IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S. SPECIALTY INSURANCE COMPANY,	§	
Plaintiff,	§	
v.	§	Civil Action No. 4:20-cv-1850
Gartner Group, Inc.,	§	
Defendant.	§	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT OR TO TRANSFER THE ACTION TO NEW YORK

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Plaintiff U.S. Specialty Insurance Company ("USSIC") files this opposition to Defendant Gartner, Inc.'s[1] ("Gartner") Motion to Dismiss the Amended Complaint or Transfer this Action to New York [Dkt. 26] ("Motion" or "Mot.").

PRELIMINARY STATEMENT

Although Gartner asks this Court to dismiss or transfer this lawsuit based on considerations of convenience, in truth, Gartner simply prefers to litigate this insurance coverage dispute closer to its Stamford, Connecticut headquarters. As is often the case, neither the Southern District of New York ("SDNY") nor the Southern District of Texas ("SDTX") will perfectly balance the burdens of litigation between the parties. But in an era of electronic filing, electronic document production, and remote depositions, any imbalance is insufficient to justify the extraordinary relief that Gartner seeks. After all, Gartner, who provides technology research and consulting services, regularly stages events around the world and is represented here by an international law firm with offices on three different continents. All of which suggests that the Motion is driven more by gamesmanship than by any real concern about litigating this case in Texas.

The insurance coverage dispute at the heart of this suit arises from a seventeen-year relationship between Houston-based USSIC, its Houston-based parent company, Houston Casualty Company ("HCC"), and Gartner. USSIC already has confirmed acceptance of claims by Gartner that potentially exhaust the $150 million Aggregate Limit of Indemnity under an event cancellation policy, Policy No. U-19/7004347 (the "Policy"). Gartner, which represents that it may have suffered losses in excess of this amount due to the COVID-19 pandemic, takes the position

[1] The Amended Complaint for Declaratory Judgment ("Amended Complaint" or "AC") names Gartner, Inc. as defendant. AC, Dkt. 23, at 1 n.1. The original complaint named "Gartner Group, Inc." as defendant because it is the insured under the Policy (as defined in the Amended Complaint). AC, Ex. A at 3. Gartner Group, Inc. changed its name to Gartner, Inc. on February 1, 2001. AC at n.1. Capitalized terms not otherwise defined have the same meaning as in the Policy. AC, Ex. A.

that it can increase the Aggregate Limit of Indemnity by an additional $150 million—***above the $150 million USSIC already has agreed to pay***. No provision of the Policy, however, entitles Gartner to increase the Aggregate Limit of Indemnity, let alone secure additional coverage where, prior to the inception of that coverage, Gartner is aware of circumstances—such as the COVID-19 pandemic—that may lead to a claim.

Consistent with the intent and purpose of the Declaratory Judgment Act, USSIC filed this suit ***to seek clarification*** regarding its obligations under the Policy. Because Gartner has failed to demonstrate that it is entitled to dismissal of USSIC's claims or that this case should be transferred to the SDNY, Gartner's efforts to avoid litigating this dispute in Texas must fail, and this Court should deny the Motion.

FACTUAL BACKGROUND

A. Gartner Establishes a Long-Term Relationship With USSIC and HCC

Gartner organizes hundreds of events and conferences around the world each year. AC ¶ 10. In 2003, Gartner began purchasing event cancellation insurance from HCC to cover these events, and in 2014, began purchasing the insurance from USSIC.[2] AC ¶ 3; Decl. of Michael Thompson ("Thompson Decl.") ¶¶ 10–11. The policies have been negotiated through Gartner's insurance brokers and HCC Specialty Underwriters, Inc. ("HCCSU"), USSIC's specialty group. AC ¶ 11. Since April 2002, USSIC has authorized HCCSU to issue policies on USSIC's behalf

[2] Although the Amended Complaint states that Gartner began purchasing event cancellation insurance from HCC in 2005 and USSIC in 2016, Gartner actually began purchasing those policies in 2003 and 2014, respectively. Thompson Decl. ¶ 11 n.1.

pursuant to a Managing General Underwriter's Agreement ("USSIC MGA").[3,4] AC ¶ 11; Thompson Decl. ¶ 6. Since 2014, each of the policies has identified USSIC, in Houston, as the insurer. AC ¶ 12; Thompson Decl. ¶¶ 11.

In October 2019, Aon contacted HCCSU to begin negotiating a renewal of Gartner's insurance with USSIC.[5] AC ¶ 14; Thompson Decl. ¶ 13. Under the MGA, a policy involving exposure in excess of $50 million needed approval by USSIC's Houston-based senior management. AC ¶ 14; Thompson Decl. ¶7. The negotiations continued through December 2019, and when USSIC issued the Policy it was approved by USSIC's Houston-based officer, Michael Schell. AC ¶¶ 12, 14; Thompson Decl. ¶ 14. The Policy was also executed and attested by Mr. Schell and another USSIC Houston-based officer, Alexander Ludlow. *Id.* On February 1, 2020, Gartner provided a Schedule of Events for all shows that it intended to host through December 31, 2020. AC ¶ 16; Thompson Decl. ¶ 16.

