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Hon. James P. McCormack

At IAS Part 23, Supreme Court, State of New York, County of Nassau, 100 Supreme Court Drive, Mineola, N.Y. on the 18<sup>th</sup> of October, X 2018.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

M.W., an infant under the age of fourteen (14) years, by Index No.: 600685/13  
LATISHA WHITE, her Mother and Natural Guardian, and  
LATISHA WHITE, individually,

Plaintiffs,

[PROPOSED] ORDER TO  
SHOW CAUSE  
TO COMPEL  
COMPLIANCE WITH A  
PRIOR COURT ORDER,  
COMPEL DISCLOSURE  
OF INSURANCE  
POLICIES AND TO  
DISQUALIFY COUNSEL  
FROM REPRESENTING  
DEFENDANT RUBAND  
AND TO STAY TRIAL

- against -

ELM STREET ASSOCIATES, L.P., WESTHAB, INC.,  
RUBAND CONTRACTING CORP., EMBE HOME  
SOLUTIONS, INC. and CERTA PROPAINTERS, LTD. and  
COLOR WHEEL PAINTING, INC.,

MOTION SEQUENCE # 7

ORIGINAL RETURN DATE \_\_\_\_\_

Defendants.

RELIEF OO TH

COUNSELORS:

Upon the annexed affirmation of Robert S Cypher Esq. dated October 17 2018, and the exhibits annexed hereto, and upon all the proceedings and other papers heretofore filed herein and due deliberation having been had thereon it is hereby ordered that defendants, RUBAND CONTRACTING CORPORATION (RUBAND), EMBE HOME SOLUTIONS, INC (EMBE), and CERTA PRO PAINTERS LTD (CERTA-PRO), show cause before this court at IAS part 23 to be held at the courthouse located at 100 Supreme Court Drive, Mineola, NY on ~~October 21~~ <sup>November 13</sup> 2018, Part 23 <sup>at 9:30 in the fore noon</sup> or as soon thereafter as counsel can be heard, for why an order should not be entered herein:

1. Requiring defendant RUBAND, EMBE, and CERTA-PRO to immediately adhere to the prior Order of this court, entered May 14, 2018, directing that they defend, indemnify and pay counsel fees to defendants WESTHAB and ELM STREET ASSOCIATES (hereinafter referred to as WESTHAB);
2. Disqualifying the firm of Marshall, Dennehey, Warner, Coleman and Goggins, current attorneys for RUBAND, EMBE, and CERTA-PRO from continuing to represent those defendants, on the basis that a conflict of interest exists;
3. Compelling defendants to supply to all parties the demanded insurance information as set forth in the defendants' demand and letter of July 10, 2018;
4. Pursuant to New York Civil Practice Law and Rules ("CPLR") § 2201 issuing an Order for a temporary stay of the action in the court below until Defendants' Order to Show Cause is decided; and there is compliance with said Order;
5. Pursuant to CPLR § 2201, staying the trial of this action currently scheduled for October 23, 2018, pending the decision of Defendants' Order to Show Cause; and compliance with the resulting Order;
6. Staying the Trial of this matter pursuant to the Court's inherent power to issue a stay under the circumstances, and;
7. Granting such other and further relief as this court may deem just and proper.

*J.S.C.*

**IT IS ORDERED THAT THE TRIAL CURRENTLY SCHEDULED FOR OCTOBER 23, 2018 BE STAYED.** *pending the hearing & determination of this application.*

SUFFICIENT REASON APPEARING THEREFORE, it is hereby:

*J.S.C.*

ORDERED, that service of a copy of this order, together with the papers on which it is granted, TO BE MADE upon counsel for defendants, RUBAND, EMBE, and CERTA-PRO, 105 Maxis Rd., Suite 303 Melville, NY 11747, by ~~Certified Mail~~ *overnight*, and to plaintiff's counsel, THE OR LOW FIRM 71-18 Main Street Flushing, New York 11367, by ~~Certified Mail~~ *overnight* on or before October 19, 2018, shall be deemed good and sufficient service thereof. Answering papers shall be served on or before November 5 2018.

*OPP*

ENTER:

*[Signature]*  
 \_\_\_\_\_  
 J.S.C.

*[Handwritten mark]*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
M.W., an infant under the age of fourteen (14) years, by  
LATISHA WHITE, her Mother and Natural Guardian, and  
LATISHA WHITE, individually,

**Index No.:** 600685/13

Plaintiffs,

- against -

ELM STREET ASSOCIATES, L.P., WESTHAB, INC.,  
RUBAND CONTRACTING CORP., EMBE HOME  
SOLUTIONS, INC. and CERTA PROPAINTERS, LTD. and  
COLOR WHEEL PAINTING, INC.,

Defendants.  
-----X

**MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF DEFENDANTS’  
ORDER TO SHOW CAUSE TO COMPEL DEFENDANTS, RUBAND CONTRACTING  
CORP., EMBE HOME SOLUTIONS, INC. and CERTA PROPAINTERS, LTD TO  
COMPLY WITH A PRIOR COURT ORDER, COMPEL DISCLOSURE OF ALL  
RELEVANT INSURANCE INFORMATION TO DISQUALIFY COUNSEL FROM  
REPRESENTING SAID DEFENDANTS, AND TO STAY ALL PROCEEDINGS  
PENDING RESOLUTION OF THESE ISSUES.**

HAVKINS ROSENFELD RITZERT &  
VARRIALE, LLP  
*Attorneys for Defendants*  
ELM STREET ASSOCIATES LP AND  
WESTHAB INC.  
170 Hamilton Avenue, Ste 210  
White Plains, NY 10601  
File No.: 11990-000524

*Of Counsel:*

*Tara C. Fappiano, Esq.*  
*Robert Cypher, Esq.*

### STATEMENT OF FACTS

For a more complete recitation of the facts underlying this action, this Honorable Court is respectfully referred to the accompanying Affirmation of Robert S. Cypher, dated October 15, 2018 (the “Cypher Affirmation”), and the exhibits annexed thereto.

### PRELIMINARY STATEMENT

Defendants, ELM STREET ASSOCIATES, L.P. and WESTHAB, INC., (hereinafter referred to as “Defendants”), submit this Memorandum of Law in support of their Order To Show Cause. For the reasons set forth below, Defendants’ motion should be granted in its entirety.

Based upon the clear and undisputed evidence, it is respectfully requested that this Honorable Court grant the moving Defendants’ Order to Show Cause in its entirety.

On May 4, 2018, Justice James P McCormack of the Nassau County Supreme Court, granted defendant WESTHAB’s motion for summary judgment, ordering that defendant RUBAND defend, indemnify and pay WESTHAB’s legal fees. The order has been ignored.

WESTHAB has demanded multiple times that counsel for RUBAND provide copies of all primary and excess policies for each defendant represented by them: RUBAND, EMBE HOME SOLUTIONS and CERTA-PRO PAINTERS LTD. To date there has been no response. At a mediation held on July 9, 2018, RUBAND and its insurance carrier, , asserted that the only coverage available was its primary policy, issued to RUBAND. This had never previously been disclosed, despite defendants’ prior demands for all insurance information.

When the case did not resolve at mediation, demand was made for any excess or additional insurance information for all of the other defendants in this action. As of this date there has been no response. Defendants also reiterated their demand for RUBAND, EMBE HOME SOLUTIONS and CERTA-PRO PAINTERS LTD to assume the defense of the defendants, and formally raised an ethical issue. When the parties appeared for the mediation, they were represented by Mark Volpi, who was previously an attorney employed by counsel for ELM STREET ASSOCIATES, L.P. and WESTHAB, INC. this was the first time that counsel became aware that he was involved in this case, having previously left the employ of Havkins, Rosenfeld, Ritzert & Varriale. Because the defendants RUBAND, EMBE HOME SOLUTIONS and CERTA-PRO PAINTERS LTD have refused to assume the defense of the moving defendants there remains a conflict of interest in his involvement in this case, as well as that of the firm of Marshall Dennehey, Warner & Goggins. This matter has been assigned to next appear in the DCM part on October 23, 2018, therefore necessitating this application be brought by Order To Show Cause and the need to stay all proceedings pending the resolution of these issues.

### ARGUMENT

#### DEFENDANT RUBAND MUST BE COMPELLED TO OBEY THE PRIOR ORDER OF THIS COURT

The Order of Justice McCormack, dated May 2, 2018, and entered May 4, 2018, speaks for itself as it clearly and unambiguously granted Defendants', ELM STREET ASSOCIATES, L.P. and WESTHAB, INC, motion for summary judgment, requiring defendants, RUBAND, EMBE HOME SOLUTIONS, and CERTA-PRO PAINTERS LTD, to defend, indemnify and pay WESTHAB's legal fees. The order, which has been ignored, granted summary judgment, holding that the moving defendants are entitled to contractual indemnity, common law indemnity, and are owed a defense and contribution. The order also holds that the moving

defendants are free from negligence. Judge McCormack's order states "It is undisputed RUBAND was solely responsible for all construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the work under the contract". The court further found that RUBAND even acknowledged its own negligence, and failed to establish the negligence of WESTHAB. The court also found that WESTHAB established entitlement to summary judgment as a matter of law on the issue of common-law indemnification. The court found that RUBAND failed to meet its burden to show that there was an issue of fact requiring a trial. The court further found that it was undisputed there was a valid contract the WESTHAB. Defendants performed by paying for the services that RUBAND was to supply, but that RUBAND breached the contract by failing to name WESTHAB as an additional insured on its policy, as contractually required. Finally, the court decided that WESTHAB was entitled to counsel fees, which was to be determined by the trial court or otherwise resolved.

It is undisputed that the decision of Judge McCormack, which is attached to the affirmation of Robert Cypher as **Exhibit "A"**, is the law of the case. Although defendant RUBAND has filed a notice of appeal, it has neither perfected its appeal, nor moved to stay the trial. To date, counsel has ignored the order of Justice McCormack in its entirety. Therefore, it is necessary that this court issue an order directing defendant RUBAND to comply.

When an issue of ultimate fact has once been determined that issue cannot again be litigated between the same parties in any future lawsuit *Ashe v. Swenson*, 397 US 436, 443, 445, (1970); *People v. Cunningham*, 62 Misc. 2d 515, 519 (Kings County Supreme Court 1970); *McGrath v. Gold* 36 NY 2d 406, 369 NYS 2d 62 (1975). In *Vanguard Tours Inc. v. Yorktown*, 102 A.D. 2d 868, 477 N.Y.S. 2d 40 (2d Dept. 1984), held that a court's decision as to a

defendant's liability constituted the law of the case which was binding, And is binding upon the court in the absence of a showing of extraordinary circumstances. No such extraordinary circumstances exist in this matter. The decision of the Court is currently the law of this case.

**RUBAND'S IS REQUIRED TO RESPOND TO DEMANDS FOR INSURANCE  
INFORMATION UNDER CPLR 3101(f) AND SHOULD BE COMPELLED TO DO SO  
BY THIS COURT**

Counsel stated at the July 9, 2018 mediation, that only one insurance policy is available to provide coverage for the claims asserted by plaintiffs herein. This position has never been put in writing and all demands for insurance information have been ignored. WESTHAB, demanded copies of all insurance policies from both the general contractor and the subcontractors, as well as correspondence relating to any such policies. This demand for the insurance information was in a letter, dated July 10, 2018, **Exhibit" B"** to Cypher Affirmation. The moving defendants also demanded the disclosure of all relevant insurance information early in the litigation. **Exhibit"C"** to Cypher Affirmation.

