UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

[redacted] )
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) Civil No. 09-200-GFVT
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) **ORDER**
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Defendant. )
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*** *** *** ***

This matter is before the Court on Defendant [redacted] Motion to Dismiss and/or Transfer. [R. 8.] In seeking dismissal, [redacted] argues that the Court lacks subject matter jurisdiction to hear this action for declaratory judgment and venue is improper. [*Id.*] Alternatively, he seeks a transfer to the United States District Court for the Middle District of Tennessee, which he claims is a more convenient forum. [*Id.*] Although the Court finds that subject matter jurisdiction exists, it declines to exercise its discretionary jurisdiction pursuant to 28 U.S.C. § 2201(a). Therefore, this action will be dismissed without prejudice.

**I.**

This case arises out of a plan by [redacted] or "hospital") to recruit plastic surgeons to its facility in Somerset, Kentucky. [Plaintiff's Response, R. 15 at 3.] To assist in these efforts, [redacted] arent corporation, [redacted] engaged [redacted]

LLC ([redacted] in June of 2008 to find candidates for the hospital. [Defendant's Motion to Dismiss, R. 8, Attach 2 at 2; Affidavit of [redacted] R. 8, Attach. 4.] That same month, Seaboard's chief operating officer, [redacted] identified Defendant [redacted] as a possible recruit and presented his *curriculum vitae* to [redacted] Affidavit at ¶ 6.] At the time, [redacted] was sixty-two years old, lived in New York and practiced medicine in Massachusetts. [*See* Affidavit of [redacted] R. 8, Attach 2.]

Lake Cumberland's chief executive officer, [redacted] expressed interest in hiring [redacted] and invited him to the facility. [Herrington Affidavit at ¶ 6a, 7.] [redacted] visited the hospital over two days in August and met with [redacted] he hospital's director of physician relations, [redacted] and other physicians. [*Id*.] By September, it seemed as though [redacted] would formally make Haidek and offer. [*Id*. at ¶ 8.] According to [redacted] however, [redacted] informed him in early October that some at the facility and [redacted] were worried about [redacted] age. [*Id*. at ¶ 10.] [redacted] assured [redacted] that he intended to continue his practice for several more years, and the hospital sent him a written contract to review. [*Id*. at ¶ 10-11; Plaintiff's Response to Defendant's Motion to Dismiss, R. 15 at 4.] [redacted] however, ultimately withdrew the contract and decided to hire another, younger physician living and practicing in Kentucky. [redacted] Affidavit at ¶ 14-15; Plaintiff's Response at 4.] Upon learning this news, [redacted] says he informed [redacted] and [redacted] that this decision would expose the hospital to age discrimination litigation and ceased referring candidates to [redacted] and the hospital. [[redacted] Affidavit at ¶ 16, 18.]

[redacted] filed a charge of discrimination with the Equal Employment Opportunity Commission in January 2009, alleging that [redacted] withdrew its offer on account of his age. [Charge of Discrimination, R. 18, Attach 2.] In February, [redacted] attorney, Joshua

Friedman, sent a letter to [redacted] chief legal officer, [redacted] requesting mediation or settlement of his client's claims. [Affidavit of Joshua Freidman, R. 8, Attach. 6.] Although [redacted] never responded, Friedman subsequently received a call from [redacted] who said he was [redacted] former partner and indicated that [redacted] wanted to discuss resolving this matter. [*Id*.] [redacted] requested a written settlement demand, which Friedman transmitted on [redacted] behalf on April 20, 2009. By reply email that month, [redacted] advised that it would take "thirty days or so to provide a response." [*Id*.]

On May 28, Friedman emailed [redacted] seeking an update. [*Id*.] [redacted] dvised that he had researched the matter and needed to consult his client. [*Id*.] When Friedman had not heard from [redacted] by June 8, he sent another email to [redacted] stating that he had drafted a complaint and inquired whether he needed to file it. [*Id*.] Peters responded the same day, thanking him for his patience and saying that he would let him know one way or the other by Friday, June 12. [*Id*.] When that day arrived, [redacted] called Friedman and informed him that [redacted] filed the instant action for declaratory judgment in the Eastern District of Kentucky. [*Id*.]

