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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 Allied World Specialty Insurance
13 Company,

14 Plaintiff,

15 vs.

16 ICR Sanitary District, et al.,

17 Defendants.

NO. CV-20-08091-PCT-DWL

**MOTION TO DISMISS OF
DEFENDANT INSCRIPTION
CANYON RANCH
SANITARY DISTRICT**

(Oral Argument Requested)

18 Pursuant to Rule 12(b)(1), Fed.R.Civ.P., defendant Inscription Canyon Ranch
19 Sanitary District (“the District”) requests that the Court exercise its discretion to dismiss
20 plaintiff’s complaint for declaratory relief under 28 U.S.C.A. § 2201(a). This motion is
21 supported by the attached exhibit and following memorandum of points and authorities.

22 **I. BACKGROUND**

23 This insurance declaratory judgment action arises from an underlying lawsuit filed
24 by defendant Talking Rock Land, LLC (“Talking Rock”) against the District in Yavapai
25 County Superior Court (“the State Court Lawsuit”). A copy of the first amended
26 complaint in the State Court Lawsuit is attached hereto as Exhibit A.¹ In the State Court

27 _____
28 ¹ This Court may take judicial notice of Exhibit A and the state court proceedings as matters of public record having a direct relation to the matters at issue in this case. Fed.R.Evid. 201; *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d, 244, 248 (9th Cir. 1992).

1 Lawsuit, Talking Rock alleges breach of contract, breach of the implied covenant of good
2 faith and fair dealing, defamation, trade libel, interference with business expectancy,
3 abuse of process and promissory estoppel causes of action against District. These causes
4 of action relate to the District’s alleged conduct in connection with waste water treatment
5 issues affecting Talking Rock’s Sterling Ranch master planned community in Prescott,
6 Arizona. The State Court Lawsuit also involves prior litigation in Yavapai County
7 Superior Court concerning an alleged sewer moratorium affecting the Talking Rock
8 community. Exhibit A at p. 6. Talking Rock’s amended complaint specifically alleges
9 that the District acted negligently or recklessly based on advice of counsel. Exhibit A at
10 p. 5 ¶ 37; pgs. 16-17 ¶ 114-116; p. 19 ¶ 136; p. 20 ¶ 146.

11 Plaintiff Allied World Specialty Insurance Company (“Allied World”) issued a
12 liability insurance policy (“the Policy”) to the District. Doc. 11 at p. 1 ¶ 1. Allied World
13 is currently defending the District in the State Court Lawsuit under a reservation of rights.
14 *Id.* at p. 6 ¶ 33.

15 Allied World filed its Second Amended Complaint in this action on July 16, 2020.
16 Doc. 11. Allied World seeks relief under the Federal Declaratory Judgment Act. *Id.* at p.
17 1. In its second amended complaint, Allied World repeatedly asserts, among other things,
18 that insurance coverage is unavailable to the District because there was no “occurrence”
19 as defined by the Policy and that the Policy excludes coverage for “Knowing Violation
20 of the Rights of Another” and “Material Published with Knowledge of Falsity.” *Id.* at p.
21 20 ¶ 54; p. 23 ¶ 79-80; p. 24 ¶ 91-92; p. 27 ¶ 111-112; p. 29 ¶ 130-131.

22
23 **II. THIS COURT HAS BROAD DISCRETION TO REFUSE TO ENTERTAIN**
24 **AN ACTION UNDER THE FEDERAL DECLARATORY JUDGMENT**
25 **ACT.**

26 The Declaratory Judgment Act, codified at 28 U.S.C. §2201, et seq., provides, in
27 pertinent part:

28 In a case of actual controversy within its jurisdiction . . . any
court of the United States, upon the filing of an appropriate
pleading, may declare the rights and other legal relations of

1 any interested party seeking such a declaration, whether or
2 not further relief is or could be sought. Any such declaration
3 shall have the force and effect of a final judgment or decree
and shall be reviewable as such.

