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14
15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA
17

18 WEST PACIFIC ELECTRIC COMPANY
CORPORATION,

19 Plaintiff,

20 v.

21 DRAGADOS/FLATIRON, a joint venture;
22 LIBERTY MUTUAL INSURANCE
COMPANY, a Massachusetts corporation;
23 FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation;
24 ZURICH AMERICAN INSURANCE
COMPANY, a New York corporation; THE
25 CONTINENTAL INSURANCE COMPANY,
a Pennsylvania corporation; XL SPECIALTY
26 INSURANCE COMPANY, a Delaware
corporation; THE INSURANCE COMPANY
27 OF THE STATE OF PENNSYLVANIA, a
Pennsylvania corporation; AMERICAN
28 HOME ASSURANCE COMPANY, a New

Case No. 1:18-cv-00166-LJO-BAM

**STIPULATION TO AMEND
SCHEDULING ORDER; AND ORDER**

Trial Date: March 17, 2020
Complaint Filed: January 30, 2018

1 York corporation; NATIONAL INDEMNITY
2 COMPANY, a Nebraska corporation;
3 TRAVELERS CASUALTY AND SURETY
4 COMPANY OF AMERICA, a Connecticut
5 corporation; FEDERAL INSURANCE
6 COMPANY, an Indiana corporation,

7 Defendants.

8 The parties to this Stipulation are Plaintiff West Pacific Electric Company Corporation
9 (“WPEC”), Defendant Dragados/Flatiron (“DFJV”), and Defendants Liberty Mutual Insurance
10 Company, Fidelity and Deposit Company of Maryland, Zurich American Insurance Company,
11 The Continental Insurance Company, XL Specialty Insurance Company, The Insurance Company
12 of the State of Pennsylvania, American Home Assurance Company, National Indemnity
13 Company, Travelers Casualty and Surety Company of America, and Federal Insurance Company
14 (collectively referred to as “Surety Defendants”). Collectively, WPEC, DFJV and the Surety
15 Defendants are hereinafter referred to as the “Parties.”

16 The Parties, through their respective counsel, jointly stipulate and respectfully request that
17 the Court enter an Order allowing for the continuance of the discovery and expert disclosure
18 deadlines; and pre-trial motion deadlines; and scheduling the sequence of the 15 day trial of the
19 case in its entirety.

20 Good cause exists to continue non-expert and expert discovery; expert disclosure
21 deadlines; and pre-trial motion deadlines as the parties will require additional time to complete
22 discovery on the licensure issues raised in the Counterclaim.

23 Good cause exists to schedule a two day court trial on WPEC’s “substantial compliance”
24 defense with the remaining 13 days allocated to a jury trial on all remaining claims and defenses
25 in the case since California substantive law (which governs in this matter) holds that such a
26 defense must be decided by the trial judge. See Business and Professions Code section 7031(e)
27 and *Judicial Council of California v. Jacobs Facilities, Inc.*, 239 Cal. App. 4th 882, 913-914, 191
28 Cal. Rptr. 3d 714, 740 (2015), as modified on denial of reh'g (Sept. 15, 2015).

Based upon the above, the Parties stipulate and request that the Court issue an order as

1 follows:

2 1. The non-expert and expert discovery; and pre-trial motion deadlines are continued
3 to the following dates:

- 4 i. Initial Disclosures on Counterclaim: August 25, 2019
- 5 ii. Expert Disclosure: October 4, 2019
- 6 iii. Supplement Expert Disclosure: October 16, 2019
- 7 iv. Non-Expert Discovery Cutoff: September 27, 2019
- 8 v. Expert Discovery Cut-Off: October 25, 2019
- 9 vi. Pretrial Motion Filing Deadline: October 25, 2019

10 2. The Parties stipulate to a two day court trial on WPEC’s “substantial compliance”
11 defense with the remaining 13 days allocated to a jury trial on all remaining claims
12 and defenses in the case.

