AC

R. LIND STAPLEY, Oregon State Bar ID Number 030531
Internet E-mail address: stapley@sohalang.com
SOHA & LANG P.S.
701 Fifth Avenue, Suite 2400
Seattle, Washington 98104-7003
Telephone: (206) 624-1800
Facsimile: (206) 624-3585

FILED '08 NOV 21 15:51 USDC-ORP

WILLIAM G. EARLE, Oregon State Bar ID Number 831859
Internet E-mail address: wearle@davisrothwell.com
JONATHAN HENDERSON, Oregon State Bar ID Number 063554
Internet E-mail address: jhenderson@davisrothwell.com
1300 Southwest Fifth Avenue, Suite 1900
Portland, Oregon 97201-5604
Telephone: (503) 222-4422
Facsimile: (503) 222-4428

Attorneys for Plaintiff Century Indemnity Company

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. CV '08-1375-AC

CENTURY INDEMNITY COMPANY., a Pennsylvania corporation,

Plaintiff,

vs.

THE MARINE GROUP, LLC, a California limited liability company, as affiliated with **NORTHWEST MARINE, INC.**, an inactive Oregon corporation, as affiliated with **NORTHWEST MARINE IRON WORKS**, an inactive Oregon corporation,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

JURY TRIAL REQUESTED

Century Indemnity Company, in its own right and as successor to CCI Insurance Company, as successor to the Insurance Company of North America (hereinafter "Century"), states and pleads as follows:

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624029

PARTIES

1. Century Indemnity Company is a Pennsylvania corporation with its principal office located in Philadelphia, PA. Century was at all relevant times engaged in the business of insurance in the State of Oregon.

2. Upon information and belief, defendant Northwest Iron Marine Works is an inactive Oregon corporation that was domiciled in Oregon, with its principle place of business located in the Portland Harbor area of Portland, Oregon. Northwest Marine, Inc. is an inactive Oregon corporation that was also domiciled in Portland, Oregon. The Marine Group LLC is a California limited liability corporation. Unless specified otherwise, these entities will be referred to collectively as "Northwest Marine."

GENERAL ALLEGATIONS

3. Beginning in the 1940s or early 1950s, Northwest Marine Iron Works conducted operations at the Portland Shipyard (Swan Island), located at 5555 North Channel Avenue, Portland, Oregon, along the Willamette River. Operations at the site eventually encompassed, among other things, ship repairs, ship scraping, and machining metal parts. Northwest Marine also owned or conducted operations at 5815 and 5851 North Lagoon Avenue, Portland, Oregon.

4. Based on information and belief, Northwest Marine Iron Works entered Chapter 11 bankruptcy proceedings in the 1980s, and a bankruptcy reorganization plan was approved by the Oregon Federal District Court in March of 1987. In 1989, Southwest Marine, Inc., signed a letter of agreement with Northwest Marine Iron Works to acquire Northwest Marine Iron Works' outstanding stock. The February 23, 1989, acquisition agreement was conditioned upon Northwest Marine Iron Works receiving specific debt concessions from its secured creditors and the debenture holders. Southwest Marine, Inc., allegedly engaged in a due diligence

investigation of potential environmental conditions at the Property prior to its acquisition of Northwest Marine Iron Works. The stock purchase was completed on April 17, 1989; a few days later the bankruptcy court issued a Chapter 11 Final Report memorializing the concessions of the creditors. On January 25, 1990, Northwest Marine Iron Works changed its name to Northwest Marine, Inc. On December 31, 1990, Northwest Marine, Inc., merged into Southwest Marine, Inc., which was the surviving corporation. On November 24, 1997, Southwest Marine, Inc., assigned all of the assets and liabilities of the former Northwest Marine, Inc., to The Marine Group LLC. Southwest Marine, Inc., is the predecessor-in-interest to BAE Systems San Diego Ship Repair Inc.

5. The Portland Harbor Superfund site ("Underlying Action") is located along the Willamette River, between river mileposts 1 through 12. The Portland Shipyard is located within this area. The United States Environmental Protection Agency ("EPA") listed the site on the NPL in December of 2000. The EPA alleges that river sediment, surface water and groundwater are contaminated with PAHs, PCBs, metals, pesticides, dioxins, and other pollutants from various industrial properties. Fish and other natural resources have also allegedly been impacted by these contaminants.

