UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SEATON INSURANCE COMPANY (f/k/a UNIGARD MUTUAL INSURANCE COMPANY) and STONEWALL INSURANCE COMPANY, Plaintiffs, v. CLEARWATER INSURANCE COMPANY (f/k/a SKANDIA AMERICA REINSURANCE CORPORATION), Defendant.	Civil Action No.: 09-516

RESPONSE OF PLAINTIFFS SEATON INSURANCE COMPANY AND STONEWALL INSURANCE COMPANY TO DEFENDANT'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to Fed.R.Civ.P. 72 and LR Cv 72(d), Plaintiffs Seaton Insurance Company ("Seaton") and Stonewall Insurance Company ("Stonewall", and together with Seaton, "Plaintiffs") submit this Response to the "Objection to Report and Recommendation" filed by Clearwater Insurance Company ("Clearwater"), on February 18, 2010 [PACER No. 19]. As set forth below, and as originally demonstrated in Plaintiffs' Memorandum of Law in Opposition to Clearwater's Motion to Dismiss or Stay [PACER No. 12], Magistrate Judge Lincoln D. Almond correctly held that Clearwater's efforts to avoid having this case litigated here should be rejected.[1] The Magistrate Judge did so for the compelling reason that the competing action commenced by Clearwater ***has been stayed*** and the Connecticut state court judge expressly ruled that this Court is a ***"better forum"*** for the resolution of this dispute. [Magistrate's Order at 5;

[1] The parties appeared for oral argument before Magistrate Judge Almond on February 3, 2010. A copy of the transcript of the hearing is attached hereto as Exhibit 1.

PACER No. 18]. There is no legal basis for the Court to reach a different conclusion. Clearwater's Objections to the Magistrate's Order should be denied and the case should proceed.

In a thorough opinion which demonstrates that he considered all of the relevant facts and legal arguments, Magistrate Judge Almond concluded that this action must be allowed to proceed as Clearwater failed to establish that there was any basis to invoke the abstention principles set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Clearwater has never challenged that the Court has jurisdiction over Plaintiffs' claims. Clearwater's contention that this case should be dismissed in favor of a far less comprehensive action filed in Connecticut state court that ***has already been stayed*** flies in the face of this Court's "virtually unflagging obligation" to exercise its properly invoked jurisdiction. Moreover, under *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), an action at law for damages can only be stayed in favor of state proceedings; it cannot be dismissed. At its core, the action filed by Seaton and Stonewall is one for breach of contract to recover ***more than $500,000*** that is owed to them under the reinsurance contracts at issue. Dismissal of this action is directly contrary to *Quackenbush*.

Clearwater's position is made even more untenable by the fact that Clearwater is asking the Court to dismiss this case in favor a case that has been stayed, thereby effectively depriving Plaintiffs of any forum at all. Clearwater's Objection misleadingly suggests that it was only seeking a stay of this case. To the contrary, at the hearing held on February 3, 2010, Clearwater ***withdrew*** its request for a stay and stated that the ***only*** remedy that it was seeking was outright dismissal. [2/3/10 Tr. at 4-5, 22-23; Ex. 1]. In effect, such an action by this Court would prevent Seaton and Stonewall from ever litigating their claims. There is no authority that would support granting such an extraordinary (and entirely illogical) request.

Clearwater fundamentally mischaracterizes the nature of this action in an attempt to have it dismissed. Clearwater erroneously asserts that this action is predominantly a declaratory judgment action to which the "more forgiving, discretionary standard" for abstention articulated in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) applies. To the contrary, the primary relief sought by Seaton and Stonewall is ***money damages in excess of $535,000*** for Clearwater's breach of the express terms of thirteen reinsurance contracts. The fact that Seaton and Stonewall also request a declaratory judgment with respect to additional losses that may come due and be presented for payment to Clearwater under the subject reinsurance contracts does not transform the fundamental nature of this case. *Colorado River* and *Quackenbush* control and preclude the Court from dismissing this action in favor of a case that has been stayed. There is no practical reason that would support a stay or dismissal of this action as it would deprive Seaton and Stonewall of any forum to recover the damages caused by Clearwater's breach of thirteen reinsurance contracts. The Magistrate Judge's Report and Recommendation should be affirmed.

BACKGROUND

This comprehensive action for breach of contract to obtain sums that are owed by Clearwater to Seaton and Stonewall under the terms of numerous facultative reinsurance contracts was commenced on October 26, 2009. Clearwater owes Seaton and Stonewall in excess of $535,000 for losses that Seaton and Stonewall have paid on behalf of their various policyholders. Despite repeated requests by Seaton and Stonewall, Clearwater has failed to make the payments required by the reinsurance contracts. As the Magistrate Judge determined, allowing this action to proceed is consistent with this Court's exercise of its properly invoked jurisdiction and will provide a comprehensive resolution of the dispute.

A. The Claims at Issue

Seaton and Stonewall seek to recover amounts that are owed by Clearwater under the terms of thirteen separate facultative reinsurance contracts. Reinsurance is a means by which insurance companies insure themselves against risks that they may be obligated to pay to their policyholders under insurance policies. Reinsurance contracts are regarded as an honorable engagement and a reinsurer owes a duty of "utmost good faith" to its ceding company. *See Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 43 (1st Cir. 2000). "Utmost good faith...requires a reinsurer to indemnify its cedent for losses that are even arguably within the scope of the coverage reinsured, and not to refuse to pay merely because there may be another reasonable interpretation of the parties' obligations under which the reinsurer could avoid payment." *Id., quoting United Fire & Cas. Co. v. Arkwright Mut. Ins. Co.*, 53 F. Supp. 2d 632, 642 (S.D.N.Y. 1999). Clearwater issued four facultative reinsurance contracts reinsuring certain excess insurance policies issued by Seaton and nine facultative reinsurance contracts reinsuring certain excess insurance policies issued by Stonewall (collectively, the "Reinsurance Contracts"). [*See* Complaint, Exs. A-M].[2]

Seaton's claims under the Reinsurance Contracts arise out of excess and umbrella liability policies that it issued to Champion International Corporation ("Champion"); Studebaker-Worthington, Inc. ("Studebaker"); Union Carbide Corporation ("Union Carbide"); and Westinghouse Electric Company ("Westinghouse"). Champion, Studebaker, Union Carbide and Westinghouse have each been sued by individuals who claim to have suffered bodily injury as

[2] The reinsurance contracts that are the subject of this case were issued to Seaton and Stonewall by Skandia America Reinsurance Corporation ("Skandia"). At the time the contracts were bound, Skandia was based in New York City. Accordingly, the only connection between this dispute and Connecticut (where Clearwater filed its competing action) is the fact that many years after the contracts were issued Clearwater became the successor to Skandia and its office is presently located in Connecticut.

the result of exposure to asbestos or asbestos-containing products or other substances. Seaton has participated in funding the defense, settlement or other resolution of these claims under its policies. Seaton has paid more than $141,000 with respect to these claims which it seeks to recover under the Reinsurance Contracts.

Similarly, Stonewall's claims arise out of excess and umbrella liability policies that it issued to the Atchison, Topeka and Santa Fe Railroad Company ("Atchison Topeka"); Dynalectron Corporation ("Dynalectron"); Hughes Aircraft Company ("Hughes Aircraft"); Illinois Central Industries, Inc. ("ICI"); Kraftco Corporation ("Kraftco"); Menasha Corporation ("Menasha"); Oscar Meyer & Co., Inc. ("Oscar Meyer"); Studebaker-Worthington ("Studebaker"); and Vulcan Materials Company ("Vulcan"). Atchison Topeka, Dynalectron, Hughes Aircraft, ICI and Studebaker have been sued by individuals who claim to have suffered bodily injury as the result of exposure to asbestos or asbestos-containing products or other substances. In addition, Kraftco, Menasha, Oscar Meyer and Vulcan are the subject of legal proceedings brought by various governmental agencies which seek remediation costs resulting from pollution or contamination of various sites. Stonewall has paid more than $394,000 with respect to these claims which it seeks to recover under the Reinsurance Contracts.

B. Seaton and Stonewall's Comprehensive Action

As set forth above, Seaton and Stonewall have collectively ceded more than $535,000 in losses relating to the underlying claims identified above. Clearwater has failed to make timely payment to Stonewall and Seaton under the terms of the Reinsurance Contracts. In most instances, Clearwater has not provided any substantive explanation for its failure to make such payments. The action commenced by Seaton and Stonewall is comprehensive and includes claims for breach of contract with respect to all accounts on which Clearwater has failed to make

payments. To the extent that Seaton and Stonewall will continue to make additional payments to, or on behalf of, their policyholders with respect to the underlying claims, Seaton and Stonewall also seek a declaration of the parties' respective rights and obligations under the Reinsurance Contracts.

C. The Fragmented Connecticut Action

In stark contrast to the global suit for breach of contract commenced by Seaton and Stonewall, in May 2009 Clearwater filed a narrow, very limited declaratory judgment action against Seaton and Stonewall in the Superior Court in Stamford, Connecticut, Docket No. FST-CV-09-4016468-S (the "Connecticut Action"). The Connecticut Action concerns the parties' respective rights and obligations under ***only two of the thirteen facultative reinsurance contracts that are at issue in this case***. Specifically, Clearwater sought a declaration of rights only with respect to the Clearwater contracts reinsuring the excess policies issued to Studebaker by Seaton and Stonewall. Clearwater requested the limited remedy of a declaratory judgment that it is not obligated to reimburse Seaton and Stonewall for some unspecified portion of the amounts that Seaton and Stonewall have paid on behalf of Studebaker. These claims are only a portion of the overall dispute between Plaintiffs and Clearwater.

