

Regan Furcolo (SBN 162956)  
 Lynn Trang (SBN 221808)  
 Christopher M. Lea (SBN 207723)  
 WALSH MCKEAN FURCOLO LLP  
 625 Broadway, Suite 1402  
 San Diego, CA 92101-5420  
 Telephone: (619) 232-8486  
 Facsimile: (619) 232-2691

Attorneys for Plaintiff ADMIRAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE BRANCH

ADMIRAL INSURANCE COMPANY,

Plaintiff,

vs.

BLUE LAKE RANCHERIA TRIBAL  
 COURT; LESTER J. MARSTON, Chief  
 Judge of the BLUE LAKE RANCHERIA  
 TRIBAL COURT OF THE BLUE LAKE  
 RANCHERIA INDIAN TRIBE; WOOD'S  
 ROOFING INC., a California Corporation,  
 DOES 1-10.

Defendants.

CASE NO. CV 12-01266 LHK

**ADMIRAL INSURANCE COMPANY'S  
 RENEWED EX PARTE APPLICATION  
 FOR A TEMPORARY RESTRAINING  
 ORDER; DECLARATION OF LYNN H.  
 TRANG IN SUPPORT THEREOF**

DISTRICT JUDGE: Hon. Lucy H. Koh  
 MAGISTRATE JUDGE: Hon. Howard R.  
 Lloyd

TRIAL DATE: TBD

This is an action to enjoin the Blue Lake Rancheria Tribal Court ("Tribal Court"), its Chief and Presiding Judge, the Honorable Lester J. Marston ("Judge Marston"), and Wood's Roofing, Inc. ("WRI"), from taking any further action on a case currently before the Blue Lake Rancheria Tribal Court known as Case No. C-09-0612-LJM, *Mainstay Business Solutions v. Wood's Roofing, Inc.* ("Tribal Action") and the cross-complaint filed against Admiral Insurance Company ("Admiral") therein. This action is necessitated because the Tribal Court and Judge Marston have unlawfully and improperly sought to exercise jurisdiction over moving party, a non-tribe member who has no connection with the tribe. Specifically, Admiral seeks a

1 temporary restraining order to enjoin the Defendants from proceeding with imposing sanctions  
 2 upon Admiral for failure comply with the Tribal Court's order to file a motion for summary  
 3 judgment and ruling upon a motion for summary judgment filed by WRI in the Tribal Action as  
 4 Admiral cannot oppose the same until jurisdictional issues are resolved in the Tribal Action.

5 On March 16, 2012, Plaintiff Admiral filed an Ex Parte Application for a Temporary  
 6 Restraining Order ("TRO") to temporarily enjoin the Defendants from exercising Tribal Court  
 7 jurisdiction over Admiral so as to preserve its due process rights ("Original TRO Application").  
 8 On March 20, 2012, this Court denied the Original TRO Application, without prejudice, on the  
 9 grounds that "Admiral fails to show that 'immediate and irreparable injury, loss, or damage will  
 10 result...before the adverse party can be heard in opposition.'" *Order Den. Without Prejudice Ex*  
 11 *Parte Appl. for TRO* ("Order Den. TRO") at pg. 4:17-19, citing Fed. R. Civ. P. 65(b)(1)(a),  
 12 emphasis in original. The Court based this denial on the fact that "Admiral's irreparable harm  
 13 argument hinges on the fact that on March 15 or 17, 2012, it would be forced to either submit to  
 14 the Tribal Court's jurisdiction or face sanctions. These dates have passed... Thus, it is possible  
 15 that any alleged irreparable harm to Admiral has already occurred and that the Court is unable to  
 16 offer Admiral any relief." *Order Den. TRO* at pg.4:27-5:1. However, the Court also stated that  
 17 "Admiral may file...a renewed motion and declaration informing the Court whether its TRO  
 18 application was mooted on March 15 or 17, 2012, or at any time since then." *Id.* at pg. 5:15-17.  
 19 Accordingly, Admiral submits this instant renewed ex parte application for a TRO as the  
 20 Original TRO Application is not yet moot and Admiral continues to face immediate and  
 21 irreparable harm if a TRO is not granted at this time.

## 22 **I. ADDITIONAL FACTS**

23 Admiral refers to its Original TRO Application for the background information and facts  
 24 relating to this dispute. However, it provides the following facts which were not included in the  
 25 Original TRO Application, as well as outlines events that have transpired since the Original TRO  
 26 Application was filed.

As noted by the Court, the Tribal Court had ordered all parties to file cross-motions for summary judgment by March 15 or 17, 2012. WRI has complied with that order and filed a Motion for Summary Judgment against Admiral on March 15, 2012. Attached hereto as Exhibit "A" is a true and correct copy of this motion. As Admiral has not been provided its due process in the Tribal Court, it could not, and did not, submit a motion for summary judgment, lest it be seen as subjecting to the Tribal Court's jurisdiction. Thus, it is currently at risk of being sanctioned for failure to abide by the Tribal Court's order. Meanwhile, the hearing date on WRI's Motion for Summary Judgment is set for April 16, 2012, with reply briefs due on April 2, 2012. Admiral cannot file a reply brief since doing so would subject itself to the Tribal Court's jurisdiction. Nor can Admiral appear and orally argue its position at the hearing on the motion for summary judgment for the same reason. Thus, Admiral continues to face immediate and irreparable harm due to the Tribal Court's actions in the form of a significant likelihood of sanctions and an adverse judgment against Admiral on the substantive merits of the case without the possibility of appeal.

While Admiral has since re-filed its Motion to Dismiss the Tribal Action in the Tribal Court, there is currently no guarantee that it will be heard before reply briefs and/or oral argument on WRI's motion for summary judgment would be due. Before it re-filed the motion, Admiral made numerous inquiries to the Tribal Court's court clerk to secure a hearing date. Attached hereto as Exhibit "B" are true and correct copies of the various e-mails and letters Admiral's counsel sent to the Tribal Court's court clerk requesting a hearing date. As previously indicated, Admiral also filed an Ex Parte Application for an Order Shortening Time to obtain a proper hearing date to re-file the Motion to Dismiss. Attached as Exhibit "K" to the Original TRO Application was a true and correct copy of this ex parte application. All of Admiral's requests went ignored and the Tribal Court has continued to refuse to entertain Admiral's Ex Parte Application for an Order Shortening Time. Being unable to secure a hearing date, Admiral unilaterally re-filed the Motion to Dismiss and utilized the same hearing date as WRI's Motion

for Summary Judgment since that was the only date it knew the Tribal Court would actually be available and open for business. Thus, Admiral's re-filed Motion to Dismiss will not be heard before the Motion for Summary Judgment. Nor is it even certain that Admiral's re-filed Motion to Dismiss has been accepted by the Tribal Court and will be heard. While Admiral re-submitted its Motion to Dismiss to the Tribal Court clerk on March 15, 2012, it has yet to receive a stamped endorsed copy back from the Tribal Court. Accordingly, the irreparable harm Admiral is facing remains in place since it requests to have jurisdictional issues entertained in advance of the merits of the Tribal Action continues to be thwarted.

## II. LEGAL ARGUMENT

As correctly cited by the Court, there are four factors which a party must show to be entitled to a TRO. "[A] plaintiff generally must show that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest." *Order Den. TRO* at pg. 4:6-8, citing *Winter v. Natural Res. Dec. Council, Inc.* (2008) 555 U.S. 7, 24-25. Admiral's Original TRO Application addressed its likelihood of succeeding on the merits and thus will not re-address them herein. Instead, Admiral addresses the remaining three factors which is what the Court's order denying Admiral's Original TRO Application addressed.

### A. Admiral Continues to Suffer Irreparable Harm

It is clear that Admiral is suffering, and will continue to suffer, irreparable harm if a TRO is not granted. To preserve its due process rights, Admiral was forced to defy a court order and is at risk of being sanctioned. That risk is real as Judge Marston has not hesitated in the past to impose sanctions on other parties in the Tribal Action.<sup>1</sup> It also is currently faced with a motion for summary judgment which it cannot oppose. Without being presented with a reply brief, Judge Marston is obligated to "deem the material facts claimed and adequately supported by [WRI] to be established." Rule 35 of the Civil Rules of Procedure for the Tribal Court of the

<sup>1</sup> Attached hereto as Exhibit "C" is a true and correct copy of an order by Judge Marston wherein he imposed sanctions upon Mainstay Business Solutions, plaintiff in the Tribal Action.

1 Tribe. Thus, there is a significant likelihood that the Tribal Court will enter an adverse judgment  
2 against Admiral on the substantive merits of the case.

3 These examples of harm are irreparable as there is no ability to turn back the clock once  
4 the Tribal Court issues a sanction or rules on WRI's motion for summary judgment. Admiral  
5 cannot file a motion for reconsideration of the sanctions or summary judgment ruling since filing  
6 this motion will also subject itself to the Tribal Court's jurisdiction. Moreover, under section  
7 11.1.1.070(a) of Blue Lake Rancheria Business Council Ordinance No. 07-01, "[u]ntil the  
8 Business Council adopts a separate Ordinance establishing a Court of Appeal and providing for  
9 its scope of review, the decisions of the Trial Court shall be final and non-appealable." As far as  
10 Admiral is aware, no such Court of Appeal has been established for the Blue Lake Rancheria  
11 Tribe. Being unable to appeal the sanctions and any other decision by the Tribal Court that also  
12 means Admiral cannot request a stay of enforcement of the judgment or sanctions award pending  
13 the appeal. Neither would any form of monetary award after the fact save Admiral from the  
14 harm that results in having a judgment or sanctions entered against it as a matter of public record.

15 It is also important to note that "[a]n alleged constitutional infringement will often alone  
16 constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of the State of Cal.* (9<sup>th</sup>  
17 Cir. 1984) 739 F.2d 466, 472; see also, *Associated Gen. Contractors of Cal., Inc. v. Coalition for*  
18 *Economic Equity* (9<sup>th</sup> Cir. 1991) 950 F.2d 1401. This is exactly the situation we have here. If  
19 Admiral is denied a TRO, its due process rights guaranteed to it by the United States  
20 Constitution as well as the Indian Civil Rights Act of 1968 will have been circumvented. There  
21 is no greater example of irreparable harm than this.

## 22 **B. A Temporary Restraining Order is the Only Form of Relief Currently Available**

23 A TRO is needed as there is insufficient time to hear a properly noticed motion for a  
24 preliminary injunction in this case. "The court may issue a preliminary injunction only on notice  
25 to the adverse party." Fed. R. Civ. P. 65. Thus, at least thirty-five (35) days' notice is required.  
26 Civil L.R. 7-2(a). If thirty-five (35) days are allowed to lapse, reply briefs, as well as the hearing

1 date on WRI's motion for summary judgment will have come and passed. That also allows at  
 2 least 35 days where the Tribal Court is free to sanction Admiral for failure to file a motion for  
 3 summary judgment. Thus, a TRO is the only means for Admiral to seek relief in this matter.  
 4 Without one, the Defendants remain free to act to Admiral's detriment with no form of recourse.

5 **C. No Opposition to Admiral's Request for a TRO Has Ever Been Filed**

6 Moreover, even though Admiral is notifying Defendants about its request for a temporary  
 7 restraining order, given the irreparable harm Admiral is facing and the time constraints, it is clear  
 8 that the temporary restraining order can be issued before Defendants can be heard in opposition.  
 9 The Tribal Court as well as Judge Marston were notified that Admiral filed the instant federal  
 10 court action on March 15, 2012. See, Exh. N to Original TRO Appl. They were also personally  
 11 served with the Complaint, the Summons and the Original TRO Application on March 19, 2012.  
 12 Attached hereto as Exhibit "D" is a true and correct copy of this proof of service. Thus, they are  
 13 fully aware of the instant matter and did not file an opposition or even orally inform Admiral that  
 14 they opposed the Original TRO Application.

15 WRI was also notified that Admiral filed the instant federal court action on March 15,  
 16 2012. While Admiral is still attempting to personally serve WRI, a courtesy copy of the  
 17 Complaint, the Summons and the Original TRO Application were sent to its counsel, Mr. Eric  
 18 Hartman, on March 16, 2012 and received by him on March 19, 2012. Attached hereto as  
 19 Exhibit "E" is a true and correct copy of the delivery confirmation. Prior to these dates, Mr.  
 20 Hartman had been orally notified on March 13, 2012 that Admiral intended to file the Original  
 21 TRO Application. Based on a conversation with Mr. Hartman, it is Admiral's understanding that  
 22 he will be representing WRI in the instant action. As noted by the Court, no opposition has been  
 23 filed by WRI. Meanwhile, in compliance with the Court's order, a copy of the Order denying  
 24 Admiral's Original TRO Application has been personally served on the Tribal Court, Judge  
 25 Marston as well as WRI's counsel, Mr. Hartman. True and correct copies of these proofs of  
 26



1 service are attached hereto as Exhibit "F". To date, none of the Defendants have provided notice  
2 to the Court that they opposed Admiral's actions.

### 3 **D. Any Competing Claims of Injury Weigh in Favor of Issuing a TRO**

4 It is important to note that Admiral's request for a TRO in no way prejudicially impacts  
5 WRI's position in the Tribal Action. Its summary judgment has already been filed. No trial,  
6 mandatory settlement conference, discovery cut off, etc. dates have been set. In fact, there are no  
7 other pending events in the Tribal Action. Thus, WRI is only awaiting the ruling on its summary  
8 judgment motion. A ruling which can still be provided, just delayed in order to have Admiral's  
9 re-filed motion to dismiss addressed first. This same inconvenience is also the only harm the  
10 Tribal Court and Judge Marston are facing if a TRO is granted. Conversely, the harm Admiral is  
11 suffering is being deprived of its due process rights guaranteed to it by the Constitution of the  
12 United States and the Indian Civil Rights Act of 1968. As noted by the United States Supreme  
13 Court in deciding whether to issue a preliminary injunction "courts 'must balance the competing  
14 claims of injury and must consider the effect on each party of the granting or withholding of the  
15 requested relief.'" *Winter v. National Resources Defense Council* (2008) 555 U.S. 7, 24, citing  
16 *Amoco Production Co. v. Village of Gambell, AK* (1987) 480 U.S. 531, 542. Defendants face  
17 having the Tribal Action delayed by a couple of months at most, a move which may actually  
18 result in resolving the Tribal Action if Admiral prevails in its re-filed motion to dismiss. This is  
19 trivial when compared to Admiral's denial of rights which make up the very foundation upon  
20 which our government is based upon.

