No. 16-56872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLUMBIA CASUALTY COMPANY,
Plaintiff-Appellant,

v.

COTTAGE HEALTH,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California, No. 2:16-cv-03759-JAK-SK (Kronstadt, J.)

ANSWERING BRIEF OF APPELLEE COTTAGE HEALTH

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant/Appellee Cottage Health makes the following disclosure: Cottage Health has no parent corporation; no publicly held corporation owns 10% or more of its stock.

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ANSWERING BRIEF

By this appeal, Columbia Casualty Company ("Columbia") seeks to reverse the District Court's stay, thus resulting in two parallel insurance coverage lawsuits, both of which are identical as to the purely state law claims between Cottage Health ("Cottage") and Columbia, proceeding at the same time in state and federal court. Granting Columbia's request and reversing the District Court's stay would not only waste judicial resources and risk inconsistent rulings on identical issues, but would also undermine the District Court's broad discretion to control its docket.

By way of background, on May 31, 2016, Cottage and Columbia filed competing insurance coverage actions stating purely state law claims in Santa Barbara Superior Court (the "State Court Action") and the Central District of California (the "Federal Court Action"). The only difference between the two lawsuits is that Cottage's State Court Action is more comprehensive, in that it includes bad faith claims against Columbia, as well as additional claims against Cottage's excess insurer, Certain Underwriters at Lloyd's, London ("Underwriters").

On October 7, 2016, the Santa Barbara Superior Court denied Columbia's motion to dismiss or stay Cottage's State Court Action, on the basis that state court was the most appropriate venue for the dispute because it could accord full relief as to all parties, including Underwriters (which cannot be joined to the Federal Court

Action without destroying diversity). Both Underwriters and Columbia have filed answers in Cottage's more comprehensive State Court Action, and Columbia has also filed a Counterclaim that is verbatim the same as Columbia's Complaint in the Federal Court Action. Discovery is underway, a mandatory settlement conference is scheduled for October 27, 2017, and trial is scheduled for November 17, 2017 in the State Court Action.

On December 2, 2016, the Honorable Judge Kronstadt of the United States District Court for the Central District of California granted Cottage's request to stay Columbia's Federal Court Action pursuant to *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976). Key to Judge Kronstadt's stay order was that (1) the more comprehensive State Court Action would dispose of all issues in the Federal Court Action, (2) allowing the Federal Court Action to proceed parallel with the State Court Action would waste resources and risk inconsistent rulings, (3) Columbia had not given any reason why its rights would not be fully protected in the State Court Action, and (4) the parties would be required to provide the District Court with a report every 90 days indicating that the State Court Action was proceeding with diligence and efficiency, otherwise the stay would be lifted.

Columbia seeks reversal of this order on the ground that the District Court purportedly abused its discretion under *Colorado River*, as applied by this Circuit in *Travelers Indemnity Company v. Madonna*, 914 F.2d 1364 (9th Cir. 1990).

However, because Judge Kronstadt retained jurisdiction over the Federal Court Action and reserved the right to reconsider the Order every 90 days and, if necessary, lift the stay, it is unclear that the stay is immediately appealable under Section 1291. Moreover, as Judge Kronstadt correctly found, the *Madonna* case is not on point, and "exceptional circumstances"—including the State Court's Order Denying Columbia's Request for Dismissal or a Stay, and its Scheduling Order setting the trial for this year—justify the grant of a limited *Colorado River* stay. Finally, Columbia completely ignores the District Court's broad discretion under *Landis v. North American Company*, 299 U.S. 248, 254 (1936) and subsequent Ninth Circuit precedent to stay an action pursuant to its inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." For at least these reasons, the December 2, 2016, Order Staying the Federal Court Action should be AFFIRMED.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(2), based on diversity of the parties and the amount in controversy. However, as described below, this Court lacks jurisdiction under 28 U.S.C. § 1291, because the District Court's December 2, 2016, Order is not a final appealable order.

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether the December 2, 2016, Order is a final appealable order under 28 U.S.C. § 1291.

2. Whether the District Court properly exercised its discretion under *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976) to stay the Federal Court Action in favor of the State Court Action.

3. Whether the District Court properly exercised its discretion under *Landis v. North American Company*, 299 U.S. 248, 254 (1936) to stay the Federal Court Action in favor of the State Court Action.

