

1 ROBERT M. CHILVERS, Calif. Bar No. 65442
2 AVIVA CUYLER, Calif. Bar No. 185284
3 CHILVERS & TAYLOR PC
4 83 Vista Marin Drive
5 San Rafael, California 94903
6 Telephone: (415) 444-0875
7 Facsimile: (415) 444-0578

8 Attorneys for Plaintiffs
9 United States for the Use and Benefit of
10 Dixon Marine Services, Inc. and
11 Dixon Marine Services, Inc.

12 EILEEN M. DIEPENBROCK, Calif. Bar No. 119254
13 CHRIS A. MCCANDLESS, Calif. Bar No. 210085
14 DIEPENBROCK HARRISON
15 A Professional Corporation
16 400 Capital Mall, Suite 1800
17 Sacramento, California 95814
18 Telephone: (916) 492-5000
19 Facsimile: (916) 446-4535

20 Attorneys for Defendant/Cross-Complainant
21 Travelers Casualty and Surety Company of America

22 **UNITED STATES DISTRICT COURT**
23 **NORTHERN DISTRICT OF CALIFORNIA**
24 **SAN FRANCISCO DIVISION**

25 UNITED STATES FOR THE USE AND)
26 BENEFIT OF DIXON MARINE SERVICES,)
27 INC. and DIXON MARINE SERVICES,)
28 INC., a California Corporation.)
29 Plaintiffs,)

30 vs.)

31 MASS EX CONSTRUCTION CO., a)
32 California Corporation, and TRAVELERS)
33 CASUALTY AND SURETY COMPANY OF)
34 AMERICA, a Connecticut Corporation,)
35 Defendants.

Case No.: C-05-02039 SI

**JOINT CASE MANAGEMENT
STATEMENT AND PROPOSED ORDER**

Conference Date: September 23, 2005

Time: 2:00 p.m.

Courtroom: 10

Judge: Susan Illston

1 The parties to the above-entitled action jointly submit this Case Management Statement
2 and Proposed Order and request the Court to adopt it as its Case Management Order in this case.

3 **DESCRIPTION OF THE CASE**

4 **1. A brief description of the events underlying the action:**

5 This is an action to recover amounts allegedly due on a Miller Act Payment Bond, and
6 related state law claims arising out of labor, materials, services and equipment supplied by
7 Plaintiff Dixon Marine Services, Inc. (“Dixon”) pursuant to a written subcontract (“Contract”)
8 with defendant Mass Ex Construction Co. (“Mass Ex”). Dixon was the subcontractor that
9 installed, maintained and removed, the turbidity curtain and conducted daily water quality
10 monitoring on a federal project on the Napa River in Napa, California administered by the
11 United States Army Corps of Engineers (the “Government”), which hired Mass Ex as its prime
12 contractor. Defendant Travelers Casualty and Surety Company of America (“Travelers”) is the
13 surety that issued a Miller Act Payment Bond to Mass Ex. Mass Ex has not appeared in this
14 action and the clerk entered its default on August 18, 2005. Plaintiffs’ motion for judgment by
15 default is forthcoming. In light of that default, the only claim remaining to be tried under the
16 Complaint is Dixon’s Third Claim for Relief on the Miller Act Payment Bond against Travelers.

17 As of August 31, 2005, Dixon claims the principal sum of \$37,419.00, plus interest of
18 \$15,080.76, which continues to accrue at the Contract rate of 1.5% per month. Dixon also claims
19 attorneys’ fees and costs pursuant to the Contract. Dixon claims the principal amount of its
20 claim is based on labor, materials, services and equipment actually furnished on the project, at
21 the rates set forth in the Contract. Travelers disputes Dixon’s claim.

22 Travelers has filed a Cross-Complaint for indemnity against cross-defendants Mass Ex
23 and its principals, Armando Quesada, Maria Quesada, Robert G. Cados and Megan M. Cados.
24 Mass Ex and the other cross-defendants have been served but have not appeared in response to
25 the Cross-Complaint. The clerk entered the cross-defendants’ default on August 26, 2005.

1 **2. The principal factual issues which the parties dispute:**

2 It is plaintiff's contention that the material facts are not subject to dispute and that the
3 case will be resolved by summary judgment at the appropriate time. Travelers contends that its
4 liability is only to the extent its bond principal can be found liable to Plaintiff, and that Travelers
5 enjoys all defenses available to its principal. Travelers understands that its principal does have
6 factual and legal defenses to this action. Primarily, Travelers understands that Mass Ex paid
7 Plaintiff more than its original bid estimate but that the amount at issue now is the result of a
8 claim for additional work under the subcontract. Travelers understands that Plaintiff's claim was
9 passed on to the project owner, the United States Army Corps of Engineers, and that the owner
10 has not approved or paid Mass Ex for the claim, a requirement under the subcontract for any
11 payment of claims by Mass Ex to Plaintiff.

