UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

GEMINI INSURANCE COMPANY,

Plaintiff,

Case No. 19-cv-00488-D

v.

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

Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND
28 U.S.C. § 1447(c) and E.D.N.C. Civ. R. 7.1(f)

SUMMARY OF THE NATURE OF THE CASE

On July 10, 2016, Sheila Campos left the Harrah's Cherokee Casino Resort to return to her hotel when, while walking across public roadway Paint Town Road/U.S. Route 19, she was allegedly struck by a vehicle and killed. Her husband filed suit in The Cherokee Court.

Gemini Insurance Company ("Gemini") now sues 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"), under a policy of insurance that Old Republic allegedly issued to CEC. Gemini alleges Harrah's NC, CEC, and the Band, are necessary parties under North Carolina General Statute § 1-260, defeating diversity. Harrah's

NC, CEC, and Old Republic disagree because those parties are fraudulently joined. On November 15, 2019, The Cherokee Court determined, "It is undisputed that [Campos] was not on property owned or occupied by the Defendants at the time her injuries were sustained." *Campos v. Eastern Band of Cherokee Indians, et al.*, Eastern Band of Cherokee Indians, The Cherokee Court, File No. CV 17-331, slip op. at 7 (Nov. 15, 2019). (Brown Aff. ¶ 9, Ex. B).

SUMMARY OF THE ARGUMENT

Harrah's NC, CEC, and Old Republic (collectively, "Removing Defendants"), removed this lawsuit under 28 U.S.C. § 1332. It is undisputed there is diversity between Gemini and Old Republic and that the jurisdictional threshold at the time of removal was met.

Gemini requests remand arguing: (1) remand is necessary because the Band was required to consent to removal and it did not do so; (2) the non-diverse "defendants," Harrah's NC, CEC, and the Band, are properly joined, thereby preventing the Court from exercising subject matter jurisdiction under 28 U.S.C. § 1332; and, (3) a few technical errors, considered collectively, require remand.

Remand is inappropriate because, at the time of removal, the Band had neither been properly served nor joined, and nevertheless was a nominal party, whose consent was unnecessary. Moreover, the Court lacks personal jurisdiction over CEC and the Band. Additionally, Harrah's NC, CEC, and the Band have no interest in the purported dispute between Gemini and Old Republic. Finally, the technical errors have been corrected. This Court has jurisdiction and it should deny this motion.

RELEVANT PROCEDURAL HISTORY

On September 24, 2019, Gemini filed a Complaint against the Removing Defendants and the Band, in the Superior Court Division for Wake County in the State of North Carolina. (ECF

1-3). Gemini claims it served the Band that day, via certified first-class mail, return receipt requested to the Eastern Band of Cherokee Indians, c/o Richard G. Sneed, Principal Chief. (ECF 11-1, ¶ 2).[1] Gemini served Harrah's NC and CEC on October 3, 2019, and Old Republic on October 4, 2019. (ECF 1, ¶ 3).

On October 29, 2019, Gemini filed an Amended Complaint maintaining the same parties and positions. (ECF 1-4) Of note, Gemini alleged that: "Defendant Eastern Band of Cherokee Indians ('EBCI') is a federally recognized Indian tribe located in Cherokee, Cherokee County, North Carolina. (ECF 1-4, ¶ 11). The Court's record does not contain any information pertaining to service of the Amended Complaint.

On November 1, 2019, the Removing Defendants removed this lawsuit. (ECF 1). The Removing Defendants invoked the Court's subject matter jurisdiction under 28 U.S.C. § 1332, explaining: "there is complete diversity of citizenship between Gemini and Old Republic and the amount in controversy exceeds $75,000, exclusive of interest and costs." (ECF 1, ¶ 22). The Removing Defendants noted: "Gemini is a citizen of Delaware and Connecticut" and Old Republic is a citizen of Pennsylvania; they also explained the Band is allegedly "a federally recognized Indian tribe located in Cherokee, North Carolina" and Harrah's NC and CEC are citizens of Delaware and Nevada. (ECF 1, ¶¶ 7-11, 23-26).

The Notice of Removal noted:

1. "The Eastern Band of Cherokee Indians ha[d] not yet been properly served." (ECF 1, ¶ 4. *See also Id.*, at ¶¶ 25, 28, 32).
2. The Band was a "nominal party." (ECF 1, ¶¶ 25.a., 28); and

[1] These averments have been specifically contradicted by counsel for the Band. (Second Krokosky Decl. ¶ 3, Ex. A.)

3. Gemini had fraudulently joined Harrah's NC, CEC, and the Band. (ECF 1, ¶¶ 21, 25-29).

On November 29, 2019, Gemini filed its Motion to Remand and a Memorandum of Law in Support of Motion to Remand (ECF 10 & ECF 11). Gemini argues that the Court should remand this lawsuit because:

- the Band was required to consent to removal, and it did not do so;
- the non-diverse "defendants," Harrah's NC, CEC, and the Band, are properly joined, thereby preventing the Court from exercising subject matter jurisdiction under 28 U.S.C. § 1332; and,
- the Removing Defendants did not file the Declaration of Neal S. Krokosky referenced in the Notice of Removal with the Notice of Removal, did not serve the Band with the Notice of Removal or file a copy of the notice that they filed in the state court in the Court's record, and the Removing Defendants' Supplemental Removal Cover Sheet (ECF 1-2) was deficient because it did not contain a signature.

(ECF 11, ¶ 14-15).

Following Gemini's identification of technical defects, the Removing Defendants:

1. Filed the Declaration of Neal S. Krokosky on December 6, 2019, after discovering it had not been filed with the Notice of Removal. (ECF 18) (Brown Aff. ¶ 5).

2. Served the Eastern Band of Cherokee Indians, including its Attorney General, with the Notice of Removal and all its attachments, Declaration of Neal Krokosky, and Notice of Filing of Notice of Removal in the Superior Court of Wake County on December 9, 2019. (Brown Aff. ¶ 8).

3. Filed their Notice of Filing of Notice of Removal with the Eastern District of North Carolina on December 13, 2019, which had previously been filed in the Superior Court of Wake County on November 5, 2019. (ECF 23) (Brown Aff. ¶ 6).

4. Filed their Amended Supplemental Cover Sheet on December 6, 2019, ensuring a proper e-signature was affixed to the document. (ECF 19) (Brown Aff. ¶ 4).

RELEVANT FACTS

Gemini asserts Old Republic is obligated to defend and indemnify the Band in the Underlying Lawsuit based upon its assertion that a Management Agreement between the Band and Harrah's NC required Harrah's NC to obtain an insurance policy for the Band, and that a policy issued by Old Republic to CEC fulfilled that requirement. Thus, the following sections reference the material allegations in the Underlying Lawsuit negating Gemini's assertion Harrah's NC, CEC, or the Band is a necessary party defeating diversity.

I. The Underlying Lawsuit

On July 10, 2016, Sheila Campos allegedly sustained injuries and died after being struck by a motor vehicle. (ECF 1-4, ¶¶ 33-34). Thereafter, Louis Campos instituted the Underlying Lawsuit. (*Id.* at ¶ 35, Ex. C).[2] The Second Amended Complaint 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.

(*Id.*) (quoting ECF 1-4, Ex. C, ¶¶ 15-16) (italics added).

And, in fact, The Cherokee Tribal Court, in granting the defendants' motions to dismiss in the Underlying Lawsuit, recently explained:

> It is undisputed that the Plaintiff was not on property owned or occupied by the Defendants at the time her injuries were sustained. The Plaintiff's injuries occurred on a neighboring highway, street, road or property that Defendants did

[2] The Court can take judicial notice of the documents attached to the Amended Complaint. *See Lolavar v. De Santibanes*, 430 F.3d 221, 224 n.2 (4th Cir. 2005); *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.).

> not own or occupy. In fact, at the time the Plaintiff sustained her injuries, she was crossing the street or highway from the Defendant's property using a pedestrian crosswalk which was located between the Defendant's hotels and casino.

Campos, The Cherokee Court, File No. CV 17-331, slip op. at 7 (Nov. 15, 2019) (referred to but not provided in ECF 11, n.2). (Brown Aff. ¶ 9 Ex. B) The Court can take judicial notice of The Cherokee Court's ruling. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989).

