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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EVANSTON INSURANCE COMPANY,  
  
Plaintiff,  
  
vs.  
  
BARKANDBREW, INC. d/b/a LA JOLLA  
BREW HOUSE; CLAUDETTE MANNIX;  
and CYNTHIA KAUANUI,  
  
Defendant.

CASE NO. 09 CV 2295 JLS (POR)

**ORDER: (1) DENYING  
DEFENDANTS’ MOTION TO  
DISMISS; (2) STAYING THE  
ACTION PENDING RESOLUTION  
IN STATE COURT; and (3)  
DISMISSING PLAINTIFF’S  
MOTION FOR SUMMARY  
JUDGMENT WITHOUT  
PREJUDICE.**

Presently before the Court is Barkandbrew, Inc., Claudette Mannix, and Cynthia Kauanui’s (collectively, “Defendants”) motion to dismiss or, in the alternative, stay the above-captioned action. (Doc. No. 27.) Also before the Court is Evanston Insurance Company’s (“Plaintiff”) opposition and Defendants’ reply. (Doc. Nos. 31, 33.) For the reasons stated below, the Court **HEREBY DENIES** Defendants’ motion to dismiss; (2) **GRANTS** Defendants’ motion to stay the proceedings; and (3) **DISMISSES** Plaintiff’s motion for summary judgment without prejudice.

**BACKGROUND**

The present action is an insurance coverage dispute between Evanston Insurance Company (“Plaintiff”) and its insureds, BarkandBrew, Inc. and Claudette Mannix, the owners and operators of the La Jolla Brew House. The coverage dispute arises out of the underlying action currently

1 pending in San Diego County Superior Court and set for jury trial to begin on July 23, 2010:  
2 *Cynthia Kauanui v. Seth Logotaeao Cravens, et al.*, Case No. 37-2009-00086511-CV-PO-CTL.  
3 (hereinafter the “Underlying Action”).

4 **I. The Underlying Action**

5 The Underlying Action was filed in state court on July 22, 2008 by Ms. Kauanui and  
6 alleges survival and wrongful death actions arising from the death of her son, Emery Kauanui Jr.  
7 (*See* Evanston RJN, Ex. A (original complaint).) The operative complaint in the Underlying  
8 Action, the Third Amended Complaint, alleges that, on May 24, 2007, five defendants in that  
9 action were served alcohol at the Brew House. (*See id.*, Ex. E (Third Amended Complaint) at ¶¶  
10 8, 15.) While at the Brew House, the five defendants became belligerent and were asked to leave  
11 the bar. (*Id.* ¶ 16.) The five defendants did so, as did Ms. Kauanui’s son Emery. (*Id.* ¶¶ 16, 17.)  
12 Emery “withdrew from defendants . . . and went straight home.” (*Id.* ¶ 17.) The five defendants,  
13 however, followed Emery home “and in their drunken stupor, ended up gravely injuring him. The  
14 injuries suffered by Emery . . . in the altercation resulted in his untimely death four days later.”  
15 (*Id.*)

16 The Third Amended Complaint in the Underlying Action alleged six causes of action  
17 against the various defendants: (1) negligence against all defendants; (2) providing alcohol to  
18 obviously intoxicated minor against Mannix and BarkandBrew; (3) willful misconduct against all  
19 defendants; (4) battery against the five defendants; (5) wrongful death against all defendants; and  
20 (6) survival as to causes of action one through four against all defendants. (*See generally id.*)

21 **II. The Present Action**

22 The present action arises out of Plaintiff’s alleged duty to defend and indemnify  
23 BarkandBrew and Mannix in the Underlying Action. Plaintiff issued a commercial general  
24 liability policy, No. ARTV001158-01 to Defendants BarkandBrew and Mannix, effective March  
25 10, 2007 to March 10, 2008. (*See* Tomasevic Decl. ISO MTD, Ex. B (hereinafter “Policy”).) The  
26 Policy affords General Liability coverage and Liquor Liability coverage with a limit of  
27 \$1,000,000. (*Id.*)

28 An Assault and/or Battery Coverage endorsement (the “A/B Endorsement”) to the Policy,

1 however, modifies the insurance coverage under the Policy. The A/B Endorsement provides that  
2 Plaintiff will only pay \$100,000, including damages and defense costs, per occurrence/common  
3 cause with a \$300,000 aggregate “for claims made against [Defendants] caused by:

- 4 (1) Assault and Battery committed by any person;
- 5 (2) The failure to suppress or prevent assault and battery by any person;
- 6 (3) The failure to provide an environment safe from assault and battery or failure to warn  
of the dangers of the environment which would contribute to assault and battery;
- 7 (4) The negligent hiring supervision, or training of any person; or
- 8 (5) The use of any force to protect persons or property . . .