More specifically, [redacted] Complaint for Declaratory Judgment seeks a declaration that "the contemplated relationship between the Hospital and [redacted] pursuant to the recruiting agreement was one of independent contractor and not employer/employee." [redacted] [redacted] Complaint, R. 1 at ¶ 12.] Accordingly, [redacted] claims that if [redacted] was never an "applicant" for employment then he would not be entitled to any relief under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*., or the Kentucky Civil Rights Act ("KCRA"), Ken. Rev. Stat. § 344.010, *et seq*. [*Id*. at ¶ 15.]

On June 18, 2009, [redacted] filed a complaint against [redacted] and [redacted] in the Middle District of Tennessee on the grounds that their actions violated ADEA and KCRA.

[redacted] Complaint, R. 8, Attach 5.] Shortly thereafter, [redacted] filed the instant motion to dismiss and/or transfer this case.

**II.**

A.

In his motion to dismiss, [redacted] first challenges the jurisdiction of this Court. Although [redacted] originally invoked this Court's diversity jurisdiction under 28 U.S.C. § 1332, it now agrees that complete diversity of citizenship is lacking. [Plaintiff's Response, R. 15 at 2.] For purposes of diversity jurisdiction [redacted] is a citizen of Delaware and Tennessee.[1] It argued complete diversity existed because it believed [redacted] was a resident of either New York or Massachusetts when it brought this action. [Plaintiff's Complaint, R. 1 at ¶ 2.] [redacted] states that although he lived in New York and practiced medicine in Massachusetts when [redacted] first recruited him, he is a citizen of Tennessee now because he relocated to Tullahoma, Tennessee in April of 2009 and continues to reside there. [redacted] Affidavit at ¶ 5-6.] [redacted] oes not challenge these assertions and concedes that since [redacted] moved prior to it filing this action, the parties are not diverse. [Plaintiff's Response at 2.]

Nevertheless, [redacted] now argues that, pursuant to 28 U.S.C. § 1331, federal question jurisdiction exists because [redacted] subsequently-filed suit in the U.S. District Court for the Middle District of Tennessee seeks relief for a violation of federal law, the ADEA. In

[1]Since [redacted] is a limited liability company, it has the citizenship of all of its members. *See Homfeld II, LLC v. Comair Holdings, Inc.*, 53 F. App'x 731, 732 (6th Cir. 2002). [redacted] is the sole member of [redacted] [R. 1 at ¶ 1.] Unlike a LLC, a corporation is a citizen of the state under whose laws it is organized and the state where its principal place of business is located. 28 U.S.C. § 1332(c)(1). [redacted] is organized under the laws of Delaware and has its principal place of business in Nashville, Tennessee. [R. 1 at ¶ 1.]

response, [redacted] invokes the well-pleaded complaint rule, arguing that [redacted] has failed to properly allege federal question jurisdiction in its complaint for declaratory judgment and has not sought leave to amend its complaint.

[redacted] argument misses the mark. Ordinarily, to invoke federal question jurisdiction, a federal question must appear on the face of the plaintiff's complaint, and not in anticipation of a defense based on federal law. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). However, the rule is different when a declaratory judgment plaintiff brings an action under 28 U.S.C. § 2201 that asserts a defense to an impending claim. In such situations, federal question jurisdiction will be found when the declaratory judgment defendant's threatened coercive action would present a federal question. *See Skelly Oil v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983); *AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004). Thus, "it is the character of the threatened action, and not the defense, which will determine whether there is federal-question jurisdiction in the District Court." *AmSouth*, 386 F.3d at 775 (quoting *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952). By its very nature, then, this inquiry is not confined to the allegations contained in the initial pleading seeking declaratory relief.[2]

That Haidek's threatened action presents a federal question and thereby confers subject matter jurisdiction over this case is beyond doubt. Haidek believed that Lake Cumberland had discriminated against him because of his age when it rescinded its recruitment offer. Among other things, the federal ADEA prohibits an employer from refusing to hire an individual because

[2]Moreover, the Court does not agree that a federal issue is absent from the face of [redacted] complaint for declaratory relief. Although the complaint does not allege federal question jurisdiction as the basis for this Court's subject matter jurisdiction, it specifically sought a declaration that [redacted] was not entitled to any relief under the federal Age Discrimination in Employment Act. [R. 1 at ¶ 15.]