CPLR 3101(f) states: " A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of the judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." RUBAND has neither objected to this demand, nor moved for a protective order. Rather, it has simply ignored the demands. In *Sharkey v. Chow*, 84 A.D.3d 1719, 922 N.Y.S. 2d 691 (4<sup>th</sup> Dept. 2011), the Appellate Division held that: "Plaintiff was unquestionably entitled to insurance information for use in formulating his trial strategy" In *Ambra v. Awad* , 16 Misc. 3d 1128 (A), 847 N.Y.S. 2d 900 (Supreme Court Nassau County 2007) the court held that: "Article 31 of the Civil Practice Law and Rules gives rise to a duty on the part of the defendant to provide complete accurate and truthful discovery. To the

extent that an attorney assumes responsibility for compliance on behalf of the client, that attorney is answerable for a breach of that duty.” In this matter, repeated demands were made for insurance policies and coverage for all of the other defendants. To this date, there has been no response from their counsel, in response. Counsel’s continued representation of the RUBAND defendants poses a clear conflict of interest in this case. Therefore, the court should compel RUBAND to immediately disclose this information.

**THERE IS A CLEAR CONFLICT OF INTEREST**

In *Salow v. W.R. Grace & Co.*, 83 NY 2d 303, 610 N.Y.S. 2d 128, (1994), the Court of Appeals held that:

A lawyer may not both appear for and oppose the client on substantially related matters when the clients interests are adverse. The rule has been extended to provide that if one attorney in a firm is disqualified from representing a client and all attorneys in the firm are disqualified. This is so because there is an irrebuttable presumption of shared confidences among attorneys employed by the firm which forecloses the firm from representing others in the future and substantially related matters id. 307,129 ...a party seeking to disqualify an attorney or law firm, most established one existence of a prior attorney-client relationship and to that the former and current representations are both adverse and substantially related Id, at 308,130.

In the instant case, there is no question that the parties’ interests are adverse as long as RUBAND fails to provide WESTHAB and ELM STREET with a complete defense and indemnification, and fails to reimburse legal fees now due. RUBAND cannot on the one hand claim that there is no coverage beyond the primary policy, and still represent the moving defendants.

In *Tekni- Plex, Inc. v. Meyer and Landis*, 89 N.Y. 2d 123, 651 N.Y.S.2d 954 (1996), the Court of Appeals held, “ except with the consent of a former client after full disclosure, a lawyer who has represented the former client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to



the interests of the former client.” In *Rotan v. Lawrence Hospital*, 46 A.D. 2d 199, 361 N.Y.S. 2d 372 (1st Dept. 1974), an attorney representing a doctor in a medical malpractice case, left his defense firm, and was hired as an attorney for the firm representing the plaintiff. The court held that:

While these facts neither indicate nor imply any departure from professional conduct or breach of any ethical canon, we cannot escape the conclusion that this is a situation rife with the possibility of discredit to the bar and the administration of justice. Though we do not dispute his good faith or the good faith of the firm representing plaintiff, both the possibility of conflict of interest and the appearance of it are too strong to ignore. [The concurring opinion states] while the attorney “ was hired for reasons having nothing to do with the pending litigation” there is no implication of improper motive. Nonetheless, the attorney-client relationship requires the client who is the defendant make the determination and not the insurance company and the attorney is not merely a gladiator who simply has the sword and shield and will travel.

In *Aversa v. Taubes*, 194 A.D.2d 579, 598 N.Y.S. 2d (2d Dept.1993), the Appellate Division reversed an order denying disqualification of the defendant’s firm in a medical malpractice action. In that case, an attorney, formerly with the plaintiff’s law firm, joined the law firm of the defendant. The court held that:

Irrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interest will not be prejudiced and quantum consequence of representation of the opposing litigant by the client’s former attorney. The standards of the profession exist for the protection and insurance of the clients and are demanding; an attorney must avoid not only the fact but even the appearance of representing conflicting interests. With rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting the obligations of the professional relationship.

Finally, in *Cardinale v. Golinello* 55 A.D.2d 898, 389 N.Y.S.2d 893, (2d Dept. 1977), the Appellate Division held that defendants’ motion to disqualify an attorney for the plaintiff, who had previously done legal work for the defendant: ... “was properly granted, and that there was such a conflict of interest in violation of the Code of Professional Responsibility that it was of no

moment that the attorney did not personally render any legal services to the defendant. It suffices that he was associated with the firm that did". The court held, at 295, 195:

That if one lawyer would be disqualified from undertaking a subsequent representation then all the attorneys in the firm are likewise precluded from such representation. The obligation of a lawyer to preserve the confidences and secrets of his client continue after the termination of his employment. The obligation of an attorney to represent the client with undivided fidelity and not divulge the secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. The proscription against taking a case against the former client is predicated, however, on more than the possibility of use in the second representation of information confidentially obtained from the former client in the first representation. The limitation arises simply from the fact the lawyer or the firm with which he was then associated represented the former client in matters related to the subject matter of the second representation. Accordingly, it is no answer that the lawyer did not in fact obtain any confidential information in connection with the first employment, or even that it was only other members of his firm who render the services to the client. Irrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interest will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney. The standards of the profession exist for the protection and assurances of all clients, and are demanding; an attorney must avoid not only the fact but even the appearance of representing conflicting interests. With rare and conditional exceptions, the lawyer may not place himself in a position where conflicting interest may even inadvertently affect or give the appearance of affecting the obligations of the professional relationship.

**There can be no doubt here that a conflict of interests exists and disqualification is the appropriate remedy.**

**THE TRIAL MUST BE STAYED PENDING THE RESOLUTION OF THE ISSUES PRESENTED**

In its application for relief by means of the submitted order to show cause, the WESTHAB defendants request that this court compel the RUBAND defendants to comply with the previous order of Justice McCormack, and direct them to assume the defense of WESTHAB, indemnify the moving defendants, and pay their legal costs. Additionally, WESTHAB demands that RUBAND provide the insurance policies and other information pertaining to coverage for

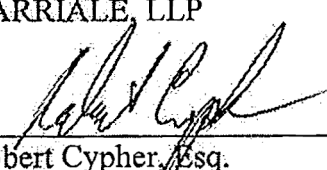
all defendants. Lastly, counsel for RUBAND must be disqualified. Giving all these issues, and in order to avoid severe prejudice to the WESTHAB defendants, all proceedings, including any trial, now on for October 23, 2018, in the DCM part must be stayed. CPLR 2201 states: "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case upon such terms as may be just" See also *Coburn v. Coburn* 109 A.D.2d 984, 486 NYS 2d 467 (3d Dept. 1985). Courts have an inherent power to stay a proceeding where a former attorney of a party subsequently represents his adversary. *Feldman v. Bernham* 6 A.D. 2d 498, 179 N.Y.S.2d 881 (1<sup>st</sup> Dept.1958).

In the instant matter, proceeding with the trial would render the decision of Justice McCormack a nullity, and endorse the principle that a party can avoid the consequences of a court order by simply ignoring it. Further, proceeding with the trial at this time would be a waste of legal and judicial resources, as well as great cost to the parties herein.

WHEREFORE, it is respectfully submitted that the defendant WESTHAB's motion should be granted, and an order issued requiring defendant RUBAND to: defend, indemnify, and pay the legal fees of defendant WESTHAB, provide the demanded insurance information for all other defendants, and to disqualify counsel from further representation of RUBAND in this action, and to stay all proceedings, and for such other and further relief as this court deems just and proper.

Dated: White Plains, New York  
October 17, 2018

HAVKINS ROSENFELD RITZERT &  
VARRIALE, LLP



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Robert Cypher, Esq.  
Attorneys for Defendants  
ELM STREET ASSOCIATES, L.P. and  
WESTHAB, INC.  
170 Hamilton Avenue Suite 210  
White Plains, New York 10601  
(914) 368-7211  
File No.: 11990-534

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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M.W., an infant under the age of fourteen (14) years, by  
LATISHA WHITE, her Mother and Natural Guardian, and  
LATISHA WHITE, individually,

**Index No.: 600685/13**

Plaintiffs,

**AFFIRMATION IN  
SUPPORT OF  
ORDER  
TO SHOW CAUSE**

- against -

ELM STREET ASSOCIATES, L.P., WESTHAB, INC.,  
RUBAND CONTRACTING CORP., EMBE HOME  
SOLUTIONS, INC. and CERTA PROPAINTERS, LTD. and  
COLOR WHEEL PAINTING, INC.,

Defendants.  
-----X

**ROBERT S. CYPHER**, an attorney duly admitted to practice in New York State, avers  
the following pursuant to CPLR §2106:

1. I am associated with the law firm of Havkins Rosenfeld Ritzert & Varriale, LLP,  
attorneys for the defendants, ELM STREET ASSOCIATES, L.P. and WESTHAB, INC.  
Accordingly, based upon my review of the files maintained by this office, I am familiar with the  
facts and proceedings as set forth herein.

2. I submit this Affirmation in support of the instant Order To Show cause:
- a. Requiring defendant RUBAND, EMBE, and CERTA-PRO to immediately adhere to the prior Order of this court, entered May 2, 2018, directing that they defend, indemnify and pay counsel fees to defendants WESTHAB and ELM STREET ASSOCIATES (hereinafter referred to as WESTHAB);
  - b. Disqualifying the firm of Marshall, Dennehey, Warner, Coleman and Goggins, current attorneys for RUBAND, EMBE, and CERTA-PRO from continuing to represent those defendants, on the basis that a conflict of interest exists;

- c. Compelling defendants to supply to all parties the demanded insurance information as set forth in the defendants' demand and letter of July 10, 2018;
- d. Pursuant to New York Civil Practice Law and Rules ("CPLR") § 2201 issuing an Order for a temporary stay of the action in the court below until Defendants' Order to Show Cause is decided, and there is compliance with said Order;
- e. Pursuant to CPLR § 2201, staying the trial and all proceedings in this action currently scheduled for October 23, 2018, pending the decision of Defendants' Order to Show Cause; and compliance with the resulting Order;
- f. Staying the Trial of this matter pursuant to the Court's inherent power to issue a stay under the circumstances, and;
- g. Granting such other and further relief as this court may deem just and proper.

**No Prior Request For The Relief Requested Herein Has Been Made By Movants**

**PRELIMINARY STATEMENT**

3. This Court has already held that defendants, RUBAND CONTRACTING CORP., EMBE HOME SOLUTIONS, and CERTA-PRO PAINTERS, are liable to the moving defendants for contractual and common law indemnification, and contribution. A copy of this Court's Order, filed and entered May 4, 2018, is annexed hereto as **Exhibit "A"**. To date, despite multiple requests, and the submission of proof of attorneys' fees and costs, the defendants, RUBAND CONTRACTING CORP., EMBE HOME SOLUTIONS, and CERTA-PRO PAINTERS, have failed to comply with the Court Order or reimburse defendants, ELM STREET ASSOCIATES, L.P. and WESTHAB, INC., for attorneys' fees and costs, as required by the Order.

4. On May 4, 2018, Justice James P. McCormack of the Nassau County Supreme Court, granted defendant WESTHAB's motion for summary judgment, ordering that defendant RUBAND defend, indemnify and pay WESTHAB's legal fees. The Order has been ignored.

5. On July 10, 2018, counsel for WESTHAB demanded that counsel for RUBAND provide copies of all primary and excess policies, and other relevant insurance information, for each defendant represented by them: RUBAND, EMBE HOME SOLUTIONS and CERTA-PRO PAINTERS LTD. To date, there has been no response. Demand letter is attached hereto as **Exhibit "B"**

6. At a mediation held on July 9, 2018, counsel for RUBAND and its insurance carrier, Main Street, America Assurance Company, asserted that the only coverage available was the one primary policy, issued to RUBAND. This information had never previously been disclosed, despite defendants' prior demands for all insurance information. See **Exhibit "B"**.

