STATE OF NORTH CAROLINA FORSYTH COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 5279
HARRIS TEETER SUPERMARKETS, INC., et al., Plaintiffs, v. ACE AMERICAN INSURANCE COMPANY, et al., Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS AND MOTION TO STAY**

1. **THIS MATTER** is before the Court on the 27 March 2023 filing of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Under the North Carolina Declaratory Judgment Act (the "Motion to Dismiss"), (ECF No. 135 ["Mot. Dismiss"]), and Defendants' Motion to Stay (the "Motion to Stay", and together with the Motion to Dismiss, the "Motions"), (ECF No. 137 ["Mot. Stay"]).

2. The Court held a hearing on the Motions on 19 July 2023 (the "Hearing"), (*see* ECF No. 206), and its Case Management Conference pursuant to Rule 9.3 of the North Carolina Business Court Rules ("BCR(s)") immediately following the Hearing.

3. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motions.

Offit Kurman, P.A. by J. Alexander S. Barrett and Kurt A. Seeber, and Morgan, Lewis & Bockius, LLP by Gerald P. Konkel and Christopher M. Popecki, for Plaintiffs Harris Teeter Supermarkets, Inc., Harris Teeter, LLC, The Kroger Co., Kroger Limited Partnership I, and Kroger Limited Partnership II.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP by Agustin M. Martinez, Jim W. Phillips, Jr., and Jennifer K. Van Zant, Clyde & Co US LLP by Robert M. Mangino and Susan K. Sullivan, and Holwell

Shuster & Goldberg, LLP by Andrew C. Indorf, Blair E. Kaminsky, Neil R. Lieberman, Michael S. Shuster, and Daniel M. Sullivan, for Defendants ACE American Insurance Co., ACE Property and Casualty Insurance Co., and Federal Insurance Co.

James, McElroy & Diehl, P.A. by Adam L. Ross, and Kennedys CMK LLP by Christopher R. Carroll, Tara E. McCormack, Christina R. Salem, and Joshua S. Wirtshafter, for Defendants Allied World National Assurance Co., Starr Surplus Lines Insurance Co., and United States Fire Insurance Co.

Maynard Nexsen PC by James W. Bryan and Olivia F. Fajen, and Skarzynski Marick & Black, LLP by Karen M. Dixon, for Defendants American Guarantee and Liability Insurance Co., Steadfast Insurance Co., and Zurich American Insurance Co.

Bennett Guthrie, PLLC by Joshua H. Bennett, and BatesCarey LLP by Joshua A. Boggioni, Adam H. Fleischer, and Paige M. Houin, for Defendants Aspen American Insurance Co., Great American Alliance Insurance Co., Great American Assurance Co., Great America Insurance Co., Great American Insurance Co. of New York, Great American Spirit Insurance Co., and Westport Insurance Corp.

Teague Campbell Dennis & Gorham, LLP by William A. Bulfer and John M. Little, and Skarzynski Marick & Black LLP by Cheryl P. Vollweiler, for Defendant Axis Surplus Insurance Co.

James, McElroy & Diehl, P.A. by Edward T. Hinson, Jr. and Jennifer M. Houti, and and Dentons US LLP by Deborah J. Campbell, Kathryn M. Guinn, M. Keith Moskowitz, and Samantha Wenger, for Defendants Columbia Casualty Co., Continental Casualty Co., and Continental Insurance Co.

Poyner Spruill, LLP by J. Nicholas Ellis, Andrew H. Erteschik, and Colin R. McGrath, and Nicolaides Fink Thorpe Michaelides Sullivan, LLP by Amy J. Collins Cassidy, Stephanie M. Flowers, and Monica T. Sullivan, for Defendants Endurance American Insurance Co. and Endurance American Specialty Insurance Co.

Phelps Dunbar, LLP by Thomas M. Contois, Machaella M. Reisman, and Robert D. Whitney, and Dentons US LLP by Deborah J. Campbell, Kathryn M. Guinn, M. Keith Moskowitz, and Samantha Wenger, for Defendants Indian Harbor Insurance Co. and XL Insurance America, Inc.

Cranfill Sumner LLP by Jennifer A. Welch, and Choate, Hall & Stewart, LLP by John C. Calhoun and Robert A. Kole, for Defendants Liberty Insurance Underwriters, Inc., Liberty Surplus Insurance Corp., and Ohio Casualty Insurance Co.

Goldberg Segalla, LLP by David L. Brown, and Willkie Farr & Gallagher, LLP by Joseph G. Davis, John B. Goerlich, Christopher J. St. Jeanos, and Diana C. Vall-llobera, for Defendant National Union Fire Insurance Co. of Pittsburg, PA.

Manning, Fulton & Skinner, P.A. by Brianne M. Glass and Michael T. Medford, and Clausen Miller, P.C. by Amy R. Paulus, for Defendant Old Republic Insurance Co.

Womble Bond Dickinson (US) LLP by M. Elizabeth O'Neill, and Simpson Thacher & Bartlett, LLP by Bryce L. Friedman and Joshua C. Polster, for Defendants St. Paul Fire and Marine Insurance Co., The Travelers Indemnity Co., Travelers Property Casualty Co. of America, and United States Fidelity and Guaranty Co.

Young Moore and Henderson, P.A. by Brian O. Beverly, and Ruggeri Parks Weinberg LLP by Annette P. Rolain and James P. Ruggeri, for Defendant Twin City Fire Insurance Co.

HWG LLP by Amy E. Richardson and Lauren E. Snyder, and Nicolaides Fink Thorpe Michaelides Sullivan, LLP by So Young Lee, Richard H. Nicolaides, Jr., and Madison G. Satterly, for Defendant Mitsui Sumitomo Insurance Co. of America.

Robinson, Judge.

I. INTRODUCTION

4. This matter is primarily an insurance coverage dispute concerning whether Defendants, insurance companies that issued insurance policies to Plaintiffs, owe coverage obligations to Plaintiffs. Specifically, Plaintiffs seek a declaration from the Court that Defendants have certain duties under the policies with respect to nearly 800 underlying lawsuits brought by governmental entities, third-party payors, and

individuals seeking damages related to injuries allegedly caused by Plaintiffs' distribution and dispensing of opioid drugs.

5. At this stage, the Court is presented with preliminary questions. First, the Court must determine whether it is proper to exercise personal jurisdiction over the thirty-five foreign insurance company Defendants. In doing so, the Court is in the rare position of needing to address and apply recent United States Supreme Court precedent to the facts of this case. Next, the Court must address whether, under the North Carolina Declaratory Judgment Act, the Court should exercise its discretion to refuse to render a declaratory judgment as to the liabilities and obligations of Defendants, if any. Finally, the Court will address whether it is more appropriate to stay this action pending a final resolution of a similar, earlier-filed action initiated in the State of Ohio that involves some, but not all, of the parties to this action.

II. FACTUAL AND PROCEDURAL BACKGROUND

6. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motions.

7. "The Court does not make determinations of fact on motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)") but only recites those factual allegations of the Amended Complaint that are relevant and necessary to the Court's determination of the motions to dismiss." *Gateway Mgmt. Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *9 (N.C. Super. Ct. May 9, 2018).

8. However, on the filing of a motion to dismiss for lack of personal jurisdiction, "[e]ither [side] may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615 (2000) (citations omitted). Neither side requests the Court do so. The Court therefore declines to make findings of fact in its later analysis of the Motion to Dismiss pursuant to Rule 12(b)(2).

A. <u>The Parties</u>

9. Plaintiffs The Kroger Co., Kroger Limited Partnership I, and Kroger Limited Partnership II (together, the "Kroger Plaintiffs") are Ohio corporations with their corporate headquarters in Cincinnati, Ohio. (Am. Compl. ¶¶ 10–12, ECF No. 25 ["Am. Compl."].) The Kroger Co. owned or operated pharmacies in North Carolina beginning in the 1980s. (Am. Compl. ¶ 10.)

10. Plaintiffs Harris Teeter Supermarkets, Inc. ("HT Supermarkets"), a North Carolina corporation, and Harris Teeter, LLC ("HT LLC," and together, "HT Plaintiffs," and with the Kroger Plaintiffs, "Plaintiffs"), a North Carolina limited liability company, each maintain their headquarters in Matthews, North Carolina. (Am. Compl. ¶¶ 7–8.) HT LLC's sole member is HT Supermarkets. (Aff. Taryn Mecia ¶ 14, ECF No. 180 ["Mecia Aff."].) The HT Plaintiffs are wholly owned subsidiaries of The Kroger Co., (Am. Compl. ¶ 10), and operate more than 250 stores across eight states, including 149 stores across North Carolina, (Am. Compl. ¶ 9).

11. Defendants are 35 insurance companies that one or more of the Plaintiffs purchased insurance policies from. (Am. Compl. ¶¶ 13–48.) None of the Defendants

is incorporated in North Carolina, and none maintains a principal place of business in this State. (*See* Am. Compl. ¶¶ 13–48.) Plaintiffs allege that Defendants maintain licenses to transact insurance business in North Carolina and that Defendants "issue[d] policies in North Carolina to commercial entities residing within North Carolina." (Am. Compl. ¶¶ 13–48.) The Court more fully addresses herein the respective policies Defendants issued to Plaintiffs. (*See infra* Part II.C.)

B. <u>The Underlying Opioid Lawsuits</u>

12. As of the filing of the Motions, the Kroger Plaintiffs were named as defendants in at least 797 lawsuits involving the increased overuse and misuse of, and overdose deaths attributed to, prescription opiates (the "Underlying Opioid Lawsuits"). (*See* Aff. Daniel M. Sullivan ¶¶ 5–6, Ex. B at 16–98, ECF No. 142.1 ["Sullivan Aff. (Ex(s).)"][1] (providing a color-coded spreadsheet of the opioid lawsuits naming the Kroger Plaintiffs and their affiliates as defendants as of February 2023).) Of those 797 lawsuits, 14 were initiated in North Carolina, (Sullivan Aff. Ex. B at 56–57), and 57 were initiated in Ohio, (Sullivan Aff. Ex. B at 58–61). At the Hearing, counsel represented that the Kroger Plaintiffs have since been named in additional lawsuits arising from similar allegations that the Kroger Plaintiffs distributed and/or dispensed prescription opiates in a wrongful manner.

13. As of the filing of the Motions, the HT Plaintiffs were named as defendants in only one of the Underlying Opioid Lawsuits, *Durham County v. AmerisourceBergen*

[1] In this instance, Mr. Sullivan's Affidavit and the exhibits to it may be identified by the same ECF No. Rather than citing in full at each citation to a new exhibit, the Court uses the abbreviation ("Sullivan Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The exhibits to Mr. Sullivan's Affidavit are located at ECF Nos. 142.1–.8.

Drug Corp., et al., Case No. 1:19-op-45346-DAP (the "*Durham County* Bellwether"). (*See* Sullivan Aff. Ex. B at 57, Ex. C.) The *Durham County* Bellwether was initiated in the U.S. District Court for the Middle District of North Carolina. (*See* Aff. Christopher J. St. Jeanos Ex. F at 1 n.3, n.6, 19, ECF No. 141.1 ["St. Jeanos Aff. (Ex(s).)"].)[2] That matter has since been transferred from North Carolina to the Multi-District Litigation ("MDL") before Federal District Court Judge Dan Aaron Polster in the Northern District of Ohio, bearing the same case caption and assigned MDL No. 2804. (St. Jeanos Aff. Ex. G.)

14. The *Durham County* Bellwether complaint alleges a claim for relief of public nuisance against Plaintiffs. (St. Jeanos Aff. Ex. F at 229–37.) Plaintiff Durham County alleges therein that Plaintiffs, as the natural defendants in that action, "created and maintained a public nuisance by marketing, distributing, dispensing, and selling opioids in ways that have subverted the public order, affected the health of Durham County's community, and caused an unreasonable interference with a right common to the general public." (St. Jeanos Aff. Ex. F at ¶ 730.)

15. The Kroger Plaintiffs were named in another bellwether action, which originated in Federal Court in Ohio, *Montgomery Cty. Bd. of Cty. Comm'rs v. Cardinal Health, Inc., et al.*, No. 1:18-op-46326-DAP (the "*Montgomery County* Bellwether"). (Sullivan Aff. Ex. MM at 1 n.3.) The *Montgomery County* Bellwether was transferred from the U.S. District Court for the Southern District of Ohio to the MDL before

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[2] In this instance, Mr. St. Jeanos's Affidavit and the exhibits to it are identified by the same ECF No. To cite the exhibits to the Affidavit, the Court uses the abbreviation ("St. Jeanos Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The St. Jeanos Affidavit and Exhibits are located at ECF No. 141.1.

Judge Polster. (*See* Sullivan Aff. Ex. MM at ¶ 32.) The plaintiffs in that action allege that the Kroger Plaintiffs, as the natural defendants, "funneled far more opioids into Ohio and [Montgomery] County than could have been expected to serve legitimate medical use," but that they "did not report a single suspicious order in the County between 2007 and 2014." (Sullivan Aff. Ex. MM at ¶ 456.) The complaint also alleges that the Kroger Plaintiffs' policies and procedures were "particularly glaring" before 2005. (Sullivan Aff. Ex. MM at ¶ 465.)

16. The *Montgomery County* Bellwether complaint asserts a claim for qualified public nuisance, alleging that the Kroger Plaintiffs "created and maintained a public nuisance through their ongoing conduct of marketing, distributing, dispensing, and selling opioids . . . in a manner which caused prescriptions and sales to skyrocket in [p]laintiff's community." (Sullivan Aff. Ex. MM at 241–42.)

17. Several other complaints from the Underlying Opioid Lawsuits were filed in this matter for the Court's consideration. (*See* St. Jeanos Aff. Exs. E, M–N; Aff. Gerald P. Konkel Exs. 8–20, ECF Nos. 181, 181.2–.4 ["Konkel Aff. (Ex(s).)"] (providing the thirteen complaints for the Underlying Opioid Lawsuits initiated in North Carolina, excluding the *Durham County* Bellwether).)[3] For example, the Complaint filed in Kentucky action *Paintsville Hosp. Co., LLC, et al. v. Amneal Pharm., LLC, et al.*, No. 20-CI-00151 (Ky. Cir. Ct. June 8, 2020), contains seven claims for relief against at least 62 defendants, including the Kroger Plaintiffs. (St. Jeanos. Aff. Ex. E

[3] In this instance, the exhibits to Mr. Konkel's Affidavit may be identified by the same ECF No. Rather than citing in full at each citation to a new exhibit, the Court uses the abbreviation ("Konkel Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The exhibits to Mr. Konkel's Affidavit may be found at ECF Nos. 181.1–.5.

["Ky. Compl."].) The 380-page complaint alleges that the Kroger Plaintiffs, as a national operator of over 2,268 pharmacies, "distributed prescription opioids throughout the United States" and that the "volumes of opioids distributed to and dispensed by [Kroger] pharmacies were disproportionate to non-controlled drugs and other products sold by these pharmacies[.]" (Ky. Compl. ¶¶ 267, 269.) Like the complaints in the *Durham County* and *Montgomery County* Bellwethers, the *Paintsville* Complaint alleges a claim for nuisance. (*See* Ky. Compl. ¶¶ 821–35.)

18. Numerous additional complaints filed in the Underlying Opioid Lawsuits allege that the Kroger Plaintiffs engaged in similar conduct and raise nuisance claims against them. (*See, e.g.*, St. Jeanos Aff. Ex. M (Complaint in California action *Cty. of Yuba v. AmerisourceBergen Drug Corp., et al.*, alleging a claim for public nuisance against the Kroger Plaintiffs and others for their alleged unlawful distribution and sale of prescription opioids), Ex. N (Complaint in New York action *Painting Indus. Ins. Fund v. Purdue Pharma L.P., et al.*, alleging a claim for public nuisance against the Kroger Plaintiffs, among other claims, for their alleged unlawful conduct which "severely impacted public health" such that the "public nuisance is commonly referred to as a 'crisis' or an 'epidemic' ").)

C. Insurance Policies at Issue[4]

19. Plaintiffs allege that Defendants issued insurance and fronting policies to them, and that those policies covered "periods when the bodily injuries alleged in the

[4] Numerous policies that Plaintiffs purchased from Defendants were filed by the parties in support of and in opposition to the Motions. Rather than identifying each filed policy, for brevity the Court cites to those policies which appear in the record where appropriate.

[Underlying] Opioid Lawsuits potentially and/or actually took place." (Am. Compl. ¶ 51.) For purposes of this section only, the Court recites the allegations of the Amended Complaint without restating that they are Plaintiffs' allegations.

20. ACE American Insurance Company ("ACE American") issued at least nine policies to the HT Plaintiffs for the period 1 May 2014 to 1 March 2023, (Am. Compl. ¶ 57; *see, e.g.*, Sullivan Aff. Exs. II–KK (including the policies for the period 1 March 2020 to 1 March 2023)), and twenty-three policies to the Kroger Plaintiffs for the period 1 January 2003 to 1 March 2020, (Am. Compl. ¶ 58; Aff. Jay Chung Exs. 5–27, ECF Nos. 183.1–.2 ["Chung Aff. Ex(s)."]).[5]

21. ACE Property and Casualty Insurance Company ("ACE P&C") issued at least two policies to the Kroger Plaintiffs for the period 25 January 2018 to 1 March 2020. (Am. Compl. ¶ 60; Chung Aff. Exs. 28–29.)

22. Federal Insurance Company ("Federal Insurance" and, together with ACE American and ACE P&C, the "Chubb Defendants") issued at least three policies to the HT Plaintiffs for the period 1 May 1995 to 1 May 1998, (Am. Compl. ¶ 71), and twenty-five policies to the Kroger Plaintiffs for the period 1 January 1994 to 25 January 2019, (Am. Compl. ¶ 72; Chung Aff. Exs. 30–53 (excluding the policy issued for the period 1 January 1998 to 1 January 1999)).

23. National Union Fire Insurance Company of Pittsburgh, PA ("National Union") issued at least eleven policies to the Kroger Plaintiffs for the period

[5] In this instance, the exhibits to Mr. Chung's Affidavit may be identified by the same ECF No. Rather than citing in full at each citation to a new exhibit, the Court uses the abbreviation ("Chung Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The exhibits to Mr. Chung's Affidavit may be found at ECF Nos. 183.1–.16.

1 January 2000 to 25 January 2007, and 25 January 2015 to 25 January 2018. (Am. Compl. ¶ 59; Chung Aff. Exs. 54–63.)

24. Allied World National Assurance Company ("Allied World") issued at least one policy to the HT Plaintiffs for the period 1 May 2013 to 1 May 2014, (Am. Compl. ¶ 61; *see* Mecia Aff. Ex. 8, ECF No. 180.8 (providing the policy for the period 1 May 2013 to 1 May 2014)), and at least two policies to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2018, (Am. Compl. ¶ 62; Chung Aff. Exs. 64–65).

25. American Guarantee and Liability Insurance Company ("American Guarantee") issued at least three policies to the HT Plaintiffs for the period 1 May 2008 to 1 May 2011, (Am. Compl. ¶ 63), and at least fifteen policies to the Kroger Plaintiffs for the period 1 January 2001 to 1 March 2020, (Am. Compl. ¶ 64; Chung Aff. Exs. 66–80).

26. Aspen American Insurance Company ("Aspen American") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2017 to 1 March 2020. (Am. Compl. ¶ 65; Chung Aff. Exs. 81–83.)

27. AXIS Surplus Insurance Company ("AXIS") issued at least one policy to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2017. (Am. Compl. ¶ 66; Chung Aff. Ex. 84.)

28. Columbia Casualty Company ("Columbia Casualty") issued at least one policy to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2017. (Am. Compl. ¶ 67; Chung Aff. Ex. 85.)

29. Continental Casualty Company ("Continental Casualty") issued at least five policies to the Kroger Plaintiffs for the period 1 January 1995 to 1 January 2000. (Am. Compl. ¶ 68; Chung Aff. Exs. 86–89 (missing only the policy allegedly issued for the period 1 January 1998 to 1 January 1999).)

30. Continental Insurance Company ("Continental Insurance") issued at least two policies to the Kroger Plaintiffs for the period 25 January 2018 to 1 March 2020. (Am. Compl. ¶ 69; Chung Aff. Exs. 90–91.)

