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9
10 Counsel for Plaintiff and
Counter-Defendant ERIC GRANT

11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA

14 ERIC GRANT,) No. 2:08-cv-00672-FCD-KJM
15)
Plaintiff,)
16)
v.) **APPENDIX OF NON-STANDARD**
17) **AUTHORITIES IN SUPPORT OF**
KAMEHAMEHA SCHOOLS/BERNICE) **PLAINTIFF AND COUNTER-DEFENDANT**
18) **ERIC GRANT’S MOTION FOR SUMMARY**
ING, NAINOA THOMPSON, DIANE J.) **JUDGMENT [L.R. 5-133(i)]**
19)
PLOTTS, ROBERT K.U. KIHUNE, and)
20)
CORBETT A.K KALAMA, in their)
capacities as Trustees of the Kamehameha)
21)
Schools/Bernice Pauahi Bishop Estate;)
JOHN DOE; and JANE DOE,)
22)
Defendants.)
23)
JOHN DOE and JANE DOE,)
24)
Counter-Claimants,)
25)
v.)
26)
KAMEHAMEHA SCHOOLS/BERNICE)
PAUAHI BISHOP ESTATE, et al.,)
27)
Counter-Defendants.)
28)

Hearing Date: Oct. 31, 2008
Time: 10:00 a.m.
Courtroom: 2
Judge: Hon. Frank C. Damrell, Jr.

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1 **TABLE OF CONTENTS**

2 1. *Mitsui Sumitomo Insurance Co. v. Delicato Vineyards*, No. CIV. S-06-2891 FCD
3 GGH (E.D. Cal. May 10, 2007).

4 2. 6 B.E. Witkin, *Summary of California Law: Torts* § 1220, at 597 (10th ed. 2005).

5 Dated: October 3, 2008.

6 Respectfully submitted,

7 /s/ Eric Grant
8 ERIC GRANT

9 Counsel for Plaintiff and
10 Counter-Defendant ERIC GRANT

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Exhibit 1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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12 MITSUI SUMITOMO INSURANCE
13 COMPANY OF AMERICA,

14 Plaintiff,

15 v.

16 DELICATO VINEYARDS,
17 Defendant.

NO. CIV. S-06-2891 FCD GGH

MEMORANDUM AND ORDER

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20 This matter is before the court on defendant Delicato
21 Vineyards' ("Delicato") motion to dismiss for lack of subject
22 matter jurisdiction, pursuant to Federal Rule of Civil Procedure
23 12(b)(1), on the basis that there was no actual case or
24 controversy at the time plaintiff Mitsui Sumitomo Insurance
25 Company ("Mitsui") filed its complaint seeking declaratory
26 relief. In the alternative, Delicato requests the court to
27 exercise its discretion under the Declaratory Judgment Act and
28 decline to assert jurisdiction over the matter. Mitsui opposes

1 the motion. For the reasons set forth below, defendant's motion
2 is DENIED.¹

3 **BACKGROUND**

4 Delicato is a wine producer, with its principal place of
5 business located in Manteca, California. (Pl.'s Comp., filed
6 December 22, 2006, ¶ 2). Mitsui is an insurance provider, with
7 its principal place of business located in Warren, New Jersey.
8 (Id. at ¶ 1). In 2006, Mitsui issued an insurance policy to
9 Delicato providing coverage for direct physical loss to covered
10 property, including Delicato wine, for a policy period of July 1,
11 2006 through July 1, 2007. (Id. at ¶¶ 6-8).

12 In July 2006, a heat wave occurred in the Central Valley
13 region of California. (Def.'s Mot. to Dismiss, filed February
14 26, 2007, at 2). Delicato stored significant quantities of its
15 wines in two warehouses located in this region, the Klein
16 Brothers warehouse in Stockton and the Sierra Pacific warehouse
17 in Modesto. (Pl.'s Comp. at ¶ 9).

