

1 THOMAS E. MULVIHILL, ESQ. (SBN 129906)
 TAMIKO A. DUNHAM, ESQ. (SBN 233455)
 2 BOORNAZIAN, JENSEN & GARTHE
 A Professional Corporation
 3 555 12th Street, Suite 1800
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6 Attorneys for Plaintiff
 7 UNITED SPECIALTY INSURANCE COMPANY

8 UNITED STATES DISTRICT COURT
 9 EASTERN DISTRICT OF CALIFORNIA

11			
12	UNITED SPECIALTY INSURANCE)	Case No.: 2:16-CV-02480-KJM-GGH
13	COMPANY, a Delaware corporation,)	
14)	STIPULATION AND ORDER FOR FILING
15	Plaintiff,)	FIRST AMENDED COMPLAINT AND
16	v.)	ANSWER TO FIRST AMENDED
17)	COMPLAINT
18	DEAN PETERSEN dba PETERSEN)	
19	CONSTRUCTION SERVICES, a citizen of)	The Hon. Kimberly J. Mueller
20	the State of California;)	Action Filed: October 17, 2016
21)	
22	Defendants.)	
23)	
24)	

25 Plaintiff UNITED SPECIALTY INSURANCE COMPANY (“Plaintiff”) and Defendant
 26 DEAN PETERSEN dba PETERSEN CONSTRUCTION SERVICES (“Defendant”) (collectively,
 27 the “Parties”) respectfully submit the following Stipulation and Proposed Order for Filing First
 28 Amended Complaint and Answer to First Amended Complaint:

29 WHEREAS, on October 17, 2016, Plaintiff filed its Complaint in this action;
 30 WHEREAS, on December 27, 2016, Defendant filed its Answer to Plaintiff’s Complaint in
 31 this action;

32 ///

1 WHEREAS, information concerning the claims at issue subsequently came to the attention
2 of the Parties, resulting in the Parties each desiring to amend their respective pleadings in this
3 action.

4 NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by the Parties
5 through their undersigned counsel of record that the Parties will file concurrent limited
6 amendments to the pleadings, as follows:

7 1. Plaintiff shall be allowed to file its First Amended Complaint. A copy of Plaintiff's
8 First Amended Complaint, in draft with revisions shown in redline, is attached hereto as **Exhibit**
9 **A**. A clean copy of the First Amended Complaint, which will become the operative complaint, is
10 attached hereto as **Exhibit B**. Upon entry of the proposed order herein, Plaintiff will file a copy of
11 **Exhibit B** as its amended complaint;

12 2. Defendant will then file its Answer to Plaintiff's First Amended Complaint, a copy
13 of which, in draft with revisions shown in redline, is attached hereto as **Exhibit C**. A clean copy of
14 the Answer to Plaintiff's First Amended Complaint is attached hereto as **Exhibit D**. Following
15 entry of the proposed order herein and Plaintiff's filing of Exhibit B, Defendant will file a copy of
16 Exhibit D as its answer to the amended complaint.

17

18 **IT IS SO STIPULATED.**

19

20 Dated: July 13, 2017

BOORNAZIAN, JENSEN & GARTHE
A Professional Corporation

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22

23

By: / S / Tamiko A. Dunham, Esq.
THOMAS E. MULVIHILL, ESQ.
TAMIKO A. DUNHAM, ESQ.
Attorneys for Plaintiff
UNITED SPECIALTY INSURANCE
COMPANY

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Dated: June 13, 2017

WEINSTEIN & NUMBERS, LLP

By: /s/ Shanti Eagle, Esq. (as authorized on 7/13/17)
BARRON L. WEINSTEIN, ESQ
SHANTI EAGLE, ESQ.
Attorneys for Defendant
DEAN PETERSEN dba PETERSEN
CONSTRUCTION SERVICES

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ORDER

PURSUANT TO STIPULATION, and for good cause shown, **IT IS HEREBY ORDERED** that:

1. Plaintiff shall be allowed to file its First Amended Complaint. A copy of Plaintiff's First Amended Complaint, in draft with revisions shown in redline, is attached hereto as **Exhibit A**. A clean copy of the First Amended Complaint, which will become the operative complaint, is attached hereto as **Exhibit B**. Upon entry of the proposed order herein, Plaintiff will file a copy of Exhibit B as its amended complaint;

2. Defendant will then file its Answer to Plaintiff's First Amended Complaint, a copy of which, in draft with revisions shown in redline, is attached hereto as **Exhibit C**. A clean copy of the Answer to Plaintiff's First Amended Complaint is attached hereto as **Exhibit D**. Following entry of the proposed order herein and Plaintiff's filing of Exhibit B, Defendant will file a copy of Exhibit D as its answer to the amended complaint.

IT IS SO ORDERED.

DATED: August 2, 2017.


UNITED STATES DISTRICT JUDGE

EXHIBIT A

1 THOMAS E. MULVIHILL, ESQ. (SBN 129906)
2 TAMIKO A. DUNHAM, ESQ. (SBN 233455)
3 BOORNAZIAN, JENSEN & GARTHE
4 A Professional Corporation
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7 Oakland, CA 94604-2925
8 Telephone: (510) 834-4350
9 Facsimile: (510) 839-1897

10 Attorneys for Plaintiff
11 UNITED SPECIALTY INSURANCE COMPANY

12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**

14 UNITED SPECIALTY INSURANCE)
15 COMPANY, a Delaware corporation,)

Case No.: [2:16-cv-02480-KJM-GGH](#)

16 Plaintiff,)

**[PROPOSED] FIRST AMENDED
COMPLAINT FOR DECLARATORY
JUDGMENT AND REIMBURSEMENT**

17 v.)

18 DEAN PETERSEN dba PETERSEN)
19 CONSTRUCTION SERVICES, a citizen of)
20 the State of California;)

21 Defendants.)
22)
23)
24)
25)
26)
27)
28)

COMES NOW Plaintiff UNITED SPECIALTY INSURANCE COMPANY (“USIC”) and complains of defendant DEAN PETERSEN dba PETERSEN CONSTRUCTION SERVICES (“PETERSEN”) as follows:

JURISDICTIONAL ALLEGATION

1. This is an action for declaratory judgment between citizens of different states in which the amount in controversy exceeds \$75,000, exclusive of costs and interest. This Court has original jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a) (1) and (c) (1).

1 **VENUE ALLEGATION**

2 2. A substantial part of the events giving rise to this action occurred within this
3 judicial district, and defendant’s business activities and contacts within this judicial district are
4 sufficient to subject defendant to personal jurisdiction within this judicial district. Accordingly,
5 venue in the Eastern District of California is appropriate pursuant to 28 U.S.C. § 1391(b) (1) and
6 (2), and 28 U.S.C. § 1391 (d).

7 **GENERAL ALLEGATIONS**

8 3. USIC is, and at all times relevant hereto was, an insurance corporation in good
9 standing, organized and existing under the laws of the State of Delaware. USIC is authorized to do
10 business and write insurance in the State of California, with its principal place of business in
11 Bedford, Texas. Accordingly, USIC is a citizen of the State of Delaware and the State of Texas
12 for the purpose of diversity jurisdiction.

13 4. PETERSEN is an individual domiciled in the State of California and is a citizen of
14 the State of California for purposes of diversity jurisdiction.