STANDARD OF REVIEW

Every court possesses inherent power to "control the disposition of the causes on its docket with economy of time and effort," which calls for the "exercise of judgment." *Landis*, 299 U.S. at 254. A district court's order granting a motion to stay is reviewed for *abuse of discretion*. "Under the abuse-of-discretion standard, we cannot reverse the district court order absent a 'definite and firm conviction that the district court committed clear error of judgment in the conclusion it reached upon a weighing of relevant factors.'" *Johnson v. Inos*, 619 Fed. Appx. 651 (9th Cir. 2015) (*citing Valdivia v. Schwarzenneger*, 599 F.3d 984, 988 (9th Cir. 2010)).

While Columbia has argued that "[i]t is well established that the pendency of an action in the state court is no bar to proceedings concerning the same matter in

the Federal court having jurisdiction," the Supreme Court has held "[i]t is equally well settled that a district court is under no compulsion to exercise that jurisdiction where the controversy may be settled more expeditiously in state court." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662-63 (1978). "[T]he decision is largely committed to the carefully considered judgment of the district court." *Id.*

Furthermore, while "[i]t is true that *Colorado River* emphasized 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them[,] that language underscores [the Court's] conviction that a district court should exercise its discretion with this factor in mind, but it in no way undermines the conclusion . . . that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." *Id.* While Columbia has emphasized the "unflagging obligation" language in *Colorado River*, the Supreme Court has subsequently cautioned that "seizing upon the phrase 'unflagging obligation' in an opinion which *upheld* the correctness of a district court's *final decision* to dismiss because of concurrent jurisdiction" is misguided. *Id.*

STATEMENT OF THE CASE

I. THE UNDERLYING PROCEEDINGS

Columbia issued to Cottage "NetProtect 360" Policy No. 4255651402 (the "Policy") for the policy period of October 1, 2013, to October 1, 2014. See

Columbia Complaint, Dkt. 1, ¶ 25, et. seq. (Excerpts of Record Vol. II ("ER") 135, ¶ C). The lawsuit captioned *Kenneth Rice, et al. v. inSync, et al.*, in Orange County Superior Court (the "*Rice* Lawsuit") was filed and served as a putative class action against Cottage and others on or about January 27, 2014. Vol. II, ER 188-202. The Complaint alleged, among other things, two causes of action against Cottage for "violation of [the] California Confidentiality of Medical Information Act ['CMIA'] by negligent disclosure" and "by negligent maintenance." Id., ¶¶ 56-68 (Vol. II, ER 198-199). The Rice Complaint also alleged that Cottage breached "a non-delegable duty" to protect the confidentiality of medical records under the Health Information Portability and Accountability Act ("HIPAA"). Id., ¶ 65 (Vol. II, ER 199). On or about November 17, 2014, Cottage reached a settlement with the Rice Lawsuit class, which was later approved by the court and funded by Columbia. Vol. II, ER 206, ¶ 8. However, Columbia expressly reserved a claimed right to seek recovery from Cottage for the amount paid, and has since denied all coverage for the Underlying Claims, and has sought reimbursement of the amounts it thus far has paid. Id.

As required by law, Cottage provided notice of the data breach at issue in the *Rice* Lawsuit to the United States Department of Health and Human Services, Office for Civil Rights ("OCR"), the California Department of Public Health ("CDPH") and the California Attorney General's Office ("AG"). Id., ¶ 9. Upon receipt of this notice, all three regulators commenced investigations of the breach, which presently

are ongoing. Id. (Together, the proceedings commenced by the OCR, the AG, and the CDPH are referred to as the "Regulatory Proceedings.") Among other things, the Regulatory Proceedings focus on the issue of whether Cottage complied with its obligations under HIPAA and the CMIA, and could result in the imposition of statutory financial exposure to Cottage, potentially substantially in excess of Columbia's policy limit. Id.

