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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

16 PHL VARIABLE INSURANCE COMPANY

17 Plaintiff,

18 vs.

19 XL SPECIALTY INSURANCE COMPANY,
20 ARGONAUT INSURANCE COMPANY, ACE
AMERICAN INSURANCE COMPANY, STARR
21 INDEMNITY & LIABILITY COMPANY, AXIS
INSURANCE COMPANY, STRATFORD
22 INSURANCE COMPANY, IRONSHORE
23 INDEMNITY, INC. and DOES 1-100, inclusive,

24 Defendants.

Case No.: CGC-23-609780

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, STAY ACTION ON
THE GROUNDS OF FORUM NON
CONVENIENS**

Date: TBD
Time: TBD
Dept: 613

Hon. Andrew Y.S. Cheng

Action Filed: October 16, 2023

ELECTRONICALLY
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Superior Court of California,
County of San Francisco

12/18/2023
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Rules

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1 Defendants XL Specialty Insurance Company (“XL”), Argonaut Insurance Company
2 (“Argonaut”), ACE American Insurance Company (“ACE”), Starr Indemnity & Liability Company
3 (“Starr”), AXIS Insurance Company (“AXIS”), Stratford Insurance Company (“Stratford”), and
4 Ironshore Indemnity, Inc. (“Ironshore,” and collectively, the “Insurers”) submit this memorandum
5 of points and authorities in support of Defendants’ motion to dismiss or, in the alternative, to stay
6 this action on the grounds of forum non conveniens pursuant to C.C.P. §§ 418.10(a)(2) and
7 410.30(a).
8

9
10 **PRELIMINARY STATEMENT**

11 This insurance coverage dispute involving out-of-state companies concerns conduct
12 committed and underlying actions pending in Connecticut. Plaintiff PHL Variable Insurance
13 Company (“PHL”), a Connecticut domiciled life insurer, seeks defense and indemnity coverage
14 from seven out-of-state Insurers for lawsuits pending in Connecticut challenging “cost of insurance”
15 (“COI”) rate increases that PHL evaluated and implemented in Connecticut.

16 California’s contacts to this dispute are almost non-existent. PHL filing this action in this
17 Court is blatant forum shopping, in an apparent effort to repeat its strategy in a distinguishable
18 coverage action against a different group of insurers related to different insurance policies. The
19 insurer there brought a similar motion to transfer the action to Connecticut based on forum non
20 conveniens but the court denied the motion solely due to the moving party’s technical failure to
21 establish that every defendant (the two excess insurers) were subject to jurisdiction in Connecticut.
22 Here, the Insurers have no such jurisdictional issue. Here, *all* the Insurers will be subject to
23 personal jurisdiction in Connecticut by way of their voluntary appearance in Connecticut Superior
24 Court as plaintiffs in an imminent, substantially similar declaratory judgment action against PHL.
25 California has no interest in adjudicating a contractual dispute between out-of-state corporations
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1 regarding conduct committed and underlying actions pending in Connecticut. The proper forum for
2 this dispute is Connecticut state court, where the Insurers will soon file a substantially similar
3 declaratory judgment action against PHL.

4 California Civil Procedure §410.30 requires that this action, addressing a Connecticut-
5 centered dispute, be dismissed, or alternatively stayed, based upon forum non conveniens.
6

7 **FACTUAL BACKGROUND**

8 This is an insurance coverage dispute addressing whether PHL is entitled to coverage under
9 management liability and errors and omissions primary and excess policies for two lawsuits pending
10 in Connecticut, styled *James Kenney v. PHL Variable Insurance Company* Case No. 3:22-cv-552
11 (D. Conn.) (the “Kenney Action”) and *Conestoga Trust et al. v. PHL Variable Insurance Company*
12 Docket No. HHD-CV22-6157546-S (Conn. Sup. Ct., Hartford Jud. Dist.) (the “Conestoga II
13 Action”) (collectively, the “Underlying Actions”). Defendants’ Request for Judicial Notice (“Req.
14 Jud. Not.”) Ex. A ¶¶ 1-5. The plaintiffs in the Underlying Actions are an out-of-state individual trust
15 and a putative nationwide class of PHL life insurance policyholders who allege that in 2021 PHL
16 wrongfully implemented COI rate increases to certain life insurance policies. *Id.* Ex. C ¶¶ 1,8-10;
17 Ex. D ¶¶ 1, 78-86. The underlying plaintiffs assert causes of action against PHL for breach of
18 contract, declaratory relief, and violation of the Connecticut Unfair Trade Practices Act. *Id.* Ex. C
19 ¶¶ 83-90; Ex. D ¶¶ 99-126.
20
21

