

FEB 18 2021

**BEFORE THE WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS**

WV PE BOARD

**IN RE: POTESTA & ASSOCIATES, INC., and
 TERENCE MORAN**

C2021-03

CONSENT ORDER

Comes now the West Virginia State Board of Registration for Professional Engineers by Bhajan S. Saluja, P.E., its President, (hereinafter “the Board”) for the purpose of agreeing to resolve a Board-initiated Complaint seeking disciplinary action against Potesta & Associates, Inc. (“Respondent Firm”) and Terence Moran, (“Respondent Moran”) (collectively “Respondents”). As reflected in this document, the parties have reached an agreement concerning the proper disposition of this matter, and the Board, upon approval of this agreement, does hereby **FIND** the following:

1. The matters set forth herein are within the jurisdiction of the Board, which is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia.
2. Respondent Firm is a corporation organized under the laws of the State of West Virginia with its principal place of business in Charleston, West Virginia.
3. Respondent Firm’s Certificate of Authorization (COA# C00994), was activated on April 1, 1997, and has been active at all times through to the present.
4. Respondent Moran is a licensed professional engineer in the State of West Virginia, holding PE license number 012985.
5. This matter was originally before the Board as a result of a third-party complaint filed by James Upton on behalf of Upton Construction Company, Inc., which named Potesta & Associates, Inc. as Respondent Firm. On November 30, 2016, this complaint was filed and numbered C2017-11. The complaint related to a public water project which was awarded to Upton Construction Company for the replacement and/or installation of

waterlines/mains for the Town of Mill Creek, Municipal Water Department, the *2015 Water System Improvements Project, Town of Mill Creek, West Virginia*, (“Project”). Upton Construction Company alleged that Respondent Firm, together with its professional engineers who provided engineering services for the Project, violated West Virginia engineering laws and/or rules.

6. A verified response to complaint C2017-11 from Potesta & Associates was received on December 30, 2016.
7. During the pendency of this complaint, it was determined that Upton Construction Company had also brought other civil actions regarding the Project in other venues, more specifically; Upton Construction Company, Inc. v. Mill Creek Municipal Water Department, Before the Public Service Commission of West Virginia, Case No. 16-1601-W-C; and Upton Construction Company v. Potesta & Associates, Inc., et al., In the Circuit Court of Randolph County, West Virginia, Case No.16-C-165. It should be noted that the Board is not authorized by law to grant and/or award monetary damages to any person injured as result of violations of engineering laws or rules.
8. Respondent Firm in C2017-11 desired to litigate the allegations alleged by the third-party complainant, James Upton, in these other forums, so that the Board’s adjudication of C2017-11 would not have *res judicata* or estoppel effects in the other two actions.
9. The Board and Respondents in C2017-11, agreed to the entry of a Consent Order in which Terence Moran would be named as a Respondent, in that there was evidence that he improperly signed and sealed a set of engineered drawings by using a copy of his seal and signature taken from an earlier set of sealed drawings. Respondent Moran acknowledged that he failed to affix a new seal and signature to the revised drawings.
10. After further consideration of the entry of the C2017-11 Consent Order, the Board would, and did enter, an order on March 14, 2018, wherein the Board would dismiss all other allegations set forth in C2017-11 without prejudice.

11. On or about March 11, 2019, the action before the Public Service Commission of West Virginia, Case No. 16-1601-W-C, was withdrawn by Upton Construction Company. This, in effect, resolved the differences, if any, between Upton Construction Company and the defendants Town of Mill Creek Municipal Water Department and Respondent Firm in that forum. This left the Randolph County Circuit Court action pending.
12. The jury, on or about January 30, 2020, delivered its verdict in the Randolph County Circuit Court action. The jury:
 - a. Found that Respondent Firm (Potesta & Associates, Inc.) was negligent;
 - b. Found that Respondent Firm committed fraud;
 - c. Found that Respondent Firm's conduct was a proximate cause of harm to Upton Construction Company;
 - d. Awarded Upton Construction Company \$1,719,143.53 in compensatory damages as a result of Respondent Firm's conduct; and
 - e. Found that Respondent Firm committed a wrongful act with actual malice towards Upton Construction Company, or acted with conscious, reckless, and outrageous indifference to the health, safety, and welfare of others, and awarded Upton Construction Company \$300,000.00 in punitive damages.
13. The jury verdict was disputed by Respondent Firm and was the subject of post-trial motions, as was Upton's counsel's statements during closing argument, trial evidence rulings, and other pre-trial rulings. While these post-trial motions were pending, Upton and Potesta negotiated a resolution of the dispute.
14. In February, 2020, Mr. James Upton, President of the Upton Construction Company, provided a copy of the jury verdict to Board staff, and indicated that its litigation had been completed.
15. These facts resulted in a Board-initiated investigation, which disclosed that Respondent Firm in the Randolph County litigation had been found guilty of negligence and fraud; that Respondent Firm had been the cause of Upton Construction Company's complained harm;

