

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case 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.

**BRIEF IN SUPPORT OF HARRAH'S NC CASINO COMPANY, LLC AND
CAESARS ENTERTAINMENT CORPORATION'S MOTION TO DISMISS
Fed. R. Civ. P. 12(b)(2) and (6)**

Introduction

Gemini Insurance Company ("Gemini") sued Harrah's NC Casino Company, LLC ("Harrah's NC"), Caesars Entertainment Corporation ("CEC"), Old Republic Insurance Company ("Old Republic"), and the Eastern Band of Cherokee Indians ("Band"), seeking a declaratory judgment that Old Republic is obligated to defend and indemnify the Band in *Campos v. Eastern Band of Cherokee Indians, et al.*, Eastern Band of Cherokee Indians, The Cherokee Court, File No. 17-331 ("Underlying Lawsuit" or "*Campos*"), under a policy of insurance that Old Republic allegedly issued to CEC. In a lengthy, confusing Amended Complaint, Gemini tells a tale that – when liberally construed – seemingly consists of the following, over-simplified theory: (a) Harrah's NC had a contract with the Band; (b) the contract between Harrah's NC and the Band required Harrah's NC to obtain insurance coverage for the

Band; (c) Harrah's NC fulfilled its obligation by obtaining a policy of insurance from Old Republic; (d) Old Republic has refused to defend the Band in the Underlying Lawsuit; and, therefore, (e) Old Republic has breached its duty to the Band. Accordingly, Gemini – which admittedly insures the Band – desperately wants the Court to view this lawsuit as a simple “who's on first” insurance coverage dispute between it and Old Republic.

This is not simply a “who's on first” insurance coverage dispute. The flaw in Gemini's theory-of-the-case is in the second link in its chain of logic -- whether the contract between Harrah's NC and the Band required Harrah's NC to obtain insurance coverage for the Band for the claims in the Underlying Lawsuit. In the Amended Complaint, Gemini did not even identify the actual “insurance” term in the contract between Harrah's NC and the Band. The contract between Harrah's NC and the Band only required Harrah's NC to obtain insurance coverage for the Band *in the circumstances set forth in the contract*. Based on the plain language of the contract, Harrah's NC was not obligated to obtain insurance coverage for the Band for the accident at-issue in the Underlying Lawsuit. That is evident based on the face of the pleadings in the Underlying Lawsuit.

Neither CEC nor Harrah's NC is properly joined as a party in this lawsuit. Initially, the Amended Complaint is devoid of allegations that suggest that the Court can exercise personal jurisdiction over CEC. Gemini merely alleged that: “This Court has jurisdiction over the parties pursuant to N.C.G.S. § 1 – 75.4.” Am. Compl. ¶ 13. This allegation is insufficient under Federal Rule of Civil Procedure 8(a)(1). Therefore, the Court should dismiss CEC under Federal Rule of Civil Procedure 12(b)(2).

Additionally, neither CEC nor Harrah's NC claims an interest in the purported dispute between Gemini and Old Republic. Likewise, Gemini has not alleged facts that suggest that

either CEC or Harrah's NC has an interest in this lawsuit. There are no material facts alleged against CEC, and the facts alleged in the Amended Complaint – regarding the location of the alleged accident at-issue in the Underlying Lawsuit – demonstrate that Harrah's NC does not have an interest in this lawsuit. Therefore, the Court should dismiss Gemini's "claim" against CEC and Harrah's NC under Federal Rule of Civil Procedure 12(b)(6).

Factual Background

I. The Plaintiff's Decedent in the Underlying Lawsuit was Hit by a Vehicle While She was Attempting to Cross a Public Road Between the Casino and Stonebrook Lodge.

On July 10, 2016, Sheila Diane Campos sustained injuries after being struck by a motor vehicle. Am. Compl. ¶¶ 33-34. Following the alleged accident, Louis Campos instituted a lawsuit seeking damages allegedly caused by the accident, captioned *Campos v. Eastern Band of Cherokee Indians, et al.*, Eastern Band of Cherokee Indians, The Cherokee Court, File No. 17-331. Am. Compl. ¶ 35. According to Gemini, "A true and correct copy of the Second Amended Complaint in the Underlying Lawsuit¹ is attached as **Exhibit C** to this Amended Complaint, and is incorporated herein by reference." *Id.* (internal footnote added).²

The Second Amended Complaint for Damages in the Underlying Lawsuit provided detailed factual allegations regarding the alleged accident. According to the Plaintiff in the Underlying Lawsuit, "Decedent and her sister had reserved a room at Stonebrook Lodge in Cherokee, North Carolina for the night of July 10, 2016 and were walking to the hotel when the events which form the basis of this lawsuit occurred. . . . Stonebrook Lodge is located across the

¹ Gemini used "Underlying Lawsuit" as a shorthand reference to the *Campos* lawsuit. Am. Compl. ¶ 35. CEC and Harrah's NC use the term in the same manner, herein.

² "When evaluating a motion to dismiss, a court considers the pleadings and any materials 'attached or incorporated in the complaint.'" *Aquestive Therapeutics, Inc. v. BioDelivery Scis. Int'l, Inc.*, No. 5:18-CV-514-D, 2019 WL 3729807, at *2 (E.D.N.C. Aug. 6, 2019) (Dever III, J.).

street (Paint Town Road/U.S. Route 19) from Harrah’s Cherokee Casino Resort (hereinafter, ‘Casino’).” Am. Compl. ¶ 35, Exhibit C (quoting Second Amended Complaint for Damages ¶ 6).

The Plaintiff in the Underlying Lawsuit alleged that the accident involving Plaintiff’s decedent occurred when Plaintiff’s decedent was *crossing the public road* that ran between the Casino and Stonebrook Lodge. Am. Compl. ¶ 35, Exhibit C (Second Amended Complaint for Damages ¶¶ 14, 15). As the Plaintiff in the Underlying Lawsuit alleged:

15. Sheila Diane Campos then utilized a marked crosswalk located on or adjacent to Casino property *to cross Paint Town Road/U.S. Route 19* to reach Stonebrook Lodge.

16. As Sheila Diane Campos was legally *traversing the crosswalk from the lower parking lot of the Casino to reach Stonebrook Lodge* located on Paint Town Road/U.S. Route 19 in Cherokee, North Carolina, she was violently struck by a vehicle with such force that her body was thrown and came to rest approximately fifty-seven feet to sixty-four feet from the subject cross walk.

Am. Compl. ¶ 35, Exhibit C (quoting Second Amended Complaint for Damages ¶¶ 15-16) (*italics added*).³ Gemini did not identify either of these paragraphs in the Amended Complaint.

Am. Compl. ¶¶ 36-39 (only citing paragraphs 14, 19-20, 24, 29, 34-35, and 40-59 from the Second Amended Complaint for Damages in the Underlying Lawsuit). Gemini, however, summarized Ms. Campos’ location in the Amended Complaint, concluding: “Campos left the casino property in order to walk to the Stonebrook Lodge, which is located near the casino.” Am. Compl. ¶ 33.

³ In the Underlying Lawsuit, several of the Plaintiff’s allegations indirectly identified the alleged accident as having occurred on the public roadway. Am. Compl. ¶ 35 (incorporating the Second Amended Complaint for Damages by reference, ¶ 27 (“across Paint Town Road/U.S. Route 19”), ¶ 28 (“across a busy, poorly lit road”), ¶ 34 (“traversing the crosswalk”); ¶ 42 (“crossing Paint Town Road/U.S. Route 19 – particularly for those traversing the crosswalk”), ¶¶ 51-53 (“the subject crosswalk”).

II. Notwithstanding its Actual Knowledge that the Alleged Accident Occurred On the Public Road, Gemini – By Failing to Even Acknowledge Section 4.26 in the Amended and Restated Management Agreement – Has Erroneously Alleged that CEC and Harrah’s NC Have an Interest in the Outcome of this Lawsuit.