When underwriting the Policy, USSIC assessed the risk of each show identified on the Schedule of Events to determine the applicable premiums, as some areas pose more risk than others, *e.g.*, events held on the Texas coast during hurricane season. AC ¶ 15; Thompson Decl. ¶ 15. The Schedule of Events for 2020 included two Texas shows with limits of indemnity

[3] Under the USSIC MGA, HCCSU performs underwriting management and administrative services for USSIC. Thompson Decl. ¶ 6. Pursuant to the USSIC MGA's terms, all policies are issued on behalf of USSIC, which is the insurer, through authority it has delegated to HCCSU. *Id.* No policies are issued on behalf of HCCSU because it is not an insurance company. *Id.* HCC also has permitted HCCSU to issue policies on its behalf since April 2002 under a similar agreement. *Id.* ¶ 8.

[4] Contrary to Gartner's statement in the Motion, the Amended Complaint does not allege that the policies underwritten by HCCSU were issued "in Massachusetts." *Compare* Mot. at 3 n.4 ("Instead, the Amended Complaint alleges in ¶ 11 that USSIC authorized [HCCSU] to issue policies in USSIC's name in Massachusetts."), *with* AC ¶11 ("Since April 2002, [HCCSU] has been authorized by USSIC to issue event cancellation policies on its behalf."). In fact, the Amended Complaint does not allege that the Policy was issued in any particular state.

[5] Gartner disputes the Amended Complaint's allegation that in October 2019, Aon began negotiating the terms of the Policy with USSIC (AC ¶ 14) because, according to Gartner, the negotiations were between Aon and HCCSU. Mot. at 3 n.3. This argument, however, ignores that HCCSU was acting as USSIC's agent and negotiating with Aon ***on USSIC's behalf***. *See* Thompson Decl. ¶¶6, 23.

exceeding $30 million, and Gartner has insured shows in Texas for at least the past three years, with total limits of indemnity exceeding $35 million. *Id.* That Gartner insured Texas shows factored into the underwriting and calculation of Gartner's premiums. *Id.*

B. The COVID-19 Pandemic Triggers Widespread Cancellation of Events

Following the global COVID-19 outbreak, Gartner cancelled or postponed nearly all of its 2020 events. AC ¶ 17. USSIC has confirmed acceptance of claims that potentially exhaust the Policy's Aggregate Limit of Indemnity of $150 million, subject to a full coverage review when Gartner provides necessary documentation. AC ¶¶ 1, 4; Thompson Decl. ¶174. The total aggregate losses remain uncertain because Gartner has failed to provide USSIC or Hyperion, the adjuster Gartner requested, with information that would permit USSIC to assess indemnity, even preliminarily.[6] AC ¶17; Thompson Decl. ¶17–18. In April, Mr. Walden requested a written coverage opinion as to (i) shows that Gartner had cancelled through June 2, 2020; (ii) reinstatement of the Limits of Indemnity under the Policy absent a COVID-19 exclusion; and (iii) events to be declared to the second year of the Policy covering 2021.[7] AC ¶ 19; Thompson Decl. ¶ 18.

To provide a coverage opinion, USSIC had to review and confirm coverage for dozens of shows in dozens of locations involving millions of dollars in Limits of Indemnity, which required time to investigate. *Id.* Nevertheless, Mr. Walden repeatedly and unreasonably insisted that USSIC immediately respond to his demands for confirmation of coverage for COVID-19 related losses

[6] Despite Gartner's statement to the contrary (Mot. at 6), ***Gartner*** (not USSIC), through Claudia Kaufman (with Aon) requested that Hyperion (specifically, Sean Coyne) be assigned to adjust its claims under the Policy. Thompson Decl. ¶18.

[7] The written coverage opinion provided to Gartner on May 27, 2020 clearly indicates the letter "addresses ***USSIC's*** [not HCCSU'] preliminary and conditional acceptance of the claims under the Policy." Thompson Decl. ¶ 21, Ex. A. (emphasis added). Moreover, it makes no difference that Aon contacted HCCSU to request a coverage opinion (instead of USSIC directly). USSIC, as the insurer, is the entity that ultimately provides coverage under the Policy, and any communications regarding coverage with HCCSU was made ***on USSIC's behalf***. *Id.* at ¶ 26.

and reinstatement of the Policy's Limits of Indemnity. AC ¶ 19. Gartner acknowledges the requests were "repeated" and "urgent." Mot. at 6.

On May 11, 2020, Mr. Walden also communicated with Lorna Gillespie at HCCSU and demanded "an answer by the end of the day Re June and July events." AC ¶ 19. Because USSIC's review of these events and the Policy remained ongoing, Ms. Gillespie responded that Gartner's claims were under advisement and that a response to Gartner's questions would be provided once that review was complete. AC ¶ 19; Thompson Decl. ¶ 20. On May 27, 2020, Ms. Gillespie wrote Mr. Walden and stated that subject to a reservation of rights and a full coverage review, USSIC accepted coverage for events cancelled or postponed due to COVID-19 through the end of August 2020. AC ¶ 21; Thompson Decl. ¶ 21.

C. USSIC Seeks Declaratory Relief in Texas to Facilitate Prompt Resolution of Dispute

Gartner maintains an operational hub in Texas. AC ¶ 7. It has three Texas offices (Houston, Austin, and Irving), with approximately 1,260 employees—over 13% of Gartner's U.S.-based work force, and nearly as many as the 1,314 at Gartner's headquarters in Stamford. *Id.* Gartner applied for and has been doing business in Texas since October 1992, maintains a registered agent in Texas, and has paid franchise taxes to the State Comptroller of Texas. *Id.*

In recent years, Gartner has grown its Texas footprint substantially. Its 2019 Annual Report identified Irving as its fourth largest U.S. office, and one of three U.S. markets outside of Stamford where Gartner maintains an key presence. *Id.* Between 2018 and 2019, Gartner increased its Irving headcount by 113%, and it now is Gartner's sixth largest office in the world. *Id.*; Supplemental Decl. of John Riley ¶ 9 (July 23, 2020) [Dkt. 27-2]. In 2018, Gartner established the Irving Center of Excellence, which serves as a hub for Gartner's Global Technology Sales ("GTS") and Global Business Sales ("GBS") divisions. AC ¶ 7. Gartner's 2019 Annual Report disclosed that GTS accounts for approximately 80% of Gartner's research business, while GBS accounts for the other

20%. *Id.* It also disclosed that the research business (i) was responsible for approximately 79% of Gartner's overall revenues (ii) was Gartner's highest contribution margin business, and (iii) was Gartner's most important driver of growth in profits. *Id.*

Given Gartner's long-term relationship with USSIC (and previously HCC) in Houston, and Gartner's operational hub in Irving, Texas was a natural forum to hear a dispute over the Policy. Thus, once it became reasonably clear that the parties interpreted the Policy differently, USSIC sought clarification from this Court regarding its obligations with respect to Gartner's reinstatement request. At the time USSIC commenced this suit, there was no indication that Gartner had any current or future plan to commence litigation in New York or elsewhere. Thompson Decl. ¶ 25. As Gartner's own declaration confirms, Gartner never threatened suit before commencing the duplicative action in New York. Decl. of John Riley (June 25, 2020) ¶¶ 24–26 [Dkt. 26-2] ("Riley Decl"). And Gartner even concedes that it was unaware that "a real controversy existed between the parties" when this suit was filed. Mot. at 6 ("This allowed USSIC to file a lawsuit before putting Gartner on notice that a real controversy existed between the parties."). Indeed, shortly after USSIC brought this suit, Aon contacted USSIC's Houston-based senior executives twice to discuss, among other things, the coverage dispute and whether the parties could *defer* litigation.[8]

D. Gartner Commences Duplicative Litigation in New York

On June 25, 2020, nearly a month after USSIC commenced this suit, Gartner filed duplicative litigation against USSIC in New York ("SDNY Action"), asking that court to declare USSIC's obligations with respect to the Policy's reinstatement provision—***the exact issue in this***

[8] *See* Supplemental Declaration of George Walden ¶ 4 (July 24, 2020), Dkt. 27-4 ("Supp. Walden Decl.").

case.[9] In the SDNY Action, Gartner brings claims against USSIC for breach of contract, breach of the implied covenant of good faith and fair dealing, violations of Massachusetts' unfair and deceptive trade practices statute, and a claim for "misrepresentation." Ex. 1 ¶¶ 66–125. Gartner also asserts claims against HCCSU under the Massachusetts unfair and deceptive trade practices statute and for "misrepresentation." *Id.*

In a bold effort to escape this Court's lawful jurisdiction and move this dispute to New York, Gartner filed this Motion, along with a Motion to Dismiss for Lack of Personal Jurisdiction ("Personal Jurisdiction Motion"), on the same day it brought the SDNY Action. The Court should reject Gartner's procedural gamesmanship.

ARGUMENT & AUTHORITIES

I. THIS COURT SHOULD DENY GARTNER'S REQUEST TO DISMISS THIS CASE IN FAVOR OF THE SDNY ACTION

This suit is entitled to priority over the SDNY Action because it was first-filed. *See Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999) ("Under the first-to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap."); *J. Lyons & Co. Ltd. v. Republic of Tea, Inc.*, 892 F. Supp. 486, 490 (S.D.N.Y. 1995) ("The first-to-file rule gives priority to the first-filed suit except where there are special circumstances which justify giving priority to the second-filed suit or a showing of a balance of circumstances favoring the second-filed suit.").[10]

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[9] *See* Exhibit 1 to the Declaration of Todd Batson ("Batson Declaration") accompanying this opposition. References to "Ex. [•]" are to the exhibits accompanying the Batson Declaration. The court may take judicial notice of pleadings in another pending matter. *E.g. Hall v. Hodgkins*, 305 F. App'x 224, 229 (5th Cir. 2008) (affirming district court's grant of defendants' motion to dismiss after district court took "judicial notice of the publicly available pleadings and opinions in *Hall I* and *Hall II*.").

[10] Regardless of whether this Court or the New York court addresses whether the first-to file rule applies, the result will be the same—this action has priority.

