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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

JOHN C. BRISBIN dba CONSTRUCTION)
DEVELOPMENT SYSTEMS,)
)
Plaintiff,)
)
v.)
)
VULCAN MATERIALS COMPANY;)
and DOES 1-100, inclusive,)
)
Defendants.)

1:11-cv-00568-AWI-SKO
AMENDED PRETRIAL ORDER
Motions In Limine Hearing and
Trial Confirmation:
October 28, 2013
1:30 p.m., Courtroom 2
Trial: November 13, 2013
8:30 a.m., Courtroom 2

UNITED STATES OF AMERICA for)
use and benefit of CALMAT CO. dba)
VULCAN MATERIALS COMPANY –)
WESTERN DIVISION; CALMAT CO.,)
dba VULCAN MATERIALS COMPANY)
– WESTERN DIVISION,)
)
Counter-claimant)
and Use Counter-)
Claimant,)
)
v.)
)
JOHN C. BRISBIN dba CONSTRUCTION)
DEVELOPMENT SYSTEMS;)
WESTERN SURETY COMPANY,)
)
Counter-defendants.)

RULES OF CONDUCT

The pretrial conference was held on Wednesday, June 26, 2013. The trial in this matter is set for

1 Wednesday, November 13, 2013. The parties currently estimate that the trial shall take six (6) days.

2
3 **I. Jurisdiction and Venue**

4 There are no disputes regarding jurisdiction or venue in this action.

5
6 **II. Jury Trial**

7 The parties request a jury trial on all triable issues.

8
9 **III. Facts**

10 **A. Undisputed Facts**

- 11 1. Plaintiff/Cross-defendant John C. Brisbin is an individual residing and conducting business
12 in the County of Fresno, State of California, and does business under the fictitious business
13 names of Construction Development Systems (“CDS”).
- 14 2. Defendant/Cross-complainant CalMat Co. is a Delaware corporation which does business
15 in the State of California under fictitious name of Vulcan Materials Company - Western
16 Division (“Vulcan”).
- 17 3. Cross-defendant Western Surety Company (“Western”) is a South Dakota corporation which
18 conducts business in the State of California as a corporate surety.
- 19 4. In March 2009, CDS entered into a written contract with the United States Department of
20 Federal Highways Administration (“FHWA”) to construct a federal work of improvement
21 known as the “General Highway Road Rehabilitation, Sequoia National Park.”
- 22 5. The Contract between CDS and the FHWA is identified as Contract Number
23 DTFH68-09-C-00013. Pursuant to 40 U.S.C. Section 3131 et seq. (The Miller Act”), CDS,
24 as contractor, was required to execute and deliver to the FHWA a payment bond with respect
25 to the Project.
- 26 6. On or about March 20, 2009, CDS, as principal, and Western, as surety, executed and
27

1 delivered to the FHWA, Payment Bond Number 58638739("Payment Bond").

2 **B. Disputed Facts**

3 **I. Brisbin/CDS**

- 4 1. Vulcan disputes every claim by Brisbin in any way relating to "Assured but Unapplied
5 Credits" and "Set-offs." Brisbin denies that Vulcan is entitled to any recovery of attorney's
6 fees.
- 7 2. Whether Vulcan provided materials that met all specifications.

8 **ii. Vulcan**

- 9 1. Vulcan disputes each and every claim by plaintiff CDS in its complaint for "assured but
10 unapplied credits" and "set-offs." Vulcan contends that each of these items is wholly without
11 merit.

12 **iii. Western**

- 13 1. Western is aware from Vulcan's separate pre-trial conference statement that it disputes each
14 and every claim by plaintiff CDS described as "assured but unapplied credits" and "set-offs."
15 As the bond issuer, Western adopts the position of its bond principal as to its credits and
16 setoffs because, if proved, they will reduce the amount for which Western might otherwise
17 be obligated under its bond obligation.