II. COLUMBIA'S PREEMPTIVE, FORUM-SHOPPING 2015 FEDERAL ACTION

In early April 2015 in the context of discussing Columbia's payment of the Rice Lawsuit settlement, counsel for the parties also discussed Columbia's intent to seek reimbursement of the amounts paid by Columbia, and the parties' disparate positions regarding coverage. Vol. II, ER 184-185, ¶ 6. On April 21, 2015, Columbia sent to Cottage a proposed stipulation regarding its payment of the Rice settlement. Id., ¶ 7. The draft stipulation included an express waiver of the Columbia Policy's ADR Provision. Id. Contrary to Columbia's characterization, Cottage did not reject mediation as "futile." Instead, by email dated April 28, 2015, Cottage simply informed Columbia that Cottage would not waive the policy's ADR provision in advance of litigation. Id.

Thereafter, on May 7, 2015, without first engaging in ADR and without Cottage's agreement to forego ADR in advance of litigation, Columbia filed a complaint for declaratory relief captioned *Columbia Casualty Company v. Cottage*

Health System, Case No. 15-cv-03432 (Central District of California) (J. Dean Pregerson). Id. Soon after Columbia filed suit, Cottage wrote to Columbia and requested that Columbia dismiss its suit so that the parties could pursue mediation. Vol. II, ER 44-45.

On July 17, 2015, Judge Pregerson dismissed Columbia's 2015 Action without prejudice, on the basis that "Plaintiff [Columbia] ha[d] not exhausted the non-judicial remedies required by" the policy's ADR provision. Vol. II, ER 185, ¶ 8.

On February 12, 2016, Cottage and Columbia participated in a mediation before Judge Diane Wayne, but were unable to resolve their dispute. Id., ¶ 9. The parties mutually agreed that mediation concluded on March 31, 2016, and that the first date either party could file a complaint under the policy's ADR provision was May 31, 2016. Id.

III. COTTAGE'S 2016 STATE COURT ACTION

Cottage filed its complaint on May 31, 2016, in Santa Barbara Superior Court to resolve this insurance coverage dispute. Vol. II, ER 204-219. In addition to seeking declaratory relief, the State Court Action also brings claims for breach of contract and breach of the implied covenant of good faith fair dealing. Vol. II, ER 185-186, ¶ 11. The State Court Action includes defendant Underwriters Syndicates 623 and 2623, unincorporated associations which insured Cottage in addition to

Columbia and are therefore important parties to this dispute. Id. However, certain members of Underwriters Syndicate 623 reside in California. Id. As a result, Underwriters could never be a party to the Federal Court Action without defeating diversity, the only basis for federal jurisdiction.[1]

Cottage served its complaint the same day it was filed on May 31, 2016. ER Id., ¶ 12 (Vol. II, ER 186). Underwriters have answered the complaint in the State Court Action. Id., ¶ 13.

IV. COLUMBIA'S 2016 FEDERAL COURT ACTION

On May 31, 2016, Columbia also filed substantially the same complaint as it had the year prior in the Central District of California, but did not effectuate service until July 7, 2016. See Columbia Complaint and Waiver of Service, Dkt. 1 and 7 (Vol. II, ER 163). Columbia's new complaint requested materially identical relief as the old complaint. Vol. II, ER 163-164. However, in its Civil Cover Sheet, Columbia claimed that this action was neither identical nor related to the previous

[1] Columbia accuses Cottage of including Underwriters as a defendant in the Santa Barbara action to destroy the District Court's diversity jurisdiction and to prevent removal. This is inaccurate. As Columbia is well aware, it is typical insurance litigation practice for a policyholder seeking complete relief for an underlying claim to file one single lawsuit naming each of its insurers as defendants in one litigation. Here, including Columbia and Underwriters in the same lawsuit makes sense because pursuant to the policies, if the Court determines that Columbia's coverage does not apply to the underlying data breach matter, then Underwriters' coverage would become primary coverage. Even if Columbia's coverage does apply, then Underwriters' policy provides excess coverage for the underlying litigation.

action it filed in 2015. Id. Columbia's 2016 action was at a minimum "related" to the 2015 action, as it "ar[o]se from the same or a closely related transaction, happening, or event" and "call[ed] for determination of the same or substantially related or similar questions of law and fact." Id. On the basis of Columbia's representations in its Civil Cover Sheet, this action was assigned to Judge Kronstadt instead of Judge Pregerson, who had dismissed the prior related complaint. Id.