Gartner filed the SDNY Action on June 25, 2020, almost a month *after* USSIC filed this lawsuit. Although the SDNY Action includes an additional party (HCCSU) and additional claims, the core dispute is the same—whether Gartner is entitled to reinstatement under the Policy, and if so, under which terms. The below chart illustrates just a handful of the similarities in the allegations:

Above-Captioned Lawsuit	SDNY Action
"USSIC is entitled to a declaration that Gartner is not entitled to use increased or reinstated Limits of Indemnity for losses arising from the COVID-19 pandemic." AC ¶56.	"Gartner is entitled to a declaration that it is entitled to reinstate the initial aggregate limits of the Gartner Policy, in part or in full, at its option." Ex. 1 ¶69.
"USSIC is entitled to a declaration that Condition 12 of the Policy only authorizes Gartner to reinstate that part of the original Limit of Indemnity of a Show, as shown in the Schedule of Events, eroded by way of potential or actual loss payment on account of that Show." *Id.* ¶46.	"Gartner is entitled to a declaration that USSIC is obligated to provide coverage under the Policies at the levels stated in the 2020 schedules provided to Specialty Underwriters, without an exclusion for losses related to COVID-19." *Id.* ¶83.
"As coverage under the requested reinstatement has not incepted, and the COVID 19 pandemic is well known to Gartner, Gartner is not entitled to use reinstated Limits of Indemnity under Condition 12 to cover losses arising from the COVID-19 pandemic." *Id.* ¶55.	"USSIC breached the Gartner Policy by refusing to reinstate its limits, thereby depriving Gartner of as much as $150,000,000 in coverage for 2020." *Id.* ¶91.

Gartner attempts to avoid application of the first-to-file rule by asking this Court to exercise its discretion under 28 U.S.C. § 2201(a) to dismiss this case so that Gartner can obtain a ruling ***on the very same issues*** from a New York court instead.[11] In support of this request, Gartner alleges

[11] In analyzing whether to decide or dismiss declaratory judgment claims, "a federal district court must determine: (1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether to exercise its discretion to decide or dismiss the action." *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 387 (5th Cir. 2003). Importantly, the only prong Gartner focuses on in the Motion is the third prong—whether this Court should exercise its discretion to decide or dismiss USSIC's declaratory judgment claims. Mot. at 7.

that the seven *Trejo* factors[12]—which Fifth Circuit courts use to determine whether to exercise their discretion to dismiss declaratory judgment actions—favor dismissal. Mot. at 7–8. But proper application of the *Trejo* factors demonstrates the opposite.

A. The First and Seventh *Trejo* Factors Do Not Support Dismissal or Transfer of this Lawsuit

The first and seventh *Trejo* factors do not support Gartner's request for dismissal. The first factor considers whether there is a pending state action that can resolve all of the claims; the seventh factor applies only when a federal court is asked to construe a state judicial decree. *See Sherwin-Williams Co.*, 343 F.3d at 389 ("(1) ***whether there is a pending state action*** in which all of the matters in controversy may be fully litigated; . . . (7) ***whether the federal court is being called on to construe a state judicial decree*** involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.") (emphasis added). Both factors concern comity between federal and state courts.

Here, the first factor "strongly weighs against dismissal" because there is no pending state action between Gartner and USSIC.[13] *Id.* at 384 ("[A]lthough ***the lack of a pending parallel state***

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[12] The seven factors identified in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590 (5th Cir. 1994) are as follows:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams, 343 F.3d at 388.

[13] Gartner acknowledges that the lack of a pending state action "diminishes the comity concern," (Mot. at 8), but argues that the Court should consider the existence of a second federal action, "in which all of the matters in controversy here can be fully litigated," under the first *Trejo* factor. The only case on which Gartner relies concerns the Jones Act and was heard in the Eastern District of Louisiana. Mot. at 8 (citing *Coastal Drilling Company, LLC v. Creel*, No. 17-188, 2017 WL 1234207 (E.D. La. April 4, 2017)). As explained by one of the decisions on which *Coastal Drilling* relies, the Eastern District of Louisiana has "a well established practice . . . to dismiss preemptive declaratory judgment actions in maritime personal injury cases, even when the injured party has not yet filed a state or federal court action." *Offshore Liftboats, L.L.C. v. Bodde*n, No. 12-700, 2012 WL 2064496, at *2 (E.D. La. June 7,

proceeding did not require the district judge to hear the declaratory judgment action, ***it is a factor that weighs strongly against dismissal***.") (emphasis added). Similarly, since this Court is not "being called on to construe a state judicial decree—a fact Gartner does not dispute—the seventh *Trejo* factor does not support dismissal. Mot. at 8–9.

Gartner's only other argument under the first and seventh factors is that because New York law likely applies,[14] a "New York court[] should hear [the dispute]." Mot. at 8. The potential application of New York law to USSIC's claims—by one federal court rather than another—has no bearing on the comity considerations underlying the first and seventh factors. This Court is perfectly capable of applying New York law, and has done so frequently. *See, e.g.*, *Haralson v. E.F. Hutton Group, Inc.*, No. H-86-2761, 1987 WL 5669, at *3 (S.D. Tex. Jan. 15, 1987) ("Texas courts can and routinely do apply New York law to contracts.").

B. The Second, Third, and Fourth *Trejo* Factors Do Not Support Relief Because USSIC Properly Brought this Suit to Facilitate Prompt Resolution of the Parties' Dispute

Gartner argues that the second, third, and fourth[15] *Trejo* factors weigh in favor of dismissal because USSIC purportedly filed this case in anticipation of Gartner filing its own suit and because USSIC engaged in forum shopping. Mot. at 9–12. USSIC did not commence this suit in anticipation of litigation or to prevent Gartner from filing its own action in New York. Further, Houston-based USSIC did not forum shop by filing its claims in Houston, the forum where the parties have established a long-term relationship, and where USSIC is headquartered.

