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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

BEAZLEY UNDERWRITING, LTD.,

Plaintiff,

v.

FITNESS INTERNATIONAL, LLC,

Defendant.

CASE NO. 8:21-cv-00642 CJC (DFMx)

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STAY**

Complaint Filed: April 6, 2021

Date: May 24, 2021
Time: 1:30 p.m.
Dept.: Courtroom 9 B
Judge: Hon. Cormac J. Carney

Trial Date: Not Set

COMES NOW, Plaintiff Beazley Underwriting, Ltd. ("Beazley"), and files this memorandum of points and authorities in opposition to Defendant Fitness International LLC's ("Fitness International") Motion to Dismiss or Stay.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

***Cases***

***Other Authorities***



***Rules***

## I. INTRODUCTION

Defendant Fitness International, LLC ("Fitness International") is insured under a policy subscribed to by Beazley Underwriting, Ltd. ("Beazley") and seeks $10 million in damages from Beazley. Despite the fact that Fitness International is a California company with approximately six times as many gyms in California as Washington, it seeks an order forcing Beazley to litigate in Washington state court. Incredibly, Fitness International does so even though the contract between Fitness International and Beazley contains a California choice of law provision.

Fitness International has run from California courts as COVID-19 decisions have come down adverse to policyholders. It first filed a claim for COVID-19related losses with its insurers for the 2019-2021 policy year, to which Beazley did not subscribe. Fitness International filed suit against those 2019-2021 insurers in California state court, and the action was removed to this Court. On January 6, 2011, two days before this Court was to issue its ruling, Fitness International dismissed the lawsuit. That same day, it filed suit in Washington state court against its 2019-2020 insurers. On or about January 11, 2021, Fitness International then filed a claim with Beazley for COVID-19 business interruption losses for the 2020-2021 Policy year. Beazley filed this action against Fitness International seeking a judicial declaration as to its rights and obligations under the Beazley policy, which is governed by California law. Two days later, Fitness International retaliated by filing suit against Beazley in Washington state court.

Fitness International has moved to dismiss Beazley's complaint on the basis that this Court should decline to exercise its discretion under the Declaratory Judgment Act. No legitimate ground exists for the Court to decline jurisdiction. Contrary to Fitness International's assertions, there would be no needless determination of state law, and there would not be duplicative litigation. Instead due to Fitness International's forum shopping, it effectively argues that it would be better to have a Washington state court decide questions of California law than allowing this Court to reach these

questions. Therefore, Fitness International has failed to show why this Court should decline to exercise jurisdiction over Beazley's action.

Fitness International has also failed to meet its burden of showing that this action must be dismissed for failure to join necessary and indispensable parties. The Beazley policy is an individual policy that forms part of an insurance program for the 2020-2021 policy year. Beazley's contract with Fitness International is separate and distinct from any of the other insurers' contracts with Fitness International. Indeed, Beazley individually negotiated for and obtained a communicable disease endorsement, precluding coverage for losses arising out of viruses. Therefore, Beazley cannot be jointly liable for any duties or obligations the other insurers might owe to Fitness International. Additionally, the other insurers have not claimed an interest in this Lawsuit, and as such, are not necessary parties under Rule 19(a). Moreover, even if the other insurers were considered necessary, they are not considered indispensable under Rule 19(b).

Accordingly, Fitness International's Motion to Dismiss, or in the alternative, Stay, is due to be denied as a matter of law.

## II. STATEMENT OF FACTS

Fitness International, a California corporation with its principal place of business located in California, is the Named Insured under a commercial property policy subscribed to by Beazley, Policy No. W2C215200101 (the "Beazley Policy"). (Doc. 1-1). The Beazley Policy is an individual policy which forms part of a large commercial property insurance program for the 2020-2021 policy year, providing property damage and business income coverage to over 700 fitness centers owned and operated by Fitness International (the "2020-2021 Policy"). Of those fitness centers, 124 are in California, as compared to only 27 in Washington. (Wraith Decl., Ex A). The individual policies comprising the 2020-2021 Policy include the "Zurich Edge Form," along with additional forms required by the individual insurers. (Wraith Decl., Ex. B). Prior to the inception of the 2020-2021 Policy, Fitness International was

insured under a different insurance program for the 2019-2020 policy year (the "2019-2020 Policy"). Beazley did not subscribe to the 2019-2020 Policy.

The Beazley Policy was negotiated through Fitness International's broker, RT Specialty, located in California. (Wraith Decl., Ex. B; Ex. C). During negotiations, Fitness International's broker advised that Fitness International had filed a claim for business interruption losses as a result of COVID-19 against the 2019-2020 Policy, but that Fitness International knew "that carriers are declining coverage" and that Fitness International also "expect[ed] that markets that will be quoting will have an exclusion." (Wraith Decl., Ex. C).