8 (*Id.* at 56.)

9 Plaintiff filed the present declaratory relief action on October 15, 2009, seeking a  
10 declaratory judgment concerning the application of the A/B Endorsement.<sup>1</sup> (Doc. No. 1.)  
11 Specifically, Plaintiff seeks a judicial determination that the A/B Endorsement applies to the  
12 Underlying Action and that the Policy limit for both the defense and indemnity of the Underlying  
13 Action is \$100,000. (*Id.*)

14 On November 30, 2009, Defendant Kauanui filed an answer and counterclaim for  
15 declaratory relief against Plaintiff. (Doc. No. 6.) On December 16, 2009, Defendants  
16 BarkandBrew and Mannix filed an answer and counterclaim for declaratory relief against Plaintiff  
17 as well. (Doc. No. 10.) The counterclaims contend that the A/B Endorsement does not apply to  
18 the Underlying Action and that the applicable policy limit is \$1,000,000, not including defense  
19 costs. (*See* Doc. Nos. 6, 10.)

20 Plaintiff filed its answer to Defendant Kauanui’s counterclaim on December 18, 2009 and  
21 its answer to Defendant BarkandBrew and Mannix’s counterclaim on December 31, 2009. (Doc.  
22 Nos. 11, 14.)

23 On March 5, 2010, Plaintiff filed a motion for summary judgment, which is currently set  
24 for hearing on July 8, 2010. (Doc. No. 24.) On March 11, 2010, Defendant Kauanui filed the  
25 present motion to dismiss or, in the alternative, to stay the action. (Doc. No. 27.) Defendants

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27 <sup>1</sup> The action was also originally filed against Emery’s father who, at the time, had an  
28 underlying wrongful death action pending as well. However, Mr. Kauanui subsequently dismissed  
his underlying claims and was dismissed from the action on March 4, 2010. Accordingly, the  
declaratory judgment action not only concerns the underlying action filed by Ms. Kauranui. (*See* Doc.  
No. 22; *see also* Firtch Decl. ISO Opp. ¶¶ 15-18.)

1 BarkandBrew and Mannix filed a notice of joinder to Defendant Kauanui's motion to dismiss on  
2 April 1, 2010. (Doc. No. 30.) Plaintiff filed its opposition to the motion to dismiss on April 9,  
3 2010 (Doc. No. 31) and Defendants filed a reply on April 16, 2010. (Doc. Nos. 33; *see also* Doc.  
4 No. 34 (notice of joinder).) A hearing on the motion to dismiss originally set for April 23, 2010  
5 was thereafter vacated and taken under submission without oral argument.

### 6 LEGAL STANDARD

7 This action was brought before this Court under the Federal Declaratory Judgment Act, 28  
8 U.S.C. §§ 2201 and 2202. District courts have the discretion to decline jurisdiction over suits  
9 brought under the Declaratory Judgment Act when federal law is not at issue. *Brillhart v. Excess*  
10 *Ins. Co. of America*, 316 U.S. 491, 494-95 (1942), *reh'g denied*, 317 U.S. 704 (1942); *see also*  
11 *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366 (9th Cir. 1991). In considering whether to  
12 retain jurisdiction, the court must "balance the concerns of judicial administration, comity, and  
13 fairness to the litigants." *Chamberlain*, 931 F.2d at 1367. "Federal courts should be reluctant to  
14 decide factual issues which are currently at issue in state court." *State Farm Fire and Cas. Co. v.*  
15 *McIntosh*, 837 F. Supp. 315, 316 (N.D. Cal. 1993). This is to prevent the federal court from  
16 collaterally estopping the parties from litigating the issue further in state court, disrupting the  
17 underlying state court action, and adversely impacting the promotion of comity between federal  
18 and state courts. *Id.* If the court declines to exercise jurisdiction, the court must dismiss the  
19 action. Fed. R. Civ. P. 12(h)(3).

20 In the alternative, the court may retain jurisdiction but stay the action pending the  
21 resolution of the state court action under the "power inherent in every court to control the  
22 disposition of the causes on its docket with economy of time and effort for itself, counsel, and for  
23 litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see also Leyva v. Certified Grocers*  
24 *of CA, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) ("A trial court may, with propriety, find it is  
25 efficient for its own docket and the fairest course for the parties to enter a stay of an action before  
26 it, pending resolution of independent proceedings which bear upon the case.")

### 27 DISCUSSION

28 Defendants' motion requests the Court to decline jurisdiction over the action or, in the

1 alternative, stay the action pending resolution of the state court proceeding. Defendants contend  
2 that jurisdiction over the matter under the Declaratory Judgment Act should be declined because  
3 (1) the Court would be required to decide factual issues that have been pending in state court for  
4 the past 20 months; (2) the Court would have to decide issues of California state law; and (3) the  
5 declaratory relief action is not ripe for adjudication and there is no need to needlessly expend  
6 resources before determining BarkandBrew and Mannix’s liability in the Underlying Action.

7 First, Defendants argue that there are several facts at issue in the Underlying Action which  
8 will allegedly determine the outcome of the present case; namely, who or what “caused” Emery’s  
9 death and the number of qualifying “occurrences/common causes.” These two issues, according to  
10 Defendants, will determine whether the A/B Endorsement applies and, if so, whether the coverage  
11 is limited to \$100,000, \$200,000 or the aggregate \$300,000 depending on the number of  
12 occurrences/common causes.

13 Defendants argue that who and/or what caused Emery’s death, and if Mannix and  
14 BarkandBrew proximately caused his death, is at issue in the present case because causation is also  
15 an issue under the Policy and A/B Endorsement. Defendants misconstrue the causation element in  
16 the A/B Endorsement. The Underlying Action will determine, for example, the knowledge and  
17 state of mind of BarkandBrew, whether similar incidents have transpired at the Brew House,  
18 whether BarkandBrew knew or had reason to know the five defendants were dangerous, and the  
19 time that elapsed between the serving of alcohol and Emery’s beating. However, these factual  
20 determinations which will ultimately determine proximate causation in the Underlying Action are  
21 irrelevant to the determination of what caused *the claims* to be filed in the Underlying Action and  
22 whether those *claims* were caused by an assault or battery committed by any person. As stated  
23 above, the A/B Endorsement limits coverage for “any claims made against [the insured] caused by  
24 . . . Assault and Battery committed by any person . . .” or other specific situations related to assault  
25 and battery. (*See* Policy at 56.) Thus, the applicability of the A/B Endorsement limitation to the  
26 indemnity and defense of the Underlying Action is a legal determination involving the language of  
27 the contract which does not require the factual determination of proximate causation involved in  
28

1 the Underlying Action.<sup>2</sup>

2 This same analysis applies to the determination of how many “occurrences/common  
3 causes” occurred as defined within the Policy. What constitutes an “occurrence/common cause”  
4 under the language of the Policy is a legal determination made by this Court, not a factual  
5 determination made by the jury in the Underlying Action. Any such determinations regarding the  
6 applicability of the A/B Endorsement and the Court’s interpretation of the contract language is not  
7 binding on the state court in the Underlying Action and therefore will have no collateral estoppel  
8 effect which was a concern in the cases cited by Defendants. *See, e.g., State Farm Fire*, 837 F.  
9 Supp. at 316. Accordingly, the Court will not decline jurisdiction over the coverage dispute based  
10 on Defendants’ argument that the Court will be required to make factual determinations already at  
11 issue in the Underlying Action.

12 Second, Defendants assert that issuing a declaratory judgment in this action would require  
13 the Court to make “needless decisions of state law.” *State Farm Fire*, 837 F. Supp. at 317 (citing  
14 *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Zurich*, 669 F. Supp. at 309.  
15 Specifically, Defendants argue that a declaratory judgment would require the Court to decide what  
16 constitutes a “claim” under California law, as well as what “caused” the claims to be filed against  
17 the insureds. While these may be state law determinations, they are not “needless” determinations  
18 and, as explained above, they are not determinations which will be decided in state court. The  
19 issue in this case is whether the claims asserted in the Underlying Action constitute “claims”  
20 “caused by” the assault or battery committed by any person. This is not a “needless decision[] of  
21 state law” and the Court will not decline jurisdiction on this basis.

22 Third, Defendants argue that declaratory relief is not ripe for adjudication and that no  
23 justification for the action has been stated in the Complaint. Defendants assert that fifteen months  
24 elapsed between Ms. Kauanui filing the complaint in state court and Plaintiff filing the instant

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26 <sup>2</sup> Defendants argue that claims “caused by” assault and battery defer from claims “arising out  
27 of” assault and battery, thus making causation an issue in this case where it would not otherwise be  
28 in policies using the “arising out of” language. The Court, in deciding the present motion, does not  
resolve that issue nor whether the A/B Endorsement does in fact apply in this case. Those  
determinations are properly made in regards to the pending motion for summary judgment. The only  
determination at this stage is whether the Court should decline jurisdiction over the matter or stay the  
action.

1 action, and this action was filed only three months prior to the then-scheduled jury trial in the  
2 Underlying Action. The declaratory judgment complaint alleged that, at that time, only \$48,000  
3 remained of the \$100,000 limitation Plaintiff asserted was applicable in this case. (Do. No. 1.)  
4 However, Defendants argue that there is no justification for why trial could not proceed with the  
5 remaining \$52,000 regardless of whether the A/B Endorsement limitation applies or not, and  
6 therefore adjudication of the issue is not ripe. Defendants argue that Plaintiff's goal in filing the  
7 action with \$52,000 remaining must be to either coerce a low settlement or to prejudice Ms.  
8 Kauanui by having them spend money and resources defending this action instead of the  
9 Underlying Action.<sup>3</sup>

10 To be sure, courts have questioned the validity of bringing a federal action under the  
11 Declaratory Judgment Act when the state court proceeding is still pending because "the federal  
12 action tends to exert a profound influence on the state court proceeding itself by changing the  
13 balance in settlement bargaining. The advantages gained by the insurer as a result of this influence  
14 appear to be incalculable." *State Farm Fire*, 837 F. Supp. at 316; *see also Zurich*, 669 F. Supp. at  
15 310-11. Moreover, "a state court plaintiff interested in settling his claim may be forced to await  
16 the determination of the federal suit." *Zurich*, 669 F. Supp. at 310. But, on the other hand,  
17 resolution of a coverage dispute could resolve legal questions which could ultimately facilitate  
18 settlement. *See Allstate Ins. Co. v. Green*, 825 F.2d 1061, 1064 (6th Cir. 1987), *abrogated on*  
19 *other grounds by, Scottsdale Ins. Co. v. Rounph*, 211 F.3d 964 (6th Cir. 2000); *see also ACandS,*  
20 *Inc. v. Aetna Casualty and Surety Co.*, 666 F.2d 819, 823 (3d Cir. 1981). In this case, a decision  
21 on the coverage action could very well break the apparent stalemate in settlement discussions  
22 because the parties and the insurer, who has been and is involved in the defense of the Underlying  
23 Action, will know the sum available for settlement.

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25 <sup>3</sup> Defendants further argue that it is unnecessary to determine the coverage dispute without  
26 first determining whether the Underlying Action as against Defendants Mannix and BarkandBrew is  
27 valid, citing *Zurich*, 669 F. Supp. at 310. As explained above, the validity of the tort claims asserted  
28 against Defendants in the Underlying Action, and thus the Defendants' liability in that action, is  
irrelevant for purposes of this coverage dispute. Whether or not Mannix and/or BarkandBrew are  
found liable in the Underlying Action has no bearing as to whether the A/B Endorsement limits  
Plaintiff's duty to defend and potentially indemnify Defendants. Furthermore, the issue of ripeness  
as it relates to how much is left of the \$100,000 limitation is now moot, as it appears that the limit has  
since been reached. (*See Wright Decl. ISO Opp.*, ¶¶ 8-9.)