22 XL issued: (i) Insurance Company Professional Liability Policy No. ELU168179-20 for the
23 Policy Period of June 13, 2020 to June 13, 2021 (the “E&O Policy”); and (ii) Private Company
24 Insurance Policy No. ELU168177-20, for the same Policy Period which contains a Management and
25 Company Liability Coverage Part (the “D&O Policy”). Declaration of Sara J. Savage, Esq.
26 (“Savage Decl.”), Exs. A and B. Argonaut, Starr and AXIS (collectively, the “E&O Excess
27
28

1 Insurers”) issued excess E&O policies (the “E&O Excess Policies,” and collectively with the E&O
2 Policy, the “E&O Policies”). Req. Jud. Not., Ex. A ¶¶ 28b, 30b, 31b. Argonaut, ACE, Starr, AXIS,
3 Ironshore and Stratford (collectively, the “D&O Excess Insurers”) issued excess D&O policies (the
4 “Excess D&O Policies,” and collectively with the D&O Policy, the “D&O Policies”). *Id.* ¶¶ 28a,
5 29a, 30a, 31a, 32a, 33a. Each of the E&O Excess Policies and D&O Excess Policies (collectively
6 the “Excess Policies” and together with the D&O Policy and E&O Policy, the “Policies”) are
7 subject to their respective terms, conditions, and endorsements and “follow form,” respectively, to
8 the E&O Policy or D&O Policy.

10 In this action, PHL argues that the Insurers wrongfully denied or failed to acknowledge
11 coverage for the Underlying Actions and asserts causes of action for breach of contract and
12 declaratory judgment. *Id.* ¶¶ 1, 67-98.

14 PHL brought a similar coverage lawsuit in 2017 against different primary and excess
15 insurance carriers styled, *PHL Variable Insurance Company v. Continental Casualty Company, et*
16 *al.*, Case No. CGC-19-579321 in this Court (the “Prior Coverage Action”) concerning underlying
17 actions involving PHL’s implementation of a 2017 COI Increase (the “2017 COI Actions”)¹. The
18 primary insurer in the Prior Coverage Action, CNA, filed a motion to dismiss, or in the alternative,
19 to stay the action on grounds of forum non conveniens, which similarly requested that the matter be
20 transferred to Connecticut. However, the Court denied the motion without reaching the merits
21 because the moving party failed “to establish that the other defendants in [that] action, the [other
22 insurers], would be subject to jurisdiction in Connecticut.” *Id.* Ex. E at 2:18-19. There is no similar
23 technical deficiency here.

25
26 ¹ *PHT Holding I LLC et al. v. PHL Variable Insurance Company* Civil Action No. 1:18-cv-03444
27 (S.D.N.Y.); *Derek Fan and Robert Putz v. Phoenix Life Insurance Company et al.*, Case No. 1:18-
28 cv-01288-PAC (S.D.N.Y.); and *Conestoga Trust et al. v. PHL Variable Insurance Company*, Case
Docket No. HHD-CV21-6145336-S (Conn. Sup. Ct., Hartford Jud. Dist.).

1 PHL is a Connecticut headquartered and incorporated life insurer whose primary regulator is
2 the Connecticut Department of Insurance. *Id.* Ex. A ¶¶ 20-21; Ex. F at 4. XL, the primary insurer
3 who drafted and issued the D&O Policy and E&O Policy, to which the D&O Excess Policies and
4 E&O Excess Policies respectively follow form, is a Connecticut headquartered company. *Id.* Ex. A
5 ¶ 11. The Underlying Actions against PHL are both pending in Connecticut and being decided
6 under Connecticut law. *Id.* Exs. C and D. In the 2017 COI Actions, PHL previously challenged
7 whether the Southern District of New York had personal jurisdiction based on its argument that it is
8 a Connecticut domiciled company and the 2017 COI Adjustments originated from and were
9 implemented in Connecticut. *Id.* Ex. F at 6-8, 12-16; Ex. G at 10-12, 15-17. The 2021 COI
10 Adjustments were administered in a substantially similar manner as the 2017 COI Adjustments. *Id.*
11 Ex. B at 4.

