

NO. 78287-3

SUPREME COURT OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR., and
LISA BLUME,

Petitioners,

v.

GULF UNDERWRITERS INSURANCE COMPANY and AMERICAN
BUSINESS & PERSONAL INSURANCE, INC.,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

Petitioners, Planet Earth Foundation and John Keith Blume, Jr. and Lisa Blume (collectively “Planet Earth”), respectfully submit that the Court of Appeals erred in holding that their liability insurer, Respondent Gulf Underwriters Insurance Company (“Gulf”), had no duty to defend them against the underlying lawsuit, where:

- the liability insurance policy issued by Gulf to Planet Earth contained an exclusion for liability “with respect to the rendering of, or failure to render professional services for any party”; and where
- the underlying lawsuit against Planet Earth alleged tortious financial mismanagement, misrepresentation, and trademark infringement, all committed in the course of tasks that required no specialized knowledge or skills; and where
- the “professional services” exclusion from coverage was reasonably susceptible to two interpretations in the context of the underlying lawsuit, one of which would lead to coverage; and where
- Washington law, as clarified and strengthened by this Court’s decision in *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43 (2007), relieves a liability insurer from the duty to defend its insured only

if the underlying complaint, construed liberally in favor of triggering the duty to defend, consists solely of allegations “clearly not covered by the policy.” *Woo*, 161 Wn.2d at 60.

“The duty to defend is one of the main benefits of the insurance contract.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561 (1998) (internal quotation and citation omitted). Indeed, “[t]he duty to defend can be the most important coverage of a commercial general liability policy and comprises an increasingly significant part of the insurer’s exposure.” *Pilkington North Am. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 127 (Ohio 2006). Gulf did **not** defend Planet Earth and pursue a declaratory judgment action seeking to terminate its obligation; instead it left its insureds to fend for themselves. For the reasons set forth herein and in Planet Earth’s other briefs now before this Court, Gulf’s actions were in breach of its duty to defend.

This Court should reverse the decision below, hold that Gulf had a duty to defend Planet Earth and breached that duty, award Planet Earth its attorneys’ fees and costs incurred to date, and remand the case to King County Superior Court for further proceedings.

II. ASSIGNMENTS OF ERROR

Planet Earth seeks this Court’s review of the following errors in the decision of the Court of Appeals, Division I: (a) the affirmance of the

Superior Court's denial of Planet Earth's Motion for Partial Summary Judgment Re: Duty to Defend; and (b) the denial of Planet Earth's claim for attorney fees and costs under the rule in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52 (1991).

III. STATEMENT OF THE CASE

Planet Earth incorporates by reference the Statement of the Case set forth at pages 2 through 10 of its Petition for Discretionary Review.

IV. ARGUMENT

A. **Gulf's Refusal to Defend is Contrary to this Court's Holding in *Woo v. Fireman's Fund* Concerning the Standard for Triggering the Insurer's Duty to Defend.**

1. ***Woo* Further Strengthened the Duty to Defend in Washington, and is Irreconcilable With Gulf's Denial.**

Over the past 25 years, this Court has made clear, time and again, that the liability insurer's duty to defend is exceptionally robust. The duty is broader than and independent of the duty to indemnify. *E.g.*, *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 690 (2000). The duty is readily triggered; if the underlying lawsuit against the insured, construed liberally, **could** result in the insured being held liable on a covered claim, the insurer must defend. *E.g.*, *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 908 (1986); *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 197 (1987). The duty is difficult to terminate; the insurer cannot look to evidence outside the

pleadings in order to terminate the duty, but the insured may rely on such extrinsic evidence to trigger it. *E.g., Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 67-68 (2000). The insurance policy language granting coverage is interpreted broadly in favor of coverage, and policy exclusions are interpreted narrowly in favor of coverage. *E.g., State Farm Mut. Auto Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718 (1998); *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678,682 (1994). If there is any uncertainty as to whether a defense is owed, the insurer must provide a defense and seek a declaratory judgment of no coverage. *E.g., Truck Ins. Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761 (2002). If an insurer fails to provide a defense in breach of its duty, it does so at its peril and will be barred from raising any defenses to indemnity coverage. *VanPort Homes*, 147 Wn.2d at 755. For the reasons detailed in their briefs below and their Petition for Discretionary Review, Planet Earth respectfully submits that the decision below, relieving Gulf of its duty to defend, was contrary to the body of case law governing the duty to defend that was in place at the time of the Court of Appeals' decision in 2005.

However, this Court's decision in *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43 (2007), left no doubt as to the strength of the duty to defend in Washington or that Gulf's denial in the instant case breached that duty. In *Woo*, the Court reinforced all of the foregoing aspects of the duty to

defend and added to them in one important respect. Two aspects of the *Woo* decision bear emphasis in the context of this Court’s evaluation of Gulf’s refusal to defend Planet Earth. First, *Woo* adopted what might fairly be termed a “hair trigger” for the duty to defend—the “conceivably covered” standard. The Court held that “the duty to defend is triggered if the insurance policy **conceivably covers** the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured’s liability.” *Woo*, 161 Wn.2d at 53. The “conceivably covered” standard is the distillation and culmination of the Court’s last 25 years of jurisprudence concerning the liability insurer’s duty to defend.

Second, the Court held, for the first time, that a liability insurer must resolve any **legal** uncertainty—*e.g.*, as to whether its interpretation of a contested policy exclusion is correct—in favor of providing its insured with a defense.¹ In *Woo* the insurer, Fireman’s Fund, had obtained a formal legal opinion from an attorney as to whether the insurer had a duty to defend its insured, a dentist. 161 Wn.2d at 60. The attorney opined that Fireman’s Fund was not obligated to defend the personal-injury action against the dentist. That opinion was subject to various reservations and caveats, however, due to the particular facts of the case and the legal

¹ The insurer is free, of course, to seek to eliminate that uncertainty by pursuing a declaratory-judgment action. The insurer must defend, however, unless and until it obtains a judicial declaration relieving it of its duty. See *VanPort*, 147 Wn.2d at 761.

arguments that had been advanced on behalf of the insured. *Id.* This Court took the opportunity to instruct insurers in Washington as to their duties in the face of such legal uncertainty:

Fireman's reliance on [coverage counsel's] equivocal advice [in] this case flatly contradicts one of the most basic tenets of the duty to defend. The duty to defend arises based on the insured's **potential** for liability and whether allegations in the complaint **could conceivably** impose liability on the insured. *Truck Ins., 147 Wn.2d at 760*. An insurer is relieved of its duty to defend only if the claim alleged in the complaint is "clearly not covered by the policy." *Id.* Moreover, an ambiguous complaint must be construed liberally in favor of triggering the duty to defend. *Id.*

Fireman's is essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, Fireman's did the opposite—it relied on an equivocal interpretation of case law to give **itself** the benefit of the doubt rather than its insured

161 Wn.2d at 60 (emphasis in original).

Planet Earth has addressed the substantive coverage issue in this case—the inapplicability of Gulf's "professional services" exclusion to the underlying NYU lawsuit—in the balance of this Supplemental Brief and in its briefs before the Court of Appeals. For the reasons set forth herein and in those briefs, the "professional services" exclusion in the Gulf policy

presents a far less compelling and certain coverage defense than did the limitations on the grant of coverage for “dental services” in *Woo*.

Gulf’s own conduct and testimony demonstrate that it shared this uncertainty concerning the meaning of its own policy language. As detailed in Planet Earth’s Brief of Appellants before the Court of Appeals, pp. 7-10, Gulf’s claim handler, Mr. Rizzuto, was “not comfortable denying coverage for all [of the underlying] claims” when he first received Planet Earth’s claim, and instead referred the matter to coverage counsel. CP 222. Further, Gulf testified at deposition that it had no understanding of what, if any, “professional services” Planet Earth provided NYU, or what the policy possibly could cover if Gulf’s current position were correct. CP 269.

The Court must evaluate the substantive coverage arguments against the backdrop of rules, including those strengthened and created by *Woo*, governing the trigger of the duty to defend. The *Woo* decision confirmed, most importantly, that the liability insurer’s duty to defend is subject to the “conceivably covered” standard, and that all legal uncertainty must be resolved in favor of defending—even if the insurer simultaneously files a declaratory judgment action seeking to terminate its duty. Planet Earth submits that the NYU lawsuit more than satisfied that

standard, and Gulf's refusal to defend was in breach of its duty under the policy.

2. *Woo's Holding Interpreting a Coverage Grant is Fully Consistent with Planet Earth's Position as to the Application of the Gulf Professional-Services Exclusion.*

At the time Planet Earth filed its Petition for Discretionary Review, this Court had not yet granted review in *Woo*. The Court of Appeals, Division I, had reversed the Superior Court and held that the allegations of tortious conduct made against the insured dentist—the insertion and photographing of false boar-tusk-like teeth in the mouth of an unconscious patient/employee—fell outside of the grant of coverage under the dentist's professional liability insurance policies. *Woo v. Fireman's Fund Ins. Co.*, 128 Wn. App. 95 (2005). The Court of Appeals held, in essence, that such tortious conduct was too far removed from the legitimate practice of dentistry to fall within the policy's coverage for "dental services." 128 Wn. App. at 104-05. In its Petition, Planet Earth pointed out that the Court of Appeals' decision in *Woo* was inconsistent with the Court of Appeals' decision in the instant case: in *Woo*, tortious conduct concomitant with but separate from the actual professional services was held to be **outside** the scope of a coverage grant for "dental services," while in Planet Earth's case tortious conduct, also concomitant with but separate from the intellectual work being performed by the insured for its

client NYU, was held to be **within** an exclusion for “professional services.”

The fact that this Court reversed the Court of Appeals’ decision in *Woo* does not mean that the decision now disfavors Planet Earth’s position in the instant case. To the contrary, two aspects of this Court’s decision make *Woo* fully consistent with and supportive of Planet Earth’s entitlement to a defense from Gulf. First, the Court decided the substantive coverage issue in *Woo* on narrow grounds. The Court based its ruling on the operative term of the coverage grant in the Fireman’s Fund dental liability policy, which was “dental services.” *Woo*, 161 Wn.2d at 55. The policy defined “dental services” as “all services which are performed the practice of the dentistry profession as defined in the business and professional codes of the state where you are licensed.” *Id.* The Court noted that the Washington statutory definition of the practice of dentistry, at RCW 18.32.020, provides in part: “A person practices dentistry, within the meaning of this chapter, who . . . (3) owns, maintains or operates an office for the practice of dentistry” *Id.* The Court’s holding was as follows: “Because RCW 18.32.020 defines the practice of dentistry so broadly, the fact that [the insured’s] acts occurred during the operation of a dental practice conceivably brought his actions within the professional liability portion of his policy.” *Id.* at 57.

The Court thus chose not to make any broad pronouncement concerning the dividing line between “professional services” and other acts undertaken by professionals. The holding in *Woo*, therefore, does not support an argument that the underlying claims against Planet Earth were within Gulf’s “professional services” exclusion, for that exclusion is **not** broadened by the incorporation of a broad Washington statute, as was the coverage grant in Dr. Woo’s Fireman’s Fund policy. The exclusion at issue in the instant case applies only to an “act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party.” CP 114. The Gulf policy does not define “professional services.”

Second, it must be emphasized that the *Woo* case involved the interpretation of a **grant** of coverage or “insuring agreement,” *i.e.*, the policy term that defines what the policy affirmatively **does** cover. The instant case, in contrast, involves the interpretation of an **exclusion** from coverage. As set forth above, Washington law long has provided that coverage grants are interpreted differently than are coverage exclusions; the former are interpreted broadly in favor of coverage, while the latter are interpreted narrowly in favor of coverage. *Supra* p. 3. In sum, then, *Woo* only favors Planet Earth’s position—its holding on the specific coverage

issue is inapposite, but its strengthening of the duty-to-defend standard in Washington applies squarely in favor of Planet Earth and against Gulf.