15 **FACTUAL ALLEGATIONS**

16 5. This declaratory relief action arises out of a construction defect lawsuit filed on
17 November 12, 2014 by plaintiffs David and Michelle Finkelstein (collectively, “Finkelsteins”) in
18 the Superior Court of the State of California, County of Placer, Case No. SCV 0035325, styled
19 *David Finkelstein and Michelle Finkelstein v. Dean Petersen, et al.* (“Underlying Action”). A true
20 and correct copy of the Complaint in the Underlying Action is attached hereto as **Exhibit A**.

21 6. The Complaint in the Underlying Action alleged that the Finkelsteins entered into a
22 written agreement dated August 15, 2013 with PETERSEN, in which PETERSEN agreed to
23 construct a single-family residence at 8360 Rustic Woods Way, Loomis, California (“Property”)
24 for \$1,110,398.

25 7. The Complaint in the Underlying Action alleged that construction at the Property
26 continued through June of 2014, at which time the Finkelsteins moved into the Property even
27 though not all work had been completed.

1 8. The Complaint in the Underlying Action alleged the Property was negligently built,
2 resulting in significant construction defects and resultant damages. The alleged damages include
3 defects relating to the foundation, hardscape, driveway, concrete, siding and trim, exterior
4 balconies, wrought iron, roofing, finish carpentry, cabinets, electrical, painting, windows, doors,
5 sheet metal, appliances, framing, and other components of the Property as yet unknown, resulting
6 in significant expense to repair the Property. The amount in controversy in the Underlying Action
7 allegedly exceeds \$75,000.

8 9. PETERSEN retained independent contractors to perform ~~all of the~~ construction
9 work and supply ~~all of the~~ materials for the Property ~~with respect to the alleged defects~~, including
10 but not limited to, work and/or materials related to the foundation, hardscape, driveway, concrete,
11 siding and trim, exterior balconies, wrought iron, roofing, finish carpentry, cabinets, electrical,
12 painting, windows, doors, sheet metal, appliances, and framing of the Property.

13 10. The ~~damages at issue in the~~ Underlying Action arose, in whole or in part, out of the
14 actions or inactions ~~of~~ or the materials provided by ~~the~~ independent contractors performing work
15 on behalf of PETERSEN, or the actions or inactions of ~~the~~ independent contractors' employees,
16 laborers, suppliers or vendors.

17 11. PETERSEN did not secure from each independent contractor prior to construction
18 of the Property the following documents: (1) a written agreement requiring the independent
19 contractor to indemnify and hold harmless PETERSEN against all liability arising out of or related
20 to the work or products of the independent contractor; (2) a written agreement requiring the
21 independent contractor, at its own expense, to defend any suit brought against PETERSEN
22 founded upon a claim for damage sustained by any third party arising out of or related to the work
23 or product of the independent contractor; (3) a written agreement requiring the independent
24 contractor to defend and indemnify PETERSON at the time written notice of the claim or suit is
25 first provided to PETERSEN regardless of whether the independent contractor is named as part to
26 the claim or suit; (4) a written agreement requiring the independent contractor to name
27 PETERSEN an additional insured on its Commercial General Liability policy; and (5) a valid and
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1 enforceable Certificate of Insurance and Additional Insured Endorsement issued by or on behalf of
2 the insurance carrier for the independent contractor indicating that PETERSEN is named as an
3 additional insured for coverage equal to or greater than the coverage provided by the Commercial
4 General Liability issued by USIC to PETERSON (Policy No. DSI-GL-CA-00545) for the entire
5 time the independent contractor is performing work or providing materials on behalf of
6 PETERSON, including coverage for both on-going and products-completed operations hazards.

7 12. USIC insured PETERSEN pursuant to a Commercial General Liability policy of
8 insurance, Policy No. DSI-GL-CA-00545, effective August 28, 2013 to August 28, 2014
9 (“Policy”). A true and correct copy of the Policy in redacted form is attached hereto as **Exhibit B**.

10 13. PETERSEN tendered its defense and indemnity of the Underlying Action to USIC
11 under the Policy. USIC agreed to defend PETERSEN in the Underlying Action under the Policy
12 pursuant to a full reservation of rights to disclaim any obligation to defend or indemnify
13 PETERSEN in connection with the Underlying Action. USIC retained counsel to defend
14 PETERSEN in the Underlying Action and is currently defending PETERSEN against the
15 Underlying Action.

16 **FIRST CAUSE OF ACTION**

17 **DECLARATORY JUDGMENT**

18 **(Against All Defendants)**

19 14. USIC incorporates the allegations contained in paragraphs 1 through 13, inclusive,
20 of this First Amended Complaint as though fully set forth herein.

21 15. The Policy contains an Independent Contractors Exclusion (“ICE”). The ICE
22 expressly excludes coverage as follows:

23 **49. INDEPENDENT CONTRACTORS**

24 Any **claim** or **suit** arising, in whole or in part, out of the actions or inactions of or
25 the materials provided by an independent contractor performing work on behalf of
26 an insured or the actions or inactions of the independent contractor’s **employees**,
laborers, suppliers or vendors.

27 This exclusion will not apply if:

1 (a) Prior to an independent contractor commencing work, services, or
2 operations or supplying products or materials for or on behalf of any
3 **insured**, the **insured** receives a written agreement providing that:

4 (1) The independent contractor will indemnify and hold the **insured**, its
5 partners, officers, agents and employees harmless against all liability,
6 **claims**, judgments, **suits** or demands by any third party, including any
7 other **insureds**, arising out of or related to the work or product of the
8 independent contractor; and

9 (2) The independent contractor will at its own expense defend any **suit**
10 brought against the **insured** founded upon a **claim** for damage sustained
11 by any third party arising out of or related to the work or product of the
12 independent contractor; and

13 (3) The independent contractor's obligation to defend and indemnify will
14 arise at the time written notice of the **claim** or **suit** is first provided to an
15 **insured** regardless of whether the independent contractor is named as
16 part to the **claim** or **suit**; and

17 (4) The independent contractor will name the **insured** as an **additional**
18 **insured** on the independent contractor's Commercial General Liability
19 policy, the endorsement will provide coverage for the independent
20 contractor's completed work and will specify that the independent
21 contractor's insurance is primary to any insurance issued by **us** to the
22 **insured**.

23 (b) Prior to an independent contractor commencing work, services, or
24 operations or supplying products or materials for or on behalf of any
25 **insured**, the **insured** will obtain and thereafter maintain valid and
26 enforceable Certificates of Insurance and Additional Insured Endorsements
27 issued by or on behalf of the insurance carrier from each and every
28 independent contractor indicating that the **insured** is named as an additional
insured and that the coverage maintained is equal to or greater than
provided by this policy for the entire time the independent contractor is
performing work or providing materials on behalf of the **insured** and that
coverage is provided for both on-going and **products-completed**
operations hazard. The policy carried by the independent contractor shall
be primary and non-contributory as regards the **insured's** policy as well as
containing a waiver of subrogation against the **insured**.

(c) It is expressly agreed by the **insured** that if the **insured** fails to comply with
the conditions stated in paragraphs (a) and (b) above, then the exclusion
remains effective.