18 On August 2, 2006, Delicato filed a claim with Mitsui,
19 alleging that it had suffered "[i]nventory spoilage of wine due
20 to weather (heat)," as a result of the July heat wave. (Id. at ¶
21 12). Mitsui acknowledged receipt of the claim on August 4, and
22 advised Delicato that it reserved its rights pending an
23 investigation into the claim. (Id. at ¶ 13). Mitsui then
24 retained A. Dolence & Associates ("Dolence") to adjust the claim,
25 and Thomas G. Eddy & Associates ("Eddy") to inspect and evaluate
26

27 ¹ Because oral argument will not be of material
28 assistance, the court orders this matter submitted on the briefs.
E.D. Cal. L.R. 78-230(h).

1 the wine in question and the circumstances surrounding the claim.
2 (Id. at ¶¶ 14, 17).

3 On October 31, 2006, Dolence forwarded to Delicato a copy of
4 the Eddy report, dated October 19, 2006. (Id. at ¶ 19). The
5 report indicated that only a small number of wines suffered
6 damage due to the elevated temperatures in the two warehouses,
7 and that the ambient temperatures inside the warehouses during
8 the July heat wave may not have been substantially higher than
9 the warehouses' typical ambient temperatures. (Id. at ¶ 20-21).

10 On November 10, Delicato's counsel wrote to Dolence
11 regarding Delicato's claim. (Declaration of James P. Wagoner in
12 Supp. of Mot. to Dismiss, filed February 26, 2007, Ex. C). In
13 this letter, Delicato insisted that its claim be paid, and that
14 Mitsui's delay in resolving the claim was "outrageous" and had
15 caused substantial economic losses to Delicato. (Id.). Counsel
16 also accused Mitsui of "shopping" for coverage counsel who would
17 provide Mitsui with a favorable opinion. (Id.).

18 Dolence responded to Delicato by letter dated November 14.
19 (Wagoner Decl., Ex D). Dolence indicated that the matter had
20 been referred to counsel for a coverage opinion; that Mitsui was
21 not "shopping" for coverage counsel, as only one counsel had been
22 retained; and that the delay in resolving the claim was not
23 outrageous considering the time needed for Eddy to complete the
24 investigation. (Id.).

25 In a letter dated November 30, Delicato's counsel responded
26 to Dolence, insisting that Mitsui's handling of the Delicato
27 claim was in violation of the California Code of Regulations and
28 that Delicato would report such violations to the State Insurance

1 Commissioner unless Mitsui responded immediately. (Wagoner
2 Decl., Ex. E). Delicato's counsel also reiterated his contention
3 regarding Mitsui's "efforts to 'shop' for coverage counsel."
4 (Id.).

5 In a letter dated December 4, 2006, Mitsui acknowledged its
6 receipt of Delicato's November 30 letter to Dolence. (Wagoner
7 Decl., Ex. F). Mitsui stated it strongly disagreed with
8 Delicato's characterization of its handling of the Delicato
9 claim. (Id.). Mitsui also informed Delicato that it was
10 completing its coverage analysis and would inform Delicato of its
11 coverage position within fourteen days. (Id.).

12 Delicato's counsel responded on December 6. (Wagoner Decl.,
13 Ex. G). In his response, Delicato's counsel again criticized
14 Mitsui's handling of the Delicato claim and reasserted Delicato's
15 contention that Mitsui was violating state regulations. (Id.).
16 The letter states that Delicato "has no confidence that its claim
17 is being handled in good faith, nor any confidence that its
18 claim, which is fully covered, will be honored." (Id.).

19 Mitsui's counsel responded in a letter dated December 8.
20 (Wagoner Decl., Ex. H). After defending its claims handling
21 practices, Mitsui informed Delicato that "there is an issue as to
22 the existence and extent of any damaged wine," as well as an
23 issue as to "whether any loss associated with the allegedly
24 damaged wine falls within the scope of the coverage provided" by
25 the Mitsui policy. (Id.).

26 In a letter dated December 18, 2006, Delicato's counsel
27 responded, again arguing that Mitsui's handling of the claim was
28 severely deficient and in violation of state regulations.