of his age, and expressly authorizes private causes of action provided certain administrative steps are first taken. 29 U.S.C. §§ 623, 626. In January 2009, [redacted] took the first step towards bringing an action when he filed a charge of discrimination against [redacted] ith the Equal Employment Opportunity Commission. Moreover, [redacted] was apparently aware that [redacted] was contemplating a claim under the ADEA because its declaratory complaint expressly requests a determination that [redacted] was not entitled to any relief under the ADEA. Eventually, [redacted] action before the federal court in Tennessee would be predicated on the ADEA, and thus a federal question. Accordingly, the Court finds that it has jurisdiction over [redacted] complaint despite the fact that it failed to allege the presence of a federal question in its initial pleading.

B.

Having found that subject matter jurisdiction exists, the Court now must determine whether it should exercise its discretionary jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). *See Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942) (exercise of jurisdiction under the Declaratory Judgment Act is not mandatory); *see also Bituminous Cas. Corp. v. J & L Lumber Co., Inc.*, 373 F.3d 807, 812 (6th Cir. 2004). "[D]istrict courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). In other words, although the District Court has jurisdiction of the suit brought under the Declaratory Judgment Act, "it [i]s under no compulsion to exercise that discretion." *Brillhart*, 316 U.S. at 494. Moreover, a district court does not need to point to "exceptional circumstances" in declining to exercise jurisdiction in a

declaratory judgment suit." *See Wilton*, 515 U.S. at 286.

Therefore, because [redacted] eeks a declaratory judgment, this Court, in its discretion, must determine whether this case is appropriate for such relief. In making this assessment, the Court should determine "whether the judgment 'will serve a useful purpose in clarifying and settling the legal relationships in issue' and whether it 'will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Brotherhood Mut. Ins. Co. v. United Apostolic Lighthouse, Inc.*, 200 F. Supp. 2d 689, 692 (E.D. Ky. 2002) (citations omitted). A full inquiry into all relevant considerations must be made, taking into account the following five factors:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

*See Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 968 (6th Cir. 2000) (citations omitted).

Here, these factors do not weigh in favor of exercising discretional jurisdiction to resolve the controversy. With regard to the first factor, a declaration about whether the contemplated relationship between the parties was that of an independent contractor or employer-employee would not necessarily settle the matter. If the Court were to determine that the recruiting agreement would have established an employment relationship between [redacted] and [redacted] then the broader issues of whether the hospital violated federal and state age discrimination laws by withdrawing the proposed contract and giving it to another physician would remain for the federal court in Tennessee to resolve. Accordingly this factor weighs against discretionary jurisdiction.

The Court also believes the second factor - whether the declaratory judgment would serve a useful purpose in clarifying the legal relations at issue - weighs against hearing this case. The Sixth Circuit has noted that there is little utility in a declaratory action that is brought for a determination of liability on an already-accrued damages claim when a suit for relief on the underlying coercive claim is also pending. *See AmSouth Bank v. Dale*, 386 F.3d 763, 786-87 (6th Cir. 2004). This is the situation here since the injuries alleged by [redacted] "are dependent on historical occurrences rather than ongoing conditions." *See id.* at 787-88.

Moreover, the Sixth Circuit was emphatic that where resolution of a pending coercive suit would address the issues raised in the declaratory action, the second factor weighs "heavily in favor of dismissing the declaratory judgment suit." *Id.* at 786. As the *AmSouth* court noted, "Where a pending action, filed by the natural plaintiff, would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified." *AmSouth*, 386 F.3d at 787. In this case, [redacted] defense that it contemplated a independent contractor, and not a employer-employee, relationship would need to be resolved by the federal court in Tennessee, if the hospital chooses to raise it.

