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7  
8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10

11 JOHN C. BRISBIN, an individual, dba  
12 CONSTRUCTION DEVELOPMENT  
SYSTEMS,

13 Plaintiff,

14 v.

15 VULCAN MATERIALS COMPANY, a  
16 New Jersey corporation; and DOES 1  
through 100, inclusive,

17 Defendant.

18  
19 THE UNITED STATES OF  
AMERICA, for the Use and Benefit of  
20 CALMAT CO., a Delaware corporation,  
dba VULCAN MATERIALS  
21 COMPANY – WESTERN DIVISION;  
et al,

22 Counter-Claimants

23 v.

24 JOHN C. BRISBIN, an individual, dba  
25 CONSTRUCTION DEVELOPMENT  
SYSTEMS; WESTERN SURETY  
26 COMPANY, a South Dakota  
corporation,

27 Counter-Defendant  
28

Case No. 1:11-CV-00568-AWI-SKO

**STIPULATION TO AMEND  
SCHEDULING ORDER TO  
ALLOW DEPOSITIONS OF  
EXPERT WITNESSES; ORDER  
THEREON**

1 IT IS HEREBY STIPULATED by and between Plaintiff and Counter-  
2 Defendant JOHN C. BRISBIN, an individual, dba CONSTRUCTION  
3 DEVELOPMENT SYSTEMS (“BRISBIN”), Defendant and Counter-Claimant  
4 CALMAT CO., a Delaware corporation, dba VULCAN MATERIALS COMPANY  
5 – WESTERN DIVISION (“VULCAN”) and Counter-Defendant WESTERN  
6 SURETY COMPANY, a South Dakota corporation (“WESTERN”), through their  
7 respective counsel, as follows:

8  
9 1. The Scheduling Order in this case shall be amended to allow for  
10 VULCAN to take the depositions of Brian Hall, Tim Kempkes and John Brisbin, the  
11 expert witnesses designated by BRISBIN.

12  
13 2. BRISBIN shall make said witnesses available for deposition on or  
14 before August 30, 2013.

15  
16 3. No other provision of the Scheduling Order or the Pretrial Order are  
17 sought to be amended by this Stipulation.

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19 Good cause exists for this Stipulation as evidenced by the following facts:

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21 1. On July 12, 2011, the Court issued its initial Scheduling Order in the  
22 case setting a trial date of July 17, 2012, and, as is relevant to this Stipulation, a  
23 deadline for completion of expert discovery of January 31, 2012.

24  
25 2. On December 29, 2011, the parties filed a Stipulation requesting to  
26 amend the Scheduling Order and continue all deadlines by 60 days to allow the  
27 parties to engage in mediation. On January 5, 2012, the Court approved the request  
28 and continued the trial to September 18, 2012, and, as is relevant to this Stipulation,

1 continued the deadline for completion of expert discovery to March 16, 2012.

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3           3.       In January, 2012, due to BRISBIN's health reasons, BRISBIN was  
4 unable to participate in mediation and unable to participate in depositions.  
5 Accordingly, on January 26, 2012, the parties submitted a Stipulation to continue  
6 the trial date and all other deadlines in the case. The Stipulation was approved by  
7 the court and pursuant to Order filed February 3, 2012, the trial date was continued  
8 to November 27, 2012 and, as is relevant to this Stipulation, the deadline for  
9 completion of expert discovery was continued to May 16, 2012.

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11           4.       On May 11, 2012, the parties filed a Stipulation requesting a further  
12 modification of the Scheduling Order due to Plaintiff Brisbin's ongoing health  
13 problems. By Order dated May 15, 2012, the Court extended the completion of  
14 expert discovery to July 31, 2012.

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16           5.       On July 17, 2012, a Mandatory Settlement Conference was held before  
17 the Court. Plaintiff BRISBIN did not appear at the Mandatory Settlement  
18 Conference, and counsel for BRISBIN advised the Court that based upon  
19 BRISBIN's medical condition, an additional continuance of the trial date and all  
20 deadlines would be sought.

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22           6.       On August 16, 2012, the parties submitted another Stipulation to  
23 continue the trial date and related dates. Pursuant to the Court's Order dated August  
24 24, 2012, the Court approved the parties' Stipulation and the trial was continued to  
25 March 26, 2013 and the parties were ordered to meet and confer and file a further  
26 Stipulation regarding the remaining deadlines in the case.

27           7.       On August 29, 2012, the parties submitted a further Stipulation  
28 pursuant to which the deadline for completion of expert discovery would be

1 continued to December 14, 2012. That Stipulation was approved by the Court's  
2 Order filed September 4, 2012. Thereafter, during October and November,  
3 BRISBIN and VULCAN served Supplemental Expert Witness Disclosures and  
4 revised Supplemental Expert Witness Disclosures in preparation for the expert  
5 witness depositions.