This lawsuit arises from Gemini’s belief that Old Republic – which allegedly wrote a policy of insurance to CEC – has wrongfully refused to defend the Band in the Underlying Lawsuit. Am. Compl. ¶¶ 29, 56-61. Gemini did not allege any facts that suggest it is attempting to pursue the Band’s rights, but it did attempt to allege that Harrah’s NC was obligated to obtain insurance for the Band for the accident at-issue in the Underlying Lawsuit. Gemini alleged that:

25. In addition to managing, maintaining, and/or operating the casino, Harrah’s NC agreed to secure the following insurance on behalf of [EBCI] pursuant to Exhibit ‘F’ Section 1.01.1.(e) of the agreement, entitled ‘Tribe’s Insurance Requirements’:

Commercial general liability insurance naming [Harrah’s NC], [EBCI], and the TCGE as insureds, covering bodily injury, personal injury (including humiliation), broad form property damage (including completed operations), automobile liability (including owned, non-owned and leased automobiles), innkeeper’s liability in applicable statutory amounts, products liability, and contractual liability in an amount equal to not less than \$50,000,000 single limit per occurrence.

26. Exhibit ‘F’ Section 1.02.2 of the agreement provides that the insurance required under Section 1.01.1(e) above ‘shall be primary, not excess and not contributory to any similar insurance carried by [Harrah’s NC].’

27. Additionally, Exhibit ‘F’ Section 1.02.3 of the agreement provides that all policies of insurance required under Section 1.01.1 above shall be carried in the name of [EBCI].

28. Accordingly, Harrah’s NC was obligated under the agreement to secure a primary commercial general liability policy with limits not less than \$50 million on behalf EBCI’s behalf.

Am. Compl. ¶¶ 25-28. Nowhere in the Amended Complaint did Gemini allege that CEC was obligated to obtain any insurance for the Band.⁴

Ironically, though alleging that Harrah's NC was obligated to obtain insurance for the Band for the accident at-issue, Gemini did not explicitly identify Section 4.26 of the Amended and Restated Management Agreement, aptly titled "Insurance," even though it allegedly attached a "true and correct copy" of that document to the Amended Complaint. Am. Compl. ¶ 18.

III. Under Section 4.26, Harrah's NC Was Not Required to Obtain Insurance for the Band for the Accident At-Issue in the Underlying Lawsuit.

Gemini alleged that a "true and correct copy of the [Amended and Restated Management Agreement] is attached as **Exhibit A** to [its] Amended Complaint, and it is incorporated herein by reference." Am. Compl. ¶ 18 (alterations in brackets). The Amended and Restated Management Agreement includes the following provisions:

4. Business and Affairs In Connection with Enterprise.

4.2 Duties of the Manager. In managing, operating, maintaining and repairing the Enterprise and the Facilities, the Manager's duties shall include, without limitation, the following:

4.26 Insurance. The Manager, on behalf of the Tribe, shall obtain and maintain, or cause its agents to maintain, with responsible insurance carriers licensed to do business in the state of North Carolina, insurance satisfactory to Manager and the Bank *covering the Facility and the operations of the Enterprise*, naming the Tribe, the TCGE, the Manager, its parent and other affiliates as insured parties, *as set forth in Exhibit 'F' attached hereto and incorporated herein by reference*,⁵ provided in any event such insurance shall meet the requirements under the Loan Agreement or any Authorized Debt.

⁴ In the Amended Complaint, the only references to CEC were in paragraphs: 2-4, 8-10, 31, 41-46, 48, 52.

⁵ Exhibit 'F' contains two notable sections:

1.01 Coverage.

Am. Compl. ¶ 18, Exhibit A (quoting the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah’s NC Casino Company, L.L.C.) (italics added) (internal footnote added). The terms “Enterprise,” “Facility,” and “Property” (which is used in the definition of “Facility”) are specifically defined in the Amended and Restated Management Agreement:

2. **Definitions.** As they are used in this Agreement, the terms listed below shall have the meaning assigned to them in this Section:

2.13 Enterprise. The ‘Enterprise’ is the commercial enterprise of the Tribe authorized by IGRA and/or the Compact and operated and managed by Manager in accordance with the terms and conditions of this Agreement *to engage in (a) gaming, defined as Class II and Class III Gaming under IGRA conducted at the Facility; and (b) any other lawful commercial activity allowed at the Facility with the approval of the TCGE Board of Advisors. The Enterprise shall not include any commercial enterprise conducted by the Tribe or any other instrumentality of the Tribe other than the Class II and Class III gaming operations at the Facility and any other lawful commercial activity approved by the TCGE Board of Advisors to be operated at the Facility in connection therewith.* The Tribe shall have the sole proprietary interest in and responsibility for the conduct of all Gaming conducted by the Enterprise, subject to the rights and responsibilities of the Manager under this Agreement. The scope of the Enterprise as of the date of this Agreement is set forth on Exhibit ‘B’⁶ incorporated herein by reference and the parties agree that Exhibit ‘B’ shall be modified to reflect any other Class II or Class III *gaming operations* at the Facility or any other lawful commercial activity approved by the TCGE Board of

1.01.1. **Required Insurance.** The following insurance will be secured by the Manager on behalf of the Tribe and maintained *with respect to the Casino . . .* (italics added).

