UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MT. HAWLEY INSURANCE COMPANY,
an Illinois Corporation,

Plaintiff,

-against-

SPRING MOUNTAIN VINEYARD, INC,
A Delaware Corporation,

Defendant.

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Case No.: 1:22-cv-03191-GHW

Oral Argument Requested

SPRING MOUNTAIN VINEYARD, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, STAY THIS ACTION

Cohen Tauber Spievack & Wagner P.C.
420 Lexington Avenue, Suite 2400
New York, New York 10170
Tel.: (212) 586-5800

Counsel for Defendant Spring Mountain Vineyard, Inc.

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Spring Mountain Vineyard, Inc. ("SMV"), by its undersigned counsel, respectfully submits this memorandum of law in support of its motion to dismiss or, alternatively, stay this limited declaratory judgment action in favor of a first-filed, more comprehensive state court action pending in California captioned *Spring Mountain Vineyards, Inc. v. Landmark American Ins. Co., et. al*, Case No. 22CV000270 (Napa County, California, filed March 11, 2022) (the "California Action").

PRELIMINARY STATEMENT

This action (like the California Action) is an insurance coverage dispute arising from losses SMV sustained to its Napa Valley vineyard and winery from a wildfire on September 27, 2020 (the "Fire"). After SMV sued its excess carriers and others in California, plaintiff Mt. Hawley Insurance Company ("Mt. Hawley"), one of SMV's excess insurance carriers and a defendant in the California Action, brought this declaratory judgment action, presumably to secure some imagined litigation advantage.

Mt. Hawley's action—which is limited to a small subset of the overall coverage dispute involving a number of interlocking excess policies and parties—should be dismissed or stayed pursuant to the abstention doctrine articulated in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942) ("*Brillhart*"), as reaffirmed by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282, 287 (1995) ("*Wilton*"). Those cases established the federal district courts' broad power under the Declaratory Judgment Act to dismiss or stay declaratory judgment actions brought by insurers in favor of more comprehensive state actions filed by insureds. Courts in this district routinely abstain in favor of parallel state court actions, particularly when the state action is more comprehensive, involves more parties, and will necessarily turn on state—not federal—law. Such abstention is appropriate here to preserve judicial resources, to prevent duplicative,

piecemeal litigation, and to enable the California Court the opportunity to adjudicate the validity of a purported New York forum selection clause (which is the only conceivable basis for this Court's jurisdiction over a California property insurance dispute between SMV (a Delaware corporation with a principal place of business in St. Helena, California) and Mt. Hawley (an Illinois corporation with a principal place of business in Peoria, Illinois)).

Mt. Hawley has filed a motion to dismiss the California Action on jurisdictional grounds. SMV's opposition to that motion relies, in part, on the facts that Mt. Hawley did not *disclose* to SMV or its agent Arthur J. Gallagher & Co. ("AJG") that Mt. Hawley's policy purportedly contained a New York forum selection clause until *after* the Fire. Mt. Hawley cannot enforce a forum selection clause that was never agreed to by SMV. At a minimum, this action should be dismissed or stayed to allow the California Court the opportunity to rule on that motion. If the California Court determines that the purported forum selection clause cannot be enforced, the action will proceed there. If it grants Mt. Hawley's motion, then this action can resume on Mt. Hawley's only live claim—that SMV breached its duty to cooperate in Mt. Hawley's claims investigation.

For these reasons, as set forth more fully below, this Court should exercise its discretion by abstaining in favor of the California Action and dismiss or stay this case pending the resolution of the California Action.

RELEVANT FACTUAL BACKGROUND[1]

A. The Dispute and California Action

SMV owns and operates a winery in California's Napa Valley, for which it annually purchased approximately $36.6 million in open blanket property insurance coverage. (Cal. Compl. ¶¶ 32-34; Seavoy Cal. Decl. ¶¶ 6-10, Ex. 2.)[2]

On June 30, 2020, SMV authorized its insurance advisor and broker AJG to accept each of the property insurance coverage proposals submitted by the primary insurer, First Specialty Insurance Corporation ("First Specialty"), and each of the excess insurer defendants, including Mt. Hawley.[3] (Seavoy Cal. Decl. ¶¶ 4, 17, 28 n.12, Ex. 9.) Mt. Hawley's lead underwriter authorized Risksmith Insurance Services, Inc. ("Risksmith") to submit a quote proposal for Mt.

[1] The facts set forth herein are derived from the following: (i) Declaration of Mary Seavoy dated July 27, 2022 ("Seavoy NY Decl."); (ii) Declaration of Timquin Larsen dated July 20, 2022 ("Larsen NY Decl."); and (iii) Declaration of Jay Spievack dated July 27, 2022 ("Spievack Decl."). The Seavoy NY Declaration attaches and incorporates her California Declaration, dated July 1, 2022 ("Seavoy Cal. Decl.," Ex. A to the Seavoy NY Decl.). The Larsen NY Declaration attaches and incorporates his California Declaration, dated June 24, 2022 ("Larsen Cal. Decl.," Ex. B to the Larsen NY Decl.). The Complaint in the California Action ("Cal. Compl.") is attached at Exhibit 1 to the Seavoy Cal. Declaration.

[2] For many years prior to the relevant policy period (July 1, 2020-July 1, 2021), SMV secured property insurance through Allianz affiliates (collectively, "Allianz") until Allianz exited the wine-related business in 2020. (Cal. Compl. ¶¶ 12, 39, 42; Seavoy Cal. Decl. ¶¶ 6-11, Ex. 2.) Allianz's property insurance policies provided open blanket property coverage, *always* permitted suit in California, and *never* included a non-California forum selection clause. (Seavoy Cal. Decl. ¶¶ 8-10, 16, Exs.1-3.)

