

In the Circuit Court of Ohio County, West Virginia

Grae-Con Construction, Inc.,
Plaintiff,

v.

Case No. CC-35-2022-C-166
Judge Jason A. Cuomo

The Cincinnati Insurance Company,
Ohio County Development Authority,
Mohawk Construction and Supply
Co., Inc.,
Defendants

**ORDER DENYING THE CINCINNATI INSURANCE COMPANY'S MOTION TO
DISMISS PLAINTIFF'S AMENDED COMPLAINT**

This matter came before the Court pursuant to Defendant The Cincinnati Insurance Company's *Motion to Dismiss Plaintiff's Amended Complaint* pursuant to Rules 12(b)(2), (3) and (6) of the West Virginia Rules of Civil Procedure filed on **December 13, 2022**, Grae-Con Construction, Inc.'s *Response* filed on **December 21, 2022**, and Cincinnati's *Reply* filed on **December 23, 2022**. Upon consideration of the same, and for reasons set forth more fully below, the Court is of the opinion to and does hereby **DENY** Defendant's *Motion*.

I. FINDINGS OF FACT

1. On September 26, 2011, Grae-Con entered into a contract with the Ohio County Development Authority ("OCDA"), a West Virginia Public Corporation with a principal place of business in Triadelphia, West Virginia, to construct a 120,000 square foot distribution center, OCDA Project 43150, in Triadelphia, West Virginia (i.e., the "Project"). (Am. Compl., ¶¶ 8, 11, 12, and Exh. 1.)

2. On September 20, 2011, six days prior to entering into the above-referenced contract with OCDA and presumably in anticipation of entering into the same, Grae-Con entered into a Subcontract Agreement No. 1113-06 ("Subcontract") with Mohawk Construction and Supply Company, Inc. ("Mohawk"), wherein Mohawk was to "[f]urnish all labor and equipment to install the metal roofing and siding for the 120,000 SF Distribution Center in strict accordance with the plans and specifications prepared by M&G Architects & Engineers." (*Id.* at ¶ 13, Exh. 2.)

3. The Subcontract required Mohawk to name Grae-Con as an additional insured on its general liability insurance policy and to provide Grae-Con with a Certificate of Insurance. (*Id.* at ¶ 15.)

4. Mohawk provided Grae-Con with a copy of its Certificate of Liability Insurance, dated May 21, 2012, which included Grae-Con as a certificate holder and an additional insured. (*Id.* at ¶ 16, Exh. 3.)

5. The Certificate of Liability Insurance, endorsed and issued by The Cincinnati Insurance Company (hereinafter "Cincinnati"), states: "Description of Project: Installation of metal roofing, siding and related accessories" for "Project Name: OCDA Silgan Distribution Center/Triadelphia, West Virginia." (*Id.* at ¶ 21, Exh. 3.)

6. The Certificate of Liability Insurance identified Grae-Con as an additional insured on Mohawk's general liability policy ("Mohawk Policy"). (*Id.*)

7. Cincinnati specifically insured risk located in Ohio County, West Virginia. (*Id.*)

8. The OCDA does not transact any business in Ohio.

9. On August 31, 2021, the OCDA initiated an arbitration proceeding against Grae-Con in West Virginia (with an evidentiary hearing to be held at the Ohio County, WV offices of the OCDA) wherein it asserted that the building has suffered from

moisture condensation and roof leaks. The OCDA's allegations against Grae-Con relate solely to the work of Grae-Con's subcontractor, Mohawk, and states that Mohawk violated specific installation requirements in the installation of the roof and/or wall insulation panels when Mohawk double-folded and stapled the panel joints between the panels but failed also to tape the panel joints. (*Id.* at ¶ 26, Exh. 4.)

10. Cincinnati denied defense and indemnity to Grae-Con, but is providing a defense to Mohawk, in the Underlying Arbitration pending in West Virginia.

11. On October 11, 2022, Grae-Con filed its Complaint in this matter, stating claims against Cincinnati for declaratory judgment, breach of contract, common law bad faith, and Unfair Trade Practices Act violations arising from Cincinnati's refusal to defend and indemnify Grae-Con for claims pending against Grae-Con in the West Virginia arbitration, pertaining to the West Virginia construction project.