### 21 **E. It Is In the Public's Interest That A Temporary Restraining Order is Granted**

22 The TRO which Admiral is requesting has no affect upon the public at large. "When the  
23 reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the  
24 public interest will be 'at most a neutral factor in the analysis rather than one that favor[s]  
25 [granting or] denying the preliminary injunction.'" *Stormans, Inc. v. Selecky* (Wash. 2009) 586  
26 F.3d 1109, 1138-1139, citing *Bernhardt v. LA County* (9<sup>th</sup> Cir. 2003) 339 F.3d 920, 931.

1 Nevertheless, it would clearly be in the public's best interest to ensure that the Tribal Court and  
 2 its Judge respect the jurisdiction laws of the United States and its own statutes and affords a  
 3 party it due process rights.

4 **F. Defendants Should Be Ordered to Show Cause Regarding the Issuance of a**  
 5 **Preliminary Injunction**

6 Since a temporary restraining order is issued to preserve the status quo before a  
 7 preliminary injunction hearing may be held, the standard for issuance of a temporary restraining  
 8 order mirrors the standard for granting a preliminary injunction. See, *Sierra On-Line, Inc. v.*  
 9 *Phoenix Softward, Inc.* (1997) 739 F.2d 1415, 1422; *Weinberger v. Romero-Barcelo* (1982) 456  
 10 U.S. 305, 312 (The Court has repeatedly held that the "basis for injunctive relief in the federal  
 11 courts has always been irreparable injury and inadequacy of legal remedies."). As demonstrated  
 12 above, Plaintiff has met its burden for obtaining a temporary restraining order. This Court  
 13 should therefore issue an order requiring Defendants to show cause why the Court should not  
 14 issue a preliminary injunction.

15  
 16 DATED: March 22, 2012

WALSH MCKEAN FURCOLO LLP

17  
 18 By: 

19 Regan Furcolo  
 20 Lynn Trang  
 21 Christopher M. Lea  
 22 Attorneys for Plaintiff  
 23 ADMIRAL INSURANCE COMPANY



DECLARATION OF LYNN H. TRANG

I, Lynn H. Trang, declare:

1. I am over 18 years of age and am competent to testify in this matter.

2. All of the statements made in this declaration are true as of my own personal knowledge.

3. I am an attorney duly admitted to practice before this court and licensed to practice law in the courts of the State of California and attorney of record for Plaintiff herein, ADMIRAL INSURANCE COMPANY ("Admiral"). I make this declaration in Support of Admiral's Renewed Ex Parte Application for Temporary Restraining Order in this matter.

4. WOOD'S ROOFING, INC. ("WRI") has filed a Motion for Summary Judgment against Admiral on March 15, 2012 in a case currently before the Blue Lake Rancheria Tribal Court known as Case No. C-09-0612-LJM, *Mainstay Business Solutions v. Wood's Roofing, Inc.* ("Tribal Action"). Attached hereto as Exhibit "A" is a true and correct copy of this motion. Admiral did not submit a motion for summary judgment in the Tribal Action.

5. The hearing date on WRI's Motion for Summary Judgment is set for April 16, 2012, with reply briefs due on April 2, 2012.

6. Admiral has re-filed a Motion to Dismiss in the Tribal Action. Before it re-filed the motion, I made numerous inquiries to the Tribal Court's court clerk to secure a hearing date. Attached hereto as Exhibit "B" are true and correct copies of the various e-mails and letters I sent to the Tribal Court's court clerk requesting a hearing date. No hearing date was ever provided.

7. Admiral also filed an Ex Parte Application for an Order Shortening Time to obtain a proper hearing date to re-file the Motion to Dismiss in the Tribal Action. Attached as Exhibit "K" to the Original TRO Application was a true and correct copy of this ex parte application. The Tribal Court has continued to refuse to entertain this ex parte application.

8. Being unable to secure a hearing date, Admiral unilaterally re-filed the Motion to

Dismiss and utilized the same hearing date as WRI's Motion for Summary Judgment since that was the only date it knew the Tribal Court would actually be available and open for business.

9. Thus, Admiral's re-filed Motion to Dismiss will not be heard before the Motion for Summary Judgment. Nor is it even certain that Admiral's re-filed Motion to Dismiss has been accepted by the Tribal Court and will be heard. I re-submitted Admiral's Motion to Dismiss to the Tribal Court clerk on March 15, 2012, but have yet to receive a stamped endorsed copy back from the Tribal Court.

10. Attached hereto as Exhibit "C" is a true and correct copy of an order by Judge Marston wherein he imposed sanctions upon Mainstay Business Solutions, plaintiff in the Tribal Action.

11. The Tribal Court as well as Judge Marston were notified that Admiral filed the instant federal court action on March 15, 2012. See, Exh. N to Original TRO Appl. Their registered agent for service of process was also personally served with the Complaint, the Summons and the Original TRO Application on March 19, 2012. Attached hereto as Exhibit "D" is a true and correct copy of this proof of service.

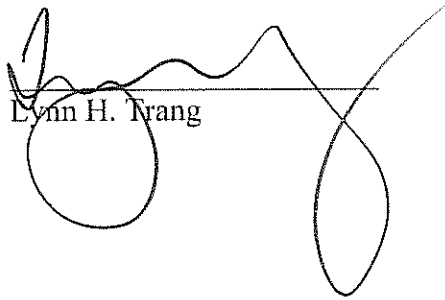
12. WRI was also notified that Admiral filed the instant federal court action on March 15, 2012. See, Exh. N to Original TRO Appl. While Admiral is still attempting to personally serve WRI, a courtesy copy of the Complaint, the Summons and the Original TRO Application were sent to its counsel, Mr. Eric Hartman, on March 16, 2012 and received by him on March 19, 2012. Attached hereto as Exhibit "E" is a true and correct copy of the delivery confirmation. Prior to these dates, Mr. Hartman had been orally notified on March 13, 2012 that Admiral intended to file the Original TRO Application. Based on a conversation with Mr. Hartman, it is Admiral's understanding that he will be representing WRI in the instant action. No opposition has been filed by WRI with the Court.

13. In compliance with the Court's order, a copy of the Order denying Admiral's Original TRO Application has been personally served on the Tribal Court, Judge Marston as well

1 as WRI's counsel, Mr. Hartman. True and correct copies of these proofs of service are attached  
2 hereto as Exhibit "F". To date, none of the Defendants have provided notice to the Court that  
3 they opposed Admiral's actions.

4 I declare under penalty of perjury of the laws of the United States of America that the  
5 foregoing is true and correct. I executed this declaration on March 22, 2012.

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



Lynn H. Trang

EXHIBIT “A”

ERIC F. HARTMAN, ESQ. (SB # 083571)  
**LAW OFFICE OF ERIC F. HARTMAN**  
 300 S. FIRST STREET, #210  
 SAN JOSE, CA. 95113  
 (408) 297-7254 / Fax (408) 297-0608

Attorney for Cross-Complainant, Wood's Roofing Inc., a California Corporation

**IN THE TRIBAL COURT OF  
 BLUE LAKE RANCHERIA**

MAINSTAY BUSINESS SOLUTIONS, )

Plaintiff, )

vs. )

WOOD'S ROOFING INC., a California )  
 Corporation, DOES 1-10. )

Defendants. )

WOOD'S ROOFING INC., a California )  
 Corporation; )

Cross-Complainant, )

vs. )

UNITED CONTRACTORS INSURANCE )  
 COMPANY INC.; ADMIRAL )  
 INSURANCE COMPANY; ROES 1-100. )

Cross-Defendants. )

**CASE NO. C-09-0612A-LJM**

**CROSS-COMPLAINANT WOOD'S  
 ROOFING INC.'S POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MANDATORY COURT ORDERED  
 CROSS-MOTION FOR SUMMARY  
 JUDGMENT ON IT'S CROSS-COMPLAINT  
 FOR DAMAGES AGAINST ADMIRAL  
 INSURANCE COMPANY FOR BREACH  
 OF IMPLIED COVENANT OF GOOD  
 FAITH AND FAIR DEALING, REFUSAL  
 OF INSURER TO DEFEND ACTION  
 AGAINST INSURED AND INDEMNIFY  
 AND FOR WRONGFULLY REFUSAL TO  
 SETTLE [CRPTCT Rule 35]**

**Date : April 16, 2012  
 Time : 1:30 p.m.  
 Dept : Blue Lake Tribal Court  
 Judge : Lester Marston**

## I.

GENERAL INTRODUCTION

This court has ordered (October 27, 2011) cross-complainant Wood's Roofing Inc. and cross-defendant Admiral Insurance company to file cross-motions for Summary Judgment only on the following issues : (note: cross-defendant United Contractors Insurance Company Inc. defaulted and settled with Wood's Roofing and a Motion for Good Faith Settlement is pending) and this Motion for Summary Judgment only pertains to remaining cross-defendant Admiral Insurance Company.

The parties in Woods shall file cross-motions for summary judgment addressing the following issues:

- (1) does the Court have personal jurisdiction over the cross-defendant Admiral Insurance Company
- (2) does the Court, as a matter of tribal law, have subject matter jurisdiction over the cross-defendant Admiral Insurance Company
- (3) does the Court, as a mater of federal law, have subject matter jurisdiction over the cross-defendant Admiral Insurance Company
- (4) do the cross-defendant have an obligation to tender a defense on behalf of Wood's Roofing in this case pursuant to policies of insurance entered into between insured cross-complainant and cross-defendant (Does cross-defendant Admiral Insurance Company owe a duty to provide a defense to insured/cross-complainant Wood's Roofing under the GCL Policy after timely tender by insured Wood's Roofing Inc.).

Much of the facts and evidence and law and argument for granting Summary Judgment in favor of Wood's Roofing Inc. and against Admiral Insurance Company is taken from plaintiff Mainstay Business Solutions' amicus brief on the 3 jurisdictional issues filed on January 11, 2012 with Exhibits. It is not necessary for Wood's Roofing Inc. to reinvent the wheel.

## II.

**Key Points in Support of Wood's Roofing Inc.'s Motion for Summary Judgment against Admiral Insurance Company.**

1        A.     Prior to settlement, cross-defendant **United Contractors Insurance Company**  
 2     unsuccessfully attempted to obtain Declaratory Relief/ Ex Parte Relief and Injunctive Relief against  
 3     Wood's Roofing Inc. in United States District Court - Central District of California Los Angeles -  
 4     Case No. LA CV11-10161 JAK/SHX filed on December 9, 2011 by attempting to bypass the Blue  
 5     Lake Rancheria Tribal Court's authority.

6        The District Court issued an Order (Judge John A. Kronstadt), inter alia (Exhibit A) denying  
 7     everything and holding as follows:

8                     Before the federal courts will review a tribal court's determinate of  
 9                     jurisdiction, the party challenging jurisdiction must exhaust all available  
 10                    remedies in the tribal court system. Id. at 857. United Contractors has made  
 11                    no showing that it exhausted its remedies in the Blue Lake Rancheria.

12                    4. Public Interest

13                    The public interest favors rejecting United Contractor's petition  
 14                    Considerations of comity with the Blue Lake Rancheria Tribal Court  
 15                    weigh strongly against this Court's consideration of that court's  
 16                    determination of jurisdiction, when United Contractors has not exhausted  
 17                    its remedies there. See Iowa Mutual Insurance Co. vs. LaPlante, 480  
 18                    U.S. 9, 16 n.8 (1987) ("Exhaustion is required as a matter of comity,  
 19                    not as a jurisdictional prerequisite.").

20                    In the case at bar, Admiral Insurance Company has not even begun to exhaust it's Tribal Law  
 21                    remedies and any Admiral Insurance Company attempt to bypass to Tribal Court and proceed to any  
 22                    United States District Court will be denied by that Court and Wood's Roofing will file a Motion to  
 23                    Dismiss (specially appearing).

24                    In the case at bar, cross-defendant Admiral Insurance Company in addition is absolutely  
 25                    barred from going to Federal Court and seeking Declaratory Relief/Injunction Relief because of  
 26                    failure to exhaust the Tribal remedies.

27                    This entire lawsuit is not a worker's compensation lawsuit and not excluded from coverage.

28                    B.     During the applicable policy CA000001403-06 for the policy period 9/28/2007  
 to 9/28/2008 (date of injury: 10/24/2007 of Daniel Flores), Plaintiff Mainstay Business Solutions  
 was the employer and assigned its employees to Wood's Roofing Inc. to work. Plaintiff Mainstay



Business Solutions was a division of Blue Lake Rancheria Economic Development Corporation and wholly owned by Blue Lake Rancheria - a federally recognized Indian and Mainstay Business Solutions was permissibly self insured for workers compensation.

**C. Effect of cross-motions:** Cross-motions for summary judgment do not warrant the conclusion that one of the motions must be granted. The court must still determine whether summary judgment for either party is appropriate. [*Appoloni v United States* (6<sup>th</sup> Cir. 2006) 450 F3d 185, 189; *Fair Housing Council of Riverside County Inc. vs. Riverside Two* (9<sup>th</sup> Cir. 2001) 249 F3d 1132].

**D. Standard applicable to cross-motions:** The fact that both sides move for summary judgment does not necessarily mean there are no triable issues of fact. The court must consider each motion separately to determine whether any genuine issue of material fact exists. ie. The court is not required to grant either motion, and may properly deny both motions. [*Starsky v. Williams* (9<sup>th</sup> Cir. 1975) 512 F2d 109, 112; *Shook v. United States* (11<sup>th</sup> Cir. 1983) 713 F2d 662, 665; *Beck v. City of Cleveland, Ohio* (6<sup>th</sup> Cir. 2004) 390 F3d 912, 917].

**E. Court must consider all evidence offered in both cross-motions:** When cross-motions for summary judgment are filed on the same claim, the court must consider evidence submitted in support of (and in opposition to) both motions before ruling on either motion. Thus, a court ruling on one motion must consider evidence submitted in support of cross-motion in determining whether there is a triable issue of fact ,even if no formal opposition is filed. [*Fair Housing Council of Riverside County Inc. v. Riverside Two* (9<sup>th</sup> Cir. 2001) 249 F3d 1132, 1136].