Of critical importance to the issue before the Court is the fact that the Connecticut Superior Court has already ruled that the Connecticut Action commenced by Clearwater should be stayed in favor of this comprehensive Rhode Island federal court action. [*See* Ex. 2 attached hereto]. The Order could not be clearer. Having been presented with all of the same arguments that Clearwater has made in this action, the Connecticut court determined on January 20, 2010

that this Court is the "better forum" to resolve this reinsurance dispute. [*See* Ex. 2].[3] The Magistrate Judge correctly relied upon this Order in refusing Clearwater's request to dismiss the action.

Prior to the issuance of the Order staying the Connecticut Action, it had not progressed in any meaningful way. No discovery requests had been propounded; no depositions had been scheduled or even discussed; and no documents had been exchanged. Clearwater did absolutely nothing to advance the Connecticut Action.[4] After this action was filed, Clearwater did not indicate that it wanted to advance the Connecticut Action or that it contested proceeding with this comprehensive case in Rhode Island. Accordingly, Seaton and Stonewall filed a Motion to Stay or Dismiss the Connecticut Action in favor of this case after it became evident that Clearwater was not going to advise them of its position on whether it planned to contest this Court's exercise of jurisdiction. [Ex. C to Harding Aff.; PACER No. 13]. Given the complete inaction by Clearwater in moving the case forward, the Connecticut Action appears to have been nothing more than a tactical maneuver by Clearwater to justify its failure to make timely payments under the Reinsurance Contracts, rather than being a good faith effort to promptly resolve the dispute. There is no reason for this Court to defer to the fragmented Connecticut Action which, in any event, is no longer active.

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[3] Throughout these proceedings, Clearwater has fallen back on repeating the mantra of "forum shopping." The fact is that Seaton and Stonewall are the logical plaintiffs in this matter as they are the ones who are owed money based upon Clearwater's breach of contract. As Seaton and Stonewall made clear at the hearing on February 3, 2010, Seaton and Stonewall made substantial efforts to resolve the claims at issue without litigation during the period before they filed this action. [2/3/10 Tr. at 14-15; Ex. 1].

[4] Contrary to Clearwater's suggestion that Seaton and Stonewall unduly delayed the case, Clearwater's Connecticut counsel indicated that Seaton and Stonewall were ***not*** required to file a responsive pleading until Clearwater decided what position it was going to take with respect to the forum issue. [*See* Ex. B to Harding Aff.; PACER No. 13]. Clearwater never had the courtesy to provide the promised information and instead just filed its motion to dismiss this action. [Harding Aff., ¶4; PACER No. 13].

ARGUMENT

I. MAGISTRATE'S ORDER SHOULD BE AFFIRMED UNDER EITHER A CLEARLY ERRONEOUS OR DE NOVO STANDARD OF REVIEW.

Clearwater contends that a *de novo* standard of review applies. However, to the extent that Clearwater's request for a stay of this action remains, the Magistrate Judge's denial of that request is to subject to review based upon the "clearly erroneous or contrary to law" standard set forth in Fed.R.Civ.P. 72(a), rather than the *de novo* standard set forth in Fed.R.Civ.P. 72(b)(3) for dispositive motions. A motion to stay is non-dispositive because it does not resolve the litigation or any claim in the litigation. *Powershare, Inc. v. Syntel, Inc.*, No. 09-1625, 2010 U.S. App. LEXIS 4182, at *8 (1st Cir. Mar. 1, 2010)(noting that a ruling on a motion to stay does not dispose of the case or any claim or defense within it); *see also Margrabe v. Sexter & Warmflesh, P.C.*, No. 07-2798, 2009 U.S. Dist. LEXIS 11426, at *11, n.4 (S.D.N.Y. Feb. 11, 2009)(motion to stay was non-dispositive); *Sylvester v. Menu Foods, Inc.*, No. 07-0409, 2007 U.S. Dist. LEXIS 89551, at *8 (D. Haw. Dec. 5, 2007)(motions to stay are non-dispositive).

The District Court is only authorized to consider timely objections to a Magistrate Judge's order on non-dispositive matters and modify or set aside any part of the order that is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A); Fed.R.Civ.P. 72(a); *Gray*, 937 F. Supp. at 156; *Phinney v. Wentworth Douglas Hospital*, 199 F.3d 1, 5 (1st Cir. 1999). The Magistrate Judge's findings of fact and the conclusions drawn therefrom must be accepted by the District Court unless, after scrutinizing the entire record, the court "form[s] a strong, unyielding belief that a mistake has been made." *Phinney*, 199 F.3d at 4, quoting *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 152 (1st Cir. 1990); *see also Gray*, 937 F. Supp. at 156. There is no clear error, however, where the factfinder simply makes a choice between two plausible views of the evidence. *Tsoulas v. Liberty Life Assurance Co. of Boston*, 454 F.3d 69, 76 (1st Cir. 2006),

quoting Anderson v. City of Besemer City, N.C., 470 U.S. 564, 573-74; *see also Leal Santos v. Mukasey*, 516 F.3d 1, 4-5 (1st Cir. 2008).

Here, no mistake has been made by Magistrate Judge Almond in finding that abstention was inappropriate. The Magistrate Judge's denial of Clearwater's Motion to Stay is supported by the fact that the Connecticut Action has been stayed and there is no other forum available to Seaton and Stonewall that would resolve the entire dispute with Clearwater. Moreover, the *Colorado River* factors considered in the abstention analysis and the discretion afforded to the Court by *Wilton* weigh in favor of allowing this action to proceed. Accordingly, the Magistrate's Order with respect to the denial of Clearwater's request to stay is not clearly erroneous or contrary to law and should be affirmed. Even under a *de novo* standard of review, there is no basis to set aside the Magistrate's Order.

Dismissal of this action as requested by Clearwater would leave Seaton and Stonewall without any legal recourse to recover the more than $535,000 owed to them under the Reinsurance Contracts. The fragmented action commenced by Clearwater in Connecticut has been ***stayed*** in favor of this comprehensive action. Clearwater does not contest that this action is comprehensive and includes all reinsurance disputes that are pending between the parties and that are not the subject of an agreement to arbitrate. Clearwater does not challenge that the Court's jurisdiction has been properly invoked by Seaton and Stonewall, both of which are Rhode Island corporations with their principal place of business in Rhode Island. Clearwater does not contend that Rhode Island is an inconvenient forum or that the Connecticut state court provides a superior forum for the resolution of this dispute. Indeed, the stay of the Connecticut Action makes this Court the ***only*** viable forum.

In effect, Clearwater is attempting to deprive Seaton and Stonewall of ***any forum*** in which to litigate their claims to recover the substantial losses that Clearwater has failed to pay. The position advanced by Clearwater is contrary to this Court's "virtually unflagging obligation" to exercise its jurisdiction over this action and would deprive Seaton and Stonewall of an opportunity to pursue their monetary claims because all litigation would be frozen. Clearwater's suggestion that if the Court were to stay or dismiss this case, it would "force" the Connecticut court to hear the matter is unfounded. [*See* 2/3/10 Tr. at 12-13; Ex. 1 hereto]. This Court cannot "command" the Connecticut court to reverse its Order and accept the case notwithstanding its determination that the comprehensive action commenced by Seaton and Stonewall is a "better forum" for the case to proceed. Moreover, any attempt by this Court to "force" the Connecticut court to change its decision would violate fundamental notions of comity and the "full faith and credit clause" of the Constitution.

II. THE ABSENCE OF A VIABLE PARALLEL PROCEEDING IS FATAL TO CLEARWATER'S REQUEST TO STAY OR DISMISS.

The abstention doctrines articulated by the Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); and *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) are premised upon "consideration of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Gonzalez v. Cruz*, 926 F.2d 1, 3 (1st Cir. 1991)(quoting *Colorado River*, 424 U.S. at 817). The abstention analysis involves a two-step inquiry. The first step asks whether there are parallel proceedings that would provide an "adequate vehicle for the complete and prompt resolution of the issues between the parties." *See Moses H. Cone*, 460 U.S. at 28; *see also Std. Fire Ins. Co. v. Gordon*, 376 F. Supp. 2d 218, 224 (D.R.I. 2005)(noting that "district courts should look for guidance to the scope of the

pending state court proceeding, the available state court defenses, and whether the claims of all parties in interest can be settled in the state court proceeding"). This step is a "threshold step," and if there is no parallel proceeding, the abstention doctrine simply does not apply. *U.S. Bank, N.A. v. EMC-Lincolnshire LLC*, No. 03-4692, 2003 U.S. Dist. LEXIS 15098, at *10 (N.D. Ill. Aug. 28, 2003); *Kane v. Mfrs. Life Ins. Co.*, No. 08-4581, 2009 U.S. Dist. LEXIS 1630, at *18-19 (D.N.J. Jan. 9, 2009); *Legion Ins. Co. v. Wisconsin-California Forest Prods.*, No. 00-2289, 2001 U.S. Dist. LEXIS 1600, at *8 (E.D. Ca. Feb. 6, 2001).

Here, there is no parallel proceeding to which this Court can defer. The suit commenced by Clearwater in the Connecticut state court is stayed. This is the only action in which Seaton and Stonewall can recover the more than $535,000 owed to them by Clearwater, and thus the abstention doctrine is inapplicable on its face. Clearwater's blatant attempt to have this Court disregard the Order entered in the Connecticut Action is untenable. Accordingly, this Court should retain jurisdiction and allow this action to proceed.

