IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
No. 5:19-cv-00488-D

GEMINI INSURANCE COMPANY,

Plaintiff,

v.

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND

Pursuant to Rules 7.1(e) and 7.2 of the Local Civil Rules of Practice and Procedure for the Eastern District of North Carolina, Plaintiff Gemini Insurance Company ("Plaintiff") serves this Memorandum of Law in Support of its Motion to Remand [DE: # 10].

I. A CONCISE SUMMARY OF THE NATURE OF THE CASE

In this proceeding, Plaintiff seeks a declaratory judgment and other relief related to certain insurance coverage obligations arising from a wrongful death action currently pending in the Eastern Band of Cherokee Indians Cherokee Court. [DE: #1-4, Amended Complaint].

II. A CONCISE SUMMARY OF THE FACTS OF THE CASE

On July 10, 2016, casino patron Sheila Cam pos left the Harrah's Cherokee Casino Resort in Cherokee, North Carolina in order to walk to the nearby Stonebrook Lodge. As she did so, she was struck by a passing vehicle. She died on July 17, 2016. Her husband, Louis Campos, filed a wrongful death action against the Eastern Band of Cherokee Indians ("EBCI"), Harrah's NC Casino Company, LLC ("Harrah's"), Caesar's Entertainment Operating Company, and the Tribal Casino Gaming Enterprise alleging several theories of recovery, including premises

liability, agency of Harrah's for the other defendants, and breach of EBCI's customs and traditions. [DE: #1-4, pp. 258-276]. Specifically, Mr. Campos alleged as follows:

> [Harrah's NC and EBCI], (collectively "Defendants" hereinafter) had a duty to use ordinary care to keep the Casino, surround parking lots/pedestrian bridges, crosswalks, streets, and other surrounding properties, including Stonebrook Lodge, in a reasonably safe condition for lawful visitors using the Casino and public ways/spaces in a reasonable and ordinary manner.
>
> …
>
> Defendants' breached their duty of care by failing to properly maintain the roadway and surrounding properties/premises/equipment, which was the proximate cause of [Mrs. Campos'] injuries and untimely death as described herein.
>
> …
>
> At all times mentioned in this Complaint, Defendants, jointly and severally either through interlocking contractual agreements or through shared duty owned, possessed or leased and were in full possession or control of the Casino, parking lots/pedestrian bridges, crosswalks, streets, and surrounding properties, including Stonebrook Lodge. Defendants negligently failed to correct the unsafe condition caused by the following: insufficient warning/signage to motorists of an existing crosswalk, insufficient lighting, and insufficient warnings to pedestrians of the existing unsafe condition. Defendant knew or with the exercise of reasonable inspection should have known that the deficient crosswalk, lack of warning/signage, insufficient lighting, and heavy pedestrian foot traffic in the area of the Casino and Paint Town Road/U.S. Route 19 created an unsafe condition (particularly for those patrons/members of the public traversing the crosswalk at night), but failed to take any action to correct said unsafe condition.
>
> Defendants' negligence in failing to correct the unsafe condition caused by the deficient crosswalk, lack of warning/signage, and insufficient lighting was the direct and proximate cause of [Mrs. Campos'] injuries and untimely death as described herein.
>
> [*Id*. at pp. 258-276, ¶¶ 24, 29, 34-35].

Plaintiff issued a sovereign national commercial general liability insurance policy to EBCI and ultimately undertook the defense of EBCI in the wrongful death litigation. However, Plaintiff believes that Old Republic Insurance Company ("Old Republic") should be defending

and indemnifying EBCI in the tort action in light of the provisions of the Amended and Restated Management Agreement ("Agreement") executed between Harrah's (the operator/manager of the casino) and EBCI (the owner of the casino). [DE: #1-4, pp. 17-108]. In that Agreement, Harrah's agreed to secure insurance on behalf of EBCI. [*Id*. at pp. 100-104, Exhibit "F" Section 1.01.1.(e)]. The Old Republic Policy contains an Additional Insured Endorsement (CG 20 26 04 13) which provides that those entities required to be named as an additional insured under a written contract or agreement constitute additional insureds under its Policy. [*Id*. at 192]. Despite the applicability of that contractual provision and policy, Harrah's and Old Republic declined to accept the tender of the defense and indemnity of EBCI. [DE: #1-4, pp. 316-323].

