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10 ROBERTO A. CALLES, and ERIC ORTIZ CRUZ

11 UNITED STATES DISTRICT COURT

12 FOR THE

13 NORTHERN DISTRICT OF CALIFORNIA

14 FRANCIS SANCHEZ, JOSE L. SANCHEZ,
15 ROBERTO A. CALLES, and ERIC ORTIZ
16 CRUZ,

17 Plaintiff,

18 v.

19 H&R PLUMBING AND DRAIN
20 CLEANING, INC.; CITY OF
21 BRENTWOOD, MOUNTAIN VIEW
22 SANITARY DISTRICT; WESTERN
23 SURETY COMPANY; and AMERICAN
24 CONTRACTORS INDEMNITY COMPANY

Case No.: CV 12-04588 DMR

**PLAINTIFFS' MOTION TO CONTINUE
CASE MANAGEMENT CONFERENCE
PURSUANT TO LOCAL RULE 16-2(d);
DECLARATION OF TOMAS E.
MARGAIN IN SUPPORT THEREOF; and
PROPOSED ORDER**

25 TO THE COURT AND ALL PARTIES WHO HAVE MADE AN APPEARANCE IN
THIS ACTION

Pursuant to Local Rule 16-2(d), as well as the Federal Rules of Civil Procedure, Plaintiffs hereby requests that the initial Case Management Conference set for December 5, 2012 be continued to January 9, 2013 or the next available Wednesday on the Court's calendar. As

1 described in the below Declaration of Tomas E. Margain, good cause exists. Counsel for
2 Defendant H&R PLUMBING AND DRAIN CLEANING, INC. (“H&R Plumbing”) needs time
3 to pick up the defense of the surety Defendants WESTERN SURETY COMPANY and
4 AMERICAN CONTRACTORS INDEMNITY COMPANY and get their consent to have a
5 Magistrate hear this matter. Moreover, counsel need to put in place a mechanism by which funds
6 held by public agency Defendants, CITY OF BRENTWOOD and MOUNTAIN VIEW
7 SANITARY DISTRICT, can be deposited in an escrow account so that those Defendants can be
8 dismissed. As such, a continuance will allow both of these events to occur with the goal of
9 having the pleadings settled by the Case management conference. Plaintiffs and Defendant H&R
10 Plumbing have also been engaged in information exchanges as part of settlement
11 communications and the continuance will also allow the parties to continue to focus on this.

12 Dated: November 16, 2012

13 By: //s// TOMAS E. MARGAIN
14 TOMAS E. MARGAIN

15 **DECLARATION OF TOMAS E. MARGAIN**

16 I, TOMAS E. MARGAIN, declare as follows:

17 1. I am an attorney duly authorized to practice before this Court and Plaintiffs’
18 attorney of record in this action. I base this declaration on my personal knowledge unless
19 otherwise indicated.

20 2. Defendant H&R PLUMBING AND DRAIN CLEANING, INC. is being
21 represented by Jeff McClure of Davenport Gerstner & McClure with whom I have litigated
22 employment wage and hour cases in the past and who I know to be experienced in public works
23 litigation cases such as the matter at hand.

24 3. I have spoken with Mr. McClure about the litigation in a substantive manner and
25 we have exchanged numerous e-mails. We have agreed to both try to investigate the claims to

1 aid our clients in settlement and to simplify the procedural posture of the case at this point due to
2 the number of Defendants.

3 4. I have spoken to and e-mailed counsel for the two public entity defendants which
4 are holding construction funds based on about \$36,000.00 in Stop Notices filed by the four
5 Plaintiffs. The only role they have in the litigation is to be told by the Plaintiffs, based on a
6 release, or the Court, based on a judgment, how to transmit these funds. As such, I
7 communicated to both of these counsel and to Mr. McClure that we are going to draft a
8 stipulation and order allowing the entities to transmit the funds to Mr. McClure's trust account
9 and dismiss the entities. We are going to work on drafting this document by the end of the
10 month to have a mechanism in place such that the funds can only be disbursed by Court order.
11 The goal is to dismiss the public entities so that they will not incur any litigation costs.