and that Respondent Firm committed a wrongful act with actual malice towards Upton Construction Company, or acted with conscious, reckless, and outrageous indifference to the health, safety, and welfare of others which resulted in an award of punitive damages against Respondent Firm to the benefit of Upton Construction Company. Further, said investigation disclosed that Respondent Moran signed and/or sealed three separate sets of engineered drawings which he could not explain or failed to possess knowledge concerning some of the revisions made in the second and contained again in the third sets of engineered drawings for the Project.

16. The Board considered the matters set forth in the dismissed complaint C2017-11, together with the additional allegations based on the facts revealed in the Randolph County Circuit Court action, and now deems the matter mature and ripe for adjudication. The Board initiated Complaint Number C2021-03 at its regular meeting on September 22, 2020, which was filed and received on said date.
17. The Board and Respondents have agreed to settle this matter in lieu of Respondents filing a formal Response, and to forego their right to an administrative hearing, and their right to appeal.
18. Respondent Firm will admit that the jury found that it had committed fraud in the circuit court action, and that the jury awarded Upton Construction Company \$1,719,143.53 for damages stemming from the Project.
19. Respondent Firm will also admit that the jury also found that it had committed a wrongful act with actual malice toward Upton Construction Company, or had acted with conscious, reckless, and outrageous indifference to health, safety, and welfare of others, i.e., the public.
20. Respondent Moran will admit that he failed to exercise the proper care, knowledge and/or supervision required by a professional engineer regarding the second and third sets of engineered drawings and their content on the two occasions he sealed and signed the second and third sets of engineered drawings for the Project. More specifically, that he

did not fully and completely check the preparation of these drawings in violation of West Virginia engineering law.

21. The Board has considered the following factors in reaching this settlement: Respondents were in good standing with the Board prior to the service of this Complaint upon Respondents; and Respondents have cooperated in the resolution of this Complaint.
22. The Board, in its discretion, will not assess administrative costs although it is within its power to assess such costs and administrative costs were incurred in the investigation, initiation and resolution of this complaint.

CONCLUSIONS OF LAW

23. The Board is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia, and matters related to such practice are within the jurisdiction of the Board. W. Va. Code §30-13-1 *et seq.*
24. Ronald R. Potesta, as the President of Respondent Firm, has the power and authority to make admissions and otherwise act on behalf of Respondent Firm, and he makes such admissions, knowingly, freely, voluntarily, and without any threat of harm or act of coercion.
25. Respondent Moran has the power and authority to make admissions and otherwise act on his own behalf, and he makes such admissions, knowingly, freely, voluntarily, and without any threat of harm or act of coercion.
26. It is unlawful for any person to engage in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public. W. Va. Code §30-13-21(a)(11).
27. The provisions of W. Va. Code §30-13-21(a) are applicable to firms. W. Va. Code §30-13-21(b) and (d).
28. The Board may reprimand, suspend or revoke or refuse to issue, restore or renew a certificate of registration or authorization, or place on probation, impose a civil penalty or reprimand any professional engineer or firm, who has failed to comply with any of the

provisions of this article or any of the rules promulgated under it. W. Va. Code §30-13-21(a)(4), (b) and (d), and §30-13-22(d).

29. Practicing engineering, as defined by W. Va. Code §30-13-3(e), in such a manner that it is likely to deceive or defraud the public, and/or threatens the public health, safety and welfare, may subject any person or firm to discipline by the Board, including a civil penalty up to Fifteen Thousand dollars (\$15,000.00) for each offense. W. Va. Code R. §7-1-15.1.
30. W. Va. Code § 30-13-16(c) provides that “(w)henever presented to a client or any public or governmental agency, the seal, signature and date shall be placed on all specifications, reports, drawings, plans, design information and calculations in accordance with rules promulgated by the board”
31. Revisions shall be numbered, dated, initialed, and sealed by the registrant responsible for the revision. W. Va. Code R. § 7-1-7.3(c).
32. The registrant signing and sealing the first or title page of documents shall be the firm’s PE in responsible charge as designated on the firm’s COA application or the project engineer. W. Va. Code R. § 7-1-7.3(b).
33. When a registrant examines and verifies the engineering work of another, the registrant must take complete dominion and control of the design, which includes possession of the sealed and signed reproducible construction drawings with complete signed and sealed design calculations indicating all changes in design. W. Va. Code R. § 7-1-7.3(c).
34. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration, or place on probation, impose a civil penalty or reprimand any professional engineer who has failed to comply with any of the provisions of this article or any of the rules promulgated under it. W. Va. Code § 30-13-21(a)(4).
35. Misuse of a West Virginia professional engineer seal subjects Respondent Moran to discipline by the Board, including a civil penalty up to Five Thousand Dollars (\$5,000.00) for each offense. W. Va. Code R. § 7-1-15.1.

36. The Board is authorized to “assess civil penalties against any person who violates any provision of this article or any rule promulgated by the board for each offense in an amount determined by the board.” W. Va. Code §30-13-21(b); see also W. Va. Code §30-13-21(d)(4) and W. Va. Code R §7-1-15.
37. In determining the amount of a civil penalty to be assessed, the Board may consider such factors as the circumstances leading to the violation; the nature and severity of the violation and the risk of harm to the public; the extent to which the cited person or firm has cooperated with the Board and the Board’s investigation; and other matters as may be appropriate. W. Va. Code R. §7-1-15.4.
38. The assessment of administrative costs is within the Board’s sole discretion. W. Va. Code §30-13-21(d)(4) and W. Va. Code R. §7-1-14.4.

CONSENT OF THE RESPONDENTS

Ronald R. Potesta, as the President of Respondent Firm, by affixing his signature hereon, agrees to the following on behalf of Respondent Firm, Potesta & Associates, Inc., and Terence Moran, individually, by affixing his signature hereon, agrees to the following on his own behalf:

39. Respondents are aware of their rights to be represented by counsel in this matter and to pursue this matter through appropriate administrative and/or court procedures, including their right to a formal hearing before the Board, and said Respondents, after having the opportunity to consult with their counsel, Pietragallo, Gordan, Alfano, Bosick & Raspanti, LLP, knowingly, freely, voluntarily, and without any threat of harm or act of coercion, enter into this Consent Order to resolve Complaint, C2021-03; provided the Board accepts the terms and conditions set forth in this Consent Order.
40. Respondent Firm admits, for this action only, that it was found by a jury to have been negligent and been fraudulent in its providing engineering services for the Project.
41. Respondent Firm also admits, for this action only, that it was found by a jury to have committed an act with conscious, reckless, and outrageous indifference by revising the

Project's second and third sets of engineered drawings with erroneous markings indicating the locations of underground utilities.

42. Respondent Moran admits, for this action only, that he failed to exercise the proper care, knowledge and/or supervision required by a professional engineer regarding the engineered drawings and their content on the two occasions he sealed and signed the second and third sets of engineered drawings for the Project.
43. Respondents accept the findings set forth above and consent to the entry of this Consent Order, knowingly, freely and voluntarily, and not under duress, restraint or compulsion, and after having time in which to confer with their counsel.
44. Respondents acknowledge that this Consent Order is being executed for the purpose of avoiding further administrative action with respect to the above-styled matter. In this regard, Respondents authorize the Board to review and examine all investigative file materials concerning Respondents' activities in West Virginia in consideration of this Consent Order.
45. Respondents acknowledge that the Board may reject this proposal, notice and hold a hearing, and, upon adjudication, impose such sanctions of a disciplinary nature as it deems appropriate.
46. Should the Board not approve this Consent Order, Respondents waive any objections to the Board, or any of its members, participating in the adjudication of this matter. This paragraph is binding on Respondents even if the Board does not approve this Consent Order.
47. If the Board does reject this proposal, any admissions made herein by Respondents are deemed null and void.
48. Respondents understand that this Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to the same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order, but that nothing in this Consent

Order prohibits the Board from considering this disciplinary action or the circumstances giving rise to same with regard to any future disciplinary matter involving Respondents, or either of them, which may be before this Board.

49. Respondents understand that the Complaint and this Consent Order are public records which, together with other public documents in the file, must be made available upon legal request in accordance with the State's Freedom of Information Act.
50. Respondents agree that the sum and substance of the Complaint and this agreement in part or in their entirety will be set forth in Board publications and on the Board's website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).
51. Respondents acknowledge that non-compliance with this Consent Order may result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation, non-renewal or non-reinstatement of any Certificate of Registration issued to Respondent Moran and/or Certificate of Authorization issued to Respondent Firm by the Board, and the addition of any other charges which may arise or ensue from Respondents' non-compliance with this Consent Order.
52. Respondents acknowledge that proof of any material misstatement or misrepresentation made in connection with this matter will result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation, non-renewal or non-reinstatement of any Certificate of Registration issued to Respondent Moran and/or Certificate of Authorization issued to Respondent Firm by the Board, and the addition of any other charges which may arise or ensue from providing false information to the Board in violation of West Virginia engineering law.