13 3. The Court’s previous Scheduling Order, including all discovery deadlines, is
14 vacated and the new Scheduling Order is as follows:

- 15 i. Initial Disclosures on the Counterclaim: August 25, 2019
- 16 ii. Expert Disclosure: October 4, 2019
- 17 iii. Supplement Expert Disclosure: October 16, 2019
- 18 iv. Non-Expert Discovery Cutoff: September 27, 2019
- 19 v. Expert Discovery Cut-Off: October 25, 2019
- 20 vi. Pretrial Motion Filing Deadline: October 25, 2019
- 21 vii. Settlement Conference: Not set
- 22 viii. Pretrial Conference: Date: January 21, 2020
23 Time: 9:00 a.m.
24 Dept: 4 (LJO)
- 25 ix. Court Trial (two (2) day est.)¹ Date: March 17, 2020
26 Time: 8:30 a.m.

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28 ¹ The court trial will be limited to the hearing and determination of WPEC’s “substantial compliance” defense.

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Dept: 4 (LJO)

xii. Jury Trial (13 day est.): Date: March 19, 2020

Time: 8:30 a.m.

Dept: 4 (LJO)

4. A further scheduling conference is scheduled for August 27, 2019 at 9:00 a.m.

The Court will inform the parties if such conference will be necessary following its review of the Parties' Stipulation.

Dated: August 7, 2019

MURPHY AUSTIN ADAMS SCHOENFELD LLP

By: /s/ Lisa D. Nicolls

D. MICHAEL SCHOENFELD
LISA D. NICOLLS
Attorneys for Plaintiff
WEST PACIFIC ELECTRIC COMPANY
CORPORATION

Dated: August 7, 2019

FINCH, THORNTON & BAIRD, LLP

By: /s/ David W. Smiley

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DAVID W. SMILEY
Attorneys for Defendants
DRAGADOS/FLATIRON JOINT VENTURE,
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ORDER

Having reviewed the stipulation of the parties, the Court finds good cause to partially grant and partially deny the parties’ request to modify the Scheduling Order in this action. Accordingly, IT IS HEREBY ORDERED that the Scheduling Order in this action is modified as follows:

- a. Supplemental Disclosures regarding Dragados/Flatiron’s Counterclaim shall be exchanged by August 25, 2019;
- b. Non-expert discovery shall be completed by September 27, 2019;
- c. Initial expert disclosures shall be completed by October 4, 2019;
- d. Supplemental expert disclosures shall be completed by October 16, 2019; and
- e. Expert discovery shall be completed by October 25, 2019.

The deadline for filing dispositive motions remains set for October 25, 2019, the pretrial conference remains set for January 21, 2020 at 9:00 AM in Courtroom 4 before Chief Judge Lawrence J. O’Neill, and the trial date remains set for March 17, 2020, at 8:30 a.m. in Courtroom 4 before Chief Judge O’Neill.

The Court notes that the authority cited by the parties in support of their contention that they are entitled to a two-day court trial on the “substantial compliance” defense followed by a thirteen-day jury trial on the remaining issues is not controlling and does not address the issue of whether the procedure proposed by the parties is considered state substantive law within the meaning of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As California Business and Professions Code § 7031 does not require a court trial in order to decide the “substantial compliance” defense and this proposed procedure further does not appear to be outcome determinative as that term is understood under the *Erie* doctrine, and to accommodate the Court’s calendar as well as the availability of judges to decide this case, the parties’ request for a two-day court trial beginning on March 17, 2020 followed by a thirteen-day jury trial beginning on March 19, 2020 is DENIED without prejudice. *See id.*; *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). However, this order is not intended to preclude the parties from submitting a request for an evidentiary hearing to Chief Judge O’Neill, moving for summary judgment or partial summary judgment, or pursuing alternative procedures as necessary and appropriate in order to resolve the “substantial compliance” defense.

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The Court further notes that this is the parties' third stipulation to modify the Scheduling Order with respect to the deadline for completion of non-expert discovery and second stipulation to modify the Scheduling Order with respect to expert discovery deadlines. The parties are cautioned that further modifications of the Scheduling Order will not be granted absent a showing of good cause, and such cause will be narrowly construed. Fed. R. Civ. P. 16(b).

In light of the foregoing, the Status Conference currently set for August 27, 2019 is VACATED.

IT IS SO ORDERED.

Dated: August 16, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE