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United States for the Use and Benefit of  
6 Dixon Marine Services, Inc. and  
Dixon Marine Services, Inc.  
7

8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**  
11

12 UNITED STATES FOR THE USE AND ) Case No.: C-05-02039 SI  
13 BENEFIT OF DIXON MARINE SERVICES, )  
INC. and DIXON MARINE SERVICES, ) FIRST AMENDED COMPLAINT FOR  
14 INC., a California Corporation. ) BREACH OF CONTRACT AND  
Plaintiffs, ) RECOVERY UNDER MILLER ACT  
15 ) PAYMENT BOND  
vs. )  
16 )  
17 MASS EX CONSTRUCTION CO., a )  
California Corporation, and TRAVELERS )  
18 CASUALTY AND SURETY COMPANY OF )  
AMERICA, a Connecticut Corporation, )  
19 Defendants.  

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1 **JURISDICTION**

2 1. This Court has subject matter jurisdiction pursuant to the 28 U.S.C. § 1331 and  
3 the provisions of the Miller Act, 40 U.S.C. § 3133(b)(3)(B). The Court has pendent jurisdiction  
4 and supplemental jurisdiction over the state law claims alleged in this Complaint pursuant to 28  
5 U.S.C. § 1367.

6 **VENUE**

7 2. The contract at issue was to be performed and executed in Marin County and in  
8 Napa County, California. Venue therefore lies in the United States District Court for the  
9 Northern District of California pursuant to 40 U.S.C. § 3133(b)(3)(B) and 28 U.S.C. §  
10 1391(b)(2).

11 **INTRADISTRICT ASSIGNMENT**

12 3. Assignment in the San Francisco division of the United States District Court for  
13 the Northern District of California is proper pursuant to Rule 3-2(d) of the Civil Local Rules  
14 because a substantial part of the events giving rise to the claims alleged arose in Marin County  
15 and in Napa County, California.

16 **PARTIES**

17 4. Plaintiff Dixon Marine Services, Inc. (“DMS”) is a California corporation,  
18 organized and existing under the laws of the State of California, with its principal place of  
19 business in Inverness, California. DMS is a licensed contractor.

20 5. Defendant Mass Ex Construction Co. (“Mass Ex.”) is a California corporation,  
21 organized and existing under the laws of the State of California, with is principal place of  
22 business in Santa Cruz, California.

23 6. Defendant Travelers Casualty & Surety Company of America (“Travelers”), is a  
24 Connecticut corporation, organized and existing under the laws of the State of Connecticut and  
25 authorized to do business in the state of California.

1 **STATEMENT OF FACTS**

2 7. In or before July 2003, defendant Mass Ex contracted with the U.S. Army Corps  
3 of Engineers (“Army Corps”), on the federal project known as the “Napa River/Napa Creek  
4 Flood Protection Project,” pursuant to Contract No. DACW05-03-C-0007 (hereinafter “Prime  
5 Contract”). The Prime Contract included Bid Item 0025, which required Mass Ex to install,  
6 maintain and remove the turbidity curtain, and a Self Monitoring Program (“SMP”), which  
7 required Mass Ex to conduct daily water quality monitoring and analysis.

8 8. On July 2, 2003, Mass Ex obtained a Miller Act payment bond (hereinafter the  
9 “Bond”) from defendant Travelers in the amount of \$2,546,591.00, as required by the Army  
10 Corps. In the Bond, Travelers agreed to be bound “jointly and severally with” Mass Ex to make  
11 payment to all persons having a direct contractual relationship with Mass Ex or to any  
12 subcontractor of Mass Ex who furnished labor, material or both in the prosecution of the work  
13 provided for in the Prime Contract, in the event that Mass Ex failed to make prompt payment to  
14 such persons.

15 9. On or about July 29, 2003, Mass Ex contracted with plaintiff DMS (hereinafter  
16 the “Subcontract”) to furnish labor, materials, equipment and other facilities required to complete  
17 the work included in Bid Item 0025, as well as to perform the SMP daily water quality  
18 monitoring and analysis required by the Prime Contract and specifications.

19 10. Mass Ex agreed to pay DMS “net 30 days from date of Invoice” and to pay DMS  
20 interest on amounts due and outstanding after that time. The contract further entitles the  
21 prevailing party in any dispute to an award of costs and attorneys’ fees.

22 11. DMS completed its work on or about May 22, 2004, all of which work was  
23 furnished in the prosecution of the work provided for in the Prime Contract and specifications.  
24  
25



1 under Bid Item 0025 of the Prime Contract in the absence of the labor, services and materials  
2 that plaintiff provided.

3 22. Mass Ex has failed and refused to pay plaintiff for the labor, services and  
4 materials referenced herein.

5 23. Plaintiff has suffered damages and Mass Ex has been unjustly enriched as a result  
6 of Mass Ex's failure to pay plaintiff for the labor, materials and services provided by plaintiff.

7 **THIRD CLAIM**

8 (MILLER ACT PAYMENT BOND)

9 24. Plaintiff repeats and realleges paragraph 1 through 23 above as though  
10 fully set forth in this claim.

11 25. Travelers is obligated, pursuant to the Bond, to pay DMS for the labor, materials  
12 and services it furnished in the prosecution of the work provided for in the Prime Contract, and  
13 for which Mass Ex failed to make payment.

14 26. Travelers has failed to fulfill its obligation under the Bond to pay plaintiff for  
15 labor, materials and services furnished in the prosecution of the work provided for in the Prime  
16 Contract, and for which Mass Ex failed to make payment.

17 27. Plaintiff is entitled to payment from Travelers pursuant to the Miller Act, 40  
18 U.S.C. § 3133.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays for:

1. Damages in an amount to be proven at trial;
2. Costs of suit incurred herein;
3. Reasonable attorney’s fees; and
4. Such other and further relief as the Court may deem just and proper.

Dated: May 20, 2005

CHILVERS & TAYLOR PC

By: /s/ Robert M. Chilvers  
Robert M. Chilvers

Attorneys for Plaintiff  
United States for the Use and  
Benefit of Dixon Marine  
Services, Inc. and  
Dixon Marine Services, Inc.