1 (Wagoner Decl., Ex. I). Delicato concluded the letter, stating:

2 As to your comments concerning the coverage issues, please
3 be advised that Delicato considers the claim fully covered;
4 and in any event, because of the delays in processing the
5 claim in violation of the Fair Claims and Settlement
6 Practices Regulations, any remotely arguable coverage
7 defenses which Mitsui Sumitomo might have had have now been
8 waived and Mitsui Sumitomo is estopped to assert them.

9 Delicato therefore demands that its claim be paid in full
10 immediately.

11 (Id.).

12 In a letter dated December 19, 2006, Mitsui issued its
13 denial of coverage for the claim, contending that there was no
14 direct physical loss or damage to the vast majority of the
15 Delicato wines stored at the two warehouses. (Pl.'s Comp. at ¶
16 24; Wagoner Decl., Ex. J). Additionally, Mitsui cited a policy
17 exclusion for "loss or damage . . . caused by or resulting from
18 changes in or extremes of temperature." (Wagoner Decl., Ex. J).

19 On December 22, 2006, three days after it issued its denial
20 of coverage, Mitsui filed the instant action, pursuant to the
21 Declaratory Judgment Act, 28 U.S.C. § 2201. Mitsui seeks a
22 declaration that Delicato's claim does not involve, in
23 significant part, "direct physical loss to covered property" and
24 that, to the extent the claim does involve such loss, coverage is
25 precluded by the policy's exclusion for loss resulting from
26 changes in or extremes of temperature. (Pl.'s Comp. at ¶¶ 28,
27 31-32). The complaint invokes this court's diversity
28 jurisdiction. (Id. at ¶ 3).

Delicato acknowledged receipt of the summons and complaint
on February 6, 2007. Delicato then filed a state court action in
Stanislaus County Superior Court on February 23, 2007. (Wagoner

1 Decl., Ex. K). Delicato's state complaint asserts six causes of
2 action: (1) breach of contract, (2) breach of the duty of good
3 faith and fair dealing, (3) fraud in the inducement, (4)
4 interference with contract and/or prospective business advantage,
5 (5) defamation, and (6) unfair business practices. Mitsui is
6 named as a defendant for all six causes of action. Additionally,
7 Delicato names Dolence and a California insurance brokerage (John
8 Sutak Insurance Brokers, Inc.), two non-diverse parties, for the
9 claims of interference with contract and defamation.

10 On February 26, 2007, three days after filing its state
11 court action, Delicato filed the instant motion to dismiss
12 Mitsui's declaratory relief complaint on the basis that there was
13 no actual case or controversy at the time Mitsui filed its
14 federal action.

15 STANDARD

16 Federal Rule of Civil Procedure 12(b)(1) allows a party to
17 raise, by motion, a defense that the court lacks "jurisdiction
18 over the subject matter" of a claim. Fed. R. Civ. P. 12(b)(1).
19 As "the federal courts are courts of limited jurisdiction," the
20 party seeking to invoke the court's jurisdiction bears the burden
21 of establishing its existence. Kokkonen v. Guardian Life Ins.
22 Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted); Stock
23 West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.
24 1989).

25 A motion to dismiss for lack of jurisdiction may attack the
26 allegations in the complaint used to establish jurisdiction as
27 insufficient on their face ("facial attack"), or may attack the
28 existence of subject matter jurisdiction in fact ("factual

1 attack"). Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594
2 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed. Sav. &
3 Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If, as in this
4 case, the motion constitutes a factual attack, "no presumptive
5 truthfulness attaches to plaintiff's allegations, and the
6 existence of disputed material facts will not preclude the trial
7 court from evaluating for itself the merits of jurisdictional
8 claims." Thornhill, 594 F.2d at 733 (quoting Mortensen, 549 F.2d
9 at 891). In fact, "[w]here a jurisdictional issue is separable
10 from the merits of a case,"² the court "may consider the evidence
11 presented with respect to the jurisdictional issue and rule on
12 that issue, resolving factual disputes if necessary." Thornhill,
13 594 F.2d at 733.

14 ANALYSIS

15 Delicato contends that this court lacks jurisdiction because
16 this case did not satisfy Article III's case or controversy
17 requirement at the time Mitsui filed its complaint.

18 Alternatively, defendant asks this court to abstain from
19 exercising jurisdiction over the matter pursuant to Brillhart v.
20 Excess Ins. Co. of America, 316 U.S. 491 (1942), contending that
21 Mitsui's action is "reactive" and that exercising jurisdiction
22 would encourage forum shopping.

23 A. Subject Matter Jurisdiction under the Declaratory 24 Judgment Act

25 The Declaratory Judgment Act provides:
26

27 ² The parties do not dispute that the jurisdictional
28 issue raised by defendant is separable from the merits of
plaintiff's claims.

1 In a case of actual controversy within its jurisdiction, . .
2 . any court of the United States, upon the filing of an
3 appropriate pleading, may declare the rights and other legal
4 relations of any interested party seeking such declaration,
whether or not further relief is or could be sought. Any
such declaration shall have the force and effect of a final
judgment or decree and shall be reviewable as such.

5 28 U.S.C. § 2201(a). The Declaratory Judgment Act "was enacted
6 to afford an added remedy to one who is uncertain of his rights
7 and who desires an early adjudication without having to wait
8 until he is sued by his adversary." Plum Creek Timber Co. Inc.
9 v. Trout Unlimited, 255 F. Supp. 2d 1159, 1164 (D. Idaho 2003)
10 (quoting Levin Metals Corp. v. Parr-Richmond Terminal Co., 799
11 F.2d 1312, 1315 (9th Cir. 1986)).

12 The Declaratory Judgment Act does not itself confer federal
13 subject matter jurisdiction. Staacke v. United States Secretary
14 of Labor, 841 F.2d 278, 280 (9th Cir. 1988). As such, there must
15 be an independent basis for such jurisdiction. Id. Here,
16 subject matter jurisdiction is properly predicated on diversity
17 of citizenship. See 28 U.S.C. § 1332.

18 A lawsuit seeking federal declaratory relief must first
19 present an actual case or controversy within the meaning of
20 Article III, section 2 of the United States Constitution. Gov't
21 Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1222-23 (9th Cir.
22 1998) (en banc) (citations omitted). Declaratory relief may be
23 granted so long as there is "a real and substantial controversy
24 admitting of specific relief through a decree of conclusive
25 character, as distinguished from an opinion advising what the law
26 would be upon a hypothetical state of facts." Aetna Life Ins.
27 Co. v. Haworth, 300 U.S. 227, 241 (1937). In order for there to
28 exist an actual case or controversy under the Declaratory

1 Judgment Act, the plaintiff must assert a real and reasonable
2 apprehension that he will be subject to liability as a result of
3 defendant's actions. Spokane Indian Tribe v. United States, 972
4 F.2d 1090 (9th Cir. 1992). However, in the context of insurance
5 coverage cases, the Declaratory Judgment Act does not require
6 that the insured have previously filed an action against the
7 insurer. Haworth, 300 U.S. at 240.

8 Delicato argues that there was no case or controversy at the
9 time Mitsui filed its complaint, as any dispute over the extent
10 of damaged wine or the scope of the policy's coverage "had not
11 yet crystallized into a distinct, definite dispute." Delicato
12 asserts it did not challenge the findings of the Eddy report as
13 to the extent of damage, and that there was no clear dispute as
14 to the policy's scope of coverage. Delicato argues that Mitsui
15 did not even raise the possibility that coverage may be limited
16 by the temperature exclusion until its letter of December 8,
17 2006, and did not definitively assert such a defense until its
18 denial issued on December 19. Delicato contends that its
19 response to Mitsui's December 8, 2006 letter "did not directly
20 address the 'changes or extremes in temperature' exclusion
21 alluded to" by Mitsui and did not assert coverage specifically
22 based upon an exception to that exclusion. Delicato further
23 argues that there was no time for Delicato to respond to Mitsui's
24 denial of the claim before Mitsui filed its complaint.