II. The Management Agreement Between Harrah's NC and The Band

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 under the Amended and Restated Management Agreement. (*See* ECF 1-4 ¶¶ 25-28). Gemini did not allege that CEC was obligated to obtain insurance for the Band.[3]

On April 14, 2004, the Band ratified the Amended and Restated Management Agreement between the Band and Harrah's NC. It 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 inured parties, *as set forth in Exhibit 'F' attached hereto and incorporated herein by*

[3] Gemini is defending the Band in the Underlying Lawsuit. (*See ECF 1-4* ¶ 40) (*See also* ECF 11 at 2) ("Plaintiff issued a sovereign national commercial general liability policy to EBCI any ultimately undertook the defense of EBCI in the wrongful death litigation.")

reference,[4] provided in any event such insurance shall meet the requirements under the Loan Agreement or any Authorized Debt.

(ECF 1-4, ¶ 18, ECF 1-4, Ex. A at 46, 60) (italics added) (internal footnote added). The terms "Enterprise," "Facility," and "Property" (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 . . . 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 scope of the Enterprise as of the date of this Agreement is set forth on Exhibit 'B'[5] incorporated herein by reference . . . .
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> ***
>
> **2.16 Facility.** 'Facility' shall mean the buildings, improvements, and fixtures, now or hereafter located therein or thereon and associated and adjacent

[4] Exhibit 'F' contains two notable sections:

1.01 Coverage.

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).

[5] 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." (ECF 1-4, at 100).

> 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.

(ECF 1-4, ¶ 18, ECF 1-4, Ex. A, at 34-36, 40) (italics added) (internal footnote added). This document governs Harrah's NC's obligation to provide insurance to the Band. As explained below, these allegations mean that: (1) the Band is a nominal party; and, (2) there is no possibility that Gemini can prove that Harrah's NC, CEC, or the Band, are necessary parties to this lawsuit.

ARGUMENT

I. The Removing Defendants Were Not Obligated to Obtain the Band's Consent Before Removing this Lawsuit.

A. The Band Had Not Been Properly Served at the Time of Removal.

"When a civil action is removed solely under section 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 (italics added). Even the case of *Palmetto Automatic Sprinkler Co. v. Smith Cooper International, Inc.*, which Gemini cited on page twelve of its memorandum, recognizes "an exception to the rule of unanimity may be invoked if a defendant has not been served with process at the time the removal petition was filed." 995 F. Supp. 2d 492, 495 (D.S.C. 2014).

According to Gemini's counsel, Gemini served the Band with the Complaint "[i]n accordance with Rule 4(j) of the North Carolina Rules of Civil Procedure[.]" (ECF 11-1, ¶ 2). Presumably, Gemini's counsel claims he complied with North Carolina Rule of Civil Procedure 4(j)(8)c, which provides that a plaintiff may complete service of process: "By mailing a copy of

the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a. and b."

Initially, there is no legal authority that suggests that Gemini could serve the Band under Rule 4(j)(8)c. More to the point, there was no indication that the Band had been served as a matter of law by October 23, 2019. *Cf.* Second Krokosky Decl. ¶ 3, Ex. A (principal chief "not the agent for service on the Tribe") *with* Aff. of Service by Certified Mail ¶ 2 (service attempted on principal chief). The Court should note that Gemini's counsel did not provide a copy of the documents he allegedly served on the Band and did not provide any explanation regarding his alleged personal knowledge that "Richard Sneed" was the "Principal Chief," that "Richard Sneed" was the person on whom service was appropriate, that the address to which he supposedly mailed the Summons and Complaint was an appropriate address for "Richard Sneed," that the person who signed the Return Receipt was "Richard Sneed" or his/her authorized designee, or that the "Track Another Package" page demonstrated delivery to "Richard Sneed." Simply, most of Gemini's counsel's Certificate of Mailing should be struck under Local Civil Rule of Practice and Procedure 7.1(i) (Dec. 2019).[6]

B. Gemini Fraudulently Joined the Band.

The Removing Defendants also were not obligated to obtain the Band's consent for removal because the Band was improperly joined. *See* 28 U.S.C. § 1446. The fraudulent joinder argument is developed, in detail, *infra*, section IV.