(d) It is expressly agreed by the **insured** that if the **insured** fails to comply with
the conditions stated in paragraphs (a) and (b) above, then there is no

1 coverage for any **claim** or **suit** arising out of or related in any way to the
2 work of or materials provided the **insured** even if the work or materials of
3 the **insured** is independent of or separate from the work or of materials
4 provided by the independent contractor.

5 (e) It is expressly agreed by the **insured** that the consequences set forth in
6 paragraph (c) and (d) will apply even if the independent contractor is a party
7 to the **claim**, demand or **suit** and has insurance which is participating in the
8 defense and indemnification of the independent contractor.

9 (f) It is further expressly agreed by the **insured** that the consequences set forth
10 in paragraph (c) and (d) will apply even if the failure to comply with the
11 conditions of paragraph (a) and (b) do not increase **our** monetary obligation
12 for defense or indemnification

13 (g) The coverage provided by this policy shall apply excess over and above any
14 other valid and collectible insurance available to the **insured** by virtue of the
15 additional insured endorsements provided by an independent contractor.

16 (h) Paragraphs (a) through (g) apply even if the work commenced or the
17 products were supplied prior to the inception of this policy.

18 (i) For purposes of this exclusion, any individuals, entities or companies,
19 whether appropriately licensed or not, doing work or performing services
20 for the **insured**:

21 (i) who are not specifically identified on the **insured's** employment records
22 as **employees**, are not compensated as **employees** and for which the
23 **insured** has not obtained worker's compensation insurance; or

24 (ii) which are not compensated through a payroll/staffing or PEO service
25 under contract to the **insured** are independent contractors for purposes
26 of this exclusion and the provisions of this exclusion apply in full.

27 16. The ~~damages at issue in the~~ Underlying Action arose, in whole or in part, out of the
28 actions or inactions or the materials provided by ~~the~~ independent contractors of PETERSEN, or the
actions or inactions of ~~the~~ independent contractor's employees, laborers, suppliers or vendors, so
as to trigger the ICE; and PETERSEN failed to satisfy the conditions necessary to overcome the
exclusionary impact of the ICE. Based on the ICE, USIC avers that no duty to defend or
indemnify is triggered under the Policy against the claims asserted in the Underlying Action.

17. An actual controversy now exists in that USIC contends, and PETERSEN denies,
that USIC owes no duty to defend or indemnify PETERSEN under the Policy against the claims

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1 asserted in the Underlying Action based upon the ICE.

2 18. USIC desires a judicial determination with respect to the rights, duties and
3 obligations of USIC as to the duty to defend or indemnify PETERSEN against the claims asserted
4 in the Underlying Action under the terms and conditions of the Policy, including the ICE. Such a
5 determination is necessary and appropriate at this time in order that the parties may ascertain their
6 respective rights, duties and obligations.

7 19. USIC has no other adequate remedy at law to resolve the aforesaid controversy.

8 **SECOND CAUSE OF ACTION**

9 **REIMBURSEMENT OF DEFENSE COSTS**

10 20. USIC incorporates the allegations contained in paragraphs 1 through 19, inclusive,
11 of this First Amended Complaint as though fully set forth herein.

12 21. In providing a defense to PETERSEN under the Policy in connection with the
13 Underlying Action, USIC fully reserved all rights of reimbursement from PETERSEN of any
14 defense costs paid on PETERSEN's behalf upon adjudication by this Court that no duty to defend
15 PETERSEN was ever triggered under the Policy with respect to the Underlying Action.

16 22. USIC's reservation of rights created an implied contractual obligation on the part of
17 PETERSEN to reimburse USIC upon adjudication by this Court that no duty to defend
18 PETERSEN was ever triggered under the Policy with respect to the Underlying Action

19 23. By accepting the defense under the Policy, PETERSEN received the benefits under
20 the Policy to which it was not entitled and would be unjustly enriched by the retention of those
21 benefits at the expense of USIC upon adjudication by this Court that no duty to defend
22 PETERSEN was ever triggered under the Policy with respect to the Underlying Action.

23 24. USIC contends that it never owed a duty to defend PETERSEN under the Policy in
24 connection with the Underlying Action and is therefore is entitled to a monetary judgment against
25 PETERSEN according to proof equal to the sum expended by USIC in the defense of PETERSEN
26 under the Policy in the Underlying Action.

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PRAYER FOR RELIEF

WHEREFORE, USIC prays for judgment as follows:

1. For a declaration of this court binding as to all defendants which directs that the Policy provides no coverage in connection with the Underlying Action based upon the ICE;
2. For USIC's costs of suit incurred herein;
3. For monetary judgment in favor of USIC and against PETERSEN for reimbursement of the cost of defense of PETERSEN in the Underlying Action for which USIC had no duty to provide under the Policy; and
4. For all such other and further relief as the court may deem just and proper.

DATED: ~~October 17, 2016~~DRAFT

————BOORNAZIAN, JENSEN & GARTHE
A Professional Corporation

By: _____

THOMAS E. MULVIHILL, ESQ.
TAMIKO A. DUNHAM, ESQ.
~~IAN E. ANDERSON, ESQ.~~
Attorneys for Plaintiff
UNITED SPECIALTY INSURANCE
COMPANY

27582/736318

EXHIBIT B

1 THOMAS E. MULVIHILL, ESQ. (SBN 129906)
TAMIKO A. DUNHAM, ESQ. (SBN 233455)
2 BOORNAZIAN, JENSEN & GARTHE
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7 Attorneys for Plaintiff
UNITED SPECIALTY INSURANCE COMPANY

8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**

11
12 UNITED SPECIALTY INSURANCE)
COMPANY, a Delaware corporation,)

Case No.: 2:16-cv-02480-KJM-GGH

13)
14) Plaintiff,
15 v.)

**[PROPOSED] FIRST AMENDED
COMPLAINT FOR DECLARATORY
JUDGMENT AND REIMBURSEMENT**

16 DEAN PETERSEN dba PETERSEN)
CONSTRUCTION SERVICES, a citizen of)
the State of California;)

17)
18) Defendants.
19)

20 COMES NOW Plaintiff UNITED SPECIALTY INSURANCE COMPANY (“USIC”) and
21 complains of defendant DEAN PETERSEN dba PETERSEN CONSTRUCTION SERVICES
22 (“PETERSEN”) as follows:

23 **JURISDICTIONAL ALLEGATION**

24 1. This is an action for declaratory judgment between citizens of different states in
25 which the amount in controversy exceeds \$75,000, exclusive of costs and interest. This Court has
26 original jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a) (1) and (c)
27 (1).

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VENUE ALLEGATION

2. A substantial part of the events giving rise to this action occurred within this judicial district, and defendant’s business activities and contacts within this judicial district are sufficient to subject defendant to personal jurisdiction within this judicial district. Accordingly, venue in the Eastern District of California is appropriate pursuant to 28 U.S.C. § 1391(b) (1) and (2), and 28 U.S.C. § 1391 (d).

GENERAL ALLEGATIONS

3. USIC is, and at all times relevant hereto was, an insurance corporation in good standing, organized and existing under the laws of the State of Delaware. USIC is authorized to do business and write insurance in the State of California, with its principal place of business in Bedford, Texas. Accordingly, USIC is a citizen of the State of Delaware and the State of Texas for the purpose of diversity jurisdiction.

4. PETERSEN is an individual domiciled in the State of California and is a citizen of the State of California for purposes of diversity jurisdiction.