B. The Court of Appeals Erred When it Failed to Find the Professional-Services Exclusion Ambiguous as Applied to the NYU Lawsuit, and that NYU's Allegations Created a Potential for Coverage.

1. Recent Appellate Decisions Further Compel the Conclusion that the Excluded Harm is Only that Which Results from the Actual Professional Work, and Not Ordinary Tasks that Do Not Involve Specialized Knowledge or Skill.

The Court of Appeals' decision is fundamentally flawed in that it fails to distinguish between liability that results from "professional services"—work that requires specialized knowledge or skill and is fundamentally mental or intellectual²—and liability that results from other work that is performed by a "professional" but does not employ such specialized skill or training. The bulk of NYU's claims against Planet Earth did not claim damages resulting from any inadequacy of Planet Earth's work product or intellectual output—the content of the public-service campaign to promote NYU's child mental-health services. CP-

² For purposes of the argument in this Section III.B.1 only, Planet Earth assumes that the definition of "professional services" adopted by the Court of Appeals in this case, that from *Marx v. Hartford Acc. & Indem. Co.*, 157 N.W.2d 870 (Neb. 1968), applies where, as here, the insurance policy does not define "professional services." However, Planet Earth maintains that the Court should not supply any such definition where Gulf has chosen not to do so, and that the term "professional services" is inherently ambiguous when contained in an insurance policy issued to a non-profit public-service media agency, which business is outside the traditional professions such as architecture, engineering, law, and medicine. *See infra* p. 18.

139-204 (NYU's First Amended Complaint). Instead, NYU asserted claims for three groups of alleged tortious conduct that: (a) were distinct from Planet Earth's intellectual work product for NYU; and (b) did not draw on Planet Earth's specialized skill in the field of non-profit, public-service media agency:

1. Financial Mismanagement. NYU claimed that Planet Earth failed to account for NYU's money, failed to pay third-party vendors, and tortiously diverted NYU money to non-charitable purposes. CP 139; 158-60.
2. Pre-Contracting Misrepresentations. NYU claimed that Planet Earth tortiously misrepresented its capabilities so as to induce NYU to enter into the contract. CP 142-46; 199-200.
3. Misappropriation of NYU's Intellectual Property. NYU claimed that Planet Earth infringed on NYU's trademark "About Our Kids" and tortiously attempted to register NYU's trademark in a Planet Earth application to the U.S. Patent and Trademark Office. CP 139, 152, 203.

Planet Earth is a Washington non-profit public-service media agency that has operated since 1977. Planet Earth's core business is the creation of public-service media content pertaining to a wide variety of

social issues. Planet Earth’s business involves specialized knowledge and skills, but only with respect to the creation of effective content for public-service media. CP 66. Planet Earth and its principals do not purport to have specialized knowledge or skill in financial matters or the intricacies of intellectual-property law, and their clients, including NYU, do not engage them for those purposes.

In the time since the Court of Appeals’ decision in this case, at least three courts outside of Washington have held that the reach of “professional services” terms in insurance policies—whether in coverage grants or exclusions—is limited to liability that results from tasks that inherently required the application of the insured’s specialized knowledge or skill, and does not extend to collateral actions undertaken by a professional but that do not involve such knowledge or skill. In *Zurich American Ins. Co. v. O’Hara Regional Ctr. for Rehab.*, 529 F.3d 916 (10th Cir. June 18, 2008), the U.S. Court of Appeals for the Tenth Circuit considered an insurance dispute under liability policies issued to the operators of a rehabilitation nursing center. Following an audit of the insured’s records, the U.S. government brought suit against the insured under the False Claims Act, 31 U.S.C. § 3729(a), and analogous state laws, for damages resulting from inadequate and unlawful billing practices. *O’Hara*, 529 F.3d at *5.