2012) (internal quotation marks omitted.). As this case does not involve the Jones Act and was not filed in the Eastern District of Louisiana, *Coastal Drilling* has no bearing here.

[14] USSIC takes no position at this time as to which state's law governs the Policy's construction. In fact, Gartner does not even take a clear position as to which state's law applies. Mot. at 8 n.8. Conveniently, the only thing Gartner purports to be sure of is that it does not believe Texas law applies. *Id.*

[15] Gartner does not specifically address the fourth factor, which considers "whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist." *See supra* at 12; Mot. 9.

1. USSIC Did Not Bring This Suit in Anticipation of Gartner Filing Suit

Because Gartner fails to demonstrate USSIC filed this case in anticipation of Gartner bringing suit in New York (or, for that matter, anywhere else), the second *Trejo* factor does not weigh in favor of dismissal of USSIC's claims. *See Sherwin-Williams*, 343 F.3d at 388 ("(2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant.").

Mere awareness that Gartner might file suit at some point in the future is not enough to deem this action an anticipatory litigation. USSIC does not dispute that courts in the Fifth Circuit have dismissed declaratory judgment actions as improper anticipatory litigation when the suit was filed with knowledge the other party intended to file its own suit. *See Penn. Gen. Ins. Co. v. CaremarkPCS*, No. 3:05-CV-0844-G, 2005 WL 2041969, at *7 (N.D. Tex. Aug. 24, 2005); *909 Corp. v. Vill. of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1293 (S.D. Tex. 1990). The Fifth Circuit, however, has recognized that "[f]ederal declaratory judgment suits are routinely filed in anticipation of other litigation[,]" and "[m]erely filing a declaratory judgment action … is not in itself improper anticipatory litigation or otherwise abusive 'forum shopping.'" *Sherwin-Williams*, 343 F.3d at 391. But for a declaratory judgment suit to be improper, it must fall within "a narrower category of federal declaratory judgment lawsuits filed for reasons found improper and abusive, other than selecting a forum or anticipating litigation." *Id.*

When USSIC filed this suit, there was no indication that Gartner had any current or future plan to commence litigation. Although Mr. Walden pressured USSIC to confirm coverage and reinstate the Policy's Limits of Indemnity, Gartner never threatened litigation or otherwise gave any indication it intended to file suit, and Gartner does not suggest otherwise. Thompson Decl ¶25. Further, the parties were not engaged in a long, drawn-out negotiation over a known dispute, which might indicate litigation was imminent. In fact, Gartner concedes in the Motion that at the time USSIC filed this case it was unaware that "a real controversy existed between the parties." Mot. at

6. And the declaration of John Riley, Gartner's Vice President for Internal Audit & Risk, states that Gartner apparently hoped to engage in a lengthy discussion regarding coverage before it filed suit against USSIC:

> . . . . Gartner did not anticipate that USSIC would precipitously file the two lawsuits against Gartner without first providing its coverage position to Gartner and giving us an opportunity to discuss the matters in dispute with Specialty Underwriters.
>
> If such discussions revealed that we were at an impasse and after carefully considering the coverage issues raised by Specialty Underwriters, Gartner would have promptly commenced a lawsuit against USSIC and Specialty Underwriters to resolve the dispute, as Gartner is now doing in New York.

Riley Decl ¶¶ 25–26 (June 25, 2020), Dkt. 26-2. Further, shortly after USSIC brought this suit, Aon contacted USSIC's Houston-based senior executives twice to discuss, among other things, whether the parties could *defer* litigation. Supp. Walden Decl. ¶ 4. USSIC filed this action to facilitate a prompt resolution of the reinstatement dispute once it became reasonably clear to USSIC that the parties would disagree with USSIC's decision. Facilitating prompt resolution of disputes is the entire purpose of a declaratory judgment action. *See Sherwin-Williams*, 343 F.3d 383, at ("A proper purpose of section 2201(a) is to allow potential defendants to resolve a dispute without waiting to be sued or until the statute of limitations expires.").

Gartner's real complaint appears to be that, according to Gartner, USSIC was too hasty in seeking this Court's clarification of USSIC's reinstatement obligations under the Policy.[16] Mot. at 11 ("Instead of allowing Gartner to bring a claim for breach of contract—or even giving Gartner time to consider the insurer's coverage position . . . ."); *id.* at 10 ("Gartner is the natural plaintiff

[16] Gartner asserts that this action is an improper anticipatory lawsuit simply because USSIC filed suit the same day it issued its coverage opinion. Mot. at 10. The only case Gartner cites in support of this argument is easily distinguished. In *Integon Specialty Ins. Co. v. Republic Plastics, Ltd.*, the insurer issued its coverage opinion and brought suit after "lengthy" negotiations between the parties where the "tenor" of their relationship "serve[d] as evidence that a suit was expected to be filed." No. SA-10-CA-802-FB, 2011 WL 13234744, at *9 (W.D. Tex. Mar. 28, 2011), *report and recommendation adopted*, 2011 WL 13234896 (W.D. Tex. June 13, 2011). Gartner makes no such allegations here, and as explained above, Gartner concedes that it was unaware that a controversy existed when USSIC brought this suit, and thereafter, contacted USSIC in an effort to defer litigation. *Supra* at 6.