14 ARGUMENT

15 I. The Standard Under C.C.P. § 410.30 (a)

16 As explained by the California Supreme Court: “Forum non conveniens is an equitable
17 doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has
18 over a transitory cause of action when it believes that the action may be more appropriately and
19 justly tried elsewhere.” *Stangvik v. Shiley Inc.* (1991) 54 Cal. 3d 744, 751. The doctrine is codified
20 under California Code of Civil Procedure § 410.30 (a), which provides: “When a court upon motion
21 of a party or its own motion finds that in the interest of substantial justice an action should be heard
22 in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any
23 conditions that may be just.” Cal. Civ. Proc. Code § 410.30 (West).

25 In deciding a forum non conveniens motion, the court undertakes a two-pronged analysis.
26 First, the court must determine whether a suitable alternative forum exists. *Stangvik*, 54 Cal. 3d at
27

1 751. Second, if a suitable forum does exist, the court weighs the parties’ private interests against the
2 public’s interests in retaining the action in California. *Id.* The granting or denial of a forum non
3 conveniens motion “is within the trial court’s discretion, and substantial deference is accorded its
4 determination in this regard.” *Id.*

5
6 While certain cases hold that a plaintiff’s forum choice is entitled to deference and a
7 presumption of convenience, this line of authority does not apply here. PHL is not a California
8 resident, and its forum selection is not entitled to deference. The Insurers therefore do not need to
9 show that litigating this action in California would be seriously inconvenient. *Id.* at 755 (holding
10 that foreign plaintiff’s choice to file complaint “is not a substantial factor in favor of retaining
11 jurisdiction”); *Fox Factory, Inc. v. Superior Ct.* (2017) 11 Cal. App. 5th 197, 205, 217 (holding that
12 the forum choice of a foreign plaintiff is not entitled to a presumption of convenience and trial court
13 erred in imposing a burden on defendant to show that California is a seriously inconvenient forum);
14 *Nat’l Football League v. Fireman’s Fund Ins. Co.* (2013) 216 Cal. App. 4th 902, 939 (no strong
15 presumption of convenience in favor of plaintiffs’ choice of forum applied because plaintiffs are not
16 California residents).

17
18 Rather, the Court should see PHL’s decision to file suit in California for what it is: naked
19 forum-shopping in the face of this dispute’s overwhelming connections to Connecticut.

20
21 **II. The Court Should Dismiss This Action On the Basis of Forum Non Conveniens**

22 **A. Connecticut is a Suitable Alternative Forum**

23 Under California law, “[a]n alternative forum is suitable if it has jurisdiction and the action
24 in that forum will not be barred by the statute of limitations.” *Guimei v. Gen. Elec. Co.* (2009) 172
25 Cal. App. 4th 689, 696, *as modified on denial of reh’g* (Mar. 24, 2009). Here, the Insurers clearly
26 satisfy the suitable alternative forum prong.

1 First, the Connecticut Superior Court, the forum where the Insurers will file a declaratory
2 judgment action against PHL, unquestionably has both personal and subject matter jurisdiction over
3 this dispute. The Insurers will seek declaratory relief from the Connecticut Superior Court that they
4 have no obligation to provide coverage to PHL under the Policies in connection with the Underlying
5 Actions. The Insurers' suit against PHL will provide the Connecticut Superior Court with the
6 requisite personal jurisdiction over all of the parties – evidence establishing jurisdiction that was
7 missing in the Prior Coverage Action.
8

9 Regarding subject matter jurisdiction, the Connecticut Superior Court is empowered to
10 “declare rights and other legal relations on request for such a declaration, whether or not further
11 relief is or could be claimed” and such declaration “shall have the force of a final judgment.” Conn.
12 Gen. Stat. Ann. § 52-29 (West)²; *Aetna Cas. & Sur. Co. v. Gentile* (Conn. Super. Ct. Mar. 22, 1994)
13 1994 WL 109867, at *6 (“A declaratory judgment action is the appropriate method for an insurance
14 company to determine its obligation to defend and indemnify an insured.”). Moreover, PHL as a
15 defendant in Connecticut state court may seek its own declaratory judgment via counterclaim.
16 Conn. Practice Book Sec. § 17-56(5); *see also Guimei v. General Elec. Co.* (2009) 172 Cal. App.
17 4th 689, 696 (it is sufficient for purposes of a motion for forum non conveniens that the action can
18 be brought in the alternative forum). The alternative forum is suitable if its law provides a remedy
19 for the claim sued upon. *Stangvik, supra*, 54 Cal. 3d at 764.
20
21

22 Second, the claims that the Insurers will assert in the Connecticut Superior Court and any
23 potential claims that PHL may assert are not barred by Connecticut's six year statute of limitations
24

25 ² Connecticut Practice Book §17-54 provides:

26 The judicial authority will, in cases not herein excepted, render declaratory judgments as to the
27 existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon
28 which the existence or nonexistence of such right, power, privilege or immunity does or may
depend, whether such right, power, privilege or immunity now exists or will arise in the future.