[3] In the California Action, the excess insurer defendants are Landmark American Insurance Company ("Landmark"), Kinsale Insurance Company ("Kinsale"), Mt. Hawley, Hallmark Specialty Insurance Company ("Hallmark Specialty"), Western World Insurance Company ("Western World") and AXIS Surplus Insurance Company ("AXIS") (collectively, the "Excess Insurer Defendants"). Mt. Hawley is the second-level excess carrier.

Hawley and Certain Underwriters of Lloyds of London ("Lloyds"), which SMV accepted on June 30, 2020.[4] (*Id.*; Spievack Decl. ¶ 6 and Exs. 26-27.)[5]

At the time that SMV authorized the binding of coverage, Dina Smith ("Smith") who served as a supervisor with AJG and was SMV's account manager (together with AJG, the "Broker Defendants") represented to SMV that—with the exception of four specific differences not relevant here—the policies contained the same blanket coverage, terms, and conditions as in its prior Allianz policies (none of which ever included a New York forum selection clause). (*See, e.g.*, Seavoy Cal. Decl. ¶¶ 11-17, Exs. 3-9.)

On September 27, 2020, the Fire caused significant damage to SMV's covered property. (Cal. Compl. ¶¶ 1, 64-65; Seavoy Cal. Decl. ¶ 21.) In or about late September, SMV gave claims notice to First Specialty and all of the Excess Insurer Defendants (including Mt. Hawley). (Cal. Compl. ¶ 125; Larsen Cal. Decl. ¶ 9, Exs. 12, 23.) SMV, however, did not receive the insurers' purported property policies until October 2, 2020, five days *after* the Fire. (Seavoy Cal. Decl. ¶¶ 21-22, Ex. 11; Seavoy NY Decl. ¶ 5.) AJG had not confirmed the accuracy of the policies when it sent them to SMV and, in fact, has *never* informed SMV that it completed its policy check process or that they accurately reflected the property policy coverage that SMV accepted on June 30, 2020. (Seavoy Cal Decl. ¶ 28, n.12; Larsen Cal. Decl. ¶¶ 6, 8, 19-20.)

When the policies were delivered on October 2, 2020, SMV's primary concern was securing advance insurance payments to keep its vineyard business operational and pay for its

[4] The dispute concerning the operative property insurance coverage is discussed below (*See* Section I.B, *infra*).

[5] It is common insurance industry practice for the lead underwriter—here, Mt. Hawley—to have authority to approve the binder and prospective policy terms for a carrier—here Lloyds—assuming part of the risk and obligations under the insurance contract.

catastrophic Fire-related losses. (Seavoy Cal. Decl. ¶¶ 23, 25, Ex. 12; Larsen Cal. Decl. ¶¶ 7, 9.) First Specialty did not dispute coverage and paid its $5 million limit to SMV. (Seavoy Cal. Decl. ¶ 27.) SMV then urged Landmark and Kinsale to make advance payments while the Excess Insurer Defendants continued to investigate SMV's losses. (*Id.*, ¶ 30; Larsen Cal. Decl. ¶ 10, n.5.) Landmark and Kinsale advanced more than $2.5 million to SMV. (Seavoy Cal. Decl. ¶¶ 32; Cal. Compl. ¶¶ 107-108.)

On September 29, 2021, the Excess Insurer Defendants accepted in part and denied in part coverage for SMV's Fire-related claims. (Seavoy Cal. Decl. ¶ 36, Ex.18.) From August 5, 2021, to date, Mt. Hawley has claimed that its "coverage investigation is ongoing" and has neither accepted nor denied coverage while it pursued its purported "claims investigation." (Seavoy Cal. Decl. ¶¶ 35, 36 n.14)[6]

On March 11, 2022, SMV filed the California Action against the Excess Insurer Defendants (including Mt. Hawley) and the Broker Defendants. (Seavoy Cal. Decl., Ex.1.) The California Action concerns excess insurance coverage for approximately $38.5 million in damages to SMV's St. Helena, California property caused by the Fire. (*See* Cal. Compl. ¶¶ 1, 66, 119.) There, SMV acknowledges a dispute about the operative excess insurance contracts, but alleges that, irrespective of which contract is the operative insurance policy, the Excess Insurer Defendants have breached their respective obligations to provide coverage to SMV. (*Id.* ¶¶ 10-16, 56-66, 77-91, 123-69.) SMV alleged that the Excess Insurer Defendants breached their

[6] Mt. Hawley's purported claims investigation (along with its refusal to issue a coverage determination), has been conducted entirely in bad faith, since Mt. Hawley made its *de facto* coverage determination no later than November 18, 2021. (*See* Seavoy Cal. Decl. ¶ 36, n. 14; Cal. Compl. ¶¶ 92-105, 120, 170-77.) The reason for this bad faith is clear: SMV's duty to cooperate with Mt. Hawley's claims investigation ceases when Mt. Hawley makes its coverage determination.

obligations to SMV because, even if the purported policies are operative (they are not) (i) their proffered interpretation of their own policy language and its application to SMV's covered property damage is incorrect and (ii) they have wrongfully refused to cover and pay SMV's covered damages. (*Id*., *e.g.*, ¶¶ 77-91, 123-153; Seavoy Cal. Decl. ¶ 37, Ex. 21 (pp. 3-5); Spievack Decl. ¶ 15.)