**F. Cross-defendant Admiral Insurance Company's duty to defend Wood's Roofing Inc. :** Summary Judgment Motion must be granted in favor cross-complainant Wood's Roofing Inc. and against cross-defendant Admiral Insurance Company because there exists no triable issue of material fact [CFRCP 56(a) and CRPTC Rules 35 and 36].

**G. Cross-defendant Admiral Insurance Company has failed to file an Answer and no affirmative defenses exist or have been plead by Admiral Insurance Company. Clerks Default should have been taken against Admiral Insurance Company pursuant to CRPTC Rule 15 and Rule**

34 - Clerk's Default).

### III.

#### INTRODUCTION TO JURISDICTIONAL ISSUES - 3 JURISDICTION

##### Exhibits are from January 11, 2012 AMICUS Brief

On June 12, 2009, Mainstay Business Solutions ("Mainstay") filed a complaint against Wood's Roofing Inc. ("Wood's") for in this Court. Mainstay was given leave by the Court to file an amended complaint which it did on June 23, 2011. Mainstay properly served the First Amended complaint on Wood's. It sent courtesy copies to Wood's insurers for the relevant time period—United Contractors Insurance Company ("United Contractors"), and Admiral Insurance Company ("Admiral"). Wood's filed a timely answer to Mainstay's First Amended Complaint.

##### **First Amended Complaint for Damages for Breach of Written Contract, Money on an Open Book account, Breach of Covenant of Good Faith and Fair Dealing, Gross Negligence and Ordinary Negligence for \$203,932 in Damages.**

On September 11, 2011, Wood's filed a cross complaint for damages against United Contractors and Admiral on the grounds of Breach of Implied Covenant of Good Faith and Fair Dealing, Refusal of Insurer to Defend Action Against Insure, and Indemnify and Wrongful Refusal to Settle.

On October 25, 2011, Admiral filed a Motion to Quash and Dismiss the Summons in the Cross-Complaint. United Contractors Insurance Company did not answer and Clerk's Default taken. Cross-Defendant United Contractors Insurance Company settled with Wood's Roofing Inc. for \$50,000 subject a Good Faith Settlement.

Plaintiff Mainstay is wholly owned and operated by the Blue Lake Rancheria Economic Development Corporation (BLREDC) for the purpose of generating government revenues for the Blue Lake Rancheria, a federally recognized Indian Tribe ("Tribe"). *See* Declaration of Eric Ramos (hereinafter "Ramos Dec.") at ¶ 2 to Plaintiff Mainstay Business Solutions' January 11, 2012 AMICUS Brief.

1 A Clerk's Default should have been entered twice by the Tribal Court by against Admiral  
 2 Insurance Company but woefully failed to do so. Now Admiral Insurance Company is  
 3 wrongfully proceeding in the U.S. District Court of Northern California-San Jose for a TRO /  
 4 Injunction / Motion to Dismiss the Tribal Court action against Admiral Insurance Company.

5 Defendant/Cross-Plaintiff Wood's Roofing, Inc. (Wood's) is a duly formed California  
 6 corporation which entered into an agreement for services with Mainstay. That Agreement, its  
 7 terms, and renewal are described and included as Exhibits 1 and 2 in Plaintiff's First Amended  
 8 Complaint.

9 Cross-Defendant Admiral Insurance Company ("Admiral") is an insurance carrier licensed  
 10 to operate in California.

11 On October 26, 2011, subsequent to a mandatory settlement conference held on October 6,  
 12 2011, the Tribal Court for the Blue Lake Rancheria issued an order directing the parties to submit  
 13 Cross-Motions for Summary Judgment on a number of issues related to the above-captioned  
 14 case. In that order, the Court also gave leave to Mainstay Business Solutions to file an Amicus  
 15 Brief (January 11, 2012).

16 The Blue Lake Rancheria Tribe ("Tribe") is a federally recognized Indian tribe. *See* Indian  
 17 entities Recognized and Eligible to Receive Services from the United States Bureau of Indian  
 18 Affairs, 73 Fed. Reg. 18,533 (October 10, 2010). The Blue Lake Rancheria Economic  
 19 Development Corporation ("BLREDC") is a federally chartered corporation formed pursuant to  
 20 Section 17 of the Indian Reorganization Act (25 U.S.C. §477) and Mainstay Business Solutions,  
 21 a division of BLREDC, is an arm of the Tribe which is a sovereign Indian nation.

#### 22 IV.

23 **Summary Judgment must be granted because there exists no triable**  
 24 **issues of material fact as to subject matter jurisdiction and this court**  
 25 **has subject matter jurisdictions as a matter of Tribal Law.**

26 On February 27, 2007 the Business Council of the Blue Lake Rancheria adopted Ordinance #  
 27 07-01, ("Tribal Court Ordinance") (Mobbs' Declaration, Exhibit 9) establishing the Blue Lake

1 Rancheria Tribal Court. Section 11.1.1.030(A)(1) of the Tribal Court Ordinance provides “The  
 2 Tribal Court shall have jurisdiction over all matters in law or in equity which the Business  
 3 Council Expressly authorizes by ordinance.”

4 The Tribal Court Ordinance section 11.1.1.060(A) provides: “When choosing what law  
 5 applies, the Tribal Court shall apply the law of the Tribe. In the absence of applicable tribal law,  
 6 the court shall use as guidance the laws of the State of California, the laws of other federally  
 7 recognized Tribes and federal law, but shall follow federal and state laws, if required by tribal or  
 8 federal laws.”

9 **Section 11.1.1.030 (A)4(c) provides:**

10 “The Tribal Court is granted all the powers necessary to exercise its  
 11 jurisdiction in accordance with the procedures set forth in this Ordinance.  
 12 Additionally, the Tribal Court may exercise its jurisdiction in accordance  
 13 with any suitable procedures where specific procedures are not set forth in  
 14 this Ordinance, so long as such procedures are in accordance with the  
 15 Tribe’s Constitution.”

16 Cross-defendant Admiral Insurance cites Strate v. A-1 Contractors for its assertion that  
 17 should the Tribal Court assert jurisdiction over this matter, the Court would be exceeding its  
 18 jurisdiction. Cross-defendant Admiral Insurance nullified Motion to Dismiss Complaint.

19 However, Strate goes on to further define the contours of a Tribe’s jurisdiction over non-  
 20 members, and it does not provide as absolute a rule as Admiral would like to suggest is the case  
 21 with regard to the Tribal Court’s jurisdiction in this matter.

22 “As to nonmembers [. . .] a tribe’s adjudicative jurisdiction does not exceed its legislative  
 23 jurisdiction.” Strate v. A-1 Contractors, 520 U.S. 438, 453 (1996) “[. . .] where tribes possess  
 24 authority to regulate the activities of nonmembers, “[civil jurisdiction over [disputes arising out  
 25 of] such activities presumptively lies in the tribal courts”” Strate, Ibid. citing Iowa Mutual  
Insurance Company v. LaPlante, 480 U.S. 9, 18 (1987).

26 The Tribe has, and exercised, the authority to regulate the activities of non-member with  
 27 respect to contracts with the Tribe and its wholly owned entities, as well as the forum in which

1 disputes under such contracts may be adjudicated. It did so in the Contract Code adopted by the  
2 Business Council and granted this Court original jurisdiction over contract claims and  
3 controversies consistent with the Tribe's Constitution and the Tribal Court Ordinance.

4 On August 2, 2007, the Business Council of the Blue Lake Rancheria adopted Ordinance #  
5 07-02, ("Contracts Code") (Mobbs' Declaration, Exhibit 8 - January 11, 2012 AMICUS's Brief)  
6 establishing the Blue Lake Rancheria a Contracts Code and Granting to the Blue Lake Tribal  
7 Court the Jurisdiction and Authority to Hear Contract Disputes in Limited Cases."

8 Section 11.1.2.030 the Contracts Code is explicit in the grant of subject matter jurisdiction.  
9 The Court was given jurisdiction over civil causes of action involving contracts. Section  
10 11.1.2.030, in addition to providing for subject matter jurisdiction over causes of action  
11 involving contracts, provides: "A contract may contain a choice of law and forum selection  
12 clause which also shall be deemed to grant the tribal court subject matter jurisdiction over the  
13 dispute by selecting tribal law to govern the interpretation or enforcement of the contract or tribal  
14 court as the forum for resolving such disputes."

15 The purpose of Ordinance 07-02 "is to provide the Blue Lake Rancheria Tribal Court with  
16 subject-matter jurisdiction over causes of *action* arising under contracts with the Tribe and its  
17 wholly owned business enterprises and its departments and agencies and to provide substantive  
18 tribal law governing the formation, interpretation, and enforcement of such contracts."  
19 (Ordinance 07-02, §1.5) (emphasis added).

20 "The word "action" has been commonly understood to denote not merely a "claim" or  
21 "cause of action" but "the entire controversy," . . ." *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 716,  
22 719 (2d Cir. 1980); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d  
23 Cir.), cert. denied (citations omitted).

24 The "entire controversy" naturally includes any ancillary or pendent claims which arise  
25 from the original action. Thus, cross-complainant Wood's Roofing Inc.'s action against cross-  
26 defendant Admiral Insurance Company would be part of the entire controversy of this case.

Ancillary jurisdiction is:

“the jurisdiction assumed by [ . . . ] courts, largely as a matter of convenience to the parties, which extends beyond that conferred upon them expressly by the Constitution or by enabling statutes. Under the doctrine of ancillary jurisdiction, it is recognized “that a [ . . . ] court acquires jurisdiction of a case or controversy in its entirety and may as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented. Thus, when the court has jurisdiction of the principal action, it may hear also any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that would normally determine jurisdiction.” [ . . . ] Cross-claims, impleader of third parties, interpleader, and intervention as of right are [ . . . ] examples of ancillary jurisdiction.” (Steven H. Gifis, Law Dictionary (Barrons, 4<sup>th</sup> ed. 1996), p. 24, col. 2) (citations omitted)

Admiral attempts to disqualify cross-complainant Wood’s Roofing Inc.’s action from the Court’s jurisdiction on the basis that section 11.1.2.030 of the Contracts Code, in addition to providing the Court jurisdiction over contract disputes, also provides ancillary jurisdiction over non-contract claims arising from the same “action”, and Wood’s cross-action is a contract action—thus, the Court lacks jurisdiction. (Cross-defendant’s Memo In Support of nullified Motion to Dismiss).

Admiral’s interpretation and desired application is inherently flawed. Since the Code already granted the Court jurisdiction over “causes of action arising under contracts. . .”, the Court was granted jurisdiction over the ancillary contract causes of action. The Code, by including language regarding ancillary jurisdiction for *non*-contract claims simply sets forth clarification of, and provides for, the Court’s jurisdiction over those claims. It cannot be interpreted to provide for both a grant of jurisdiction over contract causes of action—which inherently includes ancillary jurisdiction, and an exclusion of jurisdiction at the same time.

Therefore, because the Tribal Court ordinance provides for the method for establishing the Tribal Court’s subject matter jurisdiction, and because the Business Council acted to establish the Court’s subject matter jurisdiction through the Contracts Code, and because the Contract Code grants jurisdiction over all “causes of action arising under contracts”, and because

the court has jurisdiction over the entire controversy, and because cross-plaintiff's action falls within the scope of the "entire controversy", and the doctrine of ancillary jurisdiction applies, the Tribal Court, as a matter of Tribal law has subject matter jurisdiction over cross-defendants. It should be noted that, consistent with section 11.1.1.030(A) of the Tribal Court Ordinance, the Tribal Court was expressly given jurisdiction, over disputes involving the selection of tribal court as the forum for resolving causes of action involving contracts under the Contract Code. The Tribal Court's interpretation of tribal law will be controlling. (*Prescott v. Little Six, Inc.*, 387 F.3d 753, 756-57 (8th Cir.2004); see also, *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir.1993); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir.1988); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16).

V.

**Summary Judgment must be granted because no triable issue of material fact exists and this Court has subject matter jurisdiction as a matter of Federal Law and Summary Judgment must be granted as a matter of law.**

As discussed above, the Tribal Court ordinance provides for application of other sources of law, including federal law, in the absence of applicable tribal law.

Cross-defendant Admiral, itself recognizes the applicability and validity of federal and state law in this matter. (Defendant's Memo in Support, p. 5, fn 2 - nullified Motion to Dismiss).

As discussed above, the cross-complaint is part of the "same case or controversy". Federal law recognizes supplemental jurisdiction for such claims in 28 U.S.C. §1367.

"Under 28 U.S.C. §1367(a) (1994), a district court that has original jurisdiction in a civil action "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." In other words, a district court has the power to exercise supplemental jurisdiction over all claims that "arise out of a common nucleus of



operative fact with a substantial federal claim." (*Tamiami Partners v. Micosukee Tribe of Indians*, 177 F.3d 1212, 1223 (1999); *Lucero v. Trosch*, 121 F.3d 591, 597 (11<sup>th</sup> Cir. 1997).  
 "...[Section] 1367(a) is a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases. In fact, the last sentence of §1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties. The terms of §1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction." [*Exxon Mobil V. Allapattah Services*, 545 U.S. 546, 559 (2005)].  
 Therefore, since the Tribal Court can use federal law in the absence of applicable tribal law, and since there is no tribal law which addresses supplemental jurisdiction, § 1367(a) may properly be relied upon, and applied by the Tribal Court to provide subject matter jurisdiction.

## VI.

**Summary Adjudication must be granted because no triable of issue of material facts exist and Summary Judgment must be granted as a matter of law.**

### **The Court has Personal Jurisdiction over cross-defendant Admiral Insurance Company.**

#### 1. The Doctrine of Pendent Personal Jurisdiction

It is well-accepted jurisprudence that once subject matter jurisdiction is established over one count in a case, the reach and authority of the court extends to the entire factual event which gave rise to the case or controversy. The reach of specific personal jurisdiction with regard to a count is grounded in a similar analysis—i.e. the court may exercise its discretion to extend its authority to all counts which arise out of the same case or controversy.

The doctrine of pendent personal jurisdiction is well-recognized by federal courts (*Specialty Insurance Corporation v. Splash Dogs, LLC, et al.*, Case No. 2:10-CV-432, July 14, 2011 (U.S. Dist. Ct. S.D. Ohio, Eastern Division.)

