STATE OF NORTH CAROLINA IREDELL COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 2372
LINEAGE LOGISTICS, LLC; and PRIMUS BUILDERS, INC., Plaintiffs, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA; HARTFORD FIRE INSURANCE COMPANY; and REPUBLIC REFRIGERATION, INC., Defendants.	**ORDER AND OPINION ON TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S MOTIONS TO DISMISS PLAINTIFFS' AMENDED COMPLAINTS, REPUBLIC REFRIGERATION, INC'S MOTION TO DISMISS LINEAGE LOGISTICS, LLC'S AMENDED COMPLAINT, AND REPUBLIC REFRIGERATION, INC'S MOTION TO STAY**
LINEAGE LOGISTICS, LLC, Crossclaimant, v. PRIMUS BUILDERS, INC., Crossclaim Defendant.	

1. **THIS MATTER** is before the Court on four motions (collectively, the "Motions" and each a "Motion") brought under Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the North Carolina Rules of Civil Procedure (the "Rule(s)"):

a) Defendant Travelers Property Casualty Company of America's ("Travelers") Motion to Dismiss the Second Amended Complaint of Lineage Logistics, LLC ("Lineage") (the "Travelers-Lineage Motion");[1]

b) Defendant Travelers's Motion to Dismiss Second Amended Complaint of Primus Builders, Inc. and P3 Advantage, Inc. (collectively, "Primus") (the "Travelers-Primus Motion");[2]

c) Defendant Republic Refrigeration, Inc.'s ("Republic") Motion to Dismiss (the "Republic Motion");[3] and

d) Defendant Republic's Motion to Stay (the "Stay Motion").[4]

2. For the reasons set forth below, the Court **GRANTS** the Travelers-Lineage Motion, **GRANTS** the Travelers-Primus Motion, **GRANTS in part and DENIES in part** the Republic Motion, and **DENIES** the Stay Motion.[5]

McGuireWoods LLP, by Alec Covington, Zachary McCamey, Anthony Tatum, and Shelby Guilbert, for Plaintiff/Crossclaimant Lineage Logistics, LLC.

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[1] (Def. Travelers's Property Casualty Company of America's Mot. Dismiss Second Am. Compl. Lineage Logistics, LLC [Rule 12(b)(1), 12(b)(6) and 12(b)(7)] [hereinafter "Travelers Mot. Dismiss Lineage"], ECF No. 132.)

[2] (Def. Travelers's Property Casualty Company of America's Mot. Dismiss Second Amended Compl. Primus Builders, Inc. and P3 Advantage, Inc. [Rule 12(b)(1), 12(b)(6), and 12(b)(7)] [hereinafter "Travelers Mot. Dismiss Primus"], ECF No. 136.)

[3] (Republic Refrigeration, Inc.'s Mots. Dismiss, Mot. Stay Answer Pl. Lineage Logistics, LLC's Second Am. Compl. [hereinafter "Republic Mots."], ECF No. 130.)

[4] (Republic Mots.) Republic presented its two motions together, but briefed them separately.

[5] After the completion of briefing on these four motions, Primus filed a motion to sever. (*See* Primus Builders, Inc. and P3 Advantage, Inc's Mot. Sever, ECF No. 151.) Because the Court's rulings on the Motions moots the Motion to Sever, the Court will issue a separate order denying the Motion to Sever as moot.

Taylor English Duma, LLP, by Ryan M. Arnold, Gregory G. Schultz, and Stephen L. Wright, for Plaintiff/Crossclaim Defendant Primus Builders, Inc.

Womble Bond Dickinson (US) LLP, by M. Elizabeth O'Neill, Grady Michael Barnhill, and Jonathan R. Reich, for Defendant Travelers Property Casualty Co. of America.

Robinson Elliot & Smith, by William C. Robinson and Dorothy M. Gooding, for Defendant Republic Refrigeration, Inc.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

1. The Parties, Operative Contracts, and Insurance Policies

3. The Court does not make findings of fact on motions presented under Rule 12 of the North Carolina Rules of Civil Procedure (the "Rule(s)"). Rather, the Court recites the allegations asserted and documents referenced in the pleadings that are relevant to the Court's determination of the Motions.

4. Lineage operates a cold storage facility in Statesville, North Carolina that stores temperature-controlled food products for customers (the "Facility").[6] Lineage

[6] (Pl. Lineage's Second Am. Compl. and Crosscl. ¶ 1 [hereinafter "Lineage Am. Compl."], ECF No. 121; Pl. Primus's Second Am. Compl. ¶¶ 9–10 [hereinafter "Primus Am. Compl."], ECF No. 122.) For ease of reference, the Court will refer to Lineage's Second Amended Complaint and Primus's Second Amended Complaint as the "amended complaints" and to each as the respective party's "amended complaint."

assumed ownership of the Facility after it merged with Millard Refrigerated Services, LLC ("Millard").[7]

5. Primus is a general contractor specializing in the construction of large, refrigerated buildings.[8] Primus contracted with Millard (the "Primus Contract") to design and construct six blast cells at the Facility (the "Project").[9] In the Primus Contract, Primus promised to name Lineage and Millard as additional insureds under several insurance policies and to indemnify Lineage against claims and damages that arose out of Primus's performance on the Project.[10]

6. Republic entered a subcontract with Primus to perform services on the Project (the "Republic Subcontract").[11] Under the Republic Subcontract, Republic promised to name Lineage as an additional insured under several insurance policies and to indemnify Lineage against any claims or damages that arose out of Republic's performance on the Project.[12]

7. There are four insurance policies at issue in this case: two were issued to Primus, and two to Republic (each a "Policy" and together, the "Policies").[13]

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[7] (Lineage Am. Compl. ¶ 2; Primus Am. Compl. ¶¶ 10–11.)

[8] (Primus Am. Compl. ¶ 1.)

[9] (Lineage Am. Compl. ¶ 5; Primus Am. Compl. ¶ 11.)

[10] (Lineage Am. Compl. ¶¶ 27–29.)

[11] (Lineage Am. Compl. ¶ 7; Primus Am. Compl. ¶¶ 12–13.)

[12] (Lineage Am. Compl. ¶¶ 7, 30–31; Lineage Am. Compl. Ex. B Design/Build Subcontract [hereinafter "Republic Subcontract"], ECF No. 121.2.)

[13] On 25 July 2023, the parties entered into a stipulation representing that certain documents, attached as exhibits A-E to the stipulation, were the accurate and correct copies

8. National Union Fire Insurance Company of Pittsburgh, P.A. ("National Union") and Primus entered into a Commercial General Liability Policy (the "National Union Policy"), which lists Primus as the named insured and Lineage and Millard as additional insureds, and which provides a $1 million per occurrence limit of liability.[14] Lineage and Primus named National Union as a defendant in their original complaints, but all claims against it were subsequently dismissed pursuant to a settlement agreement, and it is no longer a party to this case.[15]

9. Travelers and Primus entered into an Umbrella/Excess Coverage Policy (the "Travelers-Primus Policy"), which lists Primus as the named insured and Lineage and Millard as additional insureds, and which provides a $20 million per occurrence and aggregate limit of liability.[16]

10. Hartford Fire Insurance Company ("Hartford") and Republic entered into a Commercial General Liability Policy (the "Hartford Policy"), which lists Republic as

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of the relevant insurance Policies, and consenting to the Court's consideration of the exhibits in its decision on the Motions. (*See generally* Parties' Joint Stipulation Relating Insurance Policies Issued by Travelers Property Casualty Company of America, The Hartford Fire Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and New Hampshire Insurance Company [hereinafter "Joint Stipulation"], ECF No. 153.) For example, the National Union Policy is Exhibit A to the stipulation. (*See* Joint Stipulation Ex. A, Policy No. GL 518-01-98 [hereinafter "National Union Policy"], ECF No. 153.1.)

[14] (Lineage Am. Compl. ¶ 6; Primus Am. Compl. ¶¶ 15–16.)

[15] (*See generally* Compl. [hereinafter "Lineage Original Compl."], ECF No. 3; Pl. Primus Builders Inc.'s Compl. [hereinafter "Primus Original Compl."], ECF No. 36; Voluntary Dismissal with Prejudice All Claims Made Against Def. National Union Fire Insurance Company of Pittsburgh, PA., ECF No. 104; Stipulation of Dismissal, ECF No. 105.)

[16] (*See* Joint Stipulation Ex. B, Policy No. ZUP-15S19150-19-NF [hereinafter "Travelers-Primus Policy"], ECF No. 153.2; Primus Am. Compl. ¶ 17; Lineage Am. Compl. ¶¶ 37–38.)

the named insured and Lineage and Primus as the additional insureds, and which provides a $1 million per occurrence limit of liability and $2 million aggregate limit of liability.[17] Lineage and Primus named Hartford as a defendant in their original complaints, but subsequently dismissed all claims against Hartford pursuant to a settlement agreement.[18] As a result, Hartford is also no longer a party to this case.

11. Travelers and Republic entered into an Umbrella/Excess Coverage Policy (the "Travelers-Republic Policy," together with the Travelers-Primus Policy, the "Travelers Policies"), which lists Republic as the named insured and Lineage and Primus as additional insureds, and which provides a $10 million per occurrence and aggregate limit of liability.[19]

2. The 10 January 2020 Incident

12. On 10 January 2020, two employees of Primus affiliate P3 Advantage, LLC—Anthony Lamattina ("Lamattina") and Carson Brandon Drawdy ("Drawdy")—

[17] (*See* Joint Stipulation Ex. D, Policy No. 83 UEN OD1146 [hereinafter "Hartford Policy"], ECF No. 153.4; Primus Am. Compl. ¶¶ 19, 21, 35; Lineage Am. Compl. ¶¶ 8–9.)

[18] (Lineage Original Compl.; Primus Original Compl.; Voluntary Dismissal with Prejudice All Claims Made Against Def. Hartford Fire Insurance Company, ECF No. 111; Notice of Voluntary Dismissal, ECF No. 112.)

