

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC., a Washington corporation,

Plaintiff,

v.

EPIC CASH LLC, a California limited liability
company,

Defendant.

CASE NO. C08-1553RSM

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS

Plaintiff Zango, Inc. (“Zango”), a Washington corporation, and defendant Epic Cash LLC (“Epic”), a California limited liability company, are companies engaged in internet commerce.¹ Plaintiff filed this declaratory judgment action in King County Superior Court, asking for a declaration that its software, which may be downloaded by a customer onto a personal computer, does not constitute an “infection,” and that the operation of that software does not interfere with defendant’s rights when it creates advertising “pop-ups.” Defendant removed the action to this court on the basis of the parties’ diversity, pursuant to 28 U.S.C. §§ 1332 and 1441(b). Defendant has now moved to dismiss the complaint under the declaratory relief abstention doctrine or, in the alternative, for lack of personal jurisdiction, pursuant to F.R.Civ.Proc. 12(b)(2). Plaintiff has opposed the motion. For the reasons set forth below, the Court shall decline to reach the merits of the Rule 12 motion and shall grant the motion to dismiss under the abstention doctrine.

¹It appears from the motion and response that Epic is not currently engaged in business in California. That is not relevant to the disposition of this motion.

BACKGROUND

1
2 The facts underlying the dispute are well-known to the parties and need not be set forth here, as
3 they are not relevant to resolution of the motion before the Court. The facts relevant to the motion to
4 dismiss may be summarized as follows. As noted above, both companies are engaged in internet
5 commerce; Zango provides software which customers can download onto personal computers, and Epic
6 operates various websites. A dispute arose between them, and on March 18, 2008, counsel for Epic sent
7 to counsel for Zango a copy of a complaint which Epic proposed to file in California state court against
8 Zango and two California defendants. The proposed complaint alleged common law tort claims and
9 claims under California code, all related to Zango's "pop-up" ads that appear on Epic's websites. Dkt. #
10 6, Declaration of Gary Jay Kauffman, ¶ 2 and Exhibit E. Epic sent Zango a copy of the proposed
11 complaint as "an informal attempt to settle Epic Cash's claims against Zango," and the complaint was
12 accompanied by a letter stating that the complaint would be filed on April 2, 2008 only if the parties failed
13 to reach a resolution. *Id.* Six days after receiving the draft complaint, on March 24, 2008, Zango filed
14 this declaratory judgment action in King County Superior Court asking for a declaration which would in
15 effect pre-empt Zango's claims in the California court. Dkt. # 1, Exhibit A. Zango did not, however,
16 serve or attempt to serve the summons and complaint on Epic, or inform Epic of its existence, until some
17 five months later, in September, 2008. In the meantime, with settlement negotiations having failed, Epic
18 filed its complaint in Santa Clara County Superior Court on August 26, 2008. The complaint was served
19 upon Zango in Washington on September 10, 2008. Dkt. # 6, Kaufman Declaration, ¶¶ 3-4. Zango then
20 sought permission from the Washington state court to serve Epic by means of service upon the California
21 Secretary of State, and that permission was granted on September 19, 2008. Dkt. # 1, Exhibit D. Epic
22 asserts that it first learned of the Washington action for declaratory relief on October 8, 2008 when
23 counsel received a copy of the complaint from Zango's local counsel in the California action. Kaufman
24 Declaration, ¶ 3.

25 Epic removed the action to this Court two weeks later, on October 21, 2008, and now moves to
26 dismiss, contending that this court should refrain from exercising jurisdiction over the declaratory
27 judgment action in light of the pending California litigation.
28

ANALYSIS

1
2 The decision whether to retain jurisdiction over a declaratory judgment action lies within the
3 sound discretion of the district court. *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 494
4 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 278 (1995).² Where a declaratory relief action based
5 on diversity jurisdiction is commenced in reaction to or in anticipation of a state court action involving
6 the same parties and state law issues, the federal court should abstain from exercising jurisdiction and
7 dismiss the action in favor of the state court proceedings. *Wilton*, 515 U.S. at 289; *Brillhart*, 316 U.S. at
8 494. As the Supreme Court explained, “ordinarily it would be uneconomical as well as vexatious for a
9 federal court to proceed in a declaratory judgment suit where another suit is pending in a state court
10 presenting the same issues, not governed by federal law, between the parties.” *Brillhart*, 316 U.S. at
11 495. Indeed, “where another suit involving the same parties and presenting opportunity for ventilation of
12 the same state law issue is pending in state court, a district court might be indulging in ‘gratuitous
13 interference’ if it permitted the federal declaratory action to proceed.” *Wilton*, 515 U.S. at 283 (quoting
14 *Brillhart*, 316 U.S. at 495).