18 **C. Disputed Evidentiary Issues**

19 None.

20 **D. Special Factual Information**

21 Pursuant to Local Rule 16-281(b)(6), the following special factual information pertains to this action:

22

23 **Brisbin/CDS:** Vulcan contends that the contract between the parties consists of the Credit
24 Application, price quotation and subsequent modifications. Brisbin contends that he is entitled to
25 Set-Offs and Assured but Unapplied Credits. Brisbin contends that there were misrepresentations
26 regarding pricing and credits. Brisbin contends that Vulcan breached the contract by failing to apply

1 the Assured by Unapplied Credits and the Set-Offs. The amount of damages is in dispute.

2
3 **Vulcan:** Vulcan contends that the contract consists of the terms and conditions contained in the
4 credit application dated March 20, 2002 and the specific price for the materials contained in the
5 quotation from Vulcan to CDS, and the subsequent modifications agreed upon by the parties.
6 Vulcan contends there that there were no misrepresentations of fact, mistakes or other matter
7 affecting the validity of the contract. Vulcan contends that CDS breached the contract by failing to
8 pay Vulcan for the invoices sent to CDS for the deliveries of materials for use in the construction
9 of the Project. Vulcan believes that there was no issues relating to waiver or estoppel. Vulcan is
10 seeking damages from CDS. The damages sustained by Vulcan are the principal amount of
11 \$385,755.73, together with interest thereon at the rate of 1.5% per month, attorneys's fees and costs.

12
13 **Western:** As the bond surety, Western adopts the position of its bond principal with respect to all
14 claims against Vulcan which, if proved, reduce or eliminate the amount of money which Vulcan
15 claims is otherwise due it by Plaintiff and Western.

16 17 **IV. Relief Sought**

18 **A. Brisbin/CDS**

19 Vulcan's cross-complaint seeks the principal amount of \$385,755.73, together with interest thereon
20 at the rate of 18% per annum, attorneys' fees and costs of suit against CDS and Western. Brisbin
21 contends that he does not owe any money to Vulcan. Vulcan also requests the dismissal with
22 prejudice of CDS's complaint.

23 **B. Vulcan**

24 Vulcan seeks the principal amount of \$385,755.73, together with interest thereon at the rate of 18%
25 per annum, attorneys' fees and costs of suit against CDS and Western. Vulcan also requests the
26 dismissal with prejudice of CDS's complaint.

1 impeachment witnesses. NO WITNESS, OTHER THAN THOSE LISTED IN THIS SECTION,
2 MAY BE CALLED AT TRIAL UNLESS STIPULATED TO BY THE PARTIES OR UPON A
3 SHOWING THAT THIS ORDER SHOULD BE MODIFIED TO PREVENT “MANIFEST
4 INJUSTICE.” Fed. R. Civ. P. 16(e); Local Rule 16-281(b)(10).

5 **A. Brisbin’s/CDS’s Witnesses**

- 6 1. Angela Bailey, Vulcan Materials Company
- 7 2. Marcos Galaviz, Vulcan Materials Company
- 8 3. Gary Dunkel, Vulcan Materials Company
- 9 4. Rita Leahy
- 10 5. Don Berry, Don Berry Construction
- 11 6. Ian Beatty, Krazen & Associates
- 12 7. Scott Wolfert, Federal Highways Administration
- 13 8. Chris Franks, West Coast Sand & Gravel
- 14 9. John C. Brisbin
- 15 10. Brian Hall
- 16 11. Tim Kempkes

17 **B. Vulcan’s Witnesses**

- 18 1. Angela Bailey, Vulcan Materials Company
- 19 2. Marcos Galaviz, Vulcan Materials Company
- 20 3. Gary Dunkel, Vulcan Materials Company
- 21 4. Rita Leahy
- 22 5. Don Berry, Don Berry Construction
- 23 6. Ian Beatty, Krazen & Associates
- 24 7. Scott Wolfert, Federal Highways Administration
- 25 8. Chris Franks, West Coast Sand & Gravel

26 **C. Western’s Witnesses**

1 counterclaims. This list does not include any exhibits solely intended to be used on rebuttal and
2 Vulcan reserves the right to use said rebuttal exhibits.