1.01.2. **Responsibility to Maintain.** The obligation to maintain the insurance policies required by this Agreement *shall lie solely with the Tribe through the Board of Advisors of the TCGE.* During the budgeting process, Manager shall recommend to the Management Committee for its approval a schedule setting forth the kinds and amounts of such insurance to be maintained during the ensuing policy year. (italics added).

⁶ Exhibit ‘B’ provides: “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. The Enterprise does not include any current or future operations of the Tribal Bingo Enterprise.”

Advisors to be operated at the Facility in connection with the *gaming operations* at the Facility in the future.

2.16 Facility. ‘Facility’ shall mean the 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. Title to the Property and the Facility shall merge and continue to be held by the United States of America in trust for the Tribe.

2.37 Property. ‘Property’ shall mean the parcels of land described in Exhibit ‘A’ hereto held by the United States of America in trust for the Tribe.

Am. Compl. ¶ 18, Exhibit A (quoting the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah’s NC Casino Company, L.L.C.) (italics added) (internal footnote added). Based on these contractual provisions, CEC and Harrah’s NC now request dismissal under Federal Rule of Civil Procedure 12(b)(6).

Argument

I. The Court Should Dismiss the Plaintiff’s Complaint Against CEC Because the Court Cannot Exercise Personal Jurisdiction Over CEC.

“A federal court may exercise personal jurisdiction over a person to the extent allowed by state law in the state where the federal court sits.” *Smith v. Healthcare Fin. Servs.*, No. 5:17-CV-370-D, 2018 WL 405974, at *2 (E.D.N.C. Jan. 12, 2018) (Dever III, J.) (unpublished). If a plaintiff does not allege facts to support personal jurisdiction, a defendant can move a court for dismissal. *See* Fed. R. Civ. P. 12(b)(2).⁷

⁷ When evaluating the adequacy of a plaintiff’s allegations, a “court construes all relevant jurisdictional allegations in the light most favorable to the plaintiff and draws the most favorable inferences for the existence of jurisdiction.” *Higgs*, 367 F. Supp. 3d at 449. “[C]onclusory statements or bare allegations” are insufficient to establish personal jurisdiction. *Julian v. Bank of Am., N.A.*, No. 3:16-cv-00173-RJC, 2017 WL 3971280, at *2 (W.D.N.C. Sept. 8, 2017) (unpublished).

“The court does not have personal jurisdiction over a nonresident defendant unless jurisdiction comports with North Carolina’s long-arm statute and the Fourteenth Amendment’s Due Process Clause.” *Higgs v. Brian Ctr. Health & Ret./Windsor, Inc.*, 367 F. Supp. 3d 439, 448 (E.D.N.C. 2019) (Dever III, J.). In North Carolina, the “long-arm statute extends personal jurisdiction over nonresident defendants” to the extent permitted by the Fourteenth Amendment, so “the statutory inquiry merges with the constitutional inquiry.” *Id.*

There are two theories of personal jurisdiction, specific jurisdiction and general jurisdiction. *See Smith*, 2018 WL 405974, at *2. As the Court has explained:

Due process requires a defendant to have ‘certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) (alteration and quotation omitted). The extent of the contacts needed for jurisdiction turns on whether the claims asserted against a defendant relate to or arise out of the defendant’s contacts with the forum state. *See ALS Scan, Inc. v. Dig. Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002). If the defendant’s contacts with the state are the basis for the suit, specific jurisdiction may exist. *Id.* In determining specific jurisdiction, the court considers ‘(1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiffs’ claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.’ *Id.* (alteration and quotations omitted).⁸ Thus, the ‘constitutional touchstone’ of specific personal jurisdiction ‘remains whether the defendant purposefully established minimum contacts in the forum state.’ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (quotation omitted). If the defendant’s contacts with the forum state are not the basis of suit, general jurisdiction may ‘arise from the defendant’s general, more persistent, but unrelated contacts with the State.’ *ALS Scan, Inc.*, 293 F.3d at 712. To establish general jurisdiction, the defendant’s contacts with the forum state must be both continuous and systematic. The general jurisdiction standard is more demanding than the specific jurisdiction standard. *See id.*; *Helicopteros*, 466 U.S. at 414-16.