[19] (*See* Joint Stipulation Ex. E, Policy No. ZUP-91M48318-20-NF [hereinafter "Travelers-Republic Policy"], ECF No. 153.5; Primus Am. Compl. ¶¶ 20, 30; Lineage Am. Compl. ¶ 8.) Primus erroneously identifies this Policy as a "Commercial General Liability Policy" in its Amended Complaint, (Primus Am. Compl. ¶ 20), when it is in fact an umbrella policy, (*see* Travelers-Republic Policy, at TRAV 00069). Also, Lineage mistakenly alleges that the Travelers-Republic Policy has a $20 million limit when it in fact provides a $10 million limit. (*Compare* Lineage Am. Compl. ¶ 43 *with* Travelers-Republic Policy, at TRAV 00069.)

were using a scissor lift to work on one of the blast cells at the Facility.[20] Lineage alleges that after Lamattina and Drawdy completed their initial task, a Republic employee requested that they remain on the lift and remove ice from an evaporator on one of the blast cells.[21] While removing the ice, Lamattina inadvertently punctured a coil containing liquid anhydrous ammonia, releasing nearly 1,000 pounds of ammonia into the Facility (the "Incident").[22] Lamattina was exposed to the ammonia and died at the scene. Drawdy was also exposed, but he was able to jump to the floor and escape the building. He was later hospitalized with significant injuries from the exposure.[23]

13. In addition to the human cost, the release of ammonia caused Lineage to incur massive cleanup and investigation costs, disruption to its business operations, and significant loss of products that were destroyed or rendered unusable because of the ammonia exposure.[24] Lineage and Primus allege that they have been named as defendants in numerous lawsuits related to the Incident, including a wrongful death action by Lamattina's estate and suits from customers seeking to recover for damage

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[20] (Lineage Am. Compl. ¶ 57; Primus Am. Compl. ¶¶ 22–26.) Primus's Amended Complaint does not identify Drawdy by name.

[21] (Lineage Am. Compl. ¶ 58.) Primus's Amended Complaint does not allege that a Republic employee requested Lamattina to remain on the scissor lift or remove ice. (Primus Am. Compl. ¶¶ 22–26.)

[22] (Lineage Am. Compl. ¶ 59; Primus Am. Compl. ¶ 22.)

[23] (Lineage Am. Compl. ¶ 60; Primus Am. Compl. ¶ 26.)

[24] (Lineage Am. Compl. ¶¶ 62–63.)

to property stored at the Facility (each an "Underlying Action").[25] Lineage and Primus also allege that they face claims from property owners who have not yet brought lawsuits.[26]

3. Plaintiffs' Efforts to Seek Coverage

i. Primus

14. Primus alleges that it has requested that Travelers agree to defend and indemnify Primus for all claims and consequent losses from the incident, but that Travelers has refused to indemnify Primus.[27]

ii. Lineage

15. On 13 January 2020, Lineage provided National Union and Travelers with a notice of claim on the National Union Policy and the Travelers-Primus Policy, and requested an acknowledgment that these insurers had a duty to defend and indemnify Lineage for claims and losses arising from the Incident.[28]

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[25] Each amended complaint identifies three pending lawsuits: *Stone ex rel. Estate of Anthony Lamattina v. Lineage Logistics, LLC*, Case No. 20-CVS-3109 (N.C. Super. Ct. 2020); *DFA Dairy Brands, LLC v. Primus Builders, Inc.*, Case No. 5:21-cv-00025-KDB-DSC (W.D.N.C. 2021); and *Equatorial Seafood, LLC v. Lineage Logistics, LLC*, Case No. 21-CVS-2360 (N.C. Super. Ct. 2021). (Lineage Am. Compl. ¶ 64; Primus Am. Compl. ¶ 27.) Primus's amended complaint also names a separate action brought by Lineage against Primus, *Lineage Logistics, LLC v. Primus Builders, Inc.,* Case No. 23-CVS-62 (N.C. Super. Ct. 2023). (Primus Am. Compl. ¶ 27.)

[26] (Lineage Am. Compl. ¶ 29; Primus Am. Compl. ¶ 33.)

[27] (Primus Am. Compl. ¶¶ 31, 36.)

[28] (Lineage Am. Compl. ¶ 68.)

16. Lineage alleges that Travelers has refused to accept its contractual duty to defend Lineage against claims or indemnify Lineage for losses arising from the Incident.[29]

17. On 28 December 2020, Lineage provided Hartford and Travelers with notices of claims under the Hartford Policy and the Travelers-Republic Policy and requested that these insurers acknowledge a duty to indemnify and defend Lineage as an additional insured for all claims and losses resulting from the Incident through these two Policies.[30] Lineage alleges that Travelers has declined to do so.[31]

B. Procedural Background

18. On 26 August 2021, Lineage filed its original complaint, asserting a single claim against National Union, Travelers, and Hartford for a declaratory judgment that Lineage is an additional insured under each Policy and is entitled to coverage up to the combined limits of liability under the Policies.[32]

19. The Court permitted Primus to intervene in this action on 29 November 2021, and Primus filed its original complaint the following day.[33] Although Primus had not made any claims against it, Hartford filed an answer to Primus's original

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[29] (Lineage Am. Compl. ¶ 70.)

[30] (Lineage Am. Compl. ¶ 69.)

[31] (Lineage Am. Compl. ¶ 70.)

[32] (Lineage Original Compl. ¶¶ 47–53.)

[33] (Order on Primus's Mot. Intervene as Pl., ECF No. 31; Primus Original Compl.)

complaint on 15 December 2021.[34] Later that same day, Primus filed an amended complaint ("Primus's Amended Complaint") adding claims against Hartford.[35]

20. Lineage filed an amended complaint and cross-claim on 5 January 2022, adding claims against Hartford, National Union, Primus, and Republic.[36]

21. On 1 September 2022, National Union and Plaintiffs reached a settlement agreement, under which National Union paid its full per occurrence limit, and Plaintiffs agreed to dismiss their claims against National Union (the "National Union Settlement").[37] A portion of the funds from this settlement went towards a concurrent settlement of one of the Underlying Actions.[38] The Travelers-Primus Policy is excess to the National Union Policy, and so after this settlement, Travelers agreed to defend Lineage and Primus under the Travelers-Primus Policy, but still refuses to indemnify them.[39]

22. Following the National Union Settlement, Hartford contacted Lineage to express interest in a similar settlement arrangement.[40] Lineage, Hartford, and

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[34] (Def. Hartford's Answer to Pl. Primus's Compl., ECF No. 41.)

[35] (Pl. Primus Builders, Inc.'s Am. Compl. [hereinafter "Primus First Am. Compl."], ECF No. 42.) Before Lineage filed its Amended Complaint, National Union and Travelers filed motions to dismiss or stay Primus's Original Complaint, (ECF Nos. 48, 50), which this Court declared moot by an order dated 19 January 2022, (ECF No. 60).

[36] (*See generally* Pl. Lineage Logistics LLC's First Am. Compl. and Cross Claim [hereinafter "Lineage First Am. Compl."], ECF No. 55.)

[37] (Lineage Am. Compl. ¶ 72.)

[38] (Lineage Am. Compl. ¶ 73.)

[39] (Lineage Am. Compl. ¶¶ 73–75; Primus Am. Compl. ¶¶ 36–37.)

[40] (Lineage Am. Compl. ¶ 76.)

Primus negotiated a settlement agreement during September and early October 2022, before reporting a settlement in principle to the Court on 6 October 2022.[41] However, after declining to engage in negotiations, Republic lodged a last-minute objection to the proposed settlement with Hartford, and suggested that the Hartford Policy should instead be saved to settle claims at a then-upcoming mediation of one of the Underlying Actions.[42] Lineage alleges that Republic knew that Lineage was entitled to recovery under the Hartford Policy, but pressured Hartford to pay up to its Policy limits in settlement of the Underlying Actions, rather than as part of a settlement agreement with Lineage.[43] Hartford ultimately exhausted its Policy limits at mediation, rather than through a settlement with Lineage.[44]

23. Because the Travelers-Republic Policy is excess to the Hartford Policy, Travelers agreed to defend Lineage and Primus subject to a reservation of rights after the exhaustion of the Hartford Policy, but refuses to indemnify them.[45]

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[41] (Lineage Am. Compl. ¶ 77.)

[42] (Lineage Am. Compl. ¶ 78.)

[43] (Lineage Am. Compl. ¶¶ 80–87.)

[44] (Lineage Am. Compl. ¶ 84.)

[45] (Lineage Am. Compl. ¶¶ 97, 103; Primus Am. Compl. ¶¶ 36–37.)

24. On 18 October 2022, the Court stayed this action at the parties' joint request to permit settlement talks to proceed.[46] This stay expired under its own terms on 19 December 2022.[47]

25. After the voluntary dismissal of National Union and Hartford from the action, Lineage and Primus sought and received unopposed leave to amend their complaints a second time, and filed new complaints on 24 and 28 February 2023, respectively.[48]

26. Under their respective operative complaints, Lineage and Primus seek declarations that they are covered as additional insureds under the Travelers Policies up to the full extent of their liability limits, and that they are entitled to a defense and to indemnification under those Policies.[49]

27. Lineage advances more claims than Primus. In addition to its declaratory judgment claim against Travelers, Lineage has also lodged claims for:

a) Breach of contract against Travelers;[50]

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[46] (*See* Order Staying Case, ECF No. 107.)

[47] (*See* Order Staying Case.)

[48] (Lineage Am. Compl.; Primus Am. Compl.)

[49] (Primus Prayer for Relief ¶¶ 1–3; Lineage Am. Compl. ¶¶ 104–10.) The paragraphs of each amended complaint's prayer for relief are numbered separately from the rest of the complaint, so the Court cites to the amended complaints and prayers for relief separately when necessary.

[50] (Lineage Am. Compl. ¶¶ 111–21.)

b) A declaratory judgment against Primus that Primus must defend and/or indemnify Lineage for losses sustained as a result of the Incident under the Lineage-Primus Contract;[51]

c) Breach of the Lineage-Primus Contract against Primus;[52]

d) A declaratory judgment that Republic must indemnify Lineage under the Republic Subcontract;[53]

e) Tortious interference with contract against Republic;[54] and

f) Breach of the Republic Subcontract against Republic.[55]

II.