12 5. Plaintiffs have also sued two sureties who issued Payment Bonds to which claims
13 attach. It is anticipated that both of the sureties will tender the claim for a defense to H&R
14 Plumbing. In speaking with Mr. McClure on November 14, 2012 during our Rule 26
15 conference, one surety has already tendered the claim and he is working to have the second
16 surety tender the claim. Mr. McClure needs a continuance for this to occur and also to have the
17 Defendants make a decision on consenting to a Magistrate. The goal is to have Mr. McClure
18 respond to the Complaint as to these two Defendants and H&R Plumbing.

19 6. Counsel have also been able to have two preliminary discussions and are working
20 on a document exchange to determine the value of the case from each side's perspective. A
21 continuance will allow the parties to continue to do this with the aim to settlement the case or to
22 recommend mediation at an early stage. By making this statement, I am not implying that
23 Defendants are conceding any liability but I have found the conversations productive to allow
24 counsel to assess the strengths and weaknesses of each side's case.
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7. Mr. McClure and I spoke about my intent to seek a continuance and we both looked at our calendars and decided that a continuance to a CMC date from January 7 to 14 fit our calendars and I chose the 9th based on the Court’s calendar.

I declare under penalties of perjury under the laws of the United States that the foregoing is true and accurate. Executed on November 16, 2012 in San Jose, Santa Clara California.

By: _____//s// Tomas Margain_____
Tomas E. Margain

ARGUMENT

The Court has the authority to continue hearings and a party may seek a continuance under Local Rule 16. Here, counsel have meet and conferred on the continued date. Counsel have also agreed that there is good cause as the continuance will allow parties to be dismissed and the three remaining defendants represented by one counsel.

Dated: November 16, 2012

By: //s// TOMAS E. MARGAIN
TOMAS E. MARGAIN

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FRANCIS SANCHEZ, JOSE L. SANCHEZ,
ROBERTO A. CALLES, and ERIC ORTIZ
CRUZ,

Plaintiff,

v.

H&R PLUMBING AND DRAIN
CLEANING, INC.; CITY OF
BRENTWOOD, MOUNTAIN VIEW
SANITARY DISTRICT; WESTERN
SURETY COMPANY; and AMERICAN
CONTRACTORS INDEMNITY COMPANY

Case No.: CV 12-04588 DMR

**ORDER GRANTING PLAINTIFFS’
MOTION TO CONTINUE CASE
MANAGEMENT CONFERENCE
PURSUANT TO LOCAL RULE 16-2(d)**

BASED ON PLAINTIFF’S MOTION TO CONTINUE, THE COURT’S FILE AND
GOOD CAUSE SHOWN, THE COURT ORDERS AS FOLLOWS:

1 The initial Case Management Conference and Rule 26 Deadlines are continued as follows:

2 **December 20, 2012**

- 3 • Last Day to Meet and Confer Regarding Initial Discloses, ADR process election and
4 discovery plan.
- 5 • Last Day to file ADR Certificate signed by Parties and Counsel.
- 6 • Last Day to either file a stipulation to ARD Process or Notice of Need for ADR Phone
7 Conference.

8

9 **January 2, 2013**

- 10 • Last Day to File Rule 26(f) Report, complete initial disclosures and file Joint Case
11 Management Statement
- 12 • Last Day to File Magistrate Consent Form

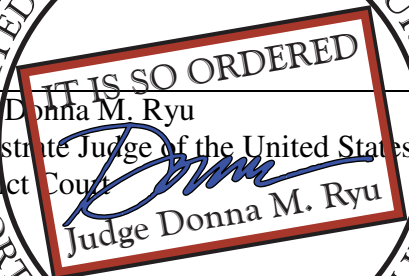
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14 **January 9, 2012**

- 15 • Initial Case Management Conference in Courtroom 4,3rd Floor, Oakland Courthouse at
16 1:30 p.m.

17 IT IS SO ORDERED

18 DATED: Nov. 20, 2012

19 By:  _____
20 Hon. Donna M. Ryu
21 Magistrate Judge of the United States
22 District Court
23 Judge Donna M. Ryu

