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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 08cv1497-L(JMA)

CUSTOM WINDOW COMPANY,
Plaintiff,
v.
5th AVENUE PARTNERS, LLC, *et al.*,
Defendants;

AND RELATED COUNTERCLAIM.

**ORDER DISMISSING
COUNTERCLAIM WITHOUT
PREJUDICE AND DENYING
MOTIONS AS MOOT**

This action arises out of a construction project for the Diegan Hotel. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Defendant and Counter-Claimant 5th Avenue Partners, LLC (“Fifth Avenue”) is the owner and developer of the Project. Counter-Defendant Highland Partnership, Inc. (“Highland”) is the general contractor. The Project involved numerous subcontractors, including Plaintiff and Counterclaim-Defendant Custom Window Company (“Custom Window”).

On August 15, 2008 Custom Window filed the instant action against AWI, Inc., a subcontractor, and Fifth Avenue for breach of contract, foreclosure of mechanic’s lien and other State law claims. On October 20, 2008 Fifth Avenue filed a counterclaim against Custom Window, Highland, Travelers Casualty and Surety Company of America, American Window All Industries, Inc. aka AWI, Inc. and TWD, LLC for breach of contract, fraud, breach of

1 performance and payment bonds, injunctive and declaratory relief, disgorgement and several
2 other business torts under State law (“Counterclaim”). “Prior to filing the Counterclaim, [Fifth
3 Avenue] filed an action in the San Diego Superior Court against the same parties to the
4 Counterclaim and alleging the same causes of action.” (Decl. of Keli Osaki at 1.)


5 Because it appeared that the State court action was filed first, covered the same parties
6 and claims as the Counterclaim in this action, and because the State court action appeared to be
7 pending concurrently with this action, this court issued an Order to Show Cause, directing Fifth
8 Avenue to show cause why this court should not abstain pursuant to the doctrine articulated in
9 *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-19 (1976), and
10 its progeny.

11 On September 4, 2009 Fifth Avenue responded to the Order to Show Cause and stated it
12 did not object to a dismissal without prejudice, given that an identical action was filed first in
13 State court and is pending concurrently with the Counterclaim. Although Counter-Defendants
14 were provided an opportunity to respond, they did not timely do so. The record reflects no
15 objection to dismissal of the Counterclaim without prejudice.

16 Accordingly, based on the foregoing, the Counterclaim filed by 5th Avenue Partners,
17 LLC is hereby **DISMISSED WITHOUT PREJUDICE**. The motions to compel arbitration
18 filed by Counter-Defendants Highland Partnership, Inc. and Travelers Casualty and Surety
19 Company of America are **DENIED** as moot.

20 **IT IS SO ORDERED.**

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22 DATED: September 9, 2009

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24 M. James Lorenz
25 United States District Court Judge
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