- 3 1. Credit Application dated March 20, 2002
- 4 2. Summary of Vulcan's invoices to CDS and CDS's payments to Vulcan and balance
5 due.
- 6 3. Vulcan's unpaid invoices, with delivery tickets.
- 7 4. Vulcan's paid invoices, with delivery tickets.
- 8 5. Vulcan's credit memo dated January 31, 2010.
- 9 6. Vulcan's pre-bid quotation to CDS.
- 10 7. Vulcan's pre-bid quotations to other bidders.
- 11 8. CDS's letter to Vulcan dated April 30, 2010.
- 12 9. CDS's checks to Vulcan.

13 **C. Western's Exhibits**

14 Western incorporates by reference all exhibits listed by its principal and reserves the right to use
15 them as evidence at trial.

16
17 **IX. Discovery Documents To Be Used At Trial (Answers To Interrogatories And Responses
18 To Requests For Admissions**

19 None.

20
21 **X. Further Discovery or Motions**

22 On June 17, 2013, Vulcan filed a motion to compel the attendance of CDS's expert witnesses at
23 deposition or for an order barring CDS from calling expert witnesses at trial, and for sanctions
24 against CDS. The hearing on said motion is scheduled for July 3, 2013.

25
26 **XI. Stipulations**

1 None.

2

3 **XII. Amendments/Dismissals**

4 None.

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6 **XIII. Settlement Negotiations**

7 Brisbin believes that a court-supervised settlement conference involving all parties would be
8 appropriate.

9

10 Vulcan believes that a court settlement conference between itself and Western would be productive.

11 Vulcan does not believe CDS's attendance at a settlement conference would productive.

12

13 Western believes that a court-supervised settlement conference involving all parties would be
14 appropriate.

15

16 **XIV. Agreed Statement**

17 The parties do not believe that a presentation of all or part of the action upon an Agreed Statement
18 of Fact is feasible or advisable.

19

20 **XV. Separate Trial Of Issues**

21 The parties do not seek a separate trial of issues.

22

23 **XVI. Impartial Experts - Limitation Of Experts**

24 The parties do not believe that court appointment of experts or a limitation on the number of experts
25 is advisable.

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1 **XVII. Attorneys' Fees**

2 Brisbin/CDS and Western do not seek an award of attorneys' fees. Vulcan seeks an award of
3 attorneys' fees.

4
5 **XVIII. Trial Exhibits**

6 The parties are not aware of any need for the special handling of exhibits.

7
8 **XIX. Trial Protective Order**

9 N/A.

10
11 **XX. Further Trial Preparation**

12 **A. Final Witness List**

13 The parties are ordered to file and serve their final list of witnesses by Thursday, November 7, 2013.
14 Additionally, at that time the parties shall disclose the order of witnesses so that the opposing parties
15 will be prepared for cross-examination. Except upon the showing set forth above in section VII, a
16 party may not add witnesses to the final list of witnesses, or to any other updated witness list, who
17 are not disclosed in this Order in Section VII.

18 **B. Trial Briefs**

19 The parties may file and serve a Trial Brief by Tuesday, October 15, 2013. Local Rule 16-285.
20 Responding briefs may be filed by Monday, October 21, 2013. The parties need not include in the
21 Trial Brief any issue that is adequately addressed in a motion in limine or in an opposition brief to
22 a motion in limine.

23 **C. Duty of Counsel to Pre-Mark Exhibits**

24 The parties are ordered to confer at their earliest convenience for the purposes of pre-marking and
25 examining each other's exhibits. All joint exhibits must be pre-marked with numbers preceded by
26 the designation JT/-- (e.g., JT/1, JT/2). All of Plaintiff's/Cross-Defendants' exhibits shall be pre-

1 marked with numbers. All of Defendant's/Cross-complainant's exhibits shall be pre-marked with
2 letters.

3
4 1. Counsel shall create four (4) complete, legible sets of exhibits in binders as follows:

5
6 (a) Two sets of binders to be delivered to Courtroom Clerk Harold Nazaroff by
7 Thursday, November 7, 2013, one for use by the Courtroom Clerk and the other for the Court; and

8 (b) One set for each counsel's own use.

9 If the parties desire, they may have a fifth set of binders to be used for the purposes of
10 questioning witnesses.

11 2. Counsel are to confer and make the following determination with respect to each proposed
12 exhibit to be introduced into evidence, and to prepare separate indexes - one listing joint exhibits,
13 and one listing each party's separate exhibits:

14 (a) Duplicate exhibits, i.e., documents which both sides desire to introduce into
15 evidence, shall be marked as a joint exhibit, and numbered as directed above. Joint exhibits shall
16 be listed on a separate index, and shall be admitted into evidence on the motion of any party, without
17 further foundation.

18 (b) As to exhibits that are not jointly offered, and to which there is no objection to
19 introduction, those exhibits will likewise be appropriately marked, e.g., Plaintiff's Exhibit 1 or
20 Defendant's Exhibit A, and shall be listed in the offering party's index in a column entitled
21 "Admitted In Evidence." Such exhibits will be admitted upon introduction and motion of the party,
22 without further foundation.

23 (c) Those exhibits to which the only objection is a lack of foundation shall be marked
24 appropriately, e.g., Plaintiff's Exhibit 2 - For Identification, or Defendant's Exhibit B - For
25 Identification, and indexed in a column entitled "Objection Foundation."

26 (d) Remaining exhibits as to which there are objections to admissibility not solely
27

1 based on a lack of foundation shall likewise be marked appropriately, e.g., Plaintiff's Exhibit 3 - For
2 Identification or Defendant's Exhibit C - For Identification, and indexed in a third column entitled
3 "Other Objection" on the offering party's index.

4 3. Each separate index shall consist of the exhibit number or letter, a brief description of the
5 exhibit, and the three columns outlined above, as demonstrated in the example below:

6

7 INDEX OF EXHIBITS

8 <u>EXHIBIT #</u>	9 <u>DESCRIPTION</u>	10 <u>ADMITTED</u> <u>INTO EVIDENCE</u>	11 <u>OBJECTION</u> <u>FOUNDATION</u>	12 <u>OTHER</u> <u>OBJECTION</u>
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13 Two sets of the completed joint index and the separate indexes shall be delivered to the
14 Courtroom Clerk with the two sets of binders.

15 The Court has no objection to counsel using copies. However, the copies must be legible.
16 If any document is offered into evidence that is partially illegible, the Court may sua sponte exclude
17 it from evidence.

18 **D. Discovery Documents**

19 N/A.

20 **E. Motions In Limine Hearing and Briefing Schedule**

21 The hearing for motions in limine will be held on Monday, October 28, 2013 at 1:30 p.m. In
22 addition to addressing any filed motions in limine, at that time the Court will also settle, to the extent
23 possible, any other matter pertaining to the conduct of the trial. Counsel are expected to be fully
24 cognizant of the legal issues involved in the case by the date of the hearing for motions in limine.

25 By 4:00 p.m. on Tuesday, October 1, 2013, all motions in limine, with supporting points and
26 authorities, shall be filed and served either personally or by facsimile upon opposing counsel.

27 By 4:00 p.m. on Tuesday, October 15, 2013, opposition to any motion in limine shall be filed
28 and served either personally or by facsimile upon opposing counsel. If a party does not oppose a
motion in limine, that party shall file and serve in the same manner a Statement of Non-Opposition

1 to that motion in limine.

2 By 12:00 p.m. on Monday, October 21, 2013, any reply to an opposition shall be filed and
3 served either personally or by facsimile upon opposing counsel. Because the Court will need time
4 to prepare for the hearing on October 28, 2013, the Court is not inclined to consider late reply briefs.

5 **F. Morning Conferences During Trial**

6 During the trial, it is the obligation of counsel to meet with the Court each morning to advise the
7 Court and opposing counsel as to what documents are proposed to be put into evidence that have not
8 previously been admitted by stipulation, court order, or otherwise ruled upon. The Court will rule
9 on those documents, to the extent possible, prior to the commencement of trial each day out of the
10 presence of the jury. If the ruling depends upon the receipt of testimony, the Court will rule as
11 requested upon the receipt of such testimony.

12 The Court shall consider any other legal matter at morning conferences as well. The Court
13 does not wish to recess the trial to hear legal argument outside of the presence of the jury, and proper
14 preparation by counsel will eliminate the need for that result.

15 **G. Use Of Videotape and Computers**

16 Any party wishing to use a videotape for any purpose during trial shall lodge a copy of the videotape
17 with the Courtroom Clerk by 4:00 p.m. on Thursday, November 7, 2013. If a written transcript of
18 audible words on the tape is available, the court requests that the transcript be lodged with the court,
19 solely for the aid of the court.

20 If counsel intends to use a laptop computer for presentation of evidence, they shall contact
21 the courtroom deputy clerk at least one week prior to trial. The courtroom deputy clerk will then
22 arrange a time for counsel to bring the laptop to the courtroom, and meet with a representative of the
23 Information and Technology Department and receive a brief training session on how counsel's
24 equipment interacts with the court's audio/visual equipment. If counsel intends to use PowerPoint,
25 the resolution should be set no higher than 1024 x 768 when preparing the presentation.

26 **H. Order Of Witnesses**

1 In order to make the trial operate efficiently and smoothly, each counsel has the continuing
2 obligation to advise opposing counsel as to what witnesses he or she intends to call twenty-four (24)
3 hours prior to calling that witness.

4 **I. Proposed Jury Instructions**

5 The parties shall file and serve proposed jury instructions by 4:00 p.m. on Monday, October 21,
6 2013. A copy of the instructions, preferably formatted for Microsoft Word 2010, should be emailed
7 to aworders@caed.uscourts.gov. All proposed jury instructions shall be in duplicate. One set shall
8 indicate the party proposing the instruction, with each instruction numbered or lettered, shall cite
9 supporting authority, and shall include the customary “Given, Given as Modified, or Refused,”
10 showing the court’s action with regard to each instruction. The other set shall be an exact copy of
11 the first set, but shall be a “clean” copy that does not contain the identification of the offering party,
12 instruction number or letter, supporting authority, or reference to the court’s disposition of the
13 proposed instruction.

14 The parties are ordered to confer after the trial confirmation hearing to determine which
15 instructions they agree should be given. As soon as possible thereafter, the parties shall submit a list
16 of joint, unopposed instructions. As to those instructions to which the parties dispute, the court will
17 conduct its jury instruction conference during trial at a convenient time.

18 **J. Voir Dire**

19 The parties shall file and serve proposed voir dire questions, if any, by 4:00 p.m. on Thursday,
20 November 7, 2013. Further, in order to aid the court in the proper voir dire examination of the
21 prospective jurors, counsel should lodge with the court on the first morning of trial a list of all
22 prospective witnesses, including rebuttal witnesses, that counsel reasonably expect to call. The
23 purpose of the lists is to advise the prospective jurors of possible witnesses to determine if a
24 prospective juror is familiar with any potential witness.

