JUDGE DAVID G. ESTUDILLO

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEXINGTON INSURANCE COMPANY; HOMELAND INSURANCE COMPANY OF NEW YORK; HALLMARK SPECIALTY INSURANCE COMPANY; ASPEN SPECIALTY INSURANCE COMPANY; ASPEN INSURANCE UK LTD.; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND LONDON MARKET COMPANIES SUBSCRIBING TO POLICY NO. PJ193647; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. PJ1900131; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. PJ1933021; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NOS. PD-10364-05 AND PD-11091-00; AND ENDURANCE WORLDWIDE INSURANCE LIMITED (T/AS SOMPO INTERNATIONAL) SUBSCRIVING TO POLICY NO. PJ1900134-A,

Plaintiffs,

v.

CASE NO. 3:21-cv-05930 - DGE

**DEFENDANT-INTERVENOR THE SUQUAMISH TRIBE'S MOTION FOR SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:
June 17, 2022

ORAL ARGUMENT REQUESTED



**DORSEY & WHITNEY LLP**
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

CINDY SMITH, in her official capacity as Chief Judge for the Suquamish Tribal Court; ERIC NIELSEN, in his official capacity as Chief Judge of the Suquamish Tribal Court of Appeals; BRUCE DIDESCH, in his official capacity as Judge of the Suquamish Tribal Court of Appeals; and STEVEN AYCOCK, in his official capacity as Judge of the Suquamish Tribal Court of Appeals,

Defendants,

and

THE SUQUAMISH TRIBE, a federally-recognized Indian Tribe,

Intervenor.

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DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

**DORSEY & WHITNEY LLP**
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

## TABLE OF AUTHORITIES





DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

**DORSEY & WHITNEY LLP**
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

**STATUTES**





**DORSEY & WHITNEY LLP**
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

## I. INTRODUCTION

This is a clear case for tribal court jurisdiction. Pursuant to tribal law and established federal law, the Suquamish Tribal Court (the "Tribal Court") has jurisdiction over nonmembers who enter into consensual relationships with the Suquamish Tribe (the "Tribe") and over nonmember conduct on tribal land. Here, the Plaintiff insurance companies (the "Insurers") voluntarily entered into insurance contracts with the Tribe itself, to insure Tribal property on Tribal land, and the Insurers' breach of contract deeply and directly affects the Tribe. Federal courts, including in the Ninth Circuit, routinely affirm tribal jurisdiction in similar cases.

The Insurers' arguments focus on three flawed premises. They assert that (1) the current dispute does not implicate the Tribe's sovereign authority, (2) the Tribe does not regulate the insurance industry, and (3) the Insurers have no "physical presence" on the land. Each of these arguments is based on a fundamental misunderstanding of governing law. No Ninth Circuit law supports these purported impediments to tribal court jurisdiction—they are a unique creation of the Insurers. Because settled law confirms that Defendants—judges of the Tribal Court—correctly determined that the Suquamish Tribal Court has jurisdiction over this matter, the Court should grant the Tribe's motion for summary judgment.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### a. The parties and the insurance contracts

The Tribe is a federally-recognized Indian tribe located in Suquamish, Washington, and situated on the Port Madison Indian Reservation ("Reservation"). (Ans. of Defendant-Intervenor The Suquamish Tribe to Compl. for Decl. & Inj. Relief, Dkt. No. 48 ("Ans.") ¶ 35.) Port Madison Enterprises ("PME"), the wholly-owned economic development arm of the Tribe, operates a number of businesses owned by the Tribe and located on the Reservation. (Ans. ¶ 3.) The business income and tax revenues derived from these businesses are vital sources used to support the Tribe's



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

governmental operations and to provide essential services to Tribal members and others on the Reservation. (Declaration of Skip Durocher ("Durocher Dec.") Ex. C ("Klatt Dec.").)

Plaintiffs, the Insurers, are all insurers of the Tribe and PME under "All Risk" property insurance policies in effect from July 1, 2019, to July 1, 2020 (collectively, the "Policies"). (Durocher Dec. Ex. D, Suquamish Tribal Court of Appeals Amended Opinion ("Am. Op."), at 1-2.) Most of the Insurers on the Policies have been insuring the Tribe and PME since 2015 at the latest, and all of the Insurers have been "on the risk" since the 2018-2019 policy year, as specifically listed in the Schedule of Carriers found in each of the Policies. (*Id.*)

The Tribe and PME purchased their "All Risk" property insurance coverage through the Tribal Property Insurance Program ("TPIP"). (Ans. ¶ 37; *see also* Am. Op. at 3.) The Policies provide broad property insurance coverage for losses to the Tribe's and PME's tribal businesses and other property; all the businesses are located on tribal trust land within the Reservation's boundaries. The coverage includes "all risk of direct physical loss or damage" to "property of every description both real and personal," as well as coverage for Business Interruption losses, Interruption by Civil Authority, Contingent Time Element Coverage, and Tax Revenue Interruption, (Klatt Dec.; *see also* Durocher Dec. Ex. B ("Trueb Dec.").) For the July 1, 2019, to July 1, 2020, period alone, the Tribe paid $231,963 in total "annual costs" for this coverage, while PME paid $1,336,007. (Am. Op. at 2.)

As its name suggests, the TPIP is an insurance program specifically marketed to tribes for coverage of tribal property. (*Id.*) The TPIP is administered by Tribal First, a division of Alliant Specialty Services, Inc., which has visited the Reservation on multiple occasions over the past decade for insurance-related issues. (*Id.*) The Insurers worked with Tribal First to issue the Policies



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

to the Tribe and PME, but there is no dispute that the Insurers (and not Tribal First) insure the on-reservation property. (Trueb Dec.; *see also* Klatt Dec.) The Insurers have admitted they knew they were insuring the Tribe. (Am. Op. at 14.)

**b. The insurance claim**

In March of 2020, the Tribe and PME were forced to suspend or restrict operations for the tribal businesses on the Reservation because of the COVID-19 pandemic, consistent with tribal, local, state, and national declarations regarding COVID-19's dangers. (Am. Op at 3.) Although this was necessary to protect tribal employees and guests, prevent further physical damage and loss to the tribal properties, and prevent the continued spread of COVID-19 on the Reservation, the decision to suspend and otherwise restrict operations resulted in the loss of use of those facilities and cost the Tribe and PME millions of dollars in lost business, tax revenue, and other expenses. (Ans. ¶ 54.)