12 **3. The principal legal issues which the parties dispute:**

13 Plaintiff contends that (a) Travelers failure to comply with the requirements of 10
14 C.C.R. 2695.5 and 2695.10 precludes Travelers from raising defenses to its liability in this
15 action; (b) Travelers' defense in this action is barred under the holding in United States for the
16 Use and Benefit of Walton Technologies, Inc. v. Westar Engineering, Inc., 290 F.3d 1199, 1208
17 (9th Cir. 2002) that, irrespective of the terms of the contract between the contractor and the
18 subcontractor, "a subcontractor's right of recovery on a Miller Act payment bond accrues ninety
19 days after the subcontractor has completed its work, not 'when and if' the prime contractor is
20 paid by the government." See also Wm. R. Clarke Corporation v. Safeco Insurance Company of
21 America, 15 Cal.4th 882 (1997); (c) Travelers' defense in this is action is barred under the
22 holdings in Wm. R. Clarke Corporation, supra, and Mai Steel Service, Inc. v. Blake Construction
23 Co., 981 F.2d 414, 417 (9th Cir. 1992) that a subcontractor is entitled to recover from a
24 contractor's Miller Act surety all out of pocket expenses incurred "in the prosecution of the work
25 provided for in" the prime contract, regardless whether the underlying subcontract anticipated the

1 expenses incurred, and regardless whether it is the contractor or a third party who was
2 responsible for the subcontractor incurring those expenses; and (d) Travelers' defense in this
3 action is barred by Mass Ex's failure to submit Dixon's claim to the government in a timely and
4 professional manner and its failure to diligently pursue payment of Dixon's claim.

5 Travelers disputes the above contentions.

6
7 **4. The other factual issues [e.g. service of process, personal jurisdiction, subject**
8 **matter jurisdiction or venue] which remain unresolved for the reason stated**
9 **below and how the parties propose to resolve those issues:**

10 None known at this time.

11 **5. The parties which have not been served and the reasons:**

12 All parties have been served.

13 **6. The additional parties which the below-specified parties intend to join and the**
14 **intended time frame for such joinder:**

15 The parties do not intend to join any new parties.

16 **7. The following parties consent to assignment of this case to a United States**
17 **Magistrate Judge for court or jury trial:**

18 Plaintiff consents to assignment of this case to a United States Magistrate Judge for court
19 trial. Travelers does not consent to assignment of this case to a United States Magistrate Judge
20 for court trial.

21 **ALTERNATIVE DISPUTE RESOLUTION**

22 **8.** On September 2, 2005, Dixon and Travelers filed a Stipulation and Proposed
23 Order selecting mediation as the method of alternative dispute resolution. On September 8, 2005,
24 the Court entered an order referring the case to mediation.
25

1 **9. Please indicate any other information regarding ADR process or**
2 **deadline.**

3 Pursuant to the Court's order, the parties anticipate mediation will be conducted on or
4 before December 7, 2005.

5 **DISCLOSURES**

6 **10. Initial Disclosures:**

7 The parties have agreed to exchange their initial disclosures on or before September 23,
8 2005. The parties are not yet required to disclose expert information or expert testimony as
9 provided in Rule 26(a)(2) of the Federal Rules of Civil Procedure, or to make the pre-trial
10 disclosures set forth in Rule 26(a)(3).

11 **DISCOVERY**

12 **11. The parties agree to the following discovery plan:**

- 13 a. Plaintiff requests that discovery, other than discovery related to expert
14 testimony, close on November 15, 2005. Defendant Travelers requests that
15 discovery other than discovery related to expert testimony, close on March 15,
16 2006.
- 17 b. It is unnecessary to conduct the discovery in phases or to limit it to specific
18 issues.
- 19 c. The parties do not believe that it is necessary to make any changes in the
20 limitations on discovery imposed by Federal Rule of Civil Procedure, Rule 26.
- 21 d. Disclosure of expert testimony shall be made pursuant to the schedule set
22 forth in Rule 26(a)(2) of the Federal Rules of Civil Procedure.
- 23
24
25

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

TRIAL SCHEDULE

12. The parties request a trial date as follows:

Plaintiff requests of trial date of December 14, 2005, or as soon thereafter as the Court's calendar permits. Defendant Travelers requests a trial date of May 1, 2006, or as soon thereafter as the Court's calendar permits.

13. The parties expect that the trial will last for the following number of days:

Plaintiff expects that the trial will last one day. Defendant Travelers expects that the trial will last two days.

Dated: September 16, 2005

CHILVERS & TAYLOR PC

By: /s/ Aviva Cuyler

Aviva Cuyler

Attorneys for Plaintiffs
United States for the Use &
Benefit of Dixon Marine
Services, Inc. and Dixon
Marine Service, Inc.

Dated: September 16, 2005

DIEPENBROCK HARRISON

By: /s/ Chris A. McCandless
Chris A. McCandless

Attorneys for Defendant
Travelers Casualty & Surety
Company of America

CASE MANAGEMENT ORDER

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

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order. In addition, the Court orders:

Dated: _____

Susan Illston
United States District Court Judge