LEGAL STANDARD

28. The Motions are brought under Rules 12(b)(1), 12(b)(6), and 12(b)(7). When considering a motion under Rule 12(b)(1), "the trial court may consider and weigh matters outside of the pleadings." *Yeager v. Yeager*, 228 N.C. App. 562, 566 (2013) (cleaned up).

29. In contrast, because "[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed," *White v. White*, 296 N.C. 661, 667 (1979), "[a]s a general proposition . . . matters outside the complaint

[51] (Lineage Am. Compl. ¶¶ 133–38.)

[52] (Lineage Am. Compl. ¶¶ 139–46.)

[53] (Lineage Am. Compl. ¶¶ 147–52.)

[54] (Lineage Am. Compl. ¶¶ 122–32.)

[55] (Lineage Am. Compl. ¶¶ 153–60.)

are not germane to a Rule 12(b)(6) motion." *Weaver v. Saint Joseph of the Pines, Inc.,* 187 N.C. App. 198, 203 (2007).

30. However, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant. *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266 (2019); *see, e.g.*, *Deluca v. River Bluff Holdings II, LLC*, 2015 NCBC LEXIS 12, at *8 (N.C. Super. Ct. Nov. 6, 2015) (under Rule 12(b)(6), "a trial court may properly consider a contract that is the subject matter of the complaint, even if the plaintiff did not attach it to the complaint").

31. Under Rule 12(b)(7), a necessary party must be joined to an action. *Strickland v. Hughes*, 273 N.C. 481, 485 (1968). A necessary party is any person or entity with a material interest in the subject matter of the controversy, and whose interests will be directly affected by an adjudication thereof. *Equitable Life Assur. Soc. of U.S. v. Basnight*, 234 N.C. 347, 352 (1951). Dismissal for failure to join a necessary party is proper only if the defect cannot be cured, and may not be with prejudice. *Lambert v. Town of Sylva*, 259 N.C. App. 294, 307 (2018).

32. Pursuant to the North Carolina Uniform Declaratory Judgment Act, N.C.G.S. §§ 1-253–67, (the "DJA"), courts have the authority to enter declaratory judgments as follows:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in

> form and effect; and such declarations shall have the force and effect of a final judgment or decree.

N.C.G.S. § 1-253.

33. "[T]o invoke the provisions of the [DJA] there must be a justiciable controversy between the parties," *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 328 N.C. 557, 559 (1991), and the "controversy must exist between the parties at the time the pleading requesting declaratory relief [was] filed." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584 (1986). "A justiciable issue . . . is real and present as opposed to imagined or fanciful." *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257 (1991) (cleaned up).

34. Thus, a trial court "has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise." *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287 (1964). To avoid dismissal, a plaintiff "must allege in his complaint that a real and justiciable controversy, arising out of opposing contentions as to respective legal rights and liabilities, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure." *Singleton v. Sunset Beach & Twin Lakes, Inc.*, 147 N.C. App. 736, 741 (2001). "When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by a Rule 12(b)(6) motion to dismiss." *Kirkman v. Kirkman*, 42 N.C. App. 173, 176 (1979).

35. Pursuant to N.C.G.S. § 1-254, this power to declare rights applies to written instruments:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

36. "[Section] 1-254 makes a declaratory judgment proceeding available where there is a dispute concerning contracts of any kind, [including] liability insurance policies." *Barnes v. Hardy*, 98 N.C. App. 381, 382 (1990). "A question concerning the liability of an insurance company under its policy is generally a proper subject for declaratory judgment, provided a genuine controversy exists between the parties." *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 100 (1988); *see also, e.g.*, *Nationwide*, 261 N.C. at 287 ("Generally, questions involving the liability of an insurance company under its policy are a proper subject for a declaratory judgment.").

III.

ANALYSIS

A. Travelers's Motion to Dismiss Lineage's Amended Complaint

1. Declaratory Judgment Claims

37. Lineage seeks a declaratory judgment that it is an additional insured under the Travelers Policies, and that Travelers has duties to defend and to indemnify it under those Policies. Travelers seeks to dismiss Lineage's declaratory judgment

claims under Rule 12(b)(1) and, in the alternative, under Rule 12(b)(7).[56] Because a moot or unripe case is unsuitable for judicial resolution, *In re Peoples*, 296 N.C. at 147 (mootness); *Fleischauer*, 258 N.C. App. at 232 (ripeness), the Court addresses these arguments first.

38. Travelers contends that the Court cannot grant the declaratory relief that Lineage seeks because Lineage's claims on the duty to defend are moot, and its claims

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[56] Although Travelers does not explicitly cite to Rule 12(b)(1) in support of its declaratory judgment arguments, it makes arguments on the doctrines of ripeness and mootness. (Def. Travelers Property Casualty Company America's Br. Supp. Mot. Dismiss Second Am. Compl. Lineage Logistics, LLC [Rule 12(b)(1), 12(b)(6), and 12(b)(7)] 13–21, [hereinafter "Travelers Br. Supp. Lineage"], ECF No. 133.)

Ripeness implicates the Court's subject matter jurisdiction under Rule 12(b)(1). *See Fleischhauer v. Town of Topsail Beach*, 258 N.C. App. 228, 232 (2018) (noting that ripeness is a matter of subject matter jurisdiction, properly raised under Rule 12(b)(1)).

Mootness is, strictly speaking, a doctrine based on "judicial restraint" rather than subject matter jurisdiction, *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 595 n.39 (2021), but it is generally applied in the same manner as subject matter jurisdiction doctrines. *See, e.g.*, *In re Peoples*, 296 N.C. 109, 147 (1978) (stating that mootness is a prudential doctrine but that moot cases "should" be dismissed); *Pearson v. Martin*, 319 N.C. 449, 451 (1987) (stating that a moot case "must" be dismissed). This approach contrasts with mootness doctrine in the federal courts, which is well-established to be a question of subject matter jurisdiction. *E.g.*, *Simmons v. United Mortg. and Loan Inv., LLC*, 634 F.3d 754, 762 (4th Cir. 2011).

The Court recognizes that some North Carolina Court of Appeals cases have framed mootness as a subject matter jurisdiction doctrine. *Yeager v. Yeager*, 228 N.C. App. 562, 565 (2013). However, the decisions of the Supreme Court of North Carolina govern to the extent that the Court of Appeals decisions are inconsistent.

But whether mootness is a matter of subject matter jurisdiction or merely a prudential doctrine, the result is the same here: because a moot case *at minimum* "should" be dismissed, *In re Peoples*, 296 N.C. at 147, the Court will consider Travelers's arguments under these doctrines before its other arguments. Travelers advances arguments under Rule 12(b)(7) as an alternative in the event the Court rejects its other contentions. (Travelers Br. Supp. Lineage 23.)

on the duty to indemnify are not ripe.[57] Lineage responds that Travelers's reservation of rights preserves the duty to defend issue for review, that North Carolina courts routinely issue declarations of coverage before the underlying case triggering coverage has been resolved, and that Travelers's litigation conduct in the Underlying Actions preserves Lineage's insured status claim for review.[58]

39. Actions seeking declarations of insurance coverage may be brought by insured and insurer alike. *W & J Rives, Inc. v. Kemper Ins. Grp.*, 92 N.C. App. 313, 320 (1988) ("Plaintiff[-insured] brought a declaratory judgment action to have the rights and relations between the insured and insurers clarified. This is quite proper under § 1-254."); *accord Alston v. ACE Am. Ins. Co.*, No. 1:20-cv-00090, 2020 WL 8084324, at *4 (D.N.D. Dec. 30, 2020) (collecting cases from multiple jurisdictions, including the United States Supreme Court, for the point that "insureds should have the same opportunity [as insurers] to seek declaration prior to the underlying action being resolved").

40. The general rule is that "[a]n insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings [while] its duty to pay is measured by the facts ultimately determined at trial." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC*, 364 N.C. 1, 6 (2010) (citation omitted).

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[57] (*See* Travelers Br. Supp. Lineage 13–21.)

[58] (Pl. Lineage Logistics, LLC's Opp'n Def. Travelers Property Casualty Company America's Mot. Dismiss [hereinafter "Lineage Br. Opp'n Travelers"] 18–25, ECF No. 143.)

41. North Carolina courts therefore separately analyze the duty to defend and the duty to indemnify to determine whether a declaratory judgment action seeking insurance coverage determination is a justiciable controversy. *See, e.g.*, *Durham City Bd. of Educ. v. Nat'l Union Fire Ins. Co.*, 109 N.C. App. 152, 157 (1993) (comparing underlying allegations to the insurance policy to determine whether insurer had a duty to defend in a declaratory judgment action); *accord Lafarge Can. Inc. v. Am. Home Assurance Co.*, No. 15-CV-8957 (RA), 2018 WL 1634135, at *4 (S.D.N.Y. Mar. 31, 2018) ("Courts often distinguish between the duty to defend and the duty to indemnify in determining whether each issue posed in a declaratory judgment action is ripe for adjudication, because the duties are usually triggered by different conditions." (cleaned up)). "Although the insurer's duty to defend an action is generally determined by the pleadings, facts learned from the insured and facts discoverable by reasonable investigation may also be considered." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638 (1990). In line with these principles, the Court examines each issue in turn.

a) Duty to Defend

42. Travelers has already agreed to defend Lineage under both Travelers Policies under a reservation of rights.[59] Lineage therefore effectively presents two sets of claims: one on Travelers's *present* obligations to defend, and another on its *future* obligations to continue to do so. Travelers argues that its agreement to defend

[59] (Travelers Br. Supp. Lineage Ex. A, ECF No. 133.2; Travelers Br. Supp. Lineage Ex. B, ECF No. 133.3.)

moots any declaratory judgment claim on its present obligations, and that Lineage's claims on its future obligations are not ripe.[60]

43. The Court begins with Travelers's present obligations. Neither party cites authority that the Court finds persuasive. Travelers argues that North Carolina courts have repeatedly discussed insurance cases that proceeded under reservations of rights without judicial objection. *E.g.*, *Fortune Ins. Co. v. Owens*, 351 N.C. 324 (2000). But *Fortune* and Travelers's other cases merely demonstrate the absence of a per se rule prohibiting a defense under a reservation of rights, such that the Court could effectively strike down Travelers's reservation here and force Travelers to proceed unconditionally. This point does *not* speak, however, to whether Lineage's claim is moot, as Travelers's cases contain no discussion of mootness or ripeness. *See generally id.*; *Shearin v. Globe Indem. Co.*, 267 N.C. 505 (1966); *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430 (1966).[61]

44. For its part, Lineage cites two non-binding cases to argue that an insurer's provision of a defense does not necessarily moot a duty to defend declaratory judgment claim. But these two cases arose in a different procedural posture. In both, the insurers sought a declaratory judgment that they were not bound to incur the

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[60] (Travelers Br. Supp. Lineage 13–15.)

[61] These cases' lack of discussion of mootness also does not demonstrate that duty to defend claims are inherently ripe even when a defense is being provided. Because mootness is not a matter of subject matter jurisdiction in North Carolina, the courts there were not under an independent obligation to consider mootness *sua sponte* on appeal. This approach is in contrast with the rules that govern the federal courts. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (noting that mootness destroys federal subject matter jurisdiction); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (stating that federal courts *must* raise subject matter jurisdiction issues *sua sponte*).

present and future costs of providing ongoing defenses the insurers believed were not legally required. *See Great W. Cas. Co. v. Packaging Corp. of Am.*, 444 F. Supp. 3d 664, 673 (M.D.N.C. 2020); *Landmark Am. Ins. Co. v. Rural Comm. Hosps. of Am., LLC*, No. 5:15-CV-390, 2015 WL 12860287, at *2 (E.D.N.C. Dec. 22, 2015). Thus, the insurers sought a *change* in the status quo, rather than to *preserve* the situation that already existed.

45. In contrast, Lineage requests that the Court order Travelers to *maintain* the status quo in perpetuity by continuing to provide what Lineage has already received. This argument clashes with a cornerstone of mootness doctrine: that a case is moot when the requesting party already has the relief it seeks. The Court cannot order Travelers to provide what it has already given. *See In re Peoples*, 296 N.C. at 147 ("[When] . . . it develops that the relief sought has been granted . . . the case should be dismissed[.]"); *cf. Chicora Country Club v. Town of Erwin*, 128 N.C. App. 101, 110, 112–13 (1997) (holding challenge to town ordinance moot when the town repealed the law during the litigation).

46. Next, Lineage argues that Travelers's reservation of rights permits Travelers to withdraw its defense at any time, which renders this claim ripe as it relates to Travelers's future obligations to continue defending Lineage.[62] But Travelers has not even attempted to withdraw its defense, and the possibility that a claim may become ripe sometime in the future does not revive it in the present. *See, e.g.*, *In re Washington Cnty. Sheriff's Off.*, 271 N.C. App. 204, 207–09 (2020) (reversing

[62] (Lineage Br. Opp'n Travelers 19–20.)

as not ripe an order contingent on a particular individual testifying in a hypothetical future case); *State v. Herrin*, 213 N.C. App. 68, 74–75 (2011) (holding an issue not ripe because it would arise only if a future sentence were imposed in a certain way); *State v. Coltrane*, 188 N.C. App. 498, 508 (2008) (holding an issue not ripe because it would arise, if at all, only if the Supreme Court of North Carolina issued a particular ruling).[63]

47. In sum, Lineage's duty to defend claim is moot insofar as it asks the Court to order Travelers to deliver a defense which Travelers has already agreed to provide. Similarly, Lineage's claim is not ripe insofar as it seeks to effectively enjoin Travelers from withdrawing from the defense at some hypothetical point in the future. The Court will therefore grant the Motion insofar as it seeks dismissal of Lineage's duty to defend declaratory judgment claim. However, recognizing that this issue may become ripe in the future should Travelers actually attempt to withdraw from its defense, this dismissal is without prejudice.[64]

b) Duty to Indemnify

48. Lineage seeks declaratory relief on two indemnification issues: that the Travelers Policies apply up to their full limits to Lineage for its claimed damages, and

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[63] *See also Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur . . . at all." (cleaned up)); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979) (noting that a party must possess a "credible threat of prosecution" to challenge a criminal statute on constitutional grounds).

[64] As discussed throughout this Order and Opinion, the Court dismisses several claims without prejudice. The Court emphasizes that it expresses no view or comment on the merits of any future claims or suits.

that Travelers has a duty to indemnify Lineage for the customer claims that Lineage has already paid to third parties.[65]

i. Coverage

49. A declaratory judgment on Lineage's coverage and right to indemnity under the Travelers Policies is premature.

50. The Supreme Court of North Carolina has reasoned that the duty to indemnify cannot be determined before the underlying litigation has concluded. *See Buzz Off*, 364 N.C. at 7 ("[I]n determining whether an insurer has a duty to indemnify, the facts *as determined at trial* are compared to the language of the insurance policy." (emphasis added)); *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 (1986) ("[An insurer's] duty to pay is measured by the facts *ultimately determined at trial*." (emphasis added)). "If the insurance policy provides coverage for the facts *as found by the trier of fact*, then the insurer has a duty to indemnify." *Buzz Off*, 364 N.C. at 7 (emphasis added).

51. *Buzz Off* and *Peerless* therefore require courts to compare an insurance policy against facts ultimately found by a jury or judge at trial. A court cannot do so before the trier of fact makes those findings in resolving the underlying litigation. *See also N.C. Farm Bureau Ins. Co. v. Cox*, 263 N.C. App. 424, 440 (2019) ("[R]eview of the duty to indemnify is appropriate *after* the facts have been determined at trial." (emphasis in original)); *City of Hickory v. Grimes*, No. COA17-441, 2018 WL 2642125, at *6 (N.C. Ct. App. June 5, 2018) ("[B]ecause the facts of the underlying case have

[65] (Lineage Prayer for Relief ¶¶ 2, 7.)

not been determined, we cannot reach [insurer's] duty to indemnify the City of Hickory."). This solid bloc of appellate authority demonstrates that the duty to indemnify depends on factfinding and so, ordinarily, a court cannot adjudicate such a claim before that process occurs.[66]

52. Lineage cites two cases for the proposition that a declaratory judgment before the resolution of the underlying litigation is appropriate, even on the duty to indemnify: *Smith v. Nationwide Mut. Ins. Co.*, 97 N.C. App. 363, 366–67 (1990), *rev'd on other grounds*, 328 N.C. 139 (1991), and *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287–88 (1964).[67] However, each case dealt with a pure question of law. In *Smith*, the insured sought a declaratory judgment that the language of two policies permitted their limits to be combined, *Smith*, 97 N.C. App. at 365, while *Roberts* examined whether an insurance contract issued under North Carolina's mandatory motor insurance statute covered intentional torts, *see generally Roberts*, 261 N.C. 285. Each case resolved a pure question of law, interwoven with statutory interpretation. *See id.* at 290–91 (examining the legal question of whether a given insurance

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[66] Moreover, this is a widely accepted cornerstone of insurance coverage law. *See, e.g.*, *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 305 (Tenn. 2007) ("[T]he duty to indemnify is based upon the facts *found by the trier of fact*." (emphasis added)); *Skinner v. Allstate Ins. Co.*, 127 P.3d 359, 363 (Mont. 2005) (to similar effect); *Constitution Assocs. v. N.H. Ins. Co.*, 930 P.2d 556, 563–64 (Colo. 1996) (same); *Eighth Floor Promotions, LLC v. Cincinnati Ins. Cos.*, 71 N.E.3d 1262, 1272 (Ohio Ct. App. 2016) (same); *Selective Way Ins. Co. v. Hosp. Grp. Servs., Inc.*, 119 A.3d 1035, 1046 (Pa. Super. Ct. 2015) (same); *Am. States Ins. Co. v. Herman C. Kempker Const. Co., Inc.*, 71 S.W.3d 232, 239 (Mo. Ct. App. 2002) (same); *Weber v. St. Paul Fire & Marine Ins. Co.*, 622 N.E.2d 66, 68 (Ill. App. Ct. 1993) ("[T]he duty to indemnify will not be defined until adjudication of the [underlying action].").

[67] (Lineage Br. Opp'n Travelers 21–23.)

provision contravened a particular statute); *Smith*, 97 N.C. App. at 368 (discussing the legal question of combining policies under a particular statute and public policy).

53. These cases therefore represent a narrow exception to the broad and otherwise governing principle that a declaratory judgment claim on an insurer's duty to indemnify is premature if brought before a determination of the underlying facts. *See, e.g.*, *Buzz Off*, 364 N.C. at 7. Indeed, one of the very cases on which Lineage relies in its duty to defend arguments[68] illustrates the critical distinction: "North Carolina law dictates that an insurer's duty to indemnify cannot be determined until the conclusion of the case, *if necessary facts remain in dispute*." *Great W. Cas. Co.*, 444 F. Supp. 3d at 674 (citing *Buzz Off*, 364 N.C. at 7) (emphasis added).

54. But Lineage's claim does not fit within this tight exception. It does not seek a declaration that, for example, a given insurance term is void as contrary to statute or public policy. Instead, Lineage requests a judgment declaring that it is entitled to indemnification whatever the outcome of the Underlying Actions.[69] But Travelers's duty to indemnify depends on the outcome of the Underlying Actions, with all the other factual issues that this umbrella question encompasses. The Court cannot rule on Lineage's entitlement to future indemnification without prematurely deciding a

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[68] (Lineage Br. Supp. Travelers 19–20.)

[69] (*See* Lineage Am. Compl. ¶ 110, Prayer for Relief ¶ 7 (requesting declaratory judgment that it is entitled to coverage and indemnification without any qualification or limitation).)

cascade of unresolved factual issues on various parties' liabilities.[70] This claim therefore is not ripe for decision.

ii. Customer Claims

55. Lineage also requests a declaratory judgment that Travelers owes it indemnification for the approximately $3.3 million in customer claims which Lineage has already paid to its third party customers.

