

1 RAMIRO MORALES, Bar No. 167947  
CHRISTINE M. FIERRO, Bar No. 191660  
2 RICHARD A. EGGERTH, Bar No. 99625  
MORALES FIERRO & REEVES  
3 2300 Contra Costa Blvd., Suite 310  
Pleasant Hill, CA 94523  
4 Telephone: (925) 288-1776  
Facsimile: (925) 288-1856

5 Attorneys for Plaintiff  
6 GERLING AMERICA INSURANCE  
COMPANY

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO

11 GERLING AMERICAN INSURANCE )  
COMPANY, a New York Corporation, )

12 )  
13 Plaintiff, )

14 vs. )

15 HOMESTEAD INSURANCE COMPANY, a )  
Pennsylvania Corporation; GREAT )  
16 AMERICAN E&S INSURANCE )  
COMPANY, an Ohio Corporation, formerly )  
17 known as AGRICULTURAL EXCESS AND )  
SURPLUS INSURANCE COMPANY, and )  
18 DOES 1-10, )

19 Defendants. )  
20 )

CASE NO.: CV08-1716 PJH

21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )  
**STIPULATION AND [PROPOSED]  
ORDER TO FILE AMENDED  
COMPLAINT**

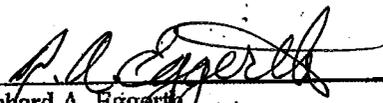
21  
22 IT IS HEREBY STIPULATED by and between the parties hereto through their  
23 respective attorneys of record that plaintiff may file an Amended Complaint, a copy of which is  
24 attached hereto. The only difference from the amended complaint to the original complaint is to  
25 change plaintiff's name from "HDI-Gerling America Insurance Company" to "Gerling America  
26 Insurance Company," as the caption of this stipulated order is changed.

27 IT IS FURTHER STIPULATED that defendants waive notice and service of the amended  
28 complaint and shall not be required to answer the amendment, and that all denials, responses and

1 affirmative defenses contained in the answers filed defendants to the original complaint shall be  
2 responsive to the amended complaint.

3 DATED: October 17, 2008

MORALES, FIERRO & REEVES

4  
5   
6 Richard A. Eggerth  
7 Attorneys for Plaintiff  
8 GERLING AMERICA INSURANCE COMPANY

9 DATED: October 16, 2008

DUANE MORRIS LLP

10   
11 Robert M. Fineman  
12 Attorneys for Defendant  
13 GREAT AMERICAN E&S INSURANCE  
14 COMPANY

15 DATED: October 14, 2008

CHARLSTON REVICH & WOLLITZ LLP

16   
17 Howard Wollitz  
18 Attorneys for Defendant  
19 HOMESTEAD INSURANCE COMPANY

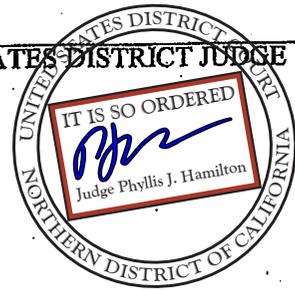
20 ~~PROPOSED~~ ORDER

21 Plaintiff may file the Amended Complaint attached to this stipulated Order.

22 IT IS SO ORDERED.

23 Dated: 10/22/08

24 UNITED STATES DISTRICT JUDGE



1 RAMIRO MORALES, SBN 167947  
CHRISTINE M. FIERRO, SBN 191660  
2 RICHARD A. EGGERTH, SBN 99625  
MORALES, FIERRO & REEVES  
3 2300 Contra Costa Blvd., Ste. 310  
Pleasant Hill, California 94523  
4 Telephone: (925) 288-1776

5 Attorneys for Plaintiff  
GERLING AMERICA INSURANCE COMPANY  
6

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 GERLING AMERICA INSURANCE  
COMPANY, a New York Corporation,

11 Plaintiff,

12 vs.