7. When the case did not resolve at mediation, demand was made for any excess or additional insurance information for all of the other defendants in this action. As of this date, there has been no response. Defendants also reiterated the request for RUBAND, EMBE HOME SOLUTIONS, and CERTA-PRO PAINTERS LTD to assume the defense of the defendants, and formally raised an ethical issue. When the parties appeared for the mediation, they were represented by Mark Volpi, who was previously an attorney employed by counsel for ELM STREET ASSOCIATES, L.P. and WESTHAB, INC. This was the first time that counsel became aware that he was involved in this case, having previously left the employ of Havkins, Rosenfeld, Ritzert & Varriale. Because the defendants, RUBAND, EMBE HOME SOLUTIONS, and CERTA-PRO PAINTERS LTD, have refused to assume the defense of the moving defendants, there remains a conflict of interest in his involvement in this case, as well as that of the firm of Marshall Dennehey, Warner & Goggins.

8. This matter is next on for an appearance on October 23, 2018, in the DCM Part, therefore necessitating this application be brought by Order To Show Cause.

### ARGUMENT

9. On March 15, 2018, Defendants moved for summary judgment against RUBAND demanding contractual and common-law indemnification, defense, and the payment of counsel fees.

10. Justice McCormack granted defendants' motion in its entirety. Decision attached as **Exhibit "A"**. Justice McCormack cited Article 2 of the contract between WESTHAB and RUBAND, which will not be repeated here in the interest of space, as it is attached as an exhibit.

11. Justice McCormack correctly held: "A simple reading of the contract makes it clear that RUBAND agreed to indemnify WESTHAB". The Court found that the WESTHAB defendants established entitlement to summary judgment as a matter of law on the issue of contractual indemnity. The Court further found that the indemnification clause was enforceable, due to the fact that the indemnitee was free from negligence. Thus, any argument that the contract violated the anti-indemnification provisions of the General Obligations Law are meritless. These determinations are the law of the case and are no longer subject to dispute.

12. The Court also found that WESTHAB is entitled to common law indemnity. It did so on the basis that defendant is not negligent, and delegated exclusive responsibility for the work to RUBAND.



13. The court further found that the WESTHAB defendants are entitled to common-law contribution from RUBAND, and that RUBAND failed to raise a material issue of fact requiring a trial on the issue.

14. Justice McCormack further ruled that RUBAND has breached its contract to WESTHAB because RUBAND failed to name defendants as additional insureds on its policy. Therefore, defendants are entitled to summary judgment as a matter of law, due to RUBAND'S breach of contract. The Court found the wording of the contract to be clear and unambiguous.

**RUBAND HAS FAILED TO COMPLY WITH A COURT ORDER**

15. The Court noted RUBAND'S failure to defend the WESTHAB defendants or reimburse them for counsel fees and costs. This was first demanded in February of 2017 (**Exhibit "C"**). The Court found that RUBAND had either denied or ignored the request. Once again, the Court found that the language in the contract requiring defendants to be indemnified was clear. The Court held that the amount of fees and costs would be resolved either between the parties or at the time the case is resolved. Subsequently, moving defendants submitted a request for the RUBAND defendants to assume their defense and reimburse the fees (see letter of May 15, 2018, annexed hereto as Exhibit "D").<sup>1</sup> Defendant ignored same.

16. On July 9, 2018 the parties appeared for a mediation before Robert Adams of NAM. The attorney who appeared on behalf of the RUBAND defendants was Mark Volpi. This attorney had not previously worked on this case, but did previously work for HRRV, counsel for WESTHAB AND ELM STREET. Counsel and the carrier representative present for RUBAND stated, for the first time, that the only available coverage for all named defendants is the one

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<sup>1</sup> The attachment is not annexed in the interest of space.

primary policy issued to RUBAND. It is unknown at this time which policy was referenced, or how Main Street reached that conclusion. Thus, Main Street indicated during the mediation that the maximum amount of coverage available was that policy. No other disclosures related to insurance have been made either before or since, despite prior demands of counsel. See **Exhibit "E"**.

17. On July 10, 2018, when the case did not resolve by settlement, counsel for WESTHAB demanded that counsel for RUBAND provide copies of all primary and excess policies, as well as all other relevant insurance information, for each defendant represented by them: RUBAND, EMBE HOME SOLUTIONS and CERTA-PRO PAINTERS LTD. To date there has been no response **Exhibit "B"**. There was a letter from Scottsdale Insurance the excess carrier for RUBAND, dated June 29, 2018, regarding coverage. This is the only insurance information ever disclosed (copy annexed hereto as **Exhibit "F"**). But, that letter was only ever provided directly by Scottsdale. RUBAND did send some limited information to plaintiffs' counsel on July 25, 2018, but never responded to the moving defendants demand.

18. On August 2, 2018, at a pretrial conference in Nassau County Supreme Court, the same demands for insurance were directed to counsel for RUBAND. Once again, the request was ignored. While RUBAND has filed a Notice of Appeal, they have neither perfected their appeal, nor sought a stay in this action. The matter is now assigned an October 23, 2018 appearance in the DCM Part. It is clear that RUBAND has no intention of obeying the court's order, providing insurance information, or resolving the conflict of interest. Therefore, it is requested that this Court issue an order directing RUBAND to comply with the order of Justice McCormick forthwith, immediately assume the defense of defendants ELM STREET ASSOCIATES, L.P. and WESTHAB, INC., and reimburse them for their counsel fees, as well as

provide the insurance information, and be disqualified as counsel for RUBAND. Otherwise, the order of Justice McCormick will be reduced to a nullity.

**COUNSEL FOR RUBAND HAS A CONFLICT OF INTEREST AND  
SHOULD BE DISQUALIFIED**

19. The attorney who represented RUBAND at the July 9, 2018 mediation and at subsequent stages of this litigation is Mark Volpi. This representation presents a conflict of interest, due to his prior employment at this firm. On July 10, 2018, Tara Fappiano of this office advised Mr. Volpi of this conflict, and requested that this matter be addressed as soon as possible. However, as is the case with the demand for defense and indemnity, counsel has ignored the request. **Exhibit "B"**.

20. The conflict of interest in the continued representation is indisputable given RUBAND's complete disregard of Justice McCormick's Order to assume the defense, as well as its position on coverage at this time. RUBAND cannot on the one hand claim that there is no coverage beyond one policy, ignore the Order, and also refuse to acknowledge there is a conflict.

**DEFENDANTS HAVE FAILED TO COMPLY WITH DEMANDS  
FOR INSURANCE INFORMATION**

21. While this firm did not represent WESTHAB and ELM STREET throughout the course of this litigation, their prior counsel did serve the defendants with demands for insurance information early in the litigation (**Exhibit "F"**).

22. Prior to the July 9, 2018 mediation, the RUBAND defendants did not advise that there were any issues with regard to coverage. The only correspondence that was received by any party was a letter from Scottsdale's counsel to the RUBAND defendants taking a coverage

position. Any letters which led up to that response had not been previously disclosed. This letter was received only days before the mediation. See **Exhibit "E"**.

23. As such, when the matter did not settle, a demand was made the RUBAND to disclose copies of every piece of relevant information pertaining to the insurance coverage for RUBAND, EMBE, and CERTA PRO, including all policies for every defendant, and correspondence pertaining to any discussions of insurance coverage, or demands for same. Given the position taken at mediation that there is a limit to the amount of coverage that is available to the defendants, all of which are now being indemnified by the RUBAND defendants, this was and remains a very significant issue. **Exhibit "B"**.

24. The RUBAND defendants never responded to this demand. They did send a response to plaintiffs' counsel, who had made a similar request. But, it was deficient because that response only addressed the Scottsdale policy and coverage issues raised by Scottsdale. That response did not respond to the moving defendants' demand, nor was it inclusive of all defendants or all policies that might be applicable to this case.

25. There can be no doubt that the information being requested is highly relevant at this time, as this case moves forward and given the RUBAND defendants' failure to comply with this Court's Order and provide WESTHAB and ELM STREET with a defense. As such, the RUBAND defendants must be ordered to comply with the demands within a timeframe set down by this Court.

**THIS MATTER MUST BE STAYED AND THE TRIAL STAYED PENDING  
RESOLUTION OF THE ABOVE ISSUES**

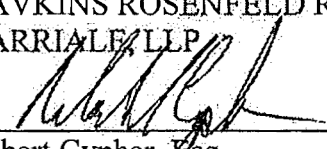
26. The above issues, especially that involving the conflict of interest of counsel for the RUBAND defendants, must be resolved before this case can proceed to trial. The RUBAND defendants cannot simply ignore a Court Order and require moving defendants to continue to

have to incur attorneys' fees and costs to continue to defend this action because the RUBAND defendants disagree with the Court's decision on the summary judgment motion. It is important to note that they have done nothing to pursue an appeal from that decision, but for to file a Notice of Appeal. Further, the RUBAND defendants have stood in the way of the moving defendants attempts to pursue coverage through other avenues, or even assess whether that might be appropriate, because they have failed to disclose the most basic information to allow the moving defendants to pursue same.

27. In short, there are a multitude of issues here that must be resolved before this case may proceed to trial and, therefore, a stay of all proceedings to address same is appropriate, in the interest of judicial economy and expense to the parties.

**WHEREFORE**, it is respectfully submitted that the defendant's WESTHAB motion should be granted in its entirety, and an Order issued requiring defendant RUBAND to: defend, indemnify, and pay the legal fees of defendant WESTHAB, provide the demanded insurance information for all other defendants, disqualify counsel from further representation of RUBAND in this action, and stay all legal proceedings, and grant such other and further relief as this court deems just and proper.

HAVKINS ROSENFELD RITZERT &  
VARRIALE, LLP



---

Robert Cypher, Esq.  
Attorneys for Defendants  
ELM STREET ASSOCIATES, L.P. and  
WESTHAB, INC.  
170 Hamilton Avenue Suite 210  
White Plains, New York 10601  
(914) 368-7211  
File No.: 11990-534

# Exhibit A

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/TAS TERM, PART 23 NASSAU COUNTY**

**PRESENT:**

*Honorable James P. McCormack*  
Justice of the Supreme Court

\_\_\_\_\_  
M.W., an infant under the age of fourteen  
(14) years, by LATISHA WHITE, her  
Mother and Natural Guardian, and  
LATISHA WHITE, individually,

**Index No. 600685/13**

**Motion Seq. No.: 006  
Motion Submitted: 3/15/18**

**Plaintiff(s),**

**-against-**

**ELM STREET ASSOCIATES, L.P.,  
WESTHAB, INC., RUBAND  
CONTRACTING CORP., EMBE HOME  
SOLUTIONS, INC. , CERTA PRO  
PAINTERS and COLOR WHEEL  
PAINTING, INC.,**

**Defendant(s).**  
\_\_\_\_\_ **X**

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....	X
Affirmation n Opposition/Supporting Exhibits.....	X
Reply Affirmation.....	X

Defendants, Elm Street Associates, L.P. and Westhab, Inc. (The “Westhab Defendants”), moves this court for an order, pursuant to CPLR 3212, granting them summary judgment on their cross claims against co-Defendant Ruband Contracting Corp (Ruband) for indemnification, contribution, breach of contract and counsel fees. Ruband opposes the motion. Neither Plaintiff nor any of the other Defendants submit papers in opposition to or in support of the motion.

The history of this case has been recited in prior orders and need not be restated in full herein. Westhab is a nonprofit organization that provides affordable housing and services to low-income individuals. Plaintiff, Latisha White, lived in a Westhab building with her daughter, M.W. In April, 2012, Westhab entered into a contract with Ruband for Ruband to, *inter alia*, paint the building where Plaintiffs lived. Ruband then entered into subcontracts with other entities, including the other co-Defendants herein, to perform the work. Plaintiffs allege that M.W. was exposed to lead, and suffered lead paint poisoning, as a result of the work that was performed. The Westhab Defendants now move for summary judgment against Ruband arguing that the contract entered into between Westhab and Ruband releases Westhab from liability, and requires Ruband to indemnify



Westhab and procure insurance for Westhab.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York, supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1<sup>st</sup> Dept 1992), and it should only be granted when there and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

The relevant portions of the contract between Westhab and Ruband are contained in Article 2, "Contractor", to wit:

The Contractor shall supervise and direct the Work, using his best skill and attention and he shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the Contract...

