

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

AGUSTIN A. ARELLANO, <i>et al.</i> , Plaintiffs,	Case No. 13-cv-0533-BAS(BGS)
v. KELLERMEYER BUILDING SERVICE, LLC, Defendant.	<b>ORDER:</b> (1) <b>GRANTING <i>EX PARTE</i>                  MOTION FOR ORDER                  CONTINUING HEARING                  DATE (ECF NO. 48);</b> (2) <b>DENYING AS MOOT <i>EX</i>                  PARTE MOTION TO                  CONTINUE HEARING                  DATE (ECF NO. 41); AND</b> (3) <b>DENYING <i>EX PARTE</i>                  MOTION TO FILE                  SUPPLEMENTAL BRIEF                  (ECF NO. 41)</b>

Pending before the Court is (1) an *ex parte* application filed jointly by Plaintiffs and Proposed Intervenor Venancia Portillo to continue the hearing on Plaintiffs’ motion for preliminary approval of class action settlement and Ms. Portillo’s motion to intervene (ECF No. 48); and (2) a separate *ex parte* motion filed by Ms. Portillo to continue the same hearing and for permission to file a supplemental brief in support of her motion to intervene (ECF No. 41).

Having read and considered the moving papers, for the reasons set forth

1 below, the Court **GRANTS** the *ex parte* motion to continue the hearing on  
2 Plaintiffs’ motion for preliminary approval of class action settlement and Ms.  
3 Portillo’s motion to intervene (ECF No. 48), **DENIES AS MOOT** Ms. Portillo’s *ex*  
4 *parte* motion to continue the same hearing (ECF No. 41), and **DENIES** Ms.  
5 Portillo’s *ex parte* motion to file a supplemental brief in support of her motion to  
6 intervene (ECF No. 41).

7 **I. CONTINUANCE OF HEARING ON MS. PORTILLO’S MOTION TO**  
8 **INTERVENE & PLAINTIFFS’ MOTION FOR PRELIMINARY**  
9 **APPROVAL OF CLASS ACTION SETTLEMENT**

10 Plaintiffs and Ms. Portillo jointly filed an *ex parte* application to continue the  
11 hearing on Plaintiffs’ motion for preliminary approval of class action settlement  
12 (ECF No. 22) and Ms. Portillo’s motion to intervene (ECF No. 20). Plaintiffs and  
13 Ms. Portillo request a continuance of the hearing for sixty (60) days so that the  
14 parties can re-address the class action settlement in this matter in light of new  
15 developments in the parallel state matter pending in Alameda Superior Court  
16 (*Portillo, et al. v. Kellermeyer Building Service, LLC*, Case No. RG11558695  
17 (“*Portillo*”). (ECF No. 48, Treglio Decl. at ¶¶ 6-12; ECF No. 48-1 at ¶ 3.) In  
18 *Portillo*, the class certification order was recently modified to include claims for  
19 locked-in meal periods and late meal periods, which significantly increases the  
20 potential damages in this action. (*Id.* at ¶¶ 6-9.) Plaintiffs’ counsel represents that  
21 he “considered this particular certification difficulty to be an important factor in  
22 settlement negotiations” in this matter. (*Id.* at ¶ 6.) Therefore, “the Settlement, as  
23 currently structured, has become problematic.” (*Id.* at ¶ 9.)

24 Plaintiffs’ counsel further represents that he contacted counsel for Defendant  
25 and Ms. Portillo and that “both are amenable to not only continue this hearing, but  
26 to mediating the issues and possibly modifying the Settlement.” (*Id.* at ¶ 11; *see*  
27 *also* ECF No. 48-1 at ¶ 3.) Defendant’s counsel was unable to obtain his client’s  
28 approval, but stated his client “might be willing to stipulate to a 30 or 45-day

1 continuance.” (*Id.*) Accordingly, for good cause shown, the Court **GRANTS** the  
2 *ex parte* application (ECF No. 48) and continues the hearing on Plaintiffs’ motion  
3 for preliminary approval of class action settlement (ECF No. 22) and Ms. Portillo’s  
4 motion to intervene (ECF No. 20) to **September 15, 2014** at **10:30 a.m.** in  
5 **Courtroom 4B.**

6 In light of this continuance, the Court **DENIES AS MOOT** Ms. Portillo’s  
7 earlier *ex parte* motion to continue the hearing (ECF No. 41).

