

TENTATIVE Order Regarding Defendants’ Motions to Dismiss and Motions to Stay

Defendants Ronald Newman, Greg Newman (the “Newmans”) and Newport Sharkeez Inc. (“Newport Sharkeez”) moved to dismiss or stay Liberty Mutual Insurance Ltd.’s (“Liberty”) Complaint. Dkt. No. 23. Defendants Greg Pappas, Chris Pappas, Mark Serventi, Ralph Nudo, and Woody’s Group, Inc (“Pappas’ Group”) also moved to dismiss the same. Dkt. No. 25. Liberty opposed both motions. Dkt. No. 30. All Defendants filed a single reply. Dkt. No. 31.

For the following reasons, the Court DENIES Newport Sharkeez and Newman’s and Pappas’ Group’s motions to dismiss. However, the Court GRANTS their motions to stay.

I. BACKGROUND

1. The Insurance Policy

Newport Sharkeez has an insurance policy with Liberty. See generally Compl., Dkt. No. 1. That policy provides coverage for the officers of Newport Sharkeez, “but only with respect to their duties as an officer of Newport Sharkeez.” Id. ¶ 28. Specifically, the policy provides that for organizations other than a partnership, joint venture, or limited liability company, executive officers and directors are insured “but only with respect to their duties as your officers or directors.” Id.

The Policy provides general bodily injury and property damage coverage. Id. ¶ 29. Central to this dispute, it also provides coverage for “personal advertising injury.” Id. ¶ 31. However, it carves out knowing violations of rights or another (“Personal advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal advertising injury”). Id. It also excludes coverage for claims arising out of or premised upon the disclosure of confidential or personal information (“Personal and advertising injury” arising out of any access to or

disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information health information or any other type of nonpublic information.”) Id. ¶ 32.

2. Factual Background

In June 2005, the Pappas' Group purchased a restaurant/bar, located at 3218 W. Newport Boulevard, Newport Beach, California, from Ralph Furra (“Furra”), and signed a long-term restaurant lease for the property. Compl. at ¶ 13, Dkt. No. 1. The lease commenced on June 1, 2005, and was set to expire on May 31, 2020. Id.

Sometime in the Fall of 2015, the Newmans expressed a desire to purchase the restaurant/bar from the Pappas' Group, but ultimately, the negotiations failed. Id. ¶ 14. Then, on December 5, 2015, the Newmans wrote to Furra via email regarding their interest in the property, and disclosed the failed purchase/sales discussions. Id. ¶ 15. In that email, the Newmans disclosed how the Pappas' Group business was not doing well, that it needed money, and that Pappas' Group, as tenants to Furra, had not been good to him and that it is not his job to make them successful. Dkt. No. 1 at 242.

On February 18, 2016, the Newmans entered into a restaurant lease agreement with Furra. Id. at ¶ 16. The lease was set to commence on June 1, 2020 and terminate on May 31, 2035. Id. As part of the lease agreement, the Newmans had to pay an additional \$100,000 per year from February 2016 until the commencement of the agreement. Id.

On November 5, 2018, the Pappas' Group learned of the new lease agreement to the property and asserted that it was in violation of the agreement it had with Furra. Id. ¶ 17. The Pappas' Group and Furra's lease agreement contained a restricted right of first refusal for a lease extension. Id. ¶ 13. Ten days later, Furra filed a lawsuit against the Pappas' Group asserting a cause of action for Declaratory Relief, seeking to adjudicate the rights of Furra and Pappas' Group. Id. ¶ 18. On February 6, 2019, the Pappas' Group filed its first cross-complaint against Furra alone, and on May 16, 2019, amended its cross-complaint to include the Newmans and Newport Sharkeez. Id. ¶ 20. The Pappas' Group

then amended its cross-complaint against the Newmans and Newport Sharkeez to include causes of action for Libel, Trade Libel, Intentional Interference with Contractual Relations, Intentional Interference with Prospective Economic Advantage, Negligent Interference with Prospective Economic Advantage, and Unfair Competition. Id.

On November 19, 2019, Liberty corresponded with the Newmans, advising that they and Newport Sharkeez would be provided with a defense subject to a reservation of rights, including the right to seek reimbursement of all costs. Id. ¶ 21. That correspondence stated that the Newmans would not be considered insureds under the agreement unless their actions at issue were related to their duties as officers of Newport Sharkeez. Id.

Around February 2020, Furra advised the Newmans that he was rescinding the lease agreement with them and provided them with a copy of his new lease agreement with the Pappas' Group. Id. ¶ 23. He also returned them all the monies they had paid pursuant to their agreement. Id. The letter to the Newmans was written to them and made no mention of Newport Sharkeez. Id. In response, on March 2, 2020, the Newmans, again with no reference to Newport Sharkeez, filed a complaint against Furra for breach of contract and specific performance. Id. ¶ 24.

3. The Underlying Complaint

Liberty attached the relevant amended cross-complaint against Newman and Newport Sharkeez as Exhibit B. Dkt. No. 1-1 at 133 ("Exhibit B"). The cross-complaint references the Newmans and Newport Sharkeez. Id.

The complaint reveals that Newman, "purportedly one of the owners and operators of Baja Sharkeez Restuarant Group and Newport Sharkeez, Inc.," had expressed a desire to purchase the Pappas' Group's restaurant in October/November 2015. Id. ¶¶ 42-48. Around November 2015, Sharkeez made an offer to the Pappas' Group, which the Pappas' Group found to be an insult, and as a result "Sharkeez then immediately went around behind their backs and went directly to [] Furra and negotiated directly with him." Id. ¶ 50. It also alleges that the aforementioned email was "libel" and contained "numerous false and defamatory statements about" the Pappas' Group. Id. ¶¶ 53-54. The underlying

complaint also lists each allegedly libelous statement. *Id.* ¶ 56.

4. Procedural Background

Liberty filed suit alleging six claims against the Newmans, Newport Sharkeez, and the Pappas' Group.

In its first claim, it alleges that the Newmans are not considered insureds under the policy with respect to the underlying lawsuit, as the email at the center of this dispute was sent by the Newmans in their individual capacity, makes no reference to Newport Sharkeez, and does not indicate that it was issued on behalf of Newport Sharkeez. *Compl.* ¶ 36. It also argues that there is no reference to Newport Sharkeez in the lease agreement between Furra and the Newmans, and that the monies paid pursuant to that agreement made no reference to Newport Sharkeez. *Id.* ¶ 37. Lastly, Liberty claims that despite numerous requests by Liberty, the Newmans have failed to demonstrate that any their actions were taken on behalf of Newport Sharkeez.

In its second and third claims, Liberty asserts that first, coverage is not triggered under the policy for bodily injury and property damage and second, that the coverage for personal advertising injury is subject to an exception. *Id.* ¶¶ 42-52. Because the December 2015 email is at the heart of the instant dispute and the Pappas' Group alleges that it constitutes libel, Liberty contends that the provision in the policy waiving coverage for personal advertising injury caused by the insured with knowledge that the acts would violate the rights of another should apply. *Id.* ¶ 48-50.

In its fourth claim, Liberty asserts that because the dispute arises out of the same email and the restaurant lease agreement the Newmans entered into with Furra (which is alleged to constitute intentional interference with contractual relations, among other things), and because coverage is excluded with respect to statements published with the knowledge that they were false, Liberty has no obligation to defend the Newmans and/or Newport Sharkeez. *Id.* ¶¶ 53-59.

In its fifth claim, Liberty asserts that because the dispute arises out of the same 2015 email (which allegedly used confidential or private financial information about the Pappas' Group as expressed in the Second Amended Cross-

Complaint) and the restaurant lease agreement the Newmans entered into with Furra, and because coverage is excluded with respect to any access to or disclosure of any person's or organizations confidential or personal information, Liberty has no duty to defend the Newmans and/or Newport Sharkeez. Id. ¶¶ 60-66.

In its final claim, Liberty asserts that the Second Amended Cross-Complaint seeks punitive damages, which are expressly excluded from coverage under its Policy with Newport Sharkeez, and therefore, coverage is not available to the Newmans and/or Newport Sharkeez for any punitive damages awarded. Id. ¶¶ 67-71.

II. LEGAL STANDARD

1. The Declaratory Judgment Act

Under the Declaratory Judgment Act, the Court “may declare the rights and other legal relations of any interested party seeking such declaration” when there is an “actual controversy.” 28 U.S.C. § 2201(a). “[T]here is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically.” Gov't Employees Ins. Co. v. Dizo, 133 F.3d 1220, 1225 (9th Cir. 1998). “[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)).