The Contractor shall be responsible to the Owner for the acts and omission of his employees, Subcontractors and their agents and employees, and other persons performing any of the work under a contract with the Contractor...

The Contractor shall maintain in full force and effect the insurance required by the Owner as specified in Schedule C. Westhab, Inc., the City of Yonkers Planning and Development and Elm. St. Associates LP shall be named as additional insured for liability...

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

**Contractual Indemnification**

A simple reading of the contract makes it clear that Ruband agreed to indemnify Westhab. However, to invoke contractual indemnification, the indemnitee must establish that it was free from negligence and that it could only be found liable solely through

---

<sup>1</sup>In the contract, "Contractor" refers to Ruband. "Owner" refers to Westhab.

statutory or vicarious liability. (*Arriola v. City of New York*, 128 AD3d 747 [2d Dept 2015]). Herein, Westhab hired Ruband to perform all the work that needed to be done. According to the deposition transcript of Kevin McAuliffe, Director of facilities for Westhab, annexed to the moving papers, he entered into the contract with Ruband, on behalf of Westhab. Similarly, Victor Rubits, president of Ruband, testified at his deposition to the circumstances of entering into the contract with Westhab and confirmed the scope of the work was as stated in the contract. Therefore, it is undisputed that Ruband was "...solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the Contract...". The court therefore finds the Westhab Defendants have established entitlement to summary judgment as a matter of law on the issue of contractual indemnity. The burden shifts to Ruband to raise a material issue of fact requiring a trial on the issue.

In opposition, Ruband first argues that the motion is late because, as per this Part's rules, it was served later than 60 days from the note of issue. However, due to the fact that Westhab changed counsel but all papers, including the note of issue, continued to get served on the outgoing counsel, Westhab was not aware of when the note of issue was filed. The court therefore accepts their motion as timely.

Ruband next argues that there is a question of fact in that they claim Westhab was negligent and they were not. The court disagrees. Their only argument in favor of

Westhab's negligence is that Westhab was under an obligation to advise tenants to remove air conditioners and close windows while the work was being performed. Even assuming that is true, the reason for taking such action was, presumably, to prevent dust, paint and any other particles from getting into the apartments. If Westhab did not warn tenants to remove air conditioners and close windows, then it follows logically that there were air conditioners present, and possibly open windows, when Ruband performed the work. By pointing out that windows should be closed and air conditioners should be removed from the windows, Ruband is actually acknowledging its own negligence by performing the work when windows were open and air conditioners were present. As Ruband was contractually obligated to supervise all the work, under these circumstances, their negligence would be clear. The court finds it was Ruband's responsibility to give all notices, and to ensure the work site was work-ready. Even though Mr. McAuliffe testified that Westhab did inform the tenants of the need to close windows and remove air conditioners, it was Ruband's responsibility to ensure that was done. There is no evidence they did so. For the purposes of this motion, the court therefore finds Ruband has not established that Westhab was negligent.

Finally, Ruband argues that the contract is not enforceable because it purports to indemnify Westhab for their own negligence. General Obligations Law §5-322.1. However, nowhere in the contract does it state that Ruband must indemnify Westhab for Westhab's own negligence. However, to the extent it can be read that way, the phrase "To the fullest extent permitted by law" in the indemnification clause protects the

contract from being void. (*Giangarra v. Pav-Lak Contracting, Inc.*, 55 AD3d 869 [2d Dept. 2008]). Further, where, as here, the indemnitee is free from negligence, even an otherwise void indemnification clause is enforceable. *Id.* In light of the foregoing, the court finds Ruband has failed to raise an issue of fact regarding contractual indemnification.

### **Common Law Indemnification**

Common law indemnification is an equitable concept which allows one party who has been compelled to pay for the wrongs of a second party to recover from that second party. (*Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 40 AD3d 1073 [2d Dept. 2007]). “[T]o be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought...” (*17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass’n of Am.*, 259 A.D.2d 75, 80 (1<sup>st</sup> Dept. 1999)).

Herein, Westhab, who for the purposes of this motion the court finds was not negligent, delegated exclusive responsibility for the work to Ruband. As Plaintiffs have sued the Westhab Defendants, to the extent that a judgment could be rendered against them, the court finds equity dictates Ruband indemnify the Westhab Defendants. As such, the Westhab Defendants have established entitlement to summary judgment as a matter of law on the issue of common law indemnification. The burden shifts to Ruband to raise a material issue of fact requiring a trial on this issue. The court finds Ruband is

unable to do so.

### **Common Law Contribution**

Common law contribution, codified as CPLR §1401, requires multiple parties be subject to liability for the same personal injury. (*Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp.*, 71 NY2d 599 [1988]). Herein, Plaintiffs have named both the Westhab Defendants and Ruband as Defendants for the same injury to MW. To the extent that Westhab could be found liable, the court finds they have established entitlement to summary judgment as a matter of law on the issue of common law contribution. The burden shifts to Ruband to raise a material issue of fact requiring a trial of the issue. They are unable to do so.

### **Breach of Contract**

A cause of action for breach of contract requires allegations that an agreement exists, plaintiff (or cross-claimant) performed under the contract, defendant breached the contract and damages as a result of the breach. (*Dee v. Rakower*, 112 AD3d 204 [2d Dept. 2013]). Herein, it is undisputed there is a valid contract and that the Westhab Defendants performed under the contract by paying for the services Ruband was to supply. The breach is the Westhab Defendants' assertion that they were not named as an additional insured on Ruband insurance policy, as required by the contract. Based upon

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<sup>2</sup>The existence of contractual indemnification does not preclude a finding of common law indemnification. (*O'Dowd v. American Sur. Co. Of N.Y.*, 3 NY2d 347 [1957]).

the admissible evidence submitted, the court finds the Westhab Defendant have established entitlement summary judgment as matter of law on the issue of breach of contract. The burden shifts to Ruband to raise a material issue of act requiring a trial of this issue.

In opposition, Ruband argues an issue of fact exists because Westhab “may” be covered under their insurance policy. However, the terms of their contract state that the Westhab Defendants “shall be *named* as additional insured for liability.” (Emphasis added). The fact that the insurance policy might cover the Westhab Defendants does not change the fact that Ruband was required to specifically name them. If the policy does cover the Westhab Defendants, this portion of the order may be rendered moot at that time. However, the fact that Ruband’s failure to abide by the terms of the contract may still result in the Westhab Defendants being covered does not raise a material issue of fact.

Finally, the Westhab Defendants seek counsel fees. The indemnification provision of the contract specifically indicates that Ruband will indemnify the Westhab Defendants for counsel fees. In February, 2017, the Westhab Defendants requested a defense from Ruband, which request was either denied or ignored. In light of the clear language of the contract, the court finds Ruband will be required to indemnify the Westhab Defendants for their counsel fees. The Westhab Defendants made no indication, or offered any proof, as to what those fees currently amount to. To the extent that the parties are unable to resolve that issue on their own, the issue of the amount of counsel fees will be referred to

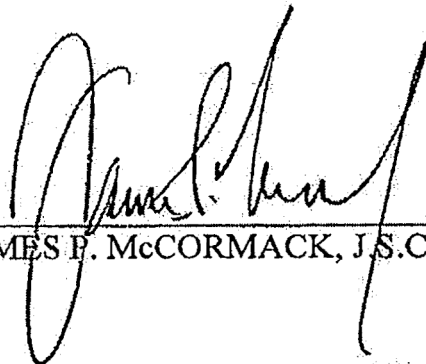
the trial court to be determined at the time the case goes to trial or is otherwise resolved.

Accordingly, it is hereby

**ORDERED**, that the Westhab Defendants' motion for summary judgment on their cross claims against Ruband is **GRANTED** in its entirety.

This constitutes the decision and order of the court.

Dated: May 2, 2018  
Mineola, New York



JAMES P. McCORMACK, J.S.C.

**ENTERED**  
MAY 04 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE



# **Exhibit B**

**H A V K I N S  
R O S E N F E L D  
R I T Z E R T &  
V A R R I A L E , L L P**

**HRRV**  
COUNSELORS AT LAW

TARA C. FAPPIANO  
DIRECT DIAL: (914) 290-6453  
EMAIL: TARA.FAPPIANO@HRRVLAW.COM

REPLY TO WHITE PLAINS OFFICE

July 10, 2018

Marshall, Dennehey, Warner, Coleman  
& Goggin  
105 Maxess Road, Suite 303  
Melville, New York 11747  
Attn: Mark Volpi

Re: *M.W. (Madison White), an infant under the age of 14 years,  
by Latisha White, her mother and natural guardian, and  
Latisha White, Individually v. Elm Street Associates, L.P.,  
Westhab, Inc., Ruband Contracting Corp., EMBE Home  
Solutions, Inc., and Certa Propainters, Ltd.*  
Docket No.: 600685/2013  
Our File No.: 11990-0534

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Dear Mr. Volpi:

Please allow this correspondence to address a number of issues that have arisen as a result of yesterday's mediation, as well as to follow up on our clients' request that your clients assume the defense and indemnify our clients in this action.

First, our clients, Westhab, Inc. and Elm Street Associates, L.P., tendered their defense to your clients in February of 2017. Subsequently, they filed a motion for summary judgment which was granted, in its entirety, pursuant to the decision of Justice James P. McCormack, served with Notice of Entry on May 4, 2018. We previously provided you with invoices showing legal costs and expenses totaling \$34,097.91 through that date. Certainly, those fees and expenses are continuing. By virtue of the same decision, your clients have an obligation to reimburse those fees and expenses, as well as to assume our clients' defense in this action (although separate counsel is certainly needed). We also note that our clients are additional

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Mr. Mark Volpi  
Page 2

insureds pursuant to the terms of the insurance policy issued to your clients (Contractors Extension Endorsement, Par. A (1) (Additional Insureds), which serves as a further basis upon which a defense is required.

Second, you and the representative from Main Street America Assurance Company who appeared at the mediation advised, for the first time, that the only available coverage for all of the named defendants is one primary policy. It is unclear which policy was being referenced. It was also unclear from those discussions how Main Street reached that conclusion. Yet, Main Street has indicated that the maximum amount available is, therefore, \$1 million. There have been no prior disclosures with regard to this position.

A demand for all applicable insurance policies was served on your office on December 29, 2016. At the time of that demand, your office did not represent all defendants. But, by the time a response was provided to the demand, your firm did represent all defendants (see Reply dated February 7, 2017). The Reply only provided a copy of the general liability policy issued by Main Street to Ruband. Please supplement this response immediately to provide copies of all primary and excess policies for each defendant: Ruband, EMBE Home Solutions, and Certa Propainters, Ltd.

In addition, it was stated during the mediation that Main Street has taken a position in writing with regard to the parties' coverage. Further, it is apparent from the letter of June 27, 2018, from Goldberg Segalla to your firm (the only one we have ever received), that there have been a series of letters written to and from Scottsdale Insurance and its representatives and counsel. As such, please provide us with copies of all correspondence by and between Main Street and its insureds, including Ruband, EBME Home Solutions, and Certa Propainters, as well as any such correspondence with any and all excess carriers for said defendants and their respective representatives and/or counsel. This should include, but not be limited to, the letters and emails referenced by Goldberg Segalla: March 13, 2018, March 21, 2018, April 25, 2018, May 11, 2018, June 1, 2018, and June 8, 2018. We assume you have also advised prior counsel and the primary/excess carrier(s) for Ruband of Main Street's position on coverage. If not, we highly recommend you do so at this time. We are copying prior counsel on this letter, accordingly.