1            “In our view, the same logic that lies behind the supplemental jurisdiction statute  
2            for purposes of subject matter jurisdiction, 28 U.S.C. § 1367, supports the application  
3            of supplemental personal jurisdiction over claims that are properly before the court  
4            under § 1367.” (*Robinson Eng. Co. Pension Plan and Trust V. George* (2000) 223 F.3d  
5            445,450.

6            “Under our case law, the district court may exercise pendant (sic) personal  
7            jurisdiction over the remainder of Fiore and Gipson's claims even if there would not be  
8            personal jurisdiction over them standing alone. *Fiore v. Walden*, (9<sup>th</sup> Cir. 2011) 657  
9            F.3d 838, 858; *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174,  
10           1181 (9th Cir.2004)

11           “[Pendent personal jurisdiction] is merely an aspect of the basic pendent  
12           jurisdiction problem. . . Justification for entertaining such claims ". . . lies in  
13           considerations of judicial economy, convenience and fairness to litigants; if these are  
14           not present a federal court should hesitate to exercise jurisdiction over state claims.”  
15           *Robinson v. Penn Central*, 484 F.2d (3<sup>rd</sup> Cir. 1973)553, 555-556.

16           It is undisputed that as to the original claim, this Court has both subject matter  
17           and personal jurisdiction under Tribal law—i.e. the Tribal Court Ordinance. Mainstay is  
18           a legal entity owned by the Tribe (§11.1.1.030 (b)), the individuals injured were  
19           employees of the Tribe ((§11.1.1.030 (c)), and Wood’s is a legal entity who had entered  
20           a contract with the Tribe or its wholly owned legal entity ((§11.1.1.030 (d)). The claim  
21           was brought under the Agreement between Mainstay and Wood’s in accordance with  
22           the governing law provisions of the Agreement. The cross-claim between Wood’s and  
23           Admiral arise from the same set of operative facts. The issue of whether cross-  
24           defendants have a duty to defend Wood’s cannot be litigated without litigating many of  
25           the identical issues arising in the original action between Mainstay and Wood’s.

26           “The facts underlying a particular claim need not exactly track the facts  
27           underlying the claims for which there is personal jurisdiction, so long as the core facts  
28           are the same.” *Fiore, Ibid.*; (see also, *CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d  
                 1107, 1114 (9th Cir. 2004), and *Channell v. Citicorp Nat'l Svcs., Inc.*, 89 F.3d 379, 385

1 (7th Cir. 1996), which noted that only a "loose factual connection between the claims"  
2 is necessary for the purposes of pendent jurisdiction.)

3 In its August 4, 2011 letter to Wood's denying coverage (cross-complainant's  
4 Cross-Complaint filed on September 7, 2011), Admiral bases its analysis on certain  
5 "facts" concerning the relationship between Mainstay and Wood's and the injured  
6 workers. Some of those "facts" are erroneous. From those misstated facts and the  
7 subsequent analysis, Admiral makes certain conclusions regarding the nature of the  
8 action between Mainstay and Wood's. Because the underlying facts upon which the  
9 conclusions are based are incorrect, the conclusions themselves are very likely  
10 incorrect, and perhaps are best resolved via litigation.

11 Contrary to what Cross-defendant Admiral Insurance Company asserts, Wood's  
12 cross-claim arises from the same nucleus of operative facts as the original action such  
13 that an adjudication of one necessarily involves the adjudication of the other.

14 The underlying "facts" which form the basis of Admiral's analysis, and its  
15 subsequent denial of coverage are the same facts which must be litigated in the action  
16 between Mainstay and Wood's i.e. the exact nature of the relationship between  
17 Mainstay and Wood's, and the injured workers, as well as the nature of the damages  
18 Mainstay sustained giving rise to the causes of action in its Complaint (First Amended  
19 of June 23, 2011). In fact, the same set of facts would have to be litigated in any denial of  
20 coverage action between Wood's and Admiral Insurance - should such an action ensue.

21 Therefore, under the doctrine of pendent personal jurisdiction, the Court has  
22 personal jurisdiction over cross-defendants, and may properly exercise such jurisdiction  
23 so long as there is authority for it to do so, and judicial economy, convenience and  
24 fairness to the parties are present.

2. This Court Has Authority to Exercise Personal Jurisdiction Under the Doctrine of  
Pendent Personal Jurisdiction

The Tribal Court Ordinance §11.1.1.030(4)(c) grants authority to Tribal Court to exercise its jurisdiction in accordance with any suitable procedures as long such procedures are not inconsistent with the Tribe's Constitution.

C.R.P.C.T.C. 14 sets forth the process for service in an action brought before the Tribal Court where service must be made off tribal trust land. Specifically, "If service must be made off of tribal trust land, and service cannot be accomplished as provided herein, service shall be made in accordance with the laws of the State in which the defendant to be served resides."

It is clear this rule allows for nationwide service in the United States (and its territories) because it specifically acknowledges and requires service in accordance with the provisions of the laws of the several states. However, while not an issue in the matter at hand, it can reasonably be argued the provision allows for international service given the capitalization of the word "State".

Therefore, where a party to be served is to be found off tribal trust land, as long as that party is served in accordance with the rules for service established in the jurisdiction in which the party is found, such service will be a valid exercise of the Tribal Court's authority of personal jurisdiction.

3. Pendent Personal Jurisdiction and Due Process

The federal analogue of C.R.P.C.T.C. 14 is FRCP 4(k)(1)(c). This rule vests the federal court with authority to exercise personal jurisdiction whenever service of process is "authorized by a statute of the United States" A federal court is permitted to exercise personal jurisdiction if such jurisdiction is permitted by a federal statute and does not violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

1           However, Tribal "retained sovereignty predates federal recognition — indeed, it  
2           predates the birth of the Republic." (*Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48,  
3           62 (2005) citing *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st  
4           Cir.1994). "Because of their sovereign status, tribes ... are insulated in some respects by  
5           a 'historic immunity from state and local control,' and tribes retain any aspect of their  
6           historical sovereignty not 'inconsistent with the overriding interests of the National  
7           Government.'" (*Aroostook, Ibid.*, citing *New Mexico v. Mescalero Apache Tribe*, 462  
8           U.S. 324, 332 (1983)

9  
10           Tribes occupy special relationship with the United States. Sometimes it is  
11           characterized as a trustee and beneficiary. Sometimes the relationship is stated as tribes  
12           are "domestic dependent nations" (Justice John Marshall's in *Cherokee Nation v.*  
13           *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

14           Thus, Tribes are not the federal government, nor are they states. Therefore, it is not  
15           normally possible to invoke the Bill of Rights or the Fourteenth Amendment against a  
16           tribe (see *Talton. v. Mayes*, 163 U.S. 376 (1896).

17           The Indian Civil Rights Act (ICRA) of 1968, (28 U.S. C. §1301, et seq.) (the  
18           "Act") was enacted to address this concern. Section 1302 (8) of the Act provides: [No  
19           Indian tribe in exercising powers of self-government shall--] deny to any person within  
20           its jurisdiction the equal protection of its laws or deprive any person of liberty or  
21           property without due process of law;". This provision is not inconsistent with Fifth  
22           Amendment to the U.S. Constitution. As a result, an analysis of whether service under  
23           C.R.P.C.T.C. 14 comports with the Act's due process requirement may be made by  
24           considering federal due process jurisprudence.  
25  
26  
27  
28

1 Due Process requires adequate notice to the defendant of the action and an  
2 opportunity for the defendant to be heard [*World-Wide Volkswagen Corp. v. Woodson*,  
3 444 U.S. 286, 297 (1980); *Pennoyer v. Neff*, 95 U.S. 714, 722-723 (1878)].

4 The method of notice must be reasonably certain to inform the defendant that he or  
5 she is being sued. If it is not possible to provide such notice, the chosen form of notice  
6 must be as likely as other feasible and customary forms of notice to notify the defendant  
7 (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950))

8 Due process also requires that the defendant be afforded an opportunity to be  
9 heard. Therefore, notice must be given sufficiently in advance to enable the defendant  
10 to properly prepare a defensive pleading. (*Mullane, ibid.*)

11 “[ . . . ] the purpose of Rule 14 is to avoid circuitry of actions by disposing of an  
12 entire subject matter arising from one set of facts in one action.” *LASA Per L'Industria*  
13 *Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 146 (1969), citing *Dewald,*  
14 *et al. v. Minister Press* (6<sup>th</sup> Cir. 1974) 494 F.2d 795, 796).

15 Service in compliance with C.R.P.C.T.C. 14, by its own terms, require  
16 compliance with the home rules of the party to be served. Such rules were designed to  
17 afford due process. Therefore, so long as the serving party complies with the home rules  
18 of the party to be served, the party served will be afforded due process under Tribal law.

19 If a plaintiff can show that his chosen forum State has a sufficient interest in the  
20 litigation (or sufficient contacts with the defendant), then the defendant who cannot  
21 show some real injury to a constitutionally protected interest, should have no  
22 constitutional excuse not to appear. (see *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d  
23 194, 201 (2<sup>nd</sup> Cir. 1978).  
24  
25  
26  
27  
28

1 Here, there is sufficient interest by the Tribe to have its ordinances complied with  
2 in a manner consistent with the Business Council's stated and implied intent. In  
3 addition, the litigation of the action between Wood's and Admiral in another forum  
4 would work additional inconvenience and expense not only on the parties, but on any  
5 witnesses which may be needed since it all likelihood the witnesses would be required  
6 to participate in two separate actions in two separate fora, separated and delayed by an  
7 indeterminable amount of time in order to litigate the same underlying facts. From  
8 Mainstay's perspective such a situation would give truth to the maxim: "Justice delayed  
9 is justice denied." This inconvenience would be avoided, and there would be  
10 commensurate judicial efficiency and economy by hearing the entire controversy in one  
11 forum—the Tribal Court where the matter was originally filed.  
12

13 As to cross-defendant's due process interests under the IRCA, since their IRCA  
14 protected interested will be served by proper service under their home rules for service,  
15 the parties will be treated fairly, and there should be no injuries to those interests. As  
16 insurance carriers, it is not unreasonable for cross-defendants to expect to find  
17 themselves in a forum not of their choosing in actions involving their policyholders.  
18 Thus, the "inconvenience" of litigating a matter in an unfamiliar court, and any  
19 attendant costs cannot be thought of as unexpected, or unreasonable, let alone injurious.  
20 Cross-defendants as insurance companies could as easily retain counsel more familiar  
21 with, and in closer proximity to, the Tribal Court as they could retain other counsel.  
22

## 23 VI.

### 24 Conclusion re: Points and Authorities on 3 Issues of Jurisdiction

25 "Although the party seeking to invoke the power of the court bears the burden of  
26 proving that jurisdiction exists, a *prima facie* showing suffices, and the plaintiff need  
27  
28



not establish jurisdiction by a preponderance of the evidence. *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006) Moreover, the "court must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction." *Id.*

Thus, where the facts support exercise of jurisdiction as they do here, this Court may properly exercise jurisdiction, and grant cross-complainant Wood's Roofing Inc.'s Motion for Summary Judgment as set forth above as to no triable issue of material law exists and Summary Judgment must be granted as a matter of law.

## VII.

**Summary Judgment must be granted in favor of cross-complainant Wood's Roofing Inc. because no triable issue of material facts exist and as a matter of law judgment must be granted because cross-defendant Admiral Insurance has an obligation to tender a defense on behalf of Wood's Roofing Inc. in this case pursuant to policy of insurance entered into between Wood's Roofing Inc. and cross-defendant Admiral Insurance. Cross-defendant Admiral Insurance does have a duty to provide a defense to Wood's Roofing Inc. under the Admiral Insurance GCL Policy after timely tender by insured Wood's Roofing Inc. to Admiral Insurance Company.**

### **A. Introduction re: Tender of Defense No Disputed Material Fact.**

Cross-Defendant **Admiral Insurance Company** was and is a corporation organized and existing under the laws of the State of California with its principal place of business in this State located at 1255 Caldwell Road, Cherry Point, New Jersey 08034 and authorized to transact business in this State as an insurer.

On or about September 28, 2006 for a period of 2 years to September 28, 2008 Cross-Defendant **Admiral Insurance Company** (hereinafter "**Admiral**") insured a policy of liability insurance - Policy No. CA00000104306 to its insured Wood's Roofing. On or about October 24, 2007 the insured Wood's Roofing

1 Inc.'s assigned worker from Plaintiff Mainstay Business Solutions to assist in  
2 Wood's roofing work was injured doing the roofing work (Daniel Flores).

3  
4 On or about the above dates in consideration of the payments of periodic  
5 full premiums, Cross-Defendants insurance companies delivered to Cross-  
6 Complainant Woods' Roofing policies of insurance in which Cross-Defendants  
7 would and did insure Cross-Complainant Wood's Roofing Inc. against any and  
8 all liability and agreed to pay on behalf of the insured Cross-Complainant  
9 Wood's Roofing Inc. All sums which their insured Cross-Complainant Wood's  
10 Roofing shall become obligated to be to a maximum of \$1,000,000 - \$2,000,000  
11 per occurrence during the policy period. At all times Cross-Complainant Woods'  
12 Roofing had a reasonable expectation of full coverage, indemnification and  
13 without dispute. The policies further provided that Cross-Defendants insurance  
14 companies "**shall defend any action against the insured cross-complainant**  
15 **Wood's Roofing**" alleging such damages, property damages, bodily injury and  
16 other covered damages even if any such actions is groundless, false, or  
17 fraudulent or meritless. The policies took effect as set forth above and remained  
18 in full force and effect and all times hereinafter mentioned. The policy is  
19 attached as **Exhibit #B** to Wood's Roofing Inc.'s Cross-Complaint against cross-  
20 defendant Admiral Insurance and **Exhibit #B** to this Motion for Summary  
21 Judgment.  
22

23 On/about June 12, 2009 Defendant Woods' Roofing was served with a  
24 Complaint for damages and First Amended Complaint on June 23, 2011 to  
25 include causes of action for negligence by Wood's Roofing Inc. causing Plaintiff  
26 Mainstay Business Solutions to proximately suffer damages.  
27  
28

1 Cross-Complainant Wood's Roofing Inc. at all times herein mentioned had  
2 and has performed all of the terms of the policies on its part to be performed.

3 Notwithstanding Cross-Complainant Wood's Roofing Inc. tender of  
4 defense to Admiral Insurance (Exhibit #C to Motion for Summary Judgment)  
5 Admiral Insurance denied all liability and refused to undertake the defense of the  
6 action against Defendant Wood's Roofing Inc. by Plaintiff Mainstay Business  
7 Solutions and refused to indemnify and pay any reasonable settlement as set forth  
8 in Exhibit #C of Wood's Roofing's Cross-Complaint against Admiral Insurance.  
9

10 Prior to Cross-Defendants' refusal to defend and indemnify cross-  
11 complainant in the Plaintiff Mainstay Business Solutions /Defendant Wood's  
12 Roofing action and at all relevant times Cross-Defendants insurance companies  
13 failed to undertake a complete and adequate investigation of the claim.  
14 Specifically, Cross-Defendant Admiral Insurance Company failed to undertake  
15 any adequate investigation of the claim. Specifically cross-defendant Admiral  
16 Insurance asserted in their denial of coverage and indemnification letters that the  
17 losses were excluded under the policy but failed to, inter alia, specify which  
18 legally correct policy provisions excluded the losses (Exhibit #C to Cross-  
19 Complaint). Despite repeated attempts by Defendant/Cross-Complainant  
20 Wood's Roofing Inc. to Admiral Insurance Company as to ascertain the grounds  
21 for its assertions, cross-defendant Admiral Insurance failed and refused to  
22 communicate with cross-complainant Wood's Roofing Inc. to answer Woods'  
23 Roofing Inc.'s inquiries and refused to defend.  
24

25 On/about August 2009 Plaintiff Mainstay Business Solutions  
26 communicated a reasonable settlement offer of \$100,000 which amount is within  
27  
28

1 the policy limits to Defendant/Cross-Complainant Wood's Roofing Inc. At all  
2 times and that time and at all relevant, Cross-Defendants insurance companies  
3 refused to consider or accept the offer.  
4

5 As a proximate result of Cross-Defendants insurance companies in their  
6 refusal to defend, indemnify and settle as herein alleged, Defendant/Cross-  
7 Complainant Wood's Roofing was compelled to engage counsel to defend in the  
8 action Plaintiff Mainstay Business Solutions vs. Defendant Woods' Roofing Inc.  
9 and is incurring fees and costs in its defense in a sum to be ascertain.

10 As a proximate result of the tortious conduct of Cross-Defendant Admiral  
11 Insurance Company, Cross-Complainant Woods' Roofing Inc. (President Larry  
12 Wood) has suffered other damages including emotional distress and loss of  
13 business.  
14

15 In committing the acts described set forth above of this Cross-Complaint,  
16 Cross-Defendant insurance companies acted in conscious disregard of the rights  
17 of Cross-Complainant Wood's Roofing Inc. and was guilty of malice or  
18 oppression or fraud. The conduct of Cross-Defendant Admiral Insurance  
19 warrants an assessment of punitive damages in an amount appropriate to punish  
20 Cross-Defendant Admiral Insurance Company and deter others from engaging in  
21 similar wrongful conduct.  
22

## 23 **B. Points and Authorities in Support of Summary Judgment**

### 24 **DUTY TO DEFEND**

25 Liability insurance usually imposes two separate obligations on the insurer: (1) to  
26 indemnify its insured against third party claims covered by the policy (by settling the  
27  
28

claim or paying any judgment against the insured); and 92) to defend such claims against its insured (by furnishing competent counsel and paying attorney fees and costs). [Howard v. American Nat'l Fire Ins. Co. (2010) 187 CA4th 498, 519, 115 CR3d 42, 61 (citing text)].

The insurer's duty to defend "entails the rendering of a service, viz., the mounting and funding of a defense...in order to avoid or at least minimize (the insured's) liability." [Buss v. Sup. Ct. (Transamerica Inc. Co)(1997) 16 C4th 35, 46, 65 CR2d 366, 373].

**1. Duty to Defend Broader Than Duty to Indemnify:** The duty to defend is broader than the duty to indemnify. [Horact Mann Ins. Co. vs. Barbara B. (1993) 4C4th 1076, 1080, 17 CR2d 210, 213; Certain Underwriters at Lloyd's of London v. Sup.Ct. (Powerine Oil Co., Inc.)(“Powerine I”)(2001) 24 C4th 945, 958, 103 CR2d 672, 680 - “Whereas the duty to indemnify may indeed be broad, the duty to defend must perforce be broader still”]. Regardless of indemnification, the insurer may owe a duty to defend:

- \* claims potentially covered under the policy;
- \* suits in which any claim is covered (or potentially covered) even if others are not;
- \* “groundless, false or fraudulent” claims;
- \* certain claims for which the insured could reasonably expect coverage.

**2. Other Differences:** The duty to indemnify and duty to defend also differ in other respects:

- \* the duty to indemnify arises only after damages are fixed in amount (ie. by settlement or judgment), but the duty to defend arises when a potentially covered claim is tendered to the insurer;

\* the duty to indemnify requires payment of money while the duty to defend “entails the rendering of a service, viz, the mounting and funding of a defense.” [Certain Underwriters at Lloyd’s of London v. Sup.Ct. (Powerline Oil Co., Inc.) (“Powerline I”), supra, 24 C4th at 958, 103 CR2d at 680; Cassady v. Morgan, Lewis & Buckius LLP (2007) 145 CA4th 220, 238, 51 CR3d 527, 540 (citing text).

**3. Importance of Duty to Defend:** Defense of third party claims is as important to the insured (sometimes more important) as indemnification because substantial costs may be incurred to defend any lawsuit, even frivolous claims. As noted by the Supreme Court: “The insured’s desire to secure the right to call on the insurer’s superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability. As a consequence, California courts have been consistently solicitous of insureds’ expectations on this score.” [Montrose Chem. Corp of Calif. vs. Sup.Ct (Canadian Universal Ins. Co. Inc.)(1993) 6 C4th 287, 295-296, 24 CR2d 467, 471].

**4. Effect of Defense Costs on Policy Limits:** Under liability policies, indemnity and defense are separate obligations, so that defense costs do not reduce the indemnity limits available to settle the claim. Indeed, the insurer is obligated to pay defense costs even if they exceed the indemnity limits. (This includes the cost of independent Cumis counsel for the insured where the insurer’s interests conflict with those of the insured).

**5. Potential Coverage Creates Duty to Defend:** An insurer “must defend a suit which potentially seeks damages within the coverage of the policy.” [Gray v.

1 Zurich Ins. Co. (1966) 65 C2d 263, 275, 54 CR 104, 112; Wausau Underwriters Ins.  
 2 Co. v. Unigard Security Ins. Co. (1998) 68 CA4th 1030, 1036, 80 CR2d 688, 691;  
 3 North American Bldg. Maint., Inc. v. Fireman's Fund Ins. Co. (2006) 137 CA4th 627,  
 4 640, 40 CR3d 468, 477. In other words, the duty to defend arises whenever the lawsuit  
 5 against the insured seeks damages on any theory that, if proved, would be covered by  
 6 the policy. Thus, a defense is excused only when "the third party complaint can by no  
 7 conceivable theory raise a single issue which could bring it within the policy coverage."  
 8 [Montrose Chem. Corp of Calif. v. Sup.Ct. (Canadian Universal Ins. Co., Inc.)(1993)  
 9 6C4th 287, 295, 24 CR2d 467, 471; Gray v. Zurich Ins. Co., supra, 65 C2d at 275, 54  
 10 CR at 112, fn. 15; Devin v. United Services Auto Assn (1992) 6 CA4th 1149, 1157, 8  
 11 CR2d 263, 268; Amato v. Mercury Cas. Co. (1993) 18 CA4th 1784, 1790, 23 CR2d 73,  
 12 76]. The insured need only show that the underlying claim may fall within policy  
 13 coverage; the insurer must prove it cannot." [Montrose chem. Corp of Calif. v. Sup.Ct.  
 14 (Canadian Universal Ins. Co., Inc.), supra, 6 C4th at 300, 24 CR2d at 475].  
 15

16 **6. Rationale:** It is difficult to determine whether a third party lawsuit falls  
 17 within the indemnification coverage until a final judgment is obtained. To resolve this  
 18 dilemma, a duty to defend is imposed whenever the insurer ascertains facts which give  
 19 rise to the possibility of coverage. [Fresno Economy Import Used Cars Inc. vs. United  
 20 States Fid. & Guar. Co.(1977) 76 CA3d 272, 278, 142 CR 681, 685].  
 21

22 To conclude otherwise would "create a peculiar form of coverage restricted to only  
 23 those cases which the insurer decides are brought on meritorious legal and factual  
 24 grounds...which would hardly give the insured the peace of mind and security which the  
 25 insured has every right to expect." [California Ins. Guar. Assn v. Wood (1990) 217  
 26 CA3d 944, 948, 266 CR 250, 252].  
 27  
 28



1           **7. Includes Groundless, False and Fraudulent Claims:** The insurer  
 2 must defend any claim that would be covered if true even if the claim is in fact  
 3 groundless, false or fraudulent. The insured does not have to prove the claim against it  
 4 is valid in order to obtain a defense [Horace Mann Ins. Co. v. Barbara B. (1993) 4 C4th  
 5 1076, 1088, 17 CR2d 210, 217 - makes no difference that third party claim is so  
 6 “insubstantial” it would not support award of damages].  
 7

8           **8. Immaterial that Insured Likely to be Exonerated:** An insurer cannot  
 9 avoid its duty to defend by concluding, based on its own investigation, that the insured  
 10 has done no wrong. “The duty to defend...extends to those insureds whom the insurer  
 11 believes to be innocent of the conduct alleged in the third party complaint.” [A-H  
 12 Plating Inc. v. American Nat’l Fire Ins. Co. (1997) 57 CA4th 427, 443, 67 CR2d 113,  
 13 121].  
 14

15           **9.** Insured was entitled to a defense in a pollution liability case even if  
 16 Insurance company’s investigation demonstrated that insured had not in fact  
 17 contaminated the groundwater as alleged [A-H Plating Inc. v. American Nat’l Fire Ins.  
 18 Co. , supra, 57 CA4th 427, 443, 67 CR2d 113, 121].  
 19

20           **10.** Insurance company could not refuse to defend on the ground the claims  
 21 against Insured were so insubstantial that there was no “occurrence” during the policy  
 22 period. If the claims lacked merit, Insurance Company should have raised this as a  
 23 defense to the underlying lawsuit, not as a reason to abandon the defense. [County of  
 24 San Bernardino v. Pacific Indem. Co.(1997) 56 CA4th 66, 686, 65 CR2d 657, 669].  
 25

26           **11. Effect of policy provision requiring defense of “groundless, false or**  
 27 **fraudulent” claims:** Some insurance policies specify the insurer’s duty to defend a  
 28 suit “even if any of the allegations are groundless, false or fraudulent.” [Venoco Inc. v.

1 Gulf Underwriters Ins. Co. (2009)175 CA4th 750, 765, 96 CR3d 409, 420].

2       **12. Unresolved Factual Disputes:** An insurer cannot avoid its duty to  
3 defend based on a coverage defense that depends on facts in dispute in the underlying  
4 lawsuit (ie. When the complaint alleges that the insured engaged in particular conduct  
5 and the issue is whether that conduct was intentional (excluded) or negligent (covered):  
6 “If coverage depends on an unresolved dispute over a factual question, the very  
7 existence of that dispute would establish a possibility of coverage and thus a duty to  
8 defend.” [Mirpad, LLC v. California Ins. Guar. Assn (2005) 132 CA4th 1058, 1068, 34  
9 CR3d 136, 142-143; Horace Mann Ins. C. v. Barbara B. (1993) 4 C4th 1076, 1085, 17  
10 CR2d 210, 216; Howard v. American Nat’l Fire Ins. Co. (2010) 187 CA4th 498, 514-  
11 516, 115 CR3d 42, 57-59 - where coverage turned on when sexual molestation  
12 occurred, insurer could not rely on vague testimony by molestation victim in underlying  
13 action, since timing of molestation was not relevant to issues in that action].

14  
15       **13. Bare possibility of coverage sufficient:** Where coverage of the claim  
16 against the insured depends on unresolved factual issues, “a bare ‘potential’ or  
17 ‘possibility’ of coverage is the trigger or a defense duty...California courts have used  
18 the terms ‘possibility’ and ‘potential’ interchangeably, and we see no difference  
19 between them.” [Montrose Chem. Corp of Calif. v. Sup.Ct. (Canadian Universal Ins.  
20 Co., Inc.)(1993) 6C4th 287, 295, 24 CR2d 467, 474].

21  
22       **14.** It need not be shown that coverage is likely or even “reasonably” likely,  
23 [Montrose Chem. Corp of Calif. v. Sup.Ct. (Canadian Universal Ins. Co., Inc.), supra, 6  
24 C4th at 299-300, 24 CR2d at 476 - rejecting “reasonable potential for coverage”  
25 standard].  
26  
27  
28

1           15.       The claims as to which there is a potential for coverage need not  
2 predominate to trigger the insurer's duty to defend. [ Horace Mann Ins. C. v. Barbara B.  
3 Supra, 4 C4th 1076, 1085, 17 CR2d 210, 216].

4           16.       Moreover, if even a single claim in a multi-count complaint is  
5 potentially covered, the insurer ordinarily must defend the entire action. [Buss v. Sup.  
6 Ct. (Transamerica Ins. Co)(1997) 16 C4th 35, 48, 65 CR2d 366, 375].

7           17.       **Insured's "reasonable expectations" as test:**  
8  
9 If the reasonable expectations of an insured are that a defense will be provided for an  
10 intentional tort claim, the insurer cannot escape that obligation merely because  
11 indemnification would be barred. [B&E Convalescent Ctr. v. State Comp. Ins. Fund  
12 (1992) 8 CA4th 78, 93, 9 CR2d 894, 903; further discussion at ¶7:561 ff; Downey  
13 Venture v. LMI Ins. Co., supra, 66 CA4th at 508, 78 CR2d at 160].

