IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXCALIBUR REINSURANCE CORPORATION	:	CIVIL ACTION
	:	
	:	No. 15-2522
v.	:	
	:	
SELECT INSURANCE COMPANY, et al.	:	
	:	

ORDER

AND NOW, this 7th day of July, 2015, upon consideration of Defendants Select Insurance Company and The Travelers Indemnity Company's Motion to Dismiss, or in the Alternative, To Transfer Venue to the District of Connecticut and Plaintiff Excalibur Reinsurance Corporation's response thereto, and following an oral argument on June 22, 2015, it is ORDERED the Motion (Document 20) is GRANTED in part insofar as Plaintiff's Complaint is DISMISSED without prejudice.[1]

[1] On May 7, 2015, Plaintiff Excalibur Reinsurance Corporation filed a Complaint against Select Insurance Company and The Travelers Indemnity Company in this Court seeking declaratory relief regarding its obligations under a reinsurance contract with Defendants. *See* Pl.'s Compl. 9. On May 12, 2015, Defendants filed a mirror-image action concerning the same parties, facts, and disputes in the District of Connecticut and seeking both damages and declaratory relief. *See Select Ins. Co. v. Excalibur Reinsurance Corp.*, No. 15-715 (D. Conn. filed May 12, 2015) (hereinafter the Connecticut action). Defendants now move to dismiss, or in the alternative, transfer this first-filed action to Connecticut. Plaintiff opposes the motion, contending this action was properly first filed, and moves to permanently enjoin Defendants from proceeding in Connecticut.

Pursuant to the Declaratory Judgment Act (DJA), "any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The DJA "confers discretionary, rather than compulsory, jurisdiction upon federal courts." *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 134 (3d Cir. 2014); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (stating the DJA "created an opportunity, rather than a duty, to grant a new form of relief"). A court may, "in the sound exercise of its discretion, . . . dismiss an action seeking a declaratory judgment." *Wilton*, 515 U.S. at 288. In determining whether to dismiss a declaratory judgment action, a court must consider the following non-exhaustive list of factors insofar as they are relevant: the existence of parallel state proceedings, the likelihood the declaration will resolve the dispute, the convenience of the parties, the public interest in settlement, the availability and relative convenience of other remedies,

avoidance of duplicative litigation, and prevention of the use of the declaratory action as a "method of procedural fencing" or a means to provide another forum in the race for res judicata. *See Reifer*, 751 F.3d at 144, 146.

The Connecticut action was filed five days after the instant action. "[T]he first-filed rule ordinarily counsels deference to the suit that was filed first, when two lawsuits involving the same issues and parties are pending in separate federal district courts." *Honeywell Int'l Inc. v. Int'l Union, United. Auto., Aerospace & Agr. Implement Workers of Am.*, 502 F. App'x 201, 205 (3d Cir. 2012). The rule gives the court in which an action was first filed the power to enjoin proceedings involving the same parties and issues in a second-filed action. *See E.E.O.C. v. Univ. of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988). Still, a court has the discretion to depart from the first-filed rule due to "rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping," *id*. at 972, when the second-filed action is further along, *id.* at 976, or "the first-filing party instituted suit in one forum in anticipation of the opposing party's imminent suit in another, less favorable, forum," *id*. Additionally, where the first-filed action seeks only declaratory relief, equity may require deference to a second-filed action for coercive relief. *See Honeywell*, 502 F. App'x at 205 (noting the first-filed rule "is not . . . a dispositive rule, nor does it override the district court's discretionary authority to determine whether or not to entertain a suit for declaratory relief"); *see also id.* at 206 (citing appellate cases for the proposition that a first-filed declaratory judgment action should be presumptively dismissed in favor of a later-filed coercive suit).