15 The pendency of a state court action does not, of itself, require a district court to decline
16 declaratory relief. *Government Employees Ins. Co. v. Dizol*, 133 F. 3d 1220, 1225 (9th Cir. 1998). The
17 Court must consider whether declining jurisdiction will further the purposes set forth in *Brillhart*: (1)
18 avoiding a needless determination of state law; (2) discouraging litigants from filing declaratory actions as
19 a form of forum shopping; and (3) avoidance of duplicative litigation (“the *Brillhart* factors”). *Id.* The
20 district court may consider additional factors, such as whether the declaratory action will settle all aspects
21 of the controversy, or whether the declaratory action is being used merely for the purposes of “procedural
22 fencing.” *Id.* at 1225 n. 5. The district court may also consider the convenience of the parties. *Id.*

23
24 ²Plaintiff contends that the *Brillhart* abstention analysis is applicable only to cases brought in
25 federal court under the Declaratory Judgment Act, 28 U.S.C. § 2201. However, the cases cited by
26 plaintiff to support that assertion do not so limit the reach of *Brillhart*, nor is the language in *Brillhart*
27 itself so narrow, referring as it does to declaratory actions in general. Indeed, the rationale behind
28 *Brillhart* is even more evident in declaratory judgment actions originating in state court solely under state
law and brought to federal court under diversity jurisdiction. The Court in this district has applied
Brillhart abstention to a case removed from state court, albeit for the purpose of remand rather than
dismissal. *Anderson v. State Farm Mutual Insurance Company*, 2005 WL 2445791 (W.D.Wash. 2005)
 (“*Brillhart*, however, is fairly clear about discretionary jurisdiction as applied to declaratory judgments
that present issues solely governed by state law.” *Id.* at *4).

1 I. The Brillhart Factors

2 The *Brillhart* doctrine is applicable where there is a pending state court action that involves the
3 same parties and the same issues. *Brillhart*, 316 U.S. at 495. Here, plaintiff Zango is one of three
4 defendants in the California action, while defendant Epic is the sole plaintiff there. The presence of
5 additional defendants in the California action does not alter the fact that this action and the California one
6 involve the “same parties” as between Zango and Epic.³ As for issues, both suits arise directly from
7 Zango’s software and its creation of “pop-up” ads. Epic asserts in the California action various tort and
8 statutory claims regarding these “pop-up” ads, such as unfair competition, tortious interference with
9 economic advantage, unfair business practice, conversion, and unjust enrichment. Dkt. # 1, Exhibit E.
10 In this action, Zango seeks a declaration that its software does not constitute an “infection” and “violates
11 no right” of Epic. Dkt. # 1, Exhibit A, p. 6. Zango’s Washington complaint refers specifically to the
12 claims in Epic’s California complaint, and the request for a declaration that Zango software “violates no
13 right” of Epic is so broad as to constitute an attempt to pre-empt all of Epic’s claims in the California
14 action. Consideration of this complaint would impermissibly entangle this Court in needless
15 determinations of state law, possibly both Washington and California law under the “violates no right”
16 language of the request for relief.

17 The Court also finds abstention from exercising jurisdiction necessary to discourage plaintiff’s
18 filing of this declaratory relief action as a means of forum-shopping. Indeed, this is a key purpose of the
19 *Brillhart* doctrine. *Dizol*, 133 F. 3d at 1225. In the prototype *Brillhart* abstention case, the plaintiff files
20 an action in state court, and the defendant then files a “reactive” declaratory relief action in federal court
21 seeking a more favorable venue. In such a case, there is a presumption that the federal court should
22 abstain in deference to the state court. “[I]f a declaratory judgment suit is defensive or reactive, that
23 would justify a court’s decision not to exercise jurisdiction.” *Continental Casualty Co. v. Robsac*
24 *Industries*, 947 F. 2d 1367, 1371 (9th Cir. 1991) (overruled on other grounds by *Dizol*, 133 F. 2d 1220).

25
26 ³The additional two defendants in the California action do come into consideration under the
27 additional factor of convenience, as these two defendants are not amenable to the jurisdiction of a
28 Washington court. This Court, therefore, may not adjudicate Epic’s claims regarding these two
defendants. On the other hand, all three defendants are before the California court, and the convenience
of these parties and their witnesses favors the litigation there.

1 This case differs from the “prototype” only in ways that do not affect the result (the fact that the
2 “reactive” suit was filed in state court), or in ways that weigh in favor of *Brillhart* abstention. In
3 particular, the Court notes the fact that Zango filed this suit just six days after counsel was shown the
4 proposed California complaint as an invitation to discuss settlement. This can only be viewed as a race to
5 the courthouse in an effort to gain a more favorable forum. Zango concealed from Epic the fact that the
6 suit had been filed for more than five months, thereby stalling the filing of Epic’s complaint in California.
7 While Zango contends that it was simply exercising its right as a plaintiff to choose a forum, the Court
8 finds that under the set of circumstances described, Zango’s suit, whether characterized as defensive or
9 reactive, constitutes a clear case of forum-shopping that cannot be condoned. This is precisely the type
10 of “procedural fencing” that *Brillhart* abstention is meant to discourage. *Dizol*, 133 F. 3d at 1225 n. 5.

11 The third *Brillhart* factor, the avoidance of duplicative litigation, is also furthered by this Court’s
12 abstention. As noted above, the facts and issues before the two courts in these two actions are the same.
13 There is a strong likelihood of piecemeal and duplicative litigation if this Court were to retain jurisdiction.
14 In light of the forum-shopping considerations above, and the fact that all the issues between all parties
15 can be resolved in the pending California action but not in this one, the Court finds that the California
16 court is the better forum for litigation of these issues.

17 CONCLUSION

18 In light of the pending litigation in California state court, this Court shall exercise its discretion to
19 decline jurisdiction over the declaratory judgment action pursuant to *Brillhart*. With this determination,
20 the Court need not reach the merits of defendant’s personal jurisdiction argument. Defendant’s motion
21 is hereby GRANTED as to the request that this Court refrain from exercising jurisdiction, and this action
22 is DISMISSED without prejudice.

23 Dated this 23 day of January, 2009.

24 

25 RICARDO S. MARTINEZ
26 UNITED STATES DISTRICT JUDGE
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