III. DISTRICT COURTS HAVE A "VIRTUALLY UNFLAGGING OBLIGATION" TO EXERCISE THEIR JURISDICTION.

Even if the Connecticut Action had not been stayed, the mere existence of parallel state court proceedings does not require the district court to abstain from exercising jurisdiction. *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 12 (1st Cir. 1990); *Buy-Rite Costume Jewelry, Inc. v. Albin*, 676 F. Supp. 433, 435 (D.R.I. 1988); *United States v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 237-38 (D.R.I. 2006). In deciding whether to stay or dismiss an action that is properly before it, the district court's task "is not to find some substantial reason for the ***exercise*** of federal jurisdiction...; rather, the task is to ascertain whether there exist ***'exceptional' circumstances***, the ***'clearest of justifications'*** that can suffice

under *Colorado River* to justify the ***surrender*** of that jurisdiction." *Villa Marina*, 915 F.2d at 13 (quoting *Moses H. Cone*, 460 U.S. at 25-26)(emphasis in original).

Clearwater cannot sustain its heavy burden of demonstrating that "exceptional circumstances" warrant the extraordinary remedy of dismissing an action that is properly before the Court. Denying such extraordinary relief is particularly appropriate here as Clearwater knowingly chose to file a state court action that was far from comprehensive and then did vitually nothing to advance the progress of the case. Even after this action was filed, Clearwater did not seek to make the Connecticut Action comprehensive. Now, the Connecticut Action has been stayed based upon a determination that the Rhode Island district court is the "better forum." There is no legal basis for this Court to decline jurisdiction over the matter.

Clearwater does not dispute that the Court has jurisdiction over this action pursuant to 28 U.S.C. §1332(a)(1) in that Plaintiffs Seaton and Stonewall and Defendant Clearwater are citizens of entirely different states and the amount in controversy, exclusive of interest and costs, exceeds the sum of $75,000. Clearwater does not question that venue is proper. The Supreme Court has repeatedly held that only in the most extraordinary and narrow of circumstances is a district court permitted to decline to exercise or postpone the exercise of jurisdiction over a controversy that is properly before it. *Colorado River*, 424 U.S. at 813; *Moses H. Cone*, 460 U.S. at 14.

Based upon the Supreme Court's decisions in *Colorado River* and *Moses H. Cone*, the First Circuit Court of Appeals has set forth a non-exhaustive list of factors that should be considered in determining whether a district court may abstain from its "unflagging obligation" to exercise jurisdiction (assuming—unlike the instant situation—that there is a pending parallel state court action):

> (1) Whether either court has assumed jurisdiction over a *res*; (2) the [geographical] inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) the adequacy of the state forum to protect the parties' interests; (7) the vexatious or contrived nature of the federal claim; and (8) respect for the principles underlying removal jurisdiction.

Fairway, 433 F. Supp. 2d at 238 (quoting *Rio Grande Community Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 71-72 (1st Cir. 2005)). These factors do not represent a mechanical checklist and no single factor is determinative. *Fairway*, 433 F. Supp. 2d at 238. However, in evaluating these factors the balance is "heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16. "Only the clearest of justifications will warrant dismissal" of an action properly before a district court. *Colorado River*, 424 U.S. at 813; *Villa Marina*, 915 F.2d at 12.

The heavy presumption favoring the district court's exercise of jurisdiction is intended to promote the comprehensive disposition of litigation. Far from being duplicative of the state court proceeding, the action commenced by Seaton and Stonewall is the ***only*** pending case that seeks a comprehensive resolution of all claims between the parties. This case involves disputes regarding ***thirteen facultative reinsurance contracts***, whereas the Connecticut Action involves ***only two*** of the facultative reinsurance contracts issued to a single policyholder, Studebaker. Seaton and Stonewall have asserted breach of contract claims to obtain the amounts due and owing from Clearwater under the Reinsurance Contracts relating to twelve separate policyholders. Seaton and Stonewall also seek a judgment directing Clearwater to promptly pay all future losses as they are presented to avoid the need for future litigation. In contrast, Clearwater's now-stayed Connecticut Action seeks the very limited remedy of a declaratory

judgment that it is not obligated to reimburse Seaton and Stonewall for some unspecified portion of the amounts that Seaton and Stonewall have paid on behalf of Studebaker.[5]

Applying the factors described in *Colorado River* and *Moses H. Cone* here, the "exceptional circumstances" that would overcome the unflagging obligation of a federal court to exercise jurisdiction are utterly lacking. There is no *res* or property at issue. *See Fairway*, 433 F. Supp. 2d at 239 (noting that the first factor applies to situations in which a court assumes jurisdiction over a *res* in the course of an *in rem* proceeding). Clearwater does not claim that there is a significant geographical inconvenience to litigating the dispute in this Court and, in fact, the vast bulk of the documents relating to this matter are located at the Plaintiffs' offices in Warwick.