Finally, it was very clear at the conclusion of the mediation that this case can be settled within the \$1 million limit that Main Street has confirmed is available at this time. Again, we do not agree with Main Street's position at all. Nevertheless, we are demanding that you settle this matter with plaintiffs at this time. Certainly this will avoid further litigation on the insurance issues, including but not limited to potential declaratory judgment actions. But, more importantly, should this case proceed to trial, the potential verdict value exceeds \$1 million, particularly in light of plaintiffs' recent representations of the intent to offer evidence of future economic damages at trial in excess of that amount. While we continue to take the position that our clients cannot be held liable to plaintiffs, which is borne out by the findings of fact in Justice McCormack's decision that are now law of the case, your clients and Main Street owe our clients a duty to resolve the case at this time and avoid the potential of exposure to our clients.

Mr. Mark Volpi  
Page 3

There is also a collateral issue that must be raised at this time. It is apparent that, if the case is not resolved now, there is a conflict of interest in your and your firm's continued representation of Ruband, EMBE and Certa Propainters given your prior employment at our firm. Please contact me immediately to discuss this issue in more detail.

Thank you for your prompt response to this correspondence.

Very truly yours,

Tara C. Fappiano

TCF/

cc: The Orlow Firm  
71-18 Main Street  
Flushing, New York 11367  
Attn: Adam Orlow

Cogdon, Flaherty, O' Callahan, Reid, Donlon,  
Travis & Fishlinger  
333 Earle Ovington Boulevard, Suite 502  
Uniondale, New York 11514

# **Exhibit C**

H A V K I N S  
R O S E N F E L D  
R I T Z E R T &  
V A R R I A L E, L L P  
H R R V  
C O U N S E L O R S A T L A W

Tracy P. Hoskinson  
Direct Dial: (646) 747-5134  
Email: Tracy.Hoskinson@hrrvllaw.com

Reply to New York Office

February 6, 2017

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**  
**Certified No.: 7015 1520 0001 2230 8760**

**MARSHALL, DENNEHEY, WARNER,  
COLEMAN & GOGGIN**

*Attorneys for Defendants*

RUBAND CONTRACTING CORP.,  
EMBE HOME SOLUTIONS, INC, and  
CERTA PROPAINTERS, LTD.  
105 Maxess Road, Suite 303  
Melville, New York 11747

Re: *M.W. v. an infant under the age of 14 years, by Latisha White, her mother and natural guardian, and Latisha White, Individually v. Elm Street Associates, L.P., Westhab, Inc., Ruband Contracting Corp., EMBE Home Solutions, Inc., and Certa Propainters, Ltd.*  
Index. No: 600685/2013  
Our File No.: 11990-534

Dear Counselors:

We represent defendants, Elm Street Associates, L.P. and Westhab, Inc., in the above-referenced matter. The purpose of this letter is to request indemnification, a defense, and insurance coverage on behalf of our clients, Elm Street Associates L.P. Westhab, Inc.

The plaintiff, M.W., and her mother and natural guardian, Latisha White, commenced this personal injury action for lead poisoning in the Supreme Court, Nassau County. As you know, plaintiffs allege that M.W. was exposed to lead paint dust during 2012, which resulted in her having elevated blood lead levels of up to 14 ug/dL at the age of two and a half years old.

1085 Avenue of the Americas ■ Suite 800 ■ New York, New York 10018  
212-488-1598 ■ 212-564-0203 Facsimile

114 Old Country Road ■ Suite 300 ■ Mineola, New York 11501  
516-620-1700 ■ 516-746-0833 Facsimile

170 Hamilton Avenue ■ Suite 210 ■ White Plains, New York 10601  
914-290-6430 ■ 914-580-2245 Facsimile



Marshall, Dennehey, Warner  
Coleman & Goggin  
February 6, 2017  
Page 2

Plaintiffs allege the dust was caused by the scraping of lead paint from the façade of the building located at 141 Elm Street, Yonkers, New York (“premises”).

Deposition testimony revealed that neither Elm Street Associates nor L.P., Westhab, Inc. performed any of the scraping work which allegedly created lead paint dust. Instead, Elm Street Associates and L.P., Westhab, Inc. hired Ruband Contracting, to act as the general contractor for the work at the site, which in turn, hired subcontractors to perform the work.

A copy of the Contract between Ruband Contracting and Westhab, Inc., dated April 17, 2012, is enclosed. In the document, Ruband Contracting is listed as “Contractor.” Westhab, Inc. is listed as “Owner/Owner’s Agent.” The contract specifies that Ruband Contracting agreed to perform work at several properties including the premises. The scope of services included repairing and painting the decorative cornice, spot pointing the front of the building, painting the building from front from roof to sidewalk, and painting all iron work. Ruband Contracting agreed to be bound by all parts of the Contract, including the following pertinent provisions:

ARTICLE #2  
CONTRACTOR

The Contractor shall supervise and direct the Work, using his best skill and attention and he shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

\*\*\*

The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the Work...

\*\*\*

The Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors, and their agents and employees, and other persons performing any of the Work under a contract with the Contractor.

\*\*\*

The Contractor shall maintain in full force and effect the insurance required by Owner as specified in Schedule C. Westhab, Inc., The City of Yonkers Planning and Development, and Elm St. Associates LP shall be named as additional insureds for liability.

\*\*\*



Marshall, Dennehey, Warner  
Coleman & Goggin  
February 6, 2017  
Page 3

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of issue resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable...

According to the contract between Westhab, Inc. and Ruband Contracting, Ruband Contracting agreed to be responsible for supervising and directing the work at the premises, and for all means and methods of the work performed at the premises. Ruband Contracting further agreed to be responsible for the acts and omissions of its employees, subcontractors and their agents and employees. Further, Ruband Contracting agreed to indemnify Elm Street Associates and L.P., Westhab, Inc., against personal injury claims, which arise out of the performance of the work.

Given that plaintiffs claim that the scraping of the building was performed without the necessary lead paint dust precautions, it was certainly the duty of Ruband Contracting, as the general contractor and pursuant to contract, to ensure the work was being performed in a safe and legal manner, and to keep the area clean and safe. Therefore, Ruband Contracting is obliged to indemnify Elm Street Associates and L.P., Westhab, Inc. pursuant to the Contract.

We are also requesting that a defense be provided to Elm Street Associates and L.P., Westhab, Inc., as additional insureds to Ruband Contracting's general liability policy. Upon information and belief, Elm Street Associates and L.P., Westhab, Inc. were named as additional insureds on the policy maintained by Ruband. Should Ruband Contracting have failed to name Elm Street Associates and L.P., Westhab, Inc. as additional insureds, it is in breach of contract. Please provide us with a copy of Ruband Contracting's general liability insurance policy listing Elm Street Associates and L.P., Westhab, Inc. as additional insureds. We previously demanded this proof in discovery demands, and most recently in our letters dated December 29, 2016 and February 3, 2017.

Accordingly, Elm Street Associates and L.P., Westhab, Inc. are hereby tendering their defense and indemnification to Ruband Contracting, given all of the evidence secured through discovery to date. Should we not receive a sufficient response to this tender, we will have no alternative but to move for summary judgment on our cross-claims, and seek reimbursement of attorneys' fees and costs.



Marshall, Dennehey, Warner  
Coleman & Goggin  
February 6, 2017  
Page 4



Thank you for your attention to this matter and your anticipated cooperation. Please do not hesitate to contact me should you have any questions.

Very truly yours,

Tracy P. Hogkinson, Esq.

TPIH/Encl.

WESTHAB  
CONTRACT AGREEMENT

This Agreement made and entered by and between:

WESTHAB, INC. (Owner/Owner's Agent)  
85 Executive Blvd.  
Blmsford, N.Y. 10523

and

Ruband Contracting (Contractor)

of

P.O. Box 181 Hasting on Hudson, NY 10706 (Address)

WHEREAS, the Contractor relating to the project on 125, 129, 139, 141 and 145 Elm St. Yonkers, NY was determined to be the lowest responsible bidder and;

WHEREAS, the Contractor has agreed to undertake the services set forth in Schedule B of this Agreement and to fulfill all responsibilities of this Agreement relating to the Project, and to be bound by the terms of this Agreement between the Owner/Owner's Agent (hereafter referred to as Owner) and Contractor, a copy of which is available upon request from the Contractor;

NOW, THEREFORE, in furtherance of Westhab and in consideration of the above and the mutual promises and obligations herein provided, the parties do mutually agree as follows:

1. **Term of Agreement**  
This Agreement shall take effect on 4/30/2012 (Commencement Date). Time is of the essence in the provision of the materials and services provided for under this contract. All work must be completed, including punch list, no later than 30 days from the commencement date.
2. **Compensation**  
The Owner agrees to pay the Contractor the sum of \$83,740.00 as set forth in Schedule A attached for the satisfactory performance of the Subcontractor's services.
3. **Entire Agreement**  
This Agreement, together with any attachments appended prior to the execution of the Agreement, constitutes the entire Agreement between the parties and shall not be changed, modified or altered in any manner except by an instrument in writing executed by the parties.

UR (Signature)

GENERAL CONDITIONS

ARTICLE III  
CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement With General Conditions, Supplementary and other Conditions, the Drawings, the Specifications, all Addenda issued prior to the execution of this Agreement, and all Modifications issued by Westhab after execution of the Contract such as Change Orders, written interpretations and written orders for minor changes in the Work. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. The contract Documents are complementary, and what is required by any one shall be as binding as if required by all. Work not covered in the Contract Documents will not be required unless it is consistent therewith and reasonably inferable therefrom as being necessary to produce the intended results.

Nothing contained in the Contract Documents shall create any contractual relationship between the Owner or the Architect and any Subcontractor or Sub-subcontractor.

By executing the Contract, the Contractor represents that he has visited the site and familiarized himself with the local conditions under which the Work is to be performed.

The Work comprises the completed construction required by the Contract Documents and includes all labor necessary to produce such construction, and all materials and equipment incorporated or to be incorporated in such construction.

*U.R. (Signature)*

ARTICLE #2  
CONTRACTOR

The Contractor shall supervise and direct the Work, using his best skill and attention and he shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

Unless otherwise specifically provided in the Contract Documents, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

The Contractor shall at all times enforce strict discipline and good order among his employees and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him.

The Contractor warrants to the Owner and the Architect that all materials and equipment incorporated in the Work will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements may be considered defective.

Unless otherwise provided in the Contract Documents, the Contractor shall pay all sales, consumer, use and other similar taxes which are legally enacted at the time bids are received, and shall secure and pay for the building permit and for all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work.

The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the Work, and shall promptly notify the Architect if the Drawings and Specifications are at variance therewith.

The Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors and their agents and employees, and other persons performing any of the Work under a contract with the Contractor.

The Contractor shall review, approve and submit all Shop Drawings, Product Data and Samples required by the Contract Documents. The Work shall be in accordance with approved submittals.

The Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by his operations. At the completion of the Work he shall remove all his waste materials and rubbish from and about the Project as well as his tools, construction equipment, machinery and surplus materials.

The Contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof.

The Contractor shall warranty the products and workmanship provided under the Agreement for the period of one year, unless otherwise specified in the Agreement.

The Contractor shall maintain in full force and effect the insurance required by Owner as specified in Schedule C. Westhab, Inc., The City of Yonkers Planning and Development, and Elm St. Associates LLP

*U.S. King*

4

shall be named as additional insured for liability. Contractor shall provide certificates of insurance to Owner prior to commencement of the work, evidencing Contractor's compliance with these insurance provisions.

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person. In any and all claims against the Owner or the Architect or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any subcontractor under workers or workmen's compensation acts, disability benefit acts or other employee benefit acts.

### ARTICLE #3 SUBCONTRACTS

A Subcontractor is a person or entity who has a direct contract with the Contractor to perform any of the Work at the site.

Unless otherwise required by the Contract Documents or in the Bidding Documents, the Contractor, as soon as practicable after the award of the Contract, shall furnish to Westhab in writing the names of Subcontractors for each of the principal portions of the Work. The Contractor shall not employ any Subcontractor to whom the Architect or the Owner may have a reasonable objection. The Contractor shall not be required to contract with anyone to whom he has a reasonable objection. Contracts between the Contractor and the Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and the Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

12/11/19 (10/28/19)

**SCHEDULE A**

**Payment for Services**

For the services detailed in Schedule B, the Owner agrees to pay the Contractor the Sum of \$83740.00 to be paid as follows:

- \$35,000.00 after scaffold installation and proof of all permits are supplied.
- \$25,000.00 at 50% completion.
- \$11,870.00 at 75% completion.
- Balance of \$11870.00 at completion and proof of closed permits.

**SCHEDULE B  
Scope of Services**

The Contractor agrees to provide all necessary services, materials and equipment to complete the full Scope of Work described below, including punch list items. Additionally assuring that all work is performed using lead safe work practices. Time is of the essence in the provision of the services, materials and equipment to be provided.

Address: Elm St, Project  
Yonkers, NY

Description of Work:

145 Elm St

- Repair and paint decorative Cornice.
- Spot paint the front of the building where needed and paint approximately 1200 Sq Ft.
- Remove loose stucco from the side of the building by playground, apply new stucco. Paint side wall to match the front of building.
- Remove approximately 35 ft of cast iron drain pipe from base to scupper, replace with 6 inch commercial grade leader.
- Scaffold will be needed for the front; a lift can be used for the side yard.

141 / 139 Elm St.

- Repair and paint decorative Cornice.
- Spot paint the front of the building where needed and paint both building fronts from roof to sidewalk.
- Scaffold will be needed.

*U.R.*

- Paint all iron work

129 Elm St.

- Spot paint the front of the building where needed and paint approximately 1000 Sq Ft. from lower cornice down to sidewalk.

125 Elm St.

- Spot paint and paint lower section of the building, including steel door and trim.

All buildings.

- Remove all debris from job site.
- Secure all necessary local permits.
- Close out all permits and provide proof of such to construction manager.

\* All paint colors to be determined prior to work starting.

UR (1/1)

IN WITNESS THEREOF, the parties have executed this AGREEMENT

BY [Signature]  
Signature

BY [Signature]  
Signature

Kevin McAuliffe  
Type/Print Name and Title

Victor R. ...  
Type/Print Name and Title

FOR Westhab, Inc.  
Owner/Owner's Agent

FOR Riverview Court  
Business Name of Contractor

DATE 4-17-12

10 Box 181 HASTINGS ON HUDSON  
Address

DATE 4-17-12



# Exhibit D

H A V K I N S  
R O S E N F E L D  
R I T Z E R T &  
V A R R I A L E, L L P



COUNSELORS AT LAW

ROBERT S. CYPHER  
DIRECT DIAL: (914) 368-7211  
EMAIL: ROBERT.CYPHER@HRRVLAW.COM

REPLY TO WHITE PLAINS OFFICE

May 15, 2018

**MARSHALL, DENNEHEY, WARNER,  
COLEMAN & GOGGIN**

*Attorneys for Defendants*

RUBAND CONTRACTING CORP.,  
EMBE HOME SOLUTIONS, INC, and  
CERTA PROPAINTERS, LTD.

105 Maxess Road, Suite 303  
Melville, New York 11747  
File No.: 40318.00145

Re: *M.W. (Madison White), an infant under the  
age of 14 years, by Latisha White, her  
mother and natural guardian, and Latisha  
White, Individually v. Elm Street Associates,  
L.P., Westhab, Inc., Ruband Contracting  
Corp., EMBE Home Solutions, Inc., and  
Certa Propainters, Ltd.*

Docket No.: 600685/2013

Our File No.: 11990-0534

Dear Sirs:

Pursuant to the decision of Justice James P. McCormack, served with Notice Of Entry on May 4, 2018, Enclosed, Please find invoices for the legal costs incurred on behalf of Westhab, in the amount of \$34,097.91. Kindly remit your client's draft for this amount, payable to AmTrust

{03170831.DOCX / }

Page 2

North America at your earliest convenience Thank you for your consideration and should you require further information, please do not hesitate to contact me.

Very truly yours,



Robert S. Cypher

RSC/Encls.  
Decision of Judge McCormack  
Invoices

Cc: Kenneth Hayes  
AmTrust North America  
(via Electronic Mail)

Laura Szabo  
AmTrust North America  
(via Electronic Mail)

# **Exhibit E**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Index No.: 600685/13

-----X  
Mi FW, an infant UNDER the age of  
fourteen (14) years by LATISHA WHITE, her mother  
and natural guardian and LATISHA WHITE,  
Individually,

Plaintiffs,

**DEMANDS TO  
CO-DEFENDANTS**

-against-

ELM STREET ASSOCIATES, L.P., WESTHAB,  
INC., RUBAND CONTRACTING CORP., EMBE  
HOME SOLUTIONS, INC. and CERTAPRO  
PAINTERS LTD.,

Defendants.  
-----X

PLEASE TAKE NOTICE, that defendants, ELM STREET ASSOCIATES, L.P.  
and WESTHAB, INC., (hereinafter, collectively, "Westhab") by and through their  
attorneys KARDISCH LAW GROUP PC, hereby make these demands pursuant to  
CPLR §§ 3101 and 3120, upon co-defendants, RUBAND CONTRACTING CORP.,  
EMBE HOME SOLUTIONS, INC. and CERTAPRO PAINTERS LTD., in accordance  
with the following definitions, returnable at the office of the undersigned at 10:00 A.M.  
on July 17, 2015, as follows:

**DEFINITIONS**

a. "Plaintiffs" means the plaintiffs, Mi FW and LATISHA WHITE  
herein, their attorneys, agents and all other persons acting on plaintiffs' behalf, or any of  
their attorneys, including all past and present consultants, advisors and independent  
contractors or any other person or organization acting in such a consulting or advisory  
capacity.

b. "Infant plaintiff" means the plaintiff, M W herein, her attorneys, agents and all other persons acting on her behalf, or any of her attorneys, including all past and present consultants, advisors and independent contractors or any other person or organization acting in such a consulting or advisory capacity.

c. "Adult plaintiff" and "senior plaintiff" mean the plaintiff, LATISHA WHITE, herein, her attorneys, agents and all other persons acting on her behalf, or any of her attorneys, including all past and present consultants, advisors and independent contractors or any other person or organization acting in such a consulting or advisory capacity.

d. "Ruband" means defendant RUBAND CONTRACTING CORP., its attorneys, agents and all other persons acting on its behalf, or any of its attorneys, including all past and present consultants, advisors and independent contractors or any other person or organization acting in such a consulting or advisory capacity.

e. "Embe" means defendant EMBE HOME SOLUTIONS, INC., its attorneys, agents and all other persons acting on its behalf, or any of its attorneys, including all past and present consultants, advisors and independent contractors or any other person or organization acting in such a consulting or advisory capacity.

f. "CertaPro" means defendant CERTAPRO PAINTERS LTD., its attorneys, agents and all other persons acting on its behalf, or any of its attorneys, including all past and present consultants, advisors and independent contractors or any other person or organization acting in such a consulting or advisory capacity.

g. "Co-Defendants" means defendants Ruband, Embe, and CertaPro, individually and/or collectively, their respective attorneys, agents and all other persons

acting on their behalf or any of their attorneys, including all past and present consultants, advisors and independent contractors or any other person or organization acting in such a consulting or advisory capacity.

h. "He" and "his" includes "she" and "hers" and the singular includes the plural as the context requires.

i. "Person" means any individual, corporation, proprietorship, partnership, association or any other entity.

j. "Subject building" means the property commonly known as 141 Elm Street, Yonkers, County of Westchester, State of New York.

k. "Subject premises" means plaintiffs' apartment(s) within the subject building, described and referred to in plaintiffs' Verified Amended Complaint, including, but not necessarily limited to Apartment 2A of the subject building.

l. "Written communication", "document" and "record" mean any written or graphic matter, however produced, or reproduced, of every kind and description in the actual or constructive possession, custody, care or control of the plaintiffs, including without limitation all writings, drawings, graphs, charts, photographs, sound tapes or other tapes, magnetic discs, magnetic strips, optical characters, recognition characters, punched paper tapes, microfiche, punched cards, telegrams, invoices, statements, notes, minutes, inter-office memoranda, reports, studies, contracts, ledgers, books of account, vouchers, receipts, working papers, drafts, statistical records, cost sheets, stenographer notebooks, calendars, diaries, time sheets or logs, computer printouts, computer files, data sheets or logs, computer printouts, computer files, data compilations from which information can be obtained or can be translated through

detection devices into a reasonably usable form, or any other tangible thing.

m. "Health care provider" means any person, firm, partnership, association or corporation that provides or has provided any services relating to the care, diagnosis, treatment, alleviation, evaluation, or review of any physical or mental condition for any person for whom identification of health care providers is requested. It specifically includes, but is not limited to, treating physicians, health maintenance organizations, preferred provider organizations, hospitals, clinics, medical doctors, nurses, physical therapists, pathologists, toxicologists, biochemists, osteopaths, chiropractors, naturopaths, homeopaths, psychologists, social workers, dentists, oral surgeons, periodontists and podiatrists.

n. "Authorization" means HIPAA-compliant authorization and/or facility/entity-specific authorization (an authorization form supplied by the specific facility and/or entity for the purpose of obtaining records from that facility and/or entity).

- o. "Identify" or "identity" when referring to a person, means to state:
- i. his full name;
  - ii. his present residence address;
  - iii. his present residence telephone number;
  - iv. his present business address;
  - v. if his present residence or business address is unknown, his last-known residence address and residence telephone number, his last-known business affiliation and address, along with any information you might have that might reasonably lead to the discovery of his present whereabouts;
  - vi. his present job title;
  - vii. each date he performed the activity to which the demand refers.

### DEMANDS

#### I. NAMES AND ADDRESSES OF WITNESSES

- a) PLEASE TAKE NOTICE, that Westhab hereby demands that co-



defendants, pursuant to CPLR § 3101(a), set forth in writing and under oath, the identity of each person claimed by any party you represent, to be a witness or to have any information or knowledge of any of the facts, occurrences, circumstances or conditions which form the basis of the Verified Amended Complaint, including but not limited to all persons who were involved in the renovation of the façade at the subject building, including the name, current employment status and last known address if not still employed, of the project manager, assistant project manager, job superintendent and general foreman; all persons who were involved in the execution and/or negotiation of an agreement, verbal or written, to perform work to the façade of the subject building; all persons who were involved in applying for permits or other regulatory requirements related to the renovation of the façade of the subject building; all persons consulted regarding the renovation of the façade of the subject building; and all persons who performed an inspection of the work and/or completed project of the renovation of the façade of the subject building.

b) PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that co-defendants set forth in writing the names and addresses of all witnesses upon whose testimony you will rely to prove or disprove any fact, occurrence, circumstance or condition which forms the basis of the Verified Amended Complaint and/or co-defendants' Counter-claims, Cross-claims and/or Affirmative Defenses. If no such witnesses are known to you, so state in the sworn reply to this demand. The undersigned will object upon trial to the testimony of any witnesses not so identified.