6. On March 8, 2005, Northwest Marine received a letter from EPA stating that EPA may be pursuing non-cooperating potentially liable parties at the site. In a January 11, 2008, letter, Northwest Marine was invited to participate in a meeting to discuss allocating damages with potential PRPs. The letter was sent by David C. Batson, Convening Neutral, on behalf of the EPA. On January 11, 2008, Northwest Marine received a CERCLA Section 104(e) request from EPA. Northwest Marine, however, has not received a General Notice Letter from EPA for the site.

7. Under CERCLA jurisdiction, Natural Resource Damage ("NRD") Trustees invited Northwest Marine to participate in an Interim Funding and Participation Agreement that will fund a Phase I Injury Assessment for NRD liability at the site. An initial participation letter was sent from the Trustees to Northwest Marine on January 30, 2008. Northwest Marine attended an informational meeting with the Trustees on March 11, 2008.

8. Northwest Marine tendered the defense of the Underlying Action to Century by way of letter in June of 2008. Northwest Marine also sought indemnity coverage for the same claims. Northwest Marine alleged that the following insurance policies were issued by Century to Northwest Marine Iron Works:

CIS 430659 (07/01/1982 – 07/01/1984)	CIZ 425568 (07/01/1983 -07/01/1984)
CIS 431140 (08/01/1984 – 07/01/1985)	ISG 1001 (07/01/1978 – 07/01/1979)
ISL 1062 (07/01/1979) – (07/01/1980)	ISLG 10987660 (12/31/1987-12/31/1988)

9. To date, Century has only been able to locate portions of the following insurance policies implicated by Northwest Marine:

CIS 430659 (07/01/1982 – 07/01/1984)	ISG 1001 (07/01/1978 – 07/01/1979)
ISL 1062 (07/01/1979) – (07/01/1980)	CIS 431140 (08/01/1984 – 07/01/1985)

10. The CIS 430659 and CIS 431140 policies contain a number of terms, definitions, conditions and exclusions, which are not fully stated herein. However, the policies do include the following provision:

> F. ASSISTANCE AND COOPERATION. The Insured shall be responsible for the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured which no underlying insurer is obligated to defend. . . .

The policies also state that the "Company shall only be liable for the ultimate net loss in excess of the self insured retention stated in the declarations in respect of each occurrence." The per occurrence retention stated in the declarations is $100,000 with a $300,000 aggregate. "Ultimate

net loss" is defined as "the total sum with the insured becomes obligated to pay as damages either through adjudication or compromise, after making deductions for all recoveries and for other valid and collectible insurances . . . ." The term "self insured retention" is defined as "the amount of 'Ultimate Net Loss' payable by the Insured in respect of each occurrence insured hereunder." The policies also contain, among others, the following exclusion:

> [T]o property damage to: (1) property owned by the Insured, (2) property used by, occupied by, rented or leased to, or in the care, custody or control of the insured to the extent the insured in is under contract to provide insured therefore; . . . .

The policies also includes the following condition: "ASSIGNMENT. Assignment of interest under this policy shall not bind the Company unless and until its consent is endorsed hereon."

