IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, Plaintiff, vs. CHARTER OAK OIL COMPANY, Defendant.	8:17-CV-164 MEMORANDUM AND ORDER

The plaintiff, Applied Underwriters Captive Risk Assurance Company (AUCRA), has sued the defendant, Charter Oak Oil Company, for breach of contract. Charter Oak moves to dismiss AUCRA's complaint for improper venue under the first-to-file rule. Filing 12. That motion will be granted in part, and denied in part, as set forth below. AUCRA will have until January 16, 2018 to inform the Court whether its complaint should be dismissed without prejudice, or transferred to the District of Connecticut.

BACKGROUND

The following facts are not meaningfully disputed. In 2013, Charter Oak entered into a Reinsurance Participation Plan ("the Plan") with Applied Underwriters, which is not a party to this dispute. Filing 1-1 at 1. The Plan included both an insurance policy, in which Charter Oak received workers' compensation coverage, and an investment component, in which it shared in the profits and losses associated with its coverage. Filing 16 at 3-4.

While the details of the Plan are unclear, it appears to operate through at least two separate entities, both of which are "indirect subsidiaries" of

Applied Underwriters. Filing 16 at 4. The first entity is California Insurance Company, which issued Charter Oak's workers' compensation coverage. Filing 16 at 4. The second entity is AUCRA, which administered the investment component through a separately executed Reinsurance Participation Agreement, or "RPA." Filing 1-1 at 1; filing 16 at 3.

AUCRA has sued Charter Oak for breach of contract, claiming that it is liable for $236,352.71 in "amounts due and owing" under the RPA. Filing 1-1 at 2. Charter Oak moves to dismiss AUCRA's complaint for improper venue, noting the existence of concurrent litigation—filed before the initiation of the underlying complaint—in Connecticut. *See Charter Oak Corporation v. Applied Underwriters, Inc. et al.*, Docket No. 3:17-CV-689-SRU (D. Conn. 2017); filing 14-2 at 15. In that case, Charter Oak has sued AUCRA, Applied Underwriters, and California Insurance Company for various claims relating to the defendants' solicitation and administration of the Plan. *See id.* That litigation remains ongoing.

The issue here is whether the Court should retain jurisdiction over AUCRA's breach of contract claim notwithstanding the existence of parallel litigation in another jurisdiction. Charter Oak argues that it should not, citing the "first to file" rule. Filing 13 at 15. That rule provides that in a case of concurrent jurisdiction, "the first court in which jurisdiction attaches has priority to consider the case." *Boatmen's First Nat. Bank of Kansas City, v. Kan. Pub. Employees Ret. Sys.*, 57 F.3d 638, 640 n.3 (8th Cir. 1995) (internal citation omitted). And because jurisdiction has attached in Connecticut, Charter Oak urges the Court to dismiss the complaint as a matter of federal comity.

AUCRA acknowledges the Connecticut litigation and its relation to the dispute at issue here. Filing 16 at 39. But, it argues, "compelling

circumstances" exist that "negate" the applicability of the first-to-file rule. Filing 16 at 38. Those circumstances, according to AUCRA, include the RPA's forum selection clause, which requires disputes to be litigated in Nebraska, and AUCRA's alleged attempt to "settle the dispute outside of court proceedings." Filing 16 at 38-40.

DISCUSSION

The first-to-file rule is premised on basic principles of federal comity; that is, that a federal court should decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another jurisdiction. *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985). However, the first-to-file rule should not be applied in a rigid, mechanical, or inflexible manner. *Nw. Airlines v. Am. Airlines,* 989 F.2d 1002, 1005 (8th Cir. 1993). Instead, it should be applied in a manner best serving the interests of justice. *Id.* The prevailing standard is that, in the absence of compelling circumstances, the first-to-file rule should apply. *Id.*

Compelling circumstances exist if the first-filing party acted in bad faith or raced to the courthouse to preempt a suit by the other party. *Id.* The Eighth Circuit has recognized two "red flags" that may indicate those compelling circumstances are present: (1) if the first suit was filed after the other party gave notice of its intention to sue, and (2) if the first action was for declaratory relief rather than for damages or equitable relief. *Boatmen's First Nat'l Bank*, 57 F.3d at 638. Other factors to consider in determining whether compelling circumstances exist include: the length of time from the date the first-filer received notice of a possible lawsuit to filing of the first-filer's lawsuit; evidence that the first-filer promised or indicated in some manner that it would not sue; and failure of the first-filer to allege that the

natural plaintiff's claims are having an adverse effect on the first-filer. *Anheuser-Busch, Inc. v. Supreme Int'l Corp.*, 167 F.3d 417, 419 (8th Cir. 1999); *Midwest Motor Exp., Inc. v. Cent. States Se.*, 70 F.3d 1014, 1017 (8th Cir. 1995).