4 28 U.S.C.A. §2201 (a) (underscore added)

5 District courts “possess discretion in determining whether and when to entertain
6 an action under the Declaratory Judgment Act, even when the suit otherwise satisfies
7 subject matter jurisdictional prerequisites.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282
8 (1995); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942); *see also Huth v. Hartford*
9 *Ins. Co.*, 298 F.3d 800, 802 (9th Cir. 2002). Guidance for the exercise of this discretion
10 is found in *Brillhart, supra*, and its progeny. In *G.E.I.C.O. v. Dizol*, 133 F.3d 1220, 1225
11 (9th Cir. 1998) (en banc), the Ninth Circuit explained:

12 The *Brillhart* factors remain the philosophical touchstone for
13 the district court. The district court should avoid needless
14 determination of state law issues; it should discourage
15 litigants from filing declaratory relief actions as a means of
16 forum shopping; and it should avoid duplicative litigation . .
17 . If there are parallel state proceedings involving the same
18 issues and parties pending at the time the federal declaratory
19 action is filed, there is a presumption that the entire suit
20 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.

21 (underscore added)

22 **III. THIS COURT SHOULD ABSTAIN FROM EXERCISING ITS**
23 **JURISDICTION TO GRANT DECLARATORY RELIEF UNDER THE**
24 **CIRCUMSTANCES OF THIS CASE.**

25 Application of the legal principles outlined above to the circumstances of this case
26 compel the conclusion that this Court should abstain from entertaining Allied World’s
27 request for declaratory relief.
28

1 **A. Federal Courts Should Avoid the Needless Determination of State Law**
2 **Insurance Issues.**

3 Federal courts ordinarily should abstain from exercising their jurisdiction in a
4 declaratory judgment action over disputes between insurance companies and their
5 insureds in which the merits must be decided under state law. *Polido v. State Farm Mut.*
6 *Auto. Ins. Co.*, 110 F.3d 1418, 1423 (9th Cir. 1997), *overruled on other grounds, Dizol,*
7 *supra; Employers Reinsurance v. Karussos*, 65 F.3d 796, 798-99 (9th Cir. 1995) (noting
8 that “comity concerns” are particularly weighty in insurance cases which are regulated by
9 state law) *overruled, in part, on other grounds, Dizol, supra; Kolstad v. Trinity Universal*
10 *Ins. Co.*, 12 F.Supp.2d 1101, 1105 (D. Mont. 1998) (“When considering [the *Brillhart*]
11 factors in the context of declaratory actions involving insurance issues, the cases generally
12 favor rejecting jurisdiction.”)

13 There is no requirement that the relevant state law issues be unsettled or complex
14 in order for a federal court to abstain from exercising jurisdiction over a declaratory
15 judgment action. In *Huth v. Hartford Ins. Co.*, 298 F.3d 800 (9th Cir. 2002), the Ninth
16 Circuit affirmed the Arizona District Court’s decision to decline jurisdiction in an
17 insurance declaratory judgment action based primarily on the district court’s conclusion
18 that the Arizona state court would be the “preferred forum” to resolve a “purely state law
19 issue.” *Id.* at 804. *Huth* indicates that a request to resolve purely state law issues
20 (regardless of their complexity) is plainly a pivotal factor in the jurisdictional analysis.

21 Moreover, the Ninth Circuit in *Huth* specifically discussed the scope of the *en banc Dizol*
22 decision and concluded that the *Dizol* court “explicitly limited its holding” and overruled
23 prior decisions only to the extent that they held that the district court may decide *sua*
24 *sponte* whether declaratory jurisdiction should be declined. *Id.* at 803.

25 In *Great American Assurance Co. v. Bartell*, 2008 WL 1927333 (D. Ariz. 2008),
26 Judge Carroll analyzed *Huth* in detail and rejected an insurer’s contention that the
27 reasoning of *Polido v. State Farm*, 110 F.3d 1418 (9th Cir. 1997) no longer applied after
28

1 the en banc decision of the Ninth Circuit in *Dizol*. Judge Carroll endorsed the statement
2 in *Polido* that generally “federal courts should abstain from exercising their jurisdiction
3 in a declaratory judgment action over disputes between insurance companies and their
4 insureds in which the merits must be decided under state law.” 2008 WL 1927333 at *1.
5 He concluded that “*Polido* . . . does not refer to requirements that state law issues be
6 complex or that an existing parallel action is pending in state court to abstain from
7 exercising jurisdiction.” *Id.* at *2. (underscore added). Other judges in the District of
8 Arizona have reached the same conclusion based on Ninth Circuit precedent. *Riverport*
9 *Ins. Co. v. Horizon Human Services, Inc.*, 2015 WL 7351670 at *4 (D. Ariz. 2015) citing
10 *National Union Fire Ins. Co. v. Aero Jet Servs., LLC*, 2011 WL 4708857 (D. Ariz. 2011).

12 In this case, Allied World’s request for declaratory relief involves interpretation of
13 insurance policies under Arizona law. Insurance law is an area that Congress has
14 expressly left for state regulation. *See* 15 U.S.C. §§1011-12. There is no need for this
15 Court to resolve a state law insurance issue under the circumstances of this case. *See*
16 *American Nat. Prop. and Cas. Co. v. Makarowski*, 2020 WL 759890 *2 (D. Nev.)
17 (granting Rule 12 (b)(1) motion because, when the only claim that plaintiff brings is under
18 the Declaratory Judgment Act, “the court has a compelling reason to let state courts
19 resolve issues of state law.”).

20 **B. Federal Courts Should Discourage Forum Shopping.**

21 To avoid forum shopping, district courts should consider the availability of state
22 court proceedings to resolve all issues without federal intervention. *Polido*, 110 F.3d at
23 1423; *Budget Rent-A-Car v. Crawford*, 108 F.3d 1075, 1081 (9th Cir. 1997) *overruled in*
24 *part on other grounds*, *Dizol*, 133 F.3d at 1227 (“[T]o avoid forum shopping and vindicate
25 federalism concerns, a district court must consider whether existing state court remedies
26 such as . . . the right to seek a declaration under state law will provide an adequate remedy
27 for a party who files a claim under the Declaratory Judgment Act.”)

28 Significantly, judges in the District of Arizona and elsewhere have relied upon

1 *Polido* to dismiss insurance declaratory judgment actions when, as here, the insurer could
2 have filed the same action in state court. The district court in *Great American Assurance*
3 *v. McCormick*, 2005 WL 3095972 (N.D. Cal. 2005) illustrates this point. There, Great
4 American's insured was sued in state court in connection with an automobile accident.
5 Subsequently, Great American filed a declaratory judgment action in federal court
6 seeking a determination that no coverage for the state court lawsuit was available under
7 its policy. In granting defendant's motion to dismiss, the district court concluded:

8 The case is a reactive declaratory action: Great American
9 filed this action in response to the state plaintiffs' lawsuits.
10 Great American's complaint seeks a declaration that the
11 insurance policy does not provide coverage for the claims
12 made by the state plaintiffs against McCormick. Great
13 American's argument that it is not forum-shopping because it
14 needs a determination of its coverage responsibilities is
15 unavailing. It could have filed a declaratory relief action in
16 state court in Monterey County where such action could have
17 been related to and coordinated with the pending state court
18 actions. [citing *Polido, supra*]

19 Judge Carroll in *Bartell, supra*, adopted the foregoing analysis and concluded that
20 the insurer's lawsuit in Arizona District Court was a reactive declaratory judgment action.
21 No related state court lawsuit against the insurer had been filed in that case. Nonetheless,
22 Judge Carroll dismissed the insurer's declaratory judgment action.

23 Judge Murguia's reasoning in *Owners Ins. Co. v. Monte Vista Hotel*, 2010 WL
24 447343 at *3 (D. Ariz. 2010) also is instructive:

25 Owners Insurance argues that it is not forum shopping, and
26 that [it] is not even a party to the underlying state court tort
27 proceeding. However, there is nothing in the record to
28 suggest that Owners could not have presented the same issues
 it brought to federal court to the state court in a separate
 proceeding. Thus, this factor also weighs against the Court's
 exercise of jurisdiction over this matter.

 In this case, there is pending litigation in Arizona Superior Court and a procedural
 vehicle available to Allied World in state court to resolve the insurance coverage issues
 raised in this action. Specifically, Allied World could have filed an action under the

1 Arizona Declaratory Judgment statute, A.R.S. §12-1831 *et seq.* There are no unique
2 circumstances in this case that would dictate utilization of the federal Declaratory
3 Judgment Act to resolve the insurance coverage issues. Accordingly, abstention would
4 be appropriate.

5 **C. Federal Courts Should Avoid Duplicative Litigation and Decline to**
6 **Assert Jurisdiction When There is a Parallel Proceeding In State**
7 **Court.**

8 In *American National Fire Ins. Co. v. Hungerford*, 53 F.3d 1012 (9th Cir. 1995)
9 *overruled in part on other grounds, Dizol, supra*, an insurance company brought an action
10 for declaratory relief in federal court seeking a declaration of non-coverage in a case
11 pending against its insured in state court. *Id.* at 1014. The Ninth Circuit noted that the
12 insurer was not a party to the state court action, and that the federal declaratory relief
13 action presented different legal issues than those in the state court action. The Ninth
14 Circuit nonetheless held “that when an ongoing state proceeding involves a state law
15 issue that is predicated on the same factual transaction or occurrence involved in a matter
16 pending before a federal court, the state court is the more suitable forum” for the insurer
17 to bring a related claim. *Id.* at 1017.

18 Relying on *Hungerford*, the Ninth Circuit in *Golden Eagle Ins. Co. v. Travelers*
19 *Co.*, 103 F.3d 750, 754-755 (9th Cir. 1996) (overruled in part, on other grounds by *Dizol*)
20 concluded that a state lawsuit is “parallel” to a federal declaratory judgment action for
21 purposes of abstention if the state lawsuit arises from the same factual circumstances.

22 Golden Eagle contends the underlying state action is not
23 “parallel” because Charter Oak is not a party to the state
24 action, and the issues are not the same. In *Karussos*, we
25 concluded that neither of these circumstances warrants the
26 exercise of federal jurisdiction. 65 F.3d at 800-801. It is
enough that the state proceedings arise from the same factual
circumstances. *Hungerford*, 53 F.3d at 1017.

27 *Id.* (underscore added)

28 Judges in the District of Arizona and elsewhere have repeatedly recognized that
the rationale of *Hungerford* and *Golden Eagle* is controlling even after the *en banc*

1 decision in *Dizol*. E.g., *Riverport*, *supra*; *AeroJet Servs., LLC*, *supra*; *Monte Vista Hotel*,
2 *supra*; *Bartell*, *supra*; see also *Hartford Fire Ins. Co. v. McGhee*, 2010 WL 2179771
3 (N.D. Cal. 2010) (granting motion to dismiss based on *Hungerford* rule); *Great American*
4 *Assurance Co. v. Discover Prop. and Cas. Ins. Co.*, 779 F. Supp.2d 1158, 1163 (D. Mont.
5 2011) (“The *Hungerford* rule applies so long as the state court proceedings arise from the
6 same factual circumstances as the claim for declaratory relief.”); *Pacific Employers Ins.*
7 *Co. v. Herman Kishner Trust*, 2011 WL 977019 *2 (D. Nev. 2011) (applying *Hungerford*
8 rule and granting motion to dismiss). Consistent with Judge Rayes’ decision in *Riverport*,
9 *supra*, because plaintiff “did not bring any non-discretionary claims and because there is
10 a pending state proceeding arising out of the same factual scenario,” this Court should
11 begin “its analysis with a presumption against exercising jurisdiction in this case.”
12 *Riverport*, *supra*, at *3; see also *National Farmers Union Prop. & Cas. Co. v. Etten*,
13 2017 WL 362700 *3 (D. Ariz. 2017) (applying the *Riverport* presumption against
14 exercising jurisdiction).
15

16 Here, there is an ongoing, parallel state proceeding (the State Court Lawsuit)
17 predicated on the same events involved in this declaratory judgment action. Plaintiff
18 could have filed this action in Yavapai County Superior Court and coordinated it with the
19 existing State Court Lawsuit. Accordingly, this Court should abstain from exercising its
20 jurisdiction due to the parallel proceeding in state court and the availability of the Arizona
21 declaratory judgment procedure.

22 **D. Other Pertinent Factors Dictate Dismissal of this Action.**

23 In *Dizol*, 133 F.3d at 1225 n. 5, the Ninth Circuit identified a non-exhaustive list
24 of other factors that may be considered in deciding whether to exercise jurisdiction
25 including: (1) whether the declaratory judgment action will settle all aspects of the
26 controversy; (2) whether the declaratory judgment action will serve a useful purpose in
27 clarifying the legal relations at issue; (3) whether the declaratory action is being sought
28 merely for the purposes of procedural fencing or to obtain a res judicata advantage; (4)

1 whether the declaratory judgment action will result in entanglement between the federal
2 and state court systems; (5) the convenience of the parties; and (6) the availability and
3 convenience of other remedies.

4 In this case, analysis of the foregoing additional factors supports dismissal
5 of this action. First, a declaratory action in federal court would not settle all aspects of
6 the controversy because liability and damages issues involving the District and Talking
7 Rock would remain in the State Court Lawsuit. *E.g., Owners Ins. Co. v. Young's Corral*
8 *LLC*, 2011 WL 3759497 *4 (D. Ariz.) (“[D]eclaratory relief would not settle all aspects
9 of the broader controversy, as the underlying case between Young’s Corral and Ms.
10 Begay’s survivors must still be litigated.”); *Monte Vista Hotel, supra*, at *5 (holding that
11 a decision about coverage will not settle all aspects of the controversy because the
12 damages issue in the state tort lawsuit would remain outstanding). Second, a federal
13 declaratory judgment action would not serve any useful purpose because a declaratory
14 judgment could be obtained in state court. “[W]hile some clarification would be gained
15 by resolution of this action, it is outweighed by concerns of judicial administration,
16 comity, and fairness to litigants.” *Etten, supra*, at *4. Third, allowing this federal
17 declaratory judgment action to proceed would encourage insurance companies to file
18 other routine declaratory judgment actions in federal court rather than to utilize the
19 procedure available under Arizona state law. *See Riverport, supra*, at *4 (“Exercising
20 jurisdiction in this case would frustrate Congress’s intent that insurance law disputes be
21 left to the states.”) Fourth, a declaratory judgment action in this Court could lead to
22 entanglement between federal and state courts by giving rise to contradictory legal or
23 factual determinations. In particular, Allied World’s coverage defenses based on the
24 definition of an “occurrence” and exclusions for “Knowing Violation of the Rights of
25 Others” and “Material Published with Knowledge of Falsity” may depend on the ongoing
26 discovery and resolution of factual or legal issues pending in the State Court Lawsuit. For
27 example, if the state court were to find that the District acted negligently or recklessly as
28 alleged in Talking Rock’s amended complaint, these determinations could be inconsistent

1 with potential factual determinations in this declaratory judgment action relating to the
2 specified “intentional act” exclusions in the Allied World policy. *See Riverport, supra* at
3 *4 (“The mere possibility of duplicative litigation, however remote, weighs in favor of
4 abstention.”); *Aero Jet Servs., supra*, at *4 (occurrence and intentional act issues
5 overlapped with state tort action); *Monte Vista Hotel, supra*, at * 5 (intent issue
6 overlapped with state court tort action). Fifth, the Arizona state declaratory judgment
7 procedure is an available and convenient alternative for Allied World to pursue. *E.g.*,
8 *Monte Vista Hotel, supra*, at *5 (“It appears that it would be much more efficient for
9 Owners Insurance to simply file a declaratory action in state court in accordance with the
10 Arizona Declaratory Judgment Act.”); *Young’s Corral LLC, supra*, at *4 (“[A] better
11 remedy exists in this case, namely the settlement of all controversies in state court.”).

12
13 **IV. CONCLUSION**

14 For the foregoing reasons, the District respectfully requests that the Court dismiss
15 this action.

16 Dated this _____ day of August, 2020.

17 PESHKIN & KOTALIK, P.C.

18
19
20 By: s/E.J. Kotalik, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August ____, 2020, I electronically transmitted the attached document to the Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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