11. The CIS 430659 policy contains the following endorsement:

> IT IS AGREED THE COMPREHENSIVE GENERAL LIABILITY AND COMPREHENSIVE AUTOMOBILE LIABILITY INSURING AGREEMENTS ARE EXTENDED TO INCLUDE THE FOLLOWING COVERAGE:
>
> 1. TO INDEMNIFY THE INSURED AGAINST ALL SUMS WHICH THE INSURED SHALL BE OBLIGATED TO PAY FOR DAMAGES BY REASON OF THE LIABILTY IMPOSED UPON THE INSURED BY LAW OR ON ACCOUNT OF:
>
> (a) BODILY INJURY
> (b) PROPERTY DAMAGE
> (c) IMPAIRMENT OR DIMINUTION OF OR THER INTERFERENCE WITH ANY OTHER ENVIRONMENTAL RIGHT OR AMENITY PROTECTED BY LAW
>
> ARISING WITHIN THE TERRITORIAL LIMITS DESIGNATED BY THE DECLARATIONS AND CAUSED BY ENVIRONMENTAL IMPAIRMENT IN CONNECTION WITH BUSINESS OF THE INSURED AND OCCURING DURING THE POLICY PERIOD.
>
> * * * *
>
> <u>EXCLUSIONS</u>
>
> IN ADDITION TO THE EXCLUSIONS STATED IN THE COMPREHENSIVE GENERAL LIABILITY AND COMPREHENSIVE AUTOMOBILE LIABILITY FORMS THIS ENDORSEMENT SHALL NOT APPLY TO OR INCLUDE LIABILITY FOR, NOR COSTS AND EXPENSES OF OR IN CONNECTION WITH:

* * * *

5. Any claim that comes within the jurisdiction of the Federal Water control act of 1972; the Federal Clean Water Act of 1977 or the Comprehensive Environmental Response, Comprehensive and Liability Act of 1980.

DEFINITIONS

IN ADDITION TO THE DEFINITIONS STATED IN THE COMPREHENSIVE GENERAL LIABILITY AND COMPREHENSIVE AUTOMOBILE LIABILITY FORMS, THE FOLLOWING ADDITIONAL DEFINITION IS ADDED FOR THE PURPOSE OF THIS ENDORSEMENT:

1. ENVIRONMENTAL IMPAIRMENT IS DEFINED AS:

(a) THE EMISSION, DISCHARGE, DISPERSAL, DISPOSAL, SEEPAGE, RELEASE OR ESCAPE OF ANY LIQUID, SOLID, GASEOUS OR THERMAL IRRITANT, CONTAMINANT OR POLLUTANT INTO OR UPON LAND, THE ATMOSPHERE OR ANY WATERCOURSE OR BODY OF WATER; . . .

ARISING OUT OF OR IN THE COURSE OF THE INSURED'S OPERATIONS, INSTALLATION OR PREMISES.

12. The CIS 431140 policy also contains an absolute pollution exclusion endorsement which states as follows:

It is agreed that exclusions (e) is amended to read as follows:

It is agreed that this policy shall not apply to any liability for Personal Injury or Property Damage arising out of the discharge, dispersal, release, escape or smoke, vapors, soots, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon any water course or body of water.

13. The policy language of ISG 1001 and ISL 1062 are not fully recited herein. By way of endorsement to the comprehensive general liability coverage, the policies state:

IT IS AGREED THAT:

1 (A) THE COMPANY'S OBLIGATION TO PAY DAMAGES ON BEHALF OF THE INSURED UNDER THE POLICY TO WHICH THIS ENDORSEMENT IS ATTACHED APPLIES ONLY TO DAMAGES IN EXCESS OF THE DEDUCTIBLE AMOUNTS STATED IN THE SCHEDULE BELOW.

The "deductible-per occurrence" stated in the policies is $100,000, with a $300,000 deductible aggregate. "Deductible-per occurrence" is defined as "damages which are to be paid by the named insured, and which arise from any once occurrence to which insurance applies under the policy." The endorsement states further that "it is the obligation of the named insured to pay the damages covered under the policy up to the 'deductible-per occurrence' amount. . . ." The endorsement includes the following:

> 6. THE COMPANY SHALL HAVE THE:
>
> (A) RIGHT TO CONTROL OF; AND
>
> (B) RIGHT AND OPPORTUNITY TO ASSOCIATE WITH THE INSURED IN THE INVESTIGATION, DEFENSE, AND SETTLEMENT OF; AND CLAIM OR PROCEEDING ARISING OUT OF ANY OCCURRENCE (1) TO WHICH THIS INSURANCE PROVIDED BY THE POLICY APPLIES AND (2) WHICH IS REASONABLY LIKELY TO EXCEED THE APPLICABLE "DEDUCTIBLE-PER OCCURRENCE." IN SUCH AN EVENT, THE INSURED SHALL COOPERATE WITH THE COMPANY TO THE EXTEND REQUIRED UNDER THE CONDITIONS OF THE POLICY TO WHICH THIS ENDORSEMENT IS ATTACHED.