Alternatively, the Complaint alleges that, if the operative insurance contracts provide the blanket property coverage that Smith repeatedly represented that First Specialty and the Excess Insurer Defendants agreed to provide, then the Excess Insurer Defendants breached their operative contracts because they have refused to cover and pay SMV's damages to its covered property up to the approximately $35.6 million aggregate property policy program limit.[7] (Cal. Compl. ¶¶ 10-16, 56-66, 154-69.)[8] SMV also claims that the Excess Insurer Defendants have breached the implied covenant of good faith and fair dealing under California law and have negligently mispresented their applicable coverage. (*Id*. ¶¶ 92-122. 170-184; Seavoy Cal. Decl. ¶ 36, n.14; Spievack Decl. ¶ 6, Ex. 26-27.)

SMV further alleged in the California Action that the Broker Defendants are liable for negligence, negligent misrepresentation, and breach of fiduciary duty. (Cal. Compl. ¶¶ 11-17, 35-59, 69-70, 185-216.) The crux of those allegations are: (i) SMV hired the Broker Defendants as its insurance advisor and broker and exclusively relied on them for their expertise (Seavoy

[7] Blanket property coverage provides coverage for any loss to any covered property up to the aggregate policy limits, without regard to the specific covered property and the individual building or structure value listed on SMV's Statement of Values. (Cal. Compl. ¶ 12, n. 1.)

[8] The Broker Defendants did not provide SMV with the actual proposals but represented that the Excess Insurer Defendants' proposals provided blanket property insurance coverage. (Seavoy Cal. Decl. ¶¶ 12-17, 24, Exs. 3-9.) SMV's files did not contain any property insurance policy proposals for the policy period of 7/1/20-7/1/21 (the "Policy Period") received on or before June 30, 2020, and SMV continues to investigate whether the Excess Property Insurers promised to provide blanket property coverage that AJG represented they promised to provide to SMV (Spievack Decl. ¶ 6, n.1; Seavoy NY Decl. ¶ 5).

Cal. Decl. ¶¶ 3, 5-10, Ex. 2); (ii) SMV directed AJG to secure the same (if not better) blanket property coverage for the Policy Period that it had in force for at least the previous 15 years (*id.* ¶¶ 12-17, Exs. 3-9); (iii) in requesting SMV's authorization to bind coverage on June 30, 2020, Smith told SMV that each of the insurers' respective proposals collectively offered $35,565,435 in commercial blanket property insurance coverage that conformed in all material respects to the earlier Allianz property policies (*id.*, ¶¶ 14-17); and (iv) relying upon the Broker Defendants' representations, SMV accepted non-party First Specialty's and the Excess Insurer Defendants' respective proposals. (*id.*, ¶¶ 14-17, Ex. 9.)

Mt. Hawley filed the Complaint in this action on April 19, 2022 (ECF Dkt. No. 1) seeking declaratory relief that (i) SMV has not complied with its obligation to cooperate with Mt. Hawley's coverage investigation, (ii) the underlying first-layer excess coverage (provided by Landmark and Kinsale) have yet to be exhausted, thus Mt. Hawley is not yet obligated to provide coverage, and (iii) if and when the underlying first-layer excess coverage are exhausted, the terms of Mt. Hawley's policy bar or limit the amounts that SMV can recover.[9]

B. The Operative Forum Selection Clause Dispute in the California State Action

Mt. Hawley has moved to dismiss or stay the California Action on the grounds that (i) its purported policy contains a New York forum selection clause and/or (ii) the policy incorporates by reference a New York forum selection clause from the primary First Specialty policy.[10]

As SMV has demonstrated in the California Action, Mt' Hawley's motion fails for at least the following reasons:

[9] Since SMV agrees that the underlying first-layer coverage is not exhausted, a declaratory judgment action on points (ii) and (iii) is premature.

[10] The other Excess Insurer Defendants also moved to dismiss on jurisdictional grounds, relying on the New York forum selection clause in the primary policy (notwithstanding their own, superseding policy

First, the operative Mt. Hawley contract—based on AJG's representations to SMV (Seavoy Cal. Decl. ¶¶ 11-17, Exs. 3-9)—did not include a New York forum selection clause. Therefore, this insurance coverage dispute can only be litigated in California because SMV (and Mt. Hawley) never contracted to litigate in New York.[11]

Second, the New York forum selection clause in the Mt. Hawley policy—if that policy were the operative contract—(i) was not *disclosed* to SMV, let alone freely negotiated or accepted by SMV at the time of contracting (June 30, 2020) and (ii) is invalid as a result of overreaching or fraud because it was not added until well after the contract was executed and was not disclosed to SMV (or its agent AJG) until *after* the Fire (*i.e.*, post loss).[12]

The Mt. Hawley/Lloyds June 29 and 30, 2020, insurance policy proposals promised to include a "Service of Suit" clause in which Mt. Hawley/Lloyds would expressly consent to suit in any court of competent jurisdiction in the United States that SMV selects—in this case,

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language consenting to suit in California). The Broker Defendants have consented to the jurisdiction of the California court. (Spievack Decl. ¶ 13.) Therefore, the California Action will proceed, at the very least, against the Broker Defendants. The motions to dismiss have been fully briefed and the California Court will hear oral argument on August 4, 2022 (*Id.* ¶ 13, Exs. 40-41).