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7 8. In November, 2012, former counsel for BRISBIN and WESTERN  
8 advised counsel for VULCAN that he was substituting out of the case and that  
9 BRISBIN and WESTERN would be getting new counsel. The Orders granting the  
10 request for substitution of counsel were filed in the beginning of December.

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12 9. In mid-December, 2012, new counsel for BRISBIN and WESTERN  
13 advised counsel for VULCAN that they intended to seek a continuance of all dates  
14 in the case, including the Mandatory Settlement Conference which was scheduled  
15 for January 8, 2013. Counsel for BRISBIN also advised the he was seeking current  
16 information on BRISBIN's medical condition in an effort to get a realistic date for  
17 the continuance of the trial and related dates, including the expert discovery  
18 completion date. However, because the Mandatory Settlement Conference was  
19 only 3 weeks away, the parties signed a Stipulation which only requested a  
20 continuance of the Settlement Conference, and that was approved and ordered by  
21 the Court on January 2, 2013. The Settlement Conference was continued to March  
22 8, 2013.

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24 10. Thus, due to the confusion caused by the numerous prior continuances  
25 requested by BRISBIN, the substitution of new counsel for BRISBIN and  
26 WESTERN, the holiday season, and the pressing need to continue the Settlement  
27 Conference, the deadline for completion of the expert depositions (the only  
28 discovery remaining to be conducted in the case) was inadvertently not included in

1 the stipulation to continue the Settlement Conference.

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3 11. On January 25, 2013, the Court issued a Minute Order vacating the  
4 Pretrial Conference and Trial date and ordered the parties to select new dates for  
5 same.

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7 12. On January 28, 2013, the parties filed a Stipulation seeking to continue  
8 the Pretrial Conference and Trial dates due to BRISBIN's continued medical  
9 condition. This Stipulation had been prepared prior to the Court's January 25, 2013  
10 Minute Order which is why it did not squarely address the Court's request for new  
11 dates for the Pretrial Conference and Trial date. On January 31, 2013, the Court  
12 ordered the schedule modified and continued the Pretrial Conference to June 26,  
13 2013, and the trial date to August 20, 2013.

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15 13. On March 6, 2013, the Court continued the Settlement Conference  
16 scheduled for March 8, 2013 to March 29, 2013 due to BRISBIN's failure to comply  
17 with the requirements set forth in the Court's December 6, 2012 Order Re  
18 Settlement Conference.

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20 14. On March 19, 2013, the Court vacated the Settlement Conference due  
21 to BRISBIN's continued failure to comply with the Court Order Re Settlement  
22 Conference.

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24 15. On April 25, 2013, VULCAN served Notices of the depositions of the  
25 expert witnesses designated by BRISBIN. Thereafter, the depositions were  
26 continued on 2 occasions based on requests by BRISBIN. BRISBIN did not object  
27 to the taking of the depositions on any grounds. BRISBIN did not produce his  
28 experts for deposition on the dates agreed upon.

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16. On June 26, 2013, a Pretrial Conference was held before District Judge Ishii, and the trial was continued to November 13, 2013.

17. By this Stipulation, the parties do not seek to continue the trial date and only seek to allow VULCAN to conduct the expert depositions which it had previously noticed.

18. The parties agree that there will be no prejudice suffered by any party as a result of VULCAN being allowed to take these depositions, and the parties agree that they shall not use this proposed amendment to the Scheduling Order as a grounds to continue the trial date in the future.

IT IS SO STIPULATED.

DATED: July 12, 2013 DOYLE & SCHALLERT

By: /s/ David D. Doyle (as authorized on 7/12/13)

David D. Doyle, Esq.  
Attorneys for John C. Brisbin, dba Construction  
Development Systems and Western Surety  
Company

DATED: July 12, 2013 LIPSCHULTZ & SCHERAGO LLP

By: /s/ James D. Lipschultz

James D. Lipschultz  
Attorneys for Defendant and Counter-Claimant  
CALMAT CO., a Delaware corporation, dba  
VULCAN MATERIALS COMPANY –  
WESTERN DIVISION

1 DATED: July 11, 2013

DOWLING AARON INCORPORATED

2 By: /s/ James D. Burnside (as authorized on 7/11/13)

3 James D. Burnside, III, Esq.

4 Attorneys for Western Surety Company

5  
6 **ORDER**

7  
8 Based upon the parties' above Stipulation, IT IS HEREBY ORDERED that:

- 9
- 10 1. The Scheduling Order in this case shall be amended to allow for
  - 11 VULCAN to take the depositions of Brian Hall, Tim Kempkes and
  - 12 John Brisbin, the expert witnesses designated by BRISBIN;
  - 13
  - 14 2. BRISBIN shall make said witnesses available for deposition on or
  - 15 before August 30, 2013; and
  - 16
  - 17 3. No other provisions of the Scheduling Order or the Pretrial Order are
  - 18 amended by this Stipulation.
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  - 21
  - 22

23 IT IS SO ORDERED.

24 Dated: July 16, 2013

/s/ Sheila K. Oberto  
25 UNITED STATES MAGISTRATE JUDGE