1 A review of the time line in this action and the Underlying Action, however, impacts the  
2 Court's decision as to whether the present action may unduly hinder settlement, give an unfair  
3 advantage to the insurer, or otherwise undermine the efficiency of the dispute resolution process.  
4 Oral argument on the pending motion for summary judgment which will determine the  
5 applicability of the A/B Endorsement to the Underlying Action is currently set for July 8, 2010  
6 before this Court. The jury trial in the Underlying Action is currently scheduled to begin on July  
7 23, 2010 as of the date of this Order. Accordingly, Plaintiff hopes that in the two weeks between  
8 oral argument in this case and the beginning of the trial in state court, an Order issuing a  
9 declaratory judgment will be issued by this Court which may facilitate settlement of the  
10 Underlying Action. However, there is no telling as to when such an Order will be issued—it could  
11 be days or weeks before the jury trial is set to begin, in the middle of the jury trial, or at the  
12 resolution of the jury trial. Accordingly, whereas a declaratory judgment may potentially facilitate  
13 settlement, the uncertainty of when such a judgment will be issued creates an undue pressure on  
14 the state court action. *See Zurich*, 669 F. Supp. at 310-11. Accordingly, the Court finds that the  
15 close time frame between the scheduled oral argument and the commencement of the jury trial  
16 creates an uncertainty as to when the Court will issue its declaratory judgment may unduly hinder  
17 settlement or provide an unfair advantage to the insurer in the Underlying Action. This makes the  
18 concerns regarding settlement and comity expressed in *State Farm* and *Zurich* applicable to this  
19 action.<sup>4</sup>

20 That said, as stated above, the Underlying Action will not determine factual issue or state  
21 law issues which otherwise weigh in favor of the Court declining to exercise jurisdiction over the  
22 coverage dispute. Moreover, the resolution of the state law claims will not, as Defendants  
23 contend, render the present action moot even if Defendants Mannix and BarkandBrew are  
24 rendered not liable for Emery's death. This Court or the state court would still need to  
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26 <sup>4</sup> Plaintiff contends that *Essex Ins. Co. v. Yi*, 795 F. Supp. 319 (N.D. Cal. 1992) is the  
27 applicable authority in this matter. The district court in *Essex* exercised jurisdiction over the federal  
28 declaratory action and determined that an assault and battery limitation in that case applied to the  
underlying action. *Id.* However, *Essex* did not discuss the retention of jurisdiction, which is the issue  
in this matter. The mere fact that *Essex* chose to retain jurisdiction, without explanation as to why,  
is not helpful to the Court. *See State Farm Fire*, 837 F. Supp. at 318.



1 independently interpret the language of the Policy and A/B Endorsement to determine the extent  
2 of, if any, Plaintiff's duty to defend its insureds in that action. Therefore, the Court finds that the  
3 appropriate action is to retain jurisdiction over the declaratory action, but stay the action pending  
4 resolution of the state action.

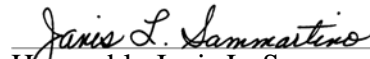
5 **CONCLUSION**

6 For those reasons, the Court **HEREBY DENIES** Defendants' motion to dismiss the action.  
7 Further, the Court **HEREBY STAYS** the present action pending resolution of the state court  
8 proceeding. Accordingly, the pending motion for summary judgment is **HEREBY DISMISSED**  
9 **WITHOUT PREJUDICE.**

10 Upon completion of the jury trial phase of the Underlying Action, Plaintiff **SHALL**  
11 **FILE** a Notice with this Court within 10 days of the date the verdict is rendered or within 10 days  
12 after settlement in the Underlying Action is reached. Further, Plaintiff **MAY RE-FILE**, if it  
13 chooses, its motion for summary judgment in this action within 30 days of the jury rendering its  
14 verdict in the Underlying Action.

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16 IT IS SO ORDERED.

17  
18 DATED: June 22, 2010

19   
20 Honorable Janis L. Sammartino  
21 United States District Judge  
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