In light of that denial, Plaintiff filed its original Complaint for declaratory and other relief in the Wake County Superior Court on September 24, 2019 [DE: #1-3] and its Amended Complaint as a matter of right on October 29, 2019 [DE: #1-4]. In so doing, Plaintiff sought a declaratory judgment relating to coverage obligations and other relief against:

- Harrah's, the operator/manager of the casino, the party to the Agreement obligated to secure insurance coverage for EBCI, and a defendant in the underlying tort action.
- Old Republic, the insurer whose policy (policy number MWZY 308055) is implicated by the Agreement and under which EBI should be an additional insured.
- Caesars Entertainment Corporation ("Caesars"), the named insured under the Old Republic policy, the owner of Harrah's, and the entity which claims on its website that the Harrah's casino at issue is a Caesars property.
- EBCI, Plaintiff's insured, a party to the Agreement, the entity for which Harrah's was required to obtain insurance, and an additional insured under the Old Republic policy.

Specifically, with respect to the coverage issues, Plaintiff sought a declaration that:

1. EBCI is an insured and/or additional insured under the Old Republic Policy;

2. Old Republic owes the primary duty to defend and indemnify EBCI in the Underlying Lawsuit;

3. As Old Republic has a duty to defend EBCI, its wrongful refusal to agree to defend and indemnify EBCI has resulted in Gemini having to incur costs and fees and other damages in connection with the defense of the action which it would not have had to incur had Old Republic fulfilled its obligations under its policy.

[DE: #1-4, Amended Complaint, pp. 13-14].

On November 1, 2019, Old Republic, Caesars, and Harrah's ("the Removing Defendants") removed this matter to this Court. [DE: #1]. In so doing, they alleged that Harrah's, Caesars, and EBCI were "sham defendants" who had been "fraudulently joined" to defeat diversity of citizenship and/or thwart removal. [*See id*.] Specifically, the Removing Defendants describe this suit as one "brought by one insurance company to determine whether another insurance company provides defense and indemnification to a claimed joint insured." [*Id*. at ¶ 6]. Put another way, the Removing Defendants characterize the suit as one in which Plaintiff'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 [Plaintiff] 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." [*Id*. at ¶ 19]. In sum, the Removing Defendants contend that "[b]ecause Plaintiff's sole stated causes of action and claims for relief are against Old Republic Insurance Company, and because [Plaintiff] misinterprets the Management Agreement, the remaining defendants are fraudulently and improperly joined parties herein." [*Id*. at ¶ 21]. The Removing Defendants concede that Old Republic is a proper defendant for the purposes of litigating this dispute.

III. GOVERNING LAW

A. Removal jurisdiction and diversity of citizenship.

"The burden of establishing federal jurisdiction is placed upon the party seeking removal." *Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148, 151 (4th Cir. 1994). "Because removal jurisdiction raises significant federalism concerns, [the court] must strictly construe removal jurisdiction." *Id.* "If federal jurisdiction is doubtful, a remand is necessary." *Id*.; *see Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008) (recognizing the court's "duty to construe removal jurisdiction strictly and resolve doubts in favor of remand").

To invoke diversity jurisdiction, the matter in controversy must exceed the sum or value of $75,000, exclusive of interest and costs, and be between citizens of different States. *See* 28 U.S.C. § 1332. A corporation is a citizen of the state in which it is incorporated and of the state in which it maintains its principal place of business. *See id*. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010). It is long settled that diversity of citizenship between the parties must be complete. *See, e.g., Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998); *Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254-55 (4th Cir. 2009).

