

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

GEMINI INSURANCE COMPANY,

Plaintiff,

Case No. _____

v.

HARRAH'S NC CASINO COMPANY, LLC,
CAESARS ENTERTAINMENT
CORPORATION, OLD REPUBLIC
INSURANCE COMPANY, and EASTERN
BAND OF CHEROKEE INDIANS,

Defendants.

NOTICE OF REMOVAL

Defendants Harrah's NC Casino Company, LLC, Caesars Entertainment Corporation, and Old Republic Insurance Company ("Removing Defendants") hereby remove Case No. 2019-CVS-12958 from the General Court of Justice, Superior Court Division for Wake County in the State of North Carolina to the United States District Court for the Eastern District of North Carolina, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, and as grounds for its removal state as follows:

STATEMENT OF CASE

1. On September 24, 2019, Plaintiff Gemini Insurance Company ("Gemini") filed a Complaint in the General Court of Justice, Superior Court Division for Wake County in the State of North Carolina styled *Gemini Insurance Company v. Harrah's NC Casino Company, LLC, Caesars Entertainment Corporation, Old Republic Insurance Company, and Eastern Band of Cherokee Indians*, Case No. 2019-CVS-12958 (the "State Court Action"). (Compl., Ex. 1 attached

hereto.) Plaintiff Amended the Complaint dated October 29, 2019. (Am.Compl., Ex. 2 attached hereto.)

2. The State Court Action arises out of a personal injury lawsuit brought against the Eastern Band of Cherokee Indians (“EBCI”), and others, in the Eastern Band of Cherokee Indians Cherokee Court (“Underlying Lawsuit”). Gemini issued a sovereign national commercial general liability insurance policy to EBCI for the relevant claims in the Underlying Lawsuit and undertook the defense of its insured EBCI thereunder. (Am.Compl. ¶¶ 1 and 35.)

3. Gemini served the Summons and Complaint in the State Court Action on Harrah’s NC Casino Company, LLC on October 3, 2019, Caesars Entertainment Corporation on October 3, 2019, and Old Republic Insurance Company on October 4, 2019.

4. Upon information and belief, the Eastern Band of Cherokee Indians has not yet been properly served.

5. The State Court Action Complaint asserts only two causes of action by Gemini: one for declaratory judgment that Old Republic Insurance Company insures and owes a duty of defense and indemnity to EBCI in the Underlying Lawsuit, and one under “Equitable Contribution and/or Equitable Subrogation” claiming Gemini is entitled to recover from Old Republic Insurance Company the defense costs and expenses, with interest, paid by Gemini in the Underlying Lawsuit. (Am.Compl. ¶¶ 56-61.)

6. Ultimately, the State Court Action is brought by one insurance company to determine whether another insurance company provides defense and indemnification to a claimed joint insured. Gemini sues Old Republic Insurance Company claiming Old Republic Insurance Company is obligated to provide defense and indemnification to the Eastern Band of Cherokee Indians for the Underlying Lawsuit. In bringing the State Court Action, Gemini sues its own

insured, Eastern Band of Cherokee Indians, and Harrah's NC Casino Company, LLC with whom the Eastern Band of Cherokee Indians had entered into a Management Agreement as described below. It also sues Caesars Entertainment Corporation who is Old Republic Insurance Company's insured.

BACKGROUND AND ALLEGATIONS

7. Gemini is an insurance company organized and existing under the laws of the State of Delaware with its principal place of business in the State of Connecticut. (Am.Compl. ¶ 1.)

8. Old Republic Insurance Company ("Old Republic") is an insurance company organized and existing under the laws of the State of Pennsylvania with its principal place of business in the State of Pennsylvania. (Am.Compl. ¶ 2.) Old Republic issued a policy of insurance to Caesars Entertainment Corporation. (Compl. ¶ 2.)

9. At the time the State Court Action was filed and at all times since, Harrah's NC Casino Company, LLC ("Harrah's NC") was a limited liability company. (Krokosky Decl. ¶ 1(a).) Harrah's NC had two members: CEOC, LLC and Harrah's Management Company. (Krokosky Decl. ¶ 1(b).)

a. At the time the State Court Action was filed and at all times since, CEOC, LLC was a limited liability company. CEOC, LLC's sole member was Caesars Entertainment Corporation. Caesars Entertainment Corporation was a corporation formed under the laws of the State of Delaware with a principal place of business in Nevada. (Krokosky Decl. ¶ 1(c).)

b. At the time the State Court Action was filed and at all times since, Harrah's Management Company was a corporation formed under the laws of the State of Nevada with a principal place of business in Nevada. (Krokosky Decl. ¶ 1(d).)

10. At the time the State Court Action was filed and at all times since, Caesars Entertainment Corporation (“CEC”) was a corporation formed under the laws of Delaware with a principal place of business in the State of Nevada. (Krokosky Decl. ¶ 1(c).)

11. Upon information and belief, the Eastern Band of Cherokee Indians is a federally recognized Indian tribe located in Cherokee, North Carolina. (Am.Compl. ¶ 11.)

12. The Underlying Lawsuit involves a claim for injuries/death that allegedly occurred on a public street away from Harrah’s Cherokee Casino Resort (“Resort”) located in Cherokee, Cherokee County, North Carolina. (Am.Compl. ¶ 36.) The Resort is owned by EBCI and managed by Harrah’s NC. (Am.Compl. ¶ 17 and 23.) EBCI and Harrah’s NC entered into a Management Agreement for the Resort property as defined therein. (Am.Compl., and attached Ex. A Management Agreement.)¹

13. The Underlying Lawsuit alleges that plaintiff’s decedent in the Underlying Lawsuit left the Resort and was in the process of crossing the street toward the “Stonebrook Lodge” in which she was staying when the alleged accident occurred. (Am.Compl. ¶¶ 35-36, and attached Ex. C to Second Amended Complaint ¶¶ 6, 14-16, 19.) The Lodge located across the street from the Resort was owned and operated by Smokey Mountain Properties, LLC. (Ex. C. Second Amended Complaint ¶ 6.) Plaintiff in the Underlying Lawsuit alleges that a street light at the Stonebrook Lodge across the street from the Resort was not in working order and caused the accident when plaintiff’s decedent was struck by a car. (Ex. B Second Amended Complaint ¶¶ 15, 16, and 19.) Gemini fails to include in its Amended Complaint herein that, after Plaintiff in the

¹ Ex. 2 attached hereto is the State Court Action Amended Complaint that attaches as Ex. A: Management Agreement between EBCI and Harrah’s NC; Ex. B: Old Republic insurance policy issued to CEC; Ex. C: Second Amended Complaint in the Underlying Lawsuit; Ex. D: Gemini insurance policy issued to EBCI; Ex. E: 2/13/19 Acceptance Letter; Ex. F: 2/19/19 Denial Letter; and Ex. G: 2/26/19 Loftin Letter.

Underlying Lawsuit allegedly used a pedestrian bridge leaving the Resort, she “then utilized a marked crosswalk located on or adjacent to Casino property to cross” the road to the Lodge. (Ex. B Second Amended Complaint ¶ 15.) She was allegedly struck in the crosswalk. (Ex. B Second Amended Complaint ¶ 16.)

14. Gemini alleges that under a Management Agreement between Harrah’s NC and EBCI, Harrah’s NC agreed to maintain commercial general liability insurance coverage on behalf of EBCI and name EBCI as an additional insured for the Underlying Lawsuit. (Am.Compl. ¶ 28)

15. Although Gemini admits that it provides coverage to EBCI for the claims in the Underlying Lawsuit, it nevertheless contends that “EBCI is an additional insured under the Old Republic Policy.” (Am.Compl. ¶ 32 and 40.)

16. Gemini claims EBCI is entitled to insurance coverage in the State Court Action under Old Republic’s insurance policy issued to CEC through obligations of the Management Agreement entered into between EBCI and Harrah’s NC. (Am.Compl. ¶¶ 18-32.)

17. The Management Agreement between EBCI and Harrah’s NC, attached as Exhibit A to the Amended Complaint State Court Action, only obligates Harrah’s NC to obtain insurance “covering the Facility and the operations of the Enterprise...” (Am.Compl. Ex. A at p. 27.) The “Facility” is defined as “buildings, improvements, and fixtures, now or hereafter located therein or thereon and associated and adjacent real property owned by the Tribe, within which the Enterprise will be housed, all as located on the Property.” (Am.Compl. ¶ 21; Ex. C at pp. 4-5.) The “Enterprise” is defined as “the commercial enterprise of the Tribe authorized by IGRA and/or the Compact and operated and managed by Manager . . . conducted at the Facility.” (Am.Compl. ¶ 19; Ex. A at p. 3.) The “Scope of the Enterprise” is: “The Facility currently consists of the following; Casino, Hotel and convention facilities, as well as other amenities which the Tribe and/or Harrah’s,

from time to time, believe might enhance the economic viability of the Enterprise.” (Am.Compl. ¶ 20; Ex. A at B-1.) The Management Agreement does not include obligations for areas outside the Resort, including the crosswalk in which Plaintiff in the Underlying Lawsuit was allegedly hit after leaving the Resort.