II. **DISCOVERY AND INSPECTION OF ANY STATEMENT OF A PARTY REPRESENTED BY THE UNDERSIGNED**

PLEASE TAKE FURTHER NOTICE, that Westhab hereby demands pursuant to

CPLR §§ 3101 and 3120 that co-defendants set forth in writing and under oath or produce to the undersigned and permit the undersigned to discover, inspect and copy each and every oral and written statement made by or taken from Westhab, their agents, servants, or employees, which statement(s) is(are) now in your possession, custody, or control or in the possession, custody or control of any party which you represent in this action.

**III. DISCOVERY AND INSPECTION OF GOVERNMENTAL AGENCY RECORDS**

PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that co-defendants permit the undersigned to discover, inspect and copy all records generated by the Department of Health (hereinafter "DOH"), Department of Buildings, and any other Federal, State, City, County or Municipal agency, relative to inspections, violations, permits, variances, applications and/or other documents generated by said agency(ies) regarding the renovation of the façade of the subject building.

**IV. DISCOVERY AND INSPECTION OF PHOTOGRAPHS**

a) PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that co-defendants permit the undersigned to discover, inspect and copy photographs of the subject building and/or subject premises referred to in the Verified Amended Complaint, which depict the condition of subject premises and building at any time during the plaintiff's alleged residence therein. This demand calls for actual reprints from the negatives or duplicate originals, **not a Xerox, black and white copy of the print.**

b) PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that co-defendants permit the undersigned to discover, inspect and copy all video images which you claim depict or otherwise represent the subject building or subject premises

during the relevant period herein. This demand calls for actual reprints from the negative or duplicate originals.

c) PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that, for each response above, you identify the photographer/videographer, the date of the recording, and the manner of said recording (e.g., digital camera, 35 mm camera, mini dv, etc.).

d) PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that you maintain the original media in a secure environment so as to avoid contamination, deterioration and/or disposal, including the original digital copy with the source code, for all material responsive to this demand herein.

**V. DISCOVERY AND INSPECTION OF TEST RESULTS ON SUBJECT BUILDING**

PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that co-defendants permit the undersigned to discover, inspect and copy all records reflecting any tests performed and results generated on the subject premises and/or building on co-defendants' behalf.

**VI. DISCOVERY AND INSPECTION OF REPORTS, CITATIONS AND VIOLATIONS**

PLEASE TAKE FURTHER NOTICE, that Westhab hereby demands pursuant to CPLR §§ 3101(g) and 3120 that co-defendants permit the undersigned to discover, inspect and copy any written reports, citations or violations whether in your possession, custody, care or control or otherwise, which were issued as a result of or relative to the facts, occurrences or circumstances referred to in the Complaint, and that you produce duly executed authorizations for the release of same.

**VII. DISCOVERY AND INSPECTION OF WRITTEN COMPLAINTS**

PLEASE TAKE FURTHER NOTICE, that Westhab hereby demands pursuant to CPLR § 3120 that co-defendants permit the undersigned to discover, inspect and copy the contents of any written complaints which co-defendants made and/or received relative to the renovation of the façade of the subject building.

**VIII. DISCOVERY AND INSPECTION OF DOCUMENTS**

PLEASE TAKE FURTHER NOTICE that defendants hereby demand that you permit the undersigned to discover, inspect and copy any and all written communications, documents and records (as defined above) in your possession, custody, care or control which relate to any of the allegations contained in the Complaint, including but not limited to:

- a. written contracts or agreements relative to the renovation of the façade at the subject building, including, but not limited to:
  - i. contracts or agreements between Westhab and co-defendant(s), including all bids, contract documents, specifications, indexes, plans, drawings, as-built plans, mechanicals, shop drawings, purchase orders, change orders, punch lists, add ons, diagrams and other records concerning the preparation of the document;
  - ii. contracts/sub-contracts or agreements between co-defendants, including all bids, contract documents, specifications, indexes, plans, drawings, as-built plans, mechanicals, shop drawings, purchase orders, change orders, punch lists, add ons, diagrams and other records concerning the preparation of the document;
  - iii. contracts/sub-contracts or agreements between co-defendants and any third parties, including all bids, contract documents, specifications, indexes, plans, drawings, as-built plans, mechanicals, shop drawings, purchase orders, change orders, punch lists, add ons, diagrams and other records concerning the preparation of the document; and
  - iv. if a consulting engineer was hired and/or retained by any co-defendant, produce a copy of the contract, if any;
- b. any logs generated in the regular course of business or operations

or practices of the co-defendants relative to the renovation of the façade at the subject building, including daily and/or weekly job reports, job logs, progress records, manpower reports, superintendent's records, project manager's records and/or diaries prepared and/or maintained by the general contractor/construction manager/project manager/supervisor;

- c. copies of the minutes of all job, safety and gang box meetings held during the renovation of the façade of the subject building;
- d. written accident and/or incident reports made in the regular course of business or operations or practices of the co-defendants (CPLR § 3101(g));
- e. a full and complete copy of the general contractor's/construction manager's project file. If said file is voluminous, Westhab requests that an index be prepared and supplied to the undersigned at this time detailing and containing the contents of said project file;
- f. copies of all OSHA correspondence received by co-defendants, including OSHA inspections, Notice of Violations, Notice of Negotiation and resolution letters received from OSHA;
- g. copy of the site safety plan; and
- h. **any documents co-defendants intend to introduce at the time of trial, to the extent not already provided in response to any other demand herein.**

**IX. DISCOVERY OF EXPERT WITNESSES**

PLEASE TAKE NOTICE that co-defendants are hereby required to furnish the attorneys for Westhab, pursuant to CPLR § 3101(d), with discovery as to each person whom they expect to call as an expert in this litigation including:

- a. the identity of every expert retained or employed by you in anticipation of this litigation or preparation for trial whom you expect to call as a witness at the trial;
- b. the qualifications of each person that you intend to call as an expert witness at the time of trial;
- c. the subject matter in reasonable detail on which the expert is expected to testify;

- d. a detailed statement of the substance of the facts and opinions upon which the expert is expected to testify;
- e. a detailed summary of those facts and opinions;
- f. the resumes and/or curriculum vitae of each expert whose testimony you will rely upon at the time of trial, with regard to the subject of this lawsuit; and
- g. whether each named expert will testify as an expert at the trial of this case.

With respect to any and all proposed medical expert witnesses, indicate:

- a. the area(s) of expertise;
- b. educational background, including the names and addresses of each medical school attended;
- c. the names and addresses of each hospital at which an internship and residence was served and the date thereof;
- d. the name and address of each hospital in which privileges of admitting patients is extended, and the nature of the privilege;
- e. the state(s) in which this individual is licensed to practice medicine;
- f. each state in which this individual is actively engaged in the practice of medicine;
- g. societies which said expert is a member of and the dates of each membership;
- h. the present board certification and/or qualifications, if any, and the dates given to each proposed expert witnesses;
- i. the subject matter in which each expert is expected to testify;
- j. the substance of these facts and opinions to which each expert is expected to testify, including a summary of his or her grounds for each opinion.

With respect to any and all proposed economists, indicate:

- a. a specific description of the losses for which economist calculations

- will be made;
- b. the undiscounted amount of such loss;
  - c. the present value of the dollar amount of such loss;
  - d. the discount rate applied by such person to determine present value and the reason for such rate;
  - e. the number of years involved in such discounting process and the opinions and facts on which the economist bases the determination of that number of years;
  - f. each factor other than those which have been noted above, which the person has used in calculating the net amount of the present value of the loss and identify specifically the source material and page number on which such person basis his opinion or draws the facts on which he relied;
  - g. with regard to any information secured from any text, publication, graph, chart or study other than as already designated above upon which the expert relied in reaching his conclusions, describe or designate such publication or matter in writing with sufficient specificity to permit its identification and location by defendant;
  - h. in detail, state precisely the manner in which the person reached his or her conclusions, showing the mathematical calculations involved;
  - i. with regard to any report, memoranda, or any other matter in writing showing in whole or in part the expert's conclusions or the facts upon which such conclusions were based, state the date of such writing and the names and addresses of person(s) having copies of it;
  - j. the identities and qualifications of all expert witnesses and other persons known to you to have made studies or analysis as to the alleged loss involved herein.

**X. DISCOVERY AND INSPECTION OF INSURANCE COVERAGE AND POLICIES**

PLEASE TAKE FURTHER NOTICE that Westhab hereby demands that co-defendants produce true and exact copies of all insurance agreements in effect, which

any insurance company may be liable to satisfy all or part of a judgment which may be entered in the within action or to indemnify or reimburse for payments made to satisfy a judgment herein. Set forth the following:

2. identify the insurance company;
3. the limits of said policy(ies), including maximum amount of coverage per person per accident and any aggregate amount(s); and
4. identify any excess or umbrella coverage, including the maximum amount of coverage per person per accident and any aggregate amount(s).

PLEASE TAKE FURTHER NOTICE that a motion will be made at the trial of this action, pursuant to the CPLR to preclude co-defendants from introducing evidence regarding any of the information and documents heretofore requested unless the aforementioned information and documents are served as demanded.

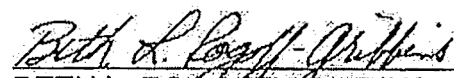
PLEASE TAKE FURTHER NOTICE, that your failure to comply within thirty (30) days of receipt of this Demand will result in an application for sanctions pursuant to the CPLR.

PLEASE TAKE FURTHER NOTICE, that the foregoing are continuing demands and that if any of the above items are obtained after the date of this Demand, they are to be furnished prior to trial.

Dated: Garden City, New York  
June 2, 2015

KARDISCH LAW GROUP PC

By:



BETH L. ROGOFF-GRIBBINS, ESQ.

Attorneys for Defendants

ELM STREET ASSOCIATES, L.P. and  
WESTHAB, INC.



Office & P.O. Address  
585 Stewart Avenue, Suite 740  
Garden City, New York 11530  
(516) 255-4160  
Fax: 516-255-4163  
Email: [blrogoff@kardischlaw.com](mailto:blrogoff@kardischlaw.com)  
Our File No.: 3177

TO: THE ORLOW FIRM  
Attorneys for Plaintiffs  
71-18 Main Street  
Flushing, New York 11367  
Attn: Brian S. Orlow, Esq.  
(718) 544-4100

CONGDON, FLAHERTY, O'CALLAGHAN, ESQS.  
Attorneys for Defendant  
RUBAND CONTRACTING CORP.  
333 Earle Ovington Blvd., Suite 502  
Uniondale, New York 11553  
Attn: Charles M. Schnepf, Jr., Esq.  
516-542-5900 ext. 1334

CERTAPRO PAINTERS LTD.  
150 Green Tree Road, Suite 1003  
Oaks, PA 19456

EMBE HOME SOLUTIONS, INC.  
5 John Brown Road  
Katonah, New York 10536-3244



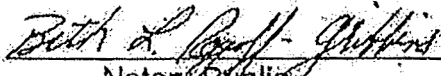
Attn: Charles M. Schnepp, Jr., Esq.  
516-542-5900 ext. 1334

CERTAPRO PAINTERS LTD.  
150 Green Tree Road, Suite 1003  
Oaks, PA 19456

EMBE HOME SOLUTIONS, INC.  
5 John Brown Road  
Katonah, New York 10536-3244

  
CARYN GUGGERI

Sworn to before me this  
2<sup>nd</sup> day of June, 2015.

  
Notary Public

BETH L. ROGOFF GRIBBINS  
Notary Public, State of New York  
No. 02R05074453  
Qualified in Nassau County  
Commission Expires March 17, 2019

# Exhibit F

GOLDBERG SEGALLA<sup>LLP</sup>Michael E. Longo | Partner  
Direct 646.292.8725 | mlongo@goldbergsegalla.com

June 27, 2018

Via Certified Mail/R.R.R. &  
Regular Mail

Marshall Dennehey Warner Coleman & Goggin, P.C.  
105 Maxess Road, Suite 303  
Melville, New York 11747  
Attn: Mark J. Volpi, Esq.