56. The parties' disagreement on this issue revolves around the meaning of the phrase "legally obligated to pay," which appears in all four Policies, but which is not defined.[71]

57. In *Lida Mfg. Co. v. U.S. Fire Ins. Co.*, 116 N.C. App. 592 (1994), the North Carolina Court of Appeals stated that when an insurance policy does not define the phrase, a third party is "legally entitled to recover" from an insured when the third party has a cause of action against the insured and a remedy by which to reduce the right to damages to judgment. *Id.* at 595.

58. This Court has subsequently applied this reasoning to the inverse formulation of whether an insured was "legally obligated to pay . . . damages" to a third party. *AP Atl., Inc. v. Crescent Univ. City Venture, LLC*, 2017 NCBC LEXIS 59, at *13–15 (N.C. Super. Ct. July 13, 2017). In *AP Atlantic*, this Court held that a

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[70] The Court emphasizes that nothing in this Order and Opinion is a comment on whether any party is, will be, or should be found liable for any of the underlying events.

[71] (*See* National Union Policy, at NATIONAL UNION 000010; Travelers-Primus Policy, at TRAV 00012; Hartford Policy, at HARTFORD 000028; Travelers-Republic Policy, at TRAV 00079; Lineage Am. Compl. ¶¶ 36, 38, 42, 44; Travelers Br. Supp. Lineage 15–17; Lineage Br. Opp'n Travelers 10–13.)

plaintiff-insured had failed to allege its legal obligation to pay damages when its complaint did not allege that any third party had a *legal claim* against the plaintiff. *See id.* at *15–16. Specifically, the plaintiff-insured alleged merely that it was obligated to repair the collapsed floor of its housing complex because the situation created "life-safety consequences." *Id.* at *15.

59. As alleged in the *AP Atlantic* complaint, the plaintiff-insured took action as a prophylactic measure against possible future litigation or out of a feeling of moral obligation to third parties, rather than because it had actually incurred any tort or contract liabilities. *See id.* at *15–16. This absence doomed the plaintiff-insured's argument that it was "legally obligated" to pay damages. *See id.* Finally, *AP Atlantic* also observed, citing *Lida*, that third parties need not actually *assert* their claims to make an insured "legally obligated" to pay damages. *See id.* at *13–14. The mere existence of potential claims sufficed. *Id.*

60. In stark contrast to the facts alleged in *AP Atlantic*, here Lineage's amended complaint states, and the Court must accept as true at the Rule 12 stage, that Lineage was contractually obligated to pay or recover approximately $3.3 million in claims to various customers.[72] While no third party has obtained a judgment or litigated claims against it, Lineage has adequately alleged the existence of liabilities to third parties, and thus its legal obligation to pay damages under *Lida* and *AP Atlantic*.

61. But this conclusion is not the end of the analysis. The Travelers Policies impose an additional caveat upon the key phrase, to limit coverage to damages

[72] (Lineage Am. Compl. ¶ 63.)

Lineage is legally obligated to pay *as a result of the acts or omissions of Primus and/or Republic*.[73] Thus, while Lineage sufficiently alleges its legal obligation to pay damages, it fails to allege a determination that such liabilities resulted from the conduct of Primus and/or Republic, because most of the Underlying Actions are ongoing. Lineage's requested relief on its customer claims is therefore premature for the same reasons as is its coverage claim. A ruling on Travelers's duty to indemnify would require the Court to peer into the future to divine whether and to what extent a future factfinder might find Primus and/or Republic liable. This claim therefore is also not ripe for decision.

62. The Court will therefore grant the Motion insofar as it seeks dismissal of Lineage's duty to indemnify claims. But recognizing that factual developments in the Underlying Actions may eventually render these issues ripe, the Court does so without prejudice.

c) Insured Status

63. Lineage seeks a declaratory judgment that it enjoys additional insured status under the Travelers Policies,[74] but Travelers has already recognized Lineage

[73] The National Union Policy states that it covers Lineage *only* for Primus's acts or omissions, and the Travelers-Primus Policy incorporates that term. (*See* National Union Policy, at NATIONAL UNION 000028; Travelers-Primus Policy, at TRAV 000012.) The Hartford and Travelers-Republic Policies include materially identical provisions that limit the Policies to cover Lineage only for Republic's acts or omissions. (*See* Hartford Policy, at HARTFORD 000056; Travelers-Republic Policy, at TRAV 00079.)

[74] (Lineage Am. Compl. ¶ 110.)

as an additional insured under both Policies.[75] This claim is therefore moot for the same reasons as Lineage's duty to defend claim on Travelers's present obligations: it seeks relief which Lineage already possesses.

64. Lineage also argues that Travelers's reservation of rights and assertion of potential future limitations on Lineage's insured status renders its declaratory judgment claim ripe, insofar as it seeks a declaration on Travelers's future obligations in the event of certain contingencies.[76] But, again, these possible future scenarios are dependent on as-yet unresolved factual determinations in the Underlying Actions. They do not render this claim ripe, for the same reasons Lineage's duty to defend claim on Travelers's future obligations, and its duty to indemnify claim, are not ripe as discussed above.

65. Lineage further argues that this claim is ripe because National Union and Hartford paid out on their Policies but Travelers refuses to do so, and because Travelers participated in the settlement of one of the Underlying Actions.[77] But neither event legally binds Travelers such that this Court could issue a declaratory judgment on the duty to defend, duty to indemnify, or Lineage's status, for two reasons.

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[75] (Travelers Br. Supp. Lineage Ex. A, ECF No. 133.2; Travelers Br. Supp. Lineage Ex. B, ECF No. 133.3.)

[76] (*See* Lineage Br. Opp'n Travelers 23–24.)

[77] (Lineage Br. Opp'n Travelers 23–25.)

66. First, that National Union and Hartford elected to settle and pay out their Policy limits to Lineage is irrelevant to Travelers's obligations. Primary and excess insurers are independent and are free to make differing assessments of liability and coverage. *See, e.g.*, *Daileader v. Certain Underwriters at Lloyd's London – Syndicate 1861*, 22 Civ. 5408, 2023 WL 3026597, at *14 (S.D.N.Y. Apr. 20, 2023); *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 871 N.E.2d 418, 426–27 (Mass. 2007) (rejecting argument that excess insurers are bound by primary insurers' decisions on coverage, liability, and settlement); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1058–60 (Ind. 2001) (rejecting primary insurer's argument that excess insurer was bound by primary insurer's understanding of a policy); *R.T. Vanderbilt Co., Inc. v. Hartford Accident and Indem. Co.*, 156 A.3d 539, 602–03 (Conn. App. Ct. 2017).[78]

67. Second, Travelers's participation in the settlement of one of the Underlying Actions does not bind Travelers now, because Travelers settled under an express reservation that its participation and ultimate decision to settle would be without any precedential value in any other matter.[79]

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[78] In addition to these express holdings, some courts have recognized causes of action that Lineage's premise would render incoherent. *See, e.g.*, *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 268 (Tex. 2021) (recognizing that "an excess carrier may sue a primary carrier that negligently settles for more than policy limits"); *Metro. Prop. and Cas. Ins. Co. v. GEICO Gen. Ins. Co.*, 130 N.Y.S.3d 847, 849 (N.Y. App. Div. 2020) (recognizing that an excess insurer may sue a primary insurer for settling an underlying case in bad faith).

[79] (Lineage Am. Compl. Ex. D, ECF No. 121.4.)

68. In sum, Lineage's present insured status claim is moot. Correspondingly, Lineage's effort to prospectively bind Travelers not to retract its recognition of Lineage's status is not ripe, for the same reasons as the future-facing portion of Lineage's duty to defend claim. The Court therefore grants Travelers's Motion insofar as it seeks dismissal of Lineage's insured status claim, without prejudice.

2. Breach of Contract Claim

69. Lineage also lodges a breach of contract claim against Travelers, which Travelers seeks to dismiss under Rule 12(b)(6).[80]

70. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of the contract." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 276 (2019) (cleaned up).

71. Lineage asserts that Travelers has breached its contractual duties to defend and to indemnify under the Travelers Policies. The Court's discussion therefore parallels its examination of Lineage's declaratory judgment claims on these issues.

72. As an initial matter, Lineage's amended complaint asserts its claim, in part, on Travelers's refusal to defend Lineage in the Underlying Actions.[81] But Travelers began defending Lineage in the Underlying Actions under both Travelers Policies *after* the filing of the operative complaint[82] and, in apparent recognition that this

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[80] (Lineage Am. Compl. ¶¶ 113–21; Travelers Br. Supp. Lineage 21–22.)

[81] (Lineage Am. Compl. ¶¶ 119–20.)

[82] (*See* Lineage Am. Compl. (24 February 2023); Travelers Br. Supp. Lineage Ex. B (10 April 2023).)

development defeats its claim on this issue, Lineage advances no argument on the duty to defend in its brief.[83] The Court therefore deems this argument waived, *see Vanguard Pai Lung, LLC v. Moody*, 2023 NCBC LEXIS 84, at *16 n.2 (N.C. Super. Ct. June 27, 2023), and proceeds to the claim insofar as it rests upon Travelers's alleged indemnification obligations.

73. The Court concludes that Lineage's breach of contract claim predicated on Travelers's alleged failure to indemnify does not survive Travelers's Motion. As discussed above with reference to Lineage's declaratory judgment claims, Lineage has adequately alleged that it is "legally obligated to pay damages" under the Travelers Policies. However, Lineage must also allege a determination that such obligations arose because of the actions or omissions of Primus and/or Republic. But no such factual determination has been alleged, and so Travelers by definition cannot have breached this contract term unless and until Primus and/or Republic are found to have caused the events that created Lineage's customer liabilities.

74. The Court will therefore grant Traveler's motion on Lineage's breach of contract claim. But recognizing that, as with Lineage's declaratory judgment claims, future events in the Underlying Actions and Travelers's responses might render these claims ripe and constitute contractual breaches, the Court dismisses these claims without prejudice.

[83] (*See* Lineage Br. Supp. Travelers 9–18.)

75. Because the Court concludes that Travelers's arguments on mootness and ripeness defeat all of Lineage's claims at this stage, the Court need not consider Travelers's Rule 12(b)(7) arguments.

