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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 09cv1613-L(AJB)

HASEKO HOMES, INC. *et al.*,  
Plaintiffs,  
v.  
UNDERWRITERS INSURANCE  
COMPANY, *et al.*,  
Defendants.

**ORDER DENYING PLAINTIFFS’  
MOTION TO REMAND;  
DISMISSING ACTION WITHOUT  
PREJUDICE; AND DENYING  
DEFENDANT’S MOTION FOR  
CHANGE OF VENUE AS MOOT**

In this insurance coverage declaratory relief action Plaintiffs filed a motion to remand and a motion for voluntary dismissal. For the reasons which follow, Plaintiffs’ motion to remand is **DENIED** and their motion for voluntary dismissal is **GRANTED**. The court declines to exercise jurisdiction over the declaratory relief counterclaim, the only proceeding remaining in this case after the complaint is dismissed. Accordingly, this action is **DISMISSED WITHOUT PREJUDICE**. The pending motion for change of venue is **DENIED** as moot.

On June 26, 2009 a construction defect class action was filed in the Hawaii state court (the “Kai Action”) against Haseko Homes, Inc. and Haseko Construction, Plaintiffs in this case. On July 1, 2009 Plaintiffs filed the instant action in California state court against their insurers, seeking a declaration of the insurers’ duty to defend and indemnify. On July 24, 2009 North American Specialty Company (“NAS”), as successor in interest for Defendant Underwriters Insurance Company, removed the action to this court. On August 21, 2009 Plaintiffs filed a

1 motion to remand.

2 On August 26, 2009 Plaintiffs filed another insurance declaratory relief action in  
3 California state court. (*See Haseko Homes, Inc. et al. v. N. Am. Specialty Ins. Co. et al.*,  
4 09cv1924-L (AJB) (“Haseko II”).) Plaintiffs named essentially the same Defendants,<sup>1</sup> but based  
5 the action on additional construction defect claims and class actions filed in Hawaii state court.  
6 Again, NAS removed the action to this court. Because this removal was improper, Haseko II  
7 was remanded to State court.

8 On September 23, 2009 the Kai Action in Hawaii was dismissed. On September 25, 2009  
9 Plaintiffs’ counsel contacted counsel for NAS to stipulate to the dismissal of the instant action.  
10 (Decl. of Celia Jackson, dated Oct. 22, 2009, Ex. C.)<sup>2</sup> NAS declined to stipulate to the dismissal  
11 (*id.* Ex. D) and subsequently filed a motion for change of venue, requesting to transfer this  
12 action to the District of Hawaii.

13 Although a number of motions are pending in this case, the court addresses the issue of  
14 subject matter jurisdiction first. “The requirement that jurisdiction be established as a threshold  
15 matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is  
16 ‘inflexible and without exception.’” *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 94-95  
17 (1998) quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

18 Federal courts are courts of limited jurisdiction. They possess only that power  
19 authorized by Constitution or a statute, which is not to be expanded by judicial  
20 decree. It is to be presumed that a cause lies outside this limited jurisdiction and  
the burden of establishing the contrary rests upon the party asserting jurisdiction.

21 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Abrego Abrego v.*  
22 *The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006).

23 Except as otherwise expressly provided by Act of Congress, any civil action  
24 brought in a State court of which the district courts of the United States have

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25 <sup>1</sup> Instead of naming Underwriters Insurance Company, a Defendant in this action,  
26 they named NAS, its successor in interest. Because the NAS is defending the instant action as  
27 successor in interest for Underwriters Insurance Company, the parties in both actions are  
essentially the same.

28 <sup>2</sup> As of that time, no other Defendant had made an appearance or been served. (*Id.* ¶  
7.)

1 original jurisdiction, may be removed by the defendant or the defendants, to the  
2 district court of the United States for the district and division embracing the place  
where such action is pending.

3 28 U.S.C. §1441(a). Consistent with the limited jurisdiction of federal courts, the removal  
4 statute is strictly construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566  
5 (9th Cir. 1992); *see also Sygenta Crop Prot. v. Henson*, 537 U.S. 28, 32 (2002); *O’Halloran v.*  
6 *University of Wash.*, 856 F.2d 1375, 1380 (9th Cir. 1988). Original jurisdiction exists in cases of  
7 diversity of citizenship. 28 U.S.C. §1332.

8 NAS removed this action based on diversity jurisdiction pursuant to 28 U.S.C. §§ 1332  
9 and 1441. Plaintiffs argue that the removal was improper under the forum defendant rule, set  
10 forth in 28 U.S.C. § 1441(b). Section 1441(b)

11 imposes a limitation on actions removed pursuant to diversity jurisdiction: “such  
12 action[s] shall be removable only if none of the parties in interest properly joined  
and served as defendants is a citizen of the State in which such action is brought.”

13 *Spencer v. U.S. Dist. Ct. N.D. Cal. (Altec Indus., Inc.)*, 393 F.3d 867, 870 (9th Cir. 2004) quoting  
14 28 U.S.C. § 1441(b). “[T]he presence of a local defendant at the time removal is sought bars  
15 removal.” *Id.* This “confines removal on the basis of diversity jurisdiction to instances where  
16 no defendant is a citizen of the forum state.” *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933,  
17 939 (9th Cir. 2006).

18 Plaintiffs maintain that Defendant TIG Insurance Company (“TIG”) is a California  
19 citizen, and therefore a forum defendant. (Mot. to Remand at 1; *see also* Notice of Removal at 3  
20 (TIG “is a corporation incorporated under the laws of the State of California”).) However,  
21 because TIG was not served at the time of removal, the removal was proper. 28 U.S.C § 1441(b)  
22 (referring to “properly joined and served” defendants); *see also Spencer*, 393 F.3d at 867 (post-  
23 removal joinder of a forum defendant does not necessitate remand); William W. Schwarzer *et*  
24 *al.*, *Federal Civil Procedure Before Trial* ¶¶ 2:626, 2:627 (2009).

25 In the alternative, Plaintiffs seize on the “properly joined and served” language of the  
26 forum defendant rule to argue that removal was improper because NAS, which is not a  
27 California citizen, removed the action before it was served with process. Plaintiffs cite no  
28 binding authority in support of the argument that actions cannot be properly removed before

1 service of process, and the court is aware of none. Accordingly, Plaintiffs' motion to remand is  
2 **DENIED.**

3 Plaintiffs also filed a motion to voluntarily dismiss this action pursuant to Federal Rule of  
4 Civil Procedure 41(a)(2), which TIG and NAS oppose. Rule 41(a)(2) provides in pertinent part  
5 that

6 an action may be dismissed at the plaintiff's request only by court order, on terms  
7 that the court considers proper. If a defendant has pleaded a counterclaim before  
8 being served with the plaintiff's motion to dismiss, the action may be dismissed  
9 over the defendant's objection only if the counterclaim can remain pending for  
independent adjudication. Unless the order states otherwise, a dismissal under this  
paragraph (2) is without prejudice.

10 Rule 41(a)(2) allows a plaintiff, "pursuant to an order of the court, and subject to any terms and  
11 conditions the court deems proper, to dismiss an action without prejudice at any time."

12 *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "A district court should  
13 grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it  
14 will suffer some plain legal prejudice." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001).

15 NAS argues that Plaintiffs are forum shopping with a view toward steering the insurance  
16 coverage litigation to California state court.<sup>3</sup> Relying solely on *Westlands Water District v.*  
17 *United States*, NAS asserts without elaboration or explanation that it will be prejudiced by the  
18 loss of the federal forum. In *Westlands*, Defendants did not argue prejudice based on the loss of  
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20 <sup>3</sup> NAS and TIG vehemently and repeatedly argue that Haseko II is identical to and  
21 duplicative of this action. They suggest Plaintiffs' filing of Haseko II in State court constitutes  
22 improper litigation conduct. This argument is rejected.

23 Although the two actions are very similar, Defendants' protestations that they are  
24 duplicative or identical is an overstatement. Most obviously, Haseko II is based on additional  
25 claims and class actions filed against Plaintiffs. While Plaintiffs could have amended the  
26 complaint in the instant action, they were not required to do so. *See Fed. R. Civ. P. 18* (joinder  
27 of claims is permissive).

28 Furthermore, when the court contacted counsel to inquire whether the motions  
filed in this action and in Haseko II could be coordinated for briefing and hearing, Defendants'  
counsel asserted that the parties in the two cases are not the same and that matters were not  
sufficiently similar. Consistently, no Defendant has moved to consolidate the actions pursuant  
to Federal Rule of Civil Procedure 42(a). Accordingly, it is disingenuous for Defendants now to  
argue that the cases are identical or duplicative.

1 the federal forum, and the court did not hold that the loss of the federal forum constituted plain  
2 legal prejudice. 100 F.3d at 96 & *passim*. “[P]lain legal prejudice does not result merely  
3 because the defendant will be inconvenienced by having to defend in another forum or where a  
4 plaintiff would gain a tactical advantage by that dismissal.” *Smith*, 263 F.3d at 976 (voluntary  
5 dismissal of federal action in favor of a pending action in state court). Accordingly, NAS’s  
6 argument that it will be prejudiced by the loss of the federal forum is rejected.

7 TIG does not argue that it will suffer any legal prejudice as a result of the dismissal.  
8 Instead, without citing to any legal authority, it argues that the motion should be denied because  
9 the dismissal of the Kai Action does not render this action moot and because Haseko II is  
10 duplicative of the instant action. Because neither amounts to plain legal prejudice, TIG’s  
11 arguments are rejected as irrelevant. *See, e.g., Hamilton v. Firestone Tire & Rubber Co.*, 679  
12 F.2d 143, 145-46 (9th Cir. 1982) (discussing prejudice); *Westlands Water Dist.*, 100 F.3d at 97-  
13 98 (same); *Smith*, 263 F.3d at 976 (same).

14 TIG’s counterclaim, filed on December 24, 2009, more than two months after Plaintiffs  
15 filed the instant motion, does not preclude a dismissal. The timing of the counterclaim together  
16 with TIG’s argument that the counterclaim demonstrates that this action is not moot (Opp’n at 8)  
17 show that TIG filed the counterclaim after it had notice of Plaintiffs’ motion for voluntary  
18 dismissal. Accordingly, Rule 41(a)(2) does not preclude dismissal over TIG’s objection.

19 Because no defendant has shown it will suffer plain legal prejudice and because none has  
20 requested any conditions for the dismissal without prejudice, Plaintiffs’ motion for voluntary  
21 dismissal is **GRANTED**. The complaint is hereby **DISMISSED WITHOUT PREJUDICE**.

22 After the dismissal of the complaint, the only proceeding remaining in this case is TIG’s  
23 counterclaim. It requests declaratory relief finding that TIG does not have a duty to defend or  
24 indemnify Plaintiffs. The court declines to exercise jurisdiction over the counterclaim.

25 The exercise of jurisdiction under the Federal Declaratory Judgment Act, 28  
26 U.S.C. § 2201(a), is committed to the sound discretion of the federal district  
27 courts. Even if the district court has subject matter jurisdiction, it is not required to  
exercise its authority to hear the case.

28 *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 802 (9th Cir. 2002). The Declaratory

1 Judgment Act “confers a discretion on the courts rather than an absolute right upon the litigant.”  
2 *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (internal quotation marks and citations  
3 omitted).

4 [T]here is nothing automatic or obligatory about the assumption of jurisdiction by  
5 a federal court to hear a declaratory judgment action. . . . Consistent with the  
6 nonobligatory nature of the remedy, a district court is authorized, in the sound  
7 exercise of its discretion, to stay or to dismiss an action seeking a declaratory  
8 judgment before trial or after all arguments have drawn to a close. In the  
9 declaratory judgment context, the normal principle that federal courts should  
10 adjudicate claims within their jurisdiction yields to considerations of practicality  
11 and wise judicial administration.

12 *Id.* at 288 (internal quotation marks, citations, ellipsis and footnote omitted.)

13 The determination whether to exercise jurisdiction is based primarily on the non-  
14 exhaustive list of factors set forth in *Brillhart v. Excess Insurance Company of America*, 316  
15 U.S. 491 (1942). *Wilton*, 515 U.S. at 289-90; *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220,  
16 1225 (9th Cir. 1998) (*en banc*); *Huth*, 298 F.3d at 803 (“*Brillhart* sets forth the primary factors  
17 for consideration.”). Under *Brillhart*, “the district court should avoid needless determination of  
18 state law issues; it should discourage litigants from filing declaratory actions as a means of  
19 forum shopping; and it should avoid duplicative litigation.” *Dizol*, 133 F.3d at 1225 (internal  
20 footnote and citation omitted).

21 Haseko II, remanded to State court, encompasses all the claims raised in TIG’s  
22 counterclaim. In Haseko II, Plaintiffs request a declaration of their rights under several  
23 insurance contracts, including a contract with TIG, to defense and indemnity against the  
24 construction defect claims and lawsuits asserted against Plaintiffs. With its counterclaim, TIG  
25 seeks a declaration of no duty to defend or indemnify under its insurance contract with Plaintiffs  
26 relative to the same claims and lawsuits. The two pleadings present the same state law issues.  
27 “For the federal court to retain jurisdiction to give declaratory judgment on the same claims  
28 would result in a needless determination of state law.” *Smith*, 263 F.3d at 978. The first  
29 *Brillhart* factor therefore weighs in favor of abstention. *See id.*

30 As to the second factor, TIG filed its counterclaim after Plaintiffs had filed Haseko II in  
31 State court. TIG’s counterclaim was not only reactive to Haseko II but also to Plaintiffs’ motion

1 for voluntary dismissal in the instant action. However, to the extent TIG engaged in forum  
2 shopping, the court cannot conclude its conduct was any worse than Plaintiffs'. Plaintiffs could  
3 have amended the complaint in the instant action to allege the additional construction defect  
4 claims and lawsuits, but chose not to apparently because they wanted to assure they could  
5 proceed in State court. On similar facts, the court in *Smith v. Lenches* found that “[i]f there is  
6 any forum shopping to be considered here, it cannot be said that one side is at fault more than the  
7 other, for neither can be faulted for seeking to litigate issues in the forum of its choice.” 263  
8 F.3d at 978. Accordingly, the second *Brillhart* factor appears neutral.” *See id.*

9       Regarding the third factor, the issues presented in the counterclaim are at issue in Haseko  
10 II. If this court retains jurisdiction over the counterclaim, “the continuation of the federal case  
11 would result in duplicative litigation and a waste of judicial resources.” *Smith*, 263 F.3d at 978.  
12 This factor therefore weighs in favor of abstention. *See id.*

13       When, as here, there is a parallel action pending in State court, there is an additional  
14 consideration weighing in favor of abstention:

15       Ordinarily it would be uneconomical as well as vexatious for a federal court to  
16 proceed in a declaratory judgment suit where another suit is pending in a state  
17 court presenting the same issues, not governed by federal law, between the same  
parties. Gratuitous interference with the orderly and comprehensive disposition of  
a state court litigation should be avoided.

18 *Smith*, 263 F.3d at 978, quoting *Brillhart*, 316 U.S. at 495. This means that

19       If there are parallel state proceedings involving the same issues and parties  
20 pending at the time the federal declaratory action is filed, there is a presumption  
21 that the entire suit should be heard in state court. The pendency of a state court  
22 action does not, of itself, require a district court to refuse federal declaratory relief.  
Nonetheless, federal courts should generally decline to entertain reactive  
declaratory actions.

23 *Dizol*, 133 F.3d at 1225 (internal citations omitted); *Smith*, 263 F.3d at 978.

24       Based on the foregoing, the court declines to exercise jurisdiction over TIG’s  
25 counterclaim. *See Smith*, 263 F.3d at 978. It is therefore **DISMISSED WITHOUT**  
26 **PREJUDICE.**

27       Accordingly, it is hereby **ORDERED** as follows:


28       1. Plaintiffs’ motion to remand is **DENIED**;

1 2. This action is **DISMISSED WITHOUT PREJUDICE** in its entirety; and

2 3. NAS's motion for change of venue is **DENIED** as moot.

3 **IT IS SO ORDERED.**

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5 DATED: January 22, 2010

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7 M. James Lorenz  
8 United States District Court Judge  
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