[11] As noted above, the Broker Defendants repeatedly affirmed that they had secured the same blanket coverage in all relevant respects as SMV's prior policies with Allianz, none of which contained a New York forum selection clause. Consequently, the California Court will, as a threshold matter, determine whether the operative policy that SMV agreed to on June 30, 2020, conformed with AJG's representations or whether the operative policy is (as Mt. Hawley contends) the policy that was provided after the Fire. SMV has not seen any pre-June 30 or June 30, 2020, insurance proposals in AJG's files, as AJG has only provided limited discovery to date (the balance of which are scheduled to be produced by mid-August). (*See, e.g.*, Larsen Cal. Decl. ¶¶ 13-17, Ex. 24.)

[12] *See, e.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13, 15 (1972) (forum selection clauses are given effect when they are "freely negotiated . . . unaffected by fraud, undue influence, or overweening bargaining power" and holding that forum selection clauses can be invalidated if incorporated into the contract as a result of fraud or overreaching); *MTS Logistics, Inc. v. Innovative Commodities Group, LLC*, 442 F. Supp. 3d 738, 752 (S.D.N.Y. 2020) (refusing to enforce forum selection clause where a copy of the contract containing such provision was not provided and thus was not reasonably communicated); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367-68 (E.D.N.Y. 2009), *aff'd*, 380 Fed. Appx. 22 (2d Cir. 2010) (declining to enforce forum selection clause where plaintiff had no notice of the website terms and conditions containing such clause).

California. (Spievack Decl. ¶ 6, Exs 26 (at MH000951-959), 27.) Because Lloyds' underwriters are United Kingdom syndicates that are not subject to the jurisdiction of any court in the United States of America, Lloyds *always*—absent an arbitration agreement—includes a standard ISO Service of Suit clause expressly consenting to suit in any court of competent jurisdiction in the United States selected by its United States-domiciled insureds. Indeed, Mt, Hawley's June 29 Binder Quote—like its other insurance binders discussed below—says its policy "**Wording**" will use "ISO forms" (Spievack Decl.¶ 6, Ex. 26 at MH000953.) Therefore, given that Mt. Hawley was the lead insurer for the second layer excess policy, there would be no reason to believe that Mt. Hawley's Service of Suit clause—based on its June 29 Binder Quote proposal—would not be exactly the same as Lloyds. It defies logic to believe that one policy would contain two competing forum selection clauses.

Moreover, Mt. Hawley's June 30, 2020, insurance binder quotation (the "June 30 Binder Quote") reiterated Mt. Hawley's earlier promise that the second layer excess policy would include (i) the standard Lloyd's "LMA5020 14/09/2005 Service of Suit (U.S.A.)" clause, and (ii) the language that stated that "in respect of coverage provided by Certain Underwriters at Lloyd's, contact for service of suit…for Insureds domiciled in California, Foley & Lardner LLP, 555 California Street, Suite 1700, San Francisco California 94101-1520, USA [and] in respect of coverage for Mt. Hawley, contact for service of suit: Craig W. Kliethermes, President, 9025 N. Lindbergh Drive, Peoria, Illinois" (Spievack Decl. ¶ 6 Ex. 27 at BR0000000011-12.)[13]

[13] SMV's authorization to bind coverage was specifically based on the June 30 Binder Quote. (Seavoy Cal. Decl. ¶ 17, Ex. 9 ("after careful consideration of [Mt. Hawley (Risksmith)/Lloyds] proposal dated June 30, 2020," SMV authorized AJG to accept Mt. Hawley's purported excess policy and "Bind 3rd $10,000,000 layer with Risksmith/Lloyds" on June 30, 2020).

While Mt. Hawley/Lloyds' revised insurance binder dated July 2, 2020 (the "July 2 Binder"), sent to AJG on July 7, 2020, subsequently removed the direct reference to Lloyd's "Service of Suit (U.S.A)" clause, it nonetheless included language that—like the June 30 Binder Quote—stated: "in respect of coverage provided by Certain Underwriters at Lloyd's, contact for service of suit;…for Insureds domiciled in California, Foley & Lardner LLP, 555 California Street, Suite 1700, San Francisco California 94101-1520, USA [and] in respect of coverage for Mt. Hawley, contact for service of suit: Craig W. Kliethermes, President, 9025 N. Lindbergh Drive, Peoria, Illinois" (*see* Spievack Decl. ¶ 7, Ex. 28 at GS 01997-1998; *see also* Seavoy Cal. Decl. ¶ 18, Ex. 10.) Anyone reviewing the July 2 Binder would reasonably conclude that the policy would include the ISO "Service of Suit" clause wherein Mt. Hawley and Lloyds would consent to be sued in any court of competent jurisdiction in the United States that SMV selected.[14]

Third, Mt. Hawley's binders do not provide any notice that its policy would incorporate by reference all of the terms of the First Specialty primary policy (including the New York forum selection clause therein). Rather, the binders note that its "share of insurance" will be "limited to 100% of the Limits/Sublimits/Aggregate Limits in the [First Specialty primary policy] as further defined/described therein but also below." (Spievack Decl. ¶ 7, Ex. 28 at GS01996; ¶ 6, Exs. 26

[14] None of the binders provided by Mt. Hawley explicitly or implicitly refer to or provide notice of a New York forum selection clause. None of the binders mention "New York" at all and, instead, allude to standard-issue service of suit provisions that would allow SMV to bring suit in a jurisdiction of its choosing. Consequently, it was impossible to deduce from the July 2 Binder's reference to a "**LEGAL ACTION CONDITION ENDORSEMENT**" that the policy would contain a New York forum selection clause. Mt. Hawley's binders could have referenced—*but did not*—a "***NEW YORK* LEGAL ACTION CONDITION ENDORSEMENT**." As written in the binders, the "**LEGAL ACTION CONDITION ENDORSEMENT**" could have referred to (a) a California forum selection clause, (b) a forum selection clause permitting the insured to bring suit in any court of competent jurisdiction, or (c) a policy provision that contained no forum selection clause whatsoever.