13 HOMESTEAD INSURANCE COMPANY,  
an Pennsylvania Corporation; GREAT  
14 AMERICAN E&S INSURANCE  
COMPANY, an Ohio Corporation, formerly  
15 known as AGRICULTURAL EXCESS AND  
SURPLUS INSURANCE COMPANY, and  
16 DOES 1-10,

17 Defendants.  
18

CASE NO.: CV08-1716 PJH

**AMENDED COMPLAINT FOR  
DECLARATORY RELIEF AND  
CONTRIBUTION**  
(DEMAND FOR JURY TRIAL)

19 Plaintiff, Gerling America Insurance Company ("Gerling"), alleges as follows:  
20

21 **JURISDICTION AND VENUE**

22 1. At all times relevant herein, Gerling was and is an insurance company organized  
23 under and by virtue of the laws of the State of New York, authorized to conduct business as an  
24 insurer in the State of California. Gerling is a resident of and incorporated in New York and has its  
25 principal place of business in New York.

26 2. Gerling is informed and believes, and on that basis alleges, that Defendant  
27 Homestead Insurance Company (hereinafter "Homestead") was and is an insurance company  
28 organized under and by virtue of the laws of the State of Pennsylvania, conducting business as an  
insurer in the State of California. Gerling is informed and believes, and on that basis alleges, that

1 Homestead is a resident of and incorporated in Pennsylvania and has its principal place of business  
2 in Pennsylvania.

3 3. Gerling is informed and believes, and on that basis alleges, that Defendant  
4 Agricultural Excess and Surplus Insurance Company (hereinafter, "Agricultural") underwent a name  
5 change to Great American E&S Insurance Company on or about July 27, 2000. Both entities are  
6 referred to hereinafter as "Great American." Gerling is informed and believes, and on that basis  
7 alleges, that Great American was and is an insurance company organized under and by virtue of the  
8 laws of the State of Delaware, conducting business as an insurer in the state of California. Gerling  
9 is informed and believes, and on that basis alleges, that Great American is a resident of Delaware,  
10 and has its principal place of business in Ohio.

11 4. The matter in controversy between Gerling and the Defendants, exclusive of interest  
12 and costs, exceeds seventy-five thousand dollars. Gerling is also seeking declaratory relief. Gerling  
13 and Defendants are citizens of diverse jurisdictions. Accordingly, this matter is properly subject to  
14 the jurisdiction of this Court under 28 United States Code sections 1332 and 2201.

15 5. Venue of this matter is proper in the Northern District of California under 28 United  
16 States Code section 1391(a) because the events giving rise to this coverage claim transpired in the  
17 Northern District.

#### 18 GENERAL ALLEGATIONS

19 6. This insurance coverage action arises from the construction defect actions entitled  
20 *Emery Bay II Associates v. Devcon Construction Incorporated, et al.*, Alameda County Superior  
21 Court Case Number RG04144077 (the "Emery Bay Action"), and *Chartwell HOA, et al. v. 44 Third*  
22 *Street, Ltd. LP, et al.*, Santa Clara County Superior Court Case Number 1-03-CV-814851 (the  
23 "Chartwell Action") (collectively "the Underlying Actions").

24 7. At all time relevant herein, Jonce Thomas Construction Company, Inc. (hereinafter,  
25 "Jonce"), was a licensed contractor in the business of building construction, whose primary place of  
26 business is 3390 Seldon Court, Fremont, Alameda County, CA.

27 8. Jonce was named as a defendant in the Underlying Actions and tendered its defense  
28 and indemnity to various insurance companies, including Gerling.

1           9.       Gerling's predecessor company, Gerling America Insurance Company, issued general  
2 liability insurance, policy number 8020350GLP, effective June 30, 1995 through September 9, 1995  
3 (hereinafter "the Gerling policy"), under which Jonce is an insured.

4           10.       Homestead issued policy number UL-03641, effective June 30, 1994 through June  
5 30, 1995, policy number UL-04314, effective June 30, 1995 through June 30, 1996, policy number  
6 UL-04935, effective June 30, 1996 through June 30, 1997, and policy number UL-05389, effective  
7 June 30, 1997 through June 30, 1998 (hereinafter "the Homestead Policies"), under which Jonce is  
8 an insured.

9           11.       The Homestead Policies are excess over "underlying insurance," as that term is  
10 defined by the Homestead Policies. The Homestead Policies state:

11                   Coverage A Excess Liability Insurance (Following Form)

12                   Coverage A is excess insurance and follows the underlying insurance except as  
13 otherwise stated in this policy.

14           1.       We will pay those sums the insured must legally pay as damages because of  
15 bodily injury, property damage, personal injury, or advertising injury, caused  
16 by an occurrence which occurs during the policy period of this policy in  
excess of the sums payable as damages in the underlying insurance or would  
have been payable but for the exhaustion of the applicable limit of insurance.

17           12.       The Homestead Policies define "underlying insurance" as "the insurance policies  
18 listed in Schedule A – Schedule of Underlying Insurance Policies, including any renewals or  
19 replacements thereof which provide the underlying coverages and limits stated in Schedule A –  
20 Schedule of Underlying Insurance Policies . . . ."

21           13.       Schedule A of Homestead policy number UL-03641 identifies commercial general  
22 liability coverage issued by "United National" as "underlying insurance."

23           14.       Schedule A of Homestead policy number UL-04314 identifies commercial general  
24 liability coverage issued by Gerling as "underlying insurance."

25           15.       Schedule A of Homestead policy number UL-04935 identifies commercial general  
26 liability coverage issued by "AIG" as "underlying insurance."

27           16.       Schedule A of Homestead policy number UL-05389 identifies commercial general  
28 liability coverage issued by "American Equity" as "underlying insurance."

1           17.     Commercial general liability coverage issued by United National to Jonce exhausted  
2 the limits of coverage which would have otherwise been available to pay losses associated with the  
3 Underlying Actions, prior to settlement of the Underlying Actions.

4           18.     Commercial general liability coverage issued by AIG to Jonce exhausted the limits of  
5 coverage which would have otherwise been available to pay losses associated with the Underlying  
6 Actions, prior to settlement of the Underlying Actions.

7           19.     Commercial general liability coverage issued by American Equity to Jonce exhausted  
8 the limits of coverage which would have otherwise been available to pay losses associated with the  
9 Underlying Actions, prior to settlement of the Underlying Actions.

10          20.     Agricultural issued policy number UMB 2703840, effective June 30, 1998 through  
11 June 30, 1999, policy number UMB 2703840-01, effective June 30, 1999 through February 6, 2000,  
12 and policy number UMB 2703840-02, effective February 6, 2000 through February 6, 2001, under  
13 which Jonce is an insured. Great American issued policy number UMB 2703840-03, effective  
14 February 6, 2001 through February 6, 2002, under which Jonce is an insured. Collectively, all these  
15 policies are referred to hereinafter as the "Great American Policies."

16          21.     The Great American Policies are excess over a "Retained Limit," as that term is  
17 defined in the policies. The policies state:

18                 We will pay on behalf of the "Insured" those sums in excess of the "Retained Limit"  
19 that the "insured" becomes legally obligated to pay by reason of liability imposed by  
20 law or assumed by the "insured" under an "insured contract" because of "bodily  
injury," "property damage," "personal injury," or "advertising injury" that takes place  
during the Policy Period and is caused by an "occurrence" happening anywhere.

21          22.     The Great American Policies define "Retained Limit" as:

22                 the greater of: 1. the total amounts stated as the applicable limits of the underlying  
23 policies listed in the Schedule of Underlying Insurance and the applicable limits of  
24 any other insurance providing coverage to the "Insured" during the Policy Period; or  
25 2. the amount stated in the Declarations as Self-Insured Retention as a result of any  
one "occurrence" not covered by the underlying policies listed in the Schedule of  
Underlying Insurance nor by any other insurance providing coverage to the "Insured"  
during the Policy Period.

26          23.     Agricultural policy number UMB 2703840 identifies commercial general liability  
27 coverage issued by "New Market" in the Schedule of Underlying Insurance and states that \$10,000  
28 is the amount of the Retained Limit.

1           24.     Agricultural policy number UMB 2703840-01 identifies commercial general liability  
2 coverage issued by “Newmarket Underwriters Insurance Company” (policy number NMG001027)  
3 in the Schedule of Underlying Insurance and states that \$10,000 is the amount of the Retained  
4 Limit.

5           25.     Agricultural policy number UMB 2703840-02 identifies commercial general liability  
6 coverage issued by “Lloyds of London” in the Schedule of Underlying Insurance and states that  
7 \$10,000 is the amount of the Retained Limit.

8           26.     Great American policy number UMB 2703840-03 identifies commercial general  
9 liability coverage issued by “Lloyds of London” in the Schedule of Underlying Insurance and states  
10 that \$10,000 is the amount of the Retained Limit.

11          27.     Commercial general liability coverage issued by “New Market” and “Newmarket” to  
12 Jonce exhausted the limits of coverage which would have otherwise been available to pay losses  
13 associated with the Underlying Actions, prior to settlement of the Underlying Actions.

14          28.     Commercial general liability coverage issued by “Lloyds of London” to Jonce  
15 exhausted the limits of coverage which would have otherwise been available to pay losses  
16 associated with the Underlying Actions, prior to settlement of the Underlying Actions.

17          29.     Gerling is informed and believes, and on that basis alleges, that Jonce performed all  
18 conditions giving rise to Homestead’s obligation to defend and indemnify Jonce with regard to the  
19 Underlying Actions. Alternatively, Jonce has been excused from performing any conditions giving  
20 rise to Homestead’s obligations under the Homestead Policies.

21          30.     In the Underlying Actions, the plaintiffs alleged that various defects in the  
22 construction of the dwellings caused property damage during Homestead’s and Great American’s  
23 respective policy periods.

24          31.     Gerling requested that, pursuant to the Homestead Policies, Homestead defend and  
25 indemnify Jonce in the Chartwell Action.

26          32.     Homestead refused to defend and indemnify Jonce in the Chartwell Action, despite  
27 its obligation to do so under the Homestead Policies, solely because Homestead alleged its four  
28 years of coverage was excess to the single year coverage provided under the Gerling Policy.

1           33.     Prior to settlement, Homestead demanded that Gerling settle the claims against Jonce  
2 in the Chartwell Action, as Homestead alleged that the claims alleged in the Chartwell Action were  
3 covered under the Gerling Policy and that all Homestead coverage was excess to the coverage  
4 provided by Gerling.

5           34.     Due to an impending trial date and Homestead's repeated refusal to contribute  
6 toward settlement, Gerling alone settled claims against Jonce in the Chartwell Action under a full  
7 reservation of rights. Gerling contributed \$425,000 toward a settlement in the Chartwell Action on  
8 behalf of Jonce, thereby resolving all claims against Jonce raised in that action.

9           35.     Gerling requested that, pursuant to the Homestead Policies, Homestead defend and  
10 indemnify Jonce in the Emery Bay Action.

11          36.     Homestead refused to defend Jonce in the Emery Bay Action and contributed to the  
12 settlement of the action only for amounts exceeding the remaining policy limits of the Gerling  
13 Policy because Homestead alleged its four years of coverage was excess to the single year of  
14 coverage provided under the Gerling policy.

15          37.     Homestead demanded that Gerling contribute the remainder of the applicable limits  
16 of coverage under the Gerling Policy to resolve the claims against Jonce in the Emery Bay Action.

17          38.     The Emery Bay Action settled in or around September, 2006. Under a full  
18 reservation of rights, Gerling agreed to contribute, on behalf of Jonce, the remainder of its  
19 applicable limits under the Gerling policy in order to resolve claims against Jonce in the Emery Bay  
20 Action. Accordingly, Gerling contributed \$302,842 on behalf of Jonce.

21          39.     Gerling is informed and believes, and on that basis alleges, that Jonce performed all  
22 conditions giving rise to Great American's obligation to defend and indemnify Jonce with regard to  
23 the Underlying Actions. Alternatively, Jonce has been excused from performing any conditions  
24 giving rise to Great American's obligations under the Great American Policies.

25          40.     Gerling requested that, pursuant to the Great American Policies, Great American  
26 defend and indemnify Jonce with regard to the Chartwell Action.

27          41.     Great American refused to defend and indemnify Jonce in the Chartwell Action,  
28 despite its obligation to do so under the Great American Policies, solely because Great American

1 alleged its five years of coverage was excess to the single year of coverage provided under the  
2 Gerling policy.

3 42. Prior to settlement, Great American demanded that Gerling settle the claims against  
4 Jonce in the Chartwell Action, as Great American alleged that the claims alleged in the Chartwell  
5 Action were covered under the Gerling Policy and that the Great American coverage was excess to  
6 the coverage provided by Gerling.

7 43. Due to an impending trial date and Great American's repeated refusal to contribute  
8 toward settlement, Gerling alone settled claims against Jonce in the Chartwell Action under a full  
9 reservation of rights. Gerling contributed \$425,000 toward a settlement in the Chartwell Action on  
10 behalf of Jonce, thereby resolving all claims against Jonce raised in that action.

11 44. Gerling requested that, pursuant to the Great American Policies, Great American  
12 defend and indemnify Jonce in the Emery Bay Action.

13 45. Great American refused to defend Jonce in the Emery Bay Action and contributed to  
14 the settlement of the action only for amounts exceeding the remaining policy limits of the Gerling  
15 policy because Great American alleged its five years of coverage was excess to the single year of  
16 coverage provided under the Gerling policy.

17 46. Homestead demanded that Gerling contribute the remainder of the applicable limits  
18 of coverage under the Gerling Policy to resolve the claims against Jonce in the Emery Bay Action.

19 47. The Emery Bay Action settled in or around September, 2006. Under a full  
20 reservation of rights, Gerling agreed to contribute, on behalf of Jonce, the remainder of its  
21 applicable limits under the Gerling policy in order to resolve claims against Jonce in the Emery Bay  
22 Action. Accordingly, Gerling contributed \$302,842 on behalf of Jonce. Great American demanded  
23 Gerling contribute the remainder of the applicable limits of coverage under the Gerling Policy to  
24 resolve the claims against Jonce in the Emery Bay Action.

25 48. The Underlying Actions settled in late 2006, and Gerling defended Jonce and  
26 indemnified Jonce for sums in relation to the settlement of the Underlying Actions, subject to a  
27 reservation of rights.

28 49. Homestead had an obligation to defend and indemnify Jonce in the Underlying

1 Actions pursuant to the Homestead Policies.

2 50. Great American had an obligation to defend and indemnify Jonce in the Underlying  
3 Actions pursuant to the Great American Policies.

4 **INTRADISTRICT ASSIGNMENT**

5 51. Gerling incorporates paragraphs 1-50 as though fully set forth herein.

6 52. Pursuant to Northern District Local Rule 3-5, Gerling asserts the following bases for  
7 assignment of this case to the Oakland Division in Alameda County.

8 53. The insured in the insurance contracts at issue in this action, Jonce Thomas  
9 Construction Company, has a mailing address and primary place of business in Alameda County.  
10 Gerling is informed and believes that all of the insurance contracts at issue in this action were issued  
11 to Jonce in Alameda County. And one of the two Underlying Actions, the Emery Bay Action, was  
12 venued in Alameda County Superior Court, and the acts, transactions and occurrences relating to  
13 that action arose in Alameda County.

14 **FIRST CAUSE OF ACTION**  
15 **DECLARATORY RELIEF**  
16 **(Against HOMESTEAD)**

17 54. Gerling incorporates paragraphs 1 through 53 as though fully set forth herein.

18 55. Gerling contends that, pursuant to the terms, conditions, and endorsements of the  
19 Homestead Policies, Homestead had an obligation to defend and indemnify Jonce in the Underlying  
20 Actions.

21 56. Gerling contends that, given Homestead's obligations to Jonce, Homestead has a  
22 duty to reimburse Gerling for the sums Gerling has already incurred in providing Jonce with a  
23 defense and indemnity with regard to the Underlying Actions.

24 57. Gerling is informed and believes, and on that basis alleges, that Homestead denies  
25 that it had a duty to defend Jonce in the Underlying Actions, denies that it had a duty to indemnify  
26 Jonce in the Chartwell Action and denies that it had a duty to indemnify Jonce in the Emery Bay  
27 Action except to the extent that the amount required to indemnify the loss exceeded the limits of the  
28 Gerling Policy. Homestead believes it owes no duty to reimburse Gerling for sums Gerling has  
incurred in defending and indemnifying Jonce with regard to the Underlying Actions.





1 **PRAYER FOR RELIEF**

2 Gerling requests trial by jury, pursuant to Fed. R. Civ. P. 38(b). In addition, Gerling  
3 requests:

4 As to the First Cause of Action for Declaratory Relief (Against Homestead):

- 5 1. For a declaration and determination that Homestead owed a duty to defend Jonce in  
6 the Underlying Actions;
- 7 2. For a declaration and determination that Homestead owed a duty to indemnify Jonce  
8 in the Chartwell Action;
- 9 3. For a declaration and determination that Homestead owed a duty to indemnify Jonce  
10 in the Emerybay Action prior to exhaustion of the Gerling policy;
- 11 4. For a declaration that Homestead owes a duty to reimburse Gerling for sums Gerling  
12 incurred in defending and indemnifying Jonce with regard to the Underlying Actions;
- 13 5. For all other relief the Court deems just and proper.

14 As to the Second Cause of Action for Declaratory Relief (Against Great American):

- 15 1. For a declaration and determination that Great American owed a duty to defend  
16 Jonce in the Underlying Actions;
- 17 2. For a declaration and determination that Great American owed a duty to indemnify  
18 Jonce in the Chartwell Action;
- 19 3. For a declaration and determination that Great American owed a duty to indemnify  
20 Jonce in the Emery Bay Action prior to exhaustion of the Gerling policy;
- 21 4. For a declaration that Great American owes a duty to reimburse Gerling for sums  
22 Gerling incurred in defending and indemnifying Jonce with regard to the Underlying  
23 Actions;
- 24 5. For all other relief the Court deems just and proper.

25 As to the Third Cause of Action for Contribution (Against Homestead):

- 26 1. For compensatory damages in excess of \$75,000 according to proof at trial;
- 27 2. For an award of attorney's fees and costs; and
- 28 3. For all other relief the Court deems just and proper.

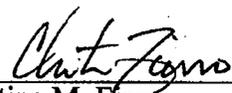
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

As to the Fourth Cause of Action for Contribution (Against Great American):

1. For compensatory damages in excess of \$75,000 according to proof at trial;
2. For an award of attorney's fees and costs; and
3. For all other relief the Court deems just and proper.

Dated: October 13, 2008

MORALES, FIERRO & REEVES

By:   
Christine M. Fierro  
Attorneys for Plaintiff  
GERLING AMERICA INSURANCE  
COMPANY

S:\DOCS\GA5105\AMENDED\CMP081013.CMF.wpd