Pursuant to the Beazley Policy, Beazley's obligations are several and not joint, meaning the various insurers are not liable to each other. (Doc. 1-1, p. 213). Indeed, the 2020-2021 Policy's "Subscription Policy Endorsement" states that:

> The liability of each Subscribing Company will be several, but not joint. No Subscribing Company will assume any liability above its respective percentage share of liability for any loss. The inability or failure for any reason of any Subscribing Company to pay its percentage share of liability will not increase, change, or in any way affect the obligation (whether percentage share or otherwise) of any other Subscribing Company. The sole right of the Insured is limited to a claim against the defaulting Subscribing Company.

(Doc. 1-1, p. 213).

While the individual policies all contain the master Zurich Edge Form, the individual policies, including the Beazley Policy, contain different endorsements. Fitness International was aware of these differences, as during negotiations for the 2020-2021 Beazley Policy, Beazley advised Fitness International's broker that it could follow the Zurich form subject to agreed amendatory endorsements and exclusions, which is not uncommon. (Wraith Decl., Ex. C). There are several differences between the two policies, including that the Beazley Policy contains a California choice of law

provision that is not found in the master Zurich Edge Form. (Doc. 1-1, p. 6). The Beazley Policy also contains a Communicable Disease Endorsement – central to the coverage litigation between Fitness International and Beazley – which is not found in the Zurich Edge Policy or potentially other insurer's policies. (Doc. 1-1, p. 238).

On September 14, 2020, Fitness International filed a complaint against its 2019-2020 insurers (the "2019-2020 Insurers") in the Orange County Superior Court, California (the "California Lawsuit"). (Wraith Decl., Ex. D). Beazley was not part of the California Lawsuit as it did not subscribe to the 2019-2020 Policy. The California Lawsuit was removed to this Court on October 23, 2020. (Wraith Decl., Ex. E). On January 6, 2021, after the 2019-2020 Insurers' Motion to Dismiss was fully briefed and a ruling was imminent, Fitness International voluntarily dismissed the California Lawsuit. (Wraith Decl., Ex. F).

That same day, in an act of deliberate forum shopping, Fitness International filed a complaint in the Superior Court of King County, Washington, in the action styled *Fitness International, LLC v. Zurich American Insurance Company, et. al.*, Case. No. 21-2-00261-3-SEA, against the 2019-2020 Insurers (the "First Washington Lawsuit"). (Wraith Decl., Ex. G). Again, Beazley was not named as a defendant in the First Washington Lawsuit, because it did not subscribe to the 2019-2020 Policy.

On or about January 11, 2021, Fitness International first made a claim with Beazley regarding business income losses due to COVID-19 under the Beazley Policy. (Wraith Decl., Ex. H). Beazley timely acknowledged Fitness International's claim. (Wraith Decl., Ex. I). Fitness International never responded to Beazley's request that it provide additional information concerning the facts and circumstances surrounding the claim. Then, even though the Beazley Policy is expressly governed by California and not Washington law, Fitness International sent an Insurance Fair Conduct Act Notice (the "IFCA Notice") to Beazley on or around March 18, 2021. (Wraith Decl., Ex. J).

On April 6, 2021, Beazley filed a declaratory action in this Court, which is the proper forum for this coverage dispute. (*See* Doc. 1). Beazley seeks a judicial

determination concerning whether Fitness International is entitled to business income coverage and/or coverage for property damage for its claimed COVID-19 losses. (*See id*.). Thereafter, on April 8, 2021, Fitness International filed a second lawsuit in the Superior Court of King County, Washington against its insurers under the 2020-2021 Policy, including Beazley in the case styled *Fitness International, LLC v. Zurich American Insurance Company*, (the "Second Washington Lawsuit"). (Wraith Decl., Ex. K).

Fitness International then moved to consolidate the First Washington Lawsuit with the Second Washington Lawsuit. (Wraith Decl., Ex. L). It also sought to enjoin Beazley from litigating in this forum. (Wraith Decl., Ex. M). Beazley opposed the motions and also moved to dismiss, or in the alternative, to stay the Second Washington Lawsuit pursuant to the doctrine of *forum non conveniens*, as the parties' coverage dispute should be heard by a California court and not a Washington court. (Wraith Decl., Ex. N; Ex. O). Fitness International has now moved to dismiss this Lawsuit.

## III. ARGUMENT

There are no legitimate grounds for Fitness International's Motion to Dismiss. Fitness International asks this Court to decline to exercise jurisdiction over its declaratory judgment action and force Beazley to litigate in Washington state, where Fitness International filed suit after Beazley filed this instant action. Fitness International has failed to show why this Court should decline jurisdiction in favor of having a Washington state court decide this dispute that is governed by California law and involves a California corporation with more locations in California than in any other state. Beazley is uniquely positioned from the other subscribing insurers in several respects, but importantly, it did not subscribe to the 2019-2020 policy against which Fitness International filed its first claim. Additionally, the Beazley Policy contains a Communicable Disease Endorsement, California choice of law provision, and prior loss provision, not found in the master policy form that is at issue in the

Washington lawsuits. Thus, the instant action and the Washington lawsuits are not duplicative. Resolution of this action will also not result in needless interpretation of state law, as federal courts, and this court in particular, have been at the forefront of settling COVID-19 business interruption disputes.