Re: *M.W., an infant under the age of fourteen years by Latisha White, her mother and natural guardian and Latisha White, Individually v Elm Street Associates, L.P., Westhab, Inc. Ruband Contracting Corp., Embe Home Solutions, Inc. and Certa Propainters, Ltd.*; Supreme Court, Nassau County; Index No.: 600685/13  
Scottsdale Excess Policies: XBS0006762 (2/11/10-4/29/10);  
XBS0014323 (4/28/11-4/28/12); XLS0081797 (4/29/12-10/3/12)  
Your File No.: 40318.00145  
Our File No.: 14002.0939

Dear Mr. Volpi:

On behalf of Scottsdale Insurance Company ("Scottsdale"), we acknowledge receipt of your recent letter with respect to the captioned matter. We advise that said correspondence is incorrect in law and fact.

Supplementing and incorporating Scottsdale's denials of coverage dated, May 11, 2018, and June 1, 2018 in their entirety, we fully reiterate Scottsdale's disclaimer. As such, Scottsdale will neither defend nor indemnify Ruband Contracting Corp., Embe Home Solutions, Inc. and Certa Propainters, Ltd. (collectively "defendants") under any excess policy issued by Scottsdale in connection with the aforementioned litigation. In the absence of any coverage obligations, Scottsdale will also not appear at any mediation, including the July 9, 2018 mediation referenced in your correspondence.

By way of background, approximately 5 years ago in 2013, a Complaint was filed by infant M.W. and her parent Latisha White alleging bodily injury. Notice of the "occurrence", claim or suit was never provided to Scottsdale. Furthermore, the exact date and specifics of the Complaint remain unknown as same has also never been forwarded to Scottsdale. Nevertheless, approximately 2 years later, and three years from the present, a Verified Amended Complaint was filed on June 1, 2015.

On March 13, 2018, Scottsdale received your correspondence advising that defendants were named in an action. Of note, your correspondence provides incorrect dates concerning the alleged exposure dates of plaintiffs, misstating the claimed dates by over two years. At the

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Office Location: 711 3rd Avenue, Suite 1900, New York, 10017-4013  
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*M.W., an infant under the age of fourteen years by Latisha White, her mother and natural guardian and Latisha White, Individually v Elm Street Associates, L.P., Westhab, Inc. Ruband Contracting Corp., Embe Home Solutions, Inc. and Certa Propainters, Ltd*

June 27, 2018

Page 2 of 4

present time, we attribute same to mere error and not any conscious attempt to obtain coverage not due to defendants. Moreover, you provide incorrect information concerning a Scottsdale Policy, including errors in inception dates, policy numbers and provide an immaterial Certificate of Liability Insurance. However, you advise that defendants are being provided a defense by Main Street America Group ("MSA") and if Scottsdale has any questions or concerns to contact you directly.

As your correspondence contained numerous errors and deficiencies, including insufficient information under which to perform an investigation, upon receiving your correspondence on March 21, 2018, Scottsdale contacted you the same day to request additional and necessary information, including a copy of the complaint and MSA's coverage position letter so that it could immediately undertake its investigation and provide its coverage determination soonest. For unknown reasons, you failed to provide any response or reply throughout the month of March. Having received no reply from you in over a month, on April 25, 2018, Scottsdale was then forced to again leave you another message and follow up email. Only then did you respond, advising that you did not even have a copy of the underlying insurer's coverage determination. You were able to provide at this belated time, again nearly three years after it was filed, a copy of the Verified Amended Complaint. Based on its review of the Verified Amended Complaint, approximately two weeks later, Scottsdale issued its disclaimer of coverage to defendants on various grounds.

Curiously, on June 1, 2018, 71 days after it was initially requested, and after Scottsdale issued its declination, you were finally able to provide Scottsdale with a copy of MSA's coverage position letter. Same was of no import as while it acknowledged MSA's receipt of the Complaint in 2015, it entirely lacked any coverage discussion, policy language or analysis. We note that you again misrepresented the claimed dates of exposure and then requested that Scottsdale revise its coverage position, despite an abject lack of support or basis for any such reconsideration.

Inexplicably, on June 8, 2018, you stated that defendants disagree with Scottsdale's coverage position, ignoring the fact that same was issued shortly after receiving some, albeit not all, of the requested information from your office. As you are hopefully aware, a disclaimer issued within three weeks of receiving necessary information to undertake an investigation is undeniably timely under New York law. Despite your attempted argument that the purported tender was made "approximately 50 days" prior to the issuance of the disclaimer, Scottsdale will not and cannot be prejudiced by your abject lack of diligence and your negligence, or purposeful refusal, in failing to provide any response. Also, your statement that Scottsdale's "disclaimer does not indicate why any further investigation was needed for it to disclaim coverage" is odd as such statements are not typically included in a disclaimer and is nonetheless belied by factual evidence wherein Scottsdale repeatedly requested information from you ". . . to complete our analysis . . ." While the remainder of your correspondence contains well cited canon concerning disclaimer provisions, we note that none of the cited cases concern counsel who ignored repeated requests for information or regard a purported "tender" letter that contained numerous errors as well as a dearth of information preventing a coverage determination.

*M.W., an infant under the age of fourteen years by Latisha White, her mother and natural guardian and Latisha White, Individually v Elm Street Associates, L.P., Westhab, Inc. Ruband Contracting Corp., Embe Home Solutions, Inc. and Certa Propainters, Ltd*

June 27, 2018

Page 3 of 4

We find that there is no dispute that Scottsdale has no obligations in the instant matter under any policy due to: untimely notice of the "occurrence", claim or suit; lack of an "occurrence" during the applicable time period; and the clear and unambiguous wording of the Lead Contamination Exclusion, all of which have been previously set forth in Scottsdale's disclaimer. Accordingly, we do not believe it necessary to further discuss the universally held positions that it is an insured's duty to establish coverage, no estoppel could be present due to the lack of prejudice suffered by the defendants, estoppel cannot be used to create coverage where it does not exist, and the fact that it is reasonable for an insurer to investigate a claim prior to disclaiming coverage so that the disclaimer is based on verifiable evidence. In sum, your argument that Scottsdale's disclaimer was improper is simply wrong and unfounded under New York law.

Accordingly, Scottsdale reaffirms and reiterates its prior coverage declination with respect to defendants. Scottsdale has no obligations under any policy with respect to the captioned litigation, defense or otherwise, and Scottsdale again denies coverage to defendants. In the absence of any coverage obligations, Scottsdale will not appear at the July 9, 2018 mediation.

We hope that the above clarifies your misconceptions.

Scottsdale reserves the right to assert other terms, conditions, and provisions of the Scottsdale Policies, and to amend and supplement this letter with respect to the captioned matter at any time in the future. None of the acts of Scottsdale's agents, attorneys or employees are to be construed as a waiver or operate as an estoppel with respect to any of Scottsdale's rights under any policy.

Very truly yours,

*/s/ Michael E. Longo*

Michael E. Longo

cc: Via Certified Mail - Return Receipt Requested

The Orlow Firm  
Attorneys for Plaintiffs  
71-18 Main Street  
Flushing, New York 11367  
Attn: Brian S. Orlow, Esq.

*M.W., an infant under the age of fourteen years by Latisha White, her mother and natural guardian and Latisha White, Individually v Elm Street Associates, L.P., Westhab, Inc. Ruband Contracting Corp., Embe Home Solutions, Inc. and Certa Propainters, Ltd*

June 27, 2018

Page 4 of 4

Elm Street Associates, L.P.  
c/o Havkins Rosenfeld Ritzert & Varriale, LLP  
170 Hamilton Avenue, Suite 210  
White Plains, New York 10601

Westhab, Inc.  
c/o Havkins Rosenfeld Ritzert & Varriale, LLP  
170 Hamilton Avenue, Suite 210  
White Plains, New York 10601





# NYSCEF - Nassau County Supreme Court Payment Receipt



This is an automated response for Supreme Court cases. The NYSCEF site has received your electronically filed documents for the following case.

600685/2013

M W INF. et al - v. - ELM STREET ASSOCIATES, L.P. et al

## Documents Received on 10/17/2018 04:36 PM

Doc #	Document Type	Control #	Motion #	Fee
165	ORDER TO SHOW CAUSE ( PROPOSED ) (Redacted per 202.5(e) or 206.5(e))			\$45.00
<i>Total Fee</i>				<b>\$45.00</b>

## Payment Information

Generated Receipt #: 0000473708  
 Payment Type: **VISA/MC**  
 Date Paid: **10/17/2018**  
 Fee Amount: **\$45.00**  
 Authorization Code: **056310**  
 Comments:

## Filing User

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# NYSCEF - Nassau County Supreme Court Payment Receipt



600685/2013

M W INF. et al - v. - ELM STREET ASSOCIATES, L.P. et al

## Authorized Agent

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Firm/Business Name: **Havkins, Rosenfeld, Ritzert & Varriale, LLP**

Work Address: 170 Hamilton Avenue  
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White Plains, NY 10601

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Maureen O'Connell, Nassau County Clerk - <http://www.nassaucountyny.gov/agencies/Clerk/index.html>

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# NYSCEF - Nassau County Supreme Court

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M W INF. et al - v. - ELM STREET ASSOCIATES, L.P. et al

Assigned Judge: Nassau DCM-TJ

### Documents Received on 10/17/2018 04:36 PM

Doc #	Document Type	Motion #
165	ORDER TO SHOW CAUSE ( PROPOSED ) (Redacted per 202.5(e) or 206.5(e))	
166	MEMORANDUM OF LAW IN SUPPORT (Redacted per 202.5(e) or 206.5(e))	
167	AFFIDAVIT OR AFFIRMATION IN SUPPORT (Redacted per 202.5(e) or 206.5(e))	
168	EXHIBIT(S) A (Redacted per 202.5(e) or 206.5(e))	
169	EXHIBIT(S) B (Redacted per 202.5(e) or 206.5(e))	
170	EXHIBIT(S) C Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
171	EXHIBIT(S) D (Redacted per 202.5(e) or 206.5(e))	
172	EXHIBIT(S) E (Redacted per 202.5(e) or 206.5(e))	
173	EXHIBIT(S) F (Redacted per 202.5(e) or 206.5(e))	

### Filing User

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# NYSCEF - Nassau County Supreme Court

## Confirmation Notice



600685/2013

M W INF. et al - v. - ELM STREET ASSOCIATES, L.P. et al

Assigned Judge: Nassau DCM-TJ

### Authorized Agent

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Firm/Business Name: **Havkins, Rosenfeld, Ritzert & Varriale, LLP**Work Address: **170 Hamilton Avenue  
Suite 210  
White Plains, NY 10601**

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VOLPI, MARK JOSEPH - mjvolpi@mdwcg.com

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File No.: 11990-534  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Index No. 600685/13

-----X  
M.W., AN INFANT UNDER THE AGE OF FOURTEEN (14)  
YEARS, BY LATISHA WHITE, HER MOTHER AND  
NATURAL GUARDIAN, and LATISHA WHITE,  
INDIVIDUALLY,

Plaintiffs,

-against-

ELM STREET ASSOCIATES, L.P., WESTHAB, INC., RUBAND  
CONTRACTING CORP., EMBE HOME SOLUTIONS, INC., and  
CERTA PROPAINERS, LTD., AND COLOR WHEEL  
PAINTING

Defendants.

-----X

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**ORDER TO SHOW CAUSE, MEMORANDUM OF LAW, AND  
AFFIRMATION IN SUPPORT**

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**H A V K I N S  
R O S E N F E L D  
R I T Z E R T &  
V A R R I A L E , L L P**



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