1 for actions brought on account of contracts. *See* Conn. Gen. Stat. Ann. § 52-576 (West). The
2 earliest of the Underlying Actions, the Kenney Action, was filed on April 15, 2022 and was based
3 on COI Adjustments that were made in 2021, during the policy period of June 13, 2020 to June 13,
4 2021. As alleged by PHL, the earliest date upon which it gave notice of a potential claim was on
5 June 4, 2021 meaning the statute would run at the very earliest on June 4, 2027. Req. Jud. Not. Ex.
6 A ¶ 51.

8 Based on the foregoing, the Connecticut Superior Court is a suitable forum to adjudicate this
9 coverage dispute.

10 **B. Private and Public Interest Factors Require Dismissal of This Action**

11 The relevant private and public interest factors require dismissal here. No matter how the
12 Court elects to weigh these factors, all analyses lead to the same conclusion: for perceived tactical
13 advantage, PHL improperly seeks to litigate its claims in California state court, a forum which bears
14 virtually no connection to this dispute.

15 1. The Private Interest Factors Require Dismissal.

16 The private interest factors that the court weighs are “those that make trial and the
17 enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of
18 access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of
19 compulsory process for attendance of unwilling witnesses.” *Stangvik*, 54 Cal. 3d at 751. These
20 factors support dismissal in favor of Connecticut here.

21 This is a contractual dispute over coverage for the Underlying Actions under the Policies.
22 PHL, the insured under the Policies, is one party to the dispute. PHL is a life insurer headquartered
23 and incorporated in Connecticut, and whose primary regulator is the Connecticut Department of
24 Insurance. On the other side of the dispute, XL, the primary insurer who drafted and issued the
25 D&O Policy and E&O Policy with the relevant language here, is also headquartered in Connecticut
26
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1 Req. Jud. Not., Ex. A ¶ 11. None of the excess insurers are citizens of California. Req. Jud. Not.,
2 Ex. A ¶¶ 28-34. The Underlying Actions, for which PHL is seeking coverage under the Policies,
3 are pending in Connecticut.

4 In other words, the two main parties to the coverage dispute are Connecticut citizens, no
5 party is a California citizen, and the Underlying Actions that are the subject of that dispute are
6 pending in Connecticut.

7
8 The conduct at issue in the Underlying Actions took place in Connecticut. The Underlying
9 Actions involve PHL’s COI increases applied to life insurance policies, increases that were
10 evaluated and implemented by PHL’s management in Connecticut. Indeed, as asserted in the
11 Conestoga II Action, “[PHL’s] actuaries in Hartford and IT personnel (also located in Hartford,
12 Connecticut or remote employees that reported to [PHL’s] Hartford headquarters) directed the
13 implementation of the [2021 COI rate increase]...and PHL personnel in Connecticut approved
14 adoption of the recommendation for such COI rate increase.” *Id.* Ex. D ¶ 15.

15
16 The Underlying Actions also tie-back to the 2017 COI Actions, all of which were filed in
17 Connecticut or New York and were based on conduct that took place in Connecticut. As PHL
18 argued, when trying to dismiss the 2017 COI Actions filed in New York:

- 19
- 20 • “PHL[]’s only home for general jurisdiction is Connecticut, and the conduct forming the
basis of Plaintiff’s lawsuit occurred in Connecticut.”
 - 21 • “Ultimate approval of the 2017 COI Rate Adjustment came from . . . a Connecticut resident
22 who works from [PHL’s] Hartford headquarters.”
 - 23 • “[T]he 2017 COI rate Adjustment . . . was planned, researched, and implemented in
24 Connecticut and Chicago. Its approval was clearly made by PHL[] corporate officers who
25 maintain primary offices in Hartford and run the business of PHL [] at its Hartford
headquarters.”

26 *Id.* Ex. F at 11, 21-22; Ex. G at 13, 21-22.

1 For these reasons, all the private interest factors – the ease and efficiency of trial, the
2 enforceability of judgment, access to proof, the cost and ability to obtain the personal attendance of
3 witnesses — support dismissal in favor of Connecticut as the more convenient forum, rather than
4 litigating this dispute across the country in California.
5

6 2. The Public Interest Factors Require Dismissal.

7 The public interest factors include “avoidance of overburdening local courts with congested
8 calendars, protecting the interests of potential jurors so that they are not called upon to decide cases
9 in which the local community has little concern, and weighing the competing interests of California
10 and the alternate jurisdiction in the litigation.” *Stangvik*, 54 Cal. 3d at 751. These factors also weigh
11 heavily in favor of dismissal.
12

13 California courts have no interest in adjudicating a contractual dispute governed by out-of-
14 state law between non-California parties involving conduct occurring primarily in Connecticut.
15 Allowing this action to proceed in California imposes an unnecessary burden on this Court.
16 Connecticut, where the Insurers will bring a substantially similar declaratory judgment action
17 against PHL, has a markedly greater interest in adjudicating this dispute.
18

19 PHL will likely argue that California is the proper forum because certain of the Policies
20 were delivered to the California insurance broker used by PHL’s parent, Nassau Financial Group LP
21 (“Nassau”). However, this connection to California is insignificant in light of the overwhelming
22 Connecticut contacts discussed above. On its own, the mere fact that Nassau, the Policies’ Named
23 Insured – worked with the California office of an international broker to procure certain of the
24 Policies, even though Nassau is not a California citizen, does not tilt the public and private interest
25 factors in PHL’s favor.
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1 Indeed, this argument about the location of the broker would not even support the
2 application of California law, let alone California as a proper forum. Under California Civil Code §
3 1646, a contract is generally “to be interpreted according to the law and usage of the place where it
4 is to be performed; or, if it does not indicate a place of performance, according to the law and usage
5 of the place where it is made.” Cal. Civ. Code § 1646 (West).
6

7 With respect to liability insurance policies, the intended place of performance is the location
8 of the insured risk. *See, e.g., Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal. App. 4th 1436,
9 1449, 1461-62. A contract is “made” in the place of acceptance. *ABF Capital Corp. v. Grove*
10 *Props. Co.* (2005) 126 Cal. App. 4th 204, 222. Similarly, under the governmental interest analysis,
11 to the extent there is a material difference between the laws of potentially concerned jurisdictions,
12 California courts have “placed particular importance on the location of the insured risk” in
13 determining which state’s law should apply. *Frontier Oil*, 153 Cal. App. 1436 at 1460-61 (citing
14 *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.* (1993) 14 Cal. App. 4th 637, 646-47).
15

16 This location may be Connecticut, because that is where PHL, an Insured under the Policies,
17 is located. *Frontier Oil*, 153 Cal. App. 1436 at 1462 (policy issued in Oregon, but place of
18 performance was California, where relevant insured was located); *Fireman’s Fund Ins. Co. v.*
19 *Nationwide Mut. Ins. Co.*, (S.D. Cal. June 4, 2012) 2012 WL 1985316, *5 (policy issued in Florida,
20 but place of performance was California, where relevant insured was located). It may also be New
21 York, where the Named Insured (PHL’s parent), under both the E&O Policy and D&O Policy is
22 located. Savage Decl. Ex. A, Declarations Item 1; Ex. B, Declarations Item 1. To be sure, the D&O
23 Policy has six separate “New York Amendatory Endorsements” attached to it. *Id.* Ex. B, Ends. Nos.
24 2-7.
25

26 But it is certainly not California, and certainly not because of the broker. The court flatly
27 rejected a similar argument in *Human Resource Advantage, LLC v Hanover Insurance Company*
28

1 (E.D. Cal. 2022) 2022 WL 1214899. There, the broker was located in California. The Court,
2 applying California choice of law analysis, nevertheless concluded that California law did not
3 apply, because the policy included Oregon endorsements, the insured was an Oregon resident with
4 its principal place of business as Oregon, and the policy was delivered to the insured in Oregon
5 through its agent in California. *Id.* at *8. The same is true here, for all the same reasons.
6

7 Accordingly, the public and private interest factors support dismissal of this action based on
8 forum non conveniens.

9 **C. Dismissal Is the Appropriate Remedy**

10 Where, as here, forum non conveniens applies, the Court has discretion in determining the
11 appropriate remedy. *See* C.C.P. § 410.30(a). The appropriate remedy here is dismissal given the
12 existence of a suitable forum, the Connecticut Superior Court, that has an interest in adjudicating
13 this Connecticut-centered dispute and where the Insurers will soon commence a declaratory
14 judgment action against PHL. Alternatively, the Court may stay this action pending resolution of
15 the Insurers' Connecticut action against PHL.
16

17 **CONCLUSION**

18 Pursuant to C.C.P. §410.30, the Court should dismiss or stay this action because the interests
19 of substantial justice dictate that this action should proceed in Connecticut.

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