. . . ."). [17] But haste is a matter of perspective when an insurer's considerable exposure ($150 million or more) hangs in balance. Gartner cites nothing to support its remarkable proposition that an insurer must wait and see whether its insured files a lawsuit before seeking declaratory relief—and precedent suggests otherwise. *See, e.g.*, *Ironshore Specialty Ins. Co. v. Tractor Supply Co*., 624 F. App'x 159, 163 (5th Cir. 2015) ("The Supreme Court has held that an actual case or controversy existed when an insurer brought a declaratory judgment action regarding its liability to the insured for an underlying state court action while the underlying action was still pending."); *RSUI Indem. Co. v. Enbridge (U.S.) Inc*., No. H-08-1807, 2008 WL 5158179, at *2 (S.D. Tex. Dec. 9, 2008) ("[T]he Texas Supreme Court encouraged insurers to seek prompt resolution of coverage disputes.") (citing *Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Renal Tools, Inc.*, 246 S.W.3d 42, 54 (Tex. 2008)).

2. USSIC Did Not Forum Shop By Bringing Suit In Houston

The third *Trejo* factor does not weigh in favor of dismissal because USSIC did not forum shop by bringing suit in Houston, the forum where the parties have established a long-term relationship, and where USSIC is headquartered. *See Sherwin-Williams*, 343 F.3d at 388 ("(3) whether the plaintiff engaged in forum shopping in bringing the suit[.]"). As the Fifth Circuit has observed, "[t]he filing of every lawsuit requires forum selection." *Id.* at 391. Merely filing a declaratory judgment suit in a federal court with jurisdiction is not in itself forum shopping. *Id.*

The basis for Gartner's argument that USSIC engaged in forum shopping by bringing this suit in Houston is far from clear. As explained in USSIC's opposition to the Personal Jurisdiction Motion, Dkt. 28, Texas is a natural forum to hear a dispute over the Policy and has an interest in

[17] The case on which Gartner relies for its assertion that it is the "natural plaintiff" is also distinguishable. Mot. at 10–11. In *Granite State Inc. Co. v. Honeywell, Inc*., the parties seeking dismissal were parties to a previously filed and related pending state court action, which is not an issue here. No. Civ-A.3-98-CV-1362-P, 1999 WL 68646, at *4 (N.D. Tex. Feb 4, 1999).

the resolution of this dispute. Gartner does not allege any unfair advantage USSIC would gain by litigating this case in the SDTX. Instead, Gartner appears to argue that proceeding in this forum would result in piecemeal litigation because HCCSU is not a party in this action (who Gartner included in the SDNY Action). Mot. at 11. But even assuming that "creating" piecemeal litigation can be evidence of forum shopping, USSIC did not "create" piecemeal litigation as the first to file suit. Rather, ***it is Gartner*** that initiated piecemeal litigation by suing USSIC in a duplicative suit in another forum.[18]

C. Dismissing this Action Would Not Promote Judicial Efficiency

The fifth *Trejo* factor, which considers whether the forum is convenient for the parties and witnesses, does not favor dismissal. *See Sherwin-Williams*, 343 F.3d at 388 ("(5) whether the federal court is a convenient forum for the parties and witnesses"). Gartner argues that this factor favors dismissal because "all or most of the relevant documents are likely located in New York, Connecticut or Massachusetts" and "the key witnesses all live in New York, Connecticut or Massachusetts or are assigned to an office in one of those states." Mot. at 12–13. To the extent the fifth factor considers the "location" of documents, the factor seems almost quaint in today's world and is a reminder that *Trejo* was decided in 1994, when "the cloud" had only one meaning. In any event, Gartner fails to explain why documents could not be collected or subpoenaed, wherever they may be, and produced to USSIC's counsel in Texas consistent with standard electronic discovery procedures. Assuming that relevant documents are, in fact, "located" on servers in "Connecticut or Massachusetts," it makes no difference whether this case proceeds in Houston or

[18] Gartner also appears to argue that USSIC engaged in forum shopping by filing in a "distant, inconvenient forum to try and obtain an unfair advantage over Gartner." Mot. at 12. Aside from being an entirely conclusory allegation, litigating in *any* district is seldom equally convenient for *all* litigants, and the relative inconvenience to one party is not indicative of forum shopping.

New York (or virtually anywhere else). Simply put, the collection of (mostly electronic) documents outside of Texas does not favor dismissal.

With respect to the convenience of witnesses, Gartner has failed to identify any witness, let alone a "key witness" that would purportedly be inconvenienced by this case proceeding in Texas. Mot. at 12–14. Gartner does not even state whether these alleged "key witnesses" are party witnesses,[19] who may be compelled to testify, or third-party witnesses.[20] Moreover, the advent of remote depositions and trials, hastened by the current pandemic, means that the physical location of witnesses should have less bearing on the burden of appearing in one venue or another. Gartner leaves the Court to speculate as to what burden, if any, would be imposed on these unnamed "key witnesses."[21]

Even taking Gartner's allegations of inconvenience as true, the fifth *Trejo* factor is, at best, neutral, as Gartner has completely ignored the convenience to USSIC, which the fifth *Trejo* factor specifically addresses, in proceeding in Texas. *See Sherwin-Williams*, 343 F.3d at 388. USSIC is headquartered in Houston and it is certainly more convenient for it to appear in a Texas forum than elsewhere. AC ¶6. Thus, dismissing this case in favor of the SDNY Action, and forcing USSIC to bring its claims in New York, would simply shift any inconvenience to USSIC. *See X Tech. v. Marvin Test Systems*, No. SA-10-CV-319-XR, 2010 WL 2303371, at *4 (W.D. Tex. Jun. 7, 2010)

[19] The Court should not give weight to any purported inconvenience to USSIC or its employees in appearing in Houston, to the extent Gartner is relying on such an alleged inconvenience, as USSIC clearly has accepted such burden.

[20] To distract from the fact that Gartner cannot name a single "key witness" that cannot appear in Texas (should it be necessary), Gartner states that the Amended Complaint "fails to identify a single individual in Texas who is likely to have personal knowledge of the negotiation of the Policy or the review of Gartner's claims." Mot. at 13. First, there is no obligation for USSIC to identify individuals likely to have discoverable information in the complaint. Second, to the extent the parties have an obligation to identify witnesses at this stage, Gartner has failed to meet that requirement as well.

[21] USSIC also submits that the Policy's terms are clear and unambiguous such that the Court may construe the Policy as a matter of law, which further diminishes the relevance of this factor.

(holding that a case should not be transferred where the only practical effect is to shift inconvenience from the moving party to the nonmoving party.).

The sixth *Trejo* factor, which considers judicial economy, similarly does not favor dismissal. *See Sherwin-Williams*, 343 F.3d at 388 ("(6) whether retaining the lawsuit would serve the purposes of judicial economy[.]"). Here, Gartner makes an argument already addressed above—namely, that litigating this case in Texas will result in piecemeal litigation. Mot. at 13–14. As previously discussed, to the extent there is piecemeal litigation, it is a problem of Gartner's own creation. Nothing prohibits Gartner from filing counterclaims against USSIC here, or a third-party complaint against HCCSU.[22] Gartner also complains that USSIC brought a separate declaratory judgment action in the SDTX to clarify its obligations under an entirely separate insurance policy that Gartner purchased from USSIC.[23] Mot. at 12 n.9. Although there are some similarities between the two suits, there are also are key differences, as each involve separate insurance policies with different provisions and different limits of indemnity. Each claim for coverage should be considered on its own terms. USSIC is under no obligation to seek declarations about two different insurance policies in the same suit just because the insured is the same, and Gartner cites no contrary authority.

Because Gartner has failed to demonstrate that the *Trejo* factors favor dismissal, this Court should deny Gartner's request for the Court to exercise its discretion to dismiss USSIC's claims.

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[22] Gartner also argues that it should not be required to bring its claims in Texas because it would "likely require time-consuming and expensive motion practice." Mot. at 14. Gartner does not explain how drafting a counterclaim and third-party complaint would somehow be unfairly time-consuming or expensive, particularly since Gartner has already asserted these claims in the SDNY Action. *Id.* Further, the case on which Gartner relies, *Ohio Nat. Life Assur. Corp. v. Riley-Hagan*, No. H-08-2285, 2008 WL 5158089 (S.D. Tex. Dec. 9, 2008), is distinguishable. Mot. at 14. There, the court held that it was unclear whether a Texas court had personal jurisdiction over the additional party at issue (here, HCCSU). *See Ohio Nat. Life Assur. Corp.*, 2008 WL 5158089, at *7. Gartner makes no such allegation here. Moreover, Gartner has spawned copious motion practice through its alternative litigation strategy.

[23] *U.S. Specialty Insurance Company v. Gartner Group, Inc.*, No. 4:20-cv-1851 (S.D. Tex. May 27, 2020).

II. THE COURT SHOULD DENY GARTNER'S ALTERNATIVE REQUEST TO TRANSFER THIS CASE TO NEW YORK

The Court should deny Gartner's alternative request to transfer this case to New York to be consolidated with the SDNY Action. Mot. at 14–20. The Fifth Circuit repeatedly has emphasized that a plaintiff's choice of venue is entitled to deference and should not be disturbed unless the moving party shows "good cause" to transfer venue.[24] *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) ("[W]hen the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice of venue should be respected"); *Peteet v. Dow Chem. Co*., 868 F.2d 1428, 1436 (5th Cir. 1989) ("[T]he plaintiff is generally entitled to choose the forum.").

To establish good cause, Defendants must demonstrate that transfer is "for the convenience of the parties and witnesses and in the interest of justice." *Volkswagen*, 545 F.3d at 315. The Court has broad discretion in deciding whether to transfer venue, and Gartner bears the burden of demonstrating that factors under Section 1404(a) favor transferring venue. *Awards Depot, LLC v. Trophy Depot, Inc.*, 18-CV-1838, 2018 WL 5311750, at *2 (S.D. Tex. Oct. 26, 2018). "Unless the balance of factors strongly favors the moving party, the Plaintiff's choice of forum generally should not be disturbed." *S & J Diving, Inc. v. Doo-Pie, Inc.*, 02-cv-0293, 2002 WL 1163627, at *4 (S.D. Tex. May 30, 2002). As illustrated below, Gartner fails to carry its heavy burden.