[6] There is no other evidence in the Court's record that Gemini completed service of process on the Band. *See* Fed. R. Civ. P. 4(l)(1). Outside counsel for the Eastern Band of Cherokee Indians confirmed to CEC and Harrah's NC's corporate counsel on October 23, 2019 the Band had not been properly served in this matter. Second Krokosky Decl. ¶ 3, Ex. A). Notably, the Band has filed no answer or other response to the Complaint. Indeed, the fact that Gemini sought a summons for the Band from this Court strongly suggests there was no service of the Underlying Lawsuit on the Band. (ECF 24)

C. The Band is a Nominal Party, Whose Consent Was Unnecessary.

Even if they had been properly served, the Removing Defendants were not obligated to obtain the Band's consent for removal because the Band is a nominal party. In *Creed v. Virginia*, which Gemini cited on page twelve of its supporting memorandum, the court explained: "the defendant seeking removal does not need the consent of a co-defendant present in the case as 'merely a nominal or formal party.'" 596 F. Supp. 2d 933, 934 (E.D. Va. 2009) (citation omitted).

The Band is a nominal party under *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255 (4th Cir. 2013) because there is no "reasonable basis to believe that [the Band] would be affected by the outcome of the case." *Hartford*, 736 F.3d at 261 (citation omitted). Gemini does not seek a monetary judgment against the Band, "nor does it seek any non-declaratory injunctive relief." *Id.* In fact, no party, herein, has sought a monetary judgment against the Band. *See id.* Gemini has even admitted that it has been paying the Band's legal bills in the Underlying Lawsuit. (*See* ECF 1-4 ¶ 40) (*See also* ECF 11 at 2) ("Plaintiff issued a sovereign national commercial general liability policy to EBCI and ultimately undertook the defense of EBCI in the wrongful death litigation.").

II. The Court Cannot Exercise Personal Jurisdiction Over CEC or the Band.

A. The Plaintiff Has Not Alleged Sufficient Facts to Support the Court Exercising Personal Jurisdiction Over CEC.

North Carolina Courts do not have jurisdiction over CEC. A court can address the issue of personal jurisdiction before it considers the propriety of remand. *See Lolavar*, 430 F.3d at 227-28. In this instance, the Court the personal jurisdiction argument is directly relevant to the arguments for remand because Gemini failed to allege facts supporting 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 court should dismiss that defendant. *See* Fed. R. Civ. P. 12(b)(2).[7]

"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. The Court explained these theories in *Higgs*, 367 F. Supp. 3d at 448-49. Unless a court holds an evidentiary hearing, "a plaintiff need only make a prima facie showing of personal jurisdiction." *Id.* at 449.

Here, Gemini failed to make a *prima facie* showing that any North Carolina 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." (ECF 1-4, ¶ 4). Gemini alleged no contacts between CEC and North Carolina, specific to this matter, such that Gemini has established a *prima facie* case of specific jurisdiction over CEC.

[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).

See Higgs, 367 F. Supp. 3d at 448-49. Gemini's allegations pertaining to an alleged "official corporate website" of CEC (ECF 1-4, ¶ 9) and an alleged parent/subsidiary relationship between CEC and Harrah's NC (ECF 1-4, ¶ 10) are insufficient. *See Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (allegations pertaining to website insufficient); *Saudi v. Grumman Corp.*, 427 F.3d 271, 276 (4th Cir. 2005) (allegations pertaining to parent/subsidiary generally insufficient). *See also 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) (allegations pertaining to website insufficient).

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 had no contacts with North Carolina, the mere occurrence of some activities within the forum state is not enough for the Court to find it has general jurisdiction. *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" (ECF 1-4, ¶ 13) is insufficient to establish personal jurisdiction. *See Julian*, 2017 WL 3971280, at *2 (court refused to exercise personal jurisdiction over defendant based on "conclusory statements or bare allegations"). *See also Penrod v. Quick,* No. 5:11-HC-2012-D, 2011 WL 8899492, at *2 (E.D.N.C. June 22, 2011) (Dever III, J.) (unpublished) (granting dismissal where the plaintiffs alleged insufficient facts to establish personal jurisdiction). Based on the foregoing, the Court should dismiss CEC under Federal Rule of Civil Procedure 12(b)(2), and its inclusion as a party should not defeat diversity.

B. Gemini Has Not Completed Service of Process on the Band.

"In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which process

has not been perfected prior to removal . . . such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court." 28 U.S.C. § 1448. If a plaintiff fails to properly serve a defendant, a court lacks personal jurisdiction over that defendant. *See Kumar v. Republic of Sudan*, 880 F.3d 144, 160-61 (4th Cir. 2018).[8]

For the reasons stated *supra*, at page 9, there is no evidence that Gemini completed service of process on the Band. Gemini may attempt to fix the problem. *See* 28 U.S.C. § 1448. However, if Gemini does not timely serve the Band thereafter, the Court should dismiss the Band under Federal Rules of Civil Procedure 4(m) and 12(b)(2).

III. Gemini Has Fraudulently Joined CEC and Harrah's NC.

A federal district court has "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – **(1)** Citizens of different States . . .." 28 U.S.C. § 1332(a)(1). For the purpose of this rule, "a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business . . .." *Id.* at § 1332(c)(1). In contrast, a limited liability company has the citizenship of its members. *See Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004).

"A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, i.e., only if there is no plaintiff and no defendant who are citizens of the same State." *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). Though complete diversity is necessary,

> the fraudulent joinder doctrine provides that diversity jurisdiction is not automatically defeated by the naming of non-diverse defendants. The district court can 'disregard, for jurisdictional purposes, the citizenship of certain

[8] As noted in the prior section, a court can address personal jurisdiction before it considers the propriety of remand. *See Lolavar*, 430 F.3d at 227-28. In this instance, the Court likely will be able to exercise its discretion and address the personal jurisdiction argument first because it is evidence that Gemini failed to properly serve the Band.

> nondiverse defendants. *Id.* at 461. It can retain jurisdiction upon the non-moving party showing . . . that 'there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.

Weidman v. Exxon Mobil Corp., 776 F.3d 214, 218 (4th Cir. 2015) (citations omitted). In other words, "the fraudulent joinder doctrine 'effectively 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, 704 (4th Cir. 2015) (citation omitted). Thus, analysis of the fraudulent joinder question necessarily requires an explication of the pertinent state law regarding an action for declaratory judgment.

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. 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 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. CEC is Not a Necessary Party.

CEC does not claim an interest "which would be affected by the declaration" that Gemini requests. N.C. Gen. Stat. § 1-260. Thus, the Court should ultimately dismiss CEC because Gemini has not and cannot allege facts that suggest that CEC has an interest "which would be affected by the declaration[.]" *Id.*

The Amended Complaint contains no allegation that suggests CEC 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 . . .." *State ex rel. Edmisten*, 312 N.C. at 343, 323 S.E.2d at 306. The only allegations in the Amended Complaint that reference CEC are in paragraphs 2-4, 8-10, 31, 41-46, 48, 52. None of the allegations suggest that CEC was obligated to obtain insurance for the Band, is a signatory to the Amended and Restated Management Agreement, is liable for the acts or omissions of Harrah's NC, or had or should have had any involvement with the alleged accident at-issue in the Underlying Lawsuit. In short, CEC has no interest in whether Old Republic provides insurance coverage to the Band.

B. Harrah's NC is not a Necessary Party.

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

The Court should dismiss the "claim" against Harrah's NC because Gemini does not seek a declaratory judgment against Harrah's NC for obligations under the Amended and Restated Management Agreement. It seeks a declaration the policy of insurance Old Republic issued to CEC provides coverage for the Band for the Underlying Lawsuit. Because Harrah's NC was not obligated to obtain insurance coverage for the Band, Harrah's NC neither stands to gain or lose from a declaration regarding Old Republic's coverage.

Gemini argues the Amended and Restated Management Agreement obligated Harrah's NC to obtain insurance coverage for the Band in the Underlying Lawsuit, but it has not explained the bases for that claim.

Under Section 4.26 of the Amended and Restated Management Agreement, Harrah's NC was only obligated to obtain insurance "covering the Facility and the operations of the Enterprise . . .." (ECF 1-4, ¶ 18, Exhibit A) (quoting the Amended and Restated Management Agreement § 4.26). Each of these terms has a specific meaning. "'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* . . .." (ECF 1-4, ¶ 18, Exhibit A) (quoting the Amended and Restated Management Agreement § 2.16) (italics added). In turn, "[t]he 'Enterprise' is the commercial enterprise of the Tribe . . . and operated and managed by Manager in accordance with the terms and conditions of this

Agreement *to engage in (a) gaming . . .; and (b) any other lawful commercial activity allowed at the Facility . . ..*" (ECF 1-4, ¶ 18, Exhibit A) (quoting the Amended and Restated Management Agreement § 2.13) (italics added). (*See also* ECF 1-4, ¶ 18, Exhibit A) (quoting the Amended and Restated Management Agreement, 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 cannot, 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 – Paint Town Road/U.S. Route 19 – was a publicly available roadway between the Casino and Stonebrook Lodge (ECF 1-4, ¶ 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.

No matter how confusing Gemini attempts to make it, the simple fact of the matter is that the plaintiff in the Underlying Lawsuit alleged that the accident at-issue occurred on a public roadway after Campos left the Casino, and The Cherokee Court found that fact to be undisputed. Gemini makes no claim against Harrah's NC, cannot prove that Harrah's NC was obligated to obtain insurance for the accident at-issue, that the contract between Harrah's NC and the Band was an insurance triggering contract, or that Old Republic was obligated to provide defense or indemnity to the Band for the accident at-issue. For these reasons, Gemini will never be able to prove that Harrah's NC is a necessary party.

IV. Gemini Fraudulently Joined the Band.

A. The Band Has Not Waived Sovereign Immunity.

Gemini acknowledges the Band "is a federally recognized Indian tribe . . .." (ECF 1-4, ¶ 11). As such, the Band is cloaked with sovereign immunity and cannot be sued absent consent for such suit. *See, e.g., Haile v. Saunooke*, 148 F. Supp. 602, 603 (W.D.N.C. 1957). If a plaintiff has not alleged and cannot identify a waiver of sovereign immunity, the Court should dismiss the Band. *See, e.g., Newman v. Tribal Casino Gaming Enter.*, No. 1:17cv77, 2017 U.S. Dist. LEXIS 213466, *3-*5 (W.D.N.C. Sept. 2017) (unpublished).

Gemini has not alleged that the Band has waived its sovereign immunity. Therefore, the Court should dismiss Gemini's claim against the "Band" because sovereign immunity protects the Band from being named in a lawsuit and having to defend a lawsuit, regardless of whether Gemini seeks damages from the Band. *See Haile*, 148 F. Supp at 603.

B. The Band is not a Necessary Party.

In addition to the arguments *supra*, III.B., pages 17-18[IIIB is p 15-17], Gemini has not alleged, and cannot prove, that there is any adversity between Gemini and the Band or that the Band stands to gain or lose anything whether Old Republic does or does not provide coverage to the Band for the accident at-issue. As noted previously, Gemini has been paying the Band's legal bills in the Underlying lawsuit. (*See* ECF 1-4, ¶ 40) (*See also* ECF 11 at 2) ("Plaintiff issued a sovereign national commercial general liability policy to EBCI any ultimately undertook the defense of EBCI in the wrongful death litigation.") Quite simply, because the declaratory judgment does not seek to impose the obligation for defense costs upon the Band, it has no direct interest in the outcome of that proceeding.

V. Gemini's Procedural Complaints Are Insufficient to Divest the Court of Subject Matter Jurisdiction and Require Remand.

Gemini identifies "procedural errors and omissions" that it believes warrant remand. (ECF 11 at 14-15). However, the Court can reject each argument insofar as Gemini did not cite any legal authorities that suggest that the "errors" or "omissions" warrant remand. *See, e.g., Projects Mgmt. v. Dyncorp Int'l LLC*, 734 F.3d 366, 376 (4th Cir. 2013). In any event, none of the perceived deficiencies divested the Court of subject matter jurisdiction or require remand.

A. The Failure of the Removing Defendants to File the Declaration of Neal S. Krokosky with the Notice of Removal was Non-Jurisdictional and, in Any Event, was Remedied by the Removing Defendants.