⁸ “When analyzing the first two elements, courts consider only the defendant’s activities—those contacts that the defendant itself has created within the forum.” *Smith*, 2018 WL 405974, at *2.

Higgs, 367 F. Supp. 3d at 448-49 (internal footnote added). Unless a court holds an evidentiary hearing, “a plaintiff need only make a *prima facie* showing of personal jurisdiction.” *Id.* at 449.

Here, Gemini has failed to make a *prima facie* showing that the Court can exercise personal jurisdiction over CEC, “a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Las Vegas, Clark County, Nevada.” Am. Compl. ¶ 4. Gemini has not alleged any facts reflecting contacts between CEC and North Carolina, much less material facts that suggest “minimum contacts” for specific jurisdiction or “continuous and systematic” contacts for general jurisdiction.

Gemini did not allege any contacts between CEC and North Carolina, specific to this matter, such that Gemini has established a *prima facie* case of specific jurisdiction over CEC. *See Higgs*, 367 F. Supp. 3d at 448-49. Nonetheless, it is possible that Gemini will attempt to argue that its allegations pertaining to an alleged “official corporate website” of CEC (Am. Compl. ¶ 9) and an alleged parent/subsidiary relationship between CEC and Harrah’s NC (Am. Compl. ¶ 10) are a sufficient basis upon which the Court can exercise specific jurisdiction over CEC. Such an argument, though, would be unavailing. *See Saudi v. Grumman Corp.*, 427 F.3d 271, 276 (4th Cir. 2005) (“it is generally the case that the contacts of a corporate subsidiary cannot impute jurisdiction to its parent entity”); *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (internal citations omitted) (“As we recognized in *ALS Scan*, ‘a person’s act of placing information on the Internet’ is not sufficient by itself to ‘subject[] that person to personal jurisdiction in each State in which the information is accessed.’ Otherwise, a ‘person placing information on the Internet would be subject to personal jurisdiction in every State,’ and

the traditional due process principles governing a State’s jurisdiction over persons outside of its borders would be subverted.”⁹)

Gemini also did not allege any facts that suggest that CEC has “continuous and systematic” contacts with North Carolina, such that Gemini has established a *prima facie* case of general jurisdiction. *Higgs*, 367 F. Supp. 3d at 449. Though CEC is not obligated to prove a negative, i.e., that it has no contacts with North Carolina, the Court should note that the mere occurrence of some activities within the forum state is not enough for the Court to find it has general jurisdiction over CEC. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

Gemini’s bare assertion that the “Court has jurisdiction over the parties pursuant to N.C.G.S. § 1-75.4” (Am. Compl. ¶ 13) is simply not enough for the Court to conclude that it can exercise personal jurisdiction over CEC. *See Julian*, 2017 WL 3971280, at *2 (the court refused to exercise personal jurisdiction over the defendant based on “conclusory statements or bare allegations”). In that regard, the Court’s analysis in *Penrod v. Quick* is on-point and persuasive:

Penrod has alleged no facts suggesting that respondents have engaged in systematic and continuous activity in North Carolina, that the underlying action is based upon activities that arise out of or relate to any contacts these respondents have with the forum, or that these respondents have purposely directed activities toward this forum. Indeed, it appears highly unlikely that Penrod could allege facts sufficient to support such a conclusion. Thus, the court lacks personal jurisdiction over respondents.