31. Endurance American Specialty Insurance Company ("Endurance Specialty") issued at least four policies to the Kroger Plaintiffs for the period 25 January 2016 to 1 March 2020.[6] (Am. Compl. ¶ 70; Chung Aff. Exs. 92–95.)

32. Great American Alliance Insurance Company issued at least six policies to the HT Plaintiffs, (Am. Compl. ¶ 73); Great American Assurance Company issued at least three policies to the HT Plaintiffs, (Am. Compl. ¶ 74); Great American Insurance Company issued at least five policies to the HT Plaintiffs, (Am. Compl. ¶ 75); and Great American Insurance Company of New York ("Great American NY") issued at least thirteen policies to the HT Plaintiffs, (Am. Compl. ¶ 76; Mecia Aff. Ex. 6, ECF No. 180.6 (including the HT Plaintiffs' policy for the period 1 May 2013 to 1 May 2014)), and eight to the Kroger Plaintiffs, (Am. Compl. ¶ 77; Chung Aff. Exs. 96–103).

[6] One of the policies that Plaintiffs allege was issued by Endurance Specialty appears to have been issued by Endurance American Insurance Company for 25 January 2019 to 1 March 2020, bearing policy number ELD30000047103. (Chung Aff. Ex. 95.)

33. Great American Spirit Insurance Company ("Great American Spirit") issued at least five policies to the Kroger Plaintiffs for the period 25 January 2015 to 1 March 2020. (Am. Compl. ¶ 78; Chung Aff. Exs. 104–08.)

34. Travelers Indemnity Company ("Travelers Indemnity") issued at least four policies to the HT Plaintiffs for the period 1 June 2000 to 1 May 2004, (Am. Compl. ¶ 79), and Travelers Property Casualty Company of America ("Travelers Property") issued at least fifteen policies to the HT Plaintiffs for the period 1 May 1995 to 1 June 2000, and 1 May 2003 to 1 May 2013, (Am. Compl. ¶ 91; Mecia Aff. Ex. 5, ECF No. 180.5 (including the policy for the period 1 May 2012 to 1 May 2013)).

35. Indian Harbor Insurance Company ("Indian Harbor") issued at least two policies to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2018. (Am. Compl. ¶ 80; Chung Aff. Exs. 109–10.)

36. Liberty Insurance Underwriters, Inc. ("Liberty Underwriters") issued at least nine policies to the HT Plaintiffs for the period 1 May 2004 to 1 May 2014. (Am. Compl. ¶ 81; Mecia Aff. Ex. 7, ECF No. 180.7 (including the policy for the period 1 May 2013 to 1 May 2014).) Liberty Underwriters also issued at least eight policies to the Kroger Plaintiffs for the period 25 January 2009 to 25 January 2017. (Am. Compl. ¶ 82; Chung Aff. Exs. 111–17 (missing only the policy allegedly issued for the period 25 January 2016 to 25 January 2017).)

37. Liberty Surplus Insurance Corporation ("Liberty Surplus") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2017 to 25 January 2019. (Am. Compl. ¶ 83; Chung Aff. Exs. 119–21.)

38. Ohio Casualty Insurance Company ("Ohio Casualty") issued at least one policy to the HT Plaintiffs for the period 1 May 2007 to 1 May 2008. (Am. Compl. ¶ 84.)

39. Old Republic Insurance Company ("Old Republic") issued at least three policies to the Kroger Plaintiffs for the period 1 January 2003 to 25 January 2006. (Am. Compl. ¶ 85; Chung Aff. Exs. 122–23 (missing only the policy allegedly issued for the period 1 January 2003 to 3 February 2004).)

40. St. Paul Fire and Marine Insurance Company ("St. Paul Fire") issued at least four policies to the HT Plaintiffs for the period 1 May 2003 to 1 May 2007, (Am. Compl. ¶ 86), and at least four policies to the Kroger Plaintiffs for the period 1 January 2002 to 25 January 2006, (Am. Compl. ¶ 87; Chung Aff. Exs. 124–27).

41. Starr Surplus Lines Insurance Company ("Starr") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2012 to 25 January 2015. (Am. Compl. ¶ 88; Chung Aff. Exs. 128–30.)

42. Steadfast Insurance Company ("Steadfast") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2019. (Am. Compl. ¶ 89; Chung Aff. Exs. 131–33.)

43. Mitsui Sumitomo Insurance Company of America ("Mitsui Sumitomo") issued at least two policies to the HT Plaintiffs for the period 1 May 1994 to 1 May 1996. (Am. Compl. ¶ 90.)

44. Twin City Fire Insurance Company ("Twin City") issued at least four policies to the HT Plaintiffs for the period 1 May 1997 to 1 June 2000, and 1 May 2013

to 1 May 2014. (Am. Compl. ¶ 92; Mecia Aff. Ex. 9, ECF No. 180.9 (including the policy for the period 1 May 2013 to 1 May 2014).)

45. United States Fidelity and Guaranty Company ("U.S. Fidelity") issued at least three policies to the HT Plaintiffs for the period 1 June 2000 to 1 May 2003, (Am. Compl. ¶ 93), and at least one policy to the Kroger Plaintiffs for the period 1 January 2000 to 1 January 2003, (Am. Compl. ¶ 94; Chung Aff. Ex. 134).

46. United States Fire Insurance Company ("U.S. Fire") issued at least one policy to the HT Plaintiffs for the period 1 May 1995 to 1 May 1996. (Am. Compl. ¶ 95.)

47. Westport Insurance Corporation ("Westport") issued at least six policies to the HT Plaintiffs for the period 1 May 1996 to 1 May 2002. (Am. Compl. ¶ 96.)

48. XL Insurance America, Inc. ("XL America") issued at least twelve policies to the HT Plaintiffs for the period 1 May 2002 to 1 May 2014, (Am. Compl. ¶ 97; Mecia Aff. Ex. 10, ECF No. 180.10 (providing the policy for the period 1 May 2013 to 1 May 2014)), and at least nine policies to the Kroger Plaintiffs for the period 25 January 2006 to 25 January 2016, (Am. Compl. ¶ 98; Chung Aff. Exs. 135–43).

49. Zurich American Insurance Company ("Zurich") issued at least one policy to the HT Plaintiffs for the period 1 May 2004 to 1 May 2005. (Am. Compl. ¶ 99.)

D. The *Acuity* Decision and the Ohio Insurance Action

50. On 7 September 2022, the Supreme Court of Ohio filed its opinion in *Acuity v. Masters Pharm., Inc.*, 205 N.E.3d 460 (Ohio 2022). There, the Supreme Court of Ohio considered whether an insurer owed a duty to defend its insured in lawsuits

brought by city and county governments for losses allegedly caused by the opioid epidemic. *Acuity*, 205 N.E.3d at 462. The trial court held, in part, that the complaints in the underlying opioid lawsuits did not seek damages because of bodily injury as the governmental entities sought damages for economic loss. *Id.* at 463.

51. The Supreme Court of Ohio held that governmental entities suing for alleged economic losses sustained by their citizens caused by the opioid epidemic were not seeking "damages because of bodily injury."[7] *Id.* at 473 ("[T]he governments here do not seek damages because of any particular opioid-related injury sustained by a citizen."). The majority wrote that, "[t]o hold otherwise would be to conclude that a duty to defend exists simply because a consequence of the alleged public-health crisis is bodily injury, regardless of the fact that the underlying parties do not seek damages because of any particular bodily injury sustained by a person." *Id.* at 474.

52. Roughly a month later, on 12 October 2022, the Chubb Defendants initiated an action in Hamilton County, Ohio seeking declarations that they are not required to provide coverage to the Kroger Plaintiffs, as the natural defendants, for underlying

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[7] The Court's analysis in *Acuity* draws attention to the "growing and diverging body of case law" on this issue. *Acuity*, 205 N.E.3d at 465. Importantly, the Court highlights the varying interpretations of the meaning of "damages because of bodily injury." On one side there are courts which have interpreted it to invoke the insurer's duty to defend because the governmental entities sought damages for bodily injuries to their citizens, and thus necessarily also sought to recover costs related to emergency medical treatment and additional services. *Id.* at 465–66 (citing *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771, 775 (7th Cir. 2016); *Giant Eagle, Inc. v. Am. Guar. & Liab. Ins. Co.*, 499 F. Supp. 3d 147 (W.D. Pa. 2020)). The Court contrasts that interpretation with the one it chooses, noting where other courts have concluded that no duty to defend existed because the governmental entities "sought to recover their own increased economic costs resulting from a public-health crisis" without tying their claims to "an individual opioid-related injury[.]" *Id.* at 466 (citing *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239, 253–54 (Del. 2022); *Westfield Natl. Ins. Co. v. Quest Pharms., Inc.*, 2021 U.S. Dist. LEXIS 86931, at *18 (W.D. Ky. May 6, 2021)).

opioid litigation.[8] (St. Jeanos Aff. ¶ 16, Ex. J.) The Complaint in that action contains three claims for declaratory judgment, seeking a declaration that: (1) the Chubb Defendants have "no duty to defend or pay for Kroger's defense of the Opioid Lawsuits"; (2) "under the terms, conditions, and exclusions of the Policies, Chubb has no duty to indemnify Kroger for the Opioid Lawsuits"; and (3) if the Chubb Defendants are found liable under the policies issued to The Kroger Co., they are entitled "to the proper share of equitable contribution from the [o]ther [i]nsurers, including but not limited to a declaration that Chubb is not responsible for any share of Kroger's defense or indemnity costs attributable to periods outside the effective dates of the Chubb Policies." (St. Jeanos Aff. Ex. J at ¶¶ 45, 48, 50.) The Chubb Defendants also named many of the Kroger Plaintiffs' other insurers as defendants.[9] (St. Jeanos Aff. Ex. J at 1–4.)

53. On 13 October 2022, National Union did the same.[10] (St. Jeanos Aff. ¶ 17, Ex. K.) National Union's Complaint contains two claims for declaratory judgment, seeking a decree that (1) the policies issued by it to The Kroger Co. do not create a duty to defend with regard to the Underlying Opioid Lawsuits; and (2) under the

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[8] That action is captioned *Ace Am. Ins. Co. et al. v. The Kroger Co., et al.*, A 2203712 (Hamilton Cty. Ct. C.P.). (*See* Sullivan Aff. ¶ 23.)