B. Travelers's Motion to Dismiss Primus's Amended Complaint

76. Primus's claims against Travelers largely parallel Lineage's: Primus seeks a declaratory judgment that Travelers owes it the duties of defense and indemnification, and that Primus is an additional insured under the Travelers-Republic Policy.[84]

1. Duty to Defend

77. Primus is currently defending two Underlying Actions: (1) the same *Lamattina* wrongful death suit which Lineage is defending, and (2) an action by Lineage for damages arising from the Incident ("Lineage II").[85] Travelers argues that a claim for defense in each suit is moot.[86]

78. First, Travelers is already defending Primus in Lineage II, and so the Court finds Primus's arguments and authority that this claim is ripe unpersuasive, for the same reasons discussed above with reference to Lineage's claims. In each of the cases on which Primus relies for its support, the plaintiff sought a declaratory judgment that would have *altered* the status quo. *See Liberty Mut. Fire Ins. Co. v. Sutton*, No.

[84] (Primus Am. Compl. ¶¶ 39–47.)

[85] (Primus Am. Compl. ¶ 27.)

[86] (Def. Travelers Property Casualty Company of America's Br. Supp. Mot. Dismiss Second Am. Compl. of Primus Builders, Inc. and P3 Advantage, Inc. [Rule 12(b)(1), 12(b)(6), and 12(b)(7)] 13–14 [hereinafter "Travelers Br. Supp. Primus"], ECF No. 137.)

21-1277, 2022 WL 11112589, at *1 (4th Cir. Oct. 19, 2022) (insurer sought declaratory judgment that it had no duty to defend *after* agreeing to provide a defense); *Gov. Emps. Ins. Co. v. Loyal*, 629 F. Supp. 3d 343, 345 (M.D.N.C. 2022) (insurer sought declaratory judgment that it could withdraw its defense); *Voyager Indem. Ins. Co. v. Gifford*, No. 1:21-cv-00242, 2022 WL 4798306, at *1 (W.D.N.C. Oct. 1, 2022) (seeking declaratory judgment that insurer could "withdraw its defense of [insured]"); *see generally Estate of Bridges ex rel. Wright v. N.C. Farm Bureau Ins. Co., Inc.*, No. COA12-566, 2013 WL 432601 (N.C. Ct. App. Feb. 5, 2013) (discussing a plaintiff-insured's declaratory judgment claim on its entitlement to a defense when the insurer refused to provide one).[87]

79. Second, the parties agree that Primus is currently receiving a defense in the underlying *Lamattina* wrongful death suit from another insurer ("NHIC"), which is not a party to this action.[88] The parties have jointly acknowledged this development in prior filings[89] of which the Court can take judicial notice. *State ex rel. Expert Discovery, LLC v. AT&T Corp.*, 287 N.C. App. 75, 85 (2022) (noting that courts may

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[87] The Court recognizes that *N.C. Farm Bureau Ins. Co., Inc. v. Hague*, 283 N.C. App. 215 (2022), could conceivably be read to support Primus's position. However, *Hague* does not state whether the insurer was already defending the insured when it sought a declaratory judgment, and thus whether the plaintiff-insurer sought a change in the status quo or not. *See generally id.* *Hague* therefore does not carry the interpretative weight Primus suggests, because its effect on whether Primus's claim is moot is unclear. Another of Primus's cases, *Connelly v. Prudential Ins. Co.*, 610 F.2d 1215 (4th Cir. 1979), suffers from the same ambiguity, and in addition was a diversity action "governed by Virginia law[.]" *Id.* at 1216. The Court therefore finds this case similarly unpersuasive.

[88] (Mem. Law Resp. Def. Travelers Property Casualty Company of America's Mot. Dismiss 4 [hereinafter "Primus Br. Opp'n Travelers"], ECF No. 142; Travelers Br. Supp. Primus 2–3.)

[89] (*See* Joint Status Report ¶ 19, ECF No. 108.)

take judicial notice even at the Rule 12 phase); *In re Byrd*, 72 N.C. App. 277, 279 (1985) ("[A] court may take judicial notice of earlier proceedings in the same cause.").

80. Travelers has no duty to defend Primus if any other insurer has a duty to defend,[90] and Primus concedes in its brief that Travelers does not *currently* have a duty to defend Primus in this Underlying Action.[91] Thus, Primus asks the Court to gaze into the future to determine whether Travelers would have a duty to defend if the NHIC policy is exhausted or if NHIC withdraws its defense. This is a purely hypothetical question, reliant on assumptions on future events, on which declaratory judgment is inappropriate.

81. Primus also argues that accepting Travelers's arguments would thwart the purposes of the DJA by, in practice, permitting only insurers to bring declaratory judgment claims absolving them of their duty to defend.[92] But this argument ignores the key distinction outlined above in discussion of Lineage's parallel claims: an insured remains free to bring a declaratory judgment claim against an insurer which refuses to defend. *See, e.g.*, *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 668–72 (3d Cir. 2016) (affirming grant of summary judgment to insured on declaratory judgment claim after noting that, because the insurer refused to defend the insured, the order upholding entitlement to a defense was effectively an injunction ordering insurer to provide one); *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1,

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[90] (Travelers-Primus Policy, at TRAV 00014–00015.)

[91] (Primus Br. Opp'n Primus 8 n.6.)

[92] (*See* Primus Br. Opp'n Travelers 10–11.)

3, 12 (2000) (affirming grant of declaratory relief to plaintiff-insured on the duty to defend when insurer refused to provide a defense).

82. The Court will therefore grant Travelers's Motion insofar as it seeks dismissal of Primus's claims on the duty to defend. But, as with Lineage's claims, the Court recognizes that future events may eventually render this claim ripe. The dismissal is therefore without prejudice.

2. Duty to Indemnify

83. Primus also seeks a declaratory judgment that Travelers has a duty to indemnify it for its losses in two Underlying Actions.[93]

84. The Court concludes that this issue is not ripe for the same reasons as Lineage's parallel claims. Declaratory relief on the duty to indemnify is improper while the Underlying Actions are proceeding, and before their facts are determined by a factfinder or admitted in a settlement. *See, e.g.*, *Buzz Off*, 364 N.C. at 7.

85. Primus cites several cases in which North Carolina courts permitted declaratory judgment actions on the duty to indemnify to proceed prior to a verdict in the underlying suits,[94] but these cases collide with the principle discussed above with reference to Lineage's claims: each of Primus's cases involved only questions of law, not unresolved questions of fact.

86. In *Metro. Prop. & Cas. Ins. Co. v. Caviness*, 124 N.C. App. 760 (1996), the insurer was undisputedly responsible for damages, and the question was instead

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[93] (Primus Am. Compl. ¶¶ 36, 43, 45, 47.)

[94] (Primus Br. Opp'n Travelers 12, 12 n.7.)

whether the relevant policy and a statute together established a maximum liability. *See id.* at 761–63. As put by Travelers in its brief, the question was "how much," as a matter of statutory interpretation, not "whose fault."[95] Indeed, the Court of Appeals there announced its disposition of the case "as a matter of law." *Id.* at 765. The court's analysis resolved a pure question of law, and so it is inapposite to this action, in which Primus seeks a declaratory judgment that would circumvent future factual determinations.

87. The same is true of *Lunsford v. Mills*, 367 N.C. 618 (2014), which involved statutory interpretation of this state's underinsured motorist statutes. *See id.* at 619–22, 623–29 (posing question as a matter of statutory interpretation, and conducting detailed analysis of the pertinent statute). Further, *W & J Rives, Inc.*, 92 N.C. App. 313, another case relied upon by Primus, dealt with the duty to defend, not the duty to indemnify. *See id.* at 317–20 (discussing only the duty to defend). Primus also cites *Smith*, which the Court has addressed above with reference to Lineage's claims.

88. The Court will therefore grant Travelers's Motion insofar as it seeks dismissal of Primus's claims on the duty to indemnify. But again recognizing that future developments may eventually make this claim ripe, dismissal is without prejudice.

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[95] Def. Travelers Property Casualty Company of America's Reply Br. Supp. Mot. Dismiss Second Am. Compl. Primus Builders, Inc., and P3 Advantage, Inc. [Rule 12(b)(1), 12(b)(6), and 12(b)(7)] 6 [hereinafter "Travelers Br. Reply Primus"], ECF No. 148.)

3. Insured Status

89. Primus's claim for a declaratory judgment on its additional insured status under the Travelers-Republic Policy can be dealt with summarily.[96] Travelers has recognized Primus's additional insured status under this Policy.[97] And Primus is an additional insured under this Policy only for liability caused by the actions or omissions of Republic.[98] For the reasons discussed above with reference to Lineage's insured status claim, this claim is therefore moot insofar as it seeks declaratory judgment on Travelers's present obligations, and not ripe insofar as it seeks relief on Traveler's future obligations.

90. In sum, the Court will grant the Travelers-Primus Motion and dismiss Primus's claims against Travelers without prejudice.

C. Republic's Motion to Dismiss Lineage's Amended Complaint

91. Lineage pursues three claims against Republic: that Republic tortiously interfered with Lineage's Policy contract with Hartford;[99] for a declaratory judgment that Republic owes Lineage indemnification under the Republic Subcontract;[100] and that Republic's failure to provide indemnification constitutes a breach of the Republic

[96] (Primus Prayer for Relief ¶ 1.)

[97] (Travelers Br. Supp. Primus Ex. A, at 2–3, ECF No. 137.2.)

[98] (*See* Hartford Policy, at HARTFORD 000056; Travelers-Republic Policy, at TRAV 00079.)

[99] (Lineage Am. Compl. ¶¶ 122–32.)

[100] (Lineage Am. Compl. ¶¶ 133–38.)

Subcontract.[101] Republic has moved to dismiss all three claims under Rule 12(b)(6).[102]

1. Indemnification Claims

92. Republic argues that both of Lineage's claims related to the Republic Subcontract's indemnification clause, for breach of contract and for declaratory judgment, should be dismissed.[103] Republic argues first that these claims must be dismissed as premature, and that the Republic Subcontract's indemnification provision is void as against public policy.[104] Because Republic advances expressly identical arguments on these two claims,[105] the Court can resolve the Motion on both claims in its discussion of the breach of contract claim.

a) Ripeness

93. Republic argues that the Republic Subcontract conditions Republic's indemnity obligations on a factual determination that Republic was responsible for any claims or losses for which Lineage seeks indemnification.[106] Republic thus

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[101] (Lineage Am. Compl. ¶¶ 153–60.)

[102] (Republic Refrigeration, Inc.'s Br. Supp. Mot. Dismiss Pl. Lineage Logistics, LLC's Second Am. Compl. Pursuant Rule 12(b)(6) 1 [hereinafter "Republic Br. Supp. Lineage"], ECF No. 138.)

[103] (*See generally* Republic Br. Supp. Lineage.)

[104] (*See* Republic Br. Supp. Lineage 7–11.)

[105] (*See* Republic Br. Supp. Lineage 11 (incorporating by reference arguments made on breach of contract claim).)

[106] (Republic Br. Supp. Lineage 10–11.)

argues that because no such determination has been made in the Underlying Actions, any claim on its indemnity obligations is premature.[107]

94. However, the clause at issue states that Republic's obligations activate in response to "any such claims . . . caused in whole or part by any act or omission, *or alleged act or omission*, of [Republic], anyone directly or indirectly employed by [Republic], or anyone for whose acts [Republic] may be liable[.]"[108] Crucially, Lineage's amended complaint contains detailed allegations that Republic and its employees were responsible for the Incident.[109] Republic is therefore presented with a complaint that its "alleged act[s] or omission[s]"[110] caused the Incident and thus gave rise to Lineage's various losses and costs. Lineage has therefore sufficiently alleged that Republic's indemnification obligations are ripe, and the Court rejects Republic's arguments to the contrary.

b) Public Policy

95. Republic also contends that the Republic Subcontract's indemnity clause is contrary to public policy as expressed by N.C.G.S. § 22B-1 and therefore void.[111]

96. Section 22B-1 states that "provisions in . . . a construction agreement . . . purporting to require a promisor to indemnify or hold harmless the

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[107] (Republic Br. Supp. Lineage 10–11.)

[108] (Republic Subcontract 6–7 (emphasis added).)

[109] (Lineage Am. Compl. ¶¶ 48–58.)

[110] (Republic Subcontract 6–7.)

[111] (Republic Br. Supp. Lineage 7–11.)

promisee . . . against liability for damages arising out of . . . the negligence, in whole or in part, of the promisee . . . is against public policy, void, and unenforceable." *Id.* In other words, a party to a construction contract cannot promise to indemnify a second party for damages caused by the second party's own negligence.

97. This Court may excise language from a contract that violates a statute or public policy, *see Jackson v. Associated Scaffolders and Equip. Co., Inc.*, 152 N.C. App. 687, 691 (2002), and turns to the language of the indemnification provision with this principle in mind.

98. Given Lineage's status as the plaintiff seeking indemnification, the language of the provision would violate section 22B-1 only if the clause, or a part of it, requires Republic to indemnify Lineage for Lineage's own acts. But only two discrete portions of the clause could even potentially be read to raise this possibility.

99. First, the phrase "regardless of whether any such claims, losses, liabilities or expenses are caused in part by a party indemnified hereunder" clearly permits a party to pursue and enforce indemnification for its own negligence, and therefore plainly violates section 22B-1.

100. Second, the last few words of the clause could, conceivably, be read to cover Lineage's acts or omissions. The clause ends with the phrase "resulting from the performance of this Subcontract and/or the Work."[112] The "Work" is defined in the Subcontract to refer to all the obligations contained in Schedule A, which in turn sets

[112] (Republic Subcontract 11.)

out in detail the parties' respective responsibilities on the worksite.[113] The vast majority of Schedule A establishes obligations for Primus and Republic, but a few relate to Lineage, such as the requirement that Republic comply with Lineage's site specifications and safety requirements.[114] The phrase "and/or the Work" could therefore potentially be read to apply to actions or omissions of Lineage.

101. But having concluded that the indemnity clause violates section 22B-1 in at least one way, the Court agrees with Lineage that the troublesome phrases are easily severable from the rest of the clause.[115] If a contract provision is valid after the removal of an illegal portion, that provision is enforceable. *Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315 (1989).

102. The Court concludes that *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66 (2007), controls on this issue. In *Vecellio*, the Court of Appeals examined a very similar indemnity clause, which provided for indemnification "regardless of whether or not such [claim] is caused in part by a party indemnified hereunder." *Id.* at 72–73. The court there determined that simply removing this "offending phrase" would render the rest of the indemnity provision enforceable, and placed special weight on the provision's severability clause, which

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[113] (Republic Subcontract 1, 12–16.)

[114] (Republic Subcontract 13.)

[115] (Pl. Lineage Logistics, LLC's Opp'n Def. Republic Refrigeration, Inc.'s Mot. Dismiss 8–13 [hereinafter "Lineage Br. Opp'n Republic"], ECF No. 144.)

provided for enforcement only "[t]o the fullest extent permitted by law[.]" *Id.* at 72; *see also Int'l Paper Co.*, 96 N.C. App. at 315–16 (to similar effect).

103. The indemnity clause here aligns neatly with the provision that *Vecellio* held enforceable-as-severed. Here, as there, the indemnity section includes a severability clause providing for enforcement only "to the fullest extent permitted by law[.]"[116] This limiting clause reflects an intent to confine the application of the indemnity provision to lawful circumstances, including by altering the clause if necessary. Furthermore, the Court concludes, as did the *Vecellio* court, that the "offending" phrases are easily removed without rewriting the contract. *See Vecellio & Grogan*, 183 N.C. App. at 72–73. The only portions that must be removed to render the provision enforceable are the phrase "regardless of whether any such claims, losses, liabilities, or expenses are caused in part by a party indemnified hereunder," which clearly contravenes section 22B-1, and the phrase "and/or the Work," which encompasses some acts by Lineage and thus *might* be read to require indemnification for those acts.

104. Without these phrases, the indemnification provision reads sensibly and naturally:

> [Republic] shall, to the fullest extent permitted by law and to the extent that any such [claims or losses] are caused . . . by any act or omission, or alleged act or omission, of [Republic], anyone directly or indirectly employed by [Republic] [,] or anyone for whose acts [Republic] may be liable, [indemnify] each and all of the indemnitees . . . against any and

[116] (Republic Subcontract 6.)

> all [claims] . . . arising out of or in any manner caused by, connected with, or resulting from the performance of this Subcontract.[117]

105. Republic's argument that the Court would have to excise most of the indemnity clause is unpersuasive. Editing the indemnity clause as Republic suggests might indeed constitute an impermissible wholesale rewriting of the contract rather than a limited excision of language that violates a statute. *See Tillman v. Com. Credit Loans, Inc.*, 362 N.C. 93, 108 (2008) (noting that courts cannot use severability clauses to entirely rewrite contracts).

106. But Republic's revisions hack out much language that poses no problem for the clause.[118] Specifically, Republic suggests that the Court must remove all the language that covers it and its employees.[119] This revision might indeed make the clause meaningless or constitute rewriting, but it is unnecessary. After removing the "offending" phrase to produce the formulation above, the clause provides merely that Republic will indemnify the indemnitees for any losses caused by Republic's alleged or actual acts or omissions. This severed provision preserves the intent of the parties and does not violate section 22B-1.

107. Finally, Republic's argument on this very contract has already been rejected twice by the United States District Court for the Western District of North Carolina. *See DFA Dairy Brands, LLC v. Primus Builders, Inc.*, No. 5:21-CV-00026, 2021 WL

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[117] (*See* Republic Subcontract 6–7.)

[118] (*See* Republic Br. Supp. Lineage 7–10.)

[119] (Republic Br. Supp. Lineage 9; Republic Subcontract 9–10.)

4258797, at *4–6 (W.D.N.C. July 27, 2021), *recommendation adopted*, No. 5:21-CV-00026, 2021 WL 3616711 (W.D.N.C. Aug. 16, 2021). That court held that under *Vecellio*, the indemnity provision is enforceable as severed. The undersigned agrees with the federal court's well-reasoned analysis.

108. The Court therefore concludes that Lineage's indemnification and breach of contract claims are ripe, and that the contract provision around which they revolve is enforceable as severed. As a result, Republic's motion will be denied insofar as it seeks dismissal of this claim.

2) Tortious Interference with Contract

109. Lineage contends that Republic's actions to derail settlement talks with Hartford constituted tortious interference with contract.[120]

110. The elements of tortious interference with contract are that "(1) a valid contract between the plaintiff and a third person . . . [exists]; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff." *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 701 (2016).

111. Lineage's amended complaint states that it negotiated a settlement with Hartford in September and October 2022, under which Hartford would pay out its Policy limits to Lineage.[121] According to Lineage, Republic refused to participate in

[120] (Lineage Am. Compl. ¶¶ 122–32.)

[121] (Lineage Am. Compl. ¶¶ 76–77.)

these talks, and lodged an objection to the settlement at the eleventh hour, which caused Hartford to withdraw from the settlement with Lineage and instead pay its limits to Republic as part of the settlement of an Underlying Action.[122]

112. Republic expressly concedes that Lineage has adequately alleged each element of this tort but argues that it has simultaneously alleged a fact fatal to the claim: that Republic is not an outsider to the contract.[123] *See Fussell v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 364 N.C. 222, 225 (2010) ("A complaint may be dismissed pursuant to Rule 12(b)(6) . . . if facts are disclosed which will necessarily defeat the claim.").

113. Generally, a party cannot interfere with its own contract. *E.g.*, *Urquhart v. Trenkelbach*, 2017 NCBC LEXIS 12, at *15 (N.C. Super. Ct. Feb. 8, 2017). Republic contends that Lineage's amended complaint alleges that Republic was a party to the pertinent contract, the Hartford Policy, which necessarily defeats this claim.[124] The Court agrees.

114. Lineage's amended complaint states that Lineage is an additional insured under the Hartford Policy, which Hartford issued to Republic.[125] The amended complaint therefore identifies one contract, to which all three entities are party.