(at MH000953), 27.) Consequently, the contention that SMV was aware of and agreed to Mt. Hawley's incorporation of any forum selection clause in the primary policy is without basis.

In fact, none of the Excess Insurer Defendants' policy binders indicate that their respective policies would include or incorporate First Specialty's New York forum selection clause. (Spievack Decl. ¶¶ 8-12, Exs. 30, 32, 34, 36, 38). To the contrary, all of their binders and policy provisions or endorsements that were subsequently included in their Excess Policies (i) expressly consent to the jurisdiction of California courts for coverage disputes and (ii) explicitly state their respective "Service of Suit" clauses supersede and replace First Specialty's New York forum selection clause. (Spievack Decl. Exs. 30-39, 41 at pp. 1-2, 4-9.) Therefore, based on what was actually disclosed, (a) the Excess insurer Defendants did not mention New York or the incorporation of First Specialty's New York forum selection clause and (b) the Excess Insurer Defendants consented to suit in California and explicitly stated that they would ***not*** follow First Specialty's New York forum selection clause. (Spievack Decl. Exs. 30-39, 41).[15]

Accordingly, it was not expected, anticipated, or anywhere disclosed that Mt. Hawley would add its own New York forum selection clause to its policy *after* the applicable insurance contract was fully executed and *only* disclose it to SMV post-loss.[16]

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[15] Given that the Excess Insurer Defendants specifically consented to SMV's suit in California, it is highly likely that the California Court will retain jurisdiction over at least 8 of the 9 defendants sued in the California Action.

[16] Mt. Hawley has claimed that (i) Brown & Riding and Risksmith were SMV's agent and (ii) SMV "ratified" the purported New York forum selection and choice of law provisions in correspondence following the Fire. Those claims are erroneous because: (i) those two companies were not SMV's agent and SMV, in fact, did not even know them, let alone have any relationship with them (Seavoy NY Decl. ¶ 5) and (ii) subject to its reservation of all rights, SMV's counsel merely stated, in an effort to secure coverage for SMV's substantial losses, that even under Mt. Hawley's proffered interpretation of the policy it contended was operative, Mt. Hawley's refusal to confirm coverage was contrary to the terms of that policy. (*See* Spievack Decl. ¶¶ 14-15.)

Finally, what is truly astonishing about Mt. Hawley's purported excess policy is that—unlike all the other Excess Insurers Defendants' binders and excess policies—the forms identified in Mt. Hawley's binder *before the Fire* bear *no* resemblance to the forms in the policy produced to SMV *after the Fire*.[17] (*Compare* Spievack Decl. ¶ 7, Ex. 28 *with* Ex. 29). Mt. Hawley's insurance binder states its "**wording**" will be "ISO forms" cited (*id*., Ex. 28 at GS01996 (emphasis in original)), but its purported post-Fire excess policy uses "CPR" forms cited nowhere in its binder. (Ex. 29 at MTD 0005-032; *Compare* Ex. 28 at GS01997 *with* Ex. 29 at MTD 0008.) For example, Mt. Hawley's binder cites "Excess Physical Damage Form IP0 348B 06 96" (GS01997), but the post-Fire policy Mt. Hawley produced includes an entirely different form, "Excess Property Coverage (Following Form) CPR 2002 (02/14)" (*see* MTD0008, MTD 0009-12), which is ***not*** found or referenced in Mt. Hawley's June 29 and June 30 Binder Quotes and its July 2 Binder.[18]

Whether Mt. Hawley disclosed its inclusion of New York forum selection clause in its policy, whether SMV agreed to such provision, and whether that clause is invalid due to overreaching or fraud are all questions currently pending before the California Court in connection with Mt. Hawley's motion to dismiss.[19]

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[17] The binder forms referenced in the Excess Insurer Defendants' binders—unlike Mt. Hawley's—appear in their respective excess policies, including provisions consenting to jurisdiction in California. (*Compare* Spievack Decl. Ex. 30 *with* Ex. 31; Ex. 32 *with* Ex. 33; Ex. 34 *with* Ex. 35; Ex. 36 *with* Ex. 37; and Ex. 38 *with* Ex. 439.)

[18] Mt. Hawley also does not include the following forms referenced in its binder in its purported policy: (i) "IPO 349A 07 96 Business interruption (if Property Insured includes Business Interruption Values);" (ii) "lL P 00101 04 OFAC Notice;" (iii) "CPR 2280 (10/13) Priority of Payments;" (iv) "CPR 2295 (02/16) Windstorm or Hail loss Reporting limitation Addendum Minimum Earned Premium;" and (v) "Claims Notice 02 2D Claims Notification Notice." (*Compare* Ex. 28 at GS01997 *with* Ex. 29 at MTD 0008.)