V. COLUMBIA'S MOTION TO STAY THE 2016 STATE COURT ACTION IS DENIED

Columbia responded to Cottage's lawsuit by filing a demurrer seeking dismissal, or in the alternative a motion to abate or stay, the State Court Action in favor of the Federal Court Action. Vol. II, ER 48. On October 5, 2016, the State Court issued a six-page, single-spaced tentative order denying Columbia's motion. The Court noted that the State Court action appeared to be more comprehensive, in part because "in [the State Court] action, Cottage Health seeks damages for breach of insurance contracts by Columbia and Underwriters, damages for tortious breach of the covenants of good faith, and declaratory relief," whereas in the "federal action, Columbia seeks declaratory relief." Vol. II, ER 51. The Court also noted that "an important difference between the actions . . . is that this [State Court] action includes Cottage Health's claims against Underwriters." *Id.* According to the Court, "Cottage Health's claims against Underwriters are intertwined with their claims against Columbia in that the Underwriters Policy is an excess policy that depends

upon the coverage by Columbia," and "it is anticipated that there would be overlap in the litigation of these claims, including at least overlap in discovery." Vol. II, ER 51. The Court further reasoned that "with all of the parties appearing in this court, this court has the jurisdiction and capability of providing complete relief to all parties as well as providing efficiency as to the overlapping issues and procedures." Vol. II, ER 51-52. The Court was concerned by the "inefficiency entailed by two actions in different jurisdictions with overlapping issues," and in denying Columbia's demurrer noted that "totality of the circumstances . . . strongly favor the continued litigation of the dispute in [State] court" over the Federal Court. Vol. II, ER 52.

On October 7, 2016, the parties appeared in court and Columbia expressly declined argument, and so the tentative order became final. Vol. II, ER 41, ¶ 4. On October 24, 2016, Columbia filed a counterclaim to Cottage's state court complaint, which mirrors Columbia's complaint in this action verbatim, with the exception of certain state-court specific jurisdictional allegations. Vol. II, ER 54-109.

VI. COTTAGE'S MOTION TO STAY THE 2016 FEDERAL COURT ACTION IS GRANTED

Cottage likewise moved to dismiss or stay Columbia's Federal Court Action. Vol. II, ER 152-182. On December 2, 2016, the state court issued an eleven-page, single-spaced order granting Cottage's motion. Vol. I, ER 1-11. The District Court held that "given the substantial overlap between the cases, it would be inefficient to have the parallel actions proceed simultaneously with a potential race for judgment."

Vol. I, ER 9. The District Court further expressed concerns that "allowing this litigation to proceed in separate courts would result in duplication of efforts and could lead to overlapping, redundant and potentially inconsistent results." Id. The District Court also noted that "the matters at issue are governed by California law," another factor weighing in favor of a stay. Id. The District Court reasoned that the State Court Action proceedings "will adequately protect the rights of the litigants," specifically noting that Columbia "has not suggested any reason why the state court cannot adequately protect its rights." Id. Finally, the District Court noted that the "state court proceedings will resolve all issues." Vol. I, ER 10.

For these reasons, the District Court stayed the Federal Court Action, placing the matter "on the Court's inactive calendar." Id. The Court ordered that "the parties shall file a joint status report on the earlier of every 90 days from the date of this Order, or within 10 days of the final disposition of some or all of the claims in the Superior Court," and that those reports "shall set forth their respective and/or collective views as to the status of the Superior Court proceedings and whether the stay of this action should be lifted." Vol. II, ER 10-11.

To date, the parties have submitted two joint notices pursuant to the December 2, 2016, Order. See Status Reports, Dkt. 37 and 40. Columbia did not request that the stay be lifted at either time. Id.

SUMMARY OF ARGUMENT

1. The December 2, 2016, Order is not a final appealable order under 28 U.S.C. § 1291.

2. The District Court's December 2, 2016, Order should be affirmed as a proper exercise of the Court's discretion under *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976) to stay the Federal Court Action in favor of the State Court Action.