18. Gemini makes no claim for relief under the Management Agreement, to which it is not a party. Gemini only contends the Management Agreement affects the declaration of coverage under Old Republic’s insurance policy.

19. Gemini’s sole stated causes of action and claims for relief are against Old Republic Insurance Company claiming Old Republic insures and owes a duty of defense to the EBCI in the Underlying Lawsuit, and Gemini claims it is entitled to recover from Old Republic Insurance Company the defense costs and expenses, with interest, paid by Gemini in the Underlying Lawsuit. (Am.Compl. ¶¶ 56-61 and Prayer for Relief.)

20. Gemini makes no claim for relief against Harrah’s NC or CEC.

21. Because Gemini’s sole stated causes of action and claims for relief are against Old Republic Insurance Company, and because Gemini misinterprets the Management Agreement, the remaining defendants are fraudulently and improperly joined parties herein.

DIVERSITY JURISDICTION UNDER 28 U.S.C. §1332(a)

22. This Court has jurisdiction over this matter under 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between Gemini and Old Republic and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

23. Gemini is a Delaware corporation with its principal place of business located in the State of Connecticut. Gemini is a citizen of Delaware and Connecticut for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1).

24. Old Republic Insurance Company is a Pennsylvania corporation with its principal place of business located in the State of Pennsylvania. Old Republic is a citizen of Pennsylvania for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1).

25. The Eastern Band of Cherokee Indians is a federally recognized Indian tribe located in Cherokee, North Carolina. (Am.Compl. ¶ 11.) Upon information and belief, EBCI has not been properly served and EBCI's joinder is fraudulent such that its joinder in this litigation fails to defeat diversity under 28 U.S.C. 1441(b)(2).

a. Gemini makes no claim for relief against its insured EBCI. For purposes of diversity jurisdiction, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980). "Nominal means simply a party having no immediately apparent stake in the litigation either prior or subsequent to the act of removal. In other words, the key inquiry is whether the suit can be resolved without affecting the . . . nominal defendant in any reasonably foreseeable way." *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013). Gemini is defending EBCI in the Underlying Lawsuit and seeks to have Old Republic share in the cost or take over the defense. EBCI remains unaffected in the Underlying Litigation.

b. To establish fraudulent joinder, a defendant must show either 1) there is no possibility that the plaintiff can establish a cause of action against the non-diverse defendant, or 2) that there has been outright fraud in plaintiff's pleading of jurisdictional facts. *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993). In this matter, Gemini has no possibility of establishing a cause of action against its own insured EBCI. Gemini makes no claim against EBCI, and cannot establish a cause of action against EBCI.

Gemini is trying to obtain additional coverage for EBCI, nothing against EBCI. Gemini fraudulently joined EBCI to this insurance coverage declaration lawsuit and EBCI's citizenship cannot be used to defeat diversity.

26. The remaining defendants' respective citizenship should also be disregarded because they, too, have been fraudulently joined to this State Court Action.

a. Harrah's NC is a limited liability company with two members: 1) CEOC, LLC a limited liability company whose sole member is CEC which is a citizen of Delaware and Nevada, and 2) Harrah's Management Company which is a citizen of Nevada. As a result, Harrah's NC is a citizen of Delaware and Nevada for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1); *Central West Va. Energy Co., Inc. v. Mount State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011).

b. CEC is a Delaware corporation with its principal place of business located in the State of Nevada. CEC is a citizen of Delaware and Nevada for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1).

27. Harrah's NC and CEC's joinder is fraudulent such that their joinder in this litigation fails to defeat diversity under 28 U.S.C. 1441(b)(2). There is no possibility that the plaintiff can establish a cause of action against either Harrah's NC or CEC. *See Marshall v. Manville Sales Corp.*, 6 F.3d at 232. While Gemini makes allegations about Harrah's NC being a party to the Management Agreement and Old Republic issuing its insurance policy to CEC, neither allegation creates a cause of action by Gemini against either Harrah's NC or CEC. Gemini's Amended Complaint identifies evidence and witnesses to the action, but it does not allege a cause of action against either Harrah's NC or CEC, and cannot allege a cause of action. Insofar as neither CEC nor Harrah's NC were obligated to obtain insurance for the Band for the accident-at-issue in the

Underlying Lawsuit, neither CEC nor Harrah's NC is a necessary party to this lawsuit. The State Court Action being removed is only about whether the Old Republic insurance policy provides a defense or indemnification to EBCI for the Underlying Lawsuit. It is not about potential liability of EBCI, Harrah's NC, or CEC to the Underlying Lawsuit. The Underlying Lawsuit, with the liability issues, remains venued in the Eastern Band of Cherokee Indians Cherokee Court.

28. Because EBCI was never properly served and is a nominal defendant, its location in North Carolina does not defeat diversity jurisdiction under 28 U.S.C. 1441(2)(b).

29. EBCI, Harrah's NC, and CEC are fraudulently joined defendants such that their citizenship cannot be considered to defeat removal. There is no possibility that Gemini can establish a cause of action against EBCI, Harrah's NC, or CEC. Gemini sues Old Republic Insurance Company claiming it provides insurance defense and indemnification to the Eastern Band of Cherokee Indians for the Underlying Lawsuit. Whether insurance coverage exists under Old Republic's insurance policy depends solely upon the terms of Old Republic's policy and has no dependence upon and creates no cause of against against Harrah's NC, CEC, or EBCI.

30. The State Court Action is a claim for the defense and indemnification for a wrongful death injury in the Underlying Lawsuit, and further requests contribution/indemnification for amounts already incurred in defense of the Underlying Lawsuit. The Underlying Lawsuit claims the plaintiff's decedent was "violently struck by the vehicle with such force that her body was thrown and came to rest approximately fifty-seven feet to sixty-four feet from the subject crosswalk." (Ex. C Second Amended Complaint ¶ 16.) Plaintiff further claims significant injuries incurred by plaintiff's decedent, including traumatic brain injury and numerous fractures, being life-flighted to a hospital, and remaining in a coma and on a ventilator for seven days. (Ex. C Second Amended Complaint ¶ 17.) This matter clearly exceeds the sum or value of

\$75,000, exclusive of interests and costs. Gemini seeks to have Old Republic defend and indemnify EBCI in the Underlying Lawsuit, and reimburse Gemini for fees, costs, and expenses incurred in the Underlying Lawsuit with pre-judgment interest and attorney's fees. (Am.Compl. Pray for Relief.)

**ALL PROCEDURAL REQUIREMENTS FOR REMOVAL HAVE BEEN
SATISFIED**

31. Pursuant to 28 U.S.C. § 1446(a) and Civil Local Rule 5.3 and 7.3, a true and correct copy of all of the process, pleadings, and orders from the State Court Action which have been served upon Harrah's NC, CEC, and Old Republic, as well as the Disclosure Statement, are being filed with this Notice of Removal.

32. The Eastern Band of Cherokee Indians has not been properly served and joined so no consent is required pursuant to 28 U.S.C. § 1446(b)(2)(A).

33. This Notice of Removal has been filed within 30 days of October 3, 2019, the earliest date that Removing Defendants were served with the Summons and Complaint in this matter. Removal is therefore timely in accordance with 28 U.S.C. § 1446(b).

34. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446(a) because the U.S. District Court for the Eastern District of North Carolina is the federal judicial district embracing the General Court of Justice, Superior Court Division for Wake County, North Carolina where the State Court Action was originally filed.

35. By filing this Notice of Removal, Removing Defendants do not waive any defenses which may be available to them in state court, including but not limited to defenses based on choice of law, and expressly deny liability for any damages alleged by Gemini Insurance Company.

WHEREFORE, Defendants Harrah's NC Casino Company, LLC, Caesars Entertainment Corporation, and Old Republic Insurance Company respectfully remove the State Court Action into the U.S. District Court for the Eastern District of North Carolina.

Dated this 1st day of November, 2019.

WOMBLE BOND DICKINSON (US) LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via First Class US Mail on November 1, 2019 on all counsel of record in the above-captioned case.

By: /s/ Claire Rauscher.
Claire Rauscher NC 21500