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12 *Attorneys for Defendant*  
13 *Allied World Assurance Company (U.S.), Inc.*

14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE DISTRICT OF NEVADA  
16

\* \* \* \* \*

17 BECKY McVAY ,

3:13-CV-00359-LRH-WGC

18 Plaintiff,

19 v.

20 ALLIED WORLD ASSURANCE  
21 COMPANY (U.S.), INC., a Delaware  
company; YORK INSURANCE  
22 SERVICES GROUP, INC.; DOES I  
through X, inclusive; DOE  
23 CORPORATION I through X, inclusive;  
and DOE ORGANIZATION I through X,  
24 inclusive;

**ALLIED WORLD ASSURANCE  
COMPANY (U.S.), INC.'S REPLY IN  
SUPPORT OF ITS MOTION TO DISMISS**

25 Defendants.  
26

27 Defendant ALLIED WORLD ASSURANCE COMPANY (U.S.), INC. ("Allied"), by  
28 and through its undersigned attorney, hereby submits its reply in support of its motion

to dismiss previously filed herein (Doc. 22). Plaintiff Becky McVay ("Plaintiff") filed a response (Doc. 30) to the motion to dismiss, but she does not provide any colorable basis to deny the motion.<sup>1</sup>

## I. ARGUMENTS

### A. Plaintiff is Not a Specific Intended Beneficiary of the Policy

Plaintiff's reliance on the Indian Self Determination Act is entirely misplaced. First, Plaintiff mis-cites it as appearing at 25 U.S.C. § 405f. The proper citation for the act is the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* ("Indian Self-Determination Act" or "the Act").

Second, Plaintiff asserts that the Act requires tribes to provide insurance coverage for tort claims by third parties for all tribal activities. This is completely wrong. No law exists that requires tribes to have insurance coverage for all of their activities. The Indian Self-Determination Act does not make this a requirement. Plaintiff does not cite to any federal law that requires such coverage.

Third, Plaintiff relies on the Indian Self-Determination Act despite the fact that it clearly does not apply to the facts of this case. As outlined in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 22.02[1], at 1386-87 (2012 ed.) (hereinafter "Handbook," attached hereto as Exhibit A)<sup>2</sup>, the Indian Self-Determination Act allows tribes to take over some of the federal government's trust duties to tribes. The United States has a

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<sup>1</sup> Defendant YORK RISK SERVICES GROUP, INC. ("York") (together with Allied, "Defendants") respectfully joins the instant motion in reply to Plaintiff's Supplemental Response to York's Motion to Dismiss (Doc. 33), on the basis that Plaintiff's Supplemental Response raised new arguments to which York had not previously been given the opportunity to respond.

<sup>2</sup> Federal courts often cite to COHEN'S HANDBOOK OF FEDERAL INDIAN LAW as the foremost treatise on this subject. *See, e.g., Winnemucca Indian Colony v. U. S.*, 837 F. Supp. 2d 1186, 1192 (D. Nev. 2011); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1205 (9th Cir. 2001); *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1299 (9th Cir. 1996); *Preston v. Heckler*, 734 F.2d 1359, 1370-1371 (9th Cir. 1984).

1 trust duty to provide certain governmental services to tribes such as law enforcement,  
 2 health services, and schooling. *Id.* The Indian Self-Determination Act provides that  
 3 tribes can enter into contracts with the United States that require the United States to  
 4 provide funds directly to the tribe that the United States would have expended on  
 5 providing the services, so that the tribe can provide the service itself.<sup>3</sup> *Id.* For  
 6 example, if the United States was going to spend \$500,000 to provide law enforcement  
 7 services on the Fallon reservation, the Fallon Paiute Shoshone Tribe would enter into a  
 8 638 contract whereby the United States would pay the \$500,000 to the Tribe, and the  
 9 Tribe would use the funds to provide law enforcement services on its Reservation.

10 As Plaintiff points out, the Indian Self-Determination Act requires tribes to obtain  
 11 liability insurance for activities conducted under 638 contracts. *Id.* at § 22.02[4][a],  
 12 1390-92; 25 U.S.C. § 450f(c).<sup>4</sup> Because the Fallon Tribe has a number of 638  
 13 contracts with the Federal government, the policy the Tribe obtained from Allied covers  
 14 the services it provides under these contracts. However, the Policy covers more than  
 15 just the Tribe's activities under 638 contracts. It potentially covers, subject to all of its  
 16 terms and conditions, *all* aspects of the Tribe's operations, many of which – including  
 17  
 18

19 <sup>3</sup> These contracts are commonly referred to as "638 contracts" because the  
 20 Indian Self-Determination Act was enacted pursuant to Public Law 93-638. See  
 21 HANDBOOK, § 22.02[1] at 1386.

22 <sup>4</sup> Plaintiff also refers to the "Legislative History" of the Indian Self-Determination  
 23 Act and quotes Pub. L. 105-277 to support her argument that Congress required tribes  
 24 to obtain tort insurance to cover all tribal operations. See Plaintiff's Response [Doc. 30]  
 25 at 7. Plaintiff provides a quotation from the "Indian Tribal Tort Claims and Risk  
 26 Management Act of 1998," but this Act merely requires a study into insurance coverage  
 27 available to tribes. See Pub. L. 105-277, Title VII, Sec. 702(b) ("The purpose of this title  
 28 is to provide for a study to facilitate relief for a person who is injured as a result of an  
 official action of a tribal government."). This Act does not require tribes to obtain  
 insurance, and thus does not support Plaintiff's argument.

1 the operations of the Fallon Tribal Development Corporation ("FTDC") – are not funded  
2 by 638 contracts.

3 The FTDC operates Tribal businesses that are not governmental services  
4 funded by 638 contracts. The Federal government has no trust duty to fund Tribal  
5 business operations. Therefore, the Indian Self-Determination Act does not apply to  
6 the FTDC's operations, which means the Act's insurance requirements do not apply to  
7 the FTDC. The insurance obtained by the Tribe for the FTDC's Fox Peak Station,  
8 where Ms. McVay fell, is thus not subject to any requirements of the Indian Self-  
9 Determination Act. See, e.g., *Demontiney v. U. S.*, 255 F.3d 801, 813 (9th Cir. 2001)  
10 ("Any effect of § 450f(c) is limited by the section to 'contracts . . . pursuant to this  
11 subchapter.'").

12 Furthermore, there is no federal law that requires tribes to obtain liability  
13 insurance for their business operations. Even if the FTDC's operations were  
14 considered governmental services that the Tribe contracted for under the Indian Self-  
15 Determination Act, the FTDC would be considered a federal entity against which any  
16 tort action would have to be processed through the Federal Tort Claims Act. See  
17 HANDBOOK, § 22.02[4][a], at 1390-91; 25 U.S.C. § 450f(d). Tribal actors providing  
18 services under a 638 contract are considered Federal employees for tort purposes,  
19 since they are providing services required by the Federal government's trust duties to  
20 tribes. *Id.* Plaintiff did not file a Federal Tort Claim against the FTDC – nor could she  
21 have because the FTDC was not acting under a 638 contract when operating the Fox  
22 Peak Station.

23 In sum, the Indian Self-Determination Act and the insurance requirements  
24 therein do not apply to the FTDC's operations. There is thus no basis upon which  
25 Plaintiff can claim any federal law makes her an intended beneficiary of the Policy.

26 **B. Plaintiff is Not a "Named Insured" Under the Contract**

27 Plaintiff has no claim against Allied or York because she was not an intended  
28 beneficiary under any insurance policy issued by Defendants. Plaintiff's argument that

1 she is a “named insured” under the Policy completely misconstrues the Policy’s  
2 definition of “insured,” which includes, in relevant part:

3 ...any person, ... to whom the Named Insured is *obligated by virtue of a*  
4 **written contract or oral agreement** to provide insurance such as is  
afforded by this policy...