FACTUAL ALLEGATIONS

5. This declaratory relief action arises out of a construction defect lawsuit filed on November 12, 2014 by plaintiffs David and Michelle Finkelstein (collectively, “Finkelsteins”) in the Superior Court of the State of California, County of Placer, Case No. SCV 0035325, styled *David Finkelstein and Michelle Finkelstein v. Dean Petersen, et al.* (“Underlying Action”). A true and correct copy of the Complaint in the Underlying Action is attached hereto as **Exhibit A**.

6. The Complaint in the Underlying Action alleged that the Finkelsteins entered into a written agreement dated August 15, 2013 with PETERSEN, in which PETERSEN agreed to construct a single-family residence at 8360 Rustic Woods Way, Loomis, California (“Property”) for \$1,110,398.

7. The Complaint in the Underlying Action alleged that construction at the Property continued through June of 2014, at which time the Finkelsteins moved into the Property even though not all work had been completed.

1 8. The Complaint in the Underlying Action alleged the Property was negligently built,
2 resulting in significant construction defects and resultant damages. The alleged damages include
3 defects relating to the foundation, hardscape, driveway, concrete, siding and trim, exterior
4 balconies, wrought iron, roofing, finish carpentry, cabinets, electrical, painting, windows, doors,
5 sheet metal, appliances, framing, and other components of the Property as yet unknown, resulting
6 in significant expense to repair the Property. The amount in controversy in the Underlying Action
7 allegedly exceeds \$75,000.

8 9. PETERSEN retained independent contractors to perform construction work and
9 supply materials for the Property, including but not limited to, work and/or materials related to the
10 foundation, hardscape, driveway, concrete, siding and trim, exterior balconies, wrought iron,
11 roofing, finish carpentry, cabinets, electrical, painting, windows, doors, sheet metal, appliances,
12 and framing of the Property.

13 10. The Underlying Action arose, in whole or in part, out of the actions or inactions of
14 or the materials provided by independent contractors performing work on behalf of PETERSEN,
15 or the actions or inactions of independent contractors' employees, laborers, suppliers or vendors.

16 11. PETERSEN did not secure from each independent contractor prior to construction
17 of the Property the following documents: (1) a written agreement requiring the independent
18 contractor to indemnify and hold harmless PETERSEN against all liability arising out of or related
19 to the work or products of the independent contractor; (2) a written agreement requiring the
20 independent contractor, at its own expense, to defend any suit brought against PETERSEN
21 founded upon a claim for damage sustained by any third party arising out of or related to the work
22 or product of the independent contractor; (3) a written agreement requiring the independent
23 contractor to defend and indemnify PETERSON at the time written notice of the claim or suit is
24 first provided to PETERSEN regardless of whether the independent contractor is named as part to
25 the claim or suit; (4) a written agreement requiring the independent contractor to name
26 PETERSEN an additional insured on its Commercial General Liability policy; and (5) a valid and
27 enforceable Certificate of Insurance and Additional Insured Endorsement issued by or on behalf of
28

1 the insurance carrier for the independent contractor indicating that PETERSEN is named as an
2 additional insured for coverage equal to or greater than the coverage provided by the Commercial
3 General Liability issued by USIC to PETERSON (Policy No. DSI-GL-CA-00545) for the entire
4 time the independent contractor is performing work or providing materials on behalf of
5 PETERSON, including coverage for both on-going and products-completed operations hazards.

6 12. USIC insured PETERSEN pursuant to a Commercial General Liability policy of
7 insurance, Policy No. DSI-GL-CA-00545, effective August 28, 2013 to August 28, 2014
8 (“Policy”). A true and correct copy of the Policy in redacted form is attached hereto as **Exhibit B**.

9 13. PETERSEN tendered its defense and indemnity of the Underlying Action to USIC
10 under the Policy. USIC agreed to defend PETERSEN in the Underlying Action under the Policy
11 pursuant to a full reservation of rights to disclaim any obligation to defend or indemnify
12 PETERSEN in connection with the Underlying Action. USIC retained counsel to defend
13 PETERSEN in the Underlying Action and is currently defending PETERSEN against the
14 Underlying Action.

15 **FIRST CAUSE OF ACTION**

16 **DECLARATORY JUDGMENT**

17 **(Against All Defendants)**

18 14. USIC incorporates the allegations contained in paragraphs 1 through 13, inclusive,
19 of this First Amended Complaint as though fully set forth herein.

20 15. The Policy contains an Independent Contractors Exclusion (“ICE”). The ICE
21 expressly excludes coverage as follows:

22 **49. INDEPENDENT CONTRACTORS**

23 Any **claim** or **suit** arising, in whole or in part, out of the actions or inactions of or
24 the materials provided by an independent contractor performing work on behalf of
25 an insured or the actions or inactions of the independent contractor’s **employees**,
laborers, suppliers or vendors.

26 This exclusion will not apply if:

27 (a) Prior to an independent contractor commencing work, services, or
28

1 operations or supplying products or materials for or on behalf of any
2 **insured**, the **insured** receives a written agreement providing that:

3 (1) The independent contractor will indemnify and hold the **insured**, its
4 partners, officers, agents and employees harmless against all liability,
5 **claims**, judgments, **suits** or demands by any third party, including any
6 other **insureds**, arising out of or related to the work or product of the
7 independent contractor; and

8 (2) The independent contractor will at its own expense defend any **suit**
9 brought against the **insured** founded upon a **claim** for damage sustained
10 by any third party arising out of or related to the work or product of the
11 independent contractor; and

12 (3) The independent contractor's obligation to defend and indemnify will
13 arise at the time written notice of the **claim** or **suit** is first provided to an
14 **insured** regardless of whether the independent contractor is named as
15 part to the **claim** or **suit**; and

16 (4) The independent contractor will name the **insured** as an **additional**
17 **insured** on the independent contractor's Commercial General Liability
18 policy, the endorsement will provide coverage for the independent
19 contractor's completed work and will specify that the independent
20 contractor's insurance is primary to any insurance issued by **us** to the
21 **insured**.

22 (b) Prior to an independent contractor commencing work, services, or
23 operations or supplying products or materials for or on behalf of any
24 **insured**, the **insured** will obtain and thereafter maintain valid and
25 enforceable Certificates of Insurance and Additional Insured Endorsements
26 issued by or on behalf of the insurance carrier from each and every
27 independent contractor indicating that the **insured** is named as an additional
28 **insured** and that the coverage maintained is equal to or greater than
provided by this policy for the entire time the independent contractor is
performing work or providing materials on behalf of the **insured** and that
coverage is provided for both on-going and **products-completed**
operations hazard. The policy carried by the independent contractor shall
be primary and non-contributory as regards the **insured's** policy as well as
containing a waiver of subrogation against the **insured**.

(c) It is expressly agreed by the **insured** that if the **insured** fails to comply with
the conditions stated in paragraphs (a) and (b) above, then the exclusion
remains effective.

(d) It is expressly agreed by the **insured** that if the **insured** fails to comply with
the conditions stated in paragraphs (a) and (b) above, then there is no
coverage for any **claim** or **suit** arising out of or related in any way to the

1 work of or materials provided the **insured** even if the work or materials of
2 the **insured** is independent of or separate from the work or of materials
3 provided by the independent contractor.

4 (e) It is expressly agreed by the **insured** that the consequences set forth in
5 paragraph (c) and (d) will apply even if the independent contractor is a party
6 to the **claim**, demand or **suit** and has insurance which is participating in the
7 defense and indemnification of the independent contractor.

8 (f) It is further expressly agreed by the **insured** that the consequences set forth
9 in paragraph (c) and (d) will apply even if the failure to comply with the
10 conditions of paragraph (a) and (b) do not increase **our** monetary obligation
11 for defense or indemnification

12 (g) The coverage provided by this policy shall apply excess over and above any
13 other valid and collectible insurance available to the **insured** by virtue of the
14 additional insured endorsements provided by an independent contractor.

15 (h) Paragraphs (a) through (g) apply even if the work commenced or the
16 products were supplied prior to the inception of this policy.

17 (i) For purposes of this exclusion, any individuals, entities or companies,
18 whether appropriately licensed or not, doing work or performing services
19 for the **insured**:

20 (i) who are not specifically identified on the **insured's** employment records
21 as **employees**, are not compensated as **employees** and for which the
22 **insured** has not obtained worker's compensation insurance; or

23 (ii) which are not compensated through a payroll/staffing or PEO service
24 under contract to the **insured** are independent contractors for purposes
25 of this exclusion and the provisions of this exclusion apply in full.

26 16. The Underlying Action arose, in whole or in part, out of the actions or inactions or
27 the materials provided by independent contractors of PETERSEN, or the actions or inactions of
28 independent contractors' employees, laborers, suppliers or vendors, so as to trigger the ICE; and
PETERSEN failed to satisfy the conditions necessary to overcome the exclusionary impact of the
ICE. Based on the ICE, USIC avers that no duty to defend or indemnify is triggered under the
Policy against the claims asserted in the Underlying Action.

17. An actual controversy now exists in that USIC contends, and PETERSEN denies,
that USIC owes no duty to defend or indemnify PETERSEN under the Policy against the claims
asserted in the Underlying Action based upon the ICE.

1 18. USIC desires a judicial determination with respect to the rights, duties and
2 obligations of USIC as to the duty to defend or indemnify PETERSEN against the claims asserted
3 in the Underlying Action under the terms and conditions of the Policy, including the ICE. Such a
4 determination is necessary and appropriate at this time in order that the parties may ascertain their
5 respective rights, duties and obligations.

6 19. USIC has no other adequate remedy at law to resolve the aforesaid controversy.

7 **SECOND CAUSE OF ACTION**

8 **REIMBURSEMENT OF DEFENSE COSTS**

9 20. USIC incorporates the allegations contained in paragraphs 1 through 19, inclusive,
10 of this First Amended Complaint as though fully set forth herein.

11 21. In providing a defense to PETERSEN under the Policy in connection with the
12 Underlying Action, USIC fully reserved all rights of reimbursement from PETERSEN of any
13 defense costs paid on PETERSEN's behalf upon adjudication by this Court that no duty to defend
14 PETERSEN was ever triggered under the Policy with respect to the Underlying Action.

15 22. USIC's reservation of rights created an implied contractual obligation on the part of
16 PETERSEN to reimburse USIC upon adjudication by this Court that no duty to defend
17 PETERSEN was ever triggered under the Policy with respect to the Underlying Action

18 23. By accepting the defense under the Policy, PETERSEN received the benefits under
19 the Policy to which it was not entitled and would be unjustly enriched by the retention of those
20 benefits at the expense of USIC upon adjudication by this Court that no duty to defend
21 PETERSEN was ever triggered under the Policy with respect to the Underlying Action.

22 24. USIC contends that it never owed a duty to defend PETERSEN under the Policy in
23 connection with the Underlying Action and is therefore is entitled to a monetary judgment against
24 PETERSEN according to proof equal to the sum expended by USIC in the defense of PETERSEN
25 under the Policy in the Underlying Action.

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PRAYER FOR RELIEF

WHEREFORE, USIC prays for judgment as follows:

1. For a declaration of this court binding as to all defendants which directs that the Policy provides no coverage in connection with the Underlying Action based upon the ICE;
2. For USIC's costs of suit incurred herein;
3. For monetary judgment in favor of USIC and against PETERSEN for reimbursement of the cost of defense of PETERSEN in the Underlying Action for which USIC had no duty to provide under the Policy; and
4. For all such other and further relief as the court may deem just and proper.

DATED: DRAFT

BOORNAZIAN, JENSEN & GARTHE
A Professional Corporation

By: _____

THOMAS E. MULVIHILL, ESQ.
TAMIKO A. DUNHAM, ESQ.
Attorneys for Plaintiff
UNITED SPECIALTY INSURANCE
COMPANY

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EXHIBIT C

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6 | *Attorneys for Defendant*
7 | Dean Petersen dba
8 | Petersen Construction Services

8 | UNITED STATES DISTRICT COURT
9 | EASTERN DISTRICT OF CALIFORNIA

11 | UNITED SPECIALTY INSURANCE
12 | COMPANY, a Delaware corporation,

13 | Plaintiff,

14 | v.

15 | DEAN PETERSEN dba PETERSEN
16 | CONSTRUCTION SERVICES, a citizen of
17 | the State of California;

17 | Defendant.

CIVIL ACTION NO.: 2:16-cv-02480-KJM-GGH

**DEFENDANT DEAN PETERSEN'S ANSWER
TO UNITED SPECIALTY INSURANCE
COMPANY'S FIRST AMENDED
COMPLAINT FOR DECLARATORY
JUDGEMENT AND REIMBURSEMENT**

Assigned to: Hon. Kimberly J. Mueller

Action Filed: October 17, 2016

Jury trial demanded.

18 |
19 | Defendant DEAN PETERSEN dba PETERSEN CONSTRUCTION SERVICES ("Petersen"
20 | or "Defendant") in response to the unverified First Amended Complaint ("FAC") for Declaratory
21 | Judgement and Reimbursement of Plaintiff UNITED SPECIALTY INSURANCE COMPANY
22 | ("USIC" or "Plaintiff"), admits, denies and avers as follows:

23 |
24 | **JURISDICTIONAL ALLEGATION**

25 | 1. In response to Paragraph 1 of the Complaint FAC, Defendant admits the allegations
26 | contained therein.

27 | **VENUE ALLEGATION**

1 2. In response to Paragraph 2 of the [ComplaintFAC](#), Defendant admits the allegations
2 contained therein.

3 **GENERAL ALLEGATIONS**

4 3. In response to Paragraph 3 of the [ComplaintFAC](#), Defendant is without sufficient
5 knowledge or information to form a belief as to the truth of the allegations, and on that basis denies
6 each and every allegation contained therein.

7 4. In response to Paragraph 4 of the [ComplaintFAC](#), Defendant admits the allegations
8 contained therein.

9 **FACTUAL ALLEGATIONS**

10 5. In response to Paragraph 5 of the [ComplaintFAC](#), Defendant, without admitting any
11 of the allegations in the Underlying Action, admits that this coverage dispute arises out of the
12 Underlying Action as identified in Paragraph 5. Defendant admits that Exhibit A contains the
13 complaint in the Underlying Action, among other documents. Defendant avers that the pleadings in
14 the Underlying Action speak for themselves. For each of these reasons Defendant denies each and
15 every remaining allegation contained in Paragraph 5.