B. The fraudulent joinder doctrine.

"[T]he fraudulent joinder doctrine provides that diversity jurisdiction is not automatically defeated by naming non-diverse defendants." *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218 (4th Cir. 2015). The doctrine "permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 703-05 (4th Cir. 2015) (quoting *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999)).

Invocation of the fraudulent joinder doctrine is appropriate only where "there is **no possibility** that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or . . . there has been outright fraud in the plaintiff's pleading of jurisdictional facts." *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993) (emphasis in original) (citations omitted). "[U]ltimate success is not required to defeat removal. Rather, there need be only a **slight possibility** of a right to relief. Once the court identifies this glimmer of hope for the plaintiff, the jurisdictional inquiry ends." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999) (citing *Marshall*, 6 F.3d at 233) (emphasis added).

"The party alleging fraudulent joinder bears a **heavy burden** - it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor." *Id*. at 424 (emphasis added). "In order to determine whether an attempted joinder is fraudulent, the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available." *AIDS Counseling & Testing Centers v. Grp. W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (citations omitted) (quoting *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964)).

Further, the fraudulent joinder inquiry is focused on whether the plaintiff is able to establish a cause of action against the nondiverse defendant "in state court." *Marshall*, 6 F.3d at 232 (emphasis added); *see Grennell v. Western S. Life Ins. Co.*, 298 F. Supp. 2d 390, 397 n.9 (S.D. W. Va. 2004) ("[F]raudulent joinder analyses seek resolution of whether a plaintiff's claim could prevail as it was filed in the state court from which it was removed. Thus, examinations of joinder of parties should probably proceed with reference to state procedural law."); *City of Portsmouth, Virginia v. Buro Happold Consulting Eng., P.C.*, No. 2:05-341, 2005 U.S. Dist.

LEXIS 46767, 2005 WL 2009281, at *6 n.4 (E.D. Va. Aug. 19, 2005) ("The majority of courts have found that state procedural law governs the matter.").

This is true when analyzing the fraudulent joinder inquiry in the context of declaratory judgment actions. *Ohio Cas. Ins. Co. v. RLI Ins. Co.*, No. 1:04-cv-483, 2005 U.S. Dist. LEXIS 24124, 2005 WL 2574150, at *5 (M.D.N.C. October 12, 2005) (applying North Carolina state declaratory judgment act when analyzing fraudulent joinder of purported sham defendants); *see also Lexcorp v. Western World Ins. Co.*, No. 4:10-00027, 2010 U.S. Dist. LEXIS 117001, 2010 WL 3855305, at *5 (W.D. Va. Oct. 1, 2010) (same for Virginia declaratory judgment act); *American Int'l Ins. Co. v. Heltzer*, No. AW-00-335, 2001 U.S. Dist. LEXIS 1658, 2001 WL 225031, at *2 (D. Md. Feb. 7, 2001) (same for Maryland declaratory judgment act).

C. North Carolina Declaratory Judgment Act.

Under the North Carolina Declaratory Judgment Act (the "Act"), "[a]ny person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the . . . statute, ordinance, contract or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254. "The purpose of the [Act] is to settle and afford relief from uncertainty concerning rights, status and other legal relations . . . ." *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 446, 206 S.E.2d 178, 186 (1974). A court may render judgment declaring the rights and liabilities of the respective parties, and affording relief to which the parties are entitled under the judgment, when: (1) "a real controversy exists between or among the parties"; (2) "such controversy arises out of [the parties'] opposing contentions"; and (3) the parties "have or may have legal rights, or are or may

be under legal liabilities [that] are involved in the controversy, and may be determined by a judgment or decree in the action[.]" *Id*. at 449, 206 S.E.2d at 188.

D. Necessary Parties and the North Carolina Declaratory Judgment Act.

"A necessary party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *Smith v. USAA Cas. Ins. Co.*, 819 S.E.2d 610, 617 (N.C. Ct. App. 2018). "In other words, a necessary party is one whose interest will be directly affected by the outcome of the litigation." *See id*. "[A] judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Id*.

North Carolina courts have applied this necessary party principle in the context of declaratory judgment actions. *Smith*, 819 S.E.2d 610 at 617 (vacating the trial court's order in insurance coverage action and "remand[ing] this case for joinder of these necessary parties); *see also In re Foreclosure of a Lien by Hunter's Creek Townhouse Homeowners Assoc., Inc.*, 200 N.C. App. 316, 319, 683 S.E.2d 450, 453 (2009) (vacating and remanding trial court's order in declaratory judgment action where court "should have intervened ex mero motu" to ensure joinder of a necessary party); *see also N.C. Monroe Constr. Co. v. Guilford Cty. Bd. of Educ.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971) (vacating declaratory judgment that invalidated award of construction contract because party awarded contract was "a necessary party in a proceeding to declare its contract with the defendant invalid and the court below could not properly determine the validity of that contract without making Barker-Cochran a party to the proceeding"); Rice, 96 N.C. App. at 114, 384 S.E.2d at 297 ("We believe that a dispute as to the extinguishment of a subdivision easement. . . cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil[.]" (internal citations omitted)).

Further, North Carolina Rule of Civil Procedure 19 provides "[t]he court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action." N.C. R. CIV. P. 19(b).

IV. ARGUMENT

A. No defendants were fraudulent joined, and as such, remand is proper.

Remand is proper in this matter because Plaintiff did not fraudulently join any defendants and no parties to this action are "sham" defendants. Rather, in invoking fraudulent joinder, the Removing Defendants appear to fundamentally misunderstand the nature of necessary parties in coverage actions as well as the manner in which an insurer's duty to defend is triggered.

In support of their allegations of fraudulent joinder, the Removing Defendants argue that Plaintiff makes no affirmative claim for relief against Harrah's, Caesars, or EBCI. [DE: #1 at ¶¶ 20 and 25(a)].[1] Further, the Removing Defendants claim that Plaintiff cannot establish a cause of action against Harrah's, Caesars, or EBCI. [*Id*. at ¶¶ 25(b) and 27]. Thus, according to the Removing Defendants, the joinder of Harrah's, Caesars, and EBCI must be fraudulent without claims or causes of action against them. The Removing Defendants are mistaken.

The Removing Defendants do not seem to appreciate the nature of the declaratory judgment cause of action in this matter. "The North Carolina Declaratory Judgment Act provides a legitimate and expeditious method for obtaining judicial construction of an agreement and the rights and liabilities of the parties to such an agreement." *Ohio Cas. Ins. Co. v. RLI Ins. Co.*, No. 1:04CV483, 2005 U.S. Dist. LEXIS 24124, at *14-15 (M.D.N.C. Oct. 12, 2005). In the

[1] In fact, the Removing Defendants expresses at the fact that Plaintiff has sued its own insured, as if that were something unusual in insurance coverage litigation. [DE: #1, ¶¶ 6 and 25(b)].

Amended Complaint, Plaintiff noted specifically that "[a]ll persons who have or claim any interest which would be affected by the declaration sought by Gemini have been made parties to this action." [DE: #1-4, ¶ 12]. Further, Plaintiff noted that "a real and justiciable controversy exists between Gemini and the other parties named herein necessitating judicial determination of the rights and responsibilities of the parties." [*Id*.] To comply with North Carolina's necessary party jurisprudence and North Carolina Rule of Civil Procedure 19, Plaintiff sued EBCI (its insured and the entity which should be defended and indemnified pursuant to the Agreement and Old Republic's Policy), Harrah's (the entity obligated under the Agreement to obtain insurance for EBCI), Caesars (the named insured on Old Republic's policy), and Old Republic (the insurer that Plaintiff contends should be defending and indemnifying EBCI in the underlying tort suit). Each of these entities is a necessary party required to be bound by any declaratory judgment. Adding necessary parties is not fraudulent joinder. *American Int'l Ins. Co. v. Heltzer*, No. Civ. A.AW-00-3355, 2001 U.S. Dist. LEXIS 1658at *2 (D. Md. Feb. 7, 2001) (finding joinder of the named insured did not constitute fraudulent joinder in a declaratory judgment action even though it was the named insured's daughter who was claiming a benefit under the policy). In fact, had Plaintiff not added these entities as parties, it would have risked a potential dismissal, or worse, a finding that the action was a legal nullity, resulting from a failure to add a necessary party.

The Removing Defendants also contend that Plaintiff "misinterprets the Management Agreement." [DE: #1, ¶ 21]. They argue that the Management Agreement between EBCI and Harrah's, NC "only obligates Harrah's NC to obtain insurance" under certain circumstances. [DE: #1, ¶ 17]. Specifically, the Removing Defendants claim that neither Caesars nor Harrah's were obligated to obtain insurance for EBCI "for the accident-at issue." [DE: #1, ¶ 27]. Essentially, the Removing Defendants argue that because the accident actually occurred off the

property contemplated or governed by the Agreement that no insurance could apply or require the defense and indemnity of EBCI by Old Republic. However, in making this argument, the Removing Defendants conflate their potential defenses to liability in the underlying action with the duty to defend the allegations as they are set forth in the complaint in the underlying tort action. Although the Removing Defendants may contest the factual accuracy of the claims asserted by the plaintiff in the underlying tort action, it is those allegations, correct or not, which trigger the duty to defend. Whether correct or not, the plaintiff in the underlying tort action has pleaded that EBCI ahs responsible for the area where the accident occurred. Under North Carolina law, an insurer has a duty to defend "[w]hen the pleadings state facts demonstrating that the alleged injury is covered by the policy. . . whether or not the insured is ultimately liable." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 377 (N.C. 1986); *see also Penn. Nat'l Mut. Cas. Ins. Co. v. Assoc. Scaffolders & Equip. Co. Inc.*, 579 S.E.2d 404, 407 (N.C. App. 2003) ("An insurer has a duty to defend when the pleadings state facts demonstrating that the alleged injury is covered by the policy."). "[A]ny doubt as to coverage must be resolved in favor of the insured." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.,* 96 N.C. App. 635, 637, 386 S.E.2d 762, 763-64 (1990). Accordingly, even though a plaintiff's allegations may ultimately be disproven, it is the allegations themselves that determine whether the claims are covered by the policy.[2] Thus, because the plaintiff in the underlying action has pleaded that

[2] The Removing Defendants do not appear to dispute that EBCI is an additional insured under the Old Republic Policy. Rather, they appear to argue that because the facts as they understand them to be – as opposed to the facts as pleaded in the underlying tort complaint – fall outside of the policy there is no duty to defend or indemnify. Whereas most insurers would defend an additional insured based on the allegations pursuant to the issuance of a reservation of rights, Old Republic has done neither. On November 15, 2019, the Cherokee Court dismissed EBCI from the underlying tort suit. However, the likelihood of an appeal remains, and Plaintiff still seeks to recover the costs and fees it expended in defending EBCI as a result of Old Republic's refusal to accept the tender for defense and indemnity.

EBCI is liable in tort for the death at issue because of its role in the administration of the casino, the duty to defend is triggered due to the nature of that allegation. Of course, it is this dispute over the interpretation of the provisions of the Management Agreement which, in part, prompted the need for declaratory relief.

B. The Removing Defendants have failed to secure the consent of all defendants.

This Court should remand this case to state court because the Removing Defendant failed to secure the consent of all defendants as required by the rule of unanimity. Accordingly, the removal is improper, and accordingly, this Court should grant this motion for remand.

When a civil action is removed to federal court "solely under" 28 U.S.C. § 1441(a) "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). This rule of unanimity "requires that each defendant register to the Court its official and unambiguous consent to a removal petition filed by a co-defendant." *Creed v. Virginia*, 596 F. Supp. 2d 930, 934 (E.D. Va. 2009) (quotations and citations omitted). When "a defendant does not consent to removal, the party seeking removal has the burden of proving that an exception to the rule of unanimity applies." *Palmetto Auto. Sprinkler Co., Inc. v. Smith Cooper Intern., Inc.*, 995 F. Supp. 2d 492, 495 (D.S.C. 2014).

This requirement applies to cases removed on the basis of complete diversity of citizenship. *See Palmetto Automatic Sprinkler Co., Inc. v. Smith Cooper Int'l, Inc.*, 995 F. Supp. 2d 492 (D.S.C. 2014). If all properly served defendants have not consented, then remand is required. *Id*. Here, the Removing Defendants represented in their Supplemental Removal Cover Sheet that EBCI had not been served with process. [DE: #1-2, Section B].[3] As such, the

[3] On November 4, 2019, this Court issued a Notice of Deficiency regarding the lack of signature on the Supplemental Removal Cover Sheet and directed that the Removing Defendants address the issue. To date, the Removing Defendants have failed to do so.

Removing Defendants did not respond to the question of whether Defendant EBCI consented to or joined in the removal. (*See id*.). Further, the Removing Defendants contend that "[u]pon information and belief, the Eastern Band of Cherokee Indians has not yet been properly served." [DE: #1, ¶ 4; *see also id.* at ¶¶ 25, 27 and 32). However, the Removing Defendants provide no evidence in support of these conclusory allegations of improper service. Further, Plaintiff did serve EBCI with the underlying state court lawsuit on October 16, 2019. (*See* **Exhibit A**, Affidavit of Service of ECBI). Accordingly, the Removing Defendants cannot meet their burden to establish that the rule of unanimity applies, and as such, remand is proper in this matter.

C. The Removing Defendants failed to serve EBCI with the Notice of Removal.

This Court should also grant Plaintiff's motion to remand because the Removing Defendants failed to serve ECBI as required by the Federal Rules of Civil Procedure and Local Rules of this Court. In light of that failure, the removal is defective, and remand is proper.

Federal Rule of Civil Procedure 5(a) requires that certain papers "must be served on every party." *See* FED. R. CIV. P. 5(a); *see also Behr v. Campbell*, No. 9:18-CV-80221, 2018 U.S. Dist. LEXIS 64511, at *6 (S.D. Fla. Apr. 13, 2018) ("Service of pleadings and other papers, **such as a Notice of Removal**, is governed by Federal Rule of Civil Procedure 5.") (emphasis added). Because they failed to include a certificate of service, there is no evidence establishing that the Removing Defendants served the Notice of Removal on all parties. Thus, there is no evidence that the Removing Defendants served the Notice of Removal on EBCI.

This Court's rules required the Removing Defendants to include a certificate of service with its Notice of Removal. Specifically, Section VI(B) of this Court's Electronic Case Filing Administrative Policies and Procedures Manual ("the Manual") provides that "[a]ll documents filed in the Eastern District of North Carolina that are required to be served pursuant to Rule 5 of

the Federal Rules of Civil Procedure . . . whether filed by electronic means or manually in paper, must include a certificate of service identifying the document that is being served, the individuals being served and the date and manner of service." Because the Notice of Removal initiated the opening of a new civil matter, the Removing Defendants were required by Local Rule 5.1(e) to serve "[p]arties who are not registered users must be served with a copy of any document filed electronically in accordance with the Federal Rules of Civil Procedure." It is not unusual for parties to be unregistered users at the time of a removal, as they may not have obtained counsel.

It is critical that all parties to a matter be served with a Notice of Removal so that they may comply with Local Rule 5.3(b)(2), which requires that "[w]ithin 14 days after removal, counsel for all parties in the state-court action shall file either a notice of appearance, a notice of substitution of counsel, or a motion to withdraw in accordance with Local Civil Rule 5.2." ECBI has not yet complied with Local Rule 5.3(b)(2), likely due to the fact that it was not served with the Notice of Removal by the Removing Defendants.

Thus, because the Removing Defendants failed to include a Certificate of Service indicating that they served the Notice of Removal on all parties, and because of the likelihood that the Removing Defendants actually failed to serve all parties, remand is proper.

