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6 Attorneys for Defendants  
7 CLARK'S WELDING AND MACHINE,  
8 SYLVESTER HABERMAN, and FRANZ  
9 EDELMAYER, erroneously sued herein as Franz  
10 Edel Mayer

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

12 OPERATING ENGINEERS' PENSION  
13 TRUST FUND; GIL GROSTHWAITE  
14 AND RUSS BURNS, as Trustees,

15 Plaintiffs,

16 v.

17 CLARK'S WELDING AND MACHINE, a  
18 California partnership, aka CLARK'S  
19 WELDING, aka CLARK'S WELDING  
20 AND MACHINING; SYLVESTER  
21 HABERMAN, individually, and FRANZ  
22 EDEL MAYER, individually,

23 Defendants.

Case No. 3:09-cv-00044-SC

**JOINT STIPULATION REGARDING  
GOOD CAUSE TO MODIFY DATES IN  
SCHEDULING ORDER AND ~~PROPOSED~~  
ORDER THEREON**

22 Plaintiffs Operating Engineers' Pension Trust Fund, Gil Grosthwaite, and Russ Burns  
23 (hereinafter "Plaintiffs") and Defendants Clark's Welding and Machine, Sylvester Haberman, and  
24 Franz Edelmayer, erroneously sued herein as Franz Edel Mayer (hereinafter "Defendants")  
25 hereby jointly stipulate and seek leave pursuant to Rule 16(b) of the Federal Rules of Civil  
26 Procedure and this Court's Status Conference Order to extend the court's deadlines to hear  
27 motions and discovery cut-off date filed by the Court on May 29, 2009 ("Scheduling Order"),  
28 with respect to third-party witness Tracy Mainguy, Esq. only. The stipulation and requested

1 extension by the parties would not alter or otherwise affect any other dates. Good cause exists for  
2 the request as follows:

3 The focus of this litigation is Plaintiffs' claim that Defendants are liable for withdrawal  
4 liability under the Employee Retirement Income Security Act of 1974 ("ERISA"). Defendants  
5 asserted several affirmative defenses in their Answer to Plaintiffs' Complaint. Several defenses  
6 require evidence regarding the proper interpretation of the parties' February 2004 "Stipulation for  
7 Dismissal as to Defendants Clark's Welding and Machine and Franz Edel Meyer [sic],"  
8 ("Stipulated Settlement"), which was negotiated during the parties' initial 2003 lawsuit, *Walters,*  
9 *et al. v. Clark's Welding and Machine, et al.*, (N.D. Cal. 2003, No. C 03-2544 JSW).

10 Third-party witness Tracy Mainguy, Esq. represented Plaintiffs' in the 2003 lawsuit,  
11 negotiated its settlement, and drafted the Stipulated Settlement at issue in this case. Thus,  
12 Defendants' contend that Ms. Mainguy is a vital witness to the present action, and a full and  
13 complete deposition of Ms. Mainguy is critical to the just resolution of this case.

14 On September 2, 2009, Defendants subpoenaed Ms Mainguy for her deposition on  
15 September 18, 2009 at Defendants' counsel's Sacramento office. Ms. Mainguy informed  
16 Defendants' counsel that she had four young children to care for and requested accommodations.  
17 To accommodate Ms. Mainguy's requests, Defendants' re-noticed Ms. Mainguy's deposition for  
18 Saturday, September 19, 2009, at Plaintiffs' counsel's San Francisco office.

19 Defendants', through their counsel, contend as follows:

- 20 1. When Ms. Mainguy arrived at her deposition, she informed the parties' counsel,  
21 for the first time, that she was pregnant.
- 22 2. A few minutes into the deposition, Ms. Mainguy began to complain of shortness of  
23 breath and dizziness.
- 24 3. Defendants' counsel offered to re-notice her deposition for a more convenient date  
25 and location — even going so far as to suggest they hold the deposition at Ms. Mainguy's home  
26 — but Ms. Mainguy refused to provide alternative dates.
- 27 4. In order to further accommodate Ms. Mainguy, Defendants' counsel permitted her  
28 to take as many breaks as she needed during the deposition.

1           5.       Despite these numerous attempts to accommodate her, Ms. Mainguy began to yell  
2 at Defendants' counsel and accused her of harassing her.

3           6.       Ms. Mainguy then abruptly left the deposition before it was completed and refused  
4 to provide counsel with another date to continue the deposition. Because of Ms. Mainguy's  
5 numerous breaks and her abrupt termination of the deposition, Defendants' counsel did not get  
6 anymore than a hour of testimony from her.

7           On September 25, 2009, Defendants' counsel wrote Ms. Mainguy a meet and confer letter,  
8 requesting that she provide another date to continue her deposition. In response, Ms. Mainguy  
9 informed Defendants' counsel that she would agree to continue her deposition if it was held in  
10 mid-November, because at that time she would be in the second trimester of her pregnancy. Ms.  
11 Mainguy believes that she will be in better health during the second trimester.

12           After Defendants' counsel met and conferred with both Plaintiffs' counsel and Ms.  
13 Mainguy, the parties agreed to continue the deposition on November 18, 2009 — a week before  
14 the Court's discovery cut-off date, and approximately two weeks before the court's deadline to  
15 hear motions. Defendants are concerned that Ms. Mainguy may refuse to attend her second  
16 deposition date and/or disrupt the deposition. Defendants are concerned that if Ms. Mainguy  
17 again interferes with the taking of a fair and complete deposition, Defendants will have  
18 insufficient time to file a motion to compel, have the motion heard, and if the motion is  
19 successful, continue Ms. Mainguy's deposition before the current Scheduling Order's deadlines.  
20 To accommodate Ms. Mainguy's health concerns while at the same time preserving Defendants'  
21 rights to enforce the discovery rules, the parties agree that the last hearing date for motions and  
22 the discovery cut-off, with respect to Ms. Mainguy only, be extended in accordance with the dates  
23 set forth below.

24           The parties have acted diligently to comply with the deadlines in the Scheduling Order,  
25 but because matters that could not have been reasonably foreseen or anticipated at the time of  
26 scheduling, a modification of that Order has now become necessary. Accordingly, the parties  
27 respectfully request that the Court modify the existing Scheduling Order by briefly extending the  
28 Scheduling Order dates, as to Ms. Mainguy only, as follows:

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Existing Date

Proposed Date

Discovery Cut-Off  
Regarding Mainguy

November 25, 2009

January 5, 2010

Last Hearing Date  
For Motions Regarding  
Mainguy

December 4, 2009

December 30, 2009

DATED: October 12, 2009

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By: /s/ Shaamini A. Babu  
SHAAMINI A. BABU  
Attorney for Plaintiffs  
OPERATING ENGINEERS' PENSION  
TRUST FUND, GIL GROSTHWAITE,  
AND RUSS BURNS


DATED: October 15, 2009

DOWNEY BRAND LLP

By: /s/ Cassandra M. Ferrannini  
CASSANDRA M. FERRANNINI  
Attorney for Defendants  
CLARKS WELDING AND MACHINE,  
SYLVESTER HABERMAN, AND FRANZ  
EDELMAYER, ERRONEOUSLY SUED  
HEREIN AS FRANZ EDEL MAYER

PURSUANT TO STIPULATION, IT IS SO ORDERED

DATED: Oct. 16, 2009

  
SAMUEL CONTI  
HONORABLE UNITED STATES DISTRICT  
JUDGE

*NO ORAL argument - matters  
submitted on papers.*