25 **K. Agreed Summary Of The Case**

26 The parties shall lodge with the Courtroom Clerk a joint agreed summary of the case, briefly
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1 outlining the positions of the parties by 4:00 p.m. on Thursday, November 7, 2013. The summary
2 will be read to the jury panel at the outset of the trial solely for the purposes of assisting in the jury
3 selection process. The contents of the summary shall not be deemed to be evidence or an admission
4 or stipulation by a party as to any contested fact or issue.

5
6 **XXI. Objections to Pretrial Order**

7 Any party may, within ten (10) calendar days after the date of service of this order, file and serve
8 written objections to any of the provisions of this order. Local Rule 16-283. Such objection shall
9 specify the requested corrections, additions or deletions.

10
11 **XXII. Rules of Conduct During Trial**

12 **A. General Rules**

13 1. All participants in the trial shall conduct themselves in a civil manner. There shall be no
14 hostile interchanges between any of the participants.

15 2. All oral presentations shall be made from the podium, unless otherwise permitted by the
16 court.

17 3. Sidebar conferences are discouraged. Legal arguments or discussion of issues outside the
18 presence of the jury should be done during recesses.

19 4. Counsel shall advise their respective clients and witnesses not to discuss any aspect of the
20 case in the common areas of the courthouse accessible to the jurors, such as the lobby, the
21 elevators, the hallways and the cafeteria.

22 **B. Jury Selection**

23 1. The court will conduct voir dire to be supplemented by any written questions submitted
24 by counsel prior to trial and after the court has concluded its questioning of the jury panel.

25 In some circumstances, the court may allow brief direct questioning by counsel.

26 **C. Opening Statements**

1 1. Counsel may use visual aids in presenting the opening statement. However, any proposed
2 visual aids shall be shown to opposing counsel before opening statement.

3 **D. Case in Chief**

4 1. Counsel shall have his/her witnesses readily available to testify so that there are no delays
5 in the presentation of evidence to the trier of fact.

6 2. At the close of each trial day, counsel shall disclose his/her anticipated witnesses and
7 order of presentation for the next day, so that any scheduling or evidentiary issues may be
8 raised at that time.

9 **E. Witnesses**

10 1. Before approaching a witness, counsel shall secure leave of court to approach the witness.

11 2. Before approaching a witness with a writing, counsel shall first show the writing to
12 opposing counsel.

13 **F. Exhibits**

14 1. All exhibits shall be marked and identified in accordance with the instructions in the
15 Pretrial Order.

16 2. An exhibit shall not be published to the jury until it has been admitted into evidence and
17 counsel has secured leave of court to publish the exhibit.

18 3. The Court usually will conduct an on the record review of the exhibits that have been
19 admitted in evidence at the conclusion of each party's case in chief and after each party has
20 rested its entire case.

21 **G. Objections**

22 1. No speaking objections or arguments are permitted in the presence of the jury. Counsel
23 shall state the specific legal ground(s) for the objection, and the court will rule based upon
24 the ground(s) stated. The Court will permit counsel to argue the matter at the next recess.

25 2. The Court will not assume that any objection made also implies with it a motion to strike
26 an answer that has been given. Therefore, counsel who has made an objection, and who also

1 wishes to have an answer stricken, shall also specifically move to strike the answer.

2 **H. Closing Argument**

3 1. Counsel may use visual aids in presenting the closing argument. However, any proposed
4 visual aids shall be shown to opposing counsel before closing argument.

5
6 FAILURE TO COMPLY WITH ALL PROVISIONS OF THIS ORDER MAY BE GROUNDS FOR
7 THE IMPOSITION OF SANCTIONS, INCLUDING POSSIBLE DISMISSAL OF THIS ACTION
8 OR ENTRY OF DEFAULT, ON ANY AND ALL COUNSEL AS WELL AS ON ANY PARTY
9 WHO CAUSES NON-COMPLIANCE WITH THIS ORDER.

10 IT IS SO ORDERED.

11 Dated: July 8, 2013



12 _____
13 SENIOR DISTRICT JUDGE
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