partners Structural Engineers, Inc.'s capitalization, until the Entire Restitution Amount recited in this Judgment, plus Accruing Interest, is repaid.

11. Defendant David Fisher agrees to cooperate with the Secretary. Such cooperation will include speaking and/or meeting with representatives of the Secretary for interviews and disclosure of information as requested.

12. Upon the entry of this Judgment, Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. shall immediately be removed as fiduciaries of the Plan and shall be permanently enjoined from serving or acting as fiduciaries or service providers with respect to any employee benefit plan subject to ERISA, except for the purposes of restoring and allocating the monies owed to the Plan.

13. Each party agrees to bear his or its own attorneys' fees, costs and other expenses incurred by such party in connection with any stage of this proceeding to date including, but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

14. The Court shall maintain jurisdiction over this matter only for purposes of enforcing this Judgment.

15. Nothing in this Order is binding on any government agency other than the United States Department of Labor.

DATED _____, 2013

UNITED STATES DISTRICT JUDGE



The parties hereby consent to the entry of this consent order and judgment:
FOR THE SECRETARY OF LABOR:

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor



Elizabeth M. Kruse
Trial Attorney, Bar No.: TX 24070088

DATED: 8/29/13

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Fax. (312) 353-5698
Kruse.elizabeth@dol.gov

FOR THE DEFENDANTS:

FISHER & PARTNERS STRUCTURAL ENGINEERS, INC.

By: 

DAVID FISHER
President

DATED: 30-07-2013

FISHER & PARTNERS STRUCTURAL ENGINEERS, INC. SIMPLE IRA PLAN

By: 

DAVID FISHER
Fiduciary

DATED: 30-07-2013

DAVID FISHER


Individually

DATED: 30-07-2013