14           18.       **Compare - Duty Based on Insured's "Reasonable Expectations"**  
15 **Where Policy Uncertain:** In addition to the duty to defend suits potentially covered  
16 by the policy, the insurer "has a duty to defend when the policy is ambiguous and the  
17 insured would reasonably expect the insurer to defend.....against the suit based on the  
18 nature and kind of risk covered by the policy." [Foster-Gardner, Inc. v. Nat'l Union Fire  
19 Ins. Co. (1998) 18 C4th 857, 860, 77 CR2d 107, 115; Ameron Int'l Corp. v. Insurance  
20 Co. of State of Pa. (2010) 50 C4th 1370, 118 CR3d 95, 107; Uhrich v. State Farm Fire  
21 & Cas. Co. (2003) 109 CA4th 598, 622, 135 CR2d 131, 148 - also see CC §2778(4) -  
22 defense obligation implied in all indemnity agreements unless contrary intention  
23 appears].

24           19.       **Rationale:** Any uncertainty as to whether a duty to defend is owed is  
25 resolved in favor of the insured "If the coverage provisions in any policy of insurance  
26  
27  
28

1 are unclear or the exclusions are ambiguous, so that a reasonable purchaser of the  
2 policy would not realize that the risk is excluded and thus would reasonable expect the  
3 insurer to furnish a defense, a defense is required.” [B & E Convalescent Ctr. v. State  
4 Comp. Ins. Fund (1992) 8 CA4th 78, 99-100, 9 CR2d 894, 908; Producers Dairy  
5 Delivery Co. v. Sentry Ins. Co. (1986) 41 C3d 903, 912, 226 CR 558, 562; Uhrich v.  
6 State Farm Fire & Cas. Co. Supra, 109 CA4th at 622, 135 CR2d at 148].

7  
8 **20. Burden of Proof on Duty to Defend:** In resolving the question of  
9 whether a duty to defend exists, the insurer has a higher burden than the insured: “The  
10 insured need only show that the underlying claim may fall within policy coverage; the  
11 insurer must prove it cannot.” [Montrose Chem. Corp of Calif. v. Sup.Ct. (Canadian  
12 Universal Ins. Co., Inc.) (1993) 6C4th 287, 300, 24 CR2d 467, 474].

13 **21. Insured’s Burden:** The burden is on the insured to make a prima facie  
14 showing that the third party claim potentially falls within the insuring provisions of the  
15 policy; and, if the insurer carries its burden of showing an applicable exclusion (below),  
16 that the claim falls within an exception to that exclusion. [Aydin Corp. v. First State  
17 Ins. Co. (1998) 18 C4th 1183, 1188, 77 CR2d 537, 540; Anthem Electronics Inc. v.  
18 Pacific Employers Ins. Co. (9<sup>th</sup> Cir. 2002) 302 F3d 1049, 1059, 3].

19  
20 **22. Insurer’s Burden:** The burden then shifts to the insurer to show  
21 conclusively that the damages sought by the third party claimant were not covered  
22 under the policy. [Montrose Chem. Corp of Calif. v. Sup.Ct. (Canadian Universal Ins.  
23 Co., Inc.), supra, 6 C4th at 304, 24 CR2d at 478].

24 **23. At Summary Judgment State:** On a motion for summary judgment  
25 on the insurer’s duty to defend, the insurer must be able to negate coverage as a matter  
26 of law. [Maryland Cas. Co. v. Nat’l American Ins. Co. of Calif. (1996) 48 CA4th 1822,  
27  
28

1832, 56 CR2d 498, 504].

2           **24.       Matters Considered in Determining Existence of Duty:** Whether the  
3 insurer owes a defense depends on :

- 4           \* the terms of the policy;
- 5           \* the allegations of the third party's complaint against the insured;
- 6           \* all facts known to the insurer from any source. [Montrose Chem. Corp of Calif.  
7 vs. Sup.Ct (Canadian Universal Ins. Co. Inc.) (1993) 6 C4th 287, 295-296, 24  
8 CR2d 467, 471-472].

9           **25.       Allegations in Third Party Complaint Against Insured:** The insurer  
10 must initially consider the claims pleaded against the insured: "The determination  
11 whether the insurer owes a duty to defend usually is made in the first instance by  
12 comparing the allegations of the complaint with the terms of the policy." [ Horace  
13 Mann Ins. C. v. Barbara B. Supra, 4 C4th 1076, 1081, 17 CR2d 210, 213].

14           **26.**       It makes no difference that the allegations are "groundless, false or  
15 fraudulent".

16           **27.**       The insurer is relieved of its duty to defend only if the complaint "can by  
17 no conceivable theory raise a single issue which could bring it within the policy  
18 coverage." [ Gray v. Zurich Ins. Co. (1966) 65 C2d 263, 276, 54 CR 104, 112].

19           **28.**       Even if the face of the complaint does not indicate a potential for  
20 coverage under the policy, extrinsic facts known to the insurer may generate a duty to  
21 defend because (a) current pleading rules liberally allow amendment, and (b) the third  
22 party plaintiff who drafted the complaint cannot be the arbiter of the policy's coverage.  
23 [ Gray v. Zurich Ins. Co., supra, 65 C2d 275-277, 54 CR 112-113].

24           **29.       Adequacy of Pleading:** The complaint need not allege a covered cause  
25

1 of action. It need only disclose enough facts to indicate a potential for coverage: “The  
 2 duty to defend arises when the facts alleged in the underlying complaint give rise to a  
 3 potentially covered claim regardless of the technical legal cause of action pleaded by  
 4 the third party.” [Barnett v. Fireman’s Fund Ins. Co. (2001) 90 CA4th 500, 510, 108  
 5 CR2d 657, 663, fn. 5 - complaint alleging insured’s publication of disparaging  
 6 statements to third persons showed a potentially covered claim for defamation; Hudson  
 7 Ins. Co. v. Colony Ins. Co. (9<sup>th</sup> Cir. 2010) 624 F3d 1264, 1267-1269 (applying  
 8 California law) - duty to defend triggered where facts alleged would have supported  
 9 cause of action for slogan infringement, even though slogan infringement not pleaded].

11 **30. All Elements of Claim Required ?** The third party complaint need  
 12 not allege every element of a cause of action in order to trigger the insurer’s duty to  
 13 defend. [ Hudson Ins. Co. v. Colony Ins. Co. (9<sup>th</sup> Cir. 2010) 624 F3d at 1270 - failing to  
 14 allege each element of a properly pleaded cause of action “is of no moment in  
 15 determining the duty to defend”].

16 **31. Facts Known to Insurer:** The insurer must consider facts from any  
 17 source in determining its duty to defend [Montrose Chem. Corp of Calif. v. Sup.Ct.  
 18 (Canadian Universal Ins. Co., Inc.), supra, 6 C4th 287, 298-299, 24 CR2d 467, 471;  
 19 Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y. (2009) 176 CA4th 172, 198, 97  
 20 CR3d 568, 587 - an insurer “can thus get into trouble by refusing to consider facts  
 21 which it knows, but which are extrinsic to the complaint and which show .... a potential  
 22 for coverage”; America States Ins. Co. v. Progressive Cas. Ins. Co. (2009) 180 CA4th  
 23 18, 26, 102 CR3d 591, 597].

25 **32. Facts Stated by Insured as True:** An insured may create a duty to  
 26 defend simply by communicating facts to the insurer that, if true, would establish the  
 27  
 28

1 existence of coverage: "Human nature being what it is, we have no doubt that insureds  
 2 sometimes lie to their carriers... This possibility does not provide sufficient reason to  
 3 overturn the rule of Gray and its progeny, especially when consideration is given to the  
 4 vast investigative resources of insurance companies ..." [Amato v. Mercury Cas.Co.  
 5 (1993) 18 CA4th 1784, 1792, 23 CR2d 73, 77-78].

6  
 7 **33. Includes Facts Extrinsic to Complaint :** A defense is owed when the  
 8 insurer has knowledge of facts showing a potential for coverage, even if the complaint  
 9 fails to allege such facts. Rationale: "The complaint can usually be amended to allege  
 10 such facts. [Gray v. Zurich Ins. Co. (1966) 65 C2d 263, 277, 54 CR 104, 113]. It is a  
 11 settled rule that the insurer must look to the facts of the complaint and extrinsic  
 12 evidence, if available, to determine whether there is a potential for coverage under the  
 13 policy and a corresponding duty to defend." [Foster-Gardner, Inc. v. Nat'l Union Fire  
 14 Ins. Co. (1998) 18 C4th 857, 880, 77 CR2d 107, 123; El-Com Hardware Inc. v.  
 15 Fireman's Fund Ins. Co. (2001) 92 CA4th 205, 217, 111 CR2d 670, 679 - insurer  
 16 shown photocopies of insured's catalog advertising allegedly infringing product].

17  
 18 **34. Includes Facts Disputed by Insurer:** The existence of a disputed fact  
 19 relevant to the issue of coverage establishes a duty to defend. [Montrose Chem. Corp of  
 20 Calif. vs. Sup.Ct (Canadian Universal Ins. Co. Inc.) (1993) 6 C4th 287, 295-296, 24  
 21 CR2d 467, 475; Amato v. Mercury Cas.Co. (1993) 18 CA4th 1784, 1792, 23 CR2d 73,  
 22 76; Food Pro Int'l Inc. v. Farmers Ins. Exch. (2008) 169 C4th 976, 989, 89 CR3d 1,  
 23 11].

24 **35. Comment:** As a general rule, whether a particular claim is legally viable  
 25 should not affect the insurer's defense duty. Rather, the existence of the duty should be  
 26 determined solely by whether the claim, if proved, would be covered by the policy.  
 27  
 28



[CNA Cas. of Calif. V. Seaboard Sur. Co. (1986) 176 CA3d 598, 612, 222 CR 276, 284, fn. 7 - “the absence of an element of a properly pleaded caused of action is of no moment in determining (the insurer’s) duty to defend; Hudson Ins. Co. v. Colony Ins. Co. (9<sup>th</sup> Cir. 2010) 624 F3d 1264, 1269-1270 (applying California law) - noting that California courts “have cast doubt on the notion that a complaint must support all elements of cause of action to state potential liability].

**36. Adequacy of Insurer’s Investigation as Affecting Duty to Defend:**

An insurer is required to investigated all claims promptly [Ins. Code §790.03(h)(3)]: “The risk that an insurer takes when it denies coverage without investigation is that the insured may later be able to prove that a reasonable investigation would have uncovered evidence to establish coverage or a potential for coverage. In that case, the insurer will be liable for the costs of defense already incurred by the insured .....and could also be exposed to tort liability.” [American Int’l Bank v. Fidelity & Dep. Co. of Maryland (1996) 49 CA4th 1558, 1571, 57 CR2d 567, 574].

**37.** Some cases state that failure to investigate adequately “bars the insurer from denying the tendered defense, and subjects it to liability for the insureds’ full attorney’s fees and costs incurred thereafter with other counsel.” [Stalberg v. Western Title Ins. Co. (1991) 230 CA3d 1223, 1233, 282 CR 43, 50].

**38. Specific Evidence Relevant to Duty to Defend:** The following evidence may be relevant in litigation between the insurer and insured to determine the insurer’s duty to defend an underlying third party action:

**Loss reserves established by insured?** The fact the insurer established a reserve for liability on the injured party’s claim has been held to be evidence of its awareness of potential coverage under the policy, and thus of its obligation to

defend the insured. Even a reserve fund for defense costs may indicate the insurer's awareness of potential coverage. [Samson v. Transamerica Ins. Co. (1981) 30 C3d 220, 240, 178 CR 343, 355].

#### **WHEN DUTY ARISES**

**39. Upon Tender by Insured:** The duty to defend arises when the insured tenders defense of the third party lawsuit to the insurer: "Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf." [Montrose Chem. Corp of Calif. vs. Sup.Ct (Canadian Universal Ins. Co. Inc.) (1993) 6 C4th 287, 295-296, 24 CR2d 467, 471]. To defend meaningfully, the insurer must defend immediately. [Buss v. Sup. Ct. (Transamerica Ins. Co)(1997) 16 C4th 35, 48, 65 CR2d 366, 375].

**40. Duty to Defend Separate from Duty to Indemnify:** The insurer must pay defense costs before liability is established and apart therefrom; the insurer is "responsible for those costs whether or not there is ultimately any duty to indemnify the insured for the claim." [Montgomery Ward & Co., Inc. v. Imperial Cas. & Indem. Co. (2008) 81 CA4th 356, 373, 97 CR2d 44, 55].

**41. Preconditions to Tender:** Tender by the insured creates duty to defend where the following conditions are met:

- a. **Policy in Effect:** For standard CGL policies, "the obligation to defend does not mature if the policy was not in effect at the time of the alleged occurrence." [Gray v. Zurich Ins. Co. (1966) 65 C2d 263, 277, 54 CR 104, 112, fn. 15].
- b. **"Suit" filed Against Insured:** CGL policies typically provide that the insurer shall have the "right and duty to defend any suit against the insured... and may make such investigation and settlement of any claim or suit as it deems

expedient.” [Foster-Gardner, Inc. v. Nat’l Union Fire Ins. Co. (1998) 18 C4th 857, 880, 77 CR2d 107, 111].

**42. Notice to Insurer:** The insured must provide some notice of the claim to the insurer in order to trigger its duty to defend the insured. No formal request that the insurer undertake the defense is required. The tender can either be formal or constructive. [Truck Ins. Exch. v. Unigard Ins. Co. (2000) 79 CA4th 966, 979, 94 CR2d 516, 525, fn. 16].

### **SCOPE OF DUTY TO DEFEND**

**43. Duty to Defend Entire Action if Any Claim Potentially Covered:**  
In a “mixed” action, in which some claims are potentially covered and others are not, the insurer must mount and fund a defense of the entire action, including those claims for which there is no potential coverage under the policy. [Buss v. Sup. Ct. (Trans-america Ins. Co), supra, 16 C4th 35, 48, 65 CR2d 366, 375].

**44. Effect:** It is enough that a single claim is potentially covered by the policy. The insurer owes a duty to defend even if all other claims against the insured are clearly not covered. [Buss v. Sup. Ct. (Transamerica Ins. Co), supra, 16 C4th 35, 49, 65 CR2d at 375 - complaint alleged 27 claims against insured, of which only one (defamation) was potentially covered; American States Ins. Co. v. Progressive Cas. Ins. Co., supra, 180 CA4th at 26, 102 CR3d at 597]. Reservation of Rights: The insurer, however, may provide the required defense under a “reservation of rights,” including the right to seek reimbursement of defense costs attributable to the non-covered claims.

**Not done by Admiral Insurance Company.**

**45. Non-Covered Claims May Predominate:** It is immaterial that non covered acts are the dominant factors: “We look not to whether non-covered acts

predominate in the third party's action, but rather to whether there is any potential for liability under the policy." [Horace Mann Ins. C. v. Barbara B. Supra, 4 C4th 1076, 1081, 17 CR2d 210, 215].

**46. Potentially Covered Acts "Inseparable" from Non-Covered Acts:**

There may be cases in which potentially covered acts occur "in such close temporal and spatial proximity" to acts clearly not covered" as to compel the conclusion they are inseparable" for purposes of determining whether the insurer owes a duty to defend. [Horace Mann Ins. C. v. Barbara B. Supra, 4 C4th 1076, 1081, 17 CR2d at 215].

**47. Rationale.** The duty to defend a mixed action is not found in the insurance policy. Rather, the duty is imposed by public policy as a "prophylactic" rule: "To defend meaningfully, the insurer must defend immediately .....to defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not. To do so would be time consuming. It might also be futile: The 'plasticity of modern pleading' ....allows the transformation of claims that are at least potentially covered into claims that are not, and vice versa." [Buss v. Sup. Ct. (Transamerica Ins. Co), supra, 16 C4th at 49, 65 CR2d at 375].

**48. Defense Duty Extends Beyond Policy Period:** Although the trigger of coverage must occur within the policy period, the duty to defend the insured may continue long after the policy expires: "In a word, although the trigger of the duty to defend is limited to the policy period, the extent of the duty to defend is not." [Aerojet-General corp. v. Transport Indem. Co. (1997) 174<sup>th</sup> 38, 75, 7 CR2d 118, 141].

**49. Effect Where Insurer's Motion Denied:** Where disputed factual issues precludes summary judgment in the insurer's favor, denial of the motion establishes the insurer's duty to defend the underlying action as a matter of law."

1 “Factual issues exist precluding summary judgment I nthe insurer’s favor. In deed, the  
2 duty to defend is then established, absent additional evidence bearing on this issue.”  
3 [Horace Mann Ins. C. v. Barbara B. Supra, 4 C4th 1076, 1085, 17 CR2d 210, 216].  
4

5 **50. Effect Where Insured’s Motion Denied:** But denial of the insured’s  
6 motion does not establish absence of a defense duty. The disputed factual issues must  
7 be resolved at trial. In the interim, the insurer must continue to defend because there  
8 presumably continues to exist a potential for coverage. [Montrose Chem. Corp of Calif.  
9 vs. Sup.Ct (Canadian Universal Ins. Co. Inc.) (1993) 6 C4th at 301, 24 CR2d at 475].

10 **51. Summary Adjudication:** Either party may move for summary  
11 adjudication in a declaratory relief action to establish the existence or nonexistence of a  
12 duty to defend. For the insurer to obtain summary judgment, it must present  
13 undisputed facts that eliminate any possibility of coverage. It cannot rely on policy  
14 exclusions where there is a factual dispute as to whether those exclusions apply.  
15 [Vann v. Travelers Cos. (1995) 39 CA4th 1610, 1615, 46 CR2d 617, 620].  
16

17 **52. Insurer Bound by Judgment Against Insured:** An insurer refusing to  
18 defend on the ground of lack of coverage is bound by the judgment in the underlying  
19 action, absent fraud or collusion, “as to all material findings of fact essential to the  
20 judgment of liability [and damages] of the insured.” [Schaefer/Karpf Productions v.  
21 CNA Ins. Co. (1998) 64 CA4th 1306, 1313, 76 CR2d 42, 45].

22 **53. Emotional Distress:** Emotional distress damages have been held  
23 recoverable in a breach of contract action against an insurer for wrongful refusal to  
24 defend the insured. “Whenever the terms of a contract relate to matters which concern  
25 directly the comfort, happiness or personal welfare of one of the parties, .... he may  
26 recover damages for physical suffering....caused by its breach....a liability insurance  
27  
28

policy is such a contract.” [State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co. (1970) 9 CA3d 508, 527-528, 88 CR246, 258].

**54. Tort Liability :** In addition to contractual liability, tort liability may be imposed where the insurer’s erroneous refusal to defend was either coupled with an “unreasonable” refusal to settle within policy limits, or otherwise so “unreasonable” as to constitute a breach of its implied covenant of good faith and fair dealing. Moreover, where the underlying complaint contains allegations demonstrating a potential for coverage, the insurer’s refusal to provide the insured with a defense may well, without more, constitute “bad faith”.

#### **DEFENSE UNDER RESERVATION OF RIGHTS**

**55. Purpose:** Because the duty to defend is broader than the duty to indemnify, coverage questions do not necessarily excuse the insurer’s duty to defend a third party lawsuit against the insured: “The court in the third party suit does not adjudicate the issue of coverage.....The only question there litigated is the insured’s liability.” [Gray v. Zurich Ins. Co. (1966) 65 C2d 279, 54 CR at 114].

**56. Defense without reservation of rights waives known coverage defenses:**  
An insurer may waive grounds for denying coverage of which it was aware or should have been aware by defending an action against its insured without a reservation of rights.

### **VIII.**

#### **CONCLUSION**

Based upon the above cited case law and statutory law and the undisputed facts set forth the referenced Declaration of Wood’s Roofing Inc. Motion for Summary Judgment on **all 4 issues** must be granted in favor of cross-complainant Wood’s

1 Roofing Inc. and against cross-defendant Admiral Insurance Company.

2  
3 Respectfully Submitted,

4  
5  
6  
7  
8 Dated: March 13, 2012

By: 

ERIC F. HARTMAN  
Attorney for Cross-Defendant  
Wood's Roofing Inc.



EXHIBIT “B”

**Lori Ramsey**

---

**From:** Lynn Trang  
**Sent:** Tuesday, February 21, 2012 1:39 PM  
**To:** Anita Huff (AHuff@bluelakerancheria-nsn.gov)  
**Cc:** Regan Furcolo; jhart75442@aol.com; Lori Ramsey; maplaw@earthlink.net  
**Subject:** Mainstay v. Wood's Roofing- Case No. C-09-0612A-LJM

Hello Ms. Huff,

Our office has just received a copy of a letter dated February 14, 2012 from Mr. Eric Hartman to you. While the letter was sent to us via regular mail, it appears your copy went via federal express. Accordingly, we were unable to respond to the letter until now. The letter requests a clerk's default be entered against Admiral because Admiral allegedly failed to respond to the cross-complaint filed by Wood's Roofing. I write to inquire if such a default has been entered. Admiral filed a motion to quash and motion to dismiss the cross-complaint on October 25, 2011 which constituted a response to the cross-complaint. Accordingly, any request for a default was improper.

If a default has already been entered, Admiral requests the first available hearing date to lift the default.

If a default has not been entered, then Admiral requests the first available hearing date to file a motion to dismiss the cross-complaint on the grounds that the court lacks jurisdiction.

Thank you for your help. If you have any questions, please feel free to contact me.

Lynn Trang, Esq.  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway Suite 1402  
San Diego CA 92101  
(619) 232-8486; (619) 232-2691 – Fax  
e-mail: [ltrang@wmfllp.com](mailto:ltrang@wmfllp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR CO-OPERATION.

**Lori Ramsey**

---

**From:** Erin Domingo  
**Sent:** Thursday, February 23, 2012 11:05 AM  
**To:** AHuff@bluelakerancheria-nsn.gov  
**Cc:** Lori Ramsey  
**Subject:** Mainstay v. Wood's Roofing - Case No. C-09-0612A-LJM

**Importance:** High

Dear Ms. Huff:

I am writing to follow up on a 2-21-12 email sent to you by attorney Lynn Trang of our firm. We would like to inquire if a default filed by Wood's Roofing has been entered against Admiral Insurance. If so, Admiral would like to request for the soonest available hearing date to lift the default as it was improperly filed. Admiral filed a motion to quash and motion to dismiss the cross-complaint on 10-25-11 which constituted a response to the cross-complaint filed by Wood's Roofing.

Accordingly, if a default has not been entered, Admiral requests the first available hearing date to file a motion to dismiss the cross-complaint on the grounds that the court lacks jurisdiction.

Thank you for your help. Please feel free to contact me with additional questions.

ERIN DOMINGO  
Legal Assistant  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway, Suite 1402  
San Diego CA 92101  
(619) 232-8486 | Fax (619) 232-2691  
[edomingo@wmflp.com](mailto:edomingo@wmflp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR COOPERATION.

**Lynn Trang**

---

**From:** Lynn Trang  
**Sent:** Thursday, February 23, 2012 12:03 PM  
**To:** 'Anita Huff'  
**Cc:** Erin Domingo  
**Subject:** RE: Mainstay v. Wood's Roofing- Case No. C-09-0612A-LJM

Thank you Ms. Huff,

In that case, I would like the first available hearing date for an ex parte application for an order shortening time to hear a motion to dismiss the cross-complaint.

Lynn Trang, Esq.  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway Suite 1402  
San Diego CA 92101  
(619) 232-8486; (619) 232-2691 – Fax  
e-mail: [ltrang@wmflp.com](mailto:ltrang@wmflp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR CO-OPERATION.

**From:** Anita Huff [<mailto:AHuff@bluelakerancheria-nsn.gov>]  
**Sent:** Thursday, February 23, 2012 11:59 AM  
**To:** Lynn Trang  
**Cc:** Erin Domingo  
**Subject:** RE: Mainstay v. Wood's Roofing- Case No. C-09-0612A-LJM

Ms. Trang,  
I have also been contacted by Ms. Domingo about this same issue.

A Clerk's Default has not yet been entered. I will make sure you are notified via email should one be filed, as the Tribal Court normally issues conformed copies by email.

Please feel free to contact me should you require further assistance in this regard.  
Thank you,

Anita Huff  
Tribal Court Clerk  
Blue Lake Rancheria Tribal Court  
P.O. Box 426  
Blue Lake, CA 95525-0426  
Phone (707) 668-5101 x 1032  
FAX (707) 668-4272

[ahuff@bluelakerancheria-nsn.gov](mailto:ahuff@bluelakerancheria-nsn.gov)

CONFIDENTIALITY NOTICE: This e-mail and attachment(s), if any, is for the sole use of the intended recipient(s) and may contain confidential business information protected by the trade secret privilege, the Electronic Communications Privacy Act (ECPA), and/or other legal bases as may apply. If you are not an intended recipient, please take notice that disclosure of the information contained herein is inadvertent, expressly lacks the consent of the sender, and your receipt of this e-mail does not constitute a waiver of any applicable privilege(s). In this event, please notify the sender immediately, do not disseminate any of the information contained herein to any third party, and cause all electronic and/or paper copies of this e-mail to be promptly destroyed. Thank you.

---

**From:** Lynn Trang [mailto:Ltrang@wmfllp.com]  
**Sent:** Thursday, February 23, 2012 11:49 AM  
**To:** Anita Huff; Anita Huff  
**Cc:** Regan Furcolo  
**Subject:** RE: Mainstay v. Wood's Roofing- Case No. C-09-0612A-LJM

Hello again Ms. Huff,

I have not heard from you regarding the below e-mail. Please let me know if a default has been entered against Admiral or not. I'd also like the first available hearing date per below. Thank you.

Lynn Trang, Esq.  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway Suite 1402  
San Diego CA 92101  
(619) 232-8486; (619) 232-2691 – Fax  
e-mail: [ltrang@wmfllp.com](mailto:ltrang@wmfllp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR CO-OPERATION.

---

**From:** Lynn Trang  
**Sent:** Tuesday, February 21, 2012 1:39 PM  
**To:** Anita Huff (AHuff@bluelakerancheria-nsn.gov)  
**Cc:** Regan Furcolo; 'jhart75442@aol.com'; Lori Ramsey; 'maplaw@earthlink.net'  
**Subject:** Mainstay v. Wood's Roofing- Case No. C-09-0612A-LJM

Hello Ms. Huff,

Our office has just received a copy of a letter dated February 14, 2012 from Mr. Eric Hartman to you. While the letter was sent to us via regular mail, it appears your copy went via federal express. Accordingly, we were unable to respond to the letter until now. The letter requests a clerk's default be entered against Admiral because Admiral allegedly failed to respond to the cross-complaint filed by Wood's Roofing. I write to inquire if such a default has been entered. Admiral filed a motion to quash and motion to dismiss the cross-complaint on October 25, 2011 which constituted a response to the cross-complaint. Accordingly, any request for a default was improper.

If a default has already been entered, Admiral requests the first available hearing date to lift the default.

If a default has not been entered, then Admiral requests the first available hearing date to file a motion to dismiss the cross-complaint on the grounds that the court lacks jurisdiction.

Thank you for your help. If you have any questions, please feel free to contact me.

Lynn Trang, Esq.  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway Suite 1402  
San Diego CA 92101  
(619) 232-8486; (619) 232-2691 – Fax  
e-mail: [ltrang@wmfllp.com](mailto:ltrang@wmfllp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS

PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR CO-OPERATION.

**Lynn Trang**

---

**From:** Erin Domingo  
**Sent:** Friday, February 24, 2012 1:55 PM  
**To:** AHuff@bluelakerancheria-nsn.gov  
**Cc:** Lynn Trang  
**Subject:** Mainstay v. Wood's Roofing

**Importance:** High

Dear Ms. Huff:

This is a follow up to an email sent to you by attorney Lynn Trang today. I am writing to request for two soonest available hearing dates for the following:

- Admiral's Ex Parte App re Order Shortening Time to Hear Motion to Dismiss;
- Admiral's Motion to Dismiss Cross-Complaint

Your prompt attention to this matter is greatly appreciated.

ERIN DOMINGO  
Legal Assistant  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway, Suite 1402  
San Diego CA 92101  
(619) 232-8486 | Fax (619) 232-2691  
[edomingo@wmflp.com](mailto:edomingo@wmflp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR COOPERATION.



**Lynn Trang**

---

**From:** Lori Ramsey  
**Sent:** Monday, February 27, 2012 9:59 AM  
**To:** ahuff@bluelakerancheria-nsn.gov  
**Cc:** Lynn Trang  
**Subject:** Mainstay v. Wood's Roofing

**Importance:** High

Dear Ms. Huff,

This email is in follow up to the emails from Lynn Trang on February 21 and 23 requesting a hearing date for Admiral Insurance Company's ex parte application for an order shortening time to hear a motion to dismiss the cross-complaint in the above referenced matter. Please advise as soon as possible. Thank you.