Fitness International has also failed to meet its burden of demonstrating that the 2020-2021 Insurers are necessary parties to this action. As explained below, the 2020-2021 Insurers are not necessary because this Court can provide complete relief as between the two parties, as Beazley's obligations under the Beazley Policy are several, and not joint. Further, the 2020-2021 Insurers have not even claimed an interest in this action. Finally, the 2020-2021 Insurers are not indispensable, as this Court in good conscience may allow this action to proceed.

**A. Fitness International Has Failed to Articulate Any Ground for the Court to Decline Jurisdiction under the Declaratory Judgment Act**

The constitutional provision for diversity jurisdiction entitles an out of state party to a federal forum. U.S. CONST. art. III, § 2, cl. 1**.** The Declaratory Judgment Act confers on federal courts "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). This discretion, however, is not unfettered, and "a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination." *Pub. Affs. Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962). When determining whether to exercise its discretionary powers to issue declaratory judgments, "the district court must balance concerns of judicial administration, comity, and fairness to the litigants." *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 144 (9th Cir. 1994). Ninth Circuit law is clear that there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically. *Dizol*, 133 F.3d at 1225. *See also Aetna Cas. & Sur. Co. v. Merritt*, 974 F.2d 1196, 1199 (9th Cir.1992) ("We know of no authority for the proposition that an insurer is barred from invoking diversity jurisdiction to bring a declaratory judgment action against an insured on an issue of

coverage.").

The Ninth Circuit has long held that the Supreme Court's *Brillhart* opinion sets forth the primary factors to guide the district court in exercising its discretion to decline jurisdiction over a declaratory action: (1) needlessly determining state law issues, (2) discouraging litigants from forum shopping, and (3) avoiding duplicative litigation. *Gov't Emp. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (citing *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942)).

Fitness International contends that this Court should decline to exercise jurisdiction over Beazley's Declaratory Judgment Act claim. As discussed below, these arguments are without merit and none of the *Brillhart* factors weigh in favor of this Court declining to exercise its discretion to issue a declaratory judgment.

**1. The Court Would Not Needlessly Determine Issues of State Law**

The first *Brillhart* factor to be considered is whether this court would needlessly determine state law. This relates to unsettled issues of law generally, not unsettled issues of fact in the specific claim. *See Cont'l Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 (9th Cir. 1991), *overruled on other grounds*, *Dizol*, 133 F.3d at 1226; *see also Ne. Ins. Co. v. Masonmar, Inc.*, Case No. 1:13-cv-00364-AWI-SAB, 2013 WL 2474682, *4 (E.D. Cal. June 7, 2013) ("interpretation of contractual language in insurance policies is not uncommon for federal courts and generally does not require novel issues of state law"); *Mitsui Sumitomo Ins. Co. of Am. v. Delicato Vineyards*, No. CIV. S-06-2891 FCD GGH, 2007 WL 1378025, *6 (E.D. Cal. May 10, 2007) (dispute did not require the court to decide novel questions of state law as policy interpretation only involves principles of well-settled state law regarding contract interpretation).

Fitness International contends that Beazley's Complaint fails the first of three *Brillhart* prongs because its request for declaratory judgment involves issues of state law and should therefore be decided by a state court. (Doc. 9-1, p. 9). According to

Fitness International, this factor weighs in favor of a Washington court presiding over this dispute. Fitness International conveniently omits from its briefing that the Beazley Policy contains a California choice of law provision and is therefore governed by California and not Washington law.[1] In other words, Fitness International hopes to persuade this Court that a Washington state court is better situated to rule on California law than this Court.

To begin with, Fitness International overstates the importance of having a state court decide this coverage dispute. California federal courts, and this Court in particular, have considered numerous COVID-19 business interruption claims under California law. *See, e.g., 10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828 (C.D. Cal. 2020); *Selane Prod., Inc. v. Cont'l Cas. Co.*, No. 220CV07834MCSAFM, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020). This factor weighs in favor or retaining jurisdiction. *Cf. Allstate Ins. Co. v. Davis*, 430 F. Supp. 2d 1112, 1120 (D. Haw. 2006) ("On numerous occasions, the United States District Court in the District of Hawaii has interpreted insurance policies pursuant to Hawaii state law. . . This factor weighs in favor of exercising jurisdiction."). Beazley is aware of no instance, nor does Fitness International point to any, where a Washington state court has analyzed such COVID-19 business interruption cases under California law. Fitness International makes no argument, nor indeed could it, that a Washington state court is better equipped to interpret California law than a California federal court.

Further, while not in the context of the Declaratory Judgment Act, the Western District of Washington, in declining to certify questions to the Supreme Court of Washington, noted the important role that federal courts have played in interpreting state law issues in COVID-19 matters. *See Wade K. Marler, DDS v. Aspen Am. Ins.*

[1] Both California and Washington courts generally enforce choice of law provisions. *See Washington Mut. Bank, FA v. Superior Ct.*, 24 Cal. 4th 906, 917, 15 P.3d 1071, 1078 (2001); *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266 (2011) (internal citations omitted).