12. Also on October 11, 2022, Cincinnati filed a competing lawsuit against Grae-Con in Butler County, Ohio, requesting declaratory relief related to its refusal to defend and indemnify Grae-Con, as well as provided, for the first time, a copy of the Mohawk Policy to Grae-Con.

13. On November 14, 2022, Grae-Con filed its Amended Complaint, which newly included a copy of the Mohawk Policy as an exhibit. (*See Am. Compl.*)

14. On December 9, 2022, Grae-Con filed its Motion to Dismiss Cincinnati's Complaint pending in Butler County, Ohio based upon improper venue and failing to join an indispensable party.

15. On December 14, 2022, Cincinnati filed a *Motion to Dismiss Plaintiff's Amended Complaint*, currently pending before the Court.

II. CONCLUSIONS OF LAW

A. RULE 12(B)(2) MOTION FOR LACK OF PERSONAL JURISDICTION

1. West Virginia Rules of Civil Procedure Rule 12(b)(2) governs motions to dismiss for lack of personal jurisdiction. W. Va. R. Civ. P. 12(b)(2).

2. When responding to a motion to dismiss for lack of personal jurisdiction where no evidentiary hearing has been held, the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive the motion and, in determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000).

3. By way of further explanation:

[t]he burden plaintiff bears to establish the court's jurisdiction normally is not a heavy one, particularly where the court chooses to rule on the issue without an evidentiary hearing. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351 (1990). Mere allegations of personal jurisdiction are sufficient for a party to make a *prima facie* showing. *Dowless v. Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305, 1307 (4th Cir. 1986). When considering a challenge to its personal jurisdiction on the parties' filings, the court must resolve factual conflicts in favor of the party asserting jurisdiction for the purpose of determining whether he or she has made the requisite *prima facie* showing. *Bakker*, 886 F.2d at 676; *Eastern Marketing Corp. v. Texas Meridian Prod. Co., Inc.*, 798 F. Supp. 363, 364 (S.D. W.Va. 1992) (Haden, C.J.)." 830 F. Supp. at 318–19.

Clark v. Milam, 847 F. Supp. 409, 412 (S.D.W. Va. 1994).

4. West Virginia's long arm statute, West Virginia Code § 56-3-33(a), governs actions by or against nonresident persons having certain contacts with West Virginia and provides, in pertinent part:

(a) The engaging by a nonresident, or by his or her duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7),

inclusive, of this subsection shall be considered equivalent to an appointment by a nonresident of the Secretary of State, or his or her successor in office, to be his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in this state, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from, or growing out of, such act or acts, and the engaging in such act or acts shall be a signification of such nonresident's agreement that any such process against him or her, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or things in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected the person to use, consume, or be affected by the goods in this state: *Provided*, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Having an interest in, using, or possessing real property in this state; or
- (7) Contracting to insure any person, property, or risk located within this state at the time of contracting.

B. RULE 12(B)(3) MOTION FOR IMPROPER VENUE

1. Where properly questioned by motion to dismiss under Rule 12(b)(3), venue must be legally demonstrated independent of in personam jurisdiction of the defendant. *Wetzel County Sav. & Loan Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973).

2. West Virginia Code § 56-1-1 governs venue generally. Subsection (c)

provides, in pertinent part:

(c) For all civil actions filed on or after July 1, 2018, a nonresident of the state may not bring an action in a court of this state **unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state**: *Provided*, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that the action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant: *Provided, however*, that the provisions of this subsection do not apply to civil actions filed against West Virginia citizens, residents, corporations, or other corporate entities.

In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of such plaintiff without prejudice to refile in a court in any other state or jurisdiction. **When venue is proper as to one defendant, it is also proper as to any other defendant with respect to all actions arising out of the same transaction or occurrence.**

(emphasis by this Court)

C. DOCTRINE OF FORUM NON CONVENIENS

1. West Virginia Code § 56-1-1a(a) outlines eight factors for the trial court to

consider in evaluating a motion to dismiss for forum non conveniens:

(a) In any civil action if a court of this state, upon a timely written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action, or dismiss any plaintiff: *Provided*, That the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state. In determining whether to grant a motion to stay or dismiss an action, or dismiss any plaintiff under the doctrine of forum non conveniens, the court shall consider:

(1) Whether an alternate forum exists in which the claim or action may be tried;

(2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

(3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

(4) The state in which the plaintiff(s) reside;

(5) The state in which the cause of action accrued;

(6) Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;

(7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and

(8) Whether the alternate forum provides a remedy.

