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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

7 MASSACHUSETTS BAY INSURANCE  
8 CO., *et al.*,

9 Plaintiffs,

10 v.

11 PUSH HDD, LLC, *et al.*,

12 Defendants.  
13

Case No. C17-1174RSM

ORDER DENYING CROSS-DEFENDANT  
REECE'S MOTION TO DISMISS

14 **I. INTRODUCTION**

15 This matter comes before the Court on Cross-Defendant Reece Construction Company's  
16 ("Reece") Motion to Dismiss. Dkt. #54. Specifically, Reece argues that Cross-Claimant Zurich  
17 American Insurance Company's ("Zurich") crossclaims should be dismissed for failure to state  
18 a claim under Washington's Uniform Declaratory Judgments Act and for the failure to join an  
19 indispensable party. *Id.* Zurich responds that it has both adequately stated its cross-claims and  
20 that there are no indispensable parties that need to be joined. Dkt. #57. For the reasons set forth  
21 below, the Court agrees with Zurich and DENIES Reece's motion.  
22  
23

24 **II. BACKGROUND**

25 This is an insurance matter arising from a water pipeline construction project on Tulalip  
26 tribal land. The matter was filed in this Court on August 2, 2017. Dkt. #1. Since that date,  
27 numerous parties, including the original Plaintiffs have been dismissed. Dkts. #17, #53 and #56.  
28

ORDER  
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1 The only remaining parties are Defendants Push HDD, LLC, Reece and Zurich on the cross-  
2 claims between them. The instant motion involves the cross-claim made by Zurich against  
3 Reece. *See* Dkt. #37.

4 In the Second Amended Complaint, Plaintiffs alleged as follows:

5 9. This dispute arises out of a water pipeline construction project for The  
6 Tulalip Tribes of Washington (“Tulalip Tribes”) near Marysville,  
7 Washington (“the Project”).

8 10. Reece was the general contractor for the Project.

9 11. Push was a subcontractor hired to perform horizontal directional drilling  
10 and pipe ramming.

11 12. Push and Reece entered into a Subcontract Agreement regarding the  
12 Project on February 22, 2016.

13 13. The Subcontract Agreement required Push to defend and indemnify  
14 Reece against claims for damages resulting from Push’s work on the Project.

15 14. The Subcontract Agreement required Push to maintain a general liability  
16 insurance policy with limits up to \$2,000,000 per occurrence and aggregate.  
17 The Subcontract Agreement further required that Reece and Tulalip Tribes  
18 be named as additional insureds under the general liability policy and that  
19 this additional insured coverage be primary over Reece’s insurance policy.

20 ...

21 18. Push began work on the Project on or about March 28, 2016.

22 19. The Project was stalled by various delays and disruptions in relation to  
23 the work Push was hired to perform on the Project. These delays and  
24 disruptions gave rise to the underlying dispute in this case.

25 ...

26 21. On March 10, 2017, Push instituted an arbitration proceeding, American  
27 Arbitration Association Case No. 01-17-001-5069 (the “Underlying  
28 Arbitration”), against Reece, the Tulalip Tribes and Reece’s surety  
bondholder, F&D Company of Maryland.

...

1 34. Push alleged that Reece has wrongfully withheld \$958,061.80 in  
2 payments owed for work pursuant to the subcontract agreement. Push also  
3 alleged that it sustained further damages in excess of \$7,000,000 caused by  
4 differing site conditions and delays in its operations caused by Reece and the  
Tulalip Tribes. Finally, Push asserted that F&D Company of Maryland  
should pay the damages owed by Reece under the surety bond.

5 35. Push asserted claims of breach of contract and failure to pay amounts  
6 owed to a subcontractor under RCW 39.04.250 against Reece. Push also  
7 asserted claims of negligence and breach of warranty against the Tulalip  
8 Tribes for their role in causing delays and extra costs related to  
9 misrepresentation of site conditions. Push further asserted claims of quantum  
meruit and unjust enrichment against Reece and the Tulalip Tribes. Finally,  
Push asserted a claim for payment under the surety bond for Reece.

10 ...

11 36. In response to Push's Statement of Claim, Reece submitted a Pass-  
12 Through Claim to Tulalip Tribes pursuant to the dispute resolution terms  
13 contained in the Main Contract. In this claim, Reece generally and repeatedly  
14 alleged that any damages incurred in relation to Push's claims were either  
15 caused by Push or Tulalip Tribes. Reece included a claim for its alleged  
damages in the form of extra costs incurred due to delays, repairs and  
additional work.

16 ...

17 85. On information and belief, Zurich issued a commercial general liability  
18 policy, policy number GLO467839, to Push which was in effect from July 1,  
2015 to July 1, 2016 (the "Zurich Policy").

19 86. On information and belief, Zurich issued an excess liability policy, policy  
20 number CH13EXC787900IC, to Push which was in effect from July 1, 2015  
21 to July 1, 2016 (the "Zurich Policy").

22 87. On information and belief, the Zurich Policy and Zurich Excess Policy  
23 provided additional insured coverage for Push and Tulalip Tribes under the  
terms stated therein.

24 88. On April 5, 2017, Reece tendered a claim to Zurich for defense and  
25 indemnity under the Zurich Policy and Zurich Excess Policy with regard to  
26 the Underlying Arbitration.

27 ...

1 93. Zurich owed and owes a duty to defend Push, Reece and Tulalip Tribes  
2 in the Underlying Arbitration based on the terms of the Zurich Policy and  
Zurich Excess Policy.

3 94. Zurich has not provided a defense to Push, Reece or Tulalip Tribes and  
4 has not agreed to contribute to the defense being provided by Plaintiffs with  
regard to the Underlying Arbitration.

5 Dkt. #28 at ¶¶ 9-14, 18, 19, 21, 34-36, 85-88 and 93-94.

6  
7 Zurich answered the Complaint, denying many of Plaintiffs' factual allegations, and  
8 asserted a cross-claim against Reece. Dkt. #37. In support of its cross-claim, Zurich (referred to  
9 as "ZAIC" in its Answer and Cross-Claim) alleges as follows:

10 3. ZAIC issued a commercial general liability to named insured PUSH HDD,  
11 LLC ("PUSH"), Policy No. GLO 4678739-02, effective July 1, 2015 to July  
12 1, 2016. Reece and The Tribes have claimed to be additional insureds under  
13 this policy. In general terms, and subject to all of its terms, limitations,  
14 definitions, exclusions and conditions, this policy provides coverage for sums  
the insured becomes legally obligated to pay as damages because of property  
damage to which the insurance applies.

15 . . .

16 5. Unbeknownst to ZAIC at the time, on or around March 10, 2017 PUSH  
17 filed a Statement of Claim with the American Arbitration Association. This  
18 Statement of Claim contains no allegations of "property damage" as defined  
19 in Policy No. GLO 4678739-02. Rather, this Statement of Claim "makes the  
20 following demand for mediation" related to a dispute between contracting  
21 parties – PUSH, Reece Construction Company ("Reece"), and the Tulalip  
Tribes ("The TRIBES") of Washington – arising from "the Project"  
referenced in Plaintiffs' Second Amended Complaint.

22 . . .

23 9. Under Policy No. GLO 4678739-02, ZAIC has a duty to defend "suits,"  
24 which mean "a civil proceeding in which damages because of 'property  
25 damage' to which this insurance applies are alleged." The term "suit"  
26 includes "an arbitration proceeding" and "any other alternative dispute  
27 resolution proceeding in which such damages are claimed and to which the  
insured submits with our consent." ZAIC was not consulted about nor did it  
28 consent to the "demand for mediation" made in PUSH's Statement of Claim.  
Nonetheless ZAIC endeavored to understand the information provided to it.

1 10. On or around December 14, 2017, plaintiffs filed their Second Amended  
2 Complaint, naming ZAIC as a defendant in this action, and asserting a claim  
3 for contribution for defense expenses against ZAIC, and at the same time  
4 seeking a declaration that their policies did not cover the Project related  
5 claims among the parties.

6 11. On or around January 8, 2018, ZAIC attended the mediation between  
7 PUSH, Reece and The Tribes, as did plaintiffs.

8 12. In compromise of a disputed claim, ZAIC has agreed, and has  
9 communicated to plaintiffs its agreement, to pay the requested shares of  
10 expenses plaintiffs incurred in providing legal representation to PUSH, Reece  
11 and The Tribes.

12 13. ZAIC further understands, based on information and belief, that PUSH,  
13 Reece and The Tribes have settled their claims, and that plaintiffs and  
14 Defendant Hudson contributed to their settlement.

15 By way of Cross-Claim relief against all defendants, ZAIC seeks a  
16 declaratory judgment that:

17 14. ZAIC, by agreeing to pay the requested shares of defense costs paid by  
18 plaintiffs on behalf of PUSH, Reece, and The Tribes, subject only to receipt  
19 and review of the bills, that plaintiffs' claim for contribution, and any claim  
20 by defendants for payment of defense expenses, are satisfied upon actual  
21 payment to plaintiffs when made; and

22 15. ZAIC has no duty to indemnify Hudson, PUSH, Reece, and/or The Tribes  
23 for claims made by these parties against each other related the Project.

24 Dkt. #37 at *Cross-Claim* ¶¶ 3, 5 and 9-15. The instant motion followed.

### 25 III. DISCUSSION

#### 26 A. Legal Standard for Motions to Dismiss Under 12(b)(6)

27 On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure  
28 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most  
favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.  
1996). However, the court is not required to accept as true a "legal conclusion couched as a  
factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*

1 *Twombly*, 550 U.S. 544, 555 (2007)). The Complaint “must contain sufficient factual matter,  
2 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This  
3 requirement is met when the plaintiff “pleads factual content that allows the court to draw the  
4 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Absent facial  
5 plausibility, Plaintiff’s claims must be dismissed. *Twombly*, 550 U.S. at 570.

6  
7 **B. Legal Standard for Failure to Join Necessary Party**

8 Under Federal Rule of Civil Procedure 19, if feasible, a person who is subject to service  
9 of process and whose joinder will not deprive the court of subject matter jurisdiction must be  
10 joined if certain criteria are met:

11 (A) in that person’s absence, the court cannot accord complete relief  
12 among existing parties; or

13 (B) that person claims an interest relating to the subject of the action  
14 and is so situated that disposing of the action in the person’s absence may:

15 (i) as a practical matter impair or impede the person’s ability to  
16 protect the interest; or

17 (ii) leave an existing party subject to a substantial risk of incurring  
18 double, multiple, or otherwise inconsistent obligations because of the interest.

19 Fed. R. Civ. P. 19(a)(1).

20 **C. Failure to Join Tulalip Tribes**

21 Reece first argues that the Insurers’ failure to join the Tulalip Tribes as a party to this  
22 action is an insuperable bar to relief under Washington’s Uniform Declaratory Judgment Act.<sup>1</sup>  
23 Dkt. #54 at 8-9. Reece asserts that the Tribes have an interest in the construction of the Zurich  
24 insurance policy and in the manner of its application to the events and liabilities underlying this  
25

26 \_\_\_\_\_  
27 <sup>1</sup> The Court notes that when this action was initially filed, the Tulalip Tribes were named as  
28 Defendants. Dkt. #1 at ¶ 5. However, after the Tribes filed a motion to dismiss based on  
sovereign immunity, Plaintiffs voluntarily dismissed the Tribes as a Defendant and they have not  
participated in this case. *See* Dkts. #14 and #17.

1 coverage action, and therefore the Tribes are required to be named under RCW 7.24.110, *et seq.*  
2 *Id.* Zurich responds that it is not asserting its claim under Washington’s statute, but rather under  
3 the federal Declaratory Judgment Act. Dkt. #57 at 5-6. Reece replies that even under the federal  
4 Declaratory Judgment Act, this Court can still determine whether the matter “should” proceed in  
5 the absence of the Tulalip Tribes. Dkt. #59 at 4. Given that this question is fact specific, the  
6 Court first analyzes whether Tulalip is a necessary party under Rule 19.  
7

8 As noted above, a party must be joined if certain criteria are met. For the following  
9 reasons, the Court agrees with Zurich that the Tulalip Tribes is not a necessary party in this case.  
10 First, even in the Tribes’ absence, the Court can afford complete relief between Zurich and Reese  
11 with respect to the question of whether Zurich is required to indemnify Reece under its insurance  
12 contract. The policy at issue contains a separation of insureds clause providing that the insurance  
13 applies separately to each insured. Dkt. #58 at ¶ 2, Ex. 1. Thus, the Tribes are not required to be  
14 joined under Rule 19(a)(1)(A).  
15

16 Likewise, Reece cannot demonstrate that joinder is required under Rule 19(a)(1)(B).  
17 Under that subsection of the Rule, joinder is “contingent . . . upon an initial requirement that the  
18 absent party claim a legally protected interest relating to the subject matter of the action.”  
19 *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983). In this case,  
20 the Tulalip Tribes is certainly aware of this action, as it was previously a Defendant to this matter  
21 and was present at mediation where Zurich was also present. Rather than assert any claim of its  
22 own, it chose to rely on its sovereign immunity as the basis for a dismissal from this case, which  
23 ultimately led to its voluntary dismissal. The Ninth Circuit Court of Appeals has held that district  
24 courts do not err by holding that joinder is “unnecessary” when the party at issue declines to  
25 claim interest in the matter. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999);  
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28

1 *Thomas, Head and Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1460 n.18 (9th Cir. 1996)  
2 (holding that “Westwood was not an indispensable party to the proceedings,” because  
3 “Westwood had not claimed an interest in Buster’s limited partnership interest at the time of the  
4 default judgment”); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901,  
5 908 (9th Cir. 1994) (holding that, because the absent party “did not feel that it was necessarily in  
6 his interest to remain a party in this action,” “it is inappropriate for one defendant to attempt to  
7 champion [the] absent party’s interests”); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d  
8 1030, 1043-44 (9th Cir. 1983) (holding that the absent party – the government – was not  
9 “necessary” within the meaning of Rule 19, in part because the government “has never asserted  
10 a formal interest in either the subject matter of this action or the action itself. On the contrary,  
11 the record reflects that the government has meticulously observed a neutral and disinterested  
12 posture . . . .”). Accordingly, the Court concludes that the Tulalip Tribes is not required to be  
13 joined as a party to this matter.

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16 As a result, the Court also finds that the failure to join the Tulalip Tribes does not compel  
17 dismissal of Zurich’s cross-claim as to indemnity. Therefore, Reece’s motion will be denied.  
18

#### 19 **IV. CONCLUSION**

20 Accordingly, having reviewed Reece’s motion to dismiss, Zurich’s opposition thereto,  
21 and the reply of Reece in support thereof, along with the remainder of the record, the Court  
22 hereby finds and ORDERS that Reece’s motion to dismiss (Dkt. #54) is DENIED.  
23

24 DATED this 23<sup>rd</sup> day of August 2018.

25  
26 

27 RICARDO S. MARTINEZ  
28 CHIEF UNITED STATES DISTRICT JUDGE