*Co.*, No. 2:20-CV-00597-BJR, 2021 WL 1599193, at *4 (W.D. Wash. Apr. 23, 2021). The court acknowledged that federal courts regularly interpret insurance contracts and are more than equipped to handle the interpretation of state law. *Id.* The court went on to note that over 250 orders have been issued by federal courts in similar cases, underscoring that contract interpretation by state courts is not necessary in these COVID-19 disputes. *Id.*[2]; *see also Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. CV RDB-20-2892, 2021 WL 1400891, at *7 (D. Md. Apr. 14, 2021) (refusing to certify questions to Maryland Supreme Court in COVID-19 litigation as federal courts are guided by basic principles of contract law). Accordingly, there is no presumption in favor of having a Washington court decide this insurance dispute governed by California law.

**2. Beazley Has Not Engaged in Forum Shopping**

The second *Brillhart* factor is whether the plaintiff has engaged in forum shopping. In the Ninth Circuit, forum shopping "is understood to favor discouraging an insurer from forum shopping, i.e., filing a federal court declaratory action to see if it might fare better in federal court at the same time the insurer is engaged in a state court action." *Am. Cas. Co. of Reading, Pennsylvania v. Krieger*, 181 F.3d 1113, 1119 (9th Cir. 1999). This is to discourage insurers, who are already parties to a state court action by a policyholder, from filing a suit in federal court.

Fitness International contends that Beazley filed this action in this court in an attempt at forum shopping, because it filed this suit after receiving the IFCA Notice. (Doc. 9-1 p. 10). However, "[m]erely filing a declaratory judgment action in a federal court with jurisdiction to hear it, in anticipation of state court litigation, is not in itself improper anticipatory litigation or otherwise abusive 'forum shopping.'" *Lexington Ins. Co. v. Silva Trucking, Inc.*, No. 2:14-CV-0015 KJM CKD, 2014 WL 1839076, at *8 (E.D. Cal. May 7, 2014) (quoting *Sherwin–Williams Co. v. Holmes Cnty.*, 343 F.3d

[2] Citing Covid Coverage Litigation Tracker, UNIV. OF PA. CAREY SCH. OF L., https://cclt.law.upenn.edu/ (last visited April 30, 2021).

383, 391 (5th Cir. 2003)); *see also Delicato Vineyards*, 2007 WL 1378025, at *5 ("there is also no requirement that any pending state court action requires dismissal of a first-filed federal action").

There was no Washington lawsuit pending against Beazley when Beazley commenced this action. Beazley filed this action in this Court because the Beazley Policy contains a California choice of law provision, Fitness International is a California corporation with its headquarters in this district, and most of the locations at issue are scheduled in California. Further, Beazley should not be criticized for deciding to file in a federal court instead of a state court, as there is "no reason to stigmatize an insurance company's desire for a federal forum as forum shopping because that right is provided by the Constitution and statute." *First State Ins. Co. v. Callan Assocs., Inc.*, 113 F.3d 161, 162 (9th Cir.1997).

The argument that Beazley improperly filed suit in this Court completely ignores that it is Fitness International which has engaged in egregious forum shopping. In fact, Fitness International barely acknowledges in a footnote that its first choice of forum was indeed a California court. (Doc. 9-1, p. 4 n. 1). Fitness International fails to explain to the Court that it first filed suit against the 2019-2020 Insurers in California state court, that the lawsuit was then removed to this Court, and that it dismissed the suit on the eve of a most likely unfavorable ruling.[3] Fitness International

[3] By that time, California federal courts had already ruled against policy holders on COVID-19 related matters. *10E, LLC v. Travelers Indem. Co. of Connecticut*, 483 F. Supp. 3d 828 (C.D. Cal. 2020); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937 (S.D. Cal. 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG (EX), 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020); *Boxed Foods Co., LLC v. California Cap. Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020);*Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 20-CV-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834 (N.D. Cal. 2020); *W. Coast Hotel Mgmt, LLC v. Berkshire Hathaway Guard Ins. Co.* No. 220CV05663VAPDFMX, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, Inc., 488 F. Supp. 3d 904 (N.D. Cal.

disingenuously contends that it dismissed the action because it realized that this Court did not have subject matter jurisdiction but, instead of seeking remand of the case back to California state court, it rushed to re-file in Washington— a state that has no meaningful nexus to the litigation as compared to the original forum. Fitness International no doubt thought it would receive a favorable ruling in Washington, as it only filed suit in that state after two Superior Courts issued rulings favor of policyholders in COVID-19 business interruption suits.[4] These decisions are in direct conflict with California law.[5] Fitness International has improperly sought to win a tactical advantage and avoid the application of California law, despite the parties' agreement that California law would apply to the interpretation of the Beazley Policy. This egregious forum shopping is evidenced by the fact that Fitness International seeks a declaration pursuant to Washington law that its insurers must pay for its alleged losses in over 700 locations throughout the country, when it has 124 locations in California as compared to only 27 in Washington—nearly six times the amount of locations.

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2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051 (C.D. Cal. 2020); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-CV-04466-VC, 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020); *Long Aff. Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No. SACV2001713CJCJDEX, 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020); *Selane Prod., Inc. v. Cont'l Cas. Co.*, No. 220CV07834MCSAFM, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020); *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 20-CV-05441-CRB, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-CV-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020); *Baker v. Oregon Mut. Ins. Co.*, No. 20-CV-05467-LB, 2021 WL 24841 (N.D. Cal. Jan. 4, 2021); *Palmdale Ests., Inc. v. Blackboard Ins. Co.*, No. 20-CV-06158-LB, 2021 WL 25048 (N.D. Cal. Jan. 4, 2021).

[4] *See Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020); *Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020).

[5] *See* footnote 3, *supra*.

Fitness International is asking this Court to reward its attempts at taking two bites of the same apple. Fitness International filed suit in Washington State under the ruse of lack of diversity jurisdiction, but this is nothing more than a thinly veiled attempt at avoiding clearly applicable California law. This is a textbook example of forum shopping. *See Am. Cas. Co. of Reading, Pennsylvania v. Krieger*, 181 F.3d 1113, 1119 (9th Cir. 1999) (finding that party in favor of dismissal had engaged in forum shopping after receiving unfavorable rulings in federal court and seeking to "start anew" in state court) *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir.1989) (plaintiff engaged in forum shopping by filing suit in federal court after litigating in state court); *Conte v. Aargon Agency, Inc*., No. 2:12–cv–02811–MCE–DAD, 2013 WL 1907722, *5 (E.D. Cal. May 7, 2013) ("Plaintiff's filing of her class action complaint in this Court appears to be an attempt to forum shop and avoid the state court's adverse ruling. . .")

Accordingly, countervailing forum shopping considerations weigh in favor of this Court exercising jurisdiction over Beazley's claim.

**3. Avoiding Duplicative Litigation**

The third *Brillhart* factor is whether the issues in the declaratory claim are duplicative of issues being litigated in the state court action. Under the third factor, "[i]f 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." *Dizol*, 133 F.3d at 1225 (citing *Chamberlain v. Allstate Ins. Co*., 931 F.2d 1361, 1366–67 (9th Cir.1991). However, the pendency of a state court action does not itself require a district court to refuse declaratory relief. *Chamberlain*, 931 F.2d at 1367.

Here, the actions are not duplicative because the parties are not the same, as Beazley brought this action against Fitness International, while the Washington lawsuit involves several other insurers. Likewise, the Second Washington Lawsuit did not exist at the time this action was filed. Furthermore, each policy is separate and distinct

from the Beazley policy, and each subscribing insurers' policy has their bargained choice of amendatory endorsements, in Beazley's case, one such form being the Communicable Disease Endorsement. Additionally, this declaratory action is not duplicative of either the First or Second Washington Lawsuit because Beazley seeks a declaration as to what obligations, if any, it owes Fitness International under its individual policy, and not whatever obligations other insurers may have under their respective policies.

While all of the policies contain the same Zurich Edge Form, the Zurich policy does not contain the California choice of law provision found in Beazley's policy, nor does the Zurich policy contain the Communicable Disease Endorsement, microorganism exclusion, or the prior loss clause. The Communicable Disease Endorsement is of particular import because, not only does it preclude coverage for Fitness International's losses, but it also distinguishes Beazley from the other insurers. Additionally, while California law may also apply to the other individual policies pursuant to Washington's choice of law principles, Fitness International has different grounds for arguing otherwise in the Second Washington Lawsuit. Moreover, Fitness International has moved to consolidate the First Washington Lawsuit with the Second Washington Lawsuit. While Beazley opposed the motion, other insurers who have subscribed to both policy years are in favor of consolidation. It is therefore likely that the two lawsuits will be consolidated, meaning that the Washington court will have to decide issues as to two different policies spanning over two different policy years, for two different losses. Here, Beazley seeks a declaration as to its obligations solely under the Beazley Policy for a single policy year. These material differences in the different insurance policies and two Washington Lawsuits make it so this declaratory action and the Washington actions are not duplicative.

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**4. Additional Considerations Weigh in Favor of Exercising Jurisdiction**

In addition to the three *Brillhart* factors, district courts also consider whether the declaratory action (1) will settle all aspects of the controversy; (2) will serve a useful purpose in clarifying the legal relations at issue; (3) is being sought merely for the purposes of procedural fencing or to obtain a "res judicata" advantage; or (4) will result in entanglement between the federal and state court systems. *Dizol*, 133 F.3d at 1225, n. 5 (quoting *Kearns*, 15 F.3d at 145 (J. Garth, concurring)). In addition, a district court may also consider the convenience of the parties and the availability and relative convenience of other remedies. *Id*. Each of these additional factors weighs in favor of this Court retaining jurisdiction.