5 Policy, Coverage Part 1, Section 1(A) (emphasis added).<sup>5</sup> Plaintiff believes the FTDC  
6 was obligated by virtue of a written contract or oral agreement to provide insurance  
7 coverage to her. However, provisions like these refer to contracts or agreements a  
8 Named Insured has directly with a third party that require the Named Insured to provide  
9 insurance to that third party. See, e.g., *Ramparts, Inc. v. Fireman's Fund Ins. Co.*,  
10 2010 U.S. Dist. LEXIS 66228, \*8-9 (D. Nev. June 7, 2010); *Unigard Ins. Co. v. Formica*  
11 *Corp.*, 718 F.2d 1112, 1112 (9th Cir. 1983); see also *Nat'l Union Fire Ins. Co. v. Am.*  
12 *Motorists Ins. Co.*, 707 F.3d 797, 800 (7th Cir. 2013); *Turner Constr. Co. v. Kemper*  
13 *Ins. Co.*, 198 Fed. Appx. 28, 29 (2d Cir. N.Y. 2006). They do not refer to obligations  
14 the Named Insured might have pursuant to statute, as Plaintiff alleges, and especially  
15 not to a statute that does not apply to these circumstances. The Tribe never had any  
16 contract or agreement with Ms. McVay obligating it to provide insurance to her, and  
17 Plaintiff does not so allege. Nor does the Act obligate the Tribe to do so – even if the  
18 Policy’s “insured” definition did include third parties the named insured is obligated by  
19 statute to insure, the Indian Self-Determination Act does not require the Tribe to insure  
20 Plaintiff.

21 There is thus no basis under which Plaintiff qualifies as a “Named Insured” – or  
22 an insured of any kind – under the Policy.

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26 <sup>5</sup> Presumably Plaintiff did not intend to argue that she is a “Named Insured”  
27 under the Policy (see Doc. 30 at 8) because the only Named Insured on the Policy is  
28 the Tribe.

**C. Plaintiff is a Pre-Judgment Claimant.**

Plaintiff argues that she is not a pre-judgment claimant, and as such can assert a claim for bad faith. Plaintiff relies upon *Wohlers v. Bartgis*, 969 P.2d 949, 114 Nev. 1249 (1998) to support this argument. However, *Wohlers* does not apply here because the plaintiff in *Wohlers* was the insured who purchased the applicable insurance policy. This point was critical to the holding in *Wohlers*. Here, Plaintiff did not purchase any applicable insurance policy and was not an insured under any policy, and thus the holding of *Wohlers* is inapposite. In *Wohlers*, the court stated:

It is well settled in Nevada that "every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). As we explained in *Ainsworth v. Combined Insurance Co.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988), "[t]he relationship of an insured to an insurer is one of special confidence. A consumer buys insurance for security, protection, and peace of mind." While an insured assumes various duties under an insurance contract – such as the timely payment of premiums – the insurer assumes the concomitant duty "to negotiate with its insureds in good faith and to deal with them fairly." *Id.*

*Wohlers*, 969 P.2d at 956 (emphasis added).

Plaintiff did not purchase the applicable insurance policy and has no contractual relationship with Defendants. She thus cannot argue that she is entitled to the security, protection and peace of mind concomitant with the purchasing of insurance. Therefore Plaintiff cannot rely upon *Wohlers* to support her claim that she is not a pre-judgment claimant.

**D. Allied Did Not Breach the Policy by Asserting Sovereign Immunity**

Plaintiff seeks to enforce the terms of the Policy and the process for invoking sovereign immunity. However, the FTDC as a party to the insurance contract can waive strict compliance with the terms of the policy. If one of the provisions of the contract requires a certain procedure to be followed prior to asserting the defense of sovereign immunity, then the parties can agree to amend that provision, or they can simply waive it.



Waiver is usually defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. 5 Williston On Contracts § 678 (3d ed. 1961). Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing. 17 Am.Jur.2d Contracts §§ 393, 396 (1964). Express waiver, when supported by reliance thereon, excuses nonperformance of the waived condition. 5 Williston On Contracts § 679 (3d ed. 1961); 17 Am.Jur.2d Contracts § 392 (1964); Restatement (Second) of Contracts § 84(1) (1981).

*Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984). If any conditions existed that were not met related to asserting the sovereign immunity defense, the FTDC either expressly or impliedly waived any such conditions.

Furthermore, only one of the parties could insist on strict compliance with the terms of the contract. At no time has the FTDC asserted that the sovereign immunity defense was improperly raised. Plaintiff cannot come in as a third party and require strict enforcement of every term of the contract when the parties to that contract are satisfied that each has performed as agreed.

There is no dispute between the FTDC and any insurance company that the sovereign immunity defense applies to this case and that it was properly raised in the FTDC's motion to dismiss. Jon Pishion (Tribal Council member and Chairman of the Board of Directors for the FTDC) submitted an affidavit in the Tribal Court action filed by Plaintiff against the FTDC that expressly states that the FTDC did not take any action to waive its immunity from suit. The affidavit filed with the Tribal Court states in part:

9. The FTDC is endowed with all immunities from suit that are possessed by the Tribe. See FTDC Corporate Charter § 2.6. The FTDC's Board of Directors can waive the FTDC's immunities, but has not taken any action to waive such immunities to allow any personal injury action to proceed in any court against the FTDC.

10. The FTDC Board of Directors, at a duly called meeting, authorized and ordered its attorney to assert the sovereign immunity defense in the *McVay v. FTDC* case pending in the Fallon Tribal Court as Case No.: CV-FT-11-038 (the "McVay

case"). This authorization is reflected in the Board's written meeting minutes.

11. The attorney representing the FTDC is hereby authorized to and ordered to continue to assert the FTDC's sovereign immunity defense in the McVay case.

12. Any waiver of the FTDC's or the Tribe's sovereign immunity must be express and unequivocal. *No express and/or unequivocal waiver of the FTDC's or the Tribe's sovereign immunity exists to provide the Tribal Court with jurisdiction over the FTDC or the Tribe in the McVay case.*

Exhibit B at pp. 2-3 (emphasis added) [Affidavit of Jon Pishion, an exhibit to the FTDC's "Opposition to Motion for Leave to Amend Complaint" (June 17, 2013), filed in Fallon Tribal Court, *McVay v. Fallon Tribal Development Corp.*, Case No.: CV-FT-11-038].

The FTDC expressly and unequivocally ordered its attorney to assert the sovereign immunity defense. This is the complete opposite of an express and unequivocal waiver of sovereign immunity. As the U.S. Supreme Court has stated numerous times, any waiver of tribal sovereign immunity must be express and unequivocal, and cannot be implied. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). No such waiver exists here.

Plaintiff objects to the Tribal Court dismissing the case against the FTDC based upon the FTDC's sovereign immunity. However, the Tribal Court correctly applied the law when it dismissed the original complaint. The U.S. Supreme Court has noted that some parties may not agree with tribal sovereign immunity, but such immunity nevertheless exists and must be enforced, even where, "[i]n [an] economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Kiowa Tribe*, 523 U.S. at 758.

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1 **II. CONCLUSION**

2 Plaintiff fails to state a claim against Allied and York upon which relief may be  
 3 granted. She misconstrues the Indian Self-Determination Act, which does not apply to  
 4 the Tribe's business activities here, as creating an intended beneficiary relationship  
 5 that simply does not exist. She also misapplies the Policy's definition of "insured" even  
 6 though there is no contract or agreement requiring the Tribe to provide insurance to  
 7 her. Finally, she ignores the weight of the evidence illustrating that the FTDC did not  
 8 expressly or impliedly waive its sovereign immunity, and thus Allied did not breach the  
 9 Policy by accepting *its Insured's decision* to assert the Insured's sovereign immunity  
 10 defense. Based on these reasons, Allied respectfully requests that the Court enter its  
 11 order dismissing Allied and York from this case.

12 RESPECTFULLY SUBMITTED this 3rd day of December 2013.

13 TROUTMAN SANDERS LLP

14 By: /s/ Kerry S. Doyle

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