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[122] (Lineage Am. Compl. ¶¶ 78–87.)

[123] (Republic Refrigeration, Inc.'s Reply to Pl. Lineage Logistics, LLC's Opp'n to Def. Republic Refrigeration, Inc.'s Mot. Dismiss 9 [hereinafter "Republic Reply Lineage"], ECF No. 146.)

[124] (Republic Br. Supp. Lineage 6.)

[125] (Lineage Am. Compl. ¶¶ 8, 40–42, 122–32.)

115. Lineage argues that a "separation of insureds" provision in the Policy creates an entirely independent contract between Hartford and Lineage, which excludes Republic.[126] The Court finds this argument unpersuasive.

116. This "separation" provision, by its plain terms, does *not* apply to the Policy's limits.[127] This exclusion means that Lineage has no separate coverage beyond what Republic bargained for. Simply put, the Policy creates a pool of money which would not exist, and to which Lineage would have no independent claim, without the insurance Policy into which Republic entered.

117. Even more fundamentally, if Republic had not bargained for the Hartford Policy, Lineage would have no contractual rights vis-à-vis Hartford at all. The very separation of insureds provision upon which Lineage relies appears in, and exists only through, the Policy between Hartford and Republic. This reality cuts strongly against Lineage's contention that the Republic Policy spontaneously generated a separate contract between Lineage and Hartford that has life independent from the Hartford-Republic relationship.

118. Neither party offers any cases that involved similar circumstances. Indeed, the Court's research has discovered only one, but that case's common-sense analysis is highly illustrative. In *Nucor Steel Tuscaloosa, Inc. v. Zurich Am. Ins. Co.*, 343 So. 3d 458 (Ala. 2021), the Supreme Court of Alabama confronted a similar series of events. A steel mill contracted with a staffing agency; as part of their contract, the

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[126] (Lineage Br. Opp'n Republic 16–17.)

[127] (*See* Hartford Policy, at HARTFORD 000077.)

agency had to procure insurance and name the steel mill as an additional insured. *See id.* at 461–62. One of the agency's candidates was killed in an accident at the steel mill, the candidate's estate sued the mill for wrongful death, and the mill settled without participation by the agency. *See id.* at 463–64. Eventually, the mill sued both the agency and the insurer for tortious interference with contract, premised on their coordinated refusal to indemnify the steel mill for its losses. *See id.* at 467.

119. The Alabama court dispensed with the tortious interference claim on highly pragmatic, practical grounds. It first noted that under Alabama law, as in North Carolina, a party cannot tortiously interfere with its own contract. *See id.* at 476–77. Applying this principle, the court held that because the parties' obligations all flowed from "interwoven contractual arrangements," and because the mill would have no claim on the insurance policy without its own contract with the agency, the agency was not an outsider to the mill-insurer relationship. *See id.* at 477.

120. The Court finds the Alabama court's treatment of this issue persuasive. The relationship between Lineage and Hartford exists only because of Republic's own contract with Hartford. Lineage's relationship with Hartford is entirely a creature of Republic's bargaining. Because Lineage has no connection with Hartford independent of Republic, Republic does not qualify as an outsider to the relationship between Lineage and Hartford.

121. As a fallback argument, Lineage argues that North Carolina's malice exception saves its claim.[128] Under this exception, a contractual insider *can*

[128] (Lineage Br. Opp'n Republic 17–21.)

tortiously interfere with his or her own contract by acting with legal malice. *See Kingsdown, Inc. v. Hinshaw*, 2015 NCBC LEXIS 30, at *41 (N.C. Super. Ct. Mar. 25, 2015). Legal malice does not mean actual, subjective malice, but rather the commission of a wrongful act or overstepping of legal right or authority. *See id.*

122. Indeed, "[i]f [a party] has sufficient lawful reason for inducing the breach of contract, he is exempt from any liability, no matter how malicious in actuality his conduct may be." *See, e.g.*, *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 318 (1998); *see also Murphy v. McIntyre*, 69 N.C. App. 323, 328–30 (1984) (affirming directed verdict against a tortious interference claim when defendant acted "reprehensibl[y]," "underhanded[ly]," and "below the board," but within defendant's legal authority).

123. Put another way, the existence of a legitimate or rational economic motive, notwithstanding any subjective malice, shields a defendant's conduct, so long as the defendant did not engage in independently unlawful conduct. *See, e.g.*, *Link*, 372 N.C. at 284–85; *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 605 (2007); *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674 (2001); *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 134–35 (1989); *see also Smith v. Ford Motor Co.*, 289 N.C. 71, 94–95 (1976) (upholding a tortious interference claim when the defendant acted with subjective, personal malice and *without* any rational economic justification).

124. The allegations here demonstrate that Republic had a rational economic motive for its actions and that it did not engage in any independent unlawful conduct.

125. Lineage's amended complaint alleges that Lineage's use of the Hartford Policy's limits to cover its own losses was within its rights, and that Republic had the "exact same rights" as Lineage;[129] thus, Republic was within its own rights to use the Hartford limits to cover *its* own losses. Further, using an insurance policy to cover losses is plainly a rational economic motive.

126. In addition, Lineage's amended complaint does not adequately allege that Republic's actions constituted a crime, another tort, or any other independent wrongful act. For example, Lineage does not allege that Republic persuaded Hartford to act as it did through fraud.[130] *Cf. New Restoration & Recovery Servs., LLC v.*

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[129] (*See* Lineage Am. Compl. ¶¶ 80–82.)

[130] The Court recognizes that one sentence in Lineage's amended complaint might be read to accuse Republic of extorting Hartford. Lineage's amended complaint states that "Republic threatened Hartford with repercussions if Hartford allotted any of its coverage to Lineage." (Lineage Am. Compl. ¶ 86.) Depending on what "repercussion" means, this conclusory sentence may reflect that Republic extorted Hartford. A party commits extortion, which is a crime, by threatening another with the intention to thereby wrongfully obtain anything of value. N.C.G.S. § 14-118.4. "Anything of value" has been defined very broadly, and encompasses economic consideration. *E.g., In re J.A.D.*, 283 N.C. App. 8, 21 (2022) (noting that the definition would include food); *State v. Greenspan*, 92 N.C. App. 563, 566 (1989) (cash). North Carolina does not recognize a "claim of right" defense, so Republic's actual legal entitlement to the insurance proceeds is irrelevant, if Republic used unlawful means to obtain them. *See State v. Privette*, 218 N.C. App. 459, 476 (2012).

This issue therefore revolves around whether Republic's threatened "repercussions" constituted threats within the meaning of the statute. Certainly many forms of threats would qualify under the statute, but not all. For example, a threat to file a lawsuit, which is lawful conduct, does not fall within the purview of the statute. *See Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 675–76 (1987); *accord Various Markets, Inc. v. Chase Manhattan Bank, N.A.*, 908 F. Supp. 459, 468 (E.D. Mich. 1995) (noting that a "distasteful" threat to sue could not meet this element under Michigan's analogous extortion law). Thus if Republic's threatened "repercussions" were, for example, merely to file a lawsuit if Hartford paid its limits to Lineage, Republic would not have extorted Hartford.

However, the pleading burden rests upon Lineage to allege that Republic committed a wrongful act that gives rise to legal malice. In turn, for extortion, this burden requires Lineage to allege that Republic communicated an unlawful threat within the meaning of the

Dragonfly Pond Works, LLC, 2023 NCBC LEXIS 80, at *16–18 (N.C. Super. Ct. June 15, 2023) (holding that misappropriation of trade secrets, as an independent tortious act, supported legal malice).

127. Because Lineage fails to allege that Republic acted with legal malice, either through a lack of an economic motive or through the commission of an independent wrongful act, Lineage's claim does not qualify for the malice exception. Consequently, Republic's status as a party to the relevant contract is fatal to this claim.

128. The Court will therefore grant Republic's motion insofar as it seeks dismissal of Lineage's tortious interference with contract claim.

D. Republic's Motion to Stay

129. Finally, Republic seeks a stay of this action. This Court has the inherent power and discretion to control its docket, including by staying, or refusing to stay, the cases before it. *Watters v. Parrish*, 252 N.C. 787, 791–92 (1960).

130. Republic argues that the resolution of many issues in this case will depend on the outcome of the Underlying Actions, so that a stay is appropriate until their conclusion.[131] But as discussed at length above, the Court has dismissed all of the declaratory judgment and other claims that depend on the outcome of the Underlying Actions, and will therefore deny the Motion to Stay.

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extortion statute. Lineage's threadbare reference to "repercussions" does not meet this burden. While the Court must treat all the amended complaint's allegations as true at this stage, reading Lineage's amended complaint to allege an extortionate threat would amount at least to improperly accepting "unwarranted deductions of fact," *e.g.*, *Mitchell v. Pruden*, 251 N.C. App. 554, 558 (2017), if not to judicially rewriting the amended complaint.

[131] (*See generally* Republic Refrigeration, Inc.'s Br. Supp. Mot Stay, ECF No. 139.)

IV.

CONCLUSION

131. **WHEREFORE**, for the foregoing reasons, the Court hereby **ORDERS** as follows:

a. Travelers's Motion to Dismiss Lineage's Amended Complaint, (ECF No. 132), is **GRANTED**, and Lineage's claims against Travelers are hereby **DISMISSED without prejudice**;

b. Travelers's Motion to Dismiss Primus's Amended Complaint, (ECF No. 136), is **GRANTED**, and Primus's claims against Travelers are hereby **DISMSSED without prejudice**;

c. Republic's Motion to Dismiss Lineage's Amended Complaint, (ECF No. 134), is **GRANTED in part and DENIED in part** as follows:

    a. The Motion is denied as to the following claims against Republic, which shall proceed to discovery:

        i. Lineage's claim for declaratory judgment; and

        ii. Lineage's claim for breach of contract;

    b. The Motion is granted as to Lineage's claim for tortious interference with contract, which is hereby **DISMISSED with prejudice**; and

d. Republic's Motion to Stay, (ECF No. 139), is **DENIED**.

SO ORDERED, this the 10th day of August, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge