

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GREAT AMERICAN INSURANCE COMPANY,)	Judge: THOMAS L. LUDINGTON
)	
Plaintiff,)	
)	
v.)	Case No. 09-12488
)	
GEOSTAR CORPORATION, TONY P.)	
FERGUSON, THOM E. ROBINSON, JOHN W.)	
PARROTT, S. DAVID PLUMMER, SPENCER D.)	
PLUMMER, CLASSICSTAR FARMS, INC.,)	
CLASSICSTAR FARMS, LLC, FIRST SOURCE)	
WYOMING, INC., GEOSTAR EQUINE ENERGY,)	
INC., GEOSTAR FINANCIAL CORPORATION,)	
GEOSTAR FINANCIAL SERVICES)	
CORPORATION, and DOES 1-100,)	
)	
Defendants.)	

Attorneys for Plaintiff:

David A. Wallace (P 24149)
Gregory W. Mair (P 67465)
O'NEILL, WALLACE & DOYLE, P.C.
300 St. Andrews Road, Suite 302
P.O. Box 1966
Saginaw, Michigan 48605
(989) 790-0960
(989) 790-6902 fax

Paul F. Matousek
Joseph J. Borders
Neil E. Holmen
William P. Zeller
WALKER WILCOX MATOUSEK LLP
225 W. Washington Street, Suite 2400
Chicago, Illinois 60606
(312) 244-6700
(312) 244-6800 fax

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Great American Insurance Company (“Great American”), by its counsel, for its Complaint for Declaratory Judgment (“Complaint”), states as follows:

INTRODUCTION

1. Some or all Defendants have asserted that insurance coverage is available under an excess directors and officers (“D&O”) liability insurance policy issued by Great American for Defendants’ exposure in connection with Defendants’ alleged malfeasance in providing professional services to their clients as asserted in many client demand letters and complaints. In this Complaint, Great American seeks rescission of its D&O policies, or in the alternative, a declaration that coverage is not available for the Defendants for several reasons. First, when GeoStar Corporation (“GeoStar”) applied for each of two successive Great American excess D&O policies (which doubled the limits of GeoStar’s prior D&O liability insurance program), a number of material misrepresentations were made to Great American. But for these material misrepresentations, Great American would not have issued either policy at the same premium, or with the same terms, or at all. Second, the underlying claims against Defendants existed or were known to be imminent at the time of the inception of Great American coverage. Third, the Great American excess D&O policies were never meant to cover the types of claims that have been asserted against the Defendants – namely, errors and omissions (“E&O”) claims. In addition, there are numerous other provisions, exclusions, conditions, and/or legal principles that limit or bar coverage in whole or in part.

2. This coverage dispute arises from numerous underlying lawsuits, demand letters, and criminal and regulatory proceedings commenced against Defendants during the last few years by angry clients, the U.S. Attorney's Office in Portland, Oregon, and the Internal Revenue Service (“IRS”). Holding themselves out as horse, gas, and tax experts, Defendants promised their clients extraordinary returns on horse and gas investments and the ability to deduct much or

all of their investments from their taxable income. Indeed, much of clients' investments were paid using tax refunds from such deductions. Upon information and belief, most or all of these clients' deductions have been disallowed. Defendants entered "settlement" agreements with certain clients and then allegedly breached those agreements too.

PARTIES

3. Plaintiff Great American is an insurance company organized under the laws of Ohio with its principal place of business in Ohio.

4. Defendant GeoStar is a Delaware corporation with its principal place of business in Mt. Pleasant, Michigan.

5. Defendant Tony P. Ferguson ("Ferguson") is, upon information and belief, a citizen and resident of Florida.

6. Defendant Thom E. Robinson ("Robinson") is, upon information and belief, a citizen and resident of Michigan.

7. Defendant John W. Parrott ("Parrott") is, upon information and belief, a citizen and resident of California or the U.S. Virgin Islands.

8. Defendant S. David Plummer ("David Plummer") is, upon information and belief, a citizen and resident of Texas and/or Utah.

9. Defendant Spencer D. Plummer ("Spencer Plummer") is, upon information and belief, a citizen and resident of Utah.

10. Upon information and belief, Defendant ClassicStar Farms, Inc. is a Delaware corporation with its principal place of business in Michigan. Upon information and belief, GeoStar directly or indirectly owns a majority interest in ClassicStar Farms, Inc.

11. Upon information and belief, Defendant ClassicStar Farms, LLC is a Kentucky limited liability company with its principal place of business in Kentucky. Upon information and belief, GeoStar directly or indirectly owns a majority interest in ClassicStar Farms, LLC.

12. Upon information and belief, Defendant First Source Wyoming, Inc. ("FSW") is a Delaware corporation with its principal place of business in Michigan. Upon information and belief, GeoStar directly or indirectly owns a majority interest in FSW.

13. Upon information and belief, Defendant GeoStar Equine Energy, Inc. ("GEEI") is a Texas corporation with its principal place of business in Michigan. Upon information and belief, GeoStar directly or indirectly owns a majority interest in GEEI.

14. Upon information and belief, Defendant GeoStar Financial Corporation ("GF") is a Delaware corporation with its principal place of business in Michigan. Upon information and belief, GeoStar directly or indirectly owns a majority interest in GF.

15. Upon information and belief, Defendant GeoStar Financial Services Corporation ("GFS") is a Delaware corporation with its principal place of business in Michigan. Upon information and belief, GeoStar directly or indirectly owns a majority interest in GFS.

16. Defendant DOES 1-100 either are or claim to be Insureds under the policies, but whose true names or capacities, whether individual, corporate or otherwise, are unknown to Great American at this time and, therefore, Great American sues Defendant DOES 1-100 by fictitious names. Great American will request leave of this Court to amend this Complaint to insert true names and capacities of Defendant DOES 1-100, inclusive, when they have been ascertained by Great American, and to join such Defendants in this action.

JURISDICTION AND VENUE

17. This action is brought pursuant to 28 U.S.C. §§ 1332 and 2201. There is complete diversity between Great American, on the one hand, and the Defendants, on the other,

and the amount in controversy as to each Defendant exceeds the sum or value of \$75,000, exclusive of interest and costs.

18. This Court has personal jurisdiction over the Defendants pursuant to MCL §§ 600.71, 600.705, 600.711, and/or 600.715.

19. Pursuant to 28 U.S.C. §1391, venue is proper in this District because many of the events giving rise to this dispute occurred within this District.

BACKGROUND

A. GeoStar

20. GeoStar, a privately-held company, was incorporated in 1996. Robinson, Ferguson, and Parrott (collectively, the “GeoStar Principals”) directly or indirectly own and control a majority of GeoStar shares. In the mid- to late-1990s, GeoStar acquired numerous oil and gas properties as well as various entities that provide services to the oil and gas industry.