The insured tendered the claim to its insurers under policies that covered “any act or omission in the furnishing or failure to furnish professional services” *Id.* at *7, n.4. The insurers declined to defend the underlying case on the ground that administrative tasks such as billing were not “professional services” within the meaning of the policies’ coverage-granting language.

The Tenth Circuit agreed with the insurers, and affirmed the District Court’s ruling in their favor. The appellate court held that “[a]lthough processing Medicare and Medicaid claims may be difficult and time consuming, the activity does not characterize a ‘professional service’” because those tasks “did not require the level of particularized knowledge necessary to be characterized as a professional service.” *Id.* at *23, *25. The Tenth Circuit’s reasoning is consistent with that of many other courts that have concluded that billing activities, even when conducted by a professional, are not the “professional services” of that actor for insurance purposes. *E.g., Atlantic Lloyd’s Ins. Co. of Texas v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472, 476-77 (Tex. App. 1998) (“To qualify as a professional service, the task must arise out of acts particular to the individual’s specialized vocation. We do not deem an act a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized

knowledge or training.”); *Medical Records Assocs., Inc. v. American Empire Surplus Lines Ins. Co.*, 142 F.3d 512, 514 (1st Cir. 1998) (billing activities of medical-records business not “professional services” because “even tasks performed by a professional are [outside a coverage grant for “professional services”] if they are ordinary activities achievable by those lacking the relevant professional training and experience.” (citations and internal quotations omitted)).

The Appellate Division of the New Jersey Superior Court recognized the same distinction in *S.T. Hudson Engineers, Inc. v. Pennsylvania Nat’l Mut. Cas. Co.*, 909 A.2d 1156 (N.J. App. 2006), which arose out of the tragic collapse of a pier on the shore of the Delaware River near Philadelphia. The victims harmed in the collapse sued an engineering firm that had inspected the pier on several occasions in prior years. The engineering firm, Hudson, tendered the lawsuits to its general-liability insurers. The policies in question were subject to exclusions for liability arising out of the firm’s “professional services.” *S.T. Hudson*, 909 A.2d at 1162. The insurers refused to defend Hudson, arguing that the underlying lawsuits alleged only defects in Hudson’s engineering work—the inspection of the pier and interpretation of the results.

Hudson, however, pointed to the underlying claimants’ additional allegations that the responsible engineers **actually** knew of the danger

posed by the pier, but simply failed to warn the pier's owners by passing on that information. The New Jersey appellate court agreed with Hudson, and applied the distinction between alleged defects in the engineers' professional, intellectual output itself, on the one hand, versus tortious conduct occurring during tasks that do not require specialized training or knowledge, on the other:

To be sure, allegations respecting a professional's failure to provide adequate engineering, supervisory, inspection, or architectural services or to discover or remedy a condition for which the professional services were engaged would necessarily fall within the ["professional services"] exclusion as **dependent** on the professional services provided. However, allegations encompassing the violation of a duty to provide information about a known danger resulting from either a negligent omission or commission, whether based upon the relationship of the parties or legal principle, are not dependent on the rendering of professional services. Instead, such allegations arise from the information actually possessed and not provided by a party obligated to disclose such information. Thus, for example, Robert Hudson's alleged failure to advise the owners of the pier and nightclub that the pier was in imminent risk of collapsing, after obtaining that information from Tyson, would not be excluded simply because he had previously done engineering work. So too, any negligent misrepresentation regarding the condition of the pier would relate to the appropriate disclosure of known information, rather than the failure to provide professional services.