[19] As set forth in its briefing in California, SMV also contends that, even if Mt. Hawley's policy contains an operative forum selection clause, it should not be enforced because this coverage dispute (concerning real property located in Napa Valley, California) has no connection to New York. No party (including Mt. Hawley) is a New York citizen (Cal. Compl. ¶¶ 18-26) and there are no *non-counsel* witnesses (and

Against this backdrop, this Court should dismiss or stay Mt. Hawley's declaratory judgment action in favor of the more-comprehensive, first-filed California Action.

ARGUMENT

A. This Court Should Exercise its Broad Discretion to Dismiss or Stay This Action

The Declaratory Judgment Act (28 U.S.C. § 2201) permits district courts "to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear." *Dow Jones & Co., Inc. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003). The Supreme Court has interpreted the statute as "confer[ring] on federal courts *unique and substantial discretion* in deciding whether to declare the rights of litigants." *Wilton*, 515 U.S. at 282, 286 (emphasis added). Abstention is appropriate "particularly when there is a pending proceeding in another court, state or federal, that will resolve the controversies between the parties." *N. Am. Airlines, Inc. v. Int'l Bhd. of Teamsters, AFL-CIO*, No. 04 CIV. 9949 (KMK), 2005 WL 646350, at *16 (S.D.N.Y. Mar. 21, 2005) (quotations and citation omitted); *see Brillhart*, 316 U.S. at 495 ("Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."). [20]

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certainly no third-party witnesses) that can be compelled to provide live trial testimony in New York. (Seavoy Cal. Decl. ¶¶ 42, 51; Larsen Cal. Decl. ¶¶ 28-29; Seavoy NY Decl. ¶ 4, Ex. 25.) SMV is a California resident policyholder, and the property is in Napa County. (Seavoy Cal. Decl. ¶¶ 7, 41; Cal. Compl. ¶¶ 1, 32-33, 64-65.) Defendants AJG and Smith have submitted to this Court's jurisdiction and AJG's main witnesses are located in California. (Seavoy Cal. Decl. ¶ 46; Larsen Cal. Decl. ¶ 26; Spievack Decl. ¶ 13.) Most of the key party and almost all third-party witnesses are located in California or willing (for SMV's Illinois-based witnesses) to provide live testimony in a California trial. (Seavoy Cal. Decl. ¶¶ 41, 43-50; Seavoy NY Decl. ¶¶ 3-4, Ex. 25; Larsen Cal. Decl. ¶¶ 23-27.)

[20] By its own terms, the Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (emphasis added.) Therefore, courts have repeatedly held that "unlike in most actions where a district court has a 'virtually unflagging obligation' to exercise its jurisdiction, *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976), district courts 'possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfied subject matter jurisdictional prerequisites.'" *Travelers Indem. Co. v. Philips Elecs. N.A. Corp.*, 02 CIV.

Thus, district courts have broad discretion to dismiss or stay a federal declaratory judgment action in favor of a more comprehensive state court action. *See Brillhart*, 316 U.S.at 495 ; *Wilton*, 515 U.S. at 282, 287 (1995) (unlike the more limited abstention doctrine articulated in *Colorado River* and *Moses Cone Memorial Hospital v. Mercury Constr. Co.*, 460 U.S. 1 (1983), "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites."); *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Turbi de Angustia*, 05 CIV. 2068 (DLC), 2005 WL 2044930, at *2-3, 5 (S.D.N.Y. Aug. 23, 2005) (granting a stay where, as here, the state court will decide, in the first instance, whether to enforce a New York forum selection clause and dismiss the state court action).

Courts in this Circuit repeatedly have stayed an insurer's federal declaratory judgment action where, as here, the state court will decide whether to enforce a mandatory forum selection clause and dismiss the state court action. *See XL Ins. Am., Inc. v. DiamondRock Hosp. Co.*, 414 F. Supp. 3d 605, 610–11 (S.D.N.Y. 2019) (Nathan, J.) (staying district court action pursuant to the *Wilton* abstention doctrine despite the presence of a New York forum selection clause); *Natl. Union Fire Ins. Co. of Pittsburgh, PA*, *supra*, at *2-5 (rejecting plaintiff's attempted "race to *res judicata*," and staying the action while the Texas state court considered National Union's motion to dismiss or stay); *Lumbermens Mut. Casualty Co. v. Conn. Bank & Trust Co.*, 806 F.2d 411, 415 (2d Cir.1986), *overruled on other grounds by* 515 U.S. 277 (1995) (affirming district court's stay of insurer's declaratory judgment action in favor of more comprehensive state court action);

9800 (WHP), 2004 WL 193564, at *1 (S.D.N.Y. Feb. 3, 2004) (quoting *Wilton*, 515 U.S. at 282.); *Wilmington Tr., Natl. Assn. v. Est. of McClendon*, 287 F. Supp. 3d 353, 364 (S.D.N.Y. 2018) ("when there are pendant parallel state court proceedings, district courts possess discretion in determining whether and when to entertain an action under the DJA, even when the suit otherwise satisfies subject matter jurisdictional prerequisites") (quotations and citation omitted). Absent Mt. Hawley's purported New York forum selection clause, this case would ***not*** satisfy the jurisdiction prerequisites.

Comedy Partners v. St. Players Holding Corp., 34 F. Supp. 2d 194, 197 (S.D.N.Y. 1999) (dismissing in favor of a first-filed California suit, and noting that "even if [the parties' New York forum selection] clause were mandatory . . .[s]ince the California court has refused to stay or dismiss the parallel breach of contract action, allowing the instant suit to go forward would both waste judicial resources and create a risk of inconsistent adjudication").

Moreover, the Second Circuit has noted, "the classic example [of abstention] arises where all the potentially liable defendants are parties in one lawsuit, but in the other lawsuit, one defendant seeks a declaration of nonliability, and the other potentially liable defendants are not parties." *Woodford v. Cmty. Action Agency of Greene Cnty., Inc.*, 239 F.3d 517, 524 (2d Cir. 2001).

Federal courts routinely abstain under *Brillhart*/*Wilton,* "where—as here—the suit is a declaratory judgment action brought by an insurer and "only present[s] issues of state, but not federal, law." *See, e.g.*, *Ace Am. Ins. Co. v. Graftech Intern. Ltd.*, 12-CV-6355 (RA), 2014 WL 2884681, at *4 (S.D.N.Y. June 24, 2014). ("[C]ourts in this district have routinely abstained from deciding declaratory judgment actions brought by insurers in favor of parallel state court actions involving the same parties and policies"); *Travelers Indem. Co.*, 2004 WL 193564, at *2 ("[D]istrict courts routinely invoke the doctrine of abstention in insurance coverage actions, which necessarily turn on issues of state law" because "while the parties may disagree as to which state's law will ultimately apply, it is clear that state law, not federal law, will govern the resolution of the underlying claims in this insurance coverage action."); *TIG Ins. Co. v. Fairchild Corp.*, 07 CIV. 8250 (JGK), 2008 WL 2198087, at *3 (S.D.N.Y. May 27, 2008) ("Insurance disputes, such as the present case, generally present strong reasons for a federal court to abstain

because such claims are intimately tied to matters of state law which are being litigated in state court.").[21]

In *XL Ins. Am., Inc.*, 414 F. Supp. 3d at 610-11, then-District Judge Nathan noted that a federal district court need only consider the following factors in determining whether to abstain under *Brillhart*/*Wilton*: "(1) the scope of the pending state proceeding and the nature of the defenses available there; (2) whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding; (3) whether the necessary parties have been joined; and (4) whether such parties are amenable to process in that proceeding... (5) avoiding duplicative proceedings; ... (6) avoiding forum shopping...".[22] *See also Ace Am. Ins. Co.*, 2014 WL 2884681, at *4 (abstaining where, as here, "the scope of the pending state court proceeding, the nature of the defenses available there, and the ability of that proceeding to adjudicate the claims of all

[21] Numerous federal courts outside this Circuit also have abstained and stayed or dismissed an insurer's declaratory judgment action during the pendency of a state court insurance coverage action involving the same parties. *See, e.g.*, *Nautilus Ins. Co. v. Kringlen*, CIV-11-132-D, 2011 WL 5326260, at *4 (W.D. Okla. Nov. 3, 2011) (staying action in favor of earlier-filed state court action involving the same parties and the interpretation of the same insurance policy); *Allied World Assurance Co. (U.S.) Inc. v. Sentinel Offender Services, LLC*, SACV 13-00889-CJC (RNBX), 2013 WL 12131277, at *3 (C.D. Cal. Nov. 20, 2013) (staying action under *Brillhart* and noting that "deciding Allied's declaratory judgment action would require factual determinations that substantially overlap with the Georgia Litigation. This would be not only wasteful and inefficient, but also substantially prejudicial to" the defendant).

[22] As Judge Nathan also observed, courts consider other factors derived from the *Colorado River* abstention doctrine—(i) the relative convenience of the fora; (ii) the order of filing; and (iii) choice of law—but "the validity of these last factors is on uncertain ground" given that "*Wilton* held that the *Colorado River* test does not apply to *Brillhart* abstention." 414 F. Supp. 3d at 610–11; *see also Wilton v. Seven Falls Co.*, 515 U.S. at 286 ("Neither *Colorado River,* which upheld the dismissal of federal proceedings, nor *Moses H. Cone,* which did not, dealt with actions brought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) . . . Distinct features of the Declaratory Judgment Act, we believe, justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the 'exceptional circumstances' test of *Colorado River* and *Moses H. Cone.* No subsequent case, in our view, has called into question the application of the *Brillhart* standard to the *Brillhart* facts."). Certainly, the relative convenience of the fora (*see* n.19, pp. 12-13, *infra*) and the fact that the California Action was first-filed favor abstention here.

parties in interest weigh in favor of abstention.")[23]; *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Warrantech Corp.,* 00 CIV. 5007 (NRB), 2001 WL 194903, at *3 (S.D.N.Y. Feb. 27, 2001) (abstaining where, as here, "[a]ll of the issues presented in this suit are either already asserted in the [state court] action or are readily assertable as defenses to the third party claims and/or counterclaims in that suit....").

At a minimum, this Court should stay this action until the California court has ruled on Mt. Hawley's motion to dismiss it from the California Action on jurisdictional grounds, as there is no doubt that the California Action satisfies the factors for abstention cited by Judge Nathan. Indeed, this declaratory judgment action is the classic example for abstention. *See, e.g.*, *Woodford*, 239 F.3d at 524; *XL Ins. Am., Inc.*, 414 F. Supp. 3d at 610–11.

The California Action raises all the issues Mt. Hawley seeks to bring before this Court, including (i) the operative Mt. Hawley insurance contract; (ii) whether Mt. Hawley's purported New York forum selection clause is enforceable and/or valid; (iii) whether SMV's purported breach of its duty to cooperate with Mt. Hawley's alleged claim investigation excuses its obligation to cover SMV's losses; and (iv) any other coverage defense that Mt. Hawley can assert. (*See, e.g.*, Cal. Compl. ¶¶ 1-216; Spievack Decl. ¶¶ 11-15, Exs.41-42.) It cannot be disputed that the California Action is far more comprehensive and encompasses *all* of the Excess Insurer Defendants and SMV's insurance advisor and broker, at least some of whom are likely

[23] In *Ace Am. Ins. Co.*, 2014 WL 2884681, at *4, the district court abstained, noting that joining the other parties in the insurer's federal declaratory judgment action would destroy diversity jurisdiction and require the case to be remanded to state court. Assuming that AJG and Smith could be joined in this action, it would destroy diversity because SMV and AJG are Delaware Corporations and SMV and Smith are California residents (Cal. Compl. ¶¶ 18, 25-26.) On the other hand, if AJG and Smith cannot be joined here—along with other parties—then the parties face duplicative discovery and possible inconsistent rulings if both actions proceed. Indeed, the parties already are serving duplicative document requests. (Spievack Decl. ¶ 6, n.1.)

not subject to this Court's jurisdiction,[24] and all of Mt. Hawley's defenses (or counterclaims) can be asserted there, including Mt. Hawley's claim that its obligations under the policy are excused because SMV failed to cooperate in its claim investigation.

Nor can it be disputed that, given the interlocking excess policies, and that Mt. Hawley's coverage obligations are not triggered until the exhaustion of the first-layer excess policies (Landmark and Kinsale), the claims cannot be fully resolved in the absence of the other Excess Insurer Defendants. *See, e.g.*, *Ace Am. Ins. Co.*, 2014 WL 2884681, at *4 ("The scope of the pending state court proceeding, the nature of the defenses available there, and the ability of that proceeding to adjudicate the claims of all parties in interest weigh in favor of abstention."). By contrast, this declaratory judgment action is strictly limited to coverage issues between SMV and its second-level excess insurer, Mt. Hawley, which necessarily excludes other real parties to this coverage dispute.

Moreover, it is clear that abstention would avoid piecemeal, duplicative litigation; all of the issues and discovery will be the same in both the New York and California Actions. If conducted separately, the witnesses will be forced to appear twice, and the parties will be forced to produce documents twice (as the non-parties to this proceeding will be served with subpoenas). *See, e.g.*, *Travelers Prop. Cas. Co. of Am. v. N.Y. Radiation Therapy Mgt. Servs., Inc.*, 09 CIV. 694 (NRB), 2009 WL 2850691, at *2 (S.D.N.Y. Aug. 31, 2009) (granting motion for abstention in part because "judicial efficiency is not well-served by permitting parallel litigations here"). But beyond the waste of judicial resources represented by virtually identical

[24] This Court would have no jurisdiction over the Broker Defendants, as they have no connection to this forum, none of the relevant facts concerning SMV's claims against the Broker Defendants took place in or relate to New York, and there is no agreement between SMV and the Broker Defendants containing a New York forum selection clause. There is likewise no basis for jurisdiction over the other Excess Insurer Defendants in the absence of an enforceable forum selection clause.

proceedings playing out in two different fora, there is a significant risk of inconsistent judgments, especially considering the multiple layers of excess coverage at play. For example, it is easy to imagine a hypothetical scenario where this Court ultimately determines that Mt. Hawley's coverage obligations have been triggered but the California court—in determining SMV's claims against the excess carriers standing in line behind Mt. Hawley (*i.e.*, Hallmark, Western World, and AXIS)—holds that Mt. Hawley's obligations have yet to kick in (and thereby denies SMV's claims against those other excess carriers). Such risk of inconsistent outcomes for the coverage claims against SMV's excess carriers militates strongly in favor of dismissal or stay of this action under *Brillhart*/*Wilton*.

Consequently, at least the following four factors identified by Judge Nathan strongly militate in favor of abstention: (i) the more comprehensive nature of the California Action, (ii) the California Action can satisfactorily adjudicate the claims before this court, as well as all other claims and defenses at issue in this dispute, (iii) only the California Action can join all the necessary parties, and (iv) abstention in favor of the California Action will avoid duplicative litigation that wastes judicial resources.[25] *See, e.g.*, *XL Ins. Am., Inc.*, 414 F. Supp. 3d at 610-11; *Ace Am. Ins. Co.*, 2014 WL 2884681, at *4; *Natl. Union Fire Ins. Co. of Pittsburgh, PA*,, 2005 WL 2044930, at *4–5; *Travelers Prop. Cas. Co. of Am.*, 2009 WL 2850691, at *2; *Travelers Indem. Co.*, 2004 WL 193564, at *2. Because the circumstances here clearly weigh in favor of abstention, the Court should exercise its discretion and dismiss or stay this action in favor of the California Action.

[25] The forum-shopping factor is neutral; SMV brought suit in the jurisdiction where the real property is located, whereas Mt. Hawley brought suit in the jurisdiction where it (erroneously) contends the parties contracted to resolve disputes.

CONCLUSION

For the foregoing reasons, SMV's motion to dismiss or stay this action in favor of the first-filed California Action should be granted in its entirety, together with such other and further relief as the Court may deem just and proper.

Dated: July 28, 2022

COHEN TAUBER SPIEVACK & WAGNER P.C.
Counsel for Defendant Spring Mountain Vineyards, Inc.

By: /s/ Jay B. Spievack
Jay B. Spievack
Jackson S. Davis
420 Lexington Avenue, Suite 2400
New York, New York 10170
Tel.: (212) 586-5800
jspievack@ctswlaw.com
jdavis@ctswlaw.com