21. In or about February 2000, many of the unexplored and/or undeveloped oil and gas properties owned by GeoStar and/or its subsidiaries were placed in a Canadian shell company named 1075191 Ontario Ltd., which was sold to a publicly-traded Canadian company named Copperquest, Inc. (“Copperquest”) through a reverse takeover. As a result, GeoStar and the GeoStar Principals acquired a majority of the shares of Copperquest, which was then renamed Gstar Exploration Ltd. (“Gstar”). The GeoStar Principals operated Gstar from GeoStar’s Michigan office. Initially, Gstar had no employees of its own and company tasks were performed by GeoStar employees.

22. As of mid-2000, Gstar’s oil and gas property interests were mostly undeveloped. To develop its gas properties and satisfy its financial commitments, it was necessary for Gstar to raise large amounts of capital. Defendants accomplished this by, among other things, the leasing of horses to wealthy individuals, a practice known as “mare leasing.”

B. Mare Leasing

23. Mare leasing was marketed by Defendants as a way for GeoStar clients to secure tax advantages through participating in the thoroughbred horse breeding industry. Instead of purchasing a mare, a client would lease a mare for a given period of time, during which the mare would be mated. If the mating succeeded, the client would become the owner of the resulting foal. A main attraction for clients was that the “expenses” associated with such leases could be deducted from taxable income, reducing the clients’ tax liability. However, for such expenses to be properly deducted, the clients’ mare lease activities had to comply with applicable tax laws and regulations. For example, a client must have been engaged in the leasing activity as a legitimate business with the purpose of achieving a profit; deductions would not be allowed if the client’s activity was regarded as merely a hobby. Also, the client must have assumed the risk that the mating might be unsuccessful; in other words, the lessor could not guaranty that the client would receive a live, healthy foal, in which case the cost of the lease would be simply characterized as the price to purchase the foal, which could not be deducted for tax purposes. Also, the lease had to have real substance; i.e., the lessee had to have exclusive rights to a given mare for the term of the lease.

24. The framework for Defendants’ mare leasing business (the “Mare Lease Program”) was first developed by David Plummer, who marketed himself as a horse breeding and tax expert. In the 1990s, David Plummer operated a similar mare lease program through Blue Blood, Inc. (“Blue Blood”) and other related entities he owned.

25. In late 1998, Blue Blood’s assets were sold to Classic Breeders, LLC (“Classic Breeders”), a company owned by a horse breeder named George Hofmeister (“Hofmeister”). David Plummer became an employee of Classic Breeders. By 2000, Classic Breeders’ mare lease program clients were complaining that their leased horses were worthless. In or about

December 2000, a company owned by David Plummer and others purchased the business from Hofmeister.

C. GeoStar Buys ClassicStar and Defendants Market the Mare Lease Program

26. In 2000, around the time Gostar was formed, the GeoStar Principals became acquainted with David Plummer. Upon information and belief, David Plummer marketed oil and gas interests for GeoStar, Gostar and/or their subsidiaries while employed by Classic Breeders under Hofmeister's ownership.

27. In 2001, GeoStar purchased Classic Breeders from David Plummer. In or about July 2001, GeoStar organized ClassicStar Farms, LLC, ClassicStar, LLC, and ClassicStar Farms, Inc. (collectively "ClassicStar") to operate the Mare Lease Program. Upon information and belief, the purchase was completed in December 2001 (although the operative acquisition documents are dated July 2001). ClassicStar's business operations were conducted from various locations, including GeoStar's headquarters in Michigan as well as locations in Utah, Kentucky, and Florida. GeoStar retained David and Spencer Plummer (collectively, the "Plummers") to help market the Mare Lease Program.

28. ClassicStar, LLC was originally registered as a Utah limited liability company. In December 2006, ClassicStar, LLC merged into CS Interim, LLC, a Kentucky limited liability company formed in November 2006, with CS Interim, LLC as the surviving entity. CS Interim, LLC's name was changed to "ClassicStar, LLC" in connection with the merger. ClassicStar, LLC's principal place of business is in Kentucky. ClassicStar, LLC filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on September 14, 2007, which was converted to a Chapter 7 petition on April 14, 2008. In that proceeding, the bankruptcy court determined that the proceeds of the GeoStar D&O insurance policies are not property of the estate of ClassicStar, LLC. Accordingly, ClassicStar, LLC is not a defendant herein.

29. In marketing the Mare Lease Program, Defendants told potential clients they could expect a significant return on their investment while achieving significant tax benefits. Defendants obtained opinion letters from accountants and tax lawyers regarding the tax deductions, assisted the clients with creating business plans, and advised them on horse selection. Defendants also gave clients the option to exchange their mare lease interests for oil and gas “working interests” owned by GeoStar subsidiaries and/or for Gaster stock. Defendants also touted these energy interests for their tax benefits.

30. Mare Lease Program clients typically funded their participation in the Mare Lease Program with cash and loans. Most of the loans were made by National Equine Lending Co. (“NELC”), which was controlled by ClassicStar, enabling ClassicStar to self-finance the Mare Lease Program with its own money. NELC was owned by David Plummer’s brother-in-law Gary Thompson, and NELC borrowed from ClassicStar most or all of the money that it in turn loaned to Mare Lease Program clients. Upon information and belief, Defendants tried to use NELC to circumvent IRS regulations prohibiting self-financing.

31. Defendants were very successful in marketing the Mare Lease Program. It has been estimated that over 185 clients entered into agreements to purchase Mare Lease Program interests purportedly valued at up to \$600 million.

32. From the time GeoStar acquired ClassicStar’s business in 2001, Defendants sold far more Mare Lease Program interests than Defendants’ inventory of horses could support. Moreover, Defendants structured the Mare Lease Program assuming that clients would later exchange as much as 60% to 70% of their horse interests for energy interests such as working interests in coal bed methane natural gas wells and Gaster stock. In turn, as much as 60% to 70% of the money received from Mare Lease Program clients was immediately forwarded to

GeoStar on the assumption that the clients would exchange Mare Lease Program interests for energy interests or Gastar stock owned by GeoStar or its subsidiaries. GeoStar used money raised from its clients to fund the activities of Gastar and GeoStar's other affiliates and subsidiaries.

D. The Mare Lease Program Implodes

33. By 2003, Defendants either could not or would not continue to exchange working interests or Gastar stock to Mare Lease Program clients, nor did Defendants have or purchase enough horses to satisfy mare leases from the previous years. Despite the existing shortage of both horses and energy interests, Defendants kept selling Mare Lease Program interests. Moreover, some Mare Lease Program clients did not want to exchange mare lease interests for energy interests, which further imperiled Defendants' business.

34. Defendants concocted several ideas in an attempt to keep the Mare Lease Program afloat. For example, in 2004, Defendants tried to address the mounting horse shortfall by replacing the thoroughbred horses in clients' Mare Lease Program packages with less valuable quarter horses, in many instances without the clients' knowledge or approval. Moreover, ClassicStar did not own or control the quarter horses needed to fill the packages. Thus, part or all of the Mare Lease Program packages that were purportedly filled with quarter horses were and remain worthless. Further, because the Mare Lease Program packages lacked true substance, the clients lacked a legitimate basis for claiming tax deductions.

35. In 2004, as part of a program which Defendants referred to among themselves as the "Grand America Solution" or "G.A.S. 04", Defendants tried to convince Mare Lease Program clients to exchange their Mare Lease Program interests for ownership shares in separate entities, including First Equine Energy Partners, LLC ("FEEP") and GEEI. Upon information and belief, FEEP was not organized or registered until 2006. Defendants purported to capitalize

these entities with energy interests, but never actually did so. Therefore, shares of FEEP and GEEI were and are worthless, and any Mare Lease Program clients who exchanged their interests for shares in these entities were left with nothing.

36. Defendants also attempted to settle disputes with certain Mare Lease Program clients by “repurchasing” the clients’ Mare Lease Program interests or their energy interests, or both. To this end, Defendants created several companies, including GFS and GF, which entered into settlement agreements with Mare Lease Program clients. Because GFS and GF never had sufficient assets to fulfill the settlement agreements, Defendants have defaulted on many of the settlement agreements. A number of lawsuits arising from such defaults have been filed in this Court.

E. The Fallout

37. In or before 2003, the IRS commenced audits of several Mare Lease Program clients. By mid-2004, the IRS had commenced more audits and advised several Mare Lease Program clients that their tax deductions would be disallowed (despite Defendants’ representations that the deductions were permissible).

38. On November 10, 2004, only days after GeoStar submitted its first application (termed a “Proposal Form”) to Great American for a policy that would effectively double the size of GeoStar’s D&O insurance program, the IRS notified David Plummer that he was being investigated for promoting abusive tax shelters in connection with the Mare Lease Program. Specifically, the IRS stated that it was considering possible action under Sections 6700 and 7408 of the IRS Code. Spencer Plummer received a similar letter in November 2005. Specifically, the IRS stated that it was considering possible action under Sections 6700, 6701, 7402, 7407, and 7408 of the IRS Code. Since that time, the IRS has raided ClassicStar’s Utah and Kentucky facilities, and the U.S. Attorney’s Office in Portland, Oregon has been conducting an

investigation of Defendants and has served grand jury subpoenas upon several of them. Moreover, the IRS has disallowed the tax deductions taken by most or all Mare Lease Program clients.

39. In addition to the government investigations, Defendants are the subject of numerous lawsuits and proceedings relating to the Mare Lease Program. For example, aggrieved Mare Lease Program clients have filed at least 30 lawsuits and/or arbitration proceedings in various jurisdictions against Defendants seeking (collectively) hundreds of millions of dollars in damages. Many of those cases have been consolidated for discovery purposes in the United States District Court for the Eastern District of Kentucky under the caption *In re ClassicStar Mare Lease Litigation*. Upon information and belief, a number of the Defendants have indicated they will assert their Fifth Amendment privilege against self-incrimination and provide no testimony in defense of or to rebut the allegations or claims against them.

40. Lawsuits were also filed against various Defendants by brokers that referred clients to Defendants. These brokers allege that Defendants failed to pay them their earned commissions.

THE GREAT AMERICAN EXCESS D&O POLICIES

41. Great American issued Policy No. DFX0009868, its first excess D&O policy, to GeoStar for the period September 18, 2004 to September 18, 2005 (the “2004-2005 Great American Policy”). A second excess D&O policy with the same policy number was issued by Great American to GeoStar for the period September 18, 2005 to September 18, 2006, extended by endorsement to March 18, 2007¹ (the “2005-2007 Great American Policy”) (together, the

¹ GeoStar also exercised its right under the 2005-2007 Great American Policy to purchase an extended reporting period, which essentially extended the time to report claims until March 18, 2008.

2004-2005 Great American Policy and the 2005-2007 Great American Policy are collectively referred to as the "Great American Policies"). A true and correct copy of the 2004-2005 Great American Policy, and the underlying policies, are attached hereto and made a part hereof as Exhibit A. A true and correct copy of the 2005-2007 Great American Policy, and the underlying policies, are attached hereto and made a part hereof as Exhibit B.

42. Each Great American Policy contains a per Claim and aggregate Limit of Liability of \$10 million, excess of a \$5 million primary D&O policy issued by Travelers Casualty and Surety Company of America (the "Primary Policy"), a \$5 million first excess policy issued by AXIS Reinsurance Company, and a \$75,000 per Claim retention.

43. Each Great American Policy conforms to the terms, conditions, and endorsements of the Primary Policy, except with respect to specific terms and provisions contained in the Great American Policies, which include the Policies' respective policy form, endorsements, Proposal Form and Declarations.

44. The Great American Policies are claims-made policies; coverage is only provided under the Great American Policies for claims first made within the Policy Periods – between September 18, 2004 and September 18, 2005 for the 2004-2005 Great American Policy, and between September 18, 2005 and March 30, 2007 for the 2005-2007 Great American Policy. The Great American Policies do not provide for any duty by Great American to defend any "Claim" against the Defendants.

45. Further, the Great American Policies do not provide coverage excess of the Employment Practices Liability Coverage Part of the Primary Policy or any of the endorsements or modifications to such coverage part, and no coverage is provided under the Great American Policies for any "Wrongful Employment Practice," as that term is defined in the Primary Policy.

THE COVERAGE DISPUTE

46. GeoStar has provided Great American and/or its counsel with notice of numerous matters related to the Mare Lease Program (collectively, the "Reported Matters"). A list of Reported Matters is attached hereto and made a part hereof as Exhibit C.

47. Great American has reserved all of its rights, remedies, and defenses under all potentially-applicable policies, at law, and in equity with respect to the Reported Matters.

48. Defendants have asserted that coverage is available from Great American for some (but not all) of the Reported Matters.

49. Great American asserts that the Great American Policies are void *ab initio* due to material misrepresentations in the Proposal Forms for the Great American Policies, and that the Great American Policies must be rescinded.

50. In the alternative, Great American asserts that coverage is not available to any of the Defendants for the Reported Matters under either Great American Policy for numerous reasons.

51. An actual, present, and bona fide controversy exists between Great American and the Defendants with respect to whether the Great American Policies are void *ab initio* or, in the alternative, whether there is any coverage under the Great American Policies for the Reported Matters.

52. A judicial declaration is necessary to establish that the Great American Policies are void *ab initio* and should be rescinded.

53. In the alternative, a judicial declaration is necessary to establish the parties' rights and duties, if any, under the Great American Policies with respect to the Reported Matters.

COUNT I

(Declaratory Judgment – Great American v. All Defendants – The 2004-2005 Great American Policy Is Rescinded)

54. The allegations set forth in paragraphs 1 through 53 above are realleged and incorporated as if fully set forth herein.

55. GeoStar submitted to Great American a Proposal Form for the 2004-2005 Great American Policy, signed on October 28, 2004 by GeoStar's President Robinson (the "2004 Great American Proposal Form"). The 2004 Great American Proposal Form provides:

The undersigned Officer of the Company declares that to the best of his or her knowledge the statements set forth herein are true and correct and that reasonable efforts have been made to obtain sufficient information from each and every Director and Officer proposed for this insurance to facilitate the proper and accurate completion of this Proposal Form.

* * *

It is further understood and agreed by the Company and the Directors and Officers that the statements in this Proposal Form or any information provided herewith are their representations, that they are material and that this Policy is issued in reliance upon the truth of such representations; provided, however, that except for material facts or circumstances known to the person who subscribed this Proposal Form, any misstatement or omission in the Proposal Form or information provided herewith in respect of a Wrongful Act by a particular Director or Officer or his or her cognizance of any matter which he or she has reason to believe might afford grounds for a future Claim against him or her shall not be imputed to any other Director or Officer for purposes of determining the validity of this Policy as to such other Director or Officer.

56. On September 16, 2004, as required by the 2004 Great American Proposal Form, GeoStar provided Great American with the 2003 GeoStar Financial Statement. On the same day, GeoStar provided Great American with the 2003 ClassicStar Financial Statement.

57. The 2003 GeoStar Financial Statement contained material representations of fact that were false at the time the representations were made to Great American, including but not limited to the following:

- a. Revenues, profits, and shareholder equity were materially overstated for 2002 and 2003 because they included amounts received for Mare Lease Program contracts that could never be fulfilled according to their terms due to insufficient horse inventory.
- b. Reported shareholder equity was also overstated because the amount included ClassicStar's 2001 full-year results, even though the company was not owned by GeoStar for that entire year. (The overstated 2001 ClassicStar results were carried over to each subsequent year, falsely inflating shareholder equity in each of the subsequent years.)
- c. Note 1 to the 2003 GeoStar Financial Statement states that it was prepared in accordance with Generally Accepted Accounting Principles ("GAAP"). In fact, the statement incorporated ClassicStar's results, which were not prepared in accordance with GAAP.
- d. Note 5 to the 2003 GeoStar Financial Statement indicates that GeoStar owed various amounts to Parrott, Robinson, Ferguson and/or entities they owned or controlled, but did not reveal that these same Defendants and entities owed various (and often greater) amounts to GeoStar, thus concealing the true nature of GeoStar's related party transactions.

58. The 2003 ClassicStar Financial Statement contained material representations of fact that were false at the time the representations were made to Great American, including but not limited to the following:

- a. Revenues, income, and members' equity were materially overstated for 2002 and 2003 because they included amounts received for Mare Lease Program contracts that could never be fulfilled according to their terms due to insufficient horse inventory.
- b. Note 4 to the 2003 ClassicStar Financial Statement states that ClassicStar assets characterized as Notes Receivable "represent amounts loaned to an unrelated company that provides financing to some broodmare lessee clients." In fact, the "unrelated company" is NELC, which was not an unrelated company.
- c. The 2003 ClassicStar Financial Statement included a letter from Karren, Hendrix & Associates ("KHA") titled "Independent Accountants' Report." In fact, KHA was not an independent accountant for numerous reasons, including but not limited to the following: KHA employee Terry Green was a ClassicStar employee in 2001; KHA was paid for its services with Gastar shares; KHA and Green provided ClassicStar and its clients with tax opinion letters; KHA and Green entered into stock purchase agreements with GeoStar (on whose behalf Parrott signed the agreements) whereby they sold Gastar shares to GeoStar; on May 31, 2001, KHA reached a Fixed Price Agreement defining a number of

services it would provide to ClassicStar, including supervision of accounting functions, provision of tax planning, working with sales people, hiring of ClassicStar employees to perform accounting procedures, assistance with the training of sales people, and presenting seminars to clients; and interest payments from Mare Lease Program clients were remitted to NELC, care of KHA. Moreover, KHA prepared the 2003 ClassicStar Financial Statement, and thus was reviewing its own work.

- d. Note 1 to the 2003 ClassicStar Financial Statement states that ClassicStar's ~~"primary business operation is the leasing of thoroughbred broodmares to individuals throughout the United States and provide [sic] breeding, care and other related services in connection with the leases."~~ However, ClassicStar never owned enough horses to fulfill all of the horse leases, and its primary business was to raise capital to fund Defendants' oil and gas business. In addition, most of the horses allegedly leased by ClassicStar were quarter horses, not thoroughbreds.

59. The 2004 Great American Proposal Form included the following instruction:

By attachment to this Proposal Form, provide a listing of the names and principal business affiliations, including directorships of other corporations, for all Directors and Senior Officers of the Company.

Robinson purported to provide such information in an attachment to the 2004 Great American Proposal Form titled "Schedule A," but failed to list all principal business affiliations requested. For example, Robinson failed to disclose his relationship with Brookstone Development, Ltd., Inc., a company with which GeoStar had substantial business dealings.

60. The 2004 Great American Proposal Form also included the following instruction:

In an attachment to this Proposal Form, provide the name, percentage of direct or indirect ownership, and nature of operations of all Subsidiaries (including Subsidiaries of Subsidiaries).

The schedule of subsidiaries provided to Great American stated that GF and GFS were formed to "acquire working interests in Oil and Gas wells," which was false. In fact, these entities were formed to enter into settlements with Mare Lease Program clients, which agreements were later breached. Further, GEEI was not disclosed on the schedule of subsidiaries.

61. Robinson answered "No" to the following questions in the 2004 Great American Proposal Form:

Have there been during the last five years, or are there now pending any civil, criminal, administrative or arbitration proceedings ... brought against: (a) the Company or its Subsidiaries? (b) any person proposed for this insurance in their capacity as either Director, Officer, or employee of the Company or its Subsidiaries?...

In fact, there were such proceedings, including an arbitration commenced by Virgil Sparks against GeoStar, a lawsuit brought by Daffney Lee James against GeoStar and others, and a lawsuit brought by Harris Weinstein against GeoStar, Robinson, Ferguson, and others.

62. Robinson also answered "No" to the following question in the 2004 Great American Proposal Form:

Is the undersigned or any Director or Officer proposed for this insurance aware of any fact, circumstance or situation involving the Company or its Subsidiaries, [or] the Directors or Officers of the Company or its Subsidiaries, ... which he or she has reason to believe might result in any future Claim under the Policy to which this Proposal Form will be attached?"

This statement was false. In fact, Defendants were aware of the following:

- a. the IRS was conducting numerous audits and indicating that it would disallow several Mare Lease Program clients' tax deductions;
- b. Defendants lacked sufficient horse inventory to support the mare leases upon which clients were claiming deductions; and
- c. numerous clients were demanding the interests or shares of stock promised to them which, at the time, Defendants were unable or unwilling to provide.

63. The false representations were material to the hazard assumed by Great American as well as Great American's acceptance of risk in issuing the 2004-2005 Great American Policy.

64. In reliance upon the representations in and express warranties of the truthfulness and accuracy of the 2004 Great American Proposal Form, Great American issued to GeoStar the 2004-2005 Great American Policy.

65. If Great American had known the true facts prior to the issuance of the 2004-2005 Great American Policy, it would not have issued the 2004-2005 Great American Policy as written or for the premium charged or at all.

66. Through this Complaint, Great American hereby provides the Insureds with notice of rescission of the 2004-2005 Great American Policy. The 2004-2005 Great American Policy is void *ab initio* as to all Insureds, and the parties are to be returned to the status *quo ante*.

67. Concurrently with the filing of this Complaint, Great American will and hereby does offer to tender to GeoStar the full amount of the premium paid by GeoStar for the 2004-2005 Great American Policy.

COUNT II

(Declaratory Judgment – Great American v. All Defendants – The 2005-2007 Great American Policy Is Rescinded)

68. The allegations set forth in paragraphs 1 through 67 above are realleged and incorporated as if fully set forth herein.

69. GeoStar submitted to Great American a Proposal Form for the 2005-2007 Great American Policy, signed on September 1, 2005 by GeoStar's President Robinson (the "2005 Great American Proposal Form"). The 2005 Great American Proposal Form provides:

The undersigned Officer of the Company declares that to the best of his or her knowledge the statements set forth herein are true and correct and that reasonable efforts have been made to obtain sufficient information from each and every Director and Officer proposed for this insurance to facilitate the proper and accurate completion of the Proposal Form.

* * *

It is agreed by the Company and the Insured Persons that the particulars and statements contained in this Proposal Form and any information provided herewith (which shall be on file with the Insurer and be deemed attached hereto as if physically attached hereto) are the basis of this Policy and are to be considered as incorporated in and constituting a part of this Policy. It is further understood and agreed by the Company and the Directors and Officers that the statements in

this Proposal Form or any information provided herewith are their representations, that they are material and that this Policy is issued in reliance upon the truth of such representations; provided, however, that except for material facts or circumstances known to the person who subscribed this Proposal Form, any misstatement or omission in the Proposal Form or information provided herewith in respect of a Wrongful Act by a particular Director or Officer or his or her cognizance of any matter which he or she has reason to believe might afford grounds for a future Claim against him or her shall not be imputed to any other Director or Officer for purposes of determining the validity of this Policy as to such other Director or Officer.

70. In or about August 2005, as required by the 2005 Great American Proposal Form, GeoStar provided Great American with the 2004 GeoStar Financial Statement.

71. The 2004 GeoStar Financial Statement contained the following material representations of fact that were false at the time the representations were made to Great American:

- a. Revenues, profits, and shareholder equity were materially overstated for 2004 because they included amounts received for Mare Lease Program contracts that could never be fulfilled according to their terms due to insufficient horse inventory.
- b. Reported shareholder equity was also overstated because it included ClassicStar's 2001 full-year results, even though the company was not owned by GeoStar for that entire year. (The overstated 2001 ClassicStar results were carried over to each subsequent year, falsely inflating shareholder equity in each of the subsequent years.)

72. The 2005 Great American Proposal Form included the following instruction:

By attachment to this Proposal Form, provide a listing of the names and principal business affiliations, including directorships of other corporations, for all Directors and Senior Officers of the Company.

Robinson purported to provide such information in an attachment to the 2005 Great American Proposal Form titled "Schedule A," but failed to list all principal business affiliations requested. For example, Robinson failed to disclose his relationship with Brookstone Development, Ltd., Inc., a company with which GeoStar had substantial business dealings.

73. The 2005 Great American Proposal Form also included the following instruction:

In an attachment to this Proposal Form, provide the name, percentage of direct or indirect ownership, and nature of operations of all Subsidiaries (including Subsidiaries of Subsidiaries).

The subsidiary spreadsheet provided to Great American stated that GEEL, GF, and GFS were formed to "acquire working interests in Oil and Gas wells," which was false. In fact, these entities were formed to enter into settlements with Mare Lease Program clients, which agreements were later breached.

74. Robinson answered "No" to the following questions in the 2005 Great American Proposal Form:

Have there been during the last five years, or are there now pending any civil, criminal administrative or arbitration proceedings ... brought against: (a) the Company or its Subsidiaries? (b) any person proposed for this insurance in their capacity as either Director, Officer, or employee of the Company or its Subsidiaries?...

75. In fact, there were such proceedings, including an arbitration commenced by Virgil Sparks against GeoStar, a lawsuit brought by Daffney Lee James against GeoStar and others, a lawsuit brought by Harris Weinstein against GeoStar, Robinson, Ferguson, and others, and a lawsuit brought by Anderson Corporate Finance & Investments, Inc. against ClassicStar.

76. The false representations were material to the hazard assumed by Great American as well as Great American's acceptance of risk in issuing the 2005-2007 Great American Policy.

77. In reliance upon the representations in and express warranties of the truthfulness and accuracy of the 2005 Great American Proposal Form, Great American issued to GeoStar the 2005-2007 Great American Policy.

78. If Great American had known the true facts prior to the issuance of the 2005-2007 Great American Policy, it would not have issued the 2005-2007 Great American Policy as written or for the premium charged or at all.

79. Through this Complaint, Great American hereby provides the Insureds with notice of rescission of the 2005-2007 Great American Policy. The 2005-2007 Great American Policy is void *ab initio* as to all Insureds, and the parties are to be returned to the status *quo ante*.

80. Concurrently with the filing of this Complaint, Great American will and hereby does offer to tender to GeoStar the full amount of the premium paid by GeoStar for the 2005-2007 Great American Policy.

COUNT III

(Declaratory Judgment – Great American v. All Defendants – Prior Knowledge Exclusion Contained In 2004 Great American Proposal Form)

81. The allegations set forth in paragraphs 1 through 80 above are realleged and incorporated as if set forth fully herein.

82. The 2004 Great American Proposal Form provides:

It is agreed by the Company and the Insured Persons that the particulars and statements contained in this Proposal Form and any information provided herewith (which shall be on file with the Insurer and be deemed attached hereto as if physically attached hereto) are the basis of this Policy and are to be considered as incorporated in and constituting a part of this Policy.

83. The 2004 Great American Proposal Form contains a prior knowledge exclusion, which provides in pertinent part:

Is the undersigned or any Director or Officer proposed for this insurance aware of any fact, circumstance or situation involving the Company or its Subsidiaries, [or] the Directors or Officers of the Company or its Subsidiaries, ... which he or she has reason to believe might result in any future Claim under the Policy to which this Proposal Form will be attached?"

IT IS AGREED THAT IF KNOWLEDGE OF ANY SUCH FACT, CIRCUMSTANCE OR SITUATION EXISTS, ANY CLAIM SUBSEQUENTLY ARISING THEREFROM SHALL BE EXCLUDED FROM COVERAGE.

84. Defendants were aware of the following:

- a. the IRS was conducting numerous audits and indicating that it would disallow several Mare Lease Program clients' tax deductions;

- b. Defendants lacked sufficient horse inventory to support the mare leases upon which clients were claiming deductions; and
- c. numerous clients were demanding the interests or shares of stock promised to them which, at the time, Defendants were unable or unwilling to provide.

85. By application of the prior knowledge exclusion contained in the 2004 Great American Proposal Form, there is no coverage under the 2004-2005 Great American Policy for the Reported Matters.

COUNT IV

(Declaratory Judgment – Great American v. All Defendants – Prior and Pending Proceedings Exclusion Contained In 2005 Great American Proposal Form)

86. The allegations set forth in paragraphs 1 through 85 above are realleged and incorporated as if set forth fully herein.

87. The 2005 Great American Proposal Form provides:

The undersigned further agrees that if any significant adverse change in the condition of the applicant is discovered between the date of the Proposal Form and the effective date of the Policy, which would render this Proposal Form inaccurate or incomplete, notice of such change will be reported in writing to the Insurer immediately.

88. The 2005 Great American Proposal Form contains a prior and pending proceedings exclusion, which provides in pertinent part:

Have there been during the last five years, or are there now pending any civil, criminal, administrative or arbitration proceedings ... brought against: (a) the Company or its Subsidiaries? (b) any person proposed for this insurance in their capacity as either Director, Officer, or employee of the Company or its Subsidiaries?...

IT IS AGREED THAT ANY CLAIM ARISING FROM ANY PRIOR OR PENDING PROCEEDING IS EXCLUDED FROM THE PROPOSED COVERAGE

89. There was such a proceeding – on September 15, 2005, Duane Tiede and Connie Tiede filed a Counterclaim in *GeoStar v. Tiede, et al.*, an action brought by GeoStar in the

United States District Court for the Eastern District of Michigan. In the Counterclaim, the Tiedes alleged *inter alia* that a fiduciary relationship existed between themselves and Defendant Plummer, whom the Tiedes relied upon for his “expertise as a consultant and advisor with respect to horse breeding and gas investments, particularly with regard to the tax consequences of such investments.” The Tiedes further alleged that Plummer made “false promises and representations” while providing such services.

90. By application of the prior and pending proceedings exclusion contained in the 2005 Great American Proposal Form, there is no coverage under the 2005-2007 Great American Policy for the Reported Matters.

COUNT V

(Declaratory Judgment –Great American v. All Defendants – Prior Made Claim)

91. The allegations set forth in paragraphs 1 through 90 above are realleged and incorporated as if set forth fully herein.

92. As stated above, the Great American Policies provide coverage only for Claims first made during the relevant policy periods.

93. Section III.E.2. of the Common Terms and Conditions of the Primary Policy, incorporated into the Great American Policies, provides:

All **Related Claims** are a single **Claim** for purposes of all applicable **Liability Coverage Parts**, and all **Related Claims** shall be deemed to have been made at the time the first of such **Related Claims** was made, regardless of whether such date is before or during the **Policy Period**.

94. Section II.S. of the Common Terms and Conditions of the Primary Policy defines a “Related Claim” as:

all **Claims** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, events, **Wrongful Acts** ... or the same or related series of facts, circumstances, situations, transactions, events, **Wrongful Acts**

95. Upon information and belief, the Reported Matters are based upon, arise out of, directly or indirectly result from, are in consequence of, or in any way involve the same or related facts, circumstances, situations, transactions, events, or Wrongful Acts or the same or related series of facts, circumstances, situations, transactions, events, or Wrongful Acts alleged in Claims made prior to the inception of the Great American Policies, including but not limited to demands by clients for working interests in gas wells and/or Gatar stock.

96. Coverage is barred under the Great American Policies for the Reported Matters because they are deemed to be a single Claim first made prior to the Policy Periods of the Great American Policies.

COUNT VI

(Declaratory Judgment – Great American v. All Defendants – Continuity of Coverage Provision)

97. The allegations set forth in paragraphs 1 through 96 above are realleged and incorporated as if set forth fully herein.

98. Section III.Q. of the Common Terms and Conditions of the Primary Policy, incorporated into the Great American Policies, provides:

Continuity of Coverage.

The **Liability Coverage Parts** shall not apply to any **Claims** based upon, alleging, arising out of, directly or indirectly resulting from, or in any way relating to any fact, circumstance, situation, transaction, event, **Wrongful Act**, ... about which an **Insured** under the Directors and Officers Liability and Fiduciary Coverage Parts ... had knowledge prior to the Continuity Date set forth in ITEM 7 of the Declarations for each applicable **Liability Coverage Part**.

99. The date set forth in ITEM 7 of the Declarations for the D&O Part of the Primary Policy is June 24, 2000.

100. To the extent the Reported Matters are based upon, allege, arise out of, directly or indirectly result from, or in any way relate to a fact, circumstance, situation, transaction, event,

or Wrongful Act about which an Insured had knowledge prior to July 24, 2000, coverage is barred under the Great American Policies for the Reported Matters.

COUNT VII

(Declaratory Judgment – Great American v. All Defendants – Broad General Professional Errors and Omissions Exclusion)

101. The allegations set forth in paragraphs 1 through 100 above are realleged and incorporated as if set forth fully herein.

102. Section III of the Directors and Officers Liability Coverage Part of the Primary Policy (the “D&O Part of the Primary Policy”), as amended by Endorsement WDO-2049 (03-99)), contains a Broad General Professional Errors and Omissions Exclusion, which is incorporated into the Great American Policies, and provides:

This **Coverage Part** shall not apply to, and the [Insurer] shall have no duty to defend or to pay, advance or reimburse **Defense Expenses** for, any **Claim**:

based upon, alleging, arising out of, or in any way relating to, directly or indirectly, any actual or alleged act, error or omission by any **Insured** with respect to the rendering of, or failure to render professional services for any party.

103. Pursuant to the Broad General Professional Errors and Omissions Exclusion, the Reported Matters are excluded from coverage under the Great American Policies because the Reported Matters are based upon, allege, arise out of, and/or in any way relate to, directly or indirectly, an alleged act, error, or omission by an Insured with respect to the rendering of, or failure to render professional services for their clients, including but not limited to:

- advising clients regarding the tax benefits afforded by participating in the Mare Lease Program;

- advising clients about potential returns from their Mare Lease Program interests, and/or the desirability and permissibility of exchanging Mare Lease Program interests for other oil and gas interests;
- allegedly mismanaging clients' money by, for example, upstreaming it for use in oil and gas development instead of purchasing horses that clients paid to lease; and/or
- advising clients about various aspects of the horse industry, in which Defendants claimed expertise, including recommending and selecting which horses to purchase for and sell from clients' Mare Lease Program, and/or determining which stallions to breed with which mares.

COUNT VIII

(Declaratory Judgment – Great American v. All Defendants – Definition of Claim)

104. The allegations set forth in paragraphs 1 through 103 above are realleged and incorporated as if set forth fully herein.

105. The Great American Policies only cover certain "Claims" made against an Insured Person or an Insured Organization. Section II.A. of the D&O Part of the Primary Policy, as amended by Endorsement WDO-2124 (01-03), incorporated into the Great American Policies, defines a "Claim" as:

1. a written demand for monetary or non-monetary relief;
2. a civil proceeding commenced by service of a complaint or similar pleading;
3. a criminal proceeding commenced by return of an indictment;
4. a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document, including proceedings before the Equal Employment Opportunity Commission or similar state or federal agency;

5. an arbitration or mediation or other alternative dispute resolution proceeding if the **Insured** is obligated to participate in such proceeding or if the **Insured** agrees to participate in such proceeding, with the Company's written consent, such consent not to be unreasonably withheld; or
6. a written request to toll or waive a statute of limitations relating to a potential civil or administrative proceeding;

against an **Insured Person** for a **Wrongful Act** ... or against the **Insured Organization** for a **Wrongful Act**.....

106. A number of the Reported Matters do not satisfy the definition of a Claim and, as a result, there is no coverage under the Great American Policies for any such Reported Matters.

COUNT IX

(Declaratory Judgment – Great American v. All Defendants – Uninsured Capacity)

107. The allegations set forth in paragraphs 1 through 106 above are realleged and incorporated as if set forth fully herein.

108. The Great American Policies only cover Claims made against an "Insured Person" acting in an insured capacity. Section II.B. of the D&O Part of the Primary Policy, as amended by Endorsement WDO-2125 (01-03), incorporated into the Great American Policies, defines "Insured Person," either in the singular or plural, as any one or more past, present, or future:

1. duly elected or appointed director, officer or member of the board of managers, including any natural person serving in a comparable capacity outside of the United States;
2. in-house legal counsel; or
3. member of the staff, faculty or any duly constituted committee.

Insured Persons(s), either in the singular or the plural, also means any one or more past, present, or future **Employee** serving in the **Insured Organization** in a capacity other than one enumerated above but (a) only while acting within the scope of his or her employment and (b) only if such **Employee** is included as a co-defendant in such **Claims** contemporaneously with or subsequent to the naming of an **Insured Person** serving the **Insured Organization** in a capacity enumerated above.

109. The Great American Policies only cover those Claims alleging a “Wrongful Act” against an Insured Person or an Insured Organization. Section II.G. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, defines a “Wrongful Act” to include:

1. any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty ... by an Insured Person in his or her capacity as a director, officer or member of the Board of Managers of the Insured Organization;
2. any matter asserted against an Insured Person solely by reason of his or her status as a director, officer or member of the Board of Managers of the Insured Organization;

* * *

4. any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by the Insured Organization

110. A number of the Reported Matters fail to allege a “Wrongful Act” against any Insured acting in their capacity as such and, as a result, there is no coverage under the Great American Policies for any such Reported Matters.

COUNT X

(Declaratory Judgment – Great American v. All Defendants – Definition of Loss)

111. The allegations set forth in paragraphs 1 through 110 above are realleged and incorporated as if set forth fully herein.

112. The Great American Policies only cover certain “Loss” resulting from Claims. Section II.D. of the D&O Part of the Primary Policy, as amended by Endorsement WDO-2125 (01-03), incorporated into the Great American Policies, defines “Loss” as:

Defense Expenses incurred by the Company or by the **Insureds** in the defense of a **Claim**, and damages (including any punitive or exemplary damages, where insurable under the applicable law most favorable to the insurability of punitive or exemplary damages), judgments, settlements, pre-judgment interest, post-judgment interest, or other amounts that an **Insured** is legally obligated to pay as

a result of a **Claim**; provided, however, that **Loss** shall not include civil or criminal fines, sanctions; liquidated damages; payroll or other taxes; penalties; the multiplied portion of any multiplied damage award; or damages or types of relief deemed uninsurable under applicable law.

113. There is no coverage under the Great American Policies for any amounts that do not constitute "Loss."

COUNT XI

(Declaratory Judgment – Great American v. All Defendants – Lost Property Exclusion)

114. The allegations set forth in paragraphs 1 through 113 above are realleged and incorporated as if set forth fully herein.

115. Section III.A.1. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, provides that coverage is barred for any Claim "for damage to, or destruction of, loss of, or loss of use of, any tangible property"

116. A number of the Reported Matters allege loss of or loss of use of tangible property and, as a result, coverage is barred under the Great American Policies for such Reported Matters.

COUNT XII

(Declaratory Judgment – Great American v. All Defendants – Insured v. Insured Exclusion)

117. The allegations set forth in paragraphs 1 through 116 above are realleged and incorporated as if set forth fully herein.

118. Section III.A.8. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, provides that coverage is barred for any Claim brought "by or on behalf of, or in the name or right of, any **Insured**," subject to certain inapplicable exceptions.

119. One or more Reported Matters was brought by or on behalf of, or in the name or right of an Insured and, as a result, coverage is barred under the Great American Policies for such Reported Matter(s).

COUNT XIII

(Declaratory Judgment – Great American v. All Defendants – Securities Exclusion)

120. The allegations set forth in paragraphs 1 through 119 above are realleged and incorporated as if set forth fully herein.

121. Section III.A.10. of the D&O Part of the Primary Policy, as amended by Endorsement WDO 2125 (01-03), incorporated into the Great American Policies, provides that coverage is barred for any Claim:

based upon, alleging, arising out of or in any way relating to, directly or indirectly:

- (a) the public offer, sale, solicitation or distribution of securities issued by the **Insured Organization** or any **Subsidiary**; or
- (b) the actual or alleged violation of any federal, state, local or provincial statute relating to securities, including but not limited to the Securities Act of 1933 and the Securities and Exchange Act of 1934, or any rules or regulations promulgated thereunder;

Provided, however, that this exclusion will not apply to any offer, purchase or sale of securities, whether debt or equity, in a transaction that is exempt from registration under the Securities Act of 1933 (an “Exempt Transaction”).

If at least thirty (30) days prior to an offering of securities of the **Insured Organization** or any **Subsidiary**, other than pursuant to an Exempt Transaction, the [Insurer] receives notice of the proposed transaction and any additional information requested by the [Insurer], the [Insurer] shall offer to the **Insured Organization** a proposal for coverage subject to any additional terms and conditions, and payment of any additional premium, described in such proposal.

122. To the extent any of the Reported Matters allege, arise out of, or in any way relate to, directly or indirectly, activities described in Section III.A.10(a) or III.A.10(b), except in the

case of an Exempt Transaction, coverage is barred under the Great American Policies for such Reported Matters.

COUNT XIV

(Declaratory Judgment – Great American v. All Defendant Organizations – Deceptive Acts Exclusion)

123. The allegations set forth in paragraphs 1 through 122 above are realleged and incorporated as if set forth fully herein.

124. Section III.A.11.a. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, provides that coverage under Insuring Agreement I.B. of the D&O Part is barred for any Claim “for any actual or alleged violation of any law, rule or regulation relating to ... deceptive acts and practices in trade or commerce.”

125. One or more Reported Matters allege that an Insured Organization violated laws, rules, and/or regulations relating to deceptive acts and practices in trade or commerce and, as a result, coverage is barred for the Insured Organization under the Great American Policies for such Reported Matter(s).

COUNT XV

(Declaratory Judgment – Great American v. All Defendant Organizations – Tax Exclusion)

126. The allegations set forth in paragraphs 1 through 125 above are realleged and incorporated as if set forth fully herein.

127. Section III.A.11.d. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, provides that coverage under Insuring Agreement I.B. of the D&O Part is barred for any Claim “consisting of a hearing, suit, proceeding, audit, investigation or survey by a governmental agency or entity regarding ... tax payments ... or related matters.”

128. One or more Reported Matters consist of a hearing, suit, proceeding, audit, investigation, and/or survey by a governmental agency or entity regarding tax payments and, as a result, coverage is barred for the Insured Organization under the Great American Policies for such Reported Matter(s).

COUNT XVI

(Declaratory Judgment – Great American v. All Defendant Organizations – Contract Exclusion)

129. The allegations set forth in paragraphs 1 through 128 above are realleged and incorporated as if set forth fully herein.

130. Section III.A.11.e. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, provides that coverage under Insuring Agreement I.B. of the D&O Part is barred for any Claim:

for or arising out of or in consequence of any actual or alleged liability of the **Insured Organization** under any express contract or agreement; for the purposes of this exclusion, an “express contract or agreement” is an actual agreement among the contracting parties, the terms of which are openly stated in distinct or explicit language, either orally or in writing, at the time of its making.

131. A number of the Reported Matters arise out of or are in consequence of any actual or alleged liability of an Insured Organization under an express contract or agreement and, as a result, coverage is barred for the Insured Organization under the Great American Policies for such Reported Matters.

COUNT XVII

(Declaratory Judgment – Great American v. All Defendants – Conduct Exclusion)

132. The allegations set forth in paragraphs 1 through 131 above are realleged and incorporated as if set forth fully herein.

133. Section III.B.1. of the D&O Part of the Primary Policy, as amended by Endorsement WDO-2125 (01-03), incorporated into the Great American Policies, provides that Great American has no duty to pay Loss, other than Defense Expenses:

1. for any **Claim** based upon, arising out of, or in any way relating to, directly or indirectly, any **Insured**:
 - a. ~~committing any intentional, dishonest or fraudulent act or omission;~~
 - b. committing any willful violation of any statute, rule or law ...
 - c. gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled.

-Subparagraphs a. and b. above shall not apply unless a judgment or other final adjudication establishes that such **Insured** committed such intentional, dishonest or fraudulent act or willful violation.

134. To the extent that a final adjudication establishes that an Insured committed an intentional, dishonest, or fraudulent act or omission, and/or a willful violation of any statute, rule or law, with respect to the Reported Matters, coverage is barred for such Insured for all Loss, other than Defense Expenses, under the Great American Policies. Also, to the extent that an Insured gained any profit, remuneration, or advantage to which such Insured was not legally entitled with respect to the Reported Matters, coverage is barred for such Insured for all Loss, other than Defense Expenses, under the Great American Policies.

COUNT XVIII

(Declaratory Judgment – Great American v. All Defendants – Equitable Relief Exclusion)

135. The allegations set forth in paragraphs 1 through 134 above are realleged and incorporated as if set forth fully herein.

136. Section III.B.2. of the D&O Part of the Primary Policy, incorporated into the Great American Policies, provides that Great American has no duty to pay Loss, other than Defense Expenses:

which constitutes costs and expenses incurred or to be incurred to comply with an order, judgment or award of injunctive or other equitable relief of any kind, or that portion of a settlement encompassing injunctive or other equitable relief . . .

137. One or more of the Reported Matters request injunctive or other equitable relief, and coverage is barred under the Great American Policies for all Loss, other than Defense Expenses, which constitutes amounts incurred in connection with such relief.

COUNT XIX

(Declaratory Judgment – Great American v. All Defendants – Wrongful Employment Practices)

138. The allegations set forth in paragraphs 1 through 137 above are realleged and incorporated as if set forth fully herein.

139. Endorsement No. 2 to the Great American Policies specifically excludes coverage under the Employment Practices Liability Coverage Part of the Primary Policy and excludes coverage for any Wrongful Employment Practice.

140. Section II.AA. of the Common Terms and Conditions of the Primary Policy, as amended by Endorsement WEP-1074 (01-00), incorporated into the Great American Policies, defines a “Wrongful Employment Practice” to include the “breach of oral, implied or written employment agreement.”

141. One or more of the Reported Matters allege that an Insured breached the employment agreement of its employee and, as a result, coverage is barred under the Great American Policies for such Reported Matter(s).

COUNT XX

(Declaratory Judgment – Great American v. All Defendants – Public Policy)

142. The allegations set forth in paragraphs 1 through 141 above are realleged and incorporated as if set forth fully herein.

143. One or more of the Reported Matters make allegations for which insurance coverage is unavailable as a matter of public policy and, as a result, coverage under the Great American Policies is barred for such Reported Matter(s).

PRAYER FOR RELIEF

WHEREFORE, Great American respectfully requests that this Court adjudicate and declare the rights of the parties, and that the Court:

- Find that the Great American Policies are void *ab initio* and that the parties are to be returned to the status *quo ante*;
- Find that Great American has no duty to pay on behalf of, or indemnify, the Defendants under the Great American Policies; and
- Grant such other relief as the Court may deem just and proper.

June 24, 2009

Respectfully submitted,

By: s/Gregory W. Mair (P67465)
One of the Attorneys for
Great American Insurance Company

David A. Wallace (P 24149)
Gregory W. Mair (P 67465)
O'NEILL, WALLACE & DOYLE, P.C.
300 St. Andrews Road, Suite 302
P.O. Box 1966
Saginaw, Michigan 48605
(989) 790-0960
(989) 790-6902 fax

Paul F. Matousek
Joseph J. Borders
Neil E. Holmen
William P. Zeller
WALKER WILCOX MATOUSEK LLP
225 W. Washington Street, Suite 2400
Chicago, Illinois 60606
(312) 244-6700
(312) 244-6800 fax

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send confirmation of such filing to the following:

David A. Wallace

jmconnolly@owdpc.com

Gregory W. Mair

gregmair@owdpc.com
dana@owdpc.com

Paul Matousek

pmatousek@wwmlawyers.com

Respectfully submitted,

Date: June 24, 2009

s/ GREGORY W. MAIR (P67465)
P.O. Box 1966
Saginaw, Michigan 48605
989/790-0960
gregmair@owdpc.com