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7 **UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

8 **JAMES CLEMENTS, and)
JASON CLEMENTS,)**

9)
10 Plaintiffs,)

11 v.)

12 **THE CONFEDERATED)
TRIBES OF THE COLVILLE)
RESERVATION; and)
13 THE COURT OF THE)
CONFEDERATED)
14 TRIBES OF THE COLVILLE)
RESERVATION,)**

15)
16 Defendants.)

No: 2:19-cv-00201-RMP

DEFENDANTS' REPLY BRIEF

INTRODUCTION

The tribal court exhaustion doctrine requires federal courts to abstain from hearing cases challenging tribal court authority until tribal court remedies are fully exhausted. This doctrine applies to all cases where tribal court jurisdiction is “colorable” or “plausible” and allows a tribal court to have the first opportunity to determine its own jurisdiction and develop a full record before federal court review may proceed. Exhaustion does not mean allowing Plaintiffs to essentially eviscerate a pending tribal court case by asking a federal court to issue a ruling that would potentially remove necessary parties from that pending tribal court case before that court has an opportunity to rule on the nature and extent of its own jurisdiction.

In this case, Plaintiffs do not dispute that they must first exhaust their tribal court remedies before seeking federal court review of this case. Furthermore, Plaintiffs incorrectly contend that the Colville Tribal Court has made a final determination on both subject-matter jurisdiction and personal jurisdiction over the case. To the contrary, the Colville Tribal Court has not engaged in any fact-finding or made any determination on whether it has authority to exercise personal jurisdiction over Plaintiffs as individuals.

The Colville Tribal Court of Appeals specifically found, after an initial interlocutory appeal, that the question of whether the “[tribal] court should pierce

1 [the] corporate veil and find personal jurisdiction over [Plaintiffs] was not ripe for
2 interlocutory appeal, where question of piercing the corporate veil [is] a question
3 of fact, and there [has] been no fact-finding for appellate court to review regarding
4 arguments for and against personal jurisdiction.” Colville Tribal Court of Appeals
5 Order, *Clements v. Colville Confederated Tribes*, 15 Am. Tribal Law 255 (Colville
6 Tribal Ct. App. 2019) (ECF No. 9-9 at 3). If the Tribe’s own lower court has not
7 yet, itself, engaged in any fact-finding, or issued any rulings, on personal
8 jurisdiction, it is fundamentally clear there has been no exhaustion of tribal
9 remedies.

10 Subject-matter jurisdiction and personal jurisdiction are entirely separate
11 concepts that must be first evaluated by the Colville Tribal Court. Accordingly,
12 there is no basis for the Court to exercise jurisdiction over this case to review
13 Plaintiffs’ challenges to tribal court jurisdiction. For the reasons set forth herein,
14 the Court should dismiss Plaintiffs’ claims or stay the proceedings until they
15 exhaust their remedies in the Colville Tribal Court.

16 ARGUMENT

17 I. Plaintiffs Have Failed to Exhaust Their Tribal Court Remedies.

18 Plaintiffs do not dispute that they must first exhaust their tribal court
19 remedies before challenging the Colville Tribal Court’s jurisdiction over them.
20 See Plaintiffs’ Response to Defendants’ Motion to Dismiss, ECF No. 11 at 5.

1 However, Plaintiffs contend that they have exhausted their tribal court remedies
2 because the Colville Tribal Court “was given a full opportunity to consider
3 whether it had both subject matter jurisdiction and personal jurisdiction over the
4 Clements and decided that it did.” *Id.*, ECF No. 11 at 5. Plaintiffs misunderstand
5 the tribal court exhaustion doctrine, and confuse and conflate the concepts of
6 subject-matter jurisdiction and personal jurisdiction.

7 **A. The Tribal Court Exhaustion Doctrine Requires the Colville**
8 **Tribal Court to Determine its Own Jurisdiction Over the Case.**

9 The tribal court exhaustion doctrine provides that a “federal court stays its
10 hand until after the Tribal Court has had a full opportunity to determine its own
11 jurisdiction.” *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S.
12 845, 857 (1985). Tribal court jurisdiction includes both subject-matter jurisdiction
13 and personal jurisdiction. *See Water Wheel Camp Recreational Area, Inc. v.*
14 *LaRance*, 642 F.3d 803, 819 (9th Cir. 2011) (“To exercise civil authority over a
15 defendant, a tribal court must have both personal jurisdiction and subject matter
16 jurisdiction.”). Subject-matter jurisdiction and personal jurisdiction are entirely
17 separate and distinct concepts that must first be evaluated by the Colville Tribal
18 Court in accordance with the tribal court exhaustion doctrine, and Plaintiffs’
19 premature federal appeal threatens to preempt the Tribal Court’s opportunity to
20 determine its own scope of personal jurisdiction over Plaintiffs.

1 Subject-matter jurisdiction over this case involves the question of whether
2 the Colville Tribal Court has the authority to hear the type of case involving the
3 parties before it. Specifically, subject-matter jurisdiction “defines the court’s
4 authority to hear a given type of case” and “represents the extent to which a court
5 can rule on the conduct of persons or the status of things.” *Carlsbad Tech., Inc. v.*
6 *HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citations and quotation marks omitted).
7 “[S]ubject-matter jurisdiction, because it involves a court’s power to hear a case,
8 can never be forfeited or waived.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514
9 (2006) (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)); *see also Ins.*
10 *Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702
11 (1982) (“[N]o action of the parties can confer subject-matter jurisdiction upon a
12 federal court. Thus, the consent of the parties is irrelevant.”).

13 Alternatively, personal jurisdiction delineates “the persons . . . falling within
14 a court’s adjudicatory authority.” *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).
15 Derived from the Due Process Clause, personal jurisdiction restricts judicial power
16 as a matter of individual liberty, and unlike subject jurisdiction, may be waived.
17 *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702-03; *see also* Fed. R. Civ. P. 12(h)(1).
18 Personal jurisdiction requires that “the defendant has sufficient contacts with the
19 sovereign such that the maintenance of the suit does not offend traditional notions
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1 of fair play and substantial justice.” *J. McIntyre Machinery, Ltd. v. Nicastro*, 564
2 U.S. 873, 880 (2011) (citations and quotation marks omitted).

3 In this case, Plaintiffs cite to the dispute resolution provision in the Contract
4 between the Tribes and South Bay to assert that the Contract “clearly cannot
5 support the Tribal Court’s determination that the Clements consented to the Tribal
6 Courts’ jurisdiction.” Plaintiffs’ Response to Defendants’ Motion to Dismiss, ECF
7 No. 11 at 9. This argument completely misunderstands subject-matter jurisdiction
8 and personal jurisdiction. The dispute resolution provision in the Contract between
9 the Tribes and South Bay provides a basis for the Colville Tribal Court to exercise
10 subject-matter jurisdiction over the case. *See Nevada v. Hick*, 533 U.S. 353, 367
11 n.8 (2001) (explaining that the “limitation on jurisdiction over nonmembers
12 pertains to subject-matter, rather than merely personal, jurisdiction, since it turns
13 upon whether the actions at issue in the litigation are regulable by the tribe”);
14 *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 818 (stating that “under
15 *Montana*’s first exception, a tribe’s exercise of subject matter jurisdiction over a
16 non-Indian defendant depends on the existence of a ‘consensual relationship’
17 between the non-Indian defendant and the tribe or its members”).

18 Contrary to Plaintiffs’ argument, the Colville Tribal Court has not made any
19 determination on whether it has authority to exercise personal jurisdiction over
20 them as individuals. *See Colville Tribal Court of Appeals Order, Clements v.*

1 *Colville Confederated Tribes*, 15 Am. Tribal Law 255 (Colville Tribal Ct. App.
2 2019), ECF No. 9-9 at 3 n.1 (“We refer to the parties as designated by the
3 Complaint, and make no decision if [the Clements] are subject to personal
4 jurisdiction as individuals.”). Furthermore, there has not been any fact-finding on
5 the question of personal jurisdiction over Plaintiffs in the Colville Tribal Court.
6 *See id.* at 3 (“There has been no fact-finding for us to review regarding the
7 arguments for and against personal jurisdiction. The question of piercing the
8 corporate veil is a question of fact. As such, it is not ripe for an interlocutory
9 appeal, it is a matter for the fact-finder at the trial level.”). Accordingly, the
10 Colville Tribal Court must be afforded the opportunity “to determine whether tribal
11 court jurisdiction exists in the first instance[.]” *Cty. of Lewis v. Allen*, 163 F.3d
12 509, 516 (9th Cir. 1998).

13 **B. The Tribal Court Exhaustion Doctrine Allows the Colville Tribal**
14 **Court to Fully Develop the Record in this Case.**

15 The U.S. Supreme Court’s rationale for adopting the tribal court exhaustion
16 doctrine confirms that the facts pertinent to tribal court jurisdiction over this case
17 must be developed in the Colville Tribal Court. The Supreme Court stated that the
18 “orderly administration of justice in the federal court will be served by allowing a
19 full record to be developed in the Tribal Court before either the merits or any
20 question concerning appropriate relief is addressed.” *Nat’l Farmers Union Ins.*

1 *Cos.*, 471 U.S. at 856. This rationale for deferring to tribal courts to fully develop
2 a case record is directly applicable to this case.

3 Plaintiffs assert that “the Tribes presented no evidence at all before the
4 Tribal Courts, and have presented no evidence before this Court, to support their
5 mere allegations that the Clements abused and disregarded the corporate form of
6 South Bay Excavating, Inc.” Plaintiffs’ Response to Defendants’ Motion to
7 Dismiss, ECF No. 11 at 10. The specific question of whether there is sufficient
8 evidence in the record to support a finding that Plaintiffs “abused and disregarded
9 the corporate” form of South Bay and Liquid Networks is a question of fact that
10 must be first developed in the Colville Tribal Court. *See Cal. Expanded Metal*
11 *Prods. Co. v. Klein*, No. 18-0659, 2019 WL 3818181, at *14 (W.D. Wash. Aug.
12 14, 2019) (“The question whether the corporate form should be disregarded is a
13 question of fact.”) (citation omitted).

14 Developing the case record in the Colville Tribal Court will inform the
15 Tribal Court on whether there is sufficient evidence to pierce the corporate veil of
16 South Bay and Liquid Networks and assert personal jurisdiction over Plaintiffs as
17 individuals. Case law establishes that a court’s exercise of personal jurisdiction
18 over individual officers of a corporation may be appropriate when the court has
19 jurisdiction over the corporation. *See, e.g., Ranza v. Nike, Inc.*, 793 F.3d 1059,
20 1072-73 (9th Cir. 2015) (explaining that the alter ego test “may be used to extend

1 personal jurisdiction”); *Sky Cable, LLC v. DIRECTTV, Inc.*, 886 F.3d 375, 391-92
2 (4th Cir. 2018) (“[W]hen a court has engaged in traditional veil piercing, the court
3 may exercise personal jurisdiction vicariously over an individual if the court has
4 jurisdiction over the individual’s alter ego company.”); *Kinetic Instruments, Inc. v.*
5 *Lares*, 802 F. Supp. 976, 985 (S.D. N.Y. 1992) (“It is clear that if a court has
6 jurisdiction over a corporation, it may obtain jurisdiction over a corporate officer
7 or shareholder by disregarding the corporate entity.”).

8 Consistent with the tribal court exhaustion doctrine, Plaintiffs must allow the
9 Colville Tribal Court to fully develop the case record and make the first
10 determination on whether jurisdiction over them as individuals exists. To the
11 extent that the Tribal Court makes such a ruling, presumably Plaintiffs will have
12 the opportunity to potentially pursue an interlocutory appeal to the Colville Tribal
13 Court of Appeals if they disagree with the Tribal Court’s ruling. Plaintiffs could
14 then also consider, in light of applicable federal precedent on tribal court
15 exhaustion, whether to appeal that ruling to federal court. The Tribal Court could
16 also determine that it does not have personal jurisdiction over Plaintiffs, but as
17 discussed above, that Court has not even had the opportunity to rule on that issue
18 in this pending case that is still in the early discovery phase.

1 **CONCLUSION**

2 For the foregoing reasons, the Court should dismiss Plaintiffs' claims or stay
3 the proceedings until they exhaust their remedies in the Colville Tribal Court.

4 Respectfully submitted,

5 Dated: October 24, 2019

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