“[I]f the court finds that an actual case or controversy exists, the court must decide whether to exercise its jurisdiction by analyzing the factors set out in Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942), and its progeny.” Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005).

The district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation. If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there

is a presumption that the entire suit should be heard in state court. The pendency of a state court 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.

Dizol, 133 F.3d at 1225 (citations omitted). The Court should consider whether declaratory judgment will settle the controversy, whether it is sought purely to obtain a procedural advantage, whether it will result in entanglement between the state and federal courts, convenience to the parties, and other available remedies. Am. States Ins. Co. v. Kearns, 15 F.3d 142, 145 (9th Cir. 1994) (citations omitted, Garth, J., concurring). As a general rule, “when other claims are joined with an action for declaratory relief ... the district court should not ... remand or decline to entertain the claim for declaratory relief.” Dizol, 133 F.3d at 1225.

Because of the strong public policy against preemptive forum shopping, the Court must consider “whether the declaratory judgment action was filed in apparent anticipation of another pending proceeding. The Declaratory Judgment Act should not be used to deprive the plaintiff of his traditional choice of forum and timing, provoking a disorderly race to the courthouse.” First Fishery Dev. Serv., Inc. v. Lane Labs USA, Inc., CIV. 97-1069-R, 1997 WL 579165, at *2 (S.D. Cal. July 21, 1997) (quoting Ven-Fuel, Inc. v. Dep't of the Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982); Gribin v. Hammer Galleries, 793 F.Supp. 233, 234-35 (C.D. Cal. 1992)).

2. Motion to Stay

It is within the Court's discretion to grant a stay of a pending proceeding. CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962).

A district court may stay proceedings pursuant to its inherent power to “control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” Lands v. N. Am. Co., 299 U.S. 248, 254 (1936). “The exertion of this power calls for the exercise of a sound discretion.” CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962). The competing interests that a district court must weigh in deciding whether to grant a stay include the following: (1) “the possible damage which may result from the granting of a stay”;

(2) “the hardship or inequity which a party may suffer in being required to go forward”; and (3) “the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” Id. (citing Lands, 299 U.S. at 254–55).

Another proceeding that may have a substantial impact on the case may constitute a compelling reason to grant a stay. A district court therefore may “find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979). “This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.” Id. at 863–64.

III. DISCUSSION¹

Newport Sharkeez and the Newmans claim that the proceedings should be stayed because that the issues in Liberty’s Complaint turn on facts to be litigated in the underlying state court actions, Newport Sharkeez would be severely prejudiced if it was forced to fight its insurer while defending itself in the underlying state court action, California case law counsels in favor of a stay, and finally, equitable factors weigh in favor of a stay. See generally Dkt. No. 27.

1. Motion to Dismiss

Newport Sharkeez and the Newmans cite to Brillhart and argue that the Court should apply Brillhart and decline to accept jurisdiction over the declaratory action. Id. at 14-15. The Pappas’ Group also joins in this argument. Dkt. No. 25 at 15-16. Specifically, they argue that the Complaint would require the Court to

¹The Pappas’ Group acknowledges in its Motion to Dismiss that many of the arguments it advances mirrors those in Newport Sharkeez and Newmans’. Dkt. No. 25 at 2 (“The court should note that this motion is very similar to, and seeks essentially the same relief, as the Motion to Dismiss or Stay Proceedings filed on August 27, 2020 by Defendants Ronald Newman, Greg Newman and Newport Sharkeez, Inc. d.b.a. Baja Sharkeez-Newport Beach (“Sharkeez”). Therefore, the Court reviews Newport Sharkeez and the Newmans’ Motion and clarifies what, if any, different arguments the Pappas group makes.

needlessly determine state law issues, that it risks forum shopping (because the state court can handle the same issues), and finally, that it risks duplicative results. In its Opposition, Liberty claims the Court lacks the jurisdiction to decide whether to decline jurisdiction over the case when a claim is made to recover monies spent on defense and indemnification, citing to United National Insurance Co. v. R&D Latex Corp., 242 F.3d 1102, 1112 (9th. Cir. 2001). In its Reply, Defendants claim Liberty's reliance on United is inapposite.