16 6. In response to Paragraph 6 of the [ComplaintFAC](#), without admitting any of the
17 allegations in the Underlying Action, Defendant admits that the Underlying Action contains such
18 allegations, among others, but denies that Plaintiff has completely or accurately summarized those
19 allegations. Furthermore, Defendant avers that the pleadings in the Underlying Action speak for
20 themselves. For each of these reasons Defendant denies each and every allegation contained in
21 Paragraph 6.

22 7. In response to Paragraph 7 of the [ComplaintFAC](#), without admitting any of the
23 allegations in the Underlying Action, Defendant admits that the Underlying Action contains such
24 allegations, among others, but denies that Plaintiff has completely or accurately summarized those
25 allegations. Furthermore, Defendant avers that the pleadings in the Underlying Action speak for
26 themselves. For each of these reasons Defendant denies each and every allegation contained in
27 Paragraph 7.

1 8. In response to Paragraph 8 of the [Complaint](#)^{FAC}, without admitting any of the
2 allegations in the Underlying Action, Defendant admits that the Underlying Action contains such
3 allegations, among others, but denies that Plaintiff has completely or accurately summarized those
4 allegations. Furthermore, Defendant avers that the pleadings in the Underlying Action speak for
5 themselves. For each of these reasons Defendant denies each and every allegation contained in
6 Paragraph 8.

7 9. In response to Paragraph 9 of the [Complaint](#)^{FAC}, Defendant admits the allegations
8 contained therein.

9 10. In response to Paragraph 10 of the [Complaint](#)^{FAC}, [Defendant admits that the](#)
10 [Underlying Action contained allegations relating to work performed and materials provided by](#)
11 [independent contractors on behalf of Defendant, or the actions or inactions of independent](#)
12 [contractors' employees, laborers, suppliers, or vendors.](#) ~~Defendant admits the allegations contained~~
13 ~~therein.~~ [Defendant denies each and every remaining allegation contained therein.](#)

14 11. In response to Paragraph 11, Defendant denies each and every allegation contained
15 therein.

16 12. In response to Paragraph 12, Defendant admits that USIC insured PETERSEN
17 pursuant to a Commercial General Liability policy of insurance, Policy No. DSI-GL-CA-00545,
18 effective August 28, 2013 to August 28, 2014, but is without sufficient knowledge or information to
19 form a belief as to the truth of the remaining allegations and on that basis denies each and every
20 remaining allegation contained therein.

21 13. In response to Paragraph 13, Defendant admits that Defendant tendered its defense
22 and indemnity of the Underlying Action to USIC under the Policy, and that USIC retained counsel to
23 defend PETERSEN in the Underlying Action and is currently defending PETERSEN against the
24 Underlying Action. Defendant denies each and every remaining allegation contained in Paragraph
25 13.

26 **FIRST CAUSE OF ACTION**

27 **DECLARATORY JUDGMENT**

1 14. In response to Paragraph 14, Defendant incorporates the allegations contained in
2 paragraphs 1 through 13, inclusive, of this [ComplaintFAC](#) as though fully set forth herein.

3 15. In response to Paragraph 15, Defendant avers that the Policy speaks for itself and
4 must be read and interpreted as a whole, and contains language that includes some or all of the
5 language quoted in Paragraph 15. Defendant is without sufficient knowledge or information to form
6 a belief as to the truth of the remaining allegations, and on that basis denies each and every
7 remaining allegation contained in Paragraph 15.

8 16. In response to Paragraph 16, Defendant admits that [the Underlying Action contained](#)
9 [allegations relating to work performed and materials provided by independent contractors on behalf](#)
10 [of Defendant, or the actions or inactions of independent contractors' employees, laborers, suppliers,](#)
11 [or vendors. Defendant USIC is making the contentions contained therein, but](#) denies each and every
12 remaining allegation contained in Paragraph 16.

13 17. In response to Paragraph 17, Defendant admits that USIC that is making the
14 contentions contained therein, and further admits that it denies that USIC owes no duty to defend or
15 indemnify PETERSEN under the Policy against the claims asserted in the Underlying Action based
16 upon the ICE. Defendant denies each and every remaining allegation contained in Paragraph 17.

17 18. In response to Paragraph 18, Defendant avers that this paragraph contains a legal
18 conclusion which does not require a response but, to the extent otherwise, Defendant denies each
19 and every allegation contained in Paragraph 18.

20 19. In response to Paragraph 19, Defendant denies each and every allegation
21 contained in Paragraph 19.

22 **SECOND CAUSE OF ACTION**

23 **REIMBURSEMENT OF DEFENSE COSTS**

24 20. In response to Paragraph 20, Defendant incorporates the allegations contained in
25 paragraphs 1 through 19, inclusive, of this [ComplaintFAC](#) as though fully set forth herein.

26 21. In response to Paragraph 21, Defendant denies each and every allegation contained
27 therein.

1 22. In response to Paragraph 22, Defendant denies each and every allegation contained
2 therein.

3 23. In response to Paragraph 23, Defendant denies each and every allegation contained
4 therein.

5 24. In response to Paragraph 24, Defendant admits that USIC that is making the
6 contentions contained therein, but denies each and every remaining allegation contained in
7 Paragraph 24.

8 **PRAYER FOR RELIEF**

9 In response to the Prayer for Relief, Defendant denies that USIC is entitled to a judgment in
10 its favor against Defendant.

- 11 1. In response to Paragraph 1 of the Prayer, Defendant denies that USIC is entitled to any relief.
12 2. In response to Paragraph 2 of the Prayer, Defendant denies that USIC is entitled to any relief.
13 3. In response to Paragraph 3 of the Prayer, Defendant denies that USIC is entitled to any relief.
14 4. In response to Paragraph 4 of the Prayer, Defendant denies that USIC is entitled to any relief.

15
16 **PETERSEN'S AFFIRMATIVE DEFENSES:**

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18 **FIRST AFFIRMATIVE DEFENSE**

19 The [ComplaintFAC](#) and each and every allegation therein fail to state facts sufficient to state
20 a cause of action against Defendant.

21 **SECOND AFFIRMATIVE DEFENSE**

22 The [ComplaintFAC](#) is uncertain.

23 **THIRD AFFIRMATIVE DEFENSE**

24 All of the claims asserted in the [ComplaintFAC](#) are barred by operation of the doctrine of
25 unclean hands.

26 **FOURTH AFFIRMATIVE DEFENSE**

27 All of the claims set forth in the [ComplaintFAC](#) are barred by operation of the doctrine of
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1 laches.

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FIFTH AFFIRMATIVE DEFENSE

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Plaintiff has breached its contractual and extra contractual obligations under the applicable

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insurance Policy and, accordingly, all of the claims set forth in the [ComplaintFAC](#) are barred by

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Plaintiff's breaches.

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SIXTH AFFIRMATIVE DEFENSE

7

Plaintiff has breached its contractual and extra contractual obligations under the applicable

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insurance Policy and, accordingly, any relief to which Plaintiff may be entitled should be offset by

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Plaintiff's comparative fault.

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SEVENTH AFFIRMATIVE DEFENSE

11

Plaintiff owes a duty to defend and indemnify Petersen in the Underlying Action, based on

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all of the contentions made in the Underlying Action, including but not limited to the contentions

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made in pleadings and discovery, and all extrinsic facts known to Plaintiff, under the terms of all

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applicable insurance policies issued by Plaintiff.