AUCRA argues that "red flags" are present here because it allegedly warned Charter Oak in a formal demand letter of its intent to file suit in Nebraska should Charter Oak fail to pay its allegedly delinquent account. Filing 16 at 39. In other words, AUCRA suggests that the Connecticut suit was filed after AUCRA had provided notice of its intent to sue in Nebraska. Further, AUCRA characterizes its demand letter as an attempt to settle the claim outside of court proceedings. *See* filing 16 at 39-40. AUCRA argues that it should not be penalized in forum selection because of its attempt to settle matters out-of-court. Filing 16 at 39-40.

But those allegations, even assuming them to be true, do not justify abrogation of the first-to-file rule. Indeed, there is no evidence (or allegation) that Charter Oak knew that AUCRA's alleged complaint was imminent, *see Scarlett*, 2017 WL 1011450 at *7, or that it misled AUCRA "in order to gain the advantages of filing first," *Brower v. Flint Ink Corp.*, 865 F. Supp. 564, 569 (N.D. Iowa 1994). Nor is there any indication that Charter Oak filed a "surprise complaint" despite prior assurances that it would not do so. *Midwest Motor Exp., Inc.*, 70 F.3d at 1017. Rather, AUCRA alleges that Charter Oak filed suit in Connecticut despite knowing that AUCRA could, potentially, pursue a similar action in Nebraska. *See* filing 16 at 39-40. Those allegations do not indicate the type of "race[] to the courthouse" that AUCRA suggests here. *Nw. Airlines, Inc.*, 989 F.2d at 1007.

AUCRA also argues that jurisdiction has not "attached" in Connecticut, and that the first-to-file rule therefore does not apply. That argument is

premised on a motion AUCRA filed in the Connecticut litigation which, at the time of its briefing in this case, was still pending. *See* filing 17-3. In its motion, AUCRA sought the enforcement of a forum selection clause in the RPA which requires the parties to litigate disputes in Nebraska. *See* filing 18-10 at 3-4. Citing that clause, AUCRA argued that the Connecticut court lacked jurisdiction over Charter Oak's claims, or, alternatively, that it was required to transfer the case to the District of Nebraska. Filing 17-3.

But the Connecticut court denied AUCRA's motion in a September 12, 2017 Ruling and Order, finding the forum selection clause unenforceable under Nebraska law. Filing 22 at 22. The court further concluded that Nebraska was not a "reasonably convenient forum for [Charter Oak's] action," filing 22 at 31, and that even assuming the clause was enforceable, the "interest of justice would compel non-enforcement of [its terms]," filing 22 at 33-34. Thus, contrary to AUCRA's position, its previously filed motion does not foreclose or otherwise alter this Court's application of the first-to-file rule.

As a final matter, it is worth noting that Charter Oak's Connecticut litigation, while involving the same parties,[1] includes different allegations and claims than those presented here. *Compare* filing 1-1, *with* filing 14-2 at 15-32. But the first-to-file rule nonetheless applies because the allegations in the two complaints "substantially overlap." *In re Spillman Development Group, Ltd.*, 710 F.3d 299, 307 (5th Cir. 2013); *see also Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232–33 (4th Cir. 2000). In other words, both complaints are premised on Charter Oak's contractual relationship with AUCRA (and Applied Underwriters and California Insurance Company)

[1] To be clear: the Connecticut litigation is broader than the complaint at issue here. Indeed, Charter Oak has not only sued AUCRA, but also Applied Underwriters, California Insurance Company, and Applied and Applied Risk Services.

under the Plan, and therefore depend on the terms and enforceability of those agreements. Thus, in addition to the reasons stated above, judicial economy favors (if not requires) Connecticut's priority over this dispute. *See Orthman*, 765 F.2d at 121. Accordingly, the Court will decline jurisdiction over AUCRA's complaint.

The Court will deny Charter Oak's motion, however, to the extent it seeks dismissal of AUCRA's breach of contract claim. Indeed, in parallel litigation, the second-filed suit can be dismissed, stayed, or transferred and consolidated. *See Collegiate Licensing Co. v. Am. Cas. Co.*, 713 F.3d 71, 78 (11th Cir. 2013); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 629 (9th Cir. 1991). AUCRA will have until January 16, 2018 to inform the Court whether it prefers the Court to dismiss its complaint without prejudice, or transfer it to the District of Connecticut. If the Court receives no response, it will dismiss AUCRA's complaint without further notice.

IT IS ORDERED:

1. Charter Oak's motion to dismiss (filing 12) is granted in part, and denied in part, as set forth above.

2. Charter Oak's motion to file supplemental authority (filing 21) is denied as moot.

3. On or before January 16, 2018, AUCRA shall inform the Court whether it prefers the Court to either:

    a. Dismiss its complaint without prejudice; or

    b. Transfer it to the District of Connecticut

4. If the Court receives no response, it will dismiss AUCRA's complaint without further notice.

5. The Clerk of the Court shall set a case management deadline for January 16, 2018, with the following docket text: check for filing of AUCRA's notice to dismiss or transfer.

Dated this 4th day of January, 2018.

BY THE COURT:

John M. Gerrard
United States District Judge