The Tribe and PME sought coverage for these losses from the Insurers. (Am. Op. at 3.) In accordance with the Policies (which did not include any exclusion for communicable diseases or viruses in the relevant time period), the Tribe and PME tendered their claims to the Insurers. (Klatt Dec. Ex. A, Trueb Dec. Ex. 2.)[1] Lexington, acting as the lead insurer, issued reservation-of-rights letters to the Tribe and PME, indicating the "All Risk" insurance policies may not cover the catastrophic losses suffered. (Compl. for Decl. & Inj. Relief, Dkt. No. 1 ("Compl.") ¶ 60; *see also*

[1] Indeed, these same Insurers had previously included an exclusion for loss relating to "[l]oss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to: mold, mildew, fungus, sports or other microorganisms of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health," as well as resulting loss of use, but the Insurers chose to remove this exclusion in 2017-18. (Durocher Dec. Ex. E, First Amended Complaint filed in Tribal Court ¶¶ 23-24.) In the policy period following the COVID-19 loss, the Insurers again included an exclusion for losses similar to the one at issue in this case. (*Id.*)



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

Am. Op. at 3.) Lexington's response (and the failure of any of the other Insurers to affirm coverage) led the Tribe and PME to file an action for breach of contract and declaratory judgment against the Insurers in Tribal Court on June 4, 2020. (Compl. ¶ 63; *see also Suquamish Tribe v. Lexington Insurance Company*, No. 200601-C.)

**c. The Tribal Courts affirm Tribal jurisdiction over claims**

The Insurers, led by Lexington, moved to dismiss the lawsuit, challenging both subject matter and personal jurisdiction. (Am. Op. at 3.) The Tribal Trial Court rejected all of the Insurers' arguments and the Tribal Court of Appeals affirmed. (*See generally* Am. Op.) The Tribal Court of Appeals determined the Tribal Court had personal jurisdiction under tribal law because its jurisdiction extends "to the fullest extent consistent with federal law," including jurisdiction over conduct that occurs within the territorial jurisdiction of the Tribe such as insurers contracting with a tribe to insure its reservation property and businesses. (*Id.* at 4-5.) The Tribal Court of Appeals then confirmed that Tribal Court jurisdiction was consistent with Federal law, looking to Supreme Court and Ninth Circuit precedent to establish two independent bases for subject matter jurisdiction—the consensual relationship prong of *Montana v. United States*, 450 U.S. 544 (1981) and the Tribe's inherent right to exclude nonmembers from Tribal land. (*Id.* at 6-14.)

The Tribal Court of Appeals first considered subject matter jurisdiction based on *Montana*'s first exception, under which tribes may exercise subject matter jurisdiction over activities of nonmembers who enter into "consensual relationships" with the Tribe or its members through commercial dealings. (*Id.* at 6-13 (*citing Montana*, 450 U.S. at 565-66).) The Tribal Court of Appeals found the Insurers had entered into a consensual relationship with the Tribe and PME by entering into the Policies with the Tribe and PME. (*Id.*)



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

The Tribal Court of Appeals expressly rejected the Insurers' argument that Tribal Court jurisdiction cannot be asserted over the Insurers absent some "physical presence" or physical entry onto the Tribe's Reservation, explaining this purported "requirement is not found in any relevant federal case law." (*Id.* at 12.) Indeed, the Tribal Court of Appeals analyzed relevant federal authority, including *Allstate Insurance Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) and *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12-cv-00094, 2014 WL 1883633 (D.N.D. May 12, 2014), finding those cases instructive in confirming Tribal Court jurisdiction. (*Id.* at 9.)

The Tribal Court of Appeals then turned to a separate and independent basis for Tribal Court jurisdiction—the Tribe's inherent right to exclude nonmembers from tribal land, which entails a right to regulate nonmember conduct that "bears some direct connection to tribal lands." (*Id.* at 14.) Here, the Tribal Court determined the Tribe's and PME's claims bear a direct connection to Tribal lands because the Insurers "knew they were contracting with the Tribe," the relevant Policies "were expressly directed and tied to the Tribe's trust lands and businesses located on the Suquamish Tribe's reservation," and the lawsuit "asserts insurers failed to cover those losses." (*Id.* at 14.) Because the Tribe has the right to exclude the Insurers from conducting business with the Tribe and PME, it also has the right to regulate and adjudicate the Insurers' conduct arising directly from that commercial relationship tied to Tribal land. (*Id.*)

Lastly, the Tribal Court of Appeals considered the challenge to personal jurisdiction under Federal law. The Tribal Court held the Insurers had waived their right to challenge personal jurisdiction based on a Service of Suit clause in the Policies; the Tribal Court is a court of competent jurisdiction and other courts had found similar contract clauses to waive any objection to personal jurisdiction. (*Id.* at 14-16.) Beyond the waiver, the Court held it had personal



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

jurisdiction because the Insurers had "purposely availed themselves of the privilege of conducting activities" on the Reservation by contracting with the Tribe and PME to provide coverage within the Reservation. (*Id.* at 16-17.)

**d. Plaintiffs file in Federal Court to avoid Tribal Court jurisdiction**

Following the Tribal Court of Appeals decision, the Tribe and PME filed a first amended complaint in Tribal Court, to which the Insurers filed answers on December 1, 2021. (Ans. ¶¶ 82, 85.) The Insurers then filed the Complaint in this Court, seeking a declaration that the Tribal Court lacks jurisdiction.[2] (Compl. ¶ 139-41.) By stipulation among the parties, the Tribal Court action has been stayed pending the resolution of the Motion. (Ans. ¶ 87.) Also by stipulation of the parties, as approved by this Court, the Tribe has intervened in this case as the real party in interest, to defend the jurisdiction of the Tribal Court. (Dkt. Nos. 38, 39, 47.) Consistent with the parties' stipulation, the record bearing on Tribal Court jurisdiction is complete, the issue is ripe for determination, and this Court may resolve the jurisdictional question upon the parties' cross-motions for summary judgment. (*Id.*)

## III. LEGAL STANDARD

A reviewing court may resolve a challenge to tribal jurisdiction at summary judgment. *See Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1041 (9th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). "[B]ecause tribal courts are competent law-applying

[2] The Insurers initially sought injunctive relief in this case, but withdrew that request. (Dkt. No. 50.) The arguments addressed herein were raised in the Insurers' Complaint.