15

EIGHTH AFFIRMATIVE DEFENSE

16

At all times material to the allegations of the [ComplaintFAC](#) herein, the conduct and actions

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of Plaintiff and its agents, attorneys, representatives, and/or other individuals acting on its behalf,

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and each of them, was such as to constitute an estoppel as to each of the claims asserted in the

19

[ComplaintFAC](#).

20

NINTH AFFIRMATIVE DEFENSE

21

At all times material to the allegations of the [ComplaintFAC](#) herein, the conduct and actions

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of Plaintiff and its agents, attorneys, representatives, and/or other individuals acting on its behalf,

23

and each of them, was such as to constitute a waiver as to each of the claims asserted in the

24

[ComplaintFAC](#).

25

TENTH AFFIRMATIVE DEFENSE

26

Plaintiff failed to properly reserve its rights to deny coverage for defense and indemnity of

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Petersen in the Underlying Action.

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ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to take reasonable steps to mitigate its alleged loss, if any, and such conduct bars or reduces any recovery sought by Plaintiff herein.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's acts and omissions contributed as a proximate cause in bringing about Plaintiff's alleged loss, if any, and the total amount of loss to which Plaintiff is entitled, if any, should be reduced in proportion to Plaintiff's own fault.

THIRTEENTH AFFIRMATIVE DEFENSE

Portions of the applicable policies are ambiguous and unenforceable.

FOURTEENTH AFFIRMATIVE DEFENSE

Portions of the applicable policies are unenforceable because they defeat the reasonable expectations of the insured(s).

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's [ComplaintFAC](#) is barred because Plaintiff acted as a volunteer in connection with the matters alleged in the [ComplaintFAC](#).

SIXTEENTH AFFIRMATIVE DEFENSE

One or more of the controversies alleged in the [ComplaintFAC](#) is not ripe for adjudication.

SEVENTEENTH AFFIRMATIVE DEFENSE

Pursuit of the instant action is improper because the issues in this action overlap with issues in the pending Underlying Action, and pursuit of this action would prejudice the rights of Petersen as Plaintiff's insured(s). Accordingly, the instant action should be dismissed or stayed pending a resolution of the Underlying Action. *Montrose Chem. Corp. v. Sup. Ct.* 25 Cal. App. 4th 902, 910 (1994); *Wilton v. Seven Falls Co.* 515 U.S., 283 (1995); *Allied Prop. & Cas. Ins. Co. v. Roberts* 2011 WL 2495691, at *1 (E.D. Cal. June 21, 2011).

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff has breached its duty to defend Petersen in the Underlying Action by, among other things, failing to advise Petersen of its right to independent counsel as required by California Civil

1 Code Section 2860, and its claims herein are therefore barred.

2 **NINETEENTH AFFIRMATIVE DEFENSE**

3 Plaintiff's claims are barred in whole or in part by the doctrine of unjust enrichment, as
4 Plaintiff's retention of the premiums paid by Petersen for insurance coverage would be unjust if
5 Plaintiff refuses to acknowledge its obligations to Petersen.

6 **TWENTIETH AFFIRMATIVE DEFENSE**

7 Plaintiff's claims are barred by Plaintiff's failure to join one or more indispensable parties.

8 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

9 Plaintiff's [Complaint](#) [FAC](#), and each cause of action therein, is barred by the applicable
10 statutes of limitations, including without limitation Cal. Civ. Pro. Code §§ 337, 339, 343.

11 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

12 Plaintiff has failed to provide a proper and adequate defense to Defendant in the Underlying
13 Action and has therefore waived any coverage defenses.

14 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

15 Plaintiff has failed to provide a proper and adequate defense to Defendant in the Underlying
16 Action and therefore is estopped to deny any defense or indemnity obligations.

17 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

18 Plaintiff has failed to provide a proper and adequate defense to Defendant in the Underlying
19 Action and, therefore, is not entitled to any reimbursement of defense costs.

20 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

21 Plaintiff failed to properly reserve its rights to seek reimbursement from Petersen.

22 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

23 Petersen asserts that they presently have insufficient knowledge or information on which to
24 form a belief as to whether they may have further, as yet unstated, defenses available. Petersen
25 therefore reserves herein the right to assert additional defenses if discovery and further investigation
26 indicates that further defenses would be appropriate.

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PETERSEN'S PRAYER FOR RELIEF

WHEREFORE, Petersen prays for judgment as follows:

1. That Plaintiff take nothing by reason of its ~~Complaint~~FAC;
2. For costs of suit incurred herein;
3. For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure Defendant hereby demands a trial by jury of all issues so triable.

Respectfully Submitted,

DATED: December 27, 2016 ~~MEREDITH~~, WEINSTEIN & NUMBERS, LLP

By: ~~/s/ Barron L. Weinstein~~
Barron L. Weinstein
Shanti Eagle

Attorneys for Defendant
Dean Petersen dba
Petersen Construction Services

EXHIBIT D

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6 *Attorneys for Defendant*
Dean Petersen dba
7 Petersen Construction Services

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

11 UNITED SPECIALTY INSURANCE
COMPANY, a Delaware corporation,

12 Plaintiff,

13 v.

14 DEAN PETERSEN dba PETERSEN
15 CONSTRUCTION SERVICES, a citizen of
the State of California;

16 Defendant.

CIVIL ACTION NO.: 2:16-cv-02480-KJM-GGH

**DEFENDANT DEAN PETERSEN'S ANSWER
TO UNITED SPECIALTY INSURANCE
COMPANY'S FIRST AMENDED
COMPLAINT FOR DECLARATORY
JUDGEMENT AND REIMBURSEMENT**

Assigned to: Hon. Kimberly J. Mueller

Action Filed: October 17, 2016

Jury trial demanded.

18
19 Defendant DEAN PETERSEN dba PETERSEN CONSTRUCTION SERVICES ("Petersen"
20 or "Defendant") in response to the unverified First Amended Complaint ("FAC") for Declaratory
21 Judgement and Reimbursement of Plaintiff UNITED SPECIALTY INSURANCE COMPANY
22 ("USIC" or "Plaintiff"), admits, denies and avers as follows:

23
24 **JURISDICTIONAL ALLEGATION**

25 1. In response to Paragraph 1 of the FAC, Defendant admits the allegations contained
26 therein.

27 **VENUE ALLEGATION**

1 others, but denies that Plaintiff has completely or accurately summarized those allegations.
2 Furthermore, Defendant avers that the pleadings in the Underlying Action speak for themselves. For
3 each of these reasons Defendant denies each and every allegation contained in Paragraph 8.

4 9. In response to Paragraph 9 of the FAC, Defendant admits the allegations contained
5 therein.

6 10. In response to Paragraph 10 of the FAC, Defendant admits that the Underlying Action
7 contained allegations relating to work performed and materials provided by independent contractors
8 on behalf of Defendant, or the actions or inactions of independent contractors' employees, laborers,
9 suppliers, or vendors.. Defendant denies each and every remaining allegation contained therein.

10 11. In response to Paragraph 11, Defendant denies each and every allegation contained
11 therein.