3. The District Court's December 2, 2016, Order should be affirmed as a proper exercise of the Court's broad discretion under *Landis v. North American Company*, 299 U.S. 248, 254 (1936) "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS NOT A FINAL APPEALABLE ORDER UNDER SECTION 1291

As a preliminary matter, the District Court's December 2, 2016, Order is not a final appealable order under 28 U.S.C. § 1291. Section 1291 provides that "the courts of appeals . . . shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States." *Id.* "A stay order is generally not appealable under 28 U.S.C. § 1291." *Klein v. Cook*, 667 Fed.Appx. 608, 609 (9th Cir. 2016) (holding that a "temporary stay" is not an appealable final order). The only exception is when the district court's stay order puts the Appellant "effectively out

of court." *Id.*; *see also Stanley v. Chappell*, 764 F.3d 990, 996 (9th Cir. 2014) (holding Court was "without appellate jurisdiction to determine the propriety of [the stay] order," even though the stay had "the practical effect of allowing a state court to be the first to rule").

The District Court's December 2, 2016, Order is not appealable, because it does not put Columbia "effectively out of court." Not only is Columbia actively litigating the issues in the State Court Action, the District Court has retained jurisdiction, simply having placed the matter "on the Court's inactive calendar." Indeed, that the District Court requires the parties to "file a joint status report on the earlier of every 90 days from the date of this Order, or within 10 days of the final disposition of some or all of the claims in the Superior Court," and "set forth their respective and/or collective views as to the status of the Superior Court proceedings and whether the stay . . . should be lifted," is consistent with the District Court having retained jurisdiction. Notably, in both joint status reports filed with the Court to date, Columbia has not requested the stay be lifted.

In similar circumstances, this Court has held that "the district court's issuance of a limited, 60-day stay pursuant to *Colorado River* [was not] an appealable final order." *See Roe v. Northern Mariana Islands Retirement* Fund, 454 Fed. Appx. 565, 567 (9th Cir. 2011). The same result is required here. Because the December 2,

2016, Stay Order is limited in nature and Columbia is not "effectively out of court," the Order is not a final appealable order, and this Court lacks appellate jurisdiction.

II. IF THIS COURT FINDS APPELLATE JURISDICTION, THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED BECAUSE IT PROPERLY APPLIED THE *COLORADO RIVER* DOCTRINE TO STAY THE FEDERAL COURT ACTION

Alternatively, this Court should affirm the District Court's December 2, 2016, Order staying the Federal Court Action in favor of the State Court Action under *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976), because the District Court properly weighed the various factors in favor of a stay.

A. The *Colorado River* Factors Weigh Heavily in Favor of a Stay.

"Drawing from *Colorado River*, *Moses H. Cone* and subsequent Ninth Circuit cases, [the Ninth Circuit has] recognized eight factors for assessing the appropriateness of a *Colorado River* stay or dismissal: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011). As shown below, these factors weigh heavily in favor of a stay.

1. Which Court First Assumed Jurisdiction Over Any Property at Stake.

There is no property at issue in this insurance coverage dispute. Therefore the first factor, "which court first assumed jurisdiction over any property at stake," is neutral.

2. The Inconvenience of the Federal Forum.

Columbia ignores this factor in its Opening Brief, but the inconvenience of the federal forum weighs in favor of a stay. Here, litigating in Santa Barbara Superior Court is significantly more convenient to Cottage (which is based in Santa Barbara[2]), and is at least as equally convenient to Columbia (which is based in Illinois) as litigating in federal court in Los Angeles. Columbia may argue that the federal court in Los Angeles is a presumptively convenient venue for Cottage, because Cottage is located within this district. However, this argument ignores the nature of Cottage's work as a hospital providing life-saving care daily to the residents of Santa Barbara. Needlessly imposing the burden of traveling hundreds of miles on Cottage's witnesses (all of whom are Cottage employees) will necessarily distract from this important work.

[2] While the District Court's December 2, 2016, Order states that Cottage "operates a network of hospitals throughout Southern California," that is incorrect. Cottage operates exclusively in the Santa Barbara area.

3. Avoiding Piecemeal Litigation.

The desire to avoid piecemeal litigation also weighs in favor of a stay. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *R.R. Street & Co. v. Transport Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011) (*citing Am. Int'l Underwriters, (Philippines) Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988)). Indeed, in a similar insurance coverage case, the Ninth Circuit in *R.R. Street* held that deciding the two actions "in separate courts would result in duplication of efforts," because both actions "are centered on whether the [] policy obligates [the insurer] to cover damages and defense costs in the Tort Actions." *Id.* at 979. Similarly, allowing both the State Court Action and the Federal Court Action to proceed would result in duplicative efforts, because both actions concern Columbia's duties to defend and indemnify Cottage with respect to the *Rice* Lawsuit and the Regulatory Proceedings. Finally, the Ninth Circuit in *R.R. Street* held it is inappropriate for "the district court to adjudicate rights that are implicated in a vastly more comprehensive state action." *Id.* Likewise, here it would be inappropriate for the Federal Court Action to proceed, because the State Court Action includes additional claims and parties and thus is more comprehensive than the Federal Court Action.

4. The Order in which the Forums Obtained Jurisdiction.

The Order in which the forums obtained jurisdiction also weighs in favor of a stay. While Cottage filed and served its State Court complaint and summons on May 31, 2016, Columbia did not serve its Federal Court complaint until July 7, 2016. Moreover, "priority should not be measured exclusively by which complaint was field first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983). The District Court correctly noted at the time it issued the stay that the State Court Action was further along in that "the parties have already filed responsive pleadings in the Superior Court, where there has been a ruling on a demurrer and the commencement of discovery." Vol. I, ER 9. Therefore, this factor likewise supports a stay here.

5. Whether State or Federal Law Controls.

As to the question of whether State or Federal law applies, California law controls all of Columbia's claims. "[T]he presence of federal-law issues must always be a major consideration" for a Federal Court in deciding whether to stay a case. *Moses Cone*, 460 U.S. at 26. Because here there are no federal law issues, only state law issues, the District Court correctly held that this factor weighs in favor of a stay.

6. Whether the State Proceeding is Adequate to Protect the Parties' Rights.

In its Opening Brief, Columbia concedes that the state court can adequately protect its rights. Therefore this factor likewise weighs in favor of a stay.

7. The Desire to Avoid Forum Shopping.

Columbia ignores the "forum shopping" factor in its Opening Brief, but this factor too weighs in favor of a stay. Here, the relevant facts suggest that Columbia filed this matter in order to preempt a state court action by Cottage. Columbia filed a substantially identical complaint as the one in this case in the Central District of California back in 2015, without first complying with its Policy's mandatory ADR provision. Columbia refused to voluntarily withdraw that complaint when confronted with the mandatory ADR provision, and instead sought a stay of the action pending mediation. Judge Pregerson denied Columbia's request, dismissing the action without prejudice for failure to comply with the Policy's mandatory ADR provision. Columbia's preemptive filing of the 2015 Action in violation of the Policy's mandatory ADR provision suggests Columbia's intent to forum shop, a factor which weighs in favor of a stay.

8. Whether the State Court Proceedings Will Resolve All Issues Before the Federal Court.

Columbia's Opening Brief concedes that the State Court Action will resolve all issues before the Federal Court, as it must—Columbia's Counterclaim in the State

Court Action is word-for-word the same as its Complaint in the Federal Court Action. This factor too weighs in favor of a stay.

B. Columbia's Case Law is Distinguishable

While Columbia acknowledges that, at a minimum, several of the *Colorado River* factors do not favor federal jurisdiction (including that state law controls, state court adequately protects Columbia's rights, and that the State Court Action will resolve all issues in the Federal Court Action), Columbia still argues that the District Court erred in staying the Federal Court Action under *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364 (9th Cir. 1990), which it asserts is "directly on point and dispositive." However, as the District Court correctly found, *Madonna* is in fact highly distinguishable from this case. In *Madonna*, a stay was deemed inappropriate where the district court relied *solely* on the piecemeal litigation factor to issue a *Colorado River* stay. By contrast, here, several other factors support a stay. Moreover, unlike here, in *Madonna* there was "no vastly more comprehensive state action that can adjudicate the rights of many parties." *Id.* at 1369. Additionally, the Ninth Circuit in *Madonna* held that concerns over piecemeal litigation were premature because "at the time of the district court's stay order the state court had made *no rulings whatsoever* in regards to this dispute." *Id.* (emphasis added). By contrast, here, as the District Court correctly noted at the time it granted the stay, the State Court had denied a demurrer and held that State Court was the appropriate

venue for the dispute, and the parties had begun conducting discovery. Finally, there is no indication in *Madonna* that the stay at issue was limited in time or that the district court retained jurisdiction, whereas here the District Court has simply placed the matter on its inactive calendar and has expressly reserved the right to reevaluate and, if appropriate, lift the stay every 90 days (or 10 days after any ruling on any matter in the State Court Action).

We anticipate that Columbia may also raise this Court's recent decision in *Seneca Insurance Company, Inc. v. Strange Land, Inc.*, Case No. 15-16011, 2017 WL 2855082, at *7 (9th Cir. July 5, 2017) in support of its argument. However, much like *Madonna, Seneca* is distinguishable. First, like *Madonna*, there was no "vastly more comprehensive state action" as there is here. Second, there is no indication that the stay in *Seneca* was limited in time or that the district court retained jurisdiction, as it has done here. Third, in *Seneca*, "the cases had progressed equivalent amounts" at the time of the stay order, which is not the case here. *Id.* at *5. Finally, in *Seneca,* this Court specifically held that "nothing indicates that either side sought to manipulate the litigation or behaved vexatiously to wind up in the forum of its choosing." *Id.* at *7. By contrast, here, Columbia breached its policy's mandatory ADR provision in an effort to "wind up in the forum of its own choosing." Because both *Madonna* and *Seneca* are distinguishable, neither is a basis for this Court to reverse the District Court's December 2, 2016, Stay.

III. IF THIS COURT FINDS APPELLATE JURISDICTION, ALTERNATIVELY THE DISTRICT COURT'S ORDER MAY BE AFFIRMED AS A PROPER EXERCISE OF ITS BROAD DISCRETION TO ISSUE A *LANDIS* STAY

The District Court's December 2, 2016, Order may also be affirmed as a proper exercise of the Court's broad discretion under *Landis v. North American Company*, 299 U.S. 248, 254 (1936) "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." "[A] district court's inherent power to manage and control its docket . . . coexist[s] with the *Colorado River* doctrine." *Cottrell v. Duke*, 737 F.3d 1238, 1248 (8th Cir. 2013). Even where a *Colorado River* stay may not be appropriate, a "district court may impose a more finite and less comprehensive stay" under its inherent powers "if it concludes that such a stay properly balances the rights of the parties and serves the interests of judicial economy." *Id.* at 1249-50 ("We leave the determination of that question to the district court's discretion"). The State Court Action is proceeding efficiently and is likely to be tried before the hearing on this appeal, as a mandatory settlement conference is scheduled for October 27, 2017, and trial is scheduled for November 17, 2017.

While the District Court did not specifically rule under *Landis*, this Circuit has repeatedly held that it may affirm a district court's decision on any ground supported by the record, whether or not it was considered by the district court, *see, e.g., Karl Storz Endoscopy America, Inc. v. Surgical Technologies, Inc.*, 285 F.3d

848, 855 (9th Cir. 2004) ("We may affirm . . . on any ground finding support in the record, whether or not relied upon by the trial court"), and irrespective of whether it was argued below,[3] *see Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994) ("Finally, we emphasize that even if we were to determine that the RTC waived the issue by failing to rely on it in the district court, a matter which we do not decide, we would exercise our discretion to address the issue given the clear dictates of the law in this area.").

In *Landis*, the U.S. Supreme Court first held that a district court has the power "to stay proceedings in one suit until the decision of another." 299 U.S. at 249. Specifically, the Supreme Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. The Supreme Court held that whether and how to enter into such a stay was in the sound discretion of the district court, "which must weigh competing interests and maintain an even balance." *Id.*

[3] Cottage did indeed raise the possibility of a *Landis* stay below. *See* Cottage's Reply in support of Motion to Dismiss, Dkt. No. 23 (Vol II, ER 125) (citing case which granted a *Landis* stay, *North River Ins. Co. v. Leffingwell Ag Sales Co.*, No. 10-cv-2007, 2011 WL 304579, *5 (E.D. Cal. Jan. 27, 2011), for the proposition that "district courts have inherent power to stay proceedings that is incidental to the power inherent in every court to control disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants").