S.T. Hudson, 909 A.2d at 1165-66 (emphasis added). At least three other recent decisions are to the same effect: *Utica Nat'l Ins. Co. of Texas v. American Indem. Co.*, 141 S.W.3d 198 (Tex. 2004) ("professional

services” exclusion in physicians’ policy not applicable to allegations of insecure **storage** of narcotics, as distinct from allegations of negligent dispensing of those narcotics to patients, where the latter required application of specialized knowledge and skill and the former did not); *General Ins. Co. of Am. v. City of New York*, 2005 U.S. Dist. LEXIS 35864 (S.D.N.Y. Dec. 23, 2005) (alleged negligence of social workers in placing and monitoring foster children held not to fall within “professional services” exclusion where “[c]lerks with no specialized training may have carried out these acts. The conduct, even if undertaken by social workers or supervisors, may have been so routine as to have been reflexive, and may not have involved any professional training or judgment.”); *Scottsdale Indem. Co. v. Hartford Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 2454 (E.D. Pa. Jan. 14, 2008) (claims of negligence against construction-site safety inspector not within “professional services” exclusion where the work performed “was something less than a vocation or calling and was closer to a proficiency in the performance of a task.” (citation and internal quotations omitted)).

In the instant case, the Court of Appeals—without analysis—rejected the distinction between those claims against Planet Earth that did flow from its actual intellectual work product, and thus Planet Earth’s and the Blumes’ specialized knowledge and skills, and those claims that

pertained to administrative tasks that did not. *See Planet Earth*, Slip. Op. at 6. The new decisions cited in this Supplemental Brief, as well as the many other decisions cited in Planet Earth's previous briefs, establish that this common-sense distinction is a fixture of the law of insurance throughout the United States. The Court of Appeals erred when it failed to apply the distinction to the claims against Planet Earth alleging financial mismanagement, pre-contracting misrepresentations, and misappropriation of intellectual property. The Court should reverse on that ground.

2. The Professional-Services Exclusion is Inherently Ambiguous When Contained in a Policy Issued to a Business Not Within the Traditional Concept of a "Profession."

Planet Earth contends that the Gulf "professional services" exclusion is inherently ambiguous where: (a) it appears in a policy issued to a non-profit public-service media agency, which is outside of the traditional professions such as law, medicine, engineering, and the like; and (b) the Washington legislature, in RCW 18.100.030(1), has defined "professional services" in a manner that clearly excludes Planet Earth's business. Planet Earth will not repeat those arguments in this Supplemental Brief, but instead incorporates by reference the discussions at pages 14-15 of its Brief of Appellants, pages 2-3 of its Reply Brief in

the Court of Appeals, page 18 of its Petition for Discretionary Review, and pages 5-7 of its Reply in Support of Discretionary Review.

C. Planet Earth is Entitled to Recover *Olympic Steamship Attorneys' Fees and Costs*.

For the reasons set forth herein and in Petitioners' other briefs before the Court pursuant to RAP 13.7(a), Gulf breached its duty to defend Planet Earth. If the Court reverses and remands this case, as it should, Planet Earth will be entitled to recover from Gulf all attorneys' fees and costs it incurred in this litigation to date. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52 (1991).

V. CONCLUSION

The underlying lawsuit alleged harm from conduct that was separate and distinct from Planet Earth's and the Blumes' intellectual work. Instead, NYU alleged harm from collateral conduct including financial mismanagement, misrepresentation prior to the formation of the business relationship, and misappropriation of intellectual property. None of that alleged tortious conduct arose out of tasks that required the application of specialized knowledge or skills on the part of Planet Earth.

The "professional services" exclusion is inherently ambiguous when placed in an insurance policy issued to a non-profit, public-service media agency. Even if the term "professional services" were not ambiguous and referred simply to work requiring specialized knowledge

and skills, NYU's tort allegations would fall outside of the undefined "professional services" that are excluded from coverage. Gulf's refusal to defend its insureds is irreconcilable with Washington's rules governing the duty to defend, particularly as those rules were clarified and strengthened by this Court's decision in *Woo*.

Accordingly, this Court should reverse the Court of Appeals' decision, hold that Gulf had a duty to defend Planet Earth and breached that duty, remand the case to King County Superior Court for further proceedings, and award Planet Earth its attorneys' fees and costs incurred in this litigation to date.

DATED this 11th day of August, 2008.

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