12 12. In response to Paragraph 12, Defendant admits that USIC insured PETERSEN
13 pursuant to a Commercial General Liability policy of insurance, Policy No. DSI-GL-CA-00545,
14 effective August 28, 2013 to August 28, 2014, but is without sufficient knowledge or information to
15 form a belief as to the truth of the remaining allegations and on that basis denies each and every
16 remaining allegation contained therein.

17 13. In response to Paragraph 13, Defendant admits that Defendant tendered its defense
18 and indemnity of the Underlying Action to USIC under the Policy, and that USIC retained counsel to
19 defend PETERSEN in the Underlying Action and is currently defending PETERSEN against the
20 Underlying Action. Defendant denies each and every remaining allegation contained in Paragraph
21 13.

22 **FIRST CAUSE OF ACTION**

23 **DECLARATORY JUDGMENT**

24 14. In response to Paragraph 14, Defendant incorporates the allegations contained in
25 paragraphs 1 through 13, inclusive, of this FAC as though fully set forth herein.

26 15. In response to Paragraph 15, Defendant avers that the Policy speaks for itself and
27 must be read and interpreted as a whole, and contains language that includes some or all of the

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1 language quoted in Paragraph 15. Defendant is without sufficient knowledge or information to form
2 a belief as to the truth of the remaining allegations, and on that basis denies each and every
3 remaining allegation contained in Paragraph 15.

4 16. In response to Paragraph 16, Defendant admits that the Underlying Action contained
5 allegations relating to work performed and materials provided by independent contractors on behalf
6 of Defendant, or the actions or inactions of independent contractors' employees, laborers, suppliers,
7 or vendors. Defendant denies each and every remaining allegation contained in Paragraph 16.

8 17. In response to Paragraph 17, Defendant admits that USIC that is making the
9 contentions contained therein, and further admits that it denies that USIC owes no duty to defend or
10 indemnify PETERSEN under the Policy against the claims asserted in the Underlying Action based
11 upon the ICE. Defendant denies each and every remaining allegation contained in Paragraph 17.

12 18. In response to Paragraph 18, Defendant avers that this paragraph contains a legal
13 conclusion which does not require a response but, to the extent otherwise, Defendant denies each
14 and every allegation contained in Paragraph 18.

15 19. In response to Paragraph 19, Defendant denies each and every allegation
16 contained in Paragraph 19.

17 **SECOND CAUSE OF ACTION**

18 **REIMBURSEMENT OF DEFENSE COSTS**

19 20. In response to Paragraph 20, Defendant incorporates the allegations contained in
20 paragraphs 1 through 19, inclusive, of this FAC as though fully set forth herein.

21 21. In response to Paragraph 21, Defendant denies each and every allegation contained
22 therein.

23 22. In response to Paragraph 22, Defendant denies each and every allegation contained
24 therein.

25 23. In response to Paragraph 23, Defendant denies each and every allegation contained
26 therein.

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SIXTH AFFIRMATIVE DEFENSE

Plaintiff has breached its contractual and extra contractual obligations under the applicable insurance Policy and, accordingly, any relief to which Plaintiff may be entitled should be offset by Plaintiff's comparative fault.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff owes a duty to defend and indemnify Petersen in the Underlying Action, based on all of the contentions made in the Underlying Action, including but not limited to the contentions made in pleadings and discovery, and all extrinsic facts known to Plaintiff, under the terms of all applicable insurance policies issued by Plaintiff.

EIGHTH AFFIRMATIVE DEFENSE

At all times material to the allegations of the FAC herein, the conduct and actions of Plaintiff and its agents, attorneys, representatives, and/or other individuals acting on its behalf, and each of them, was such as to constitute an estoppel as to each of the claims asserted in the FAC.

NINTH AFFIRMATIVE DEFENSE

At all times material to the allegations of the FAC herein, the conduct and actions of Plaintiff and its agents, attorneys, representatives, and/or other individuals acting on its behalf, and each of them, was such as to constitute a waiver as to each of the claims asserted in the FAC.

TENTH AFFIRMATIVE DEFENSE

Plaintiff failed to properly reserve its rights to deny coverage for defense and indemnity of Petersen in the Underlying Action.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to take reasonable steps to mitigate its alleged loss, if any, and such conduct bars or reduces any recovery sought by Plaintiff herein.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's acts and omissions contributed as a proximate cause in bringing about Plaintiff's alleged loss, if any, and the total amount of loss to which Plaintiff is entitled, if any, should be reduced in proportion to Plaintiff's own fault.

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THIRTEENTH AFFIRMATIVE DEFENSE

Portions of the applicable policies are ambiguous and unenforceable.

FOURTEENTH AFFIRMATIVE DEFENSE

Portions of the applicable policies are unenforceable because they defeat the reasonable expectations of the insured(s).

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's FAC is barred because Plaintiff acted as a volunteer in connection with the matters alleged in the FAC.

SIXTEENTH AFFIRMATIVE DEFENSE

One or more of the controversies alleged in the FAC is not ripe for adjudication.

SEVENTEENTH AFFIRMATIVE DEFENSE

Pursuit of the instant action is improper because the issues in this action overlap with issues in the pending Underlying Action, and pursuit of this action would prejudice the rights of Petersen as Plaintiff's insured(s). Accordingly, the instant action should be dismissed or stayed pending a resolution of the Underlying Action. *Montrose Chem. Corp. v. Sup. Ct.* 25 Cal. App. 4th 902, 910 (1994); *Wilton v. Seven Falls Co.* 515 U.S., 283 (1995); *Allied Prop. & Cas. Ins. Co. v. Roberts* 2011 WL 2495691, at *1 (E.D. Cal. June 21, 2011).

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff has breached its duty to defend Petersen in the Underlying Action by, among other things, failing to advise Petersen of its right to independent counsel as required by California Civil Code Section 2860, and its claims herein are therefore barred.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of unjust enrichment, as Plaintiff's retention of the premiums paid by Petersen for insurance coverage would be unjust if Plaintiff refuses to acknowledge its obligations to Petersen.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's failure to join one or more indispensable parties.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiff's FAC, and each cause of action therein, is barred by the applicable statutes of limitations, including without limitation Cal. Civ. Pro. Code §§ 337, 339, 343.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to provide a proper and adequate defense to Defendant in the Underlying Action and has therefore waived any coverage defenses.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to provide a proper and adequate defense to Defendant in the Underlying Action and therefore is estopped to deny any defense or indemnity obligations.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to provide a proper and adequate defense to Defendant in the Underlying Action and, therefore, is not entitled to any reimbursement of defense costs.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiff failed to properly reserve its rights to seek reimbursement from Petersen.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Petersen asserts that they presently have insufficient knowledge or information on which to form a belief as to whether they may have further, as yet unstated, defenses available. Petersen therefore reserves herein the right to assert additional defenses if discovery and further investigation indicates that further defenses would be appropriate.

PETERSEN'S PRAYER FOR RELIEF

WHEREFORE, Petersen prays for judgment as follows:

1. That Plaintiff take nothing by reason of its FAC;
2. For costs of suit incurred herein;
3. For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure Defendant hereby demands a

1 trial by jury of all issues so triable.

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Respectfully Submitted,

4 DATED: _____

WEINSTEIN & NUMBERS, LLP

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By: _____

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Barron L. Weinstein
Shanti Eagle

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Attorneys for Defendant
Dean Petersen dba
Petersen Construction Services

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