Under the third factor, this case presents the appearance of "procedural fencing" or a "race for res judicata," which weighs in favor of dismissal. Instead of filing suit immediately, [redacted] contacted [redacted] in an attempt to enter good faith settlement negotiations. It complied with [redacted] request for a written settlement demand and acceded to its request that it be given "thirty days or so" to look into the matter. When that time was up, the hospital indicated it would need more time to make a decision. About ten days later, on June 8, [redacted] informed the hospital that he had drafted a complaint and was ready to file and wanted to

know whether he would need to do so. [redacted] again demurred, saying that it "should have something substantive [ ] one way or the other" by the end of the week. When the week's end arrived, counsel for [redacted] advised [redacted] apparently out of the blue, that the instant declaratory action had been filed. [redacted] does not contest these facts but rejects the implication that it "sandbagged" [redacted] [Plaintiff's Response at 11.] Instead, it states that this declaratory action was necessary because it was otherwise presented with a "Hobson's choice" - either settle Haidek's claims or face the possibility of having to defend itself in "New York or Massachusetts or Tennessee or whatever other jurisdiction Defendant chose." [*Id*.] Whether or not this can be called "sandbagging," such stalling by a declaratory plaintiff so that it might be able to file first and get its choice of venue is precisely what the third factor aims to discourage.

Again, the Sixth Circuit's opinion in *AmSouth* is instructive. Faced with similar dilatory tactics by the declaratory plaintiff, the Sixth Circuit held that such maneuvering weighs heavily against the exercise of jurisdiction. *See AmSouth*, 386 F.3d at 788-790. It stated,

> Courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum. Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to the courthouse, as potential plaintiffs must file before approaching defendants for settlement negotiations, under pain of declaratory suit. This also dovetails with [the second factor]: where a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff her choice of forum - a guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act.

*Id.* at 788. The court further invoked case law from other jurisdictions finding that allowing declaratory actions to continue under these circumstances would lead to "needless litigation occasioning waste of judicial resources, delay in resolution of controversies and misuse of

judicial process to harass an opponent in litigation." *Id.* (citing *BASF Corp. v. Symington,* 50 F.3d 555, 558-59 (8th Cir. 1995).

The fourth factor requires a determination of whether the use of a declaratory action would increase friction between federal and state courts. Courts usually consult several factors in making this determination.[3] However, since there is no parallel state court proceeding between the parties, there is little risk of friction between federal and state courts in this case. Moreover, because [redacted] underlying coercive action is predicated on both state and federal causes of action there is no reason to believe that a state court would be in a better position to evaluate factual issues in this case. Accordingly, this factor weighs in favor of exercising jurisdiction.

Finally, under the fifth factor, the Court must determine whether there is an alternative remedy which is better or more effective. In evaluating this factor, the Sixth Circuit in *AmSouth* noted that "[t]he existence of a coercive action is important to our determination that this declaratory action would serve no useful purpose." *Id.* at 791. Although it cited case law from district courts in Michigan finding that a pending coercive action helps "to sharpen and refine issues to be decided," *see id.* (citing *Albie's Food, Inc. v. Menusaver, Inc.,* 170 F.Supp.2d 736, 740 (E.D. Mich. 2001); *Pakideh v. Ahadi*, 99 F.Supp.2d 805, 807-09 (E.D. Mich. 2000), it ultimately was "unsure that this factor weighs heavily in favor of or against entertaining these declaratory actions." *AmSouth*, 386 F.3d at 788. For many of the reasons already stated, the Court believes that this factor tends to weigh against exercising discretion in the present case, albeit only moderately so.

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[3] Courts consider (1) whether the underlying factual issues are important to an informed resolution of the case; (2) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (3) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action. *Scottsdale*, 211 F.3d at 968.

In sum, then, there are four factors that weigh in favor of dismissing this case, two of which weighing heavily so, and one factor that weighs in favor of exercising jurisdiction. On balance, therefore, the clear weight of these factors falls against exercising jurisdiction, and the Court will decline to do so. As a result, the Court need not reach the arguments concerning venue.

**III.**

Accordingly, and the Court being duly and sufficiently advised, it is hereby **ORDERED** as follows:

1. The Defendant's Motion to Dismiss [R. 8] is **GRANTED** and alternative Motion to Transfer [R. 8] is **DENIED**;

2. This matter is **DISMISSED WITHOUT PREJUDICE** and **STRICKEN** from the Court's active docket; and

This the 17th day of March, 2010.

**Signed By:**
***Gregory F. Van Tatenhove***
**United States District Judge**