The policies also contain a number of exclusions, including, but not limited to:

> (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental;
>
> * * *
>
> (k) to property damage to
> (1) property owned or occupied by or rented to the Insured,
> (2) property used by the Insured, or
> (3) property in the care, custody or control of the Insured or as to which the Insured is for any purpose exercising physical control;
>
> (l) to property damage to premises alienated by the Named Insured arising out of such premises or any part thereof;

* * *

(k) property damage to the Named Insured's products arising out of such products or any part of such products;

(o) to property damage to worked performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parted or equipment furnished in connection therewith;

FIRST CLAIM FOR RELIEF

(Declaratory Judgment)

14. Century incorporates by reference the allegations of paragraphs 1 to 13 above as if fully alleged herein.

15. In accordance with 28 U.S.C. §2201, Century seeks a ruling from this Court that the Century policies do not include a duty or obligation to defend Northwest Marine in the Underlying Actions, and there is no corresponding obligation to indemnify defendant with respect to the Underlying Action.

16. An actual justiciable controversy exists between Century and defendant concerning the existence of a duty to defend and whether indemnity coverage may be provided for claims related to the Underlying Action.

17. The Century policies, by their terms, do not include a contractual duty to defend. Further, as a prerequisite to any coverage, defendant may not have met the self insured retentions and/or the deductible-per occurrence requirements of each of the Century policies, as defined within said policies. Moreover, the terms, conditions and exclusions of the Century policies may apply to preclude coverage for defendant's claims related to the Underlying Action, including, but not limited to the following:

(a) Some or all of the conduct alleged in the Underlying Action may not constitute an "occurrence" under the policies.

(b) There may be no suit or claim made against defendant in the Underlying Action.

(c) There may be no "damages" incurred on account of property damage caused by an occurrence at issue in the Underlying Action.

(d) Any damages that involve economic losses in the absence of "property damage," *e.g.*, diminution of value, or which otherwise do not meet the policy definition of "property damage," are not covered.

(e) To the extent there is no causal connection between an alleged "occurrence" and alleged "property damage", there is no coverage.

(f) There is no coverage for "property damage" that occurred outside of the respective policy periods.

(g) To the extent there is "property damage" as defined under the policies, some or all of such damage was expected or intended.

(h) The policies' owned property exclusions and alienated premises exclusions eliminate coverage in whole or in part.

(i) The policies pollution exclusions or exclusions for CERLCA based claims apply to defendant's coverage claims.

(j) The policies may not provide coverage to the extent defendant has failed to satisfy or comply with all terms, conditions and provisions of the policies or to perform all obligations including, but not necessarily limited to, the policies' notice, cooperation, voluntary payment and/or anti-assignment provisions.

(k) The policies may not provide coverage to the extent that the alleged damages are not the result of fortuitous events.

(l) Defendant may not be able to establish the existence of certain alleged Century

policies.

(m) Under other such further policy language or other grounds that may restrict coverage for defendants claims.

RESERVATION OF RIGHT TO AMEND

18. Century reserves the right to amend its complaint, in whole or in part, as it obtains additional facts through investigation and discovery.

PRAYER FOR RELIEF

Wherefore, Century prays for judgment as follows:

(I) That this Court declare the rights, duties, obligations, status and other legal relations of the parties, including a declaration that the Century policies do not contain a duty to defend defendant in the Underlying Action, and a declaration that Century has no duty to indemnify defendant in the Underlying Action;

(2) For all of Century's costs and disbursements incurred herein; and

(3) For such other relief as the Court may deem just and proper.

Dated this 21st day of November 2008.

SOHA & LANG, P.S.

By: _____
R. LIND STAPLEY, OSB # 030531
206-624-1800
Attorneys for Plaintiff Century Indemnity Company

DAVIS ROTHWELL EARLE & XÓCHIHUA P.C.

By: _____
WILLIAM G. EARLE, OSB #831859
JONATHAN HENDERSON, OSB #063554
503-222-4422
Attorneys for Plaintiff Century Indemnity Company