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 930 (9th Cir. 2019) (quoting *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011)). The tribal courts' factual findings relevant to jurisdiction are entitled to deference in this Court unless clearly erroneous. *Id.* In any event, the material facts establishing Tribal Court jurisdiction in this case are undisputed.

## IV. ARGUMENT

The Tribal Court of Appeals correctly concluded that the Tribal Court has both subject matter and personal jurisdiction under Tribal law. Federal law confirms that conclusion.

The seminal case and starting point for analyzing tribal court authority under federal law is *Montana v. United States*, 450 U.S. 544 (1981). The Supreme Court there explained that while tribes generally lack authority to regulate on reservation fee land activities of nonmembers, there are two significant exceptions to that general principle, permitting tribes to exercise jurisdiction over nonmembers: (1) where the nonmember entered into a consensual relationship with the tribe or tribal member, or (2) when nonmember conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe. *Id.* at 565-66.

Ninth Circuit precedent confirms a third basis for tribal court jurisdiction independent of the two "*Montana* exceptions." Specifically, tribal jurisdiction may arise under a "tribe's inherent sovereign power to exclude" nonmembers from Indian Country. *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 895 (9th Cir. 2019).

Any one of these three grounds—either *Montana* exception or the inherent right to exclude—is independently sufficient to establish tribal court jurisdiction. *Id*. Here, the Tribal Court correctly found it has jurisdiction over the case pursuant to the first *Montana* exception and the inherent right to exclude. In the alternative, it also has jurisdiction under the second *Montana*



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

exception. This Court should accordingly grant the Tribe's motion for summary judgment and confirm the Tribal Court's jurisdiction.

**a. The Tribal Court has jurisdiction under Tribal law**

The Tribal Court has jurisdiction under Tribal law. When examining this issue, the Court should defer to the Tribe's interpretation of its own law because "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *see also AT&T Corp. v. Coeur d'Alene Tribe,* 295 F.3d 899, 904 (9th Cir. 2002) ("[F]ederal courts may not readjudicate questions - whether of federal, state or tribal law - already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.") (citing *LaPlante*, 480 U.S. at 19); *see also Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) ("Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction.").

The Tribal Court of Appeals carefully analyzed Tribal law and correctly concluded that it has jurisdiction over this case.[3] (Am. Op. at 4-5.) The Court explained that the Tribe's Constitution provides the Tribe with the power to "regulate all property within the Tribe's jurisdiction to the fullest extent allowed under applicable Federal law." (Am. Op. at 4 (citing Constitution at Art. III(i)).) The Tribal Court of Appeals read that provision together with Suquamish Tribal Code § 3.2.1, which explains that the Tribal Court is a court of general jurisdiction that has subject matter jurisdiction over all cases within the jurisdiction of the Tribe. (Am. Op. at 4.) Based on those provisions, the Tribal Court of Appeals reasoned that there is Tribal Court subject matter jurisdiction because "this is a case and controversy within the territorial jurisdiction of the Suquamish Tribe involving organizations and Tribal property." (*Id.*)

[3] In making this decision, the Tribal Court of Appeals rejected the Insurers' arguments that "the Tribe's authority cannot exceed the bounds set by federal law" and that the Insurers "have no physical connection to Tribal land." (Am. Op. at 4-5 (discussing App. Br. 17-18).)



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

The Tribal Court of Appeals also found personal jurisdiction under Tribal law because the Suquamish Tribal Code grants the Tribal Court jurisdiction over persons for actions within the territorial jurisdiction of the Tribe involving (1) the transaction of business, (2) contracting for performance of any service with respect to any person or property, or (3) conduct constituting continuous or substantial business within the jurisdiction of the Tribal Court. (Am. Op. at 4-5 (citing Suquamish Tribal Code § 3.2.2).) The Tribal Court of Appeals found that the Tribal Court had personal jurisdiction under any of these options for the reasons explained herein.

The Tribal Court and the Tribal Court of Appeals concluded that the Tribal Court has personal and subject matter jurisdiction under Tribal law. The Court here should decide the same not only because it should defer to these Tribal Courts, but also because the Tribal Courts' decisions were correct. And as discussed below, federal law confirms this result.

**b. The Tribal Court presumptively has subject matter jurisdiction under Federal law because the conduct in question occurred on Tribal land**

The Supreme Court has emphasized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," and that "[c]ivil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *LaPlante*, 480 U.S. at 19-20 (explaining this rule in a case by a tribal member against an out-of-state insurance company for injury that occurred on reservation) (emphasis added). The claims at issue here are subject to this presumption because they address nonmember conduct occurring on Tribal land—specifically the Insurers' conduct in insuring *tribally-owned* property *on tribal trust land within the Reservation*. (*See* Ans. ¶ 9.) The Ninth Circuit has affirmed that tribal jurisdiction presumptively arises under the tribal "right to exclude" nonmembers, and the "*Montana* framework [is] inapplicable," where the "conduct at issue occurred on tribal land." *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 902 (9th Cir.



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

2017), *cert. denied*, 138 S. Ct. 648 (2018). The Insurers' argument that they have not physically entered onto the Reservation is irrelevant to this issue: consistent with *LaPlante*, the Ninth Circuit has recognized that a nonmember's voluntary entry into a contract with a tribe that relates directly to tribal land effectively constitutes "activity . . . on tribal land," irrespective of any so-called "physical presence." *Grand Canyon Skywalk Dev.*, 715 F.3d at 1205-06 (finding tribal jurisdiction under the first *Montana* exception and traditional right to exclude where nonmember "voluntarily entered into a contract" concerning development of tribal land without any requirement or inquiry into literal physical presence on tribal land). And the Insurers cite no treaty provision or federal statute in any way limiting the Tribal Court's jurisdiction in this case. Consequently the Court should apply a presumption in favor of Tribal jurisdiction.

The Insurers do not discuss the foregoing law, arguing instead that there is a general "presumption" against tribal courts' subject matter jurisdiction over non-tribal members. (Compl. ¶¶ 89-94.) That is not the law. The Insurers make their argument by eliding a critical distinction: the Supreme Court has applied a presumption against tribal jurisdiction only to conduct occurring on "non-Indian fee land." *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). The Ninth Circuit has also recognized this distinction. *See FMC Corp.*, 942 F.3d at 932 ("There is a presumption against tribal jurisdiction over nonmember activity on non-Indian fee land."). But there is no relevant conduct on "non-Indian fee land" here; as explained above, the Insurers' relevant conduct is directly tied to tribally owned and tribally occupied trust land on the Tribe's reservation, where tribal jurisdiction presumptively lies pursuant to circuit precedent.



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

**c. The Tribal Court has subject matter jurisdiction under the first *Montana* exception because the Insurers entered into a consensual relationship with the Tribe**

Regardless of any presumption, and even if the Court were to apply the *Montana* framework, the Tribal Court has jurisdiction in this case pursuant to the first *Montana* exception as applied to the clear and undisputed facts. Under the first *Montana* exception, tribes have subject matter jurisdiction to adjudicate nonmember conduct in the context of a consensual relationship between the nonmember defendant and the tribe or its members. *See Water Wheel*, 642 F.3d at 818; *Montana,* 450 U.S. at 565.[4] The Ninth Circuit has explained that under the first Montana exception, "tribes may exercise jurisdiction over nonmembers of the tribe who enter into 'consensual relationships' with the tribe or its members" such that "[n]onmembers of a tribe who choose to affiliate with the Indians or their tribes in this way may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006). This rationale and standard for a "consensual relationship" analysis under *Montana* "resembles the [Supreme] Court's Due Process Clause analysis for purposes of personal jurisdiction," including purposeful availment and minimum contacts. *Id.* at 1138. This principle is not without its limits—a "nonmember's consensual relationship in one area … does not trigger tribal civil authority in another …." *Id.* (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001)) (ellipses in *Smith*). Additionally, the claim must "bear[] some direct connection to tribal lands." *Id.* at 1135 (citing *Allstate Insurance Co. v. Stump*, 191 F.3d 1071, 1073-74 (9th Cir. 1999). Those requirements are easily satisfied here.

[4] *Montana* frames the first exception as giving tribes authority to regulate activity "through taxation, licensing, or other means." *Montana*, 450 U.S. at 565. This phrase "other means" makes clear that tribal jurisdiction extends beyond mere taxation and licensing. *See Fry v. Colville Tribal Court of the Confederated Tribes of the Colville Reservation,* No. CV-07-0178-EFS, 2007 U.S. Dist. LEXIS 60570 (E.D. Wash. Aug. 17, 2007). As further discussed *infra*, this *Montana* exception has been specifically applied to confirm tribal court jurisdiction over insurance coverage disputes for policies issued to tribal members for property on tribal land. *See State Farm*, 2014 U.S. Dist. LEXIS 65748.



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

i. The Insurers entered into insurance contracts with the Tribe and PME, creating consensual relationships that fit the first *Montana* exception

This dispute fits within the first *Montana* exception. The Insurers engaged in the exact type of "consensual relationship" described in *Montana*: "commercial dealing, *contracts*, leases or other arrangements" with the Tribe (and PME). *Smith*, 434 F.3d at 1136 (emphasis added). Key to this analysis is whether "the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority." *Water Wheel*, 642 F.3d at 818. Here, the Insurers entered into consensual relationships with the Tribe and PME for the sole and express purpose of insuring tribal property and businesses located on the Reservation, and had been party to similar agreements for years. (*See* Am. Op. at 2). They also concede that they knew they were contracting with the Tribe. (*Id.* at 3; Ans. ¶¶ 37, 45.) In such circumstances, the Insurers should have anticipated Tribal Court jurisdiction.

Governing case law applying the first *Montana* exception confirms the Tribal Court's jurisdiction. The Ninth Circuit in *Smith* identified two insurance-related suits in the Supreme Court, factually similar to this case, where "a member of the tribe sued a nonmember in tribal court," and "in both cases the Court declined to hold that the tribal courts lacked jurisdiction over nonmember defendants." *Smith*, 434 F.3d at 1139 (citing *LaPlante*, 480 U.S. 9 and *Nat'l Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985)). The Ninth Circuit's decision in *Allstate* also provides guidance. There, after several tribal members were killed in an automobile accident on a tribal road, their estates sued the off-reservation insurer in tribal court to confirm coverage, and also sought damages for bad-faith denial of coverage. *Allstate*, 191 F.3d at 1072. The parties in that case settled the coverage claim in tribal court, and the insurer then attempted to avoid tribal court subject matter jurisdiction over the bad-faith claim, contending the tribal court lacked jurisdiction because the lawsuit arose at the insurer's "off-reservation offices, where it allegedly committed insurance bad faith." *Id.* at 1074. The Ninth Circuit rejected this argument, citing *LaPlante*: "[a]s in *LaPlante*, the insured and injured parties in this case were tribal members who



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

lived on the reservation; the accident occurred on the reservation; and the insurer is an off-reservation entity that sold a policy to a tribal member." *Id.* This is analogous to the facts of this case, where the Tribe and PME purchased insurance from an off-reservation insurer, with the policies insuring tribal businesses owned on trust land on the reservation, with allegations of losses to business income, tax revenue, and other unexpected costs to the insured properties due to the COVID-19 pandemic. *See* Section II.A, *supra*.

The Insurers contend that reliance on *Allstate* is improper because *Allstate* involved "a car accident between tribal members on a tribal reservation and claims of bad faith against a nonmember insurance company for refusing to settle the resulting personal-injury action." (Compl. ¶ 111). To the extent this is a meaningful factual distinction, it only enhances the Tribe's jurisdictional claim. Here, the injured parties are not tribal members like those in *Allstate*, but include the Tribe itself, and the asserted damages are not for bad faith—they are for losses to Tribally-owned property on Tribal trust lands within the Reservation.

The Insurers also attempt to distinguish *Allstate* because the Ninth Circuit remanded the case rather than expressly confirming tribal court jurisdiction. (Compl. ¶ 111.) But remand was ordered not because the tribal court there affirmatively lacked jurisdiction—the court remanded to ensure exhaustion of tribal court remedies because the bad faith claim allegation did not appear to arise from "the parties' contractual relationship, as the first *Montana* exception requires, but from alleged conduct governed by the Montana Unfair Claims Settlement Practices Act, MCA §§33-18-242(3)." *Allstate*, 191 F.3d at 1076. The court's analysis in *Allstate* made clear that the conduct giving rise to the coverage claim (as opposed to the bad-faith claim) plainly occurred on the reservation. *See id.* At 1074 ("[T]he insured and injured parties were tribal members who lived on the reservation; the accident occurred on the reservation; and the insurer is an off-reservation entity that sold a policy to a tribal member."). Indeed, while the court declined to conclusively affirm tribal court jurisdiction given the exhaustion requirement, it did state that the governing



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

"authorities . . . suggest" that even the "bad faith claim should probably be considered to have arisen on the reservation." *Id.* at 1075.

There is no claim for bad faith here, nor an exhaustion dispute. This case arises from the Tribe's and Insurers' consensual relationship—the first *Montana* exception confirms Tribal Court jurisdiction.

Tribal Court jurisdiction was similarly confirmed by *State Farm Ins.*, No. 1:12-cv-00094, 2014 U.S. Dist. LEXIS 65748 (D.N.D. May 12, 2014). In *State Farm*, both the tribal court of appeals and the federal district court found tribal court jurisdiction to exist over a property insurance dispute where "State Farm voluntarily entered into a contractual relationship" with tribal members and the "contract pertained to a home physically located on the Turtle Mountain Indian reservation." *Id.* at *9-10 (quoting tribal court of appeals decision). The federal court held that tribal court subject matter jurisdiction was proper based on the factors present here: "the insurance policy was issued to members of the Tribe and is for [property] located on the reservation." *Id.* at *35.

For these reasons alone, the Tribal Court has subject matter jurisdiction over this case. The Insurers raise a host of other arguments, but they are not grounded in any insurance-specific jurisdiction cases, and instead seek to impose additional requirements that do not exist in controlling law. All were considered and rejected by the Tribal Court of Appeals and in the *State Farm* decision, and should be similarly rejected here. They are addressed in turn.

ii. <u>There is no requirement to implicate the Tribe's inherent sovereign authority to confer subject matter jurisdiction to the Tribal Court</u>

The Insurers first seek to create an artificial roadblock to Tribal Court jurisdiction by asserting the current dispute does not implicate the Tribe's inherent sovereign authority. (Compl. ¶ 120.) This is contrary to law. The Fifth Circuit has expressly addressed this issue and concluded the Supreme Court has not imposed any such requirement. *See Dolgencorp, Inc. v. Miss. Band of*



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

*Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014) ("We do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.'").[5] This is instructive, as the court in *State Farm* likewise relied on *Dolgencorp* to reject a similar argument in the insurance-related context. *See State Farm*, 2014 U.S. Dist. LEXIS 657487 at *20-24 (rejecting "State Farm's argument that there is no tribal court jurisdiction because of the lack of any demonstrable impact on tribal self-government or internal tribal relations"). The Ninth Circuit has never applied any such requirement. *See generally FMC Corp.*, 942 F.3d 916. Nor has the Supreme Court, and not for lack of raising the issue—this precise argument was raised in the losing nonmember's petition for a writ of certiorari to the Supreme Court from the Ninth Circuit's decision in *FMC*:

> Whether the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenever a *Montana* exception is met, or whether, as the Seventh and Eighth Circuits have held, a court must also determine that the exercise of such jurisdiction stems from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations.[6]

*See FMC*, 141 S. Ct. 1046 (2021) (petition denied).

iii. The Tribe does not need to regulate the insurance industry to have jurisdiction

The Insurers next assert that the Tribal Court lacks jurisdiction because the Tribe purportedly does not regulate the insurance industry. (Compl. ¶ 127.) Regulating the industry is not a jurisdictional requirement for the Tribal Court to exercise jurisdiction.[7] The Insurers cite

[5] Tellingly, the Insurers do not even address *Dolgencorp*. (*See generally* Compl.)

[6] *Available at* https://www.supremecourt.gov/DocketPDF/19/19-1143/138231/20200316121553268_2020-03-16%20FINAL%20FMC%20cert%20petition%20with%20apppendix.pdf (emphasis added).

[7] Even if this requirement did exist, the Tribe has this authority, so the Tribal Court would have jurisdiction under the Insurers' invented rule. *See State Farm*, 2014 U.S. Dist. LEXIS 65748 at *33 (explaining there is no "reason why the Tribe would not have the right to regulate the economic activity of providing insurance to tribal members on the reservation.").



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

*Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 (7th Cir. 2014), but that case is not controlling and only required regulation of the industry because of the nature of the industry at issue—the underlying claims alleged violations of state civil and criminal statutes related to online lending. This case bears no resemblance to those facts because the Tribe is not attempting to regulate the Insurers. Instead, it is simply attempting to enforce a contract.

Likewise, the Insurers cite *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019), wherein the underlying claim for relief was to enforce lease obligations under a form lease issued by the Bureau of Indian Affairs and subject to Bureau of Indian Affairs' approval, with the Court concluding that the entire relationship between the tribal parties and the non-tribal party was one "mediated by the federal government." *Id.* This is a simple contract dispute between the Insurers and the Tribe that is plainly distinguishable from *Kodiak*.

The Insurers also cite *Plains Commerce* for this same proposition, but that case is also distinguishable because unlike here, no breach of contract was at issue in *Plains*. *See Plains Commerce*, 554 U.S. at 324. Indeed, as observed by Justice Ginsburg, "the Tribal Court is a proper forum for the [tribal member's] claim that the [non-member] has broken its promise" under a breach-of-contract theory. *Id.* at 348 (Ginsburg, J., concurring in part and dissenting in part). There is no merit to the Insurers' argument that the Tribal Court lacks jurisdiction over a basic breach of contract claim for the reason that the Tribe has not enacted regulations governing insurance.

Indeed, tribal adjudicatory jurisdiction does not rest on the presence of tribal positive law, such as regulations, as Insurers argue. (Compl. ¶ 127.) The Tribe may exercise that authority through positive law, or it may exercise that authority through other forms of law such as common law tort or adjudication of contract disputes. *See Attorneys Process & Invest. Servs. v. Sac & Fox*



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

*Tribe*, 609 F.3d 927, 938 (8th Cir. 2010) (absence of tribal regulations directly addressing conduct at issue "is irrelevant" because if the tribe has the "power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here"). Stated differently, if the Tribe could issue regulations over this insurance conduct—which it could, *see supra* n.7—that is sufficient for tribal jurisdiction.

iv. Tribal Court jurisdiction is not dependent on the nonmember's physical presence on Tribal land

The Insurers next contend that the "nonmember's 'physical presence' on tribal land is a requirement that inheres within the geographically limited nature of tribal jurisdiction and sovereignty." (Compl. ¶ 109.) As indicated above, the law does not require this. In fact, courts have repeatedly considered and specifically rejected the purported "physical presence" requirement. *See e.g., AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n,* No. CIV 14-4150, 2015 US Dist. LEXIS 129071 (D.S.D. Sept. 25, 2015); *see also Sprint Communs. Co. L.P. v. Wynne,* 121 F. Supp. 3d 893 (D.S.D. 2015); *Heldt v. Payday Fin., LLC,* 12 F. Supp. 3d 1170 (D.S.D. 2014); *Brown v. Western Sky Fin., LLC,* 84 F. Supp. 3d 467, 479 (M.D.N.C. 2015); *FTC v. Payday Fin., LLC,* 935 F. Supp. 2d 926, 939 (D.S.D. 2013).

The Ninth Circuit in *Allstate* also rejected this argument. The insurer in that case argued there could be no tribal court jurisdiction because the insurer did not set foot on the reservation. *Allstate*, 191 F.3d at 1074-75. Relying on the Supreme Court's prior insurance-related holdings, the court rejected this argument because—almost exactly as in the present case—"the insured and injured parties in this case were tribal members who lived on the reservation; the accident occurred



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

on the reservation; and the insurer is an off-reservation entity that sold a policy to a tribal member." *Id*. (discussing *LaPlante*, 480 U.S. at 19-20). This is also consistent with the analysis of the federal district court in *State Farm*, which held that where "State Farm entered into an agreement to provide property damage and loss coverage for a residence owned by tribal members located on the Turtle Mountain Reservation[,] … this was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *State Farm*, 2014 U.S. Dist. LEXIS 65748, at *31.

Even the authorities on which the Insurers rely do not use the phrase "physical presence." Instead, all of the authorities explain that the focus is not on a "physical presence," but instead "conduct" or "activities" within the reservation. *See Plains Commerce Bank*, 554 U.S. at 334 ("our *Montana* cases have always concerned nonmember *conduct* on the land") (emphasis added); *see also Nevada v. Hicks*, 533 U.S. 353, 392 (2001) ("tribes retain sovereign interests in *activities* that occur on land owned and controlled by the tribe") (emphasis added); *Jackson*, 764 F.3d at 782 ("tribal regulation of nonmember *conduct* [is limited to] *conduct* inside the reservation") (emphasis added); *Stifel v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207-08 (7th Cir. 2015) (evaluating "on-reservation *conduct*" as to whether it sought to "regulate any of [non-member's] *activities* on the reservation") (emphasis added).

The relevant "activity" at issue under the first *Montana* exception is thus not the physical presence of the nonmember, but whether the nonmember conducted business with the Tribe. *See, e.g., Montana*, 450 U.S. at 565 ("A tribe may regulate … the activities of nonmembers who enter into consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements"); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

(1982) ("We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands *or conducts business with the tribe*") (emphasis added); *Plains Commerce*, 554 U.S. at 333 ("We have approved tribal taxes imposed on leasehold interests held in tribal lands …"). Put simply, the territorial component to tribal jurisdiction is satisfied when, as here, the Insurers have conducted business with the Tribe itself, irrespective of any so-called "physical presence." *See Grand Canyon Skywalk*, 715 F.3d at 1205-06 (9th Cir. 2013) (finding tribal jurisdiction under the first *Montana* exception where a nonmember "voluntarily entered into contract" with a tribal entity, and impact on tribal land arose through nonmember's "intangible property right" rather than any specified physical entry on the reservation). The Insurers' attempt to create an arbitrary "physical presence" requirement is meritless.

v. This limited use of the first *Montana* exception does not swallow the rule

The Insurers finally contend that affirming Tribal Court jurisdiction under the first *Montana* exception in this context would swallow the general rule "against tribal jurisdiction over nonmembers." (Compl. ¶ 130.) The Insurers' described scenario requires a contorted view of *Montana* that is inconsistent with decades of Federal case law. Again, the Supreme Court in *Montana* itself explained that a tribe may regulate "the activities of nonmembers who enter into consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Here, the Insurers entered into a "consensual relationship" through an insurance contract with the Tribe itself to insure Tribal properties, under an insurance program called "Tribal First." The Insurers knew exactly what relationship they were entering into, and if they wanted to avoid the potential for Tribal Court jurisdiction they could have



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

chosen not to issue these specific policies, or negotiated for mutual agreement to a non-tribal forum. This is a specific and limited situation that does not create an overbroad exception that swallows the general rules set forth in *Montana*. The Insurers' arguments about generalized *Montana* presumption against tribal jurisdiction are inconsistent with specific, relevant case law. *See, e.g.*, *Allstate*, 191 F.3d 1071; *see also State Farm*, 2014 U.S. Dist. LEXIS 65748.

The Court need go no further—the Tribal Court has subject matter jurisdiction for the sole reason that the first *Montana* exception applies here.[8]

**d. The Tribal Court has subject matter jurisdiction under the Tribe's inherent right to exclude**

As noted above, the Tribe's inherent right to exclude provides a basis for Tribal Court jurisdiction independent of the *Montana* framework. The Tribe has a right to exclude nonmembers from Tribal lands. *See Knighton*, 922 F.3d at 895 (discussing the Tribe's "inherent power to exclude nonmembers from tribal lands"). That right gives rise to other powers, including the "power to regulate non-Indians on tribal land" and exercise adjudicative authority over them. *Water Wheel*, 642 F.3d 808-09; *see also Knighton*, 922 F.3d at 895 (explaining the Tribe's right to exclude can confer jurisdiction to the Tribal Court). The *State Farm* court explained this in greater detail: a tribe can exclude insurers from conducting business with the tribe, and therefore the tribe also has the right to regulate insurers in their business activities on the reservation, granting it adjudicatory jurisdiction over the suit. *See State Farm*, 2014 U.S. Dist. LEXIS 65748 at *33 ("State Farm has not presented any reason why the Tribe would not have the right to regulate

[8] The second Montana exception—which gives a tribe jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana*, 450 U.S. at 566, also applies here. The health risks posed by the COVID-19 pandemic and crippling financial losses suffered by the primary revenue generator for the Tribe as a result of the public health threat and property damage (and insurance recovery) directly affects the economic security and health and welfare of the Tribe, satisfying the second *Montana* exception. But the Court need not reach this issue.



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

the economic activity of providing insurance to tribal members on the reservation."). Again, *State Farm* is factually analogous, instructive, and confirms that Tribal Court jurisdiction is warranted under federal law.

The Insurers seek to avoid this basis for jurisdiction by contending again that they were not physically present on the land. (Compl. ¶ 134.) Again, this is not the law—none of the cases cited by the Insurers required a physical presence. To the contrary, the court in *Grand Canyon Skywalk* specifically recognized that a tribe's right to exclude may grant the tribal court subject matter jurisdiction over a nonmember company that chooses to do business with the tribe by entering into a contract with it, with the focus for jurisdiction not being on the nonmember's physical presence, but instead the contract concerning tribal land. *Grand Canyon Skywalk*, 715 F.3d at 1204-05. *Allstate* similarly focused on tribal members who lived on the reservation, with the accident occurring on the reservation, and the insurer being an off-reservation entity that sold a policy to a tribal member but never stepped foot on the reservation. 191 F.3d at 1074. The Insurers' refrain that they were not physically present on tribal land is irrelevant.

The Insurers rely heavily on *Employers Mutual Casualty Company v. McPaul*, but that case bears no resemblance to the facts at hand. (Compl. ¶ 135.) There, a nonmember issued a general liability insurance contract to two companies—not the Tribe—without any tribal affiliation within tribal land. *See Emplrs. Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1145 (D. Ariz. 2019), *aff'd*, *Emplrs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756 (9th Cir. 2020). The nonmember insurer in that case never even "interacted with tribal members." *Id* at 1150. The Ninth Circuit declined to recognize tribal jurisdiction because the insurer's relevant conduct only involved "negotiating and issuing general liability insurance contracts to *non-Navajo entities*," which occurred outside tribal land, and the "insurance contracts, which [did] not mention liability arising from activities on the reservation, [bore] no 'direct relationship to tribal lands.'" *McPaul*, 804 F. App'x at 757 (emphasis added). *McPaul* has absolutely no bearing on this case.



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

**e. The Tribal Court has personal jurisdiction**

In addition to subject matter jurisdiction, the Tribal Court has personal jurisdiction over the Insurers because they voluntarily consented to the Tribal Court's personal jurisdiction, and because Tribal Court jurisdiction meets the requirements of the Due Process clause.

Personal jurisdiction requirements can be waived through an insurance policy service-of-suit clause. *See C3 Invs. of N.C., Inc. v. Ironshore Specialty Ins. Co.*, No. 2:19-cv-2609-DCN, 2020 U.S. Dist. LEXIS 24498 at *10-11 (D.S.C. Feb. 12, 2020) (citing *Suter v. Munich Reinsurance Co*., 223 F.3d 150, 160 (3d Cir. 2000); *see also McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1206 (5th Cir. 1991); *In re Delta Am. Re Ins. Co*., 900 F.2d 890, 894 (6th Cir. 1990)). The Policies at issue here included service-of-suit clauses providing, in relevant part, that "the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States." (*See* Compl. ¶ 49.) These are substantively similar to the clauses at issue in *C3 Invs.*, *McDermott*, and *Delta*, meaning that those cases are instructive and demonstrate that personal jurisdiction is appropriate. As discussed above, the Tribal Court is a court of competent jurisdiction within the United States because it has subject matter jurisdiction, and the analysis need go no further. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560-61 (2017) ("[A] court of competent jurisdiction is a court with a grant of subject-matter jurisdiction covering the case before it.").

Even if the Insurers did not waive their right to challenge personal jurisdiction, Tribal Court jurisdiction is entirely consistent with due process requirements. As the Ninth Circuit has explained, the analysis under the first *Montana* exception "overlaps with the inquiry into whether this Court has personal jurisdiction over defendants." *Smith,* 434 F.3d at 1138. Similarly, in *Allstate*, the Ninth Circuit concluded that the challenge to the tribal court's personal jurisdiction was "foreclosed entirely by *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.,* 907 F.2d



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

911 (9th Cir. 1990), in which we held that a Montana state court, for purposes of an accident injury claim arising in Montana, had personal jurisdiction over Portage, a Canadian insurer that sold a policy covering travel in Montana." *Allstate,* 191 F.3d at 1075. Indeed, the Insurer there "not only sold a policy covering travel in the Rocky Boy Reservation, it sold the policy to a resident of the reservation," and found that "[t]his sale of a policy is more clearly a 'purposeful availment' of the forum's laws than was Portage's inclusion of Montana within its coverage territory." *Id.* The Insurers' "purposeful availment" is even clearer here: the Insurers sold policies to the Tribe and to PME to cover Tribally-owned property on the Reservation.

The other due process concerns are similarly satisfied. As in *Allstate* and *Portage,* "this dispute arose out of the insurance coverage." *Id.* And significantly, the *Allstate* court determined that an insurer's "amenability to suit in tribal court" is just as "reasonable" as "a state's exercise of jurisdiction over a foreign insurance company." *Id* The Tribal Court assertion of personal jurisdiction over the Insurers thus fully comports with due process requirements.

## V. CONCLUSION

For the foregoing reasons, the Court should grant the Tribe's motion for summary judgment and should confirm that the Tribal Court has jurisdiction over this matter.

DATED this 2nd of May, 2022

DORSEY & WHITNEY LLP

/s/ Katie Pfeifer

SKIP DUROCHER MN #0208966 (PRO HAC VICE)
DUROCHER.SKIP@DORSEY.COM
ANDREW BRANTINGHAM MN #0389952 (PRO HAC VICE)
BRANTINGHAM.ANDREW@DORSEY.COM
KATIE PFEIFER MN #0309709 (PRO HAC VICE)
PFEIFER.KATIE@DORSEY.COM
**DORSEY & WHITNEY LLP**
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600

/s/ Benjamin D. Greenberg
BENJAMIN D. GREENBERG (WSBA # 44120)
GREENBERG.BEN@DORSEY.COM
**DORSEY & WHITNEY LLP**
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
(206) 903-8800

Timothy Woolsey
Office of the Tribal Attorney
P.O. Box 498
Suquamish, WA 98392
Telephone: (360) 394-8501
Email: twoolsey@Suquamish.nsn.us

*Attorneys for Intervenor The Suquamish Tribe, a federally recognized Indian Tribe*

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused to be served the foregoing on the following counsel of record by the method indicated:

| | |
|---|---|
| **VIA ECF**<br>Gabriel Baker, WSBA No. 28473<br>Benjamin J. Roesch, WSBA No. 39960<br>JENSEN MORSE BAKER PLLC<br>1809 Seventh Avenue, Suite 410<br>Seattle, WA 98101<br>Telephone: (206) 682-1550<br>Email: gabriel.baker@jmblawyers.com<br>Email: benjamin.roesch@jmblawyers.com<br><br>Richard J. Doren, Admitted PHV<br>Matthew A. Hoffman, Admitted PHV<br>Bradley J. Hamburger, Admitted PHV<br>Daniel R. Adler, Admitted PHV<br>Kenneth H. Oshita, Admitted PHV<br>GIBSON, DUNN & CRUTCHER LLP<br>333 South Grand Avenue<br>Los Angeles, CA 90071-3197<br>Telephone: (213) 229-7000<br>Email: rdoren@gibsondunn.com<br>Email: mhoffman@gibsondunn.com<br>Email: bhamburger@gibsondunn.com<br>Email: dadler@gibsondunn.com<br>Email: koshita@gibsondun.com<br><br>*Attorneys for Plaintiff Lexington Insurance Company* | **VIA ECF**<br>Michael E. Ricketts, WSBA No. 9387<br>GORDON THOMAS HONEYWELL LLP<br>520 Pike Street, Suite 2350<br>Seattle, WA 98101<br>Telephone: (206) 676-7500<br>Email: mricketts@gth-law.com<br><br>Shannon O'Malley, Admitted PHV<br>Kristin C. Cummings, Admitted PHV<br>Bennett A. Moss, Admitted PHV<br>ZELLE LLP<br>901 Main Street, Suite 4000<br>Dallas TX 75202<br>Telephone: (214) 742-3000<br>Email: somalley@zelle.com<br>Email: kcummings@zelle.com<br>Email: bmoss@zelle.com<br><br>*Attorneys for Plaintiff Homeland Insurance Company of New York* |
| **VIA ECF**<br>Thomas Lether, WSBA No. 18089<br>Eric J. Neal, WSBA No. 31863<br>Kevin J. Kay, WSBA No. 34546<br>Kasie Kashimoto, WSBA No. 54268<br>LETHER LAW GROUP<br>1848 Westlake Avenue North, Suite 100<br>Seattle, WA 98109<br>Telephone: (206) 467-5444<br>Email: tlether@letherlaw.com<br>Email: eneal@letherlaw.com | **VIA ECF**<br>Robert W. Novasky, WSBA No. 21682<br>FORSBERG & UMLAUF, P.S.<br>1102 Broadway, Suite 510<br>Tacoma, WA 98402<br>Telephone: (253) 572-4200<br>Email: rnovasky@foum.law<br><br>*Attorneys for Plaintiffs Certain Underwriters at Lloyd's, London and London market companies subscribing to* |



DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

| | |
|---|---|
| Email: kkay@letherlaw.com<br>Email: kkashimoto@letherlaw.com<br><br>*Attorneys for Plaintiffs Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, and Aspen Insurance UK Ltd.* | *Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A* |
| **VIA ELECTRONIC MAIL**<br>Cindy Smith<br>CHIEF JUDGE FOR THE SUQUAMISH TRIBAL COURT<br>18490 Suquamish Way, Suite 105<br>Suquamish, WA 98392<br>Telephone: (360) 394-8524<br>Email: csmith@suquamish.nsn.us<br><br>*Defendant Cindy Smith, in her official capacity as Chief Judge for the Suquamish Tribal Court* | **VIA ELECTRONIC MAIL**<br>Eric Nielsen<br>CHIEF JUDGE FOR THE SUQUAMISH TRIBAL COURT OF APPEALS<br>1908 East Madison Street<br>Seattle, WA 98122<br>Telephone: (206) 623-2373<br>Email: NielsenE@nwattorney.net<br><br>*Defendant Eric Nielsen, in his official capacity as Chief Judge for the Suquamish Tribal Court of Appeals* |
| **VIA ELECTRONIC MAIL**<br>Bruce Didesch<br>JUDGE FOR THE SUQUAMISH TRIBAL COURT OF APPEALS<br>P.O. Box 1076<br>Mead, WA 99021<br>Telephone: (509) 951-2609<br>Email: bruce@dideschlaw.com<br><br>*Defendant Bruce Didesch, in his official capacity as Judge for the Suquamish Tribal Court of Appeals* | **VIA ELECTRONIC MAIL**<br>Steven Aycock<br>JUDGE FOR THE SUQUAMISH TRIBAL COURT OF APPEALS<br>7570 West Cherrywood Drive<br>Boise, ID 83704<br>Telephone: (775) 335-9335<br>Email: mjbsreno@gmail.com<br><br>*Defendant Steven Aycock, in his official capacity as Judge of the Suquamish Tribal Court of Appeals* |

X Via Electronic Mail
X Via ECF Notification

**Dated this 2nd day of May, 2022**

*/s/ Katie Pfeifer*

Katie Pfeifer



**DORSEY & WHITNEY LLP**
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820