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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEERLESS INSURANCE COMPANY;
GOLDEN EAGLE INSURANCE COMPANY,

No. C-10-5339 MMC

Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

v.

INTEX FORMS, INC., et al.,

Defendants.

Before the Court is defendants Granite Silver Development Partners, LP, FC-Silver Canyon, Inc, American Nevada Seven Hills Limited Partnership, SS Seven Hills, Inc., and Silver Canyon Partnership's (collectively, "SCP") motion, filed December 28, 2010, to dismiss plaintiffs' Complaint for Declaratory Relief. Plaintiffs Peerless Insurance Company and Golden Eagle Insurance Company (collectively, "Peerless") have filed opposition, to which SCP has replied.¹ The matter came on regularly for hearing on March 18, 2011. Nicholas Salerno of Lincoln, Gustafson & Cercos appeared on behalf of SCP; Jay Framson of Lewis Brisbois Bisgaard & Smith LLP appeared on behalf of Peerless. Having read and considered the papers filed in support of and in opposition to the motion, and having considered the arguments of counsel, the Court rules as follows.

¹ The remaining defendant in the instant action, Intex Forms, Inc., has neither joined SCP's motion, nor responded to Peerless's complaint.

1 **BACKGROUND**

2 According to the Complaint, Peerless issued insurance policies to Intex Forms, Inc.
3 (“Intex”) between 1997 and 2002, which policies required Peerless to defend and indemnify
4 Intex in certain circumstances. (See Compl. ¶¶ 13, 14, 15.) Peerless seeks a declaration
5 that it has no duty to defend or indemnify Intex in a pending Nevada state court action
6 arising from allegedly defective work performed by Intex and SCP in construction of the
7 Seven Hills Development, and in which action SCP filed third-party claims against Intex
8 (“the Seven Hills Litigation”). (See Compl. ¶¶ 16-18; see also Framson Aff. Ex. 1 (SCP
9 Third-Party Complaint).)

10 Prior to the Seven Hills Litigation, Intex filed for Chapter 11 bankruptcy in the
11 Northern District of California. See generally In re Intex Forms Inc., No. 4-33095 (Bankr.
12 N.D. Cal. 2004). In September 2009, SCP sought relief from the automatic stay of litigation
13 against Intex, stating SCP sought such relief “solely to establish liability against Intex’[s]
14 liability carriers that have declined their obligation to defend and indemnify Intex.”
15 (See Compl. ¶¶ 20, 21; see also Framson Aff. Ex. 2 at 2:5-8.) On July 13, 2010, the
16 bankruptcy court terminated the automatic stay against Intex (1) to permit the Seven Hills
17 Litigation “to proceed to final decision against [Intex] for all purposes . . . , except that any
18 money judgment may be enforced against [Intex] only via insurance proceeds; and (2) to
19 allow any insurer to take any action necessary to contest its obligation to pay or to defend
20 [Intex].” (See Compl. Ex. 8.)

21 **LEGAL STANDARD**

22 The Declaratory Judgment Act (“DJA”) provides: “In a case of actual controversy
23 within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate
24 pleading, may declare the rights and other legal relations of any interested party seeking
25 such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

26 “Jurisdiction to award declaratory relief exists only in a case of actual controversy.”
27 Am. States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1994). The “actual controversy”
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1 requirement “is identical to Article III’s constitutional case or controversy requirement.” Id.²
2 The requirement obligates a district court to determine “whether the facts alleged, under all
3 the circumstances, show that there is a substantial controversy, between parties having
4 adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
5 declaratory judgment.” MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007).
6 “[A] party seeking a declaratory judgment has the burden of establishing the existence of
7 an actual case or controversy.” Id. at 140.

8 “If there is a case or controversy within its jurisdiction, the court must decide whether
9 to exercise that jurisdiction” as “[t]he statute gives discretion to courts in deciding whether
10 to entertain declaratory judgments.” Kearns, 15 F.3d at 143-44. “Essentially, the district
11 court must balance concerns of judicial administration, comity, and fairness to the litigants.”
12 Id. at 144 (internal quotation and citation omitted) (noting “Supreme Court has provided
13 guidance for the exercise of the district court’s discretion”; citing Billhart v. Excess Ins. Co.,
14 316 U.S. 491 (1942)).

15 DISCUSSION

16 Peerless contends an actual controversy exists between Peerless, on the one hand,
17 and Intex and SCP, on the other, as to whether Peerless has a duty to defend Intex in the
18 Seven Hills Litigation, and to indemnify Intex for any judgment obtained against it by SCP in
19 said litigation.

20 I. Case or Controversy: Intex

21 In the typical action brought by an insurance company for relief under the DJA with
22 respect to its duty to defend and indemnify an insured, the insured has tendered its
23 defense and/or claim for indemnity to the insurer. See, e.g., Aetna Cas. and Sur. Co. Co.
24 v. Merritt, 974 F.2d 1196, 1198 (9th Cir. 1992) (noting insured “tendered the defense of
25 [state action] to Aetna”). In such cases, an actual controversy exists between the insured
26 and insurer. See id. at 1199 (finding district court properly exercised jurisdiction over

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28 ² The action “must also fall under one of the foundations of federal jurisdiction.”
Kearns, 15 F.3d at 143. Here, jurisdiction is predicated on diversity of citizenship.

1 insurer's declaratory relief action).

2 Here, Peerless alleges that it "wrote to Intex denying defense or indemnity" under
3 the relevant policies "for the claims asserted in the Seven Hills Litigation." (See Compl.
4 ¶ 19 (italics omitted).) Peerless neither alleges nor presents any evidence, however, that
5 Intex requested Peerless either defend or indemnify Intex, or that Intex objected to
6 Peerless's refusal to do so. See Nat'l Union Fire Ins. Co. of Pittsburg v. ESI Ergonomic
7 Solutions, 342 F. Supp. 2d 853, 862 (D. Ariz. 2004) (finding no actual controversy between
8 insured and insurer where insurer "d[id] not allege that [insured] disputes [insurer's] denial
9 of coverage"). Indeed, Intex has not appeared in this action to assert any rights it may
10 possess under the policies.

11 Rather, the letters Peerless alleges it "wrote to Intex" were in fact written to counsel
12 for Granite Silver Development Partners, LP and American Nevada Company, LLC
13 (collectively "ANC") and refer to a request by ANC, not Intex. (See Compl. Exs. 6, 7
14 (referring to "tender of defense you forwarded to us on behalf of . . . ANC"; concluding
15 Peerless "will not provide [Intex] and ANC with a defense or indemnification").) Even
16 assuming ANC requested Peerless defend Intex,³ Peerless provides no authority by which
17 ANC's request would establish a justiciable controversy as to Intex. Cf. Gov't Emp. Ins. Co.
18 v. Dizol 133 F.3d 1220, 1222 n.2 (9th Cir. 1998) (noting Ninth Circuit has "consistently held
19 that a dispute between an insurer and its insureds over the duties imposed by an insurance
20 contract satisfies Article III's case and controversy requirement" (emphasis added)).

21 **II. Case or Controversy: SCP**

22 Peerless alleges SCP has sufficiently threatened litigation to enforce against
23 Peerless any judgement SCP obtains against Intex in the Seven Hills Litigation.
24 (See Compl. ¶ 22.) In support thereof, Peerless submits the motion SCP filed in Intex's
25 bankruptcy action, in which motion SCP stated it was seeking relief from the above-
26 referenced stay "solely to establish liability against Intex'[s] liability carriers that have
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28 ³ Peerless did not submit the letter(s) sent by ANC to Peerless.

1 declined their obligation to defend and indemnify Intex.” (See Framson Aff. Ex. 2 at 2:5-8.)

2 “If the defendant’s actions cause the plaintiff to have a real and reasonable
3 apprehension that he will be subject to liability, the plaintiff has presented a justiciable case
4 or controversy.” Spokane Indian Tribe v. U.S., 972 F.2d 1090, 1092 (9th Cir. 1992). Here,
5 although SCP, in its motion before the bankruptcy court, arguably stated an intent to
6 enforce against Intex’s “liability carriers” any judgment obtained against Intex (see Framson
7 Aff. Ex. 2 at 2:7), the motion is directed at Gemini Insurance Company, the one Intex
8 insurer identified therein as having defended Intex in the Seven Hills Litigation, but then,
9 according to SCP, “suddenly withdrew their defense” in what was a collaborative effort with
10 Intex to defeat SCP’s rights under a stipulation entered between Intex and SCP in the
11 bankruptcy court (see id. Ex. 2 at 5:9-13, 7:8-16, 9:22-10:2). By its motion, SCP sought to
12 “modify” such stipulation (see id. Ex. 2 at 1), explaining that “the judgment [against Intex]
13 will be enforced only against [Intex’s] carriers who have had more than a year to
14 investigate, defend, and potentially resolve this claim, but have now chosen to withdraw
15 their defense” (see id. at 11:9-13). Under such circumstances, and when read in context,
16 SCP’s use of the plural “carriers” cannot reasonably be understood as a threat against
17 Peerless. Nor has Peerless submitted any evidence to show that, in the year and a half
18 since SCP’s filing of the above-discussed motion, SCP has otherwise made such a threat.

19 In sum, Peerless has failed to demonstrate a “substantial controversy . . . of
20 sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”

21 See MedImmune, 549 U.S. at 126.

22 Accordingly, SCP’s motion to dismiss is hereby GRANTED, and the above-titled
23 action is hereby DISMISSED in its entirety.

24 **IT IS SO ORDERED.**

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26 Dated: March 29, 2011

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28 MAXINE M. CHESNEY
United States District Judge