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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
9

10 SURETEC INSURANCE COMPANY,  
11 INC., a Texas corporation,

NO. 2:08-cv-03036-MCE-JFM

12 Plaintiff,

13 v.

ORDER

14 NEW FAZE DEVELOPMENT, INC.,  
15 et al.,

16 Defendants.

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18 Plaintiff initiated this indemnity action seeking to, *inter*  
19 *alia*, recover losses it anticipates incurring as a result of  
20 issuing payment and performance bonds in connection with one of  
21 Defendants' development projects. Presently before the Court is  
22 Defendants' Counter-Motion for Order of Abstention<sup>1</sup>, through  
23 Colorado River Water Conservation Dist. v. United States, 424  
24 U.S. 800 (1976). For the following reasons, Defendants' Motion  
25 is denied.

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27 <sup>1</sup> Because oral argument will not be of material assistance,  
28 the Court ordered this matter submitted on the briefing. E.D.  
Cal. Local Rule 78-230(h).

1 **BACKGROUND**

2  
3 Plaintiff agreed to provide surety bonds on behalf of Nuevo  
4 Partners, an affiliate of Defendants, in connection with a local  
5 construction project. As part of the consideration for this  
6 agreement, Defendants, along with Nuevo Partners, executed a  
7 General Indemnity Agreement ("GIA") under which they agreed to  
8 indemnify Plaintiff against liability for losses and expenses  
9 incurred by Plaintiff as a result of executing the bonds. The  
10 contracting parties also agreed, upon demand, to deposit  
11 collateral with Plaintiff to discharge or cover losses or  
12 anticipated losses.

13 Nuevo Partners, later filed for Chapter 11 Bankruptcy.  
14 Plaintiff alleges the bankruptcy filing constituted a default  
15 under the terms fo the GIA.

16 Subsequently, A. Teichert & Son, Inc., d.b.a. Teichert  
17 Construction ("Teichert") made demands upon Nuevo Partners for  
18 payment of labor, materials, etc. On October 16, 2008, Teichert  
19 recorded a Mechanic's Lien and then sent to Plaintiff a notice of  
20 intent to make a claim in the amount of \$446,837.11 against the  
21 bonds. According to Plaintiff, Nuevo Partners failed to complete  
22 work as obligated on the project, exposing Plaintiff to liability.

23 As a result, Plaintiff sent letters to Defendants demanding  
24 that they indemnify Plaintiff from any losses it might sustain.  
25 Plaintiff directed Defendants to either pay Teichert and arrange  
26 for completion of the work or deposit collateral in the amount of  
27 \$500,000 with Plaintiff. To date, Defendants have done neither.

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1 Accordingly, on December 15, 2008, Plaintiff filed the instant  
2 action alleging claims for breach of contract, *quia temet*,  
3 specific performance, and declaratory relief.

4 Approximately one month later, on January 13, 2009, Teichert  
5 initiated a state action against Defendants, included Plaintiff  
6 as a defendant, and alleged causes of action for breach of  
7 contract, foreclosure or mechanic's lien and bond recovery.  
8 Defendants now move to stay the instant action until the state  
9 action is resolved.

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11 **ANALYSIS**  
12

13 According to Defendants, when Teichert recorded its  
14 Mechanic's Lien and sent a demand letter to Plaintiff as to the  
15 bonds, "[r]easonable handling of these claims, for maximum  
16 economy and benefit to the Courts and parties, would have  
17 involved (a) Teichert filing an action in the Superior Court,  
18 including a cause of action against Plaintiff for payment under  
19 the Bonds, in response to which (b) Plaintiff would bring a  
20 cross-complaint in the Superior Court against Defendants herein  
21 asserting their indemnity obligations." Instead, approximately  
22 one month before Teichert eventually filed a state court action,  
23 Plaintiff initiated the instant litigation in this Court.  
24 Defendants now ask this Court to abstain from exercising its  
25 jurisdiction until the state court action is resolved.

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1 "Under Colorado River, considerations of wise judicial  
2 administration, giving regard to conservation of judicial  
3 resources and comprehensive disposition of litigation, may  
4 justify a decision by the district court to stay federal  
5 proceedings pending the resolution of concurrent state court  
6 proceedings involving the same matter. Exact parallelism is not  
7 required; it is enough if the two proceedings are substantially  
8 similar." *Holder v. Holder*, 305 F.3d 854, 867 (9th Cir. 2002)  
9 (internal citations and quotations omitted). "But because  
10 '[g]enerally, as between state and federal courts [with  
11 concurrent jurisdiction], the rule is that the pendency of an  
12 action in the state court is no bar to proceedings concerning the  
13 same matter in the Federal court having jurisdiction[,] the  
14 Colorado River doctrine is a narrow exception to 'the virtually  
15 unflagging obligation of the federal courts to exercise the  
16 jurisdiction given them.'" *Id.* (quoting *Colorado River*, 424 U.S.  
17 at 817).

18 Thus, as a threshold matter, Colorado River applies when a  
19 federal court is asked to exercise jurisdiction over a matter in  
20 which there are parallel state court proceedings underway.  
21 Defendants argue here that the state court action constitutes  
22 parallel litigation because it concerns the same underlying  
23 construction project, the same parties, the same approximate  
24 amount of money damages, and arises under the same state's laws.  
25 Additionally, Plaintiff's potential recovery here is derivative  
26 of any recovery Teichert might obtain in state court. Plaintiff  
27 disagrees, arguing that the state court proceedings will not  
28 resolve the issues raised in federal court.

1 Plaintiff is correct because the state court proceeding revolves  
2 around the subcontract and the bonds. The federal action instead  
3 involves the instant parties' indemnity agreement. Thus, the  
4 parallelism requirement is not met.

5 Additionally, the remaining factors critical to a Colorado  
6 River analysis weigh in favor of the exercise of this Court's  
7 jurisdiction as well: 1) whether the state court has assumed  
8 jurisdiction over any res or property; 2) whether the federal  
9 forum is less convenient to the parties; 3) avoidance of  
10 piecemeal litigation; 4) the order in which jurisdiction was  
11 obtained; 5) whether the source of governing law is state or  
12 federal; 6) the adequacy of state court proceedings to protect  
13 the federal plaintiff's rights; and 7) whether exercising  
14 jurisdiction will promote forum shopping. Colorado River, 424  
15 U.S. at 818-19; Moses H. Cone Memorial Hosp. v. Mercury Const.  
16 Corp., 460 U.S. 1, 19-26 (1983); Holder, 305 F.3d at 870.

17 First, though Plaintiff claims the state court has assumed  
18 jurisdiction over property by way of Teichert's Mechanic's lien,  
19 Plaintiff's claim in this court does not concern that property  
20 and seeks only funds it anticipates recovering under the  
21 indemnity agreement. Next, the convenience of the forum is  
22 neutral as the burdens and benefits of litigating in Sacramento  
23 state court versus federal court are virtually the same.  
24 Furthermore, concerns regarding the avoidance of piecemeal  
25 litigation are not present here because, though related, the  
26 issues litigated in this Court are not the same as those before  
27 the district court.

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1 Additionally, despite Defendants' argument that the state court  
2 action should be deemed filed as of the date the Mechanic's Lien  
3 was recorded, the federal action was actually filed first and has  
4 progressed further than the state action. Moreover, though the  
5 source of applicable law is state not federal, both courts have  
6 the ability to competently address Plaintiff's instant claims.  
7 Finally, nothing in the record indicates that Plaintiff, in  
8 filing the instant action, engaged in improper forum shopping.

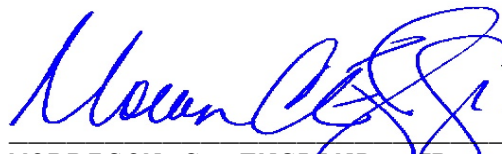
9 In sum, even if the above balancing produced a closer  
10 result, Colorado River abstention is proper only under rare  
11 circumstances not present here. Plaintiff was well within its  
12 rights to initiate the instant litigation in this Court under  
13 this Court's diversity jurisdiction. It was not required to sit  
14 on those rights and await the filing of a state court action in  
15 which Plaintiff could then file a cross-complaint for indemnity.  
16 Accordingly, this Court will not abstain.

17  
18 **CONCLUSION**  
19

20 Defendants' Counter-Motion for Order of Abstention (Docket  
21 No. 47) is DENIED.

22 IT IS SO ORDERED.

23 Dated: August 31, 2009  
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26 MORRISON C. ENGLAND, JR.  
27 UNITED STATES DISTRICT JUDGE  
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