Thank you,

Lori Ramsey  
Legal Assistant to John H. Walsh,  
Dinah McKean and Regan Furcolo  
W|M|F  
WALSH MCKEAN FURCOLO LLP  
625 Broadway, Suite 1402  
San Diego, CA 92101  
(619) 232-8486; Fax: (619) 232-2691  
[lr Ramsey@wmfllp.com](mailto:lr Ramsey@wmfllp.com)

CONFIDENTIALITY NOTE: THIS E-MAIL AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THIS E-MAIL OR ANY ATTACHMENT IS PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY RETURNING IT TO THE SENDER AND DELETE THIS COPY FROM YOUR SYSTEM. THANK YOU FOR YOUR CO-OPERATION.

EXHIBIT “C”

FILED

JAN 24 2011

CLERK OF THE TRIBAL COURT  
BLUE LAKE RANCHERIA

*Walter M. Peart*

IN THE TRIBAL COURT FOR THE BLUE LAKE RANCHERIA

MAINSTAY BUSINESS SOLUTIONS, ) Case No. C-09-0612-LJM

Plaintiff,

v.

ORDER AFTER HEARING ON ORDER TO  
SHOW CAUSE

WOOD'S ROOFING, INC., et al.,

Defendants.

The hearing on the Order ("Order") directed to plaintiff's counsel to appear and show cause why the Court should not impose sanctions on him for violating the Court's prior orders came on for hearing on January 14, 2011, at 9:00 a.m. Michael Peart appeared by telephone in response to the Court's Order.

Having considered the declaration, pleadings, and exhibits filed by Mr. Peart in response to the Order, and Mr. Peart's argument made at the hearing that he has put into place safeguards to ensure that he will comply with the Court's orders in the future, and good cause appearing therefor,

IT IS HEREBY ORDERED, as follows:

1. Michael A. Peart's admission to practice before the Blue Lake Tribal Court is suspended for six (6) months beginning on the date that this Order becomes effective, pursuant to paragraph 3 below;

2. Michael A. Peart shall pay a fine of One Hundred Dollars (\$100) to the Clerk of

1 the Tribal Court payable to the Blue Lake Rancheria Tribal Court within ten (10) days from the  
2 date that this Order becomes effective, pursuant to paragraph 3 below.

3 3. The penalties imposed by paragraphs 1 and 2 above are hereby held in abeyance  
4 and shall be vacated at the conclusion of this case, provided that Michael A. Peart does not  
5 violate any of the Court's future orders entered in this case.

6 DATED: January 24, 2011



---

LESTER J. MARSTON, Chief Judge:

EXHIBIT “D”

Attorney or Party without Attorney: REGAN FURCOLO, ESQ. SBN: 162956 WALSH MCKEAN FURCOLO LLP 625 BROADWAY #1402 SAN DIEGO, CA 92101 Telephone No: 619-232-8486				For Court Use Only	
Attorney for: Plaintiff					
Insert name of Court, and Judicial District and Branch Court: United States District Court For The Northern District Of California, San Jose Division					
Plaintiff: ADMIRAL INSURANCE COMPANY Defendant: BLUE LAKE RANCHERIA TRIBAL COURT, ET AL					
<b>PROOF OF SERVICE</b>		Hearing Date:	Time:	Dept/Div:	Case Number: CV12-01266 LHK

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the Summons; Complaint; Civil Case Cover Sheet; Notice Of Case Assignment; Admiral's Corporate Party Disclosure Statement; Notice Of Pendency Of Other Action Or Proceeding; General Order No. 45; Order Setting Initial Case Management Conference And ADR Deadlines; Standing Order Re Initial Case Management; Standing Order Re Civil Discovery Disputes; Contents Of Joint Case Management Statement; Standing Order Re Case Management In Civil Cases; Guidelines For Filing; Plaintiffs Ex Parte Application For Temporary Restraining Order And Order To Show Cause Why Preliminary Injunction Should Not Be Issued; Declaration Of Lynn Trang; Proposed Temporary Restraining Order And Order To Show Cause

3. a. Party served: LESTER J. MARSTON, CHIEF JUDGE OF THE BLUE LAKE RANCHERIA TRIBAL COURT OF THE BLUE LAKE RANCHERIA INDIAN TRIBE  
 b. Person served: LESTER J. MARSTON

4. Address where the party was served: 428 CHARTIN RD  
 Blue Lake, CA 95525

5. I served the party:  
 a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Mon., Mar. 19, 2012 (2) at: 12:35PM

7. Person Who Served Papers:

a. NATHAN BARONI  
 b. FIRST LEGAL INVESTIGATIONS  
 301 CIVIC CENTER DRIVE WEST  
 SANTA ANA, CA 92702  
 c. (714) 550-1375

Recoverable Cost Per CCP 1033.5(a)(4)(B)

d. The Fee for Service was: \$105.55  
 e. I am: (3) registered California process server  
 (i) Owner  
 (ii) Registration No.: 05-04  
 (iii) County: Humboldt

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Wed, Mar. 21, 2012

  
 (NATHAN BARONI)

Attorney or Party without Attorney: REGAN FURCOLO, ESQ. SBN: 162956 WALSH MCKEAN FURCOLO LLP 625 BROADWAY #1402 SAN DIEGO, CA 92101 Telephone No: 619-232-8486				For Court Use Only
Attorney for: Plaintiff			Ref. No. or File No.:	
Insert name of Court, and Judicial District and Branch Court: United States District Court For The Northern District Of California, San Jose Division				
Plaintiff: ADMIRAL INSURANCE COMPANY Defendant: BLUE LAKE RANCHERIA TRIBAL COURT, ET AL				
<b>PROOF OF SERVICE</b>	Hearing Date:	Time:	Dept/Div:	Case Number: CV12-01266 LHK

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the Summons; Complaint; Civil Case Cover Sheet; Notice Of Case Assignment; Admiral's Corporate Party Disclosure Statement; Notice Of Pendency Of Other Action Or Proceeding; General Order No. 45; Order Setting Initial Case Management Conference And Adr Deadlines; Standing Order Re Initial Case Management; Standing Order Re Civil Discovery Disputes; Contents Of Joint Case Management Statement; Standing Order Re Case Management In Civil Cases; Guidelines For Filing; Plaintiffs Ex Parte Application For Temporary Restraining Order And Order To Show Cause Why Preliminary Injunction Should Not Be Issued; Declaration Of Lynn Trang; Proposed Temporary Restraining Order And Order To Show Cause
3. a. Party served: BLUE LAKE RANCHERIA TRIBAL COURT  
 b. Person served: BONNIE MOBBS, AGENT FOR SERVICE OF PROCESS
4. Address where the party was served: 428 CHARTIN ROAD  
 Blue Lake, CA 95525
5. I served the party:
  - a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Mon., Mar. 19, 2012 (2) at: 12:35PM
7. Person Who Served Papers:
  - a. NATHAN BARONI
  - b. FIRST LEGAL INVESTIGATIONS  
 301 CIVIC CENTER DRIVE WEST  
 SANTA ANA, CA 92702
  - c. (714) 550-1375
  - d. The Fee for Service was: Recoverable Cost Per CCP 1033.5(a)(4)(B) **\$317.85**
  - e. I am: (3) registered California process server
    - (i) Owner
    - (ii) Registration No.: 05-04
    - (iii) County: Humboldt

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Wed, Mar. 21, 2012

  
 (NATHAN BARONI)



EXHIBIT “E”

**Lori Ramsey**

---

**From:** trackingupdates@fedex.com  
**Sent:** Monday, March 19, 2012 12:11 PM  
**To:** Lori Ramsey  
**Subject:** FedEx Shipment 798180355448 Delivered

---

This tracking update has been requested by:

Company Name: Walsh McKean Furcolo LLP  
Name: LYNN TRANG  
E-mail: [lramsey@wmfllp.com](mailto:lramsey@wmfllp.com)

---

Our records indicate that the following shipment has been delivered:

Reference: ADM.11861-17/25/12  
Ship (P/U) date: Mar 16, 2012  
Delivery date: Mar 19, 2012 12:04 PM  
Sign for by: J.HARTMAN  
Delivery location: SAN JOSE, CA  
Delivered to: Receptionist/Front Desk  
Service type: FedEx Standard Overnight  
Packaging type: FedEx Box  
Number of pieces: 1  
Weight: 2.00 lb.  
Special handling/Services: Deliver Weekday  
Tracking number: [798180355448](#)

Shipper Information	Recipient Information
LYNN TRANG	ERIC HARTMAN
Walsh McKean Furcolo LLP	LAW OFFICE OF ERIC HARTMAN
625 Broadway, Suite 1402	300 S 1ST ST STE 210
San Diego	SAN JOSE
CA	CA
US	US
92101	95113

Please do not respond to this message. This email was sent from an unattended mailbox. This report was generated at approximately 2:10 PM CDT on 03/19/2012.

To learn more about FedEx Express, please visit our website at [fedex.com](http://fedex.com).

All weights are estimated.

To track the latest status of your shipment, click on the tracking number above, or visit us at [fedex.com](http://fedex.com).

This tracking update has been sent to you by FedEx on the behalf of the Requestor noted above. FedEx does not validate the authenticity of the requestor and does not validate, guarantee or warrant the authenticity of the request, the requestor's message, or the accuracy of this tracking update. For tracking results and fedex.com's terms of use, go to [fedex.com](http://fedex.com).

Thank you for your business.

EXHIBIT “F”

Attorney or Party without Attorney: REGAN FURCOLO, ESQ. SBN: 162956 WALSH MCKEAN FURCOLO LLP 625 BROADWAY #1402 SAN DIEGO, CA 92101 Telephone No: 619-232-8486		For Court Use Only	
Attorney for: Plaintiff		Ref. No. or File No.	
Insert name of Court, and Judicial District and Branch Court: United States District Court For The Northern District Of California, San Jose Division		Case Number: 5:12-CV-01266-LHK	
Plaintiff: ADMIRAL INSURANCE COMPANY Defendant: BLUE LAKE RANCHERIA TRIBAL COURT, ET AL.		Case Number:	
<b>PROOF OF SERVICE</b>		Hearing Date:	
Time:		Dept/Div:	

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the ORDER DENYING WITHOUT PREJUDICE EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

3. a. Party served:

LESTER J. MARSTON, CHIEF JUDGE OF THE BLUE LAKE RANCHERIA INDIAN TRIBE

b. Person served:

BONNIE MOBBS, AUTHORIZED TO ACCEPT

4. Address where the party was served:

428 CHARTIN ROAD  
Blue Lake, CA 95525

5. I served the party:

a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Wed., Mar. 21, 2012 (2) at: 1:02PM.

7. Person Who Served Papers:

a. TREVOR ENRIGHT



1814 "I" Street  
Sacramento, CA 95814  
Telephone (916) 444-5111  
Fax (916) 443-3111  
www.firstlegallnetwork.com

Recoverable Cost Per CCP 1033.5(a)(4)(B)

d. The Fee for Service was:

e. I am: (3) registered California process server

(i) Owner

(ii) Registration No.: 09-04

(iii) County: Humboldt

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Wed, Mar. 21, 2012

Attorney or Party without Attorney: REGAN FURCOLO, ESQ. SBN: 162956 WALSH MCKEAN FURCOLO LLP 625 BROADWAY #1402 SAN DIEGO, CA 92101 Telephone No: 619-232-8486		For Court Use Only	
Attorney for: Plaintiff		Ref. No. or File No.:	
Insert name of Court, and Judicial District and Branch Court: United States District Court For The Northern District Of California, San Jose Division		Plaintiff: ADMIRAL INSURANCE COMPANY Defendant: BLUE LAKE RANCHERIA TRIBAL COURT, ET AL.	
<b>PROOF OF SERVICE</b>	Hearing Date:	Time:	Case Number: 5:12-CV-01266-LHK

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the ORDER DENYING WITHOUT PREJUDICE EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

3. a. Party served:  
 b. Person served:

BLUE LAKE RANCHERIA TRIBAL COURT  
 BONNIE MOBBS, AUTHORIZED TO ACCEPT

4. Address where the party was served:

428 CHARTIN ROAD  
 Blue Lake, CA 95525

5. I served the party:

a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Wed., Mar. 21, 2012 (2) at: 1:02PM

7. Person Who Served Papers:

a. TREVOR ENRIGHT



1814 "I" Street  
 Sacramento, CA 95814  
 Telephone (916) 444-5111  
 Fax (916) 443-3111  
 www.firstlegallnetwork.com

Recoverable Cost Per CCP 1033.5(a)(4)(B)

d. The Fee for Service was:

e. I am: (3) registered California process server

(i) Owner

(ii) Registration No.: 09-04

(iii) County: Humboldt

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Wed, Mar. 21, 2012

Attorney or Party without Attorney: REGAN FURCOLO, ESQ. SBN: 162956 WALSH MCKEAN FURCOLO LLP 625 BROADWAY #1402 SAN DIEGO, CA 92101 Telephone No: 619-232-8486				For Court Use Only	
Attorney for: Plaintiff					
Insert name of Court, and Judicial District and Branch Court: United States District Court For The Northern District Of California, San Jose Division					
Plaintiff: ADMIRAL INSURANCE COMPANY Defendant: BLUE LAKE RANCHERIA TRIBAL COURT, ET AL.					
<b>PROOF OF SERVICE</b>		Hearing Date:	Time:	Dept/Div:	Case Number: 5:12-CV-01266-LHK

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the ORDER DENYING WITHOUT PREJUDICE EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER
3. a. Party served: LAW OFFICES OF ERIC F. HARTMAN  
 b. Person served: ERIC HARTMAN, AUTHORIZED TO ACCEPT
4. Address where the party was served: 300 S. FIRST STREET  
 SUITE 210  
 SAN JOSE, CA 95113
5. I served the party:
  - a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Wed., Mar. 21, 2012 (2) at: 2:00PM
7. Person Who Served Papers:
  - a. PEDRO DAVILA
  - d. The Fee for Service was: Recoverable Cost Per CCP 1033.5(a)(4)(B)
  - e. I am: Not a Registered California Process Server



1511 West Beverly Blvd.  
 Los Angeles, CA 90026  
 Telephone (213) 250-0111  
 Fax (213) 250-1197  
 www.firstlegallnetwork.com

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Thu, Mar. 22, 2012