The desirability of avoiding piecemeal litigation overwhelmingly favors retaining jurisdiction over this action because it is far more comprehensive in terms of the claims at issue and the remedies sought than the Connecticut Action. That the Connecticut Action was first-filed is of minimal importance because there was no substantial progress in the Connecticut Action prior to the entry of the stay order. Clearwater failed to actively pursue its claims in the Connecticut Action and never sought to expand the scope of the state court proceeding to include all of the Reinsurance Contracts at issue.

The fact that this action involves state law does not support a request that this Court surrender its jurisdiction. *Buy-Rite*, 676 F. Supp. at 436. This is primarily a breach of contract action of the type that the Court hears all the time. "The state's interest, while important, is

[5]While Clearwater sought to blame Seaton and Stonewall for the fact that all of these claims are not included in the Connecticut Action, it is not Seaton and Stonewall's obligation to refashion Clearwater's defective complaint and fragmented case. Even after Seaton and Stonewall commenced this action, Clearwater failed to take any steps to amend its pleadings in Connecticut to include these additional claims.

diminished, in cases such as this one, where the state-law issues are not novel, unsettled, difficult, complex, or otherwise problematic." *Standard Fire Ins. Co. v. Gordon*, 376 F. Supp. 2d 218, 231 (D.R.I. 2005)(quoting *First Fin. Ins. Co. v. Crossroads Lounge, Inc.*, 140 F. Supp. 2d 686, 695 (S.D.W.Va. 2001))(internal quotations omitted). This Court has regularly addressed disputes between ceding companies and reinsurers. *See Affiliated F.M. Ins. Co. v. Employers Reinsurance Corp.*, 369 F. Supp. 2d 218 (D.R.I. 2005)(dispute between an excess insurer and its reinsurer with respect to reimbursement for asbestos-related claims under a facultative reinsurance certificate). Moreover, while the Court does not need to address any issue of choice of law at this time, there is no basis for Clearwater to contend that Connecticut law would apply even if the case was to be litigated in Connecticut. There was no connection between the parties and Connecticut at the time the Reinsurance Contracts were negotiated by Clearwater's predecessor and no reason for any court to apply Connecticut law simply because Clearwater is now located there.

In addition, Rhode Island is a more appropriate forum for this dispute than Connecticut. Both Seaton and Stonewall are Rhode Island insurance companies with their headquarters in Warwick, Rhode Island. Because Seaton and Stonewall are the ceding companies, the overwhelming majority of relevant documents are located in Rhode Island in close proximity to the courthouse. [2/3/10 Tr. at 19; Ex. 1]. Clearwater is also an approved insurer in Rhode Island and transacts business in Rhode Island. The only connection between this dispute and Connecticut is that Clearwater is currently headquartered in Stamford, Connecticut, having succeeded to the rights and obligations of New York based Skandia with respect to the Reinsurance Contracts.

Based upon these facts, Rhode Island has a far more substantial interest in adjudicating this dispute than Connecticut. Seaton and Stonewall, two Rhode Island companies, are seeking to enforce their rights under the Reinsurance Contracts, including by obtaining the sums that Clearwater is obligated (but failed) to pay. This Court has a strong interest in protecting the rights of corporate citizens of Rhode Island. Applying the factors set forth in *Colorado River* and *Moses H. Cone*, the rare and "exceptional circumstances" that would allow this Court to dispense with its "unflagging obligation" to exercise jurisdiction are utterly lacking. Accordingly, the Magistrate Judge's denial of Clearwater's Motion to Dismiss or Stay should be affirmed.

IV. THE COURT MUST RETAIN JURISDICTION BECAUSE THIS ACTION IS PREDOMINANTLY A CLAIM FOR MONEY DAMAGES.

Clearwater's attempt to recast this case as being outside the ambit of the *Colorado River* doctrine, and its concomitant efforts to bring this case within the discretionary principles set forth in *Wilton*, should be rejected.[6] As in *Colorado River*, the Supreme Court in *Wilton* addressed the abstention analysis to be undertaken by a district court in the circumstance ***where there is parallel state court litigation to which the district court can defer***. *Wilton*, 515 U.S. at 281. The fact that the Connecticut Action is stayed cuts short the Court's abstention analysis because there is no parallel proceeding to which the Court can defer. The primary consideration in deciding whether to stay or dismiss a declaratory judgment action is "the scope of the pending state court proceeding and the nature of the defenses open there." *Wilton*, 515 U.S. at 283 (quoting *Billhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942)). In *Wilton*, the Supreme

[6] While Clearwater cites to *Wilton* throughout its brief, Clearwater fails to identify a single case in which any court relied upon *Wilton* for the proposition that a federal court can stay an action in favor of a state court proceeding where the state court has expressly ruled that the federal action should have priority and entered a stay of the case. The notion that *Wilton* applies here is absurd.

Court "conclude[d] only that the District Court acted within its bounds ... where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court." *Wilton*, 515 U.S. 290. Because the Connecticut Action is stayed, there are no "parallel proceedings, presenting an opportunity for ventilation of the same state law issues." This fact compels affirmance of the Magistrate's Order.

A. Application of *Wilton* Is Limited to Declaratory Judgment Actions

Even if the stayed Connecticut Action could be considered "a pending parallel proceeding" in some metaphysical sense, abstention under the discretionary standard articulated in *Wilton* is inappropriate. The driving force of this case is to resolve Seaton and Stonewall's breach of contract claims against Clearwater and to recover the sums (more than $500,000) that Clearwater owes them under the thirteen Reinsurance Contracts. In order to avoid the prospect of future litigation, Seaton and Stonewall incidentally seek a declaration of the parties' rights and obligations with respect to future liabilities that may arise under the Reinsurance Contracts. The declaration sought by Seaton and Stonewall relates only to additional amounts that become due from Clearwater under the Reinsurance Contracts as these amounts are paid by Seaton and Stonewall and presented to Clearwater for reimbursement. This is an ancillary claim for declaratory relief, which is tacked onto the significant monetary claims asserted by Seaton and Stonewall. Contrary to Clearwater's assertions in its Objection, the monetary claims predominate this action; they are not peripheral or tangential claims. The resolution of the breach of contract claims is not dependent upon resolution of the claim for declaratory relief. Just the opposite is true since if Plaintiffs prevail in proving that Clearwater's failure to pay was a breach, it will largely resolve the question of how future losses should be treated. This case will provide a comprehensive disposition of all claims between Seaton/Stonewall and Clearwater.

The inclusion of a claim for declaratory relief does not detract from the fact that the heart of the case is for money damages resulting from Clearwater's breach. Accordingly, the "exceptional circumstances" standard articulated in *Colorado River* applies to this case, rather than the discretionary standard advocated by Clearwater. As discussed in detail in Section III, *supra*, there are no "exceptional circumstances" that warrant staying or dismissing this action.

B. Abstention Is Not Mandated by *Wilton*

Even if the *Wilton* standard were applicable, it is entirely ***discretionary***. It does not mandate abstention. This is not a typical insurance coverage case and does not involve complex issues of contract interpretation. At the center of this case are thirteen facultative reinsurance contracts, each of which contain a "follow the fortunes" clause. A follow the fortunes clause "obligates the reinsurer to indemnify the reinsured for any good faith payment of an insured loss." *North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1199 (3rd Cir. 1995). Under this provision, a reinsurer must "accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance and capitulation." *British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 342 F.3d 78, 85 (2nd Cir. 2003). The reinsurer "cannot second guess the good faith liability determinations made by its reinsured, or the reinsured's good faith decisions to waive defenses to which it may be entitled." *Christian Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 280 (2nd Cir. 1992). The follow the fortunes clause "forecloses relitigation of coverage disputes" and a reinsurer's challenge to coverage is entitled "only to a deferential review of a determination of the insurers' liability to the insured." *North River*, 52 F.3d at 1204. Accordingly, this case will require a different analysis from ordinary insurance coverage disputes seeking declaratory relief. Resolution of the declaratory judgment claim for future amounts is not necessary to resolve the

substantial monetary claims for current amounts owed by Clearwater to Stonewall and Seaton under the Reinsurance Contracts.

C. Plaintiffs' Claims for Money Damages Cannot Be Dismissed

At the hearing on February 3, 2010, Clearwater abandoned its argument that this action should be stayed and adopted the position that this action ***should be dismissed*** in its entirety in favor of the dormant Connecticut Action. [*See* 2/3/10 Tr. at 4-5, 22-23; Ex. 1]. The insurmountable problem with Clearwater's position is that the Connecticut Action has been stayed. Clearwater's suggestion that the Court nevertheless proceed to dismiss this case in favor of the stayed Connecticut case is contrary to settled law, as articulated by the Supreme Court, that forecloses any such action. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)(action at law for damages can only be stayed in favor of state proceedings, not dismissed).

Throughout the briefing of this matter, Clearwater argued that the appropriate relief for the Court to grant if it accepted Clearwater's position would be to stay this action in favor of the Connecticut case. Clearwater's motion papers are replete with requests for a "stay"; that the Court "abstain" from acting; and that the proper course for the Court to take is to invoke the "abstention" doctrine and decline to hear the matter in favor of the declaratory judgment action commenced by Clearwater in Connecticut. [See PACER No. 9-1 at 6-7, 9-10, 14; PACER No. 14 at 5]. Equally, Clearwater's Objection to the Magistrate's Report and Recommendation attempts to convey the impression that all that Clearwater is seeking is a stay. [PACER No. 20 at 1].

Clearwater fails to advise the Court that, at the hearing, Clearwater utterly changed direction, admitting that since the Connecticut Action had been stayed, a stay of the Rhode Island federal action would ***not*** be a proper course of action. Clearwater therefore expressly

withdrew its request for a stay of this case. [2/3/10 Tr. at 4-5, 22-23; Ex. 1]. Clearwater argued for the first time that the Court had the authority to refuse to entertain this action in its entirety and should dismiss the case outright.[7] When pressed for authority to support this position, Clearwater could not cite a single case holding that it would be permissible for a federal court to dismiss an action for damages in favor of a state court declaratory judgment action that had been stayed. [2/3/10 Tr. at 23; Ex. 1]. Clearwater could not do so for an obvious reason: Clearwater's contention is without any legal support and is directly contrary to Supreme Court precedent. Under *Quackenbush*, a federal court may only order a stay of an action at law pending resolution of the state proceedings; it cannot invoke abstention principles to dismiss the federal action altogether. *Quackenbush,* 517 U.S. at 719; *Dunn v. Cometa*, 238 F.3d 38, 43 (1st Cir. 2001); *DeMauro v. DeMauro*, 115 F.3d 94, 98 (1st Cir. 1997).

The action commenced by Seaton and Stonewall is one "at law"—it is a claim for breach of contract. The ***only*** circumstance in which a remedy of dismissal is permissible is where the relief sought is equitable in nature or otherwise discretionary. *Quackenbush*, 517 U.S. at 721; *see also Rossi v. Gemma*, 489 F.3d 26, 38 (1st Cir. 2007)(vacating district court's dismissal of the claims for monetary damages and holding that abstention on a damages claim permits a stay but not outright dismissal). The inclusion of an ancillary claim for declaratory relief to avoid future litigation involving the same Reinsurance Contracts does not detract from the fact that the this is essentially an action to recover money damages resulting from Clearwater's breach of the

[7] While Clearwater styled its original motion as one to dismiss or stay, the motion does not provide any argument or authority to support a dismissal. A charitable reading of the motion is that it contended that a dismissal of the declaratory aspects of Seaton and Stonewall's complaint might be appropriate under *Wilton*. Of course, the entire predicate for *Wilton* is that the only basis for federal jurisdiction is the federal Declaratory Judgment Act and the discretion that resides in a district court as to whether to entertain purely declaratory claims. As Seaton and Stonewall have repeatedly noted, the core claims in this case are for breach of contract to recover damages that exceed $500,000.

Reinsurance Contracts. Based upon *Quackenbush* and its progeny, abstention principles do not support dismissal of this action.

None of the cases cited by Clearwater support dismissal of a federal court action in favor of a state court action that has been stayed. Unlike the situation here, none of the cases relied upon by Clearwater presented a situation where the parallel state court proceedings had been stayed. *See e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Karp*, 108 F.3d 17 (2nd Cir. 1997)(affirming the district court's abstention order because the pending state court action could satisfactorily adjudicate the insurance coverage issue); *Rossi v. Gemma*, 489 F.3d 26 (1st Cir. 2007)(affirming district court's judgment insofar as it dismissed claims for injunctive and declaratory relief in deference to the pending state court action in which the state court had taken jurisdiction of the *res* at issue but vacating the judgment as to dismissal of the claims for monetary relief); *United States v. Fairway Capital Corp.*, 483 F.3d 34 (1st Cir. 2007)(affirming district court's denial of request to abstain even though there was an action pending in the Virgin Islands Territorial Court); *Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*, 751 F.2d 475 (1st Cir. 1985)(affirming district court's judgment staying the federal court action in favor of the pending state court action that was more comprehensive); *Valle-Arce v. Puerto Rico Ports Auth.*, 751 F. Supp. 2d 246 (D.P.R. 2008)(denying motion to dismiss federal court action even though there was a pending state court action). Accordingly, the mandate of *Quackenbush* requires that the Court affirm the Magistrate Judge's Order.

CONCLUSION

The simple fact of the matter is that the Connecticut court has stayed the action filed by Clearwater and determined that this case should proceed. The Magistrate Judge correctly ruled that there was no basis to dismiss this case in favor of a case that had been stayed. There is no

reason for the Court to reach a different conclusion. The Court should reject Clearwater's Objections and schedule a Rule 16 Conference so that this action can proceed.

SEATON INSURANCE COMPANY (f/k/a UNIGARD MUTUAL INSURANCE COMPANY) and STONEWALL INSURANCE COMPANY
By their attorneys,

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Dated: March 15, 2010

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on March 15, 2010.

/s/ John T. Harding

John T. Harding, Jr. BBO #221270