[9] The Chubb Defendants named four defendants which are not parties in this action: AIU Insurance Company; Lumbermens Mutual Casualty Company; XL Europe Limited; and XL Insurance Company of New York. (*See* St. Jeanos Aff. Ex. J.) At the Hearing, Plaintiffs' counsel represented to the Court that: AIU Insurance Company and XL Insurance Company of New York did not issue any policies to the Kroger Plaintiffs; Lumbermens Mutual Casualty Company was in liquidation, so Plaintiffs did not add it to this action; and XL Europe Limited did not issue any general liability policies to the Kroger Plaintiffs.

[10] That action is captioned *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa v. The Kroger Co.*, A 2203724, (Hamilton Cty. Ct. C.P.). (*See* Sullivan Aff. ¶¶ 24–25.)

terms of the policies it issued to The Kroger Co., National Union has no duty to indemnify. (St. Jeanos Aff. Ex. K at ¶¶ 33–34, 37–38.)

54. On 9 February 2023, the Ohio Court consolidated the two pending actions initiated by the Chubb Defendants and National Union (the "Ohio Insurance Action"). (Sullivan Aff. ¶ 25, Ex. J.)

55. This action was initiated by Plaintiffs shortly thereafter on 8 November 2022. (*See* Compl., ECF No. 28.) Several Defendants thereafter filed crossclaims in the Ohio Insurance Action.

56. On 29 November 2022, American Guarantee and Steadfast jointly filed their answer to the Chubb Defendants' Complaint, and a crossclaim for declaratory judgment. (*See* Sullivan Aff. ¶ 40, Ex. Y.)

57. On 5 December 2022, the Kroger Plaintiffs filed their Motion to Dismiss or Stay in the Ohio Insurance Action. (St. Jeanos Aff. Ex. L.) That matter came on for hearing on 4 April 2023 before Hon. Lisa Allen in the Court of Common Pleas of Hamilton County, Ohio. (*See* St. Jeanos Aff. ¶ 18; Sullivan Aff. Ex. J.) As far as the Court is aware, no order has been entered.

58. From 12 December to 15 December 2022, Allied World, Aspen American, Endurance American, Endurance Specialty, Great American Insurance, Great American NY, Great American Spirit, Old Republic, Starr, St. Paul Fire, and U.S. Fidelity filed answers and crossclaims to the Chubb Defendants' Complaint in the Ohio Insurance Action. (Sullivan Aff. ¶¶ 33–39, Exs. R–X.) In January 2023, AXIS, Columbia Casualty, Continental Insurance, Indian Harbor, Liberty Underwriters,

National Union, and XL Insurance also filed answers and crossclaims to the Chubb Defendants' complaint. (Sullivan Aff. ¶¶ 26–32, Exs. K–Q.)

59. The Motions in this action were thereafter filed on 27 March 2023. (Mot. Dismiss; Mot. Stay.)

E. The Parties' North Carolina Contacts

1. Plaintiffs' Business in North Carolina

60. As discussed above, the HT Plaintiffs are North Carolina corporations. On 28 January 2014, HT Supermarkets merged with Hornet Acquisition, Inc., a corporate holding company organized under the laws of North Carolina with its mailing address in Cincinnati, Ohio. (St. Jeanos Aff. Ex. B.) It is undisputed that the HT Plaintiffs became wholly owned subsidiaries of the Kroger Plaintiffs on this date. (*See* Defs.' Br. Supp. Mot. Dismiss 5, ECF No. 136 ["Br. Supp. Mot. Dismiss"] (citing St. Jeanos Aff. Ex. B); Mecia Aff. ¶ 11.) The Kroger Co. has roughly 200 wholly owned subsidiaries, at least twelve of which are incorporated in North Carolina. (*See* St. Jeanos Aff. Ex. A at 103–09 (providing the subsidiaries of The Kroger Co. in its Annual Report for the 2021 fiscal year).)

61. According to the HT Supermarkets 2021 Annual Report, its registered agent is in Raleigh, North Carolina, and its principal office is in Matthews, North Carolina. (Sullivan Aff. Ex. NN.) Four of the corporation's ten officers reside in North Carolina, with the remaining six residing in Ohio. (Sullivan Aff. Ex. NN.)

62. The HT Plaintiffs and their predecessor entities have operated grocery stores in North Carolina since the 1960s and pharmacies since 1993. (Mecia Aff.

¶¶ 16–17.) The HT Plaintiffs have 149 of their 257 total grocery stores in this State, with food distribution centers in Greensboro and Indian Trail, North Carolina. (Mecia Aff. ¶ 18.)

63. The HT Plaintiffs have "not maintained independent business activities in Ohio and ha[ve] never been registered to do business in Ohio." (Mecia Aff. ¶ 22.) Furthermore, HT Supermarkets maintained "its own general liability insurance program and was issued policies providing annual primary and excess insurance" prior to its acquisition by The Kroger Co. in 2014. (Mecia Aff. ¶ 25; Mecia Aff. Exs. 5–10, ECF Nos. 180.5–.10 (providing insurance policies that HT Supermarkets purchased from various Defendants).)

64. The Kroger Plaintiffs are Ohio corporations doing business in North Carolina. (Am. Compl. ¶¶ 10–12.) Plaintiffs allege that The Kroger Co. has "owned and operated pharmacies in North Carolina since the 1980s, employing and serving thousands of North Carolinians." (Am. Compl. ¶ 10.)

65. The Kroger Plaintiffs are registered to do business in North Carolina and The Kroger Co. filed its most recent annual report here on 24 April 2023. (Aff. Jay Chung ¶ 8, ECF No. 183 ["Chung Aff."].) The Kroger Plaintiffs operated grocery stores in North Carolina from 1989 to 2018, but they closed the remaining fourteen North Carolina stores in 2018, selling eight to the HT Plaintiffs. (Chung Aff. ¶¶ 10–11.)

66. Presently, the Kroger Plaintiffs are "in the process of opening a customer fulfillment center in North Carolina, the purpose of which is to enable Kroger to deliver groceries to e-commerce customers" in this State. (Chung Aff. ¶ 13.)

2. Defendants' North Carolina Insurance Business

67. As noted previously, none of the Defendants is incorporated in North Carolina, and none maintains its principal place of business or registered agent in this State. (*See* Am. Compl. ¶¶ 13–47; ECF Nos. 141.3–.21 (providing the affidavits of counsel for various Defendants, which affirm that those Defendants are not incorporated in this State, and providing the states in which they are incorporated and/or the cities where they maintain a principal place of business).)

68. It appears that Great American Spirit maintained a North Carolina Professional Risk Office at 11325 N. Community House Rd. Suite 200 in Charlotte from at least 25 January 2015 to 25 January 2020. (*See* Chung Aff. Exs. 104–08 (providing at Item 6 that "All other Notices . . . [t]o the Company" should be sent to that office in Charlotte).) Based on the record before the Court, Great American Spirit is the only Defendant which maintained an office in this State.

69. Plaintiffs allege that Defendants are licensed insurers in the State of North Carolina, and that they issued policies in North Carolina to commercial entities residing in this State. (Am. Compl. ¶¶ 13–47.) Furthermore, it appears that Defendants each appointed the North Carolina Commissioner of Insurance ("Commissioner") to be their agent for purposes of service of process pursuant to N.C.G.S. §§ 58-16-30 or 58-21-100. (Konkel Aff. Ex. 21.) Doing so was a requirement

for licensure pursuant to Chapter 58, Articles 16 and 21 of the North Carolina General Statutes.

70. As discussed in detail herein, Defendants issued insurance policies to The Kroger Co. and HT Supermarkets beginning as early as 1994. (*See* Chung Aff. Ex. 30 (providing a policy The Kroger Co. purchased from Federal Insurance for the period 1 January 1994 to 1 January 1995, which referenced associated policies with Continental Casualty).)

71. A vast majority of the policies in the record were issued when Plaintiffs were engaged in selling pharmaceuticals from their grocery store pharmacies in North Carolina. In fact, of the roughly 140 policies the Kroger Plaintiffs purchased from Defendants, only sixteen provided coverage for 2018 or the years after. (*See generally* Chung Aff. Exs. 5–143 (providing the insurance policies of record that the Kroger Co. purchased from Defendants).)

72. Based on the information of record, it appears that from 2013 to 2021, Defendants generated $10,464,066,455.00 in total direct premiums written in North Carolina and $10,238,904,079.00 in total direct premiums earned in North Carolina. (Konkel Aff. Ex. 22 (providing annual dollar amount totals of each Defendant's property and casualty insurance business in this State); Chirozzi Aff. Exs. 1, 3, 5, 7, 9, 11, 13, 32–33, ECF Nos. 184, 184.1–.5 (providing the data that was ultimately combined and summarized to get the total numbers stated in this paragraph).) Further, Defendants paid a combined $5,166,729,074.00 in total direct losses in North

Carolina and incurred a combined $5,567,378,332.00 in direct losses incurred in North Carolina. (Konkel Aff. Ex. 22.)

73. Following full briefing on the Motions, the Court held the Hearing on 19 July 2023, at which all parties were present and represented through counsel. (*See* ECF No. 206.) The Motions are ripe for resolution.

III. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Rule 12(b)(2)

74. When a defendant moves to dismiss a complaint under Rule 12(b)(2) for lack of personal jurisdiction, the plaintiff carries the burden of establishing that the trial court possesses personal jurisdiction over the defendant. *See Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68 (2010). "When the parties have submitted affidavits and other documentary evidence, a trial court reviewing a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) must determine whether the plaintiff has established that jurisdiction exists by a preponderance of the evidence." *State ex rel. Stein v. E. I. du Pont de Nemours & Co.*, 382 N.C. 549, 555 (2022). Once affidavits and evidence challenging personal jurisdiction are submitted, "unverified allegations in a complaint conflicting with that evidence may no longer be taken as true[,]" though "allegations in [the] complaint uncontroverted by [the evidence] are still taken as true." *Weisman v. Blue Mt. Organics Distrib., LLC*, 2014 NCBC LEXIS 41, at **2 (N.C. Super. Ct. Sept. 5, 2014) (citing *Banc of Am. Sec., LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693–94 (2005)).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

75. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Amended Complaint in the light most favorable to Plaintiffs. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987) (citation omitted). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is therefore not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (cleaned up).

76. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation omitted). Moreover, the 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." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citation omitted).

77. Our Supreme Court has noted that "[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.'" *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). This standard of review for Rule 12(b)(6) is the standard our Supreme Court "uses routinely . . . in assessing the sufficiency of complaints in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

IV. ANALYSIS

78. The Court addresses the Motions in turn, beginning with the Motion to Dismiss. The Court first considers whether it is proper to exercise personal jurisdiction over certain Defendants, and then turns to whether the Court should exercise its discretion to refuse to render a declaratory judgment as to the liabilities and obligations, if any, of Defendants. The Court concludes its analysis of the Motions by addressing the Motion to Stay.

A. Motion to Dismiss Pursuant to Rule 12(b)(2)

79. Allied World, American Guarantee, Aspen American, AXIS, the Chubb Defendants, Columbia Casualty, Continental Casualty, Continental Insurance, Endurance American, Endurance Specialty, Great American Spirit, Indian Harbor, Liberty Underwriters, Liberty Surplus, National Union, Old Republic, St. Paul Fire, Starr, Steadfast, U.S. Fidelity, and XL Insurance (together, the "PJ Moving

Defendants") request dismissal pursuant to Rule 12(b)(2) for lack of personal jurisdiction.[11] (Mot. Dismiss 2 n.2.)

80. Plaintiffs allege that the Court has personal jurisdiction over Defendants "pursuant to applicable North Carolina law" because:

> (i) the Defendant Insurers have engaged in substantial business activity within North Carolina including but not limited to being authorized to sell or write insurance in North Carolina, (ii) the Harris Teeter Plaintiffs were and are residents of and the Kroger Plaintiffs had and have substantial operations alleged to be at issue in underlying Opioid Lawsuits in North Carolina when the events out of which the claims in this action arose took place, (iii) the Policies at issue are contracts of insurance on property, lives, or interests in this State, (iv) the performance of the Insurers' duties under the Policies at issue are required to be undertaken in North Carolina, and/or (v) injurious consequences of Defendant Insurers' denial of their contractual obligations to provide coverage have been or will be sustained in North Carolina.

(Am. Compl. ¶ 49.)

81. Following the filing of the Motions, and the completion of briefing, Plaintiffs filed their Suggestion of Subsequently Decided Authority Under BCR 7.9 ("Suggestion of Subsequent Authority"). (ECF No. 228 ["BCR 7.9 Filing"].) In the Suggestion of Subsequent Authority, Plaintiffs cite to the United States Supreme Court's recent decision, *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), arguing that "consistent with due process, a state may require a foreign

[11] Great American Alliance Insurance Company, Great American Assurance Company, Great American Insurance Company, Great American NY, Ohio Casualty, Mitsui Sumitomo, Travelers Indemnity, Travelers Property Casualty, Twin City Fire, U.S Fire, Westport Insurance Corporation, and Zurich American Insurance Company do not challenge personal jurisdiction. (*See* Mot. Dismiss 1–2 n.2; Def. Twin City Joinder Mot. Dismiss, ECF No. 139 (Twin City Fire joining in the Motion to Dismiss only pursuant to Rule 12(b)(6)); ECF No. 140 (Mitsui Sumitomo joining in the Motion to Dismiss only pursuant to Rule 12(b)(6)).)

corporation to consent to personal jurisdiction before registering to do business within a state." (BCR 7.9 Filing.) Plaintiffs contend that the *Mallory* decision supports the Court's exercise of personal jurisdiction over PJ Moving Defendants because the PJ Moving Defendants each registered to do insurance business in North Carolina. (*See* BCR 7.9 Filing (citing N.C.G.S. §§ 1-75.4(1)(d), 58-16-5, 58-16-30).)

82. Determining whether a non-resident defendant is subject to personal jurisdiction in this State's courts involves a two-step analysis. "First, North Carolina's long-arm statute, N.C.G.S. § 1-75.4, must authorize a court to exercise jurisdiction." *Shaeffer v. SingleCare Holdings, LLC*, 384 N.C. 102, 106 (2023) (citation omitted). Second, the Fourteenth Amendment's Due Process Clause must permit the Court to exercise jurisdiction over a defendant. *Id.* (citation omitted). "In practice, the analysis often collapses into one inquiry because the North Carolina Supreme Court has broadly construed the long-arm statute 'to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process.' " *State ex rel. Stein v. Bowen*, 2022 NCBC LEXIS 127, at **10 (N.C. Super. Ct. Oct. 27, 2022) (citing *Beem USA LLLP v. Grax Consulting, LLC*, 373 N.C. 297, 302 (2020)).

83. Due process requires a defendant to have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (cleaned up). "Minimum contacts are established through 'some act by which the defendant purposefully avails itself of the privilege of conducting activities

within the forum State, thus invoking the benefits and protections of its laws.' " *Shaeffer*, 384 N.C. at 107 (quoting *Beem USA*, 373 N.C. at 303). Plaintiffs have the burden of proving that PJ Moving Defendants "deliberately reached out beyond [their] home—by, for example, exploiting a market in the forum State or entering a contractual relationship centered there." *Mucha v. Wagner*, 378 N.C. 167, 171 (2021) (cleaned up).

84. "Minimum contacts may give rise to one of two forms of jurisdiction: general or specific jurisdiction." *Schaeffer*, 384 N.C. at 107 (citation omitted). "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317). "When a defendant's conduct in a state is not so extensive, [specific] jurisdiction may . . . be proper if 'the litigation results from the alleged injuries that arise out of or relate to the defendant's activities.' " *Shaeffer*, 384 N.C. at 107 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

1. Long Arm Statute

85. North Carolina's long-arm statute, N.C.G.S. § 1-75.4, provides that the Court may exercise personal jurisdiction over a party that is "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)d. Our Supreme Court has interpreted this provision as permitting "North Carolina courts [to exercise] the full jurisdictional powers

permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676 (1977); *see also Schaeffer*, 384 N.C. at 106. Thus, the Court may exercise jurisdiction over PJ Moving Defendants to the extent permitted by federal due process.

86. PJ Moving Defendants contend that, under N.C.G.S. § 1-75.4(1)d, whether personal jurisdiction is appropriate depends on whether the alleged harm at issue arises out of the PJ Moving Defendants' contacts with North Carolina. (Br. Supp. Mot. Dismiss 19.) The Court agrees, and therefore, must proceed to the Due Process analysis.

2. Due Process Analysis

a. Recent Supreme Court Precedent

87. PJ Moving Defendants contend that general personal jurisdiction is "unavailable." (Br. Supp. Mot. Dismiss 15.) However, given recent United States Supreme Court precedent raised by Plaintiffs in the Suggestion of Subsequent Authority, and Plaintiffs' citation to N.C.G.S. § 58-16-30 in their response brief, (*see* Pls.' Br. Opp. Mot. Dismiss 8, 16, ECF No. 186 ["Br. Opp. Mot. Dismiss"]), the Court disagrees.

88. In *Mallory*, Defendant Norfolk Southern Railway ("Norfolk Southern") challenged the Pennsylvania courts' exercise of personal jurisdiction over it, arguing that doing so would offend Due Process. 143 S. Ct. at 2033. Norfolk Southern was incorporated in Virginia and maintained its headquarters there. *Id.* However, the company was registered to do business in Pennsylvania, which required "out-of-state

companies that register to do business in the Commonwealth to agree to appear in its courts on 'any cause of action' against them." *Id.* (citing 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b) (2019)). Plaintiff, Mr. Mallory, argued that Norfolk Southern consented to be sued in Pennsylvania and could not contest personal jurisdiction. *Id.* The United States Supreme Court, reversing the Pennsylvania Supreme Court, sided with Mr. Mallory and addressed whether the Due Process Clause prohibits states "from requiring an out-of-state corporation to consent to personal jurisdiction to do business there." *Id.*

89. In analyzing this issue, the Supreme Court relied largely on its analysis in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issues Mining & Milling Co.*, 243 U.S. 93 (1917). In that case, Pennsylvania Fire was an insurance company incorporated under the laws of Pennsylvania being sued in Missouri, and it argued that, under the Due Process Clause, it could not be sued in Missouri because it had no connection with the state. *Pennsylvania Fire*, 243 U.S. at 94–95; *Mallory*, 143 S. Ct. at 2036. Missouri, at least at that time, required out-of-state insurance companies to file "with the Superintendent of the Insurance Department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the State." *Pennsylvania Fire*, 243 U.S. at 94. There, the Supreme Court ultimately held that "there was 'no doubt' Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract because it had agreed

to accept service of process in Missouri on any suit as a condition of doing business there." *Mallory*, 143 S. Ct. at 2036 (quoting *Pennsylvania Fire*, 243 U.S. at 95).

90. The *Mallory* Court found that *Pennsylvania Fire* was still controlling,[12] concluding that the Pennsylvania law at issue which required an out-of-state corporation to register with the Department of State operated just like the Missouri law at issue in *Pennsylvania Fire*—both permitted state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they could over domestic corporations, because the foreign corporation completed the mandatory statutory registration procedures. *Mallory*, 143 S. Ct. at 2037. Therefore, the Supreme Court rejected Norfolk Southern's argument that it could not be subject to general personal jurisdiction in Pennsylvania because it already submitted to suit there. *Id.* at 2043 ("[O]ur personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State. After all, personal jurisdiction is a personal defense that may be waived or forfeited.").

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[12] Perhaps most notably, the Supreme Court expressly declined to overturn *Pennsylvania Fire*, holding that the precedent fits squarely within the personal jurisdiction analysis understood since *International Shoe*. *Mallory*, 143 S. Ct. at 2039 (citing *Int'l Shoe*, 326 U.S. 310). The *Mallory* Court explained:

> *Pennsylvania Fire* held that an out-of-state corporation that has *consented* to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that has *not consented* to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum.

Mallory, 143 S. Ct. at 2039 (emphasis added) (quoting *Int'l Shoe*, 326 U.S. at 319).

b. North Carolina's Insurance Statutes

91. North Carolina has a statutory scheme similar to the Missouri law at issue in *Pennsylvania Fire*. The laws of this State provide:

> [N.C.G.S. § 58-3-5:] Except as provided in [N.C.]G.S. [§]58-3-6,[13] it is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this State, or with any resident thereof, or for any person as an insurance producer to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of Articles 1 through 64 of this Chapter.
>
> [N.C.G.S. § 58-16-5:] A foreign or alien insurance company may be licensed to do business when it: . . . (10) Files with the Commissioner [of Insurance] an instrument appointing the Commissioner as the company's agent on whom any legal process under [N.C.]G.S. [§]58-16-30 may be served. This appointment is irrevocable as long as any liability of the company remains outstanding in this State. A copy of this instrument, certified by the Commissioner, is sufficient evidence of this appointment; and service upon the Commissioner is sufficient service upon the company.
>
> [N.C.G.S. § 58-16-30:] As an alternative to service of legal process under . . . Rule 4, the service of such process upon any insurance company or any foreign or alien entity licensed or admitted and authorized to do business in this State under the provisions of this Chapter may be made by . . . delivering and leaving a copy of the process in the office of the Commissioner with a deputy or any other person duly appointed by the Commissioner for that purpose; or acceptance of service of the process may be made by the Commissioner or a duly appointed deputy or person.

N.C.G.S. §§ 58-3-5, 58-16-5(10), 58-16-30.

92. Importantly, N.C.G.S. § 58-16-5 sets forth *requirements* for foreign insurance companies to be admitted and authorized to do business in North Carolina. *See Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 109 (1959)

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[13] North Carolina General Statutes § 58-3-6 concerns charitable organizations, as defined more thoroughly by the Internal Revenue Code §§ 501(c)(3), 170(c), and charitable gift annuities. This section is inapplicable to the facts of this case and PJ Moving Defendants.

(describing the statute, as it was formerly codified at § 58-150, as prescribing "the conditions for a foreign insurance company to be admitted and authorized to do business in North Carolina"). Thus, filing an instrument appointing the Commissioner of Insurance as agent for purposes of service of process under subsection 10 is mandatory in this State for foreign insurance companies.

c. Analysis as to PJ Moving Defendants Except AXIS

93. Here, it is undisputed that, as confirmed by the Court at the Hearing, all PJ Moving Defendants except AXIS are licensed to conduct insurance business in North Carolina. (Tr. 30:16–21, 95:8–12.) It is also undisputed that all PJ Moving Defendants except AXIS filed an instrument appointing the Commissioner as their agent on whom any legal process under N.C.G.S. § 58-16-30 may be served.

94. Further, the record demonstrates that all PJ Moving Defendants accepted service of process through the Commissioner pursuant to N.C.G.S. § 58-16-30. (*See* Konkel Aff. ¶ 22; Konkel Aff. Ex. 21 (providing the affidavit of Plaintiffs' counsel indicating that the civil summonses and complaints were mailed to the Insurance Section of the North Carolina Department of Justice, and providing that acceptance of service was made by the Special Deputy for Service of Process on behalf of Mike Causey, the current Commissioner); Tr. 59:23–60:1.) Each of the letters indicating acceptance of service were filed by Plaintiffs in opposition to the Motion to Dismiss, indicating that service was accepted on 14 November 2022. (Konkel Aff. Ex. 21.)

95. Therefore, the Court concludes that all PJ Moving Defendants except AXIS consented to suit in this State by completing the statutorily required registration

procedures for foreign corporations. Doing so rendered Defendants essentially at home in this State and Defendants submitted to suit in this State. *See Espin v. Citibank, N.A.*, 2023 U.S. Dist. LEXIS 176241, at *10–11 (E.D.N.C. Sept. 29, 2023) (determining that the court has general personal jurisdiction over Citibank, and that "[t]his conclusion does not offend due process, even if it took Citibank by surprise, as Citibank has taken full advantage of its opportunity to do business in North Carolina").

96. As a result, the Court's exercise of general personal jurisdiction over these defendants is proper. The Motion to Dismiss is therefore **DENIED** in part, to the extent it requests dismissal of PJ Moving Defendants, except AXIS, for lack of personal jurisdiction.

d. Analysis as to AXIS

97. AXIS is a surplus lines insurance company and is subject to different licensing requirements than foreign insurance companies, as set forth in the North Carolina Surplus Lines Act, N.C.G.S. § 58-21-1 *et seq*. Therefore, the Court must address AXIS separately.

98. North Carolina General Statutes § 58-21-2 provides that, unless "specifically referenced in a particular section of this Chapter, no sections contained in Articles of this Chapter other than this Article apply to surplus lines insurance, surplus lines licensees, nonadmitted domestic surplus lines insurers, or nonadmitted insurers." N.C.G.S. § 58-21-2.

99. Article 21 goes on to provide the following:

> A surplus lines insurer may be sued upon any cause of action arising in this State, under any surplus lines insurance contract made by it or evidence of insurance issued or delivered by the surplus lines licensee, pursuant to the procedure provided in [N.C.]G.S. [§]58-16-30. Any such policy issued by the surplus lines licensee shall contain a provision stating the substance of this section and designating the person to whom the Commissioner shall mail process.

N.C.G.S. § 58-21-100(a). "Each surplus lines insurer engaging in surplus lines insurance shall be deemed thereby to have subjected itself to this Article." N.C.G.S. § 58-21-100(b). This statute has yet to be interpreted by the courts of this State, and therefore, the Court is presented with an issue of first impression.

100. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992) (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614 (2005).

101. Here, the plain meaning of the statute is clear. Given that § 58-21-100(a) specifically references the procedures set forth in § 58-16-30 to achieve service of process upon foreign surplus lines insurance companies, (*see supra* ¶¶ 91, 99), and that the policies issued by that company must include a provision that instructs the Commissioner where to subsequently send process it may receive, it logically follows that the legislature intended service of process to be made upon the Commissioner as the agent of the foreign insurance company. *See Beck*, 359 N.C. at 614 ("The primary endeavor of courts in construing a statute is to give effect to legislative intent."). As

a result, the Court interprets the statute to mean that a surplus lines insurer may be sued in this State upon a cause of action arising here under any surplus lines insurance contract made by that insurer, so long as service of process is made upon the Commissioner pursuant to N.C.G.S. § 58-16-30.

102. This parallels the licensure requirement for insurance companies set forth in § 58-16-5, but without requiring action by the insurer in order to obtain a license to do business in this State. While there are separate licensure requirements set forth in Article 21, it appears that engaging in surplus lines insurance in this State is enough to be subject to this section.

103. Thus, under the limited circumstance where the surplus lines insurer is sued in this State under a policy issued by it, and service of process is made upon the Commissioner, the surplus lines insurer has consented to general jurisdiction in this State. This interpretation is supported by the statutory requirement that each contract of insurance issued by the insurer must contain a provision designating the person to whom the Commissioner shall mail process.

104. Here, the record demonstrates that the AXIS policy issued to The Kroger Co. for the period 25 January 2016 to 25 January 2017 was filed by Plaintiffs in opposition to the Motions. (Chung Aff. Ex. 84.) The AXIS policy contains a "Service of Suit Clause" which provides that AXIS designates the "Commissioner or Director of Insurance, or his/her designee, as its true and lawful attorney upon whom may be served any lawful process in any action . . . instituted by [the insured] . . . under this

Policy against the Company arising out of this Policy," and then goes on to provide a Georgia address for Claims Administration. (Chung Aff. Ex. 84 at 10.)

105. The record also demonstrates that AXIS accepted service of process for this lawsuit through the Commissioner pursuant to N.C.G.S. § 58-16-30. (*See* Konkel Aff. Ex. 21 at 14 (providing the Acceptance of Service of Process for AXIS).)

106. The Court, therefore, is unable to imagine how this procedure differs from that for foreign insurance companies as set forth in the previous section. (*See supra* Part IV.A.2.c.) While the North Carolina Surplus Lines Act does not *expressly* require foreign surplus lines insurers to appoint the Commissioner as its agent in order to do business in this State, it appears to *implicitly* require that appointment. In fact, it goes so far as to require the appointment in writing within endorsements like AXIS's Service of Suit provision. (*See* Chung Aff. Ex. 84 at 10.) To conclude otherwise would fail to give effect to the legislative intent, particularly because the Surplus Lines Act expressly rejects all other Articles in the Chapter concerning insurance companies but specifically references § 58-16-30 as the exception to that general rule.

107. The Court concludes that AXIS, by doing business in this State, agreed to be subject to the laws and regulations set forth herein. Doing so constituted a consent to the exercise of general personal jurisdiction over it by North Carolina courts because the statutory framework requires service of process upon the Commissioner as AXIS's agent for causes of action arising in this State under insurance contracts made by it. Therefore, the Motion to Dismiss is **DENIED** in part to the extent it requests dismissal of AXIS for lack of personal jurisdiction.

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

108. Defendants argue that the Court should refuse to hear this case because the Kroger Plaintiffs' filing of this action constituted forum shopping, and courts of this State have rejected declaratory judgment suits in like circumstances.[14] (Br. Supp. Mot. Dismiss 23.) As an initial matter, Defendants do not challenge Plaintiffs' standing to assert a declaratory judgment claim pursuant to N.C.G.S. § 1-254, and therefore, the Court turns directly to its discretionary authority to dismiss the claim under § 1-257.

109. "Under North Carolina law, a declaratory judgment is a statutory remedy that grants a court the authority to declare rights, status, and other legal relations, when an actual controversy exists between parties to a lawsuit." *Coley v. Its Thundertime LLC*, 2016 NCBC LEXIS 55, at *10 (N.C. Super. Ct. July 15, 2016) (cleaned up). The Court may decline to "enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding . . . ." N.C.G.S. § 1-257. The decision to do so rests in the sound discretion of the trial judge. *Augur v. Augur*, 356 N.C. 582, 587 (2002).

110. "[A] declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Id.* at 588 (cleaned up). The Court must consider that "[a]

[14] All Defendants except U.S. Fidelity join in the Motion to Dismiss pursuant to Rule 12(b)(6). (Mot. Dismiss 1–2 n.1.)

declaratory remedy should not be invoked to try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 578 (2000) (cleaned up). Further, a party "should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum." *Id.* at 579. Put more simply, North Carolina Courts "cannot condone using the Declaratory Judgment Act to obtain a more preferable venue in which to litigate a controversy." *Id*. at 581.

