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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED FINANCIAL CASUALTY
COMPANY, a foreign insurance company,

Plaintiff,

v.

SPENCER TRUCKING LLC, a Washington
limited liability company; RYAN SPENCER,
an individual; THE ESTATE OF IVAN
EMMANUEL CARDENAS SR.; I.C., an
individual,

Defendants.

No. 1:20-cv-03211-SMJ

MOTION TO DISMISS

Fed. R. Civ. P. 12 (b) (7)

Note for Hearing:

March 5, 2021

INTRODUCTION

Defendants Spencer Trucking and Ryan Spencer move the Court pursuant to Rule 12 (b) (7), Fed. R. Civ. P., to dismiss this cause for failure to join a necessary indispensable party, Yakama Forest Products, a wholly owned enterprise of the Confederated Tribes and Bands of the Yakama Nation.

For the following reasons, the motion should be granted.

STATEMENT OF FACTS

1
2 1. Plaintiff issued a policy of insurance to defendants. *See* Plaintiff's
3 Complaint, docket entry no. 1, *passim*.

4
5 2. That policy of insurance names Yakama Forest Products as an
6 additional insured. *See* Exhibit 1 filed herewith.

7
8 3. Yakama Forest Products is a wholly owned entity of the Confederated
9 Tribes and Bands of the Yakama Nation. *See generally*,
10 <https://yakamaforestproducts.com/>

STANDARD OF REVIEW

11
12 A Rule 12(b)(7) motion to dismiss for failure to join an indispensable
13 party under Rule 19 is subject to a three-step inquiry: (1) is the absent party
14 necessary under Rule 19(a), (2) is it feasible to join that party, and (3) if not
15 feasible, can the action proceed in equity and good conscience absent the
16 indispensable party, or must the action be dismissed? *See* Salt River Improvement
17 and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (*citing* EEOC v.
18 Peabody W. Coal Co., 400 F.3d 774, 779–80 (9th Cir. 2005))

ARGUMENT

21
22
23 Yakama Forest Products, a sub-entity of the Yakama Nation, is a necessary
24 party under Rule 19(a) if (1) this Court cannot accord “complete relief among
25 existing parties” in its absence, or (2) proceeding in the Tribal entity’s absence

1 will “impair or impede” its ability to protect a “claimed legal interest” relating to
2 the action, or “leave an existing party subject to a substantial risk of incurring
3 double, multiple, or otherwise inconsistent obligations because of the interest.”
4
5 *See* Alto v. Black, 738 F.3d 1111, 1126 (9th Cir. 2013). A necessary party
6 becomes indispensable if the action cannot proceed in equity or good conscience
7 in the party’s absence. *See* Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th
8 Cir. 1990).

9
10 Plaintiff’s claims necessarily rest on its assertion that a policy of insurance
11 does not provide insurance coverage to an insured under the policy. Although
12 plaintiff seeks such a declaration, plaintiff merely cherry-picks portions of the
13 policy to rely upon in its complaint. Filed herewith as Exhibit 1 is a *complete*
14 copy of the policy plaintiff issued. From this, the Court should note that plaintiff
15 failed to note that Yakama Forest Products is also an insured under the policy.
16
17 *See* Exhibit 1, page 102. A declaration that the policy provides no coverage to
18 Yakama Forest Products which is undeniably named as an insured will
19 necessarily impact Yakama Forest Products in its absence. *See* Skokomish Indian
20 Tribe v. Goldmark, 994 F. Supp. 2d 1168 at 1187 (WD. Wash. 2014). A favorable
21
22 decision would also leave all parties subject to multiple or otherwise inconsistent
23 results in future litigation. It is very likely that if the Court entered a judgment
24 impacting the parties, or the additional insured, they would seek legal recourse.
25

1 For example, the denial of coverage by plaintiff under a contract of insurance
2 consensually entered with the tribal defendants and which extended coverage to
3 Yakama Forest Products could be subject to a breach of contraction action in their
4 tribal court. Consequently the Court should conclude that Yakama Forest
5 Products, an entity wholly owned by the sovereign Yakama Nation, is a necessary
6 party.
7