D. Certain procedural omissions and irregularities justify remand in this matter.

Due to certain procedural omissions and irregularities accompanying the Notice of Removal, this Court should grant Plaintiff's motion to remand this case to state court.

First and foremost, the Removing Defendants cite to a declaration in support of their allegations of the citizenship of the parties, but no such declaration appears in the record. Specifically, the Notice of Removal references and cites a document entitled "Krokosky Decl." [DE: #1, at ¶¶ 9, 9(a), 9(b), and 10]. Although it is unclear, this document is, presumably, a

declaration of Neal Krokosky, the Corporate Counsel for Defendant Caesars. However, despite the references and citations, no declaration was attached to any of the filings in this matter.

Second, the Removing Defendants have failed to comply with Local Rule 5.3(2), which requires that "[n]o later than 7 days after the filing of the notice of removal, the removing party shall file the notice that the party filed in state court to comply with 28 U.S.C. § 1446(d)." The Removing Defendants filed the Notice of Removal on November 1, 2019. [DE: #1]. Since that date, the Removing Defendants have filed only a Notice of Appearance [DE: #5], a Notice of Substitution of Counsel [DE: #6], and three financial disclosure statements. [DE: # 7, 8, and 9]. However, to date the Removing Defendants have not complied with Local Rule 5.3(2).

Finally, the Supplemental Removal Cover Sheet [#1-2] does not comply with Section IV.D.1 of the CM/ECF Policies and Procedures Manual. On November 4, 2019, this Court issued a Notice of Deficiency related to the incorrect signature line and directed the Removing Defendants to refile a corrected Supplemental Removal Cover Sheet. However, to date, and despite the admonition from the Court, the Removing Defendants have failed to do so. It is important that this submission be signed due to its representation about the service upon EBCI.

Although each of these infractions in isolation might not ordinarily justify remand, when they are taken together and in conjunction with the Removing Defendants' failure to secure the consent of or serve EBCI and misunderstanding of the declaratory judgment act, remand is proper in this matter.

E. Plaintiff is entitled to its costs and fees as a result of the removal of this matter.

Under 28 U.S.C. § 1447(c), an order remanding a case to state court may require payment of costs and attorneys fees which are incurred as a result of removal. 28 U.S.C. § 1447(c). Where the removing party claimed fraudulent joinder in spite of clearly viable claim in the pleadings,

such an award is proper. *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, 436 Fed. Appx. 888 (11th Cir. 2011). Here, it is apparent from the face of the Amended Complaint that a declaratory judgment action required the joinder of the parties that the Removing Defendants claimed to be fraudulent. As such, an award of costs and fees is proper in this matter.

CONCLUSION

For these reasons, and because the Removing Defendants have failed to show that there is no possibility that Plaintiff could establish a cause of action against the purported sham defendants, Plaintiff requests that this Court grant its motion to remand.

Respectfully Submitted,

November 29, 2019

/s/ James M. Dedman, IV

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CERTIFICATE OF COMPLAINCE

Pursuant to Local Rule 7.2(f)(3), Plaintiff certifies that this Memorandum complies with the applicable word limit. The number of words in this memorandum is 5,212.

/s/ James M. Dedman, IV

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
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GEMINI INSURANCE COMPANY,

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Defendants.

CERTIFICATE OF SERVICE

Pursuant to the Local Civil Rules of Practice and Procedure for the Eastern District of North Carolina, I certify that on November 29, 2019 I filed the foregoing document with the Court's Electronic Case Filing ("ECF") system. The act of filing this document with the Court's ECF system automatically generated a Notice of Electronic Filing ("NEF"), which constitutes proof of service of the filed document upon all registered users. As such, service has been accomplished through the NEF for parties and counsel who are registered users of the Court's ECF system. I have served all unregistered entities and/or parties by regular U.S. Mail.

Respectfully Submitted,

/s/ James M. Dedman, IV

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