Defendants contend grounds for dismissal or transfer exist here, because Plaintiff's filing of this action in Pennsylvania was merely declaratory, in bad faith, for forum-shopping purposes, anticipatory, and inequitable. Because the Court agrees that Plaintiff's action in this Court was filed in bad faith, as it is improperly anticipatory and solely for declaratory relief, the Court declines to exercise jurisdiction under the DJA. "The [anticipatory action and bad faith] inquiries are quite similar, as paramount in both considerations is the question of whether the first-filed action was filed in apparent anticipation of imminent judicial proceedings by the opposing party." *IMS Health, Inc. v. Vality Tech. Inc.*, 59 F. Supp. 2d 454, 463 (E.D. Pa. 1999) (internal quotation marks omitted) (quoting *E.E.O.C.*, 850 F.2d at 977); *see also id*. ("[T]he bad faith inquiry also encompasses consideration of the amount of time between the declaratory and affirmative filings, with a shorter period indicating bad faith."); *FMC Corp. v. AMVAC Chem. Corp.*, 379 F. Supp. 2d 733, 744 (E.D. Pa. 2005) ("[A] second-filing party may have a strong case that the initial filing is improper if the first-filing party initiated its suit within the response period provided in a recent cease-and-desist letter.").

On May 1, 2015, Defendants requested payment from Plaintiff under the reinsurance contract by May 15, 2015. Defendants also indicated they would file a Complaint, which was attached to their demand letter, in the District of Connecticut if payment was not received by the May 15 deadline. Defs.' Mot. to Dismiss Ex. 1, at Ex. A. Instead of paying or responding, Plaintiff filed a Complaint in this Court on May 7, 2015. "This chronology is indicative of an improper first filing." *Pittsburgh Logistics Sys., Inc. v. C.R. England, Inc.*, 669 F. Supp. 2d 613, 624 (W.D. Pa. 2009) (holding as filed in bad faith a declaratory action filed three days after the plaintiff received a letter and draft Complaint from the defendant indicating the defendant would file suit in a week). Additionally, Plaintiff's actions here closely parallel the actions of the University in *E.E.O.C. v. University of Pennsylvania*. In that case, the University filed suit in the United States District Court for the District of Columbia three days before the expiration of a period during which the EEOC

stated it would not resort to judicial action. 850 F.2d at 972. After the expiration of the response period, the EEOC filed an action in this District. In affirming the district court's refusal to dismiss the EEOC's second-filed action in favor of the University's, the Third Circuit noted the first-filed rule did not apply because the timing of the University's filing indicated an attempt to circumvent an imminent action in this District, which had unfavorable law for the University. *Id.* at 977.

Plaintiff's claim that it formed the intention to sue Defendants as early as December 2014 does not save this action from being improperly anticipatory. *See* Mem. in Supp. of Pl.'s Order to Show Cause 7; *see id*. Decl. of Angela Aloisio ¶ 7. Even if Plaintiff formed the intent to sue in December "if needed upon receipt of the reinsurance billings," *see id*. ¶ 8, Plaintiff did not actually commence suit until it received Defendants' letter on May 1, 2015, *see id.* ¶ 10.

Also weighing in favor of dismissal is Plaintiff's attempt to secure better procedural law by rushing to the courthouse ahead of Defendants. In instances of forum shopping or forum avoidance, "a court has the discretion to depart from the first-to-file rule." *FMC Corp.*, 379 F. Supp. 2d at 747 n.25 ("Because the first-filed rule is based on principles of comity and equity, it should not apply when at least one of the filing party's motives is to circumvent . . . law . . . and preempt an imminent . . . action." (quoting *E.E.O.C.*, 850 F.2d at 978)); *see also PhotoMedex, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 09-00896, 2009 WL 2326750, at *6 (E.D. Pa. July 28, 2009) (declining to apply the rule after determining the first filer engaged in "procedural gamesmanship" by filing in California in anticipation of litigation being commenced in the Eastern District of Pennsylvania, which had previously ruled against the first filer in a significantly similar action). *But see Synthes, Inc. v. Knapp*, 978 F. Supp. 2d 450, 457-58 (E.D. Pa. 2013) (suggesting forum shopping justifies a departure from the first-filed rule only when it is the first filer's sole motive); *Zelenkofske Axelrod Consulting, L.L.C. v. Stevenson*, No. 99-3508, 1999 WL 592399, at *3 (E.D. Pa. Aug. 5, 1999) ("[T]o justify a disregard of the first-filed rule, forum shopping must be the sole reason for choosing one forum over another."). Neither Pennsylvania nor Connecticut supply more favorable substantive law as the parties previously chose New York law to govern the contract at issue. *See* Mem. in Supp. of Pl.'s Order to Show Cause 9. But as an unauthorized insurer in Connecticut, Plaintiff must first post a security bond to proceed with any court action. Conn. Gen. Stat. § 38a-27(a). Plaintiff's filing of its Complaint immediately after receiving Defendants' letter suggests Plaintiff filed here in bad faith to avoid posting security.