"A defendant or defendants desiring to remove any civil action from a State court shall file in the district court . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure *and containing a short and plain statement of the grounds for removal*, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a) (italics added). A removing party need only *allege* facts establishing federal jurisdiction. *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008).

The Notice of Removal (ECF 1) contained the *allegations* necessary to establish federal jurisdiction under 28 U.S.C. § 1332. Paragraphs 7-11 and 23-26 included allegations regarding the citizenship of the parties. Paragraph 22 included allegations regarding the amount in controversy. *Id.* Paragraphs 21 and 25-29 included allegations that Harrah's NC, CEC, and the Band were fraudulently joined, leaving complete diversity between Gemini and Old Republic. (*Id.*, at ¶ 21, 25-19).

Gemini has not argued that it was prejudiced by the Removing Defendants inadvertently failing to serve the Krokosky declaration at the time of removal. It could not do so. The

Krokosky declaration only *confirmed* the allegations regarding the citizenship of Harrah's NC and CEC, already alleged in the Amended Complaint at paragraphs 4-5, 8. In any event, the Removing Defendants filed the Krokosky declaration on December 6, 2019 (ECF 18). Under *Ellenburg*, remand is not required.

B. The Failure of the Removing Defendants to Comply with 28 U.S.C. § 1446(d) and with E.D.N.C. Civ. R. 5.3(a)(2) was Non-Jurisdictional and, in Any Event, was Remedied by the Removing Defendants.

"Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). In this district: "No 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)." E.D.N.C. Civ. R. 5.3(a)(2) (December 2019).

A failure to comply with the "service of the notice" requirement in 28 U.S.C. § 1446(d) is not jurisdictional and does not require remand. *See Rigsby v. Arizona*, No. CV 11-1696-PHX-DGC (ECV), 2012 WL 273703, *3 (D. Ariz. Jan. 31, 2012) (unpublished); *Washington v. DerKnoCo Auto Sales*, No. 3:06cv293LR, 2006 WL 1892549, *2-*3 (S.D. Miss. July 10, 2006) (unpublished); *Smotherman v. Caswell*, 755 F. Supp. 346, 349-50 (D. Kan. Nov. 26, 1990). Likewise, while not identifying a direct case on point, it appears that a failure to comply with the seven-day requirement in the local rule (which appears to be stricter than the federal law) would not be jurisdictional or require remand. *See Parker v. Malone*, Civil Action. No. 7:03CV00742, 743, and 744, 2004 U.S. Dist. LEXIS 1096, *4-*8 (W.D. Va. Jan. 15, 2004) (unpublished); *Burroughs v. Palumbo*, 871 F. Supp. 870 (E.D. Va. 1994).

Here, there is no dispute that Gemini timely received the Notice of Removal and timely filed this motion. Moreover, there is no evidence the Band was properly served or joined in this matter and required notice or needed to provide consent. In any event, the Removing Defendants advised the Band's outside counsel of the removal on November 8, 2019 (Second Krokosky Decl. ¶ 4, Ex. B) and served the Band with the Notice of Removal on the Eastern Band of Cherokee Indians on December 9, 2019. *See* Brown Aff. ¶ 8. Neither Gemini nor the Band will be able to identify any way in which they were prejudiced by this course of events. *See* 28 U.S.C. § 1447 (permitting a challenge to subject matter jurisdiction "at any time before final judgment").

Likewise, Gemini has not identified a legal authority that suggests that the Removing Defendants' failure to comply with the seven-day requirement in the local rule divests the Court of subject matter or requires remand. Defendants filed their Notice of Filing of Notice of Removal in the Superior Court of Wake County on November 5, 2019, serving all parties who made an appearance, and subsequently filed the pleading on December 13, 2019 with the Eastern District of North Carolina. (ECF 23). Brown Aff., ¶ 6.

C. The Defect in the Supplemental Civil Cover Sheet was Non-Jurisdictional and, in Any Event, was Remedied by the Removing Defendants.

"Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name . . .. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention." Fed. R. Civ. P. 11(a). This Court has adopted an additional requirement: "The name of the filing user under whose login and password the document is submitted must be preceded by an '/s/' and typed in the space where the signature would otherwise appear." Electronic Case Filing Administrative Policies and Procedures Manual § IV.D.1 (March 2017).

Gemini correctly noted that the Removing Defendants did not properly sign the original Supplemental Civil Cover Sheet because the electronic signature was missing a required "/". (ECF 11). However, Gemini did not argue that defect deprived the Court of jurisdiction or required remand. It did not. *See* Fed. R. Civ. P. 11(a) (permitting a party to submit a signed version of a paper, after submitting an unsigned version of that paper). *See also Lindsay v. Lewis*, 2013 WL 4500690, *1 n.2 (M.D.N.C. Aug. 21, 2013) (unpublished) (a failure to comply with Rule 11(a) can be treated as a technical defect); *Thomas v. Brown*, 2011 U.S. Dist. LEXIS 137564, **5-6 (S.D. Fla. Nov. 30, 2011) (unpublished) (alleged failure to serve civil cover sheet, later corrected, non-jurisdictional). In any event, the Removing Defendants addressed the issue by filing an amended Supplemental Cover Sheet on December 6, 2019 (ECF 19).

Moreover, Gemini did not argue that it was prejudiced by the lack of a compliant signature in the original Civil Cover Sheet and the subsequent correction of that error. Therefore, the Court should not remand this matter based on the Removing Defendants' initial failure to comply with Electronic Case Filing Administrative Policies and Procedures Manual § IV.D.1. *See Waskey v. O'Neal*, 2019 WL 2502389, *1 (D. Md. June 17, 2019) (unpublished) (some internal quotations marks omitted) (citation omitted) ("a pleading will not be stricken unless the movant can show that a failure to sign severely prejudiced the opposing party").

VI. The Court Should Not Award Costs or Expenses to Gemini Because Federal Jurisdiction is Proper and, in Any Event, the Removing Defendants had an Objectively Reasonably Basis for Removal.

"An order remanding the case *may* require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (italics added). This rule "provides the district court with discretion to award fees when remanding a case[;]" but, it need not do so. *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996).

In *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, the sole case Gemini cited on this issue, the court explained: "'Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonably basis for seeking removal.'" 436 Fed. Appx. 888, 890 (11th Cir. May 31, 2011) (citation omitted) (unpublished). In other words, a court should not award costs and fees against a removing party if it "presented reasonable arguments why the [fraudulent] joinder doctrine should be applied in the instant case, and similarly provided reasonable arguments why it did not procedurally default in filing its notice of removal." *Chavis v. Am. Honda Motor Co.*, 2019 WL 5420086, *4 (E.D.N.C. Oct. 23, 2019) (unpublished). *See also, e.g., Badalato v. Wish to Give Prod., LLC*, 2019 WL 3661164, *_ (E.D.N.C. Aug. 6, 2019) (unpublished) (declining to award costs and expenses to plaintiff when the "removal petition set[] forth in detail grounds for removal and it ha[d] comprehensively briefed the issues arising from the removal"); *Biricik v. Wal-Mart Stores E., LP*, 2014 WL 3955085, *_ (E.D.N.C. Aug. 13, 2014) (unpublished) ("While Plaintiff's motion to remand will be granted for the reasons stated herein, the court finds that the record does not reflect that defendants removed this case to prolong the litigation nor that they lacked an objective, reasonable basis for their removal, even though the basis for removal was incorrect.")

Based on the foregoing, the Court need not consider awarding costs or expenses to Gemini unless it first decides to remand this lawsuit to state court. Even if the Court remands this lawsuit, Gemini has not developed an argument that removal in this instance was objectively unreasonable. Gemini simply asserted: "it is apparent from the face of the Amended Complaint that a declaratory judgment action required joinder of the parties that the Removing Defendants claimed to be fraudulent." (ECF 11 at 16). Without belaboring the point, that assertion is simply

not accurate for the reasons set forth above. Therefore, the Court should not award costs or expenses to Gemini.

CONCLUSION

For the foregoing reasons, the Court should deny remand and dismiss Harrah's NC, CEC, and the Band because they are all fraudulently joined. *See Johnson*, 781 F.3d at 704.

Dated this the 20th day of December, 2019.

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CERTIFICATE OF COMPLAINCE

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 7,511.

/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 20th day of December, 2019.

WOMBLE BOND DICKINSON (US) LLP

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