2. "[T]he plaintiff's choice of forum is entitled to great deference." W. Va.

Code § 56-1-1a.

3. "Forum non conveniens is not a substantive right of the parties, but a procedural rule of the forum." *State ex rel. N. River Ins. Co. v. Chafin*, 233 W. Va. 289, 294, 758 S.E.2d 109, 114 (2014) (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994)).

4. Cincinnati "bears a heavy burden in opposing the plaintiff's chosen forum." *Id.* (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)).

D. 12(B)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

1. Motions to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978); *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E.2d 207, 212 (1977).

2. The standard which plaintiff must meet to overcome a motion under Rule 12(b)(6) is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss for failure to state a claim is a relatively light one. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978).

3. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Syl. Pt. 3, *Chapman*, 160 W. Va. 530, 236 S.E.2d 207; *John W. Lodge Distrib. Co.*, 161 W. Va. 603, 245 S.E.2d 157; *Mandolidis*, 161 W. Va. 695, 246 S.E.2d 907.

4. "[T]he complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *John W. Lodge Distrib. Co.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158.

III. DISCUSSION AND ORDER

A. PERSONAL JURISDICTION

Cincinnati endorsed and issued a Certificate of Liability Insurance insuring risk located in Triadelphia, West Virginia for the OCDA Project. As such, Cincinnati has engaged in “contracting to insure any person, property or risk located within this state at the time of contracting,” thereby satisfying W. Va. Code § 56-3-33(a)(7) and establishing personal jurisdiction.

In accordance with West Virginia Code § 56-3-33(b), Grae-Con's coverage and bad faith claims as set forth in the Amended Complaint stem directly from Cincinnati's conduct in West Virginia. Cincinnati insured Mohawk and Grae-Con specifically for the Project in West Virginia (i.e., the act that confers personal jurisdiction) (Am. Compl. at ¶ 21, Exh. 3); the Project resulted in an alleged loss, such that the OCDA has brought claims in a West Virginia arbitration against Grae-Con and Mohawk arising from the Project (*id.* at ¶ 26); Grae-Con tendered a request to Cincinnati for defense and indemnification as to the claims asserted against Grae-Con arising from the Project (*id.* at ¶¶ 31, 33); Cincinnati is defending its named insured, Mohawk, as it relates to the claims, but has refused a defense to its additional insured, Grae-Con, in a West Virginia arbitration (*id.* at ¶¶ 32, 35, 84); and, as a result, Grae-Con has filed its Amended Complaint raising coverage and bad faith claims directly related to Cincinnati's refusal to defend and indemnify Grae-Con for the exact risk it insured in West Virginia (*see, generally, id.*).

Cincinnati's reliance on *Lane v. Boston Scientific Corp.*, 198 W. Va. 447, 481 S.E.2d 753 (1996), is not persuasive because the factual circumstances in that case are significantly different from the facts at issue here and, as a result, personal

jurisdiction was evaluated under a different enumerated act of the long-arm statute in that case, as well as under West Virginia's other long-arm statute pertaining to corporate defendants under circumstances different than those at issue here. There, the non-resident defendant's acts tying it to West Virginia were much more attenuated, such that plaintiff could not satisfy the requirements of W. Va. Code § 56-3-33(a)(1) or W. Va. Code § 56-3-33(b). Grae-Con does not proffer that personal jurisdiction is satisfied by way of W. Va. Code § 56-3-33(a)(1) in this case.

Finally, there "must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state." Syl. Pt. 2, *Pries v. Watt*, 186 W.Va. 49, 52, 410 S.E.2d 285, 288 (1991). Additionally, "to what extent the defendant has minimum contacts depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state." *Id.* at Syl. Pt. 3. Cincinnati has sufficient minimum contacts with West Virginia such that due process is satisfied. Cincinnati is in the business of insuring risk and adjusting claims all over the country, including routinely in West Virginia. It is also permitted to do business in West Virginia by the West Virginia Insurance Commissioner and is registered with the West Virginia Secretary of State.

Based on the foregoing, the Court finds and rules that it has personal jurisdiction over Cincinnati.

B. VENUE

This Court is the proper venue for Grae-Con's claims because "all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." See W. Va. Code § 56-1-1(c). Grae-Con's claim for declaratory judgment and breach of contract derive from Cincinnati's duties and obligations under the Mohawk

Policy and its breach of those duties—more specifically, its denial of defense and indemnity to Grae-Con as to the claims against it in the Underlying Arbitration. (Am. Compl., ¶¶ 67-75.) In turn, Grae-Con's claims for common law bad faith and Unfair Trade Practices Act violations, while extra-contractual, stem from Cincinnati's conduct in conjunction with its denial of defense and indemnity to Grae-Con in the West Virginia arbitration and the resulting harm to Grae-Con. (*Id.* at ¶¶ 77-109.) The Certificate of Insurance endorsed and issued by Cincinnati indicates insurance coverage under the Mohawk Policy specifically for the OCDA Triadelphia, West Virginia Project, and names Grae-Con as an additional insured for that Project. (*Id.* at ¶ 21, Exh. 3.) Cincinnati's additional insured, Grae-Con, had legal claims filed against it, arising from the West Virginia Project, in a West Virginia arbitration. (*Id.* at ¶ 26, Exh. 4.) Grae-Con requested defense and indemnity as to those claims from Cincinnati, and Cincinnati denied defense and indemnity to Grae-Con in the West Virginia arbitration, but is providing a defense to its named insured, Mohawk, in the same arbitration. (*Id.* at ¶¶ 31-35.) The resulting harm to Grae-Con caused by Cincinnati's denial is manifesting and occurring in the West Virginia arbitration, wherein it had to retain counsel to defend itself against the claims asserted against it by the OCDA. (*Id.* at ¶ 91).

Based on the foregoing, venue is demonstrated here, independent of and in addition to personal jurisdiction.

C. DOCTRINE OF FORUM NON CONVENIENS

When analyzing the eight factors set forth in W. Va. Code § 56-1-1a, Cincinnati cannot satisfy its heavy burden to overturn Grae-Con's choice of forum.

With respect to factor one, an alternative forum does not exist in Butler County, Ohio. W. Va. Code § 56-1-1a(a)(1). Grae-Con has already filed, at the outset of the Ohio case and prior to the filing of Cincinnati's Motion to Dismiss in the instant case, a

Motion to Dismiss Cincinnati's Complaint in the Ohio case, in lieu of an Answer, based upon improper venue and failure to join a necessary party. The Ohio action may be dismissed, leaving no "alternative forum" in which the claim may be tried.

As to the second factor, maintaining Grae-Con's action in West Virginia will not "work a substantial injustice" to Cincinnati. W. Va. Code § 56-1-1a(a)(2). Cincinnati has not articulated what documents and witnesses exist that are only accessible in Butler County, Ohio. Aside from trial, there will be little, if any, requirement for the witnesses to travel to Ohio County, West Virginia. Any material facts relating to the loss at issue bearing on the coverage issues are likely to be discovered in the context of the Underlying Arbitration, which is pending in West Virginia and in which Cincinnati is providing a defense to Mohawk. Cincinnati has not articulated any "substantial injustice" that would result by maintaining the action in this Court. Inconvenience does not equate to "substantial injustice."

With respect to the third factor, Cincinnati cannot establish that the alternative forum "can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim," as Ohio does not have jurisdiction over the OCDA. W. Va. Code § 56-1-1a(a)(3). The OCDA is a determinative defendant and necessary party to the declaratory judgment action. Ohio's Declaratory Judgment Act provides that, "when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." R.C. 2721.12(a) (emphasis by this Court). The OCDA, as an alleged injured claimant, has a real interest in the declaratory judgment action, as it will directly impact the OCDA's ability to recover damages. The OCDA is a West Virginia public corporation, headquartered in Ohio County, West Virginia, and a political subdivision pursuant to W. Va. Code § 29-12A-3(c), subject to the West Virginia

Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.* The OCDA does not transact any business in Ohio. Given that the OCDA does not have “minimum contacts” within Ohio to satisfy due process, Ohio does not have personal jurisdiction over the OCDA.

Grae-Con does not dispute that it is not a resident of this state under factor four. W. Va. Code § 56-1-1a(a)(4).