Plaintiff contends equity does not permit the dismissal of a first-filed action in favor of a second-filed suit in a forum with little or no nexus to the dispute. But none of the cases Plaintiff cite as supporting this proposition say as much. Rather, those courts consider the existence of a nexus as merely one factor in determining whether the first-filed rule applies. *See Honeywell*, 502 F. App'x at 206 (holding the first-filed court's "greater nexus to the dispute," the plaintiff's decision to sue before providing the required statutory notice, and the action's status as one for declaratory relief were all "factors that the District Court could appropriately consider in determining whether deference to the second-filed action for coercive relief was 'right and equitable under the circumstances'" (internal citation omitted)); *Crown Cork & Seal Co. v. United Steelworkers of Am.*, No. 03-1381, 2004 WL 117923, at *3 (W.D. Pa. Jan. 9, 2004) (recognizing the transferee forum as appropriate not only because it "has nexus" to the parties, but also because the case in the second-filed forum was substantially further along and that forum was chosen by the "natural plaintiffs").

In fact, both *Honeywell* and *Crown Cork & Seal Co.* support Defendants' motion. The

It is further ORDERED Plaintiff's request for a permanent injunction is DENIED.[2]

The Clerk of Court is DIRECTED to mark this case CLOSED.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

Honeywell court not only held that deference to the second-filed action was appropriate under the considerations articulated above, but also suggested that coercive actions generally should be given priority over first-filed declaratory actions. *See* 502 F. App'x at 206. Similarly, the *Crown Cork & Seal Co.* court noted the second filers in that case were actually the "natural plaintiffs"—that is, the "parties who normally would sue to protect rights"—and, as such, "should be permitted to select the forum of their choice so long as the selected forum has *some* nexus to the lawsuit." 2004 WL 117923, at *3 (emphasis added). Defendants are the natural plaintiffs in this action; they are the parties "who allege that they have been wronged." *In re Amendt*, 169 F. App'x 93, 97 (3d Cir. 2006). Read fairly, *Crown Cork & Seal Co.* suggests Defendants, even though they were second filers, should be entitled to select their forum so long as it has some nexus to the suit.

Defendants have established a nexus between Connecticut and this dispute. Both Select, which wrote the policy at issue, and its parent company, The Travelers Company, have principal places of business in Connecticut. Decl. of Michael H. Goldstein in Opp. to Mot. to Dismiss ¶ 4 (acknowledging Select has no corporate offices separate from those of Travelers in Hartford, Connecticut). Defendants attest this claim is being handled by Travelers' Ceded Reinsurance Claim Operations Department, which is based in Connecticut, although it also has employees in other offices. *See* Defs.' Reply Mem. 3; Aff. of Rosemarie D. Robles ¶¶ 3, 8-9, 11-13, 16. The personnel handling this claim are located in Connecticut. *See* Robles Aff ¶¶ 12-13. The copies of department billings and cash calls are maintained in Connecticut. See Defs.' Reply Mem. 3; Robles Aff. ¶ 14.

Because Plaintiff improperly "fire[d] the first shot while Defendants had holstered their litigation guns," it is not entitled to the benefits of the first-filed rule. *Oak Assocs., Ltd. v. Palmer*, No. 05-4210, 2006 WL 293385, at *4 (E.D. Pa. 2006). The Court declines to exercise its jurisdiction over this action and dismisses it without prejudice.

[2] At the June 22, 2015, oral argument, Plaintiff's counsel conceded that if the Court were to determine it is not the valid first-filed plaintiff, there would be no basis for issuing the permanent injunction it requests. The Court finds Plaintiff has not demonstrated it is the validly first-filed plaintiff; thus, it has not demonstrated success on the merits as is necessary to receive a permanent injunction. *See Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001) ("In deciding whether to grant a permanent injunction, the district court must consider whether . . . the moving party has shown actual success on the merits . . . ."). In addition, Plaintiff still has not demonstrated irreparable harm, as the Court articulated in its June 2, 2015, Order. The Court therefore denies Plaintiff's request for a permanent injunction.