A. The Private-Interest Factors Do Not Favor Transferring Venue

Gartner argues that private concerns, particularly the access to witnesses and documents, favor transferring the case to New York. Mot. at 17. As a threshold matter, this action involved construction of the Policy's clear and unambiguous terms. Thus, it is unlikely that either witnesses

[24] USSIC does not dispute that it could have brought suit in the SDNY. *Volkswagen*, 545 F.3d at 312 ("The preliminary question under § 1404(a) is whether a civil action 'might have been brought' in the destination venue.").

or documents will be necessary to construe the Policy. *E.g.*, *Pan Am Equities, Inc. v. Lexington Ins. Co.*, 959 F.3d 671, 674 (5th Cir. 2020) (under Texas law, "[t]he paramount rule is that courts enforce unambiguous policies as written."); *Village of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114, 115 (2d Cir. 1995) (same under New York law). Regardless, Gartner has provided no evidence that such documents exist and where they are located. Even assuming such documents do exist, the location of documents should only be considered to the extent the documents cannot be transported to Texas for trial or produced electronically. *See Plant Equipment, Inc. v. Intrado, Inc.*, 2:09-cv-395-JTW, 2010 WL 2465358, *8 (E.D. Tex. June 16, 2010) (holding that transfer was not warranted where defendants failed to show "significant inconvenience" if they were required to transport documents from Colorado to Texas and did not identify any Colorado documents that could not be produced electronically); *Symbol Tech. v. Metrologic Instruments*, 450 F. Supp. 2d 676, 678 (E.D. Tex. 2006) (holding that location of documents does not favor transfer where documents are likely to be exchanged electronically).

Gartner also argues that New York is "far more accessible for the key witnesses on both sides of this dispute." Mot. at 17. As noted above, Gartner has failed to provide the identity or location of any "key witnesses" it alleges will be inconvenienced by litigation in Texas.[25] *Id.* Gartner does not even state whether these alleged "key witnesses" are party witnesses, which can be compelled to testify and, thus, their convenience is given less weight.[26] *See, e.g.*, *S & J Diving*,

[25] As explained above, USSIC has no duty to identify potential witnesses in its pleadings. *Supra* at 20. It is Gartner's burden to demonstrate that this case should be transferred to New York, not USSIC's burden to demonstrate why it should remain in Texas. *See S & J Diving, Inc.*, 2002 WL 1163627, at *4.

[26] Gartner's argument that "subpoenas that require a witness to travel more than 100 miles are subject to motions to quash," (Mot. at 18), is unpersuasive, as Gartner would have the same issue subpoenaing a Massachusetts witness to appear in New York. *See Saget v. Trump*, 351 F. Supp. 3d 251, 253 (E.D.N.Y. 2019) ("A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person: (i) is a party or party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.").

2002 WL 1163627, at *6 ("When the "key witnesses are . . . employees of the party seeking transfer, their convenience is entitled to less weight because that party will be able to compel their testimony at trial.").

Gartner also relies on an alleged "practical problem[]" in adding HCCSU to this lawsuit in further support of the private-interest factors. Mot. at 18. Gartner, however, has not explained how adding HCCSU to this case would require any more effort than restyling the claims it already has asserted against HCCSU in the SDNY Action. As such, Gartner has failed to demonstrate that the private-interest factors favor transferring this case to New York.

B. The Public-Interest Factors Do Not Favor Transferring Venue

Gartner argues that three public-interest factors favor transferring this case to New York. ***First,*** Gartner argues that the SDNY is more familiar with New York law, which Gartner alleges is "likely" to apply when construing the Policy. Mot. at 19. As outlined above, this Court is perfectly capable of applying New York law should it apply to the Policy's construction.

Second, Gartner argues that this case does not present a "localized, Texas dispute." Mot. at 19. In making this argument, however, Gartner utterly ignores the connections that Gartner has with Texas and USSIC, a Texas insurer. As explained in USSIC's opposition to the Personal Jurisdiction Motion, Dkt. 28, Texas is a natural forum to hear a dispute over the Policy and has an interest in the resolution of this dispute.

And third, Gartner argues that "administrative difficulties flowing from court congestion" favor transferring this case to New York. Mot. at 20. The cherry-picked statistics on which Gartner relies, however, are misleading. Although Gartner is correct that as of March 31, 2020, the SDTX had 732 weighted filings per judgeship compared to the SDNY's 580 weighted filings per judgeship, the median time from filing a civil case to trial in the SDTX is only 23.9 months compared to 31 months in the SDNY. *See* Ex. 4. And despite the fact that the SDNY has fewer

weighted filings per judgeship, the difference in the median time to disposition between the two courts is miniscule—7.8 months for a civil case in the SDTX, compared with 6.4 months in the SDNY. *Id.* Further, as of March 31, 2020, only 5.7% of civil filings in the SDTX were over three years old compared with 21.4% in the SDNY. *Id.*

Because Gartner has failed to demonstrate that the public-interest factors favor transfer, the Court should deny Gartner's request.

CONCLUSION

For the reasons outlined above, USSIC respectfully requests that the Court deny the Motion.

Dated: August 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to counsel of record for all parties via the Court's CM/ECF filing system on this 10th day of August, 2020.

/s/ Gerard G. Pecht
Gerard G. Pecht