8 Sovereign immunity precludes nonconsensual actions in federal court
9 against federally-recognized Indian tribes, including the Yakama Nation and
10 businesses owned by the Yakama Nation, even if operating outside reservation
11 boundaries. In Re Greene, 980 F. 2d 590 (9th Cir. 1992). These tribes may not be
12 joined as parties absent clear waiver of sovereign immunity. See Oklahoma Tax
13 Comm’n, 498 U.S. at 509. Nowhere in the record is it evident that the Yakama
14 Nation, for and on behalf of Yakama Forest Products explicitly waived its
15 sovereign immunity to allow this court to enter a judgment in its absence
16 declaring that, as an insured, it has no liability protection coverage under the
17 policy of insurance naming it as an insured. Thus it cannot be joined under Rule
18 19.
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23 The Court must therefore determine whether in “equity and good
24 conscience” the action can proceed absent the necessary tribe. See Fed. R. Civ. P.
25 19(b). Rule 19(b) provides four factors for determining whether a suit can

1 proceed under such circumstances: (1) whether the judgment may prejudice
2 existing or absent tribes, (2) the potential for lessened or avoided prejudice, (3)
3 whether a judgment rendered in the tribes' absence would be adequate, and (4)
4 whether tribe would have an adequate remedy if the action is dismissed. See *id.*;
5 see also *Makah*, 910 F.2d at 560.

7 The prejudice analysis is substantially identical to the legal interest test
8 under Rule 19(a). See *Skokomish v. Goldmark*, 994 F. Supp.2d at 1190. A
9 judgment in favor of Plaintiff requires a finding that the insurance policy provides
10 no protection to Yakama Forest Products, notwithstanding that the policy purports
11 to extend not less than \$750,000 coverage per incident. The inherent prejudice to
12 the absent tribe strongly supports the conclusion that the court cannot proceed in
13 its absence.

16 CONCLUSION

17 For the foregoing reasons, in “equity and good conscience” the Court must
18 Defendants’ motion to dismiss for failure to join an indispensable party.

20 Additionally, the Court *sua sponte* should note that in this civil action: (1)
21 Plaintiff ignored this Circuit’s mandatory requirement of exhaustion of tribal
22 remedies; (2) rather than disclose the insurance policy in its entirety, merely
23 selectively disclosed portions of the policy that it deemed “pertinent”; (3)
24 speciously seeks a declaration of non-coverage of insureds who “may be held
25

1 liable” under Workers’ Compensation laws in the clear face of authority that
2 tribes and tribal businesses may *not* be held liable nor even be required to
3 participate in state Workers’ Compensation programs; and (4) proceeded to take
4 up the court’s time even though established case law for decades hold that tribes
5 are immune from suit.
6

7 The Ninth Circuit has held that a plaintiff or appellant proceeding with
8 such action is subject to imposition of fees and costs, including reasonable
9 attorneys fees for the filing of a frivolous action. Hardin v. White Mountain
10 Apache Tribe, 761 F. 2d 1285 (9th Cir. 1985). In Suarez v. Newquist, 70 Wn.
11 App. 827 (1993), this Court dismissed a plaintiff’s complaint naming the Yakama
12 Nation as a defendant and, subsequently, the plaintiff filed essentially the same
13 suit in Washington State Superior Court omitting the tribe and naming a tribal
14 employee as defendant in an attempt to avoid sovereign immunity. The court of
15 appeals held that plaintiff’s counsel’s conduct merited CR 11 sanction. In this
16 case, the very relevant and material fact that Yakama Forest Products was as
17 much an insured as the two individual defendants it named was conveniently,
18 perhaps duplicitously, omitted. Whether resulting from purposefulness or lack
19 of diligence, the structuring of this case to conceal one of the insureds impacted
20 by this declaratory judgment action should not be tolerated.
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DATED this 15th day of January, 2021.

Respectfully submitted,

S/Jack W. Fiander
Counsel for Defendants
Spencer Trucking and Ryan Spencer

Certificate of Service

The foregoing document was filed with the Clerk of Court with copies served upon all counsel using the court's CM/ECF system.

S/Jack W. Fiander