As to factor five, Grae-Con’s cause of action accrued in West Virginia. W. Va. Code § 56-1-1a(a)(5). The Mohawk Policy directly relates to a risk insured in West Virginia, and Cincinnati’s obligation to provide a defense and indemnification to Grae-Con against claims by a West Virginia plaintiff, arising from a West Virginia construction project, involving an insured risk located in West Virginia. Grae-Con’s coverage and bad faith claims as set forth in the Amended Complaint stem directly from Cincinnati’s conduct in West Virginia.

In balancing the private interest of the parties with the public interest of the state under factor six, West Virginia is the more convenient forum. W. Va. Code § 56-1-1a(a)(6). Grae-Con and Cincinnati will have no more difficulty and expense litigating this matter in West Virginia than they would otherwise in the Underlying Arbitration. West Virginia also has an interest in that the OCDA, a local governmental entity, is a necessary party, and any outcome of the declaratory judgment action will impact the OCDA’s ability to recover damages sustained because of the alleged faulty construction subject to the Underlying Arbitration. Having the trial in Butler County, Ohio is no more convenient to the parties and witnesses than Ohio County, West Virginia, where the arbitration is currently pending. The only party with any interest in this litigation that is located in Butler County, Ohio is Cincinnati itself.

Regarding conflicts of laws, West Virginia applies the “more significant relationship” test, which provides that the provisions of an insurance policy will be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another state has a more significant relationship to the transaction of the parties. *Howe v. Howe*, 218 W. Va. 638, 644, 625 S.E.2d 716, 722 (emphasis added.) West Virginia has a more significant relationship to the parties and issues than either Ohio or Pennsylvania. An insurance company doing business in this state has denied claims for defense and indemnification in a West Virginia arbitration, arising from a construction project occurring in West Virginia and involving a West Virginia plaintiff. None of the operative facts giving rise to Grae-Con’s declaratory judgment action and other claims against Cincinnati occurred in Ohio or Pennsylvania. Any material questions of fact relevant to the coverage questions will also be determined in the Underlying Arbitration, and, as such, any discovery to be had on Grae-Con’s claims against Cincinnati is already occurring in West Virginia. Consequently, both the private and public interests predominate in favor of this action being maintained in West Virginia.

Cincinnati’s analysis as to the seventh factor, unreasonable duplication or proliferation of litigation, ignores the relationship the coverage issues have to West Virginia. W. Va. Code § 56-1-1a(a)(7). There is nothing to suggest that maintaining this particular action will result in a “proliferation of litigation” by nonresident plaintiffs against insurance companies in this state.

Under factor eight, the alternative forum of Butler County, Ohio cannot provide a remedy. W. Va. Code § 56-1-1a(a)(8). As discussed above, Grae-Con has filed a Motion to Dismiss Cincinnati’s Complaint.

For the foregoing reasons, the Court finds that Cincinnati has not met its burden to overturn Grae-Con's choice of forum.

D. DISMISSAL IS NOT REQUIRED DUE TO THE PENDENCY OF THE OHIO ACTION

Cincinnati's reliance on the pendency of the Ohio action to support dismissal of this action is misplaced, as Grae-Con has filed a Motion to Dismiss Cincinnati's Complaint in Butler County, Ohio, for improper venue and failure to join a necessary party. Grae-Con's Amended Complaint pending in this Court is more inclusive of all claims and all interested parties. The only claim currently pending in Ohio is Cincinnati's Complaint for Declaratory Judgment. By contrast, this action includes, in addition to a request for declaratory judgment, claims for breach of contract, common law bad faith, and violations of West Virginia's Unfair Trade Practices Act. Moreover, the parties in both actions are not substantially the same, as a necessary litigant in this action—the OCDA—is not a party to the Ohio action. As such, this proceeding is not redundant to Cincinnati's Complaint filed in Ohio. Particularly because the Ohio action does not encompass all of the claims, and because the OCDA cannot be joined in Ohio, the Ohio court should dismiss Cincinnati's Complaint.

ACCORDINGLY, the Court hereby **ORDERS** that Defendant The Cincinnati Insurance Company's *Motion to Dismiss Plaintiff's Amended Complaint* is **DENIED**.

The objections and exceptions of Defendant are noted.

The Court **ORDERS** the Clerk to provide attested copies of this Order to all counsel of record.

/s/ Jason A. Cuomo
Circuit Court Judge
1st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courts.wv.gov/e-file/ for more details.