No. 5:11-HC-2012-D, 2011 WL 8899492, at *2 (E.D.N.C. June 22, 2011) (Dever III, J.) (unpublished). Based on the foregoing, the Court should dismiss CEC under Federal Rule of

⁹ Consistent with the Fourth Circuit, the Court has also ruled that a website did not establish specific jurisdiction. *See Taylor v. City & Cty. of Honolulu*, No. 7:16-CV-410-D, 2017 WL 3526660, at *2 (E.D.N.C. Aug. 16, 2017) (Dever III, J.) (unpublished) (“Even if the court were to find that defendants’ generally-available internet postings . . . qualified as defendants purposefully availing themselves of the privilege of conducting activities in North Carolina, the court would still be unable to find personal jurisdiction here. Taylor cannot show that his claims against defendants arise out of defendants’ tourism promotion in North Carolina.”)

Civil Procedure 12(b)(2).¹⁰

II. The Court Should Dismiss the Plaintiff's Complaint Against CEC and Harrah's NC Because Gemini has Failed to State a Claim Against Each of Them.

“A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). As the Supreme Court has explained: “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard “does not require ‘detailed factual allegations,’” but “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)) (internal citation omitted).

A North Carolina state court has the “power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.” N.C. Gen. Stat. § 1-253.¹¹ A “person interested under a . . . written contract . . . may have determined any question of construction . . . under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder.” *Id.* at § 1-254. For example, “a controversy between insurance companies, arising . . . by direct action . . . with respect to which two or more of the insurers is liable under its particular policy and the insurers’ respective liabilities and obligations, constitutes a

¹⁰ The Court has discretion to dismiss CEC for lack of personal jurisdiction before it considers whether remand is appropriate. *See Lolavar v. De Santibanes*, 430 F.3d 221, 227-28 (4th Cir. 2005).

¹¹ In the Fourth Circuit, it is somewhat unclear in a matter in which a removing defendant alleged it was fraudulently joined, whether a court should base its review of a subsequent motion to dismiss on state or federal law. *See Cain v. XTO Energy Inc.*, Civil Action No. 1:11CV111, 2012 WL 1068199, at *4-6 (N.D.W.V. Mar. 29, 2012) (unpublished). Here, the removing defendants assume that the Court will apply state law, though the result would presumably be the same in any event.

justiciable issue and the court should, upon petition by one or more of the parties to the action, render a declaratory judgment as to the liabilities and obligations of the insurers.” *Id.* at § 1-257.

“When declaratory relief is sought, all persons shall be made parties *who have or claim any interest which would be affected by the declaration*, and no declaration shall prejudice the rights of persons not parties to the proceedings.” *Id.* at § 1-260 (italics added). Under the foregoing, “a person is a necessary party only when he has or claims to have a material interest in the subject matter of the complaint; that is, when he is so vitally interested in the controversy involved that a valid judgment cannot be entered in the action which would completely and finally determine the controversy, without that person’s presence as a party.” *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 343, 323 S.E.2d 294, 306 (1984). Though a party may have “interest” in an issue, it may not be “the kind of ‘adverse interest’ and ‘stake in the outcome’ that is a jurisdictional prerequisite to relief under the Declaratory Judgment Act.” *Id.* at 344, 323 S.E.2d at 306. If a plaintiff cannot prove that a defendant has the requisite level of interest, then a court should dismiss the defendant from the lawsuit. *See id.* at 346-47, 323 S.E.2d at 308.

A. Gemini Failed to State a Claim Against CEC.

CEC does not claim an interest “which would be affected by the declaration” that Gemini has requested in this lawsuit. N.C. Gen. Stat. § 1-260. Thus, the Court should dismiss CEC from the lawsuit unless Gemini has alleged facts that suggest that CEC has an interest “which would be affected by the declaration” that Gemini has requested in this lawsuit. *Id.*

The Amended Complaint does not contain a single allegation that suggests that CEC is interested in the controversy, much less “so vitally interested in the controversy involved that a valid judgment cannot be entered in the action which would completely and finally determine the controversy” *State ex rel. Edmisten*, 312 N.C. at 343, 323 S.E.2d at 306. As noted *supra*

note four, the only allegations in the Amended Complaint that reference CEC are contained in paragraphs 2-4, 8-10, 31, 41-46, 48, 52. The references in those paragraphs are as follows:

2. . . . Old Republic issued a commercial general liability insurance liability policy to Defendant Caesars Entertainment Corporation ('Caesars')

3. The Old Republic Policy covers Caesars' subsidiaries, divisions, and affiliated organizations.

4. Caesars is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Las Vegas, Clark County, Nevada. As noted above, Caesars is the named insured on policy number MWZY 308055 issued by Old Republic.

8. Harrah's NC is owned by CEOC, LLC ('CEOC') and Harrah's Management Company. CEOC, LLC is a Delaware corporation with its principal place of business in the State of Nevada. Caesars is the managing member of CEOC, LLC. Harrah's Management Company is a Nevada corporation with its principal place of business in the State of Nevada.

9. On its official corporate website, Caesars identifies the two aforementioned Harrah's NC casino properties as 'Caesars Properties.'

10. On information and belief, Harrah's NC is and was at all relevant times a subsidiary of Caesars.

31. At all relevant times, Harrah's NC and/or Caesars have represented the Old Republic Policy to be the applicable commercial general liability insurance policy at issue.

41. However, American Claims Management, Inc. ('ACM'), on behalf of EBCI and Gemini, tendered EBCI's defense to Harrah's NC and/or Caesars pursuant to the terms of the Old Republic Policy on multiple occasions in 2018 and 2019. . . .

42. In response, on February 13, 2019, Caesars' employee Danielle Germany, acting on behalf of Caesars' subsidiary, Harrah's NC, accepted EBCI's tender on behalf of Harrah's NC

43. However, on February 19, 2019, Caesars', once against acting on behalf of its subsidiary, Harrah's NC, inexplicably reversed itself"

44. Despite multiple subsequent demands by Gemini and/or ACM for defense and indemnity of EBCI, Harrah's NC nor Caesars have explained the denial of tender in terms of the duties of defense and indemnification.

45. On February 26, 2019, Caesars' attorney, John D. Loftin, purported to explain the denial of tender in terms of liability defenses to the Underlying Lawsuit. . . .

46. As such, on information and belief, Gemini understands that Caesars' and/or Harrah's NC believe they have no responsibility, custody, or control over the property where the accident giving rise to the Underlying Lawsuit occurred because the allegations in the Underlying Lawsuit purportedly have nothing to do with the operation of the casino's 'enterprise' and/or 'facility.'

48. As quoted above, the Underlying Lawsuit alleged all defendants, including EBCI, Harrah's NC, and Caesars', jointly and severally, were in possession or control of the property which was improperly maintained and/or contained an unsafe condition.

52. Further, Old Republic has failed to explain Caesars' denial of the tender and/or justify their refusal to defend and indemnify EBCI under the terms of the Old Republic Policy....

None of the above allegations suggest that CEC has an interest in the purported dispute between Gemini and Old Republic. None of the allegations suggest that CEC was obligated to obtain insurance for the Band. None of the allegations suggest that CEC is a signatory to the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah's NC Casino Company, L.L.C. In fact, CEC is not a signatory to that contract. None of the allegations suggest that CEC is liable for the acts or omissions of Harrah's NC, much less for the specific accident at-issue in the Underlying Lawsuit. None of the allegations suggest that

CEC had or should have had any direct or indirect involvement with respect to the alleged accident at-issue in the Underlying Lawsuit.

The simple fact that Old Republic allegedly issued a policy of insurance to CEC does not change any of the foregoing. CEC has no interest in whether Old Republic does or does not provide insurance coverage to the Band for the alleged accident at-issue in the Underlying Lawsuit. Therefore, the Court should dismiss Gemini's "claim" against CEC under Federal Rule of Civil Procedure 12(b)(6).

B. Gemini Failed to State a Claim Against Harrah's NC.

Harrah's NC does not claim an interest "which would be affected by the declaration" that Gemini has requested in this lawsuit. N.C. Gen. Stat. § 1-260. Thus, the Court should dismiss Harrah's NC from the lawsuit unless Gemini has alleged facts that suggest that Harrah's NC has an interest "which would be affected by the declaration" that Gemini has requested in this lawsuit. *Id.*

The Court should dismiss the "claim" against Harrah's NC because Gemini does not seek a declaratory judgment regarding Harrah's NC's obligations under the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah's NC Casino Company, L.L.C. If the policy of insurance that Old Republic allegedly issued to CEC provides coverage for the Band for the Underlying Lawsuit, notwithstanding the fact that Harrah's NC was not obligated to obtain insurance coverage for the Band for the accident at-issue in the Underlying Lawsuit, Harrah's neither stands to gain or lose from that situation.

Of course, the Court should dismiss the "claim" against Harrah's NC even if it concludes that somehow the Amended Complaint can be construed to seek a declaration regarding Harrah's NC's obligations under the Amended and Restated Management Agreement Between the Eastern

Band of Cherokee Indians and Harrah's NC Casino Company, L.L.C. Harrah's NC was not obligated to obtain insurance for the Band for the location of the alleged accident at-issue in the Underlying Lawsuit.

The plaintiff in the Underlying Lawsuit repeatedly alleged, directly and indirectly, that the accident – a car versus person situation – occurred on the public roadway separating the Casino from the Stonebrook Lodge. Am. Compl. ¶ 36 (incorporating the Second Amended Complaint in the Underlying Lawsuit, ¶¶ 15-16, 27-28, 34, 42, 51-53). The public roadway – where the alleged accident at-issue in the Underlying Lawsuit occurred – is not part of the “Facility” or the “Enterprise.”

Under Section 4.26 of the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah's NC Casino Company, L.L.C., Harrah's NC was only obligated to obtain insurance “covering the Facility and the operations of the Enterprise” Am. Compl. ¶ 18, Exhibit A (quoting the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah's NC Casino Company, L.L.C. § 4.26). Each of these terms has a specific meaning in the context of the contract between Harrah's NC and the Band. “‘Facility’ shall mean the 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*” Am. Compl. ¶ 18, Exhibit A (quoting the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah's NC Casino Company, L.L.C. § 2.16) (italics added). In turn, “[t]he ‘Enterprise’ is the commercial enterprise of the Tribe authorized by IGRA and/or the Compact and operated and managed by Manager in accordance with the terms and conditions of this Agreement *to engage in (a) gaming*, defined as Class II and Class III Gaming under IGRA conducted at the Facility;

and (b) any other lawful commercial activity allowed at the Facility with the approval of the TCGE Board of Advisors.” Am. Compl. ¶ 18, Exhibit A (quoting the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah’s NC Casino Company, L.L.C. § 2.13) (alteration in brackets) (italics added). See also Am. Compl. ¶ 18, Exhibit A (quoting the Amended and Restated Management Agreement Between the Eastern Band of Cherokee Indians and Harrah’s NC Casino Company, L.L.C., Exhibit F § 1.01.1) (“Required Insurance. The following insurance will be secured by the Manager on behalf of the Tribe and maintained *with respect to the Casino . . .*.” (italics added)).

Gemini did not, and could not, allege that the public roadway between the Casino and Stonebrook Lodge was part of the “buildings, improvements, and fixtures” that was part of the Casino. That public road – described as Paint Town Road/U.S. Route 19 – was a publicly available roadway between the Casino and Stonebrook Lodge (Am. Compl. ¶ 35, Exhibit C (incorporating Second Amended Complaint for Damages ¶¶ 15-16)). Harrah’s NC was not obligated to obtain insurance to cover the Band for accidents occurring on the public roadway. Therefore, the Court should dismiss the “claim” against Harrah’s NC under Federal Rule of Civil Procedure 12(b)(6).

Conclusion

The Court should dismiss the “claim” Gemini asserted against CEC because the Court cannot exercise personal jurisdiction over CEC. The Court should also dismiss the “claim” Gemini asserted against CEC because CEC neither claims nor has an interest in the purported dispute between Gemini and Old Republic. Likewise, the Court should dismiss the “claim” Gemini asserted against Harrah’s NC because Harrah’s NC neither claims nor has an interest in the purported dispute between Gemini and Old Republic.

Respectfully submitted this 4th day of December, 2019.

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Republic Insurance Company***

CERTIFICATE OF COMPLAINT

Pursuant to Local Rule 7.2(f)(3), Defendant certifies that this Memorandum complies with the applicable word limit. The number of words in this memorandum is 5,925.

/s/ M. Elizabeth O'Neill
M. Elizabeth O'Neill

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record that have made an appearance in this case.

This 4th day of December, 2019.

WOMBLE BOND DICKINSON (US) LLP

/s/ M. Elizabeth O'Neill

M. Elizabeth O'Neill