The Court concludes that a controversy exists in this case. An actual controversy exists when an insurer seeks a declaration for its duties to defend and indemnify an insured in a pending state court liability suit. Kearns, 15 F.3d at 144.

Here, the Court can – and should – entertain Liberty's declaratory relief claim because it joins other non-declaratory relief claims for reimbursement as well as attorneys' fees. See Dizol, 133 F.3d at 1225; Liberty Surplus Ins. Corp. v. IMR Contractors Corp., No. CV 08-5773 JSW, 2009 WL 1010842, at * 3 (N.D. Cal. April 14, 2009) (noting that an insurer's reimbursement claim provides an independent basis for federal jurisdiction, which prevents the district court from declining to retain jurisdiction over declaratory judgment action in an insurance coverage dispute).

Moreover, the Brillhart factors and other considerations weigh strongly in favor of retaining this action.

First, resolution of the dispute does not turn on the needless determination of state law, but rather, on a matter of contract interpretation. See Mitsui Sumimoto Ins. Co. of America v. Delicato Vineyards, No. CIV S-06-2891 FCD GGH, 2007 WL 1378025, at *6 (E.D. Cal. May 10, 2007). One key issue that faces the Court, and one that could be determinative of the outcome, is whether the Policy even applies to the Newmans and if they acted in their capacity as officers of Newport Sharkeez – a matter resolvable without deferring to state law.

Second, Liberty is not a party to the underlying dispute. See Schaefer/Karpf Productions v. CNA Ins. Co., 64 Cal. App. 4th 1306, 1313 (1998) (“Whether the plaintiff's loss is covered by the defendant's insurance is not germane to the action, and evidence on that issue would be excluded as irrelevant.”). While some

of the issues may turn on the outcomes of the underlying state court action, others, like whether the Newmans actions leading up to the suit were performed in the capacity as officers of Newport Sharkeez, do not.

Lastly, the declaratory judgment here will settle the controversy between Liberty and Newport Sharkeez and the Newmans. It is not apparent to the Court that Liberty brought this suit for a procedural advantage either – indeed, it is not a party to the underlying state court action. While resolution of the request for declaratory judgment may touch upon issues to be resolved in the underlying state court action, Liberty also claims one point that can be resolved on its own.

For the foregoing reasons, the Court will not decline to exercise its jurisdiction over this case.

2. Motion to Stay

First, Newport Sharkeez’ and the Newmans’ claim that the coverage issues in the Complaint arise from a same set of facts as those in the underlying state court action, and that should the Court consider Liberty’s Complaint now, it would “create a high risk of inconsistent factual determinations” between the two actions. Dkt. No. 27 at 10-11. Specifically, Newport Sharkeez and the Newmans point to the email at the center of the dispute, arguing that should the Court find that the email satisfies one of the exceptions to the policy, that decision would then affect the state court decision, and at worst, could contradict it. Dkt. No. 27 at 11. Moreover, Newport Sharkeez and the Newmans even cite to points in Liberty’s complaint that directly cite the underlying state court action and argue that Liberty is effectively asking the Court to base its decision on ‘contested allegations’ by the parties in that action. *Id.* at 11-12. The Pappas’ Group advances a similar argument. Dkt. No. 25 at 10. Specifically, it argues that an insurer cannot use a declaratory relief action to litigate factual issues affecting the insured’s liability in the underlying action, and cites to a number of California state law cases regarding an insurers powers in similar situations. *Id.* at 11.

Second, Newport Sharkeez and the Newmans claim that they would be prejudiced if forced to fight their insurer while defending it against the underlying state court action, citing to a California Court of Appeal case concerning the trial of coverage issues that turn upon facts to be litigated in the underlying case. Dkt.

No. 27 at 13. Newport Sharkeez and the Newmans argue that “Liberty Mutual is effectively attacking its insured, Newport Sharkeez, and giving aid and comfort to the Pappas Parties by accepting the facts of the Cross-Complaint as true, and putting its insured in a position where it may have to prove inconsistent facts to defeat both claims” and that litigating in two cases would be prohibitively expensive. *Id.* The Pappas’ Group joins this argument, advancing the same claims and adding that if the declaratory relief action were to proceed to judgment before the underlying action were to be resolved, Newport Sharkeez and the Newmans could be collaterally estopped to contest issues in the latter. Dkt. No. 25 at 14.

Lastly, Newport Sharkeez and the Newmans claim that equitable factors weigh in favor of a stay, given the hardship or inequity that it may face by having to defend themselves from two concurrent lawsuits. *Id.* at 15-16. Pappas’ Group also joins in this argument. Dkt. No. 25 at 16-17.

In its Opposition, Liberty also argues that a stay is inappropriate because the action can be resolved by means of undisputed facts, issues of law, or factual issues unrelated to the underlying lawsuit and because Liberty would be prejudiced as a result of a stay. Dkt. No. 30 at 7-10. Liberty claims that through its Complaint, it requests that the Court determine its obligations to defend the Newmans and/or Newport Sharkeez solely based on the Policy and allegations pled or already known in the underlying state action. *Id.* at 7. Citing Montrose Chemical Corp. V. Superior Court (Canadian Universal), 6 Cal. 4th 287, 302 (1993), it claims that when the coverage action is logically unrelated to the issues in the underlying lawsuit, the declaratory action may proceed. *Id.* at 8. It argues that the key issue here is not whether the Newmans and Newport Sharkeez acted in a manner that would except Liberty from coverage, but rather whether they were acting in their capacity as individuals or as officers/directors of Newport Sharkeez when they allegedly undertook the actions pled in the underlying state law action. *Id.* at 8-9. Liberty also claims that forcing it to pay for defense fees and costs for Newport Sharkeez and the Newmans has been incredibly burdensome, as based on the Reservation of Rights, they have provided them with two sets of counsel. *Id.* at 10.

Newport Sharkeez, the Newmans, and Pappas Group filed a single reply. Dkt. No. 31. In that Reply, they argue that a stay is appropriate because the Liberty’s Complaint cannot be resolved without resolving disputed facts in the

underlying lawsuit. Id. at 4. They cite to numerous points within the Liberty's Complaint, like whether Newport Sharkeez and the Newmans disclosed or accessed confidential or personal information, published material with the knowledge of its falsity, or violated the rights of another, as examples. Id. at 5. In response to Liberty's claim that the Court could resolve whether the Newmans were acting in their individual capacities or as officers of Newport Sharkeez, they argue that the December 2015 email was for the lease of a property for a Newman Sharkeez restaurant and the circumstances of that email and the lease negotiations are at the center of the underlying state court action. Id. at 7. They also claim the prejudice to them as Defendants far outweighs the prejudice to Liberty. Id. at 8-9.

Here, it is unlikely that Liberty would suffer damage as a result of the Court's staying its reimbursement claim, especially when its claim that it is suffering damage as a result of paying for two sets of attorneys for the Newmans and Newport Sharkeez stems from its own actions pursuant to its reservation of rights. See Liberty Surplus Ins. Corp. v. IMR Contractors Corp., No. CV 08-5773 JSW, 2009 WL 1010842, at *4 (N.D. Cal. April 14, 2009) (citing Lockyer v. Mirant Corp., 398 F.3d 1098, 1112 (9th Cir. 2005)). However, Newport Sharkeez and the Newmans demonstrate that should the Court decide not to stay the action, they would suffer significant prejudice, including defending two suits at the same time and possibly losing necessary funding to defend themselves in the underlying state court action.

Moreover, while Liberty is correct in claiming that the resolution of their dispute with the Newmans could depend on whether the Newmans acted in their official capacity, the majority of their claims against the Newmans and Newport Sharkeez require analyzing the factual basis of the underlying state court action, i.e., whether the statements made in the email were defamatory, libelous, etc.

Therefore, the Court STAYS the action. The Court is also not inclined to grant Liberty's request (see Dkt. No. 30 at 11-12) that it be able to conduct discovery or seek summary adjudication to obtain a declaration that it had no obligation to defend or indemnify the Newmans as doing so is at odds with the Court's reasoning behind its grant of a stay.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Newport Sharkeez and Newman's and Pappas' Group's motions to dismiss. However, the Court GRANTS their motions to stay.

IT IS SO ORDERED.

Effective immediately all oral arguments are VACATED. The Court will continue to post tentatives in the afternoon of the Court day prior to the scheduled hearing (e.g., Friday afternoon for Monday hearings). Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. the day following the scheduled hearing (e.g., Tuesday 5:00 p.m. for a Monday hearing) stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted. The Court asks for the parties' understanding and patience in these difficult times.