ORDER

1. On the basis of the foregoing, and upon entry of this Consent Order, the Board hereby **ORDERS** that this Consent Order shall serve as settlement of Complaint Number C2021-03 pursuant to West Virginia Code § 30-13-22(b).
2. The Board **ORDERS** Respondent Firm to pay a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00) for each of two counts of engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public.
3. The Board **ORDERS** Respondent Moran to pay a civil penalty in the amount of Four Thousand Dollars (\$4,000.00) for each of the two counts of failing to completely check the revised drawings, prior to him affixing his seal and signature thereto in violation of West Virginia engineering law.
4. The civil penalty imposed against Respondent Firm totals Twenty Thousand Dollars (\$20,000.00), and must be paid within thirty (30) days of the date of entry set forth below, such amount to be made payable to the “**W. Va. P.E. Board**” for transfer to the general fund of the State of West Virginia upon receipt.
5. The civil penalty imposed against Respondent Moran totals Eight Thousand Dollars (\$8,000.00), and must be paid within thirty (30) days of the date of entry set forth below, such amount to be made payable to the “**W. Va. P.E. Board**” for transfer to the general fund of the State of West Virginia upon receipt.
6. The sum and substance of the Complaint and this agreement in part or in their entirety shall be set forth in Board publications and on the Board’s website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).
7. Any violation of the terms of this Consent Order shall be immediate cause for further disciplinary action by the Board.

8. If the civil penalty imposed upon Respondent Firm herein is not paid within thirty (30) days of the date of entry set forth below, then Respondent Firm's COA is hereby **ORDERED REVOKED**. Said revoked COA may be restored once the civil penalty is paid, and Respondent Firm pays the appropriate fees, and is otherwise in good standing with the Board. West Virginia Code § 30-13-21(d)(1).
9. If the civil penalty imposed upon Respondent Moran herein is not paid within thirty (30) days of the date of entry set forth below, then Respondent Moran's W.Va. P.E. Certificate of Registration (license) is hereby **ORDERED REVOKED**. Said revoked Certificate of Registration may be restored once the civil penalty is paid, and Respondent Moran pays the appropriate fees, and is otherwise in good standing with the Board. West Virginia Code § 30-13-21(a).
10. This Consent Order may be summarily enforced in the Circuit Court of Kanawha County, West Virginia, without further notice to Respondent Firm upon application by the Board for the entry of a Judgment Order for the total amount of payment agreed to herein of Twenty Thousand Dollars (\$20,000.00) together with pre-judgment interest from the date of the Board's President's signature hereon, post-judgment interest from the date of entry of the Judgment Order, and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.
11. This Consent Order may be summarily enforced in the Circuit Court of Kanawha County, West Virginia, without further notice to Respondent Moran upon application by the Board for the entry of a Judgment Order for the total amount of payment agreed to herein of Eight Thousand Dollars (\$8,000.00) together with pre-judgment interest from the date of the Board President's signature hereon, post-judgment interest from the date of entry of the Judgment Order, and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.
12. This matter shall be closed upon execution of this Consent Order by both parties and the full payment of the civil penalty agreed to herein, except as to the provisions set forth in

paragraphs 8 and 9, above, regarding revocation of Respondent Firm's COA and Respondent Moran's Certificate of Registration, and their effects shall survive the closure of this Consent Order.

13. This Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to the same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order. This shall not prohibit the Board from considering this disciplinary action or the circumstances giving rise to the same with regard to any future disciplinary matter involving Respondent Firm or Respondent Moran which may come before this Board.
14. This Consent Order relates solely to matters set forth in West Virginia engineering law and does not evidence compliance with any other laws of the State of West Virginia or its political subdivisions, nor should any such compliance be implied.

(Signature line appears on next page)

AGREED TO BY:



POTESTA & ASSOCIATES, INC.
By: RONALD R. POTESTA, ITS PRESIDENT

2/12/21
DATE

And



TERENCE MORAN

2/12/21
DATE

ENTERED into the records of the West Virginia State Board of Registration for Professional Engineers this 3 day of March, 2021.

WEST VIRGINIA STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS

By: 

BHAJAN S. SALUJA, P.E.
BOARD PRESIDENT