Fitness International contends that this action cannot resolve all aspects of the parties' controversy because the Beazley Policy comprises "a mere 2%" of the 2020-2021 Policy's overall limits. (Doc. 9-1, pp 10-11). This "mere 2%" equates to $10 million in limits, which is anything but a paltry sum. Further, Fitness International implies that a Washington court would be able to address "100 %" of the coverage available under its overall policy limits because all the other 2020-2021 Insurers are named as defendants in the Second Washington Lawsuit. (*Id*.) This is simply not the case. As much as Fitness International would like to bury all pertinent facts in footnotes, it cannot hide the fact that it has been enjoined by an English court from filing suit against Chubb Bermuda Insurance Ltd. ("Chubb"), another subscriber to the 2020-2021 Policy. (Doc. 9-1, p. 6 n. 3).[6] Since Chubb cannot be named in the Second Washington Lawsuit, any argument that a Washington court would be able to address 100% of the coverage available under the 2020-2021 Policy is simply wrong.

In any event, Fitness International is mistaken as to what "complete relief"

[6] Chubb filed for an in injunction in the case styled *Chubb Bermuda v. Fitness International*, Case No. QB-2021-001270. Beazley is currently attempting to obtain a copy of these pleadings.

means in this situation. As discussed in Section B.1.i., *supra*, complete relief can be afforded as between Beazley and Fitness International because each insurer subscribed to its own individual policy under which it would be severally liable. (Doc. 1-1, p. 213). Therefore, there is no situation in which Beazley would owe more than its share of $10 million to Fitness International. (*Id.*). As between Beazley and Fitness International, the only two parties to the Beazley Policy, this Court can afford complete relief and settle all aspects of the dispute as to insurance coverage. *Cf. Allstate Ins. Co. v. Gillette*, No. C05-2385, 2006 WL 997236, at *4 (N.D. Cal. Apr. 17, 2006) (resolution of declaratory judgment action would result in all "coverage issues [being] conclusively determined"). Similarly, the declaratory action will serve a useful purpose in clarifying the legal relations of the parties. In particular, adjudication of Beazley's declaratory claims will serve the useful purpose of clarifying Beazley's remaining obligations under the policies, pursuant to California law.

Fitness International also argues that a declaration by this Court will entangle federal courts in issues of "Washington law being considered by a Washington court." (Doc. 9-1, p. 11). Fitness International's argument misses the mark, as the Washington court will have to consider issues of California—and not Washington—law in interpreting the Beazley Policy pursuant to the California choice of law provision. Therefore, there will be no entanglement by this Court in the Washington court. Moreover, as discussed above, Beazley has not engaged in any "procedural fencing," but rather, it is Fitness International that has treated litigation like a game and filed suit in Washington to avoid California law. Finally, the convenience of the parties weighs in favor of exercising jurisdiction, as this action involves a coverage dispute over a California policy issued to a California insured, which has most of its locations in California.

Based on the above, the *Brillhart* factors do not weigh in favor of dismissal. Therefore, this Court should exercise subject matter jurisdiction over this case.

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**B. Mandatory Joinder is Not Required Under Rule 19**

Fitness International also seeks to dismiss this action pursuant to Rule 19, claiming that the 2020-2021 Insurers are indispensable parties. However, Fitness International's Motion fails because it cannot establish the prerequisites for compulsory joinder.

Rule 12(b)(7) permits dismissal for failure to join a party deemed necessary and indispensable under Rule 19. Fed.R.Civ.P. 12(b)(7). The Ninth Circuit has held that a court should grant a 12(b)(7) motion to dismiss only if the court determines that joinder would destroy jurisdiction and the nonjoined party is necessary and indispensable. *See Shermoen v. U. S.*, 982 F.2d 1312, 1317-18 (9th Cir.1992). A party must be necessary under Rule 19(a) to be indispensable under Rule 19(b). *See U.S. v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). Further, the moving party has the burden of persuasion in arguing for dismissal. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

The Ninth Circuit has explained that a Rule 19 motion poses three successive inquiries: (1) whether a nonparty is a "necessary" party that should be joined under Rule 19(a); (2) whether it is feasible to join the necessary party; and (3) if joinder is not feasible, whether the case can proceed without the necessary party or whether the action must be dismissed. *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010) (internal citations omitted). This inquiry is designed to avoid the harsh results of rigid application. *See Eldredge v. Carpenters 46 N. Cal. Cntys. Joint Apprenticeship & Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981).

**1. The 2020-2021 Insurers are not necessary parties**

If a non-party is not found to be necessary, then joinder under Rule 19 is improper without the need to consider any other elements. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) ("Because, as discussed below, we conclude that the Government is not a necessary party to this action, we need not determine whether joinder is feasible, and, if not, whether the

Government's presence would be indispensable."). Under Rule 19(a), a non-party can be found "necessary" in two ways: "(1) when complete relief [among the existing parties] is not possible without the absent party's presence, or (2) when the absent party claims a legally protected interest in the action." *Bowen*, 172 F.3d at 688; *see also* Fed.R.Civ.P. 19(a)(1)(A).

**i. Full relief between the parties is possible without 2020-2021 Insurers**

For relief to be "complete" it "must be 'meaningful relief *as between the parties*.'" *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 139 F. Supp. 3d 1141, 1150 (E.D. Cal. 2015) (emphasis in original) (quoting *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013)). There can be no question that the Court can accord complete relief among the existing parties – Beazley and Fitness International – without the participation of the 2020-2021 Insurers. Beazley brought this action individually, seeking a declaration as to its duties and obligations under the Beazley Policy. (*See generally* Doc. 1). Beazley seeks relief specifically related to itself and no other insurer. In this policy program, each insurer enters into a bilateral contract with Fitness International independently and severally from all other insurers. Indeed, the 2020-2021 Policy specifically states that "[t]he liability of each [insurer] will be several, but not joint." (Doc. 1-1, p. 213). The contracts in question do not create one contract between all 2020-2021 Insurers and Fitness International, but rather, are individual bilateral contracts between each individual subscriber to the 2020-2021 Policy and Fitness International. *Cf. Liberty Corp. Cap. Ltd. v. Steigleman*, No. CV-19-05698-PHX-GMS, 2020 WL 2097776, at *3 (D. Ariz. May 1, 2020) (holding that other subscribers to defendant's policy were not necessary parties because each subscriber's liability was several and not joint); *Certain Underwriters at Lloyd's of London v. Illinois Nat. Ins. Co.*, No. 09 CIV. 4418 LAP, 2012 WL 4471564, at *3 (S.D.N.Y. Sept. 24, 2012) (finding that other "Names" that individually subscribed to a certain policy were not necessary because the remaining insurers could obtain a declaratory

judgment as to their several shares); *Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London*, No. CV 18-6192, 2018 WL 4042874, at *3 (E.D. La. Aug. 24, 2018) (finding that in a similar insurance program, each insurer that subscribed to policy had individual contracts with the insured). As this Lawsuit involves a contract exclusively between Beazley and Fitness International under which no other person can owe a duty or obligation, it is axiomatic that the Court can afford relief as to that contract without the inclusion of any other parties.

Fitness International's reliance on *Zurich Am. Ins. Co. v. Elecs. For Imagining, Inc*., No. C 09-02408 WHA, 2009 WL 2252098 (N.D. Cal. July 28, 2009) is misplaced. In that case, two excess insurers filed a declaratory action as to their coverage obligations to the insured. *Id*. at *2. While the court did note that the fact that each insurance contract created a separate obligation had no bearing since each policy incorporated the other's terms, the court found that it would be able to adjudicate the excess insurer's liability, irrespective of the presence of the underlying insurers in the suit. *Id*. at *3. Ultimately, the court found that the underlying insurers were necessary because of the interests of the public in avoiding repeated lawsuits, but this reasoning was based on the fact that the excess insurers' coverage obligations were necessarily tied to the underlying insurers coverage obligations, as the finality of any judgment on the excess insurers' liability was contingent on the underlying insurers' liability. *Id*. Fitness International also relies on *Navigators Ins. Co. v. Dialogic Inc*., No. 13-CV-05954-RMW, 2014 WL 2196403 (N.D. Cal. May 27, 2014). Again, that court found that the underlying insurers were necessary parties because the excess insurer's liability depended on the underlying insurers' liability. *Id*. at *2-3.

Here, Beazley is not an excess insurer, nor are the other 2020-2021 Insurers primary insurers. Further, while the Beazley Policy incorporates the Zurich Edge Form, it does not incorporate all terms of each subscribing insurer's policies. (*See* Doc. 1-1). Thus, unlike an excess insurance tower, Beazley's obligations are not dependent on any of the other 2020-2021 Insurer's coverage obligations. Accordingly, Beazley's

obligations are not tied to any of the other 2020-2021 Insurers' obligation and its liability is not contingent on the 2020-2021 Insurer's liability. They are therefore not necessary parties. *Cf. Columbia Cas. Co. v. Cottage Health Sys.*, No. LACV1603759JAKSKX, 2016 WL 10966383, at *5 (C.D. Cal. Dec. 2, 2016) (finding that excess carrier was not necessary party because coverage of the insured under the primary insurer's policy did not depend on excess insurer's policy).

Lastly, Fitness International places great weight on what it calls the 2020-2021 Policy's "One Policy Endorsement." (Doc. 9-1, p. 14). That provision states that

> [a]ny questions arising under the subscribers' respective policies as to the appropriate limit of liability, deductible or any other questions to the extent, scope or amount of coverage shall be resolved in accordance with the result that would have been achieved if there was only a single policy issued by a single insurer. In no event shall limits of liability or deductibles be cumulated or aggregated between or among the subscriber's policies for any one loss occurrence.

(Doc. 1-1, p. 213).

That provision was simply intended to clarify that the applicable limits of the insurers' respective policies do not stack, and, while each insurer has its own separate risk, the insured's deductible will be treated as one deductible. Nowhere does this provision state or even imply that any individual insurer's obligations impact other insurers' obligations. In fact, as discussed above, the 2020-2021 Policy states the exact opposite just a few short paragraphs later. (*Id.*).

As the 2020-2021 Insurers are not required for the Court to accord complete relief between Beazley and Fitness International on the issues raised in the Lawsuit, the 2020-2021 Insurers are not necessary parties under Rule 19(a)(1)(A).

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**ii. The Other Insurers have not claimed an interest in the action**

Fitness International's argument that the 2020-2021 Insurers are necessary parties under Rule 19(a)(1)(B) is also without merit. Fitness International erroneously focuses on whether the 2020-2021 Insurers' ability to protect their interests might be impeded and its potential risk of inconsistent obligations. (Doc. 9-1, p. 13). However, Fitness International fails to first establish that the other Insurers have claimed an interest, which is fatal to its argument.

Rule 19(a)(1)(B) applies when the non-party "claims an interest relating to the subject of the action . . . " Fed.R.Civ.P. 19(a)(1)(B). As the Ninth Circuit has explained, "[j]oinder is contingent [] upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action." *Bowen*, 172 F.3d at 689 (quotation omitted, emphasis in original). The non-party has to be the one that claims its interest; a party to the action cannot claim a legally protected interest for a non-party. *See id.* at 688-89; *see also Travelers Prop. Cas. Co. of Am. v. Levine*, Case No. 17-cv-07344-LB, 2018 WL 3377692, at *2 (N.D. Cal. July 11, 2018) ("Ms. Levine may claim an interest in having Mr. Levine as a party to the action, but that is not the same as Mr. Levine claiming an interest in himself.").

Here, Fitness International does not even attempt to establish that the Other Insurers have claimed an interest. (*See generally* Doc. 9-1). As Fitness International cannot claim the interest for them, the 2020-2021 Insurers cannot constitute a necessary party under Rule 19(a)(1)(B).

**2. The 2020-2021 Insurers are Not Indispensable Parties**

As detailed above, the 2020-2021 Insurers are not necessary parties to this Lawsuit, so the analysis of whether they must be joined under Rule 19 should stop. *See Northrop Corp.*, 705 F.2d at 1043. However, even if this Court proceeds in its joinder analysis, Fitness International's Motion is due to be denied because the 2020-2021 Insurers are not indispensable parties under Rule 19(b).

A party is indispensable if in "equity and good conscience," the court should not allow the action to proceed in its absence. Fed. R. Civ. P. 19(b); *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002). To make this determination, the courts in the Ninth Circuit balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Dawavendewa*, 276 F.3d at 1161-62. In this case, the factors weigh against dismissal.

First, contrary to Fitness International's assertions, a judgment rendered in this court would not prejudice the absent insurers. This is because each insurer's obligation under their respective policies is several and not joint. *See* Section B.2.i, *supra*. Fitness International's continued reliance on *Elecs. for Imaging* and *Navigators* to argue that the 2020-2021 Insurers are indispensable is misplaced, as in both cases, the obligations of the insurers present in the action were dependent on the absent insurers. *Navigators*, 2014 WL 2196403 at *4; *Elecs. for Imaging*, 2009 WL 2252098 at *5. That is not the case here.

Second, any judgment would not prejudice Fitness International since, even if the court rendered judgment in favor of Beazley, Fitness International could still seek recourse from its other insurers. Additionally, any judgment rendered would be adequate. The term adequate here refers to the "public stake in settling disputes by wholes." *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968). Here, this Court could conclusively and wholly determine Beazley's coverage obligations, if any, to Fitness International under the Beazley Policy. Lastly, while there exists an alternate forum, the other factors weigh against dismissal and the Court in good conscience may allow this action to proceed.

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## VI. CONCLUSION

For the foregoing reasons, the Court should deny Fitness International's Motion to Dismiss.

Dated: May 3, 2021

SELVIN WRAITH HALMAN LLP

By: */s/ James L. Wraith*
James L. Wraith
Sara M. Parker
Attorneys for Plaintiff
BEAZLEY UNDERWRITING, LTD.

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|---|---|
| **Re:** | **Beazley Underwriting, LTD. v. Fitness International, LLC** |
| **Court:** | **United States District Court, Central District of California** |
| **Action No.** | **8:21-cv-00642 CJC (DFMx)** |

**PROOF OF SERVICE**

I declare that I am over the age of 18, am not a party to the above-entitled action, and am an employee of Selvin Wraith Halman LLP whose business address is 505 14th Street, Suite 1200, Oakland, Alameda County, California 94612.

On May 3, 2021, I served the following document(s):

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STAY**

**DECLARATION OF JAMES L. WRAITH IN SUPPORT OF PLAINTIFF BEAZLEY UNDERWRITING, LTD.'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STAY**

**[PROPOSED] ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR STAY**

**By ELECTRONIC FILE TRANSFER TO ECF FILE & SERVE:** By transmitting a true copy the document(s) listed above for service on all parties in this case pursuant to applicable statutes, local rules and/or order of this Court.

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FITNESS INTERNATIONAL, LLC

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 3, 2021

*/s/ Laura L. Sanchez*
Laura L. Sanchez