111. "[W]hen the record shows that there is no basis for declaratory relief," the Court may dismiss a declaratory judgment action through a Rule 12(b)(6) motion. *Kirkman v. Kirkman*, 42 N.C. App. 173, 176 (1979). The Court, in deciding whether to issue a declaratory judgment, may consider information related to another pending action involving overlapping issues. *See Coley*, 2016 NCBC LEXIS 55, at *12–15.

112. Defendants contend that the Court should exercise its discretion to dismiss this action in full because (1) "the limits of its jurisdiction and the pendency of the Ohio [Insurance] Action mean that nothing close to complete relief is available to Kroger in this Court[,]" (Br. Supp. Mot. Dismiss 23); and (2) failing to dismiss would "reward Kroger's forum shopping" because Kroger brought this suit as a means of obtaining a more preferable forum, (Br. Supp. Mot. Dismiss 26–27).

113. Defendants appear to take issue only with the Kroger Plaintiffs' request for declaratory judgment, contending that the timing of Plaintiffs' filing of this action is suspect, and arguing that the Kroger Plaintiffs communicated with their insurers for

five years but failed to file an action to resolve their dispute until shortly after the Ohio Insurance Action commenced. (Br. Supp. Mot. Dismiss 27.) Defendants also argue that the Kroger Plaintiffs' inclusion of the HT Plaintiffs was a strategic choice which amounts to impermissible forum shopping. (Br. Supp. Mot. Dismiss 27.)

114. In response, Plaintiffs contend that this Court is the only forum which may provide complete relief and terminate the uncertainty regarding the insurance coverage dispute. (Br. Opp. Mot. Dismiss 27.) Plaintiffs argue that (1) the Ohio Insurance Action is less comprehensive because it includes fewer insurers and does not include the HT Plaintiffs, and (2) there has been no forum shopping by Plaintiffs, but rather that Defendants' "insistence that Ohio law governs their contracts, against all evidence, reveals them to be guilty of the very sin they ascribe to Plaintiffs: forum shopping." (Br. Opp. Mot. Dismiss 28.)

115. Since the Kroger Plaintiffs and the HT Plaintiffs each seek a declaration from this Court as to their rights, if any, under the terms of the various insurance policies issued by Defendants, and because Defendants appear to take issue largely with the Kroger Plaintiffs rather than the HT Plaintiffs, the Court, in its discretion, elects to address them separately.[15]

[15] The Court is unaware of any precedent in this State which would support the proposition that N.C.G.S. § 1-257 may be analyzed on a plaintiff-by-plaintiff basis, nor of the inverse, that the Court may *not* analyze it in that manner. However, the standard for applying § 1-257 is discretionary. Thus, the Court determines that it may exercise its discretion to apply the statute to particular facts on a plaintiff-by-plaintiff basis.

1. The Kroger Plaintiffs

116. The Court agrees with Defendants that this action will not settle the entire controversy giving rise to the proceeding as this action relates to the Kroger Plaintiffs because the issue of the Kroger Plaintiffs' rights under their insurance policies issued by Defendants is already being litigated in the Ohio Insurance Action.

117. In the Ohio Insurance Action, The Kroger Co.'s insurers seek a declaration that they have no duty to defend the Kroger Plaintiffs against the Underlying Opioid Lawsuits, have no duty to indemnify the Kroger Plaintiffs, and seek a declaration that no coverage is owed to the Kroger Plaintiffs under any of the insurance policies issued to them. (St. Jeanos Aff. Ex. J at ¶¶ 45–50.)

118. In this action, the Kroger Plaintiffs seek a decree from the Court that Defendants have a duty to pay or reimburse defense costs, and settlement or judgment costs associated with the Underlying Opioid Lawsuits. (Am. Compl. ¶ 111.)

119. Thus, this action and the Ohio Insurance Action are disputes between many of the same parties seeking a declaration from two courts regarding whether Defendants have a duty to indemnify the Kroger Plaintiffs under the insurance policies issued to The Kroger Co. (*Compare,* St. Jeanos Aff. Ex. J at ¶¶ 44, 47, *with,* Am. Compl. ¶ 111.) Therefore, this action cannot settle the entire underlying controversy as it relates to the Kroger Plaintiffs' rights, if any, under their insurance policies because the Ohio Insurance Action was first filed, remains pending, and will address the same or similar issues.

120. Our Courts have been clear that a party "should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum." *Coca-Cola*, 141 N.C. App. at 579. The Court agrees with Defendants that, as to the Kroger Plaintiffs, the filing of this action appears to be an attempt by them to avoid their home state of Ohio and the Supreme Court of Ohio's holding in *Acuity*.[16]

121. In light of these considerations, the Court determines that it is appropriate for the Court to decline to enter a declaratory judgment regarding the Kroger Plaintiffs' rights, if any, under the insurance policies they purchased from Defendants. The Court's decree would not end the uncertainty giving rise to the proceeding, and it appears that the Kroger Plaintiffs may be attempting to circumvent their home state to obtain a more preferable venue.

122. Therefore, the Court hereby **GRANTS** in part the Motion to Dismiss and declines to grant declaratory relief as it relates to the Kroger Plaintiffs. As a result, the Kroger Plaintiffs' claims for declaratory judgment against Defendants are **DISMISSED**. This includes the Kroger Plaintiffs' claims against U.S. Fidelity, notwithstanding its failure to join in the Motion to Dismiss, because the Court will

[16] As the Court has already explained, the Kroger Plaintiffs are Ohio corporations that filed this suit shortly after the *Acuity* decision was filed, and after certain Defendants filed suit against the Kroger Plaintiffs in Ohio. Importantly, the *Acuity* decision held that the "government[al entities] d[id] not seek damages because of bodily injury" against a wholesale distributor of drugs, and thus the insurance company did not owe "a duty to defend it in the underlying suits." *Acuity*, 205 N.E.3d at 474. As a result, the Kroger Plaintiffs' may have filed this action to avoid the application of *Acuity* when the Ohio court ultimately interprets their insurance policies and rights to coverage, if any.

not reward attempted forum shopping, particularly when the Kroger Plaintiffs can presumably seek to join U.S. Fidelity as a party to the Ohio Insurance Action.

123. The Court's decision in this regard is expressly contingent upon each of the insurers affected by this determination, who are not already parties in the Ohio Insurance Action, being able to join in that proceeding. In the event the Kroger Plaintiffs raise any time-related defenses, based on the period between the initial filing of the Ohio Insurance Action and the filing by the affected insurers of a motion to join that action, the Court may reconsider its discretionary ruling here upon the filing of an appropriate motion.

2. The HT Plaintiffs

124. The facts relevant to the HT Plaintiffs are notably different.

125. First, and perhaps most importantly, the HT Plaintiffs are not party to the Ohio Insurance Action, and as far as the Court is aware, no party to that action has sought to join the HT Plaintiffs in that action. (*See* St. Jeanos Aff. Exs. J–K.)

126. Next, based on the allegations in the Amended Complaint, twenty Defendants allegedly issued insurance policies to the HT Plaintiffs, including: ACE American; Federal Insurance; Allied World; American Guarantee; Great American Alliance Insurance Company; Great American Assurance Company; Great American Insurance Company; Great American NY; Travelers Indemnity; Travelers Property; Liberty Underwriters; Ohio Casualty; St. Paul Fire; Mitsui Sumitomo; Twin City; U.S. Fidelity; U.S. Fire; Westport; XL America; and Zurich. (*See supra* Part II.C.) Of those Defendants, only nine are parties to the Ohio Insurance Action: ACE American,

Federal Insurance, Allied World, American Guarantee, Great American Insurance Company, Great American NY, St. Paul Fire, U.S. Fidelity,[17] and XL America. (St. Jeanos Aff. Exs. J–K.) Thus, eleven of the HT Plaintiffs' insurers are not party to the Ohio Insurance Action.

127. Further, the HT Plaintiffs' initiation of this action does not reek of forum shopping. The HT Plaintiffs are at home in this State, and there is no contention or reason to suspect that the HT Plaintiffs are fleeing a lawsuit to which they are not a party, initiated in a state in which they are not registered to do business. (*See* Mecia Aff. ¶ 22.)

128. Further, there is no indication that the insurance policies issued to the HT Plaintiffs by their aforementioned insurers are being litigated in another forum. Rather, the Ohio Insurance Action names only the Kroger Plaintiffs, and seeks only a declaration that the insurers owe no duties to the Kroger Plaintiffs. While Defendants assert that the Ohio Insurance Action is "a comprehensive action that will resolve essentiallyall [sic] claims between Kroger and its insurers[,]" and that may very well be true, the Ohio Insurance Action has no bearing on the HT Plaintiffs or the meaning of their insurance policies.

129. A decree of this Court as to the meaning of the HT Plaintiffs' insurance policies would serve a useful purpose in clarifying and settling the legal relations at issue, and it would terminate the uncertainty and controversy giving rise to the proceeding, at least as to directly affected parties, as required by N.C.G.S. § 1-257.

[17] As noted previously, U.S. Fidelity does not seek dismissal of Plaintiffs' Amended Complaint and joins only in the Motion to Stay.

Additionally, the HT Plaintiffs have separate and distinct rights in the insurance policies issued to them, particularly as to the insurance policies issued prior to the merger with The Kroger Co., meaning this case will not result in piecemeal litigation.

130. Therefore, the Court, in its discretion, hereby **DENIES** in part the Motion to Dismiss because the Court can terminate the controversy and afford relief from uncertainty as it relates to the HT Plaintiffs' interests in this proceeding.

C. Motion to Stay

131. As a preliminary matter, because the Court has granted Defendants' Motion to Dismiss in part pursuant to Rule 12(b)(6) as it relates to the Kroger Plaintiffs' claims for relief, the Motion to Stay, as it relates to the Kroger Plaintiffs, is **DENIED** in part as moot. The claims between the Kroger Plaintiffs and the Defendants that issued insurance policies only to them have been dismissed.

132. All Defendants join in the Motion to Stay. (*See* Mot. Stay 1 n.1.) Defendants ask the Court to stay this action pursuant to N.C.G.S. § 1-75.12 in favor of the Ohio Insurance Action. (Defs.' Br. Supp. Mot. Stay 14, ECF No. 138 ["Br. Supp. Mot. Stay"].) Defendants argue that a stay would permit the parties to focus their dispute on the Kroger Plaintiffs, "rather than its all but irrelevant Harris Teeter subsidiary." (Br. Supp. Mot. Stay 14.)

133. North Carolina General Statutes § 1-75.12 provides that,

> [i]f, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another

> jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C.G.S. § 1-75.12(a). "Entry of an order under [N.C.]G.S. [§]1-75.12 is a matter within the sound discretion of the trial judge[.]" *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325 (1990).

134. In deciding whether to grant a stay, our courts consider the following convenience factors and policy considerations:

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356 (1993) (citation omitted). "It is not necessary to consider each factor or to find that every factor weighs in favor of a stay." *Cardiorentis AG v. IQVIA, Ltd.*, 2018 NCBC LEXIS 243, at *7 (N.C. Super. Ct. Dec. 31, 2018), *aff'd per curium*, 373 N.C. 309 (2020) (citations omitted). "Rather, the trial court must be able to conclude that (1) a substantial injustice would result in the absence of a stay, (2) the stay is warranted by the factors that are relevant and material, and (3) the alternative forum is convenient, reasonable, and fair." *Id.* at *7–8 (citation omitted).

135. The Court, having considered all the factors deemed relevant to its determination, determines that a stay is not warranted or reasonable as related to the HT Plaintiffs' claims. The Court focuses its analysis below on the factors relevant and material to this decision.

1. Plaintiffs' Choice of Forum

136. "Our courts generally begin with the presumption that a plaintiff's choice of forum deserves deference[,]" but the amount of deference "varies with the circumstances." *Cardiorentis*, 2018 NCBC LEXIS 243, at *8. This Court has held that, when a plaintiff sues outside its home forum, that choice deserves less deference. *Id.* (citation omitted). The inverse is also true, and a plaintiff's choice to sue in its home forum is given great deference. *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at **16–17 (N.C. Super. Ct. Mar. 5, 2015) ("[A] plaintiffs' choice of forum ordinarily is given great deference, especially when plaintiffs select their home forum to bring suit.").

137. The HT Plaintiffs elected to initiate this suit in their home forum, and therefore, this factor weighs against granting a stay.

2. Availability of Compulsory Process to Produce Witnesses & the Relative Ease of Access to Sources of Proof

138. Here, Defendants have not argued that "nonparty witnesses would participate only if compelled to do so," and therefore, "the availability of compulsory process should be given little weight in the overall balancing scheme[.]" *Cardiorentis*, 2018 NCBC LEXIS 243, at *20 (cleaned up).

139. To the extent discovery is necessary in this matter, the HT Plaintiffs maintain their corporate headquarters in Matthews, North Carolina. (Sullivan Aff. Ex. NN at 1.) Defendants contend that "most of the relevant witnesses and documents are located at Kroger's corporate headquarters in Cincinnati, Ohio[,]"

including "a majority of Harris Teeter's corporate officers[.]" (Br. Supp. Mot. Stay 28–29 (emphasis removed).)

140. Notwithstanding that contention, this case is primarily an insurance contract dispute which will require the Court and, if necessary, a jury, to interpret those contracts and declare what rights, if any, the HT Plaintiffs have in them. *See, e.g., Northrop Corp. v. Am. Motorists Ins. Co.*, 270 Cal. Rptr. 233, 239 (Cal. Ct. App. 1990) (explaining that insurance coverage disputes "principally concern questions of law and language, not physical fact, and involve more paper than live witnesses").

141. The Court agrees with Plaintiffs that some of the most important evidence in this action will be documents that may be exchanged electronically between counsel and which are accessible in any forum. (Pls.' Br. Opp. Mot. Stay 27, ECF No. 187 ["Br. Opp. Mot. Stay"].) Further, Defendants are insurance companies incorporated across the country and their corporate representatives or counsel will be required to travel regardless of where this action is litigated. (*See* Br. Opp. Mot. Stay 27.)

142. This factor does, however, weigh slightly in favor of a stay because more of the HT Plaintiffs' potential corporate witnesses reside in Ohio than in North Carolina.

3. Desirability of Litigating Matters of Local Concern in Local Courts

143. In evaluating this factor, the Court must consider the nature of the case and whether North Carolina or Ohio have a local interest in resolving the controversy.

144. Having decided the Motion to Dismiss, this matter now concerns the HT Plaintiffs' insurance coverage rights, if any, under the policies the HT Plaintiffs purchased from certain Defendants. Further, the record before the Court demonstrates that, as of the filing of the Motion to Stay, the HT Plaintiffs were named as defendants in only one Underlying Opioid Lawsuit—the *Durham County* Bellwether—which was initiated in the Middle District of North Carolina. (*See* St. Jeanos Aff. Ex. F at 1 n.3, n.6, 19.)

145. The HT Plaintiffs operate grocery stores across North Carolina, with over half their stores located here and operating 120 pharmacies in this State. (Mecia Aff. ¶¶ 18–20.) Further, the HT Plaintiffs are not registered to do business in Ohio and have never conducted business in Ohio. (Mecia Aff. ¶ 22.) While the HT Plaintiffs are now wholly owned subsidiaries of The Kroger Co., the HT Plaintiffs own and operate their stores with separate corporate formalities. (Mecia Aff. ¶¶ 22–24; Chung Aff. ¶¶ 15–16.)

146. The Court concludes that this factor weighs against granting a stay. North Carolina and its residents have a stronger interest in this Court determining the HT Plaintiffs' rights under their insurance policies, particularly given that the only Underlying Opioid Lawsuit they are party to was initiated by a governmental entity in this State.

4. Fair and Reasonable Forum

147. As a prerequisite to the entry of a stay, the moving parties "must stipulate [their] consent to suit in another jurisdiction." N.C.G.S. § 1-75.12(a). This condition

is met here, with the exception of Great American Alliance and Great American Assurance, which are Ohio companies. (Tr. 133:12–16; ECF Nos. 141.3–.21 (affidavits of counsel confirming the Defendants that are not party to the Ohio Insurance Action consent to being joined there).)

148. The statute also requires that the alternative forum be reasonable and fair. *Id.* This too is satisfied. The Court is not concerned that the Ohio courts would fail to be fair and impartial. Therefore, this factor weights in favor of granting a stay.

5. Applicable Law

149. "State and federal courts alike agree that the need to apply foreign law favors a stay in a *forum non conveniens* analysis." *Cardiorentis*, 2018 NCBC LEXIS 243, at *20 (citations omitted). "To evaluate this factor, the Court need not definitively determine which law governs[.]" *Id.* at *21.

150. Defendants contend that, under the doctrine of *lex loci contractus*, the substantive law of the state where the last act to make a binding insurance contract occurred governs the interpretation of the contract. (Br. Supp. Mot. Stay 26 (citing *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000)).) Defendants state that the place of delivery is the place where the insured resides at the time of the issuance of the policy controls, in the absence of specific evidence reflecting a contrary intention. (Br. Supp. Mot. Stay 26.)

151. Using this reasoning, the HT Plaintiffs' policies allegedly providing coverage for the periods prior to 2014 would be governed by North Carolina law.

152. Additionally, Plaintiffs point out in the briefing on the Motion to Stay that Defendants' insurance policies lack choice of law provisions, (Br. Opp. Mot. Stay 18), and the Court's review of the nearly 145 insurance policies in the record reflected the same.

153. Plaintiffs cite to N.C.G.S. § 58-3-1, which provides that all insurance contracts "on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof." N.C.G.S. § 58-3-1. Thus, North Carolina must have a "close connection" to the insured loss. *Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 335 N.C. 91, 94–95 (1993). "The test is simply stated but not so simply applied as its application revolves around the facts of particular cases from which no formula may be easily derived." *Am. Realty Advisors v. Lexington Ins. Co.*, 2019 NCBC LEXIS 59, at *8 (N.C. Super. Ct. Sept. 10, 2019).

154. It is reasonably possible that the undisputed facts may support the application of North Carolina law, with respect to the insurance policies the HT Plaintiffs purchased. However, the Court lacks sufficient facts to make that determination, given the early stage of this litigation.

155. Therefore, the Court concludes that this factor weighs against entry of a stay, as it is reasonably possible that a majority of the insurance policies the HT Plaintiffs purchased from Defendants will require this Court to apply North Carolina law.

156. After considering the relevant factors, the Court, in its sound discretion, determines that this case should not be stayed pursuant to N.C.G.S. § 1-75.12(a) as Defendants have not demonstrated that continuing the prosecution of this action would work a substantial injustice on them. *See Muter v. Muter*, 203 N.C. App. 129, 134 (2010) (explaining that the Court is "not required to decide the most convenient or ideal venue for resolving this matter but only to determine whether defendant[s] proved that proceeding in North Carolina would work a substantial injustice on [them]").

157. The Court's dismissal of a portion of this action has changed the nature of the case from one concerning primarily issues which may be appropriately litigated in Ohio, to one that concerns plaintiffs who are at home in this State and the harm alleged to have largely occurred—and thus allegedly requiring insurance coverage—in North Carolina. Therefore, the Motion to Stay is hereby **DENIED**. Based on the Court's analysis of the *Lawyers Mutual* factors, a stay is not warranted because a substantial injustice will not result from denial of the Motion to Stay, notwithstanding the fact that Ohio is a fair and reasonable alternative forum.

V. CONCLUSION

158. For the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motions as follows:

a. Defendants' Motion to Dismiss pursuant to Rule 12(b)(2) is **DENIED**;

b. Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is **GRANTED** in part to the extent it seeks dismissal of the Kroger Plaintiffs' claims for declaratory judgment pursuant to N.C.G.S. § 1-75.12(a). Except as expressly granted, Defendants Motion to Dismiss pursuant to Rule 12(b)(6) is otherwise **DENIED**; and

c. Defendants' Motion to Stay is **DENIED**.

IT IS SO ORDERED, this the 10th day of October, 2023.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases