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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Empire Fire and Marine Insurance)
Company, a Nebraska company,

No. CV-07-675-PCT-MHM

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Plaintiff,

ORDER

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vs.

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Judita Bittermann-Halbreich, a single)
woman and German national residing in)
the Country of Germany; and Klaus Bloch,
a German national residing in the Country)
of Germany,

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Defendants.

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Currently pending before the Court are the Defendants’ separate Motions to Dismiss
(Dkt. #12, 14). After considering the pleadings, briefing and oral argument in the case, the
Court issues the following Order.

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I. Background

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Defendant Judita Bittermann-Halbreich entered into an automobile rental contract
with Steward Ventures, an Independent Licensee of National Care Rental and Alamo Rent-
A-Car. (Cmplt. Dkt. #1). Empire Fire and Marine Insurance (“Empire” or “the Plaintiff”)
offered supplemental liability coverage to renters of motor vehicles, and Defendant
Bittermann-Halbreich purchased that supplemental coverage. (Id.)

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On August 13, 2004, Defendant Klaus Bloch was driving the rental car when he lost
control of the vehicle, causing a single-car accident. Defendant Bittermann-Halbreich was

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1 a passenger of the vehicle at the time of the accident and was injured. (Id.) She incurred
2 medical expenses in excess of \$430,000. (Id.)

3 Defendant Bittermann-Halbreich filed a lawsuit against Defendant Bloch in Arizona
4 state court, alleging that he negligently operated the rental vehicle. (Id.) Defendant
5 Bittermann-Halbreich also made a demand upon Empire to pay under the Supplemental
6 Liability Insurance Policy for the injuries she received. (Id.) Defendant Bloch also made a
7 claim under the Supplemental Liability Insurance Policy, seeking to have Empire provide a
8 defense for Bittermann-Halbreich's lawsuit against him. He claimed in addition an
9 entitlement to indemnity up to the policy limits of \$1,000,000 for any judgment that may be
10 entered against him. (Id.) Empire denied these claims.

11 Empire filed this action on March 29, 2007 pursuant to the Federal Declaratory
12 Judgment Act, 28 U.S.C. § 2201, *et. seq.* The Plaintiff brought suit on the basis of diversity
13 jurisdiction, seeking a declaration that (1) there is no coverage for any claims asserted against
14 it by Defendant Judita Bittermann-Halbreich arising out of an automobile accident; and (2)
15 that Empire is not obligated to defend or indemnify Defendant Klaus Bloch against any
16 claims brought against him arising out of the accident. (Id.)

17 After the Plaintiff filed this suit, Defendant Bittermann-Halbreich amended her state
18 court action to include a claim for declaratory relief against Empire, as well as claims for
19 breach of contract and insurance bad faith. (Dkt. #27, Exhibit 4).

20 The Defendants request that the Court decline to exercise its discretionary jurisdiction.
21 They seek dismissal of the action in favor of the ongoing proceeding pending in state court
22 in which (they allege) all matters can be fully adjudicated. (Dkt. #12, 14).

23 II. Standard of Review

24 A district court's assumption of jurisdiction over a declaratory judgment action is
25 discretionary rather than mandatory. Wilton v. Seven Falls Co., 515 U.S. 277, 289 (1995).
26 That discretion, however, is not unfettered. GEICO v. Dizol, 133 F.3d 1220, 1223 (9th Cir.
27 1998). The Court may not decline to entertain a declaratory judgment action merely "as a
28 matter of whim or personal disinclination." Id.

1 The applicable guidance for the district court’s exercise of discretion is found in
2 Brillhart v. Excess Ins. Co. Of America, 316 U.S. 491 (1942), and its progeny. Brillhart
3 provides:

4 [I]t would be uneconomical as well as vexatious for a federal court
5 to proceed in a declaratory judgment suit where another suit is
6 pending in a state court presenting the same issues, not governed by
7 federal law, between the same parties. Gratuitous interference with
8 the orderly and comprehensive disposition of a state court litigation
9 should be avoided.

10 [The district court] should ascertain whether the questions in
11 controversy between the parties to the federal suit . . . can be better
12 settled in the proceeding pending in the state court.

13 316 U.S. at 495.

14 The Ninth Circuit has developed several factors that courts should consider in
15 applying the guidance of Brillhart and deciding whether to exercise jurisdiction. District
16 courts should (1) avoid needless determination of state law issues; (2) discourage litigants
17 from filing declaratory actions as a means of forum shopping; (3) avoid duplicative litigation;
18 and (4) consider whether all necessary parties can be joined. Continental Cas. Co. v. Robsac
19 Indus., 947 F.2d 1367, 1371 (9th Cir. 1991).

20 Discretion to decline jurisdiction “is not dependent on the pendency of a state court
21 proceeding at the time a federal declaratory judgment action is filed.” Budget Rent-A-Car
22 v. Crawford, 108 F.3d 1075, 1079 (9th Cir. 1997) overruled on other grounds by GEICO v.
23 Dizol, 133 F.3d 1220, 1224 (9th Cir. 1998). That no state court action is pending when a
24 claim is filed under the Declaratory Judgment Act does not relieve the district court of its
25 duty to examine all of the relevant Brillhart factors in existence at the time it exercises
26 discretionary jurisdiction. Id. District courts must “weigh considerations of comity, sound
27 judicial administration, and the policy against forum shopping” before ruling on the merits
28 of a claim for declaratory relief. Id. at 1079-80.

29 III. Analysis

To determine whether the exercise of its discretionary jurisdiction is appropriate, the

1 Court will apply the guidance of Brillhart and examine the relevant factors informing its
2 discretion.

3 A. Needless Determination of State Law Issues

4 The Court finds that, although the issues in the case may not be highly complex, they
5 necessarily involve the intricacies of state insurance law. And while the Court recognizes
6 that “there is no presumption in favor of abstention generally, nor in insurance coverage
7 cases specifically,” GEICO v. Dizo, 133 F.3d 1220, 1225-26 (9th Cir. 1998), it finds here
8 that *any* determination of state law issues in this case is needless in light of the state court
9 forum in which these legal issues can and will be resolved. Accordingly, this factor weighs
10 slightly in favor of declining jurisdiction.

11 B. Discourage Forum Shopping

12 Both parties in the case have accused the other of being the primary culprit of forum
13 shopping. The parties shed some light on this issue in oral argument, where counsel for the
14 Defendants provided the Court with a rough time line of the state court case. The original
15 action was a simple negligence action between Defendant Bittermann-Halbreich and
16 Defendant Bloch. According to the Defendants’ counsel, Empire was not eligible to be
17 named as a Defendant until *after* it denied coverage on the claims made by Bittermann-
18 Halbreich and Bloch. It was only after this denial that the Damron/Morris agreement (and
19 the attendant assignment of rights) could be contemplated. According to the Defendants,
20 Empire selected the federal forum and filed a declaratory judgment action before they sought
21 to amend their complaint and add Empire to the suit.

22 When questioned in oral argument, counsel for the Plaintiff conceded that a
23 Damron/Morris agreement is not entirely unforeseeable after a denial of coverage. It is
24 therefore reasonable to assume that Empire may have suspected it might eventually be
25 brought into the state court action, giving its federal declaratory judgment action at least the
26 appearance of “reactive” litigation. See Carolina Casualty Co. v. Robsac Industries, 947 F.2d
27 1367, 1372-73 (9th Cir. 1991). Accordingly, the Court finds that to the extent that this factor
28 favors either party, the facts here weigh slightly in favor of declining jurisdiction.

1 C. Duplicative Litigation

2 Counsel for the Defendants pointed out in oral argument that the state court case —
3 now that the court has accepted Defendant Bittermann-Halbreich’s Amended Complaint —
4 will continue regardless of whether this Court accepts discretionary jurisdiction here. In fact,
5 counsel informed the Court that discovery regarding the coverage dispute is currently
6 underway.

7 It is also notable that in its Response to the Motion to Dismiss, Empire argued that,
8 should the state court grant the Defendant’s motion to amend, the entire declaratory judgment
9 action “will be properly removed to federal court and consolidated with this action.” (Dkt.
10 #16). According to the parties, the motion to amend was in fact granted, but the time for
11 removal to federal court has since passed. Counsel for Empire conceded in oral argument
12 that the state court action, as presently structured, is not properly subject to removal.

13 Given that the issue of coverage will be (and apparently is presently being) litigated
14 in state court, complete duplication of efforts would likely result if this Court were to accept
15 jurisdiction. This duplicative litigation would also put the parties at risk of inconsistent
16 judgments. The Court finds that this factor weighs heavily in favor of dismissal in favor of
17 the state forum in which the parties may litigate *all* of the issues.

18 D. Necessary Parties

19 Although the Court finds that the aforementioned factors in and of themselves weigh
20 in favor of declining jurisdiction, the Court will briefly address the issue of necessary parties.

21 The Defendants argue that federal diversity jurisdiction is defeated here because
22 Steward Ventures is a necessary party whose presence would destroy complete diversity.
23 The Court does not deem it necessary to conduct an in-depth review, but notes that it appears
24 Steward Ventures is indispensable based on the Defendants’ theory of liability — the
25 doctrine of reasonable expectations — for coverage. Although the Plaintiff makes a
26 somewhat complex legal argument regarding the realignment of parties according to their
27 interests, the Court declines to engage in the legal gymnastics required to arrive at the
28 conclusion that the parties are in fact diverse. Counsel for Empire conceded at oral argument

1 that the state court case as presently structured is not removable. Accordingly, this factor
2 also weighs in favor of declining jurisdiction.

3 IV. Conclusion

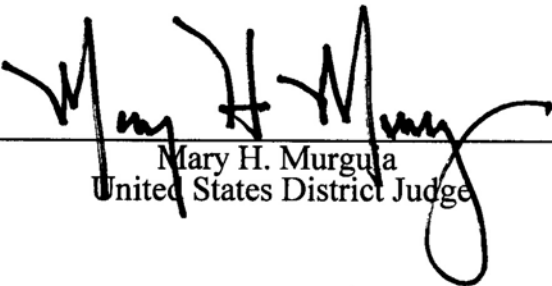
4 Applying the factors of Brillhart and its progeny, the Court finds that the exercise of
5 its discretionary jurisdiction should be declined in this case. Each factor weighs in favor of
6 dismissal of the action in favor of the ongoing state court litigation.

7 Accordingly,

8 **IT IS ORDERED** granting the Defendants' Motions to Dismiss. (Dkt. #12, 14).

9 **DATED this 5th day of September, 2008.**

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Mary H. Murgula
United States District Judge