The Ninth Circuit has likewise held that district courts may stay proceedings pending the resolution of proceedings elsewhere. For example, in *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979), the Ninth Circuit held that "a trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay on an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court." The *Leyva* Court imposed no limit on the district court's power to issue a stay, other than to request that the district court "consider conditioning any stay upon receipt of satisfactory assurances that the [other case] is proceeding with diligence and efficiency. A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Id.* The *Leyva* Court remanded to the district court to determine the propriety of a stay, but not before noting that "it would waste judicial resources and be burdensome upon the parties if the district court in a case such as this were mandated to permit discovery, and upon completion of pretrial proceedings, to take evidence and determine the merits of the case at the same time as the [other court] is going through a substantially parallel process." 593 F.2d at 864.

Since *Levya*, the Ninth Circuit has routinely affirmed a district court's decision to issue a *Landis* stay. For example, in *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983), the Ninth Circuit held that "we should overturn a trial court's stay of an action only when we believe the court has abused its discretion," and that given the trial court's "inherent power to control its own docket and calendar," "the district court did not abuse its discretion by staying the action pending receipt of the results of arbitration." Most recently, in *Johnson v. Inos*, 619 Fed. Appx. 651 (9th Cir. 2015), the Ninth Circuit affirmed the district court's *Landis* stay because "the district court's order demonstrates that the court considered the totality of the circumstances and properly exercised its discretionary power."

The few cases which have reversed a *Landis* stay are highly distinguishable. In *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112(9th Cir. 2005), the Ninth Circuit reversed a *Landis* stay because the district court action sought "injunctive relief against ongoing and future harm," and because "it [wa]s highly doubtful that the [other] court w[ould] provide a legal resolution to the [] Clayton Act claim" at issue in that case. And in *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007), the Ninth Circuit reversed a *Landis* stay that would have "forc[ed] the [insured] to enter into arbitration in a foreign country when it remains unclear whether [the insured] even agreed to arbitrate." Moreover, the stay

order was defective because it "provid[ed] no specific deadline for when the stay will terminate," and "in the nearly two years that [had] passed since the order issued, [there] was no indication that any arbitration proceedings [had] commenced." *Id.* at 1067.

Here, the District Court's December 2, 2017, stay order more closely resembles the stays in *Levya*, *Ssangyong*, and *Johnson*, than in *Lockyer* or *Dependable*. The Ninth Circuit's rationale in *Levya* for a *Landis* stay is applicable here: "It would waste judicial resources and be burdensome upon the parties if the district court in a case such as this were mandated to permit discovery, and upon completion of pretrial proceedings, to take evidence and determine the merits of the case at the same time as the [other court] is going through a substantially parallel process." 593 F.2d at 864. Similarly, here the District Court issued the stay because "given the substantial overlap between the cases, it would be inefficient to have the parallel actions proceed simultaneously with a potential race for judgment." Vol. I, ER 9. Consistent with *Levya*, the District Court put in place measures to ensure that the State Court Action was "proceeding with diligence and efficiency." 593 F.2d at 863-64. Specifically, the District Court required that the parties file a joint status report every 90 days regarding the progress of the State Court Action, at which time there would be a periodic reassessment of "whether the stay of this action should be lifted." Vol I, ER 11. Unlike the cases in which a stay was reversed, the District

Court Action does not seek injunctive relief. Moreover, far from being delayed, the State Court Action is scheduled to be tried November 17, 2017—long before this appeal is likely to be heard.

For at least these reasons, the District Court's December 2, 2016, Stay Order should be affirmed under *Landis v. North American Company*, 299 U.S. 248, 254 (1936).

CONCLUSION

For the reasons stated above, the District Court's December 2, 2016, Order staying the Federal Action is not an appealable final order. Should this Court find differently, the Order should nonetheless be affirmed as a proper exercise of the District Court's discretion under *Colorado River* and/or under *Landis*.

July 28, 2017

Respectfully submitted,

/s/ Linda D. Kornfeld

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, we are not aware of any related cases pending in this Court.

July 28, 2017 /s/ Linda D. Kornfeld

CERTIFICATE OF COMPLIANCE

I am an attorney for Cottage Health. Pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing Answering Brief of Cottage Health is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (Word 2007), the word count of the brief is 6,522, not including the table of contents, table of authorities, certificate of service, and this certificate of compliance.

July 28, 2017 /s/ Linda D. Kornfeld

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

July 28, 2017 /s/ Linda D. Kornfeld