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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**  
 ) **AUTHORITIES IN SUPPORT OF**  
 ) **PLAINTIFF AND COUNTER-DEFENDANT**  
 17 KAMEHAMEHA SCHOOLS/BERNICE ) **ERIC GRANT’S OPPOSITION TO KSBE**  
 ) **DEFENDANTS’ MOTION TO DISMISS**  
 18 ING, NAINOA THOMPSON, DIANE J. ) **[L.R. 5-133(i)]**  
 )  
 19 PLOTTS, ROBERT K.U. KIHUNE, and )  
 )  
 20 CORBETT A.K KALAMA, in their )  
 )  
 21 capacities as Trustees of the Kamehameha )  
 )  
 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 )  
 )  
 27 PAUAHI BISHOP ESTATE, et al., )  
 )  
 28 Counter-Defendants. )

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

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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. William W. Schwarzer, et al., *Rutter Group Practice Guide: Federal Civil Proce-*  
5 *dure Before Trial* ¶ 10.5 (9th Circuit ed. 2008).

6 Dated: October 17, 2008.

7 Respectfully submitted,

8 /s/ Eric Grant  
9 ERIC GRANT

10 Counsel for Plaintiff and  
11 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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11  
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

18 -----oo0oo-----  
19

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.<sup>1</sup>

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

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27 <sup>1</sup> 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 Satak 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,"<sup>2</sup> 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

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27 <sup>2</sup> 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.<sup>3</sup>

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24  
25           <sup>3</sup> 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

24  
25  
26  
27 <sup>3</sup>(...continued)  
28 cross-complaint in the state court action, it would not impact  
the court's analysis of the Brillhart factors.

# Exhibit 2

Rutter Group Practice Guide: Federal Civil Procedure Before Trial, 9th Circuit Edition  
William W Schwarzer, A. Wallace Tashima, and James M. Wagstaffe; Contributing Editors:  
Hon. Gerald E. Rosen, Hon. Roslyn O. Silver, Hon. Andrew J. Wistrich, Atty. Steven J.  
Adamski, and Atty. Ivo Labar

## Chapter 10. Actions With Special Procedural Requirements

### A. Declaratory Relief

#### 1. In General

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##### e. [10:7] Typical cases

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- Validity of contract.

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(1) [10:16] Federal question cases—coercive claim determinative

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(b) [10:17.5] Determined as of time declaratory relief action filed

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1) Application

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(1) [10:33.10] Compare—statute of limitations

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• FORM

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4. [10:45] Relief Discretionary

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(1) [10:45.2] No “exceptional circumstances” required for abstention

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- (9) [10:54] Application—insurance litigation
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=> [10:58.1] PRACTICE POINTERS FOR DEFENDANTS

This Chapter deals with certain types of federal actions having unique procedural requirements: Declaratory Relief, Interpleader, and Class Actions.

1. **In Generala.** [10:1] **Declaratory Judgment Act:** “In a case of actual controversy within its jurisdiction (except specified *federal tax* actions and *bankruptcy* proceedings) any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” [28 USC § 2201(a) (parentheses added)](1) [10:2] **Federal Rule:** “The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.” [FRCP 57]

b. [10:3] **Nature of action:** Declaratory relief is an equitable remedy. Its distinctive characteristic is that it allows adjudication of the parties' rights and obligations on a matter in dispute regardless of whether claims for damages or injunctive relief have yet arisen: “In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future.” [*Societe de Conditionnement v. Hunter Eng. Co., Inc.* (9th Cir. 1981) 655 F2d 938, 943; see also *Dickinson v. Indiana State Election Board* (7th Cir. 1991) 933 F2d 497][10:4] *Reserved.*

c. [10:5] **Purposes:** An action for declaratory relief serves several purposes:• [10:5.1] The Declaratory Judgment Act is “intended to fix the problem that arises when the other side does not sue.” [*Sony Electronics, Inc. v. Guardian Media Technologies, Ltd.* (Fed. Cir. 2007) 497 F3d 1271, 1284; see *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.* (9th Cir. 1990) 896 F2d 1542, 1555—relieves potential defendants from “Draconian threat of impending litigation which a harassing adversary might brandish”]

• [10:5.2] It permits parties uncertain of their obligations to avoid incurring liability for damages by obtaining a declaratory judgment in advance of performance. [*Societe de Condition-*

*nement v. Hunter Eng. Co., Inc.*, supra, 655 F2d at 943]

- [10:5.2a] It prevents avoidable damages from being incurred by a person who is not certain of his or her rights, “and affords him (or her) an early adjudication of his (or her) rights without waiting until his (or her) adversary takes injurious action against him (or her).” [*Heimann v. National Elevator Industry Pension Fund* (5th Cir. 1999) 187 F3d 493, 511 (parentheses added)]
- [10:5.3] It promotes judicial efficiency by avoiding multiplicity of actions between the parties. [*Societe de Conditionnement v. Hunter Eng. Co., Inc.*, supra, 655 F2d at 943]
- [10:5.4] It may be an effective alternative to injunctive relief, available on a lesser showing. For example, to obtain injunctive relief plaintiff must show irreparable injury; this is not necessary for a declaratory judgment. [*Tierney v. Schweiker* (DC Cir. 1983) 718 F2d 449, 457]