## 8 **II. PERMISSION TO FILE SUPPLEMENTAL BRIEF**

9 Ms. Portillo also moves *ex parte* for permission to file a supplemental brief  
10 requesting a stay of this litigation pending resolution of the *Portillo* matter and  
11 disqualification of counsel for the parties in this matter for ethical violations. (ECF  
12 No. 41, p. 1, ¶¶ 2-3.) Plaintiffs oppose Ms. Portillo’s *ex parte* request to file a  
13 supplemental brief because there are “no new facts or new law that give rise to [her]  
14 request for supplemental briefing.” (ECF No. 44 at p. 2.) Rather, Ms. Portillo’s  
15 motion is “part of a scheme to harass the Parties and to prevent timely resolution of  
16 Plaintiffs’ claims.” (*Id.*) Defendant opposes Ms. Portillo’s *ex parte* request to file a  
17 supplemental brief because she lacks standing and “she failed to mention or comply  
18 with the requirements for *ex parte* relief by showing there is an ‘emergency’  
19 necessitating such relief ... and that ‘immediate and irreparable injury’ will result if  
20 the subject matter is heard as a regularly-noticed motion.” (ECF No. 45 at p. 1.)  
21 Defendant maintains that Ms. Portillo’s supplemental brief should be heard as a  
22 noticed motion. The Court agrees with Defendant.

23 “*Ex parte* applications are a form of emergency relief that will only be  
24 granted upon an adequate showing of good cause or irreparable injury to the party  
25 seeking relief.” *Clark v. Time Warner Cable*, 2007 WL 1334965, at \*1 (C.D. Cal.  
26 May 3, 2007) (citing *Mission Power Engineering Co. v. Continental Cas. Co.*, 883  
27 F.Supp. 488, 492 (C.D.Cal. 1995)). “Moreover, it must be established that the  
28 moving party is without fault in creating the crisis or that the crisis occurred as a


1 result of excusable neglect.” *Id.* (citing *Mission Power*, 883 F.Supp. at 492).

2 Ms. Portillo filed her motion to intervene on January 28, 2014. (ECF No.  
3 20.) The motion to intervene was fully briefed by February 20, 2014. Five months  
4 later, Ms. Portillo seeks to file a supplemental brief in support of her motion to  
5 intervene which requests a stay of this action and a disqualification of counsel. In  
6 her motion to intervene and accompanying reply, Ms. Portillo stated her intent,  
7 upon being permitted to intervene in this matter, to file a *noticed* motion to dismiss  
8 or stay this action and to file a *noticed* motion to disqualify Plaintiffs’ counsel and  
9 preclude them from any further participation in this action (ECF No. 20-1 at pp. 3  
10 and 9; ECF No. 29 at p. 3). However, the Court setting a hearing date on the  
11 motion for preliminary approval of class action settlement undoubtedly prompted  
12 her *ex parte* request to file a supplemental brief.

13 Since Ms. Portillo’s *ex parte* request to file a supplemental brief was filed,  
14 however, Ms. Portillo has engaged in discussion with Plaintiffs and each has stated  
15 an intention to work with Defendant on evaluating “all issues in this and *Portillo*  
16 actions.” (ECF No. 48-1 at ¶ 3; *see also* ECF No. 48, Treglio Decl. at ¶¶ 8 and 11.)  
17 The Court has also continued the hearing on the preliminary approval of class  
18 action settlement to September 15, 2014. Therefore, there is no pending potential  
19 for irreparable injury to Ms. Portillo. Given the foregoing, the Court **DENIES** Ms.  
20 Portillo’s *ex parte* request to file a supplemental brief. If Ms. Portillo wishes to  
21 request a stay of this matter and disqualification of counsel, she must file a noticed  
22 motion and give the parties an opportunity to respond.

23 **IT IS SO ORDERED.**

24  
25 **DATED: July 25, 2014**

26   
27 **Hon. Cynthia Bashant**  
28 **United States District Judge**