25 In response, Mitsui points to four different letters
26 Delicato's counsel sent to Mitsui and its representatives, in
27 which Delicato repeatedly asserted that its claim should be paid
28 and that Mitsui was estopped from challenging the policy's scope

1 of coverage. The overall nature of the Delicato letters, with
2 Delicato's repeated assertions that Mitsui's handling of the
3 claim violated California's Fair Claims Settlement & Practice
4 Regulations, and threats to commence an action with the State
5 Insurance Commissioner, support Mitsui's reasonable apprehension
6 of litigation. See, e.g., Chesebrough-Pond's, Inc. v. Faberge,
7 Inc., 666 F.2d 393, 397 (9th Cir. 1982) (threat of filing an
8 opposition proceeding with the Patent Trademark Office held
9 sufficient to create a real and reasonable apprehension of
10 litigation, even when no lawsuit was threatened);
11 Freecyclesunnyvale v. Freecycle Network, Inc., No. C 06-00324,
12 2006 WL 870688 (N.D. Cal. Apr. 4, 2006) (a real and reasonable
13 apprehension of litigation was created by a letter that
14 "implied a harsh response for failure to cease usage," even
15 though a lawsuit was not threatened).

16 A specific threat of imminent litigation is not necessary to
17 show that the declaratory relief plaintiff held a real and
18 reasonable apprehension that he would be subject to liability.
19 Delicato's continued assertions that its claim was valid and
20 should immediately be paid in full, and that the policy's
21 coverage included any damage caused by the elevated temperatures
22 in the warehouses was enough to create a real and reasonable
23 apprehension of litigation when Mitsui issued its denial. This
24 question presents a "substantial controversy, between parties
25 having adverse legal interests, of sufficient immediacy and
26 reality to warrant the issuance of a declaratory judgment." See
27 Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270,
28 273 (1941) (finding an actual controversy between an insurance

1 company and an insured where insurance company sought declaratory
2 relief after a third-party filed a state action against the
3 insured). Accordingly, the court finds that Mitsui's complaint
4 presents an actual case or controversy within the meaning of
5 Article III and the Declaratory Judgment Act.

6 **B. Discretionary Dismissal**

7 Alternatively, Delicato requests that the court exercise its
8 discretion under the Declaratory Judgment Act not to hear this
9 action pursuant to the factors cited in Brillhart v. Excess Ins.
10 Co., 316 U.S. 491 (1942), and Government Employee Ins. Co. v.
11 Dizol, 133 F.3d 1220 (9th Cir. 1998). Under Brillhart and Dizol,
12 even when subject matter jurisdiction exists, the district court
13 may, in the exercise of its discretion, decline to entertain the
14 action. Dizol, 133 F.3d at 1223 (noting that the Declaratory
15 Judgment Act is "deliberately cast in terms of permissive, rather
16 than mandatory, authority"). "The Declaratory Judgment Act
17 provides that a court 'may declare the right and other legal
18 relations of any interested party' . . . not that it must do so."
19 MedImmune, Inc. v. Genentech, 127 S. Ct. 764, 776 (2006) (citing
20 28 U.S.C. § 2201(a)) (emphasis in original). Accordingly,
21 district courts retain "unique and substantial discretion in
22 deciding whether to declare the rights of litigants." Id.
23 (citing Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995)).

24 In Brillhart, the Supreme Court held that a federal court
25 sitting in diversity, presiding over an action for declaratory
26 relief, may exercise its discretion to dismiss the action where
27 another suit is pending in state court, between the same parties,
28 and presenting the same issues of state law. 316 U.S. at 495.

1 However, the Ninth Circuit has noted that "there is no
2 presumption in favor of abstention in declaratory actions,
3 generally, nor in insurance coverage cases specifically." Dizol,
4 133 F.3d at 1225. A court's decision to abstain from
5 entertaining such a suit must be based on more than "whim or
6 personal disinclination." Id.

7 The Ninth Circuit has concluded that the factors articulated
8 in Brillhart remain the "philosophic touchstone for the district
9 court." Id. The relevant factors for the district court to
10 consider in deciding whether to abstain from exercising
11 jurisdiction are: (1) avoiding needless determination of state
12 law issues, (2) discouraging forum shopping by declaratory relief
13 plaintiffs, and (3) avoiding duplicative litigation. Id. (citing
14 Continental Cas. Co. v. Robsac Indus., 947 F.2d 1367, 1371-73
15 (9th Cir. 1991) (overruled on other grounds by Dizol, 133 F.3d
16 1220)). If there are parallel state proceedings involving the
17 same issues and parties pending at the time the federal
18 declaratory action is filed, there is a presumption that the
19 entire suit should be heard in state court. Id. However, the
20 pendency of a state court action does not, by itself, require a
21 district court to refuse federal declaratory relief. Id.
22 Nonetheless, federal courts should generally decline to entertain
23 reactive declaratory actions. Id.

24 **1. Avoiding Needless Decisions of State Law**

25 Delicato argues against the exercise of jurisdiction over
26 the Mitsui complaint, as "Mitsui's coverage position as well as
27 the factual questions regarding the scope of Delicato's loss can
28 and clearly will be resolved in [the state court] action."

1 (Def.'s Mot. to Dismiss, filed February 26, 2007, at 22). When
2 the sole basis for federal jurisdiction is diversity of
3 citizenship, "the federal interest is at its nadir and the
4 Brillhart policy of avoiding unnecessary declarations of state
5 law is especially strong." Robsac, 947 F.2d at 1371. However,
6 the instant dispute does not require this court to decide novel
7 questions of state law. To the contrary, the parties' dispute
8 requires the interpretation of the Mitsui policy. While this
9 analysis is governed by state law, the principles of contract
10 interpretation are well settled, and this court is an appropriate
11 forum to adjudicate this matter. See Dizol, 133 F.3d at 1225
12 ("We know of no authority for the proposition that an insurer is
13 barred from invoking diversity jurisdiction to bring a
14 declaratory judgment action against an insured on the issue of
15 coverage.").

16 **2. Avoiding Forum Shopping**

17 Delicato urges this court not to exercise jurisdiction over
18 the Mitsui complaint, contending that Mitsui forum-shopped by
19 rushing to file its complaint in this court in order to avoid
20 being named in a non-removable state court action. (Def.'s Mot.
21 at 16). Delicato argues that the Mitsui complaint falls within
22 the type of "reactive" litigation that the Ninth Circuit has
23 cautioned exercising jurisdiction over. See Robsac, 947 F.2d
24 1367.

25 The Ninth Circuit has explained that a "declaratory judgment
26 action by an insurance company against its insured during the
27 pendency of a non-removable state court action presenting the
28 same issues of state law is an archetype of what we have termed

1 'reactive' litigation." Robsac, 947 F.2d at 1372-73. If there
2 are parallel state proceedings involving the same issues and
3 parties pending at the time the federal declaratory action is
4 filed, there is a presumption that the entire suit should be
5 heard in state court. Dizol, 133 F.3d at 1225.

6 However, while Dizol cautions against entertaining reactive
7 declaratory actions, the pendency of a state court action does
8 not require a district court to dismiss a declaratory relief
9 action that was filed before the state court action. The instant
10 case is distinguishable from Robsac and other cases cited by
11 Delicato, as those cases involved a federal action filed *after* a
12 state court action was already pending. While Robsac court
13 indicated that the federal suit would have been reactive even if
14 it had been filed first, this conclusion was dictum as the
15 federal suit in that case had not been filed first. See Aetna
16 Casualty & Surety Co. v. Merritt, 974 F.2d 1196, 1199 (9th Cir.
17 1992) (upholding a district court's decision to assert
18 jurisdiction when there was no state court action pending at the
19 time the federal declaratory relief action was filed).

20 Just as Delicato argues that a "first-to-file" rule should
21 not be mechanically applied, there is also no requirement that
22 any pending state court action requires dismissal of a first-
23 filed federal action. Delicato argues that the short timeframe
24 between Mitsui's issuance of its denial and its filing of the
25 instant action indicates that Mitsui anticipated that Delicato
26 was about to file a non-removable state court action. However,
27 the court finds no indication within the correspondence between
28 Delicato and Mitsui that a non-removable state court action,

1 naming non-diverse parties, was imminent. While there was a
2 clear dispute between the parties and Mitsui had a reasonable
3 apprehension of litigation, there was no indication that Delicato
4 would be filing a non-removable state court action immediately.
5 The court finds that Mitsui's suit was not "reactive" and that
6 asserting jurisdiction over the suit would not encourage forum
7 shopping in violation of Brillhart.

8 **3. Avoiding Duplicative Litigation**

9 Delicato argues that this court should not exercise
10 jurisdiction over Mitsui's complaint, "as all the legal issues
11 would be best and most economically determined in the state court
12 action, the forum with the closest connection to this cases."
13 (Def.'s Reply, filed March 26, 2007, at 12). It is true that
14 there may be some overlap between the issues determined by this
15 court and the state court, as the state court may need to
16 determine the validity's of Mitsui's denial in order to determine
17 the validity of Delicato's breach of contract claim. However,
18 the state court action involves several causes of action that do
19 not involve a determination of the same issues of policy
20 coverage, such as Delicato's claim for defamation against the
21 non-diverse defendants. Accordingly, this action will not be
22 duplicative of almost all of the issues to be determined in the
23 state court action.³


24
25 ³ Delicato's counsel filed a Supplemental Declaration in
26 support of its motion to dismiss on April 23, 2007, indicating
27 that Mitsui filed a cross-complaint against Delicato in the state
28 court action, seeking declaratory relief similar to that sought
in the instant case. The court declines to consider this late
filing. Even if the court were to consider the existence of a
(continued...)

1 **CONCLUSION**

2 Based upon the foregoing analysis, in the totality of the
3 circumstances, the Brillhart factors do not weigh in favor of the
4 court's abstention from exercising jurisdiction in this case.
5 There is no evidence that plaintiff has filed this case as
6 "reactive litigation" in an effort to forum shop. Further, while
7 this case involves issues of state law which were subsequently
8 brought in state court by defendant, subsequent state court
9 filings cannot be solely dispositive of the Brillhart inquiry as
10 such an analysis would necessitate abstention from jurisdiction
11 in almost all declaratory relief actions brought into this court
12 on the basis of diversity jurisdiction and would encourage forum
13 shopping and "reactive litigation" by parties seeking to litigate
14 their claims in state court. As such, the court will exercise
15 its discretion to assume jurisdiction over the instant
16 declaratory judgment action. Therefore, defendant's motion to
17 dismiss is DENIED.

18 IT IS SO ORDERED.

19 DATED: May 10, 2007

20
21 
22 FRANK C. DAMRELL, JR.
23 UNITED STATES DISTRICT JUDGE
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25
26

27 ³(...continued)
28 cross-complaint in the state court action, it would not impact
the court's analysis of the Brillhart factors.

Exhibit 2

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Witkin
Summary of California Law, Tenth Edition
B.E. Witkin and Members of the Witkin Legal Institute

Chapter IX. Torts
XIII. NEGLIGENCE: LIABILITY FOR NEGLIGENCE OF OTHERS

A. [§ 1220] Circumstances Justifying Vicarious Liability.

(1) *General Rule.* Tort liability of a person for the acts of others does not exist unless there is some relationship or other circumstance justifying the imposition of this liability. (See *Mathias v. United Pac. Ins. Co.* (1968) 260 C.A.2d 752, 755, 67 C.R. 511, supra, §865, citing the text; *Rubio v. Swiridoff* (1985) 165 C.A.3d 400, 404, 211 C.R. 338, citing the text; *Thomas v. Intermedics Orthopedics* (1996) 47 C.A.4th 957, 962, 55 C.R.2d 197, supra, §976 [discussing “captain of the ship” negligence doctrine of surgeon's liability for not assisting persons]; Rest.2d, Torts §315; 5 Harper, James & Gray 2d §26.1 et seq.; 57B Am.Jur.2d, Negligence (2004 ed.), §1096 et seq.; Cal. Civil Practice, 1 Torts, Liability for Acts of Others, Chap. 3.)

(2) *Vicarious Liability Present.* In the following situations, vicarious liability is generally recognized by common law or statute:

(a) *Special Relationship Between Defendant and Wrongdoer.* Where a special relationship exists between the defendant and the wrongdoer, such as agency or employment (see 3 Summary (10th), *Agency and Employment*, §163 et seq.), joint enterprise (see infra, §1235), and in some situations, employer and independent contractor (see infra, §1236.). (See also Rest.2d, Torts §319 [duty of those in charge of person having dangerous propensities]; 42 A.L.R.4th 586 [liability of physician to third person for prescribing drug to known drug addict]; 43 A.L.R.4th 153<<* p.598>> [liability of physician to third person for failure to disclose driving-related impediment]; 25 A.L.R.5th 1 [liability of adult assailant's family for physical assault on third party].)

(b) *Special Relationship Between Defendant and Plaintiff.* Where a special relationship exists between the defendant and the plaintiff, so that the defendant owes an affirmative duty of care toward the plaintiff; e.g., landowner and person coming on the land. (See Rest.2d, Torts §344; supra, §1129).

(c) *Statutory Liability.* Where a statute imposes this liability; e.g., the limited liability of a parent for torts of a child (see infra, §1229.), or an owner for negligence of one driving a car with permission (see infra, §1260.), and of an insurance company for negligence of an insured driver (see 2 Summary (10th), *Insurance*, §§309, 310).

(d) *Dangerous Instrumentality.* Where the defendant entrusts a dangerous instrumentality

to an improper person. (See *infra*, §1221, *infra*, §1222.)

(3) *No Vicarious Liability*. In the following situations, vicarious liability is not generally recognized:

(a) *Family Relationship*. Family relationships normally do not give rise to vicarious liability. Thus, a parent is not, as such, liable for the torts of his or her child except by statute in special situations and to a limited extent (see *infra*, §1227.). And one spouse is not liable for the torts of another. (Family C. 1000.) (On liability of community property, see 11 *Summary* (10th), *Community Property*, §175 et seq.)

In *Wise v. Superior Court* (1990) 222 C.A.3d 1008, 272 C.R. 222, defendant's husband mounted a sniper attack from the roof of his home, and injured a number of passing motorists, including plaintiffs, before taking his own life. Plaintiffs sued defendant widow, alleging that decedent husband was "a human time bomb" with a long history of erratic and violent behavior and an arsenal of weapons; and that defendant was negligent in permitting decedent to occupy the house without doing anything to protect or warn others in the zone of danger. *Held*, no cause of action was stated.

(a) No special relationship was shown, for decedent's behavior was beyond the control of anyone, and the type of attack was not foreseeable. (222 C.A.3d 1008.)

(b) *Pamela L. v. Farmer* (1980) 112 C.A.3d 206, 169 C.R. 282, *supra*, §1058, is distinguishable. In that case defendant wife, who allegedly knew of her husband's history of child molestation, invited minor girls to use the swimming pool in their home while she was at work. (222 C.A.3d 1014.)

(b) *Landlord-tenant Relationship*. The landlord and tenant relationship also falls outside the vicarious liability rules; a landlord is not liable<<* p.599>> for the negligence of a tenant. (*Mundt v. Nowlin* (1941) 44 C.A.2d 414, 415, 112 P.2d 782; 30 *Stanf. L. Rev.* 725 [argument that landlord has duty of care in selection of tenant, hence should be liable for foreseeable injuries inflicted by a foreseeably dangerous tenant].)

West's Key Number Digest, Negligence ↪ 483

Contents Index and Tables

6 WITSUM Ch. IX, § 1220

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