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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LEXINGTON INSURANCE COMPANY, a Delaware Corporation,

Plaintiff,

v.

MARTIN A. MUELLER, in his official capacity as Judge for the Cabazon Reservation Court; DOUG WELMAS, in his official capacity as Chief Judge of the Cabazon Reservation Court,

Defendants.

Case No. 5:22-cv-00015–JWH-KK

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT (FRCP 12(b)(1), (6), & (7))

Hearing Date: June 24, 2022
Hearing Time: 9:00 AM
Hon. John W. Holcomb

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Defendants Martin A. Mueller and Doug Welmas respectfully submit the following Memorandum of Points and Authorities in support of their Motion to Dismiss.

I.

INTRODUCTION

Defendants Martin A. Mueller and Doug Welmas, each sued in his official capacity as a judge of the Cabazon Reservation Court, move to dismiss Plaintiff Lexington Insurance Company's ("Lexington's" or "Plaintiff's") First Amended Complaint ("FAC") for lack of jurisdiction, for failure to state a claim upon which relief can be granted, and for failure to join a party under Federal Rule of Civil Procedure ("Rule") 19. *See* Rules 12(b)(1), (6), & (7). This Court lacks jurisdiction because the Defendants, as judges, are not adverse to the Plaintiff; therefore, there is no case or controversy as required by Article III of the Constitution. Separately, Plaintiff has failed to state a claim because the Defendants are not subject to the prospective injunctive relief sought by Plaintiff under the *Ex parte Young* doctrine. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 531–32 (2021). Finally, under Rule 19, the Cabazon Band of Cahuilla Indians (the "Cabazon Band" or "Tribe"),[1] the real party in interest in this case, cannot be joined due to its sovereign immunity from suit; in the Tribe's absence, equity and conscience dictate that Plaintiff's FAC be dismissed.

Two additional grounds warrant dismissal of the FAC as to Chief Judge Welmas. First, Chief Judge Welmas lacks the "fairly direct" connection with the enforcement of tribal court jurisdiction that Plaintiff seeks to enjoin; thus, he is not appropriate defendant in an *Ex parte Young* action. Second, Plaintiff lacks standing to sue Chief Judge Welmas because he cannot redress Plaintiff's "injury" even if this Court were to rule in Plaintiff's favor.

[1] The Tribe was formerly known as the Cabazon Band of *Mission* Indians. (Rosser Decl. ¶ 1.)

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II.

BACKGROUND

A. THE CABAZON RESERVATION COURT

The Cabazon Band is a federally recognized Indian tribe. (*Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022); FAC ¶ 30.) As a component of its tribal government, the Tribe has established and operates the Cabazon Reservation Court. (Rosser Decl. ¶ 5 & Exh. 1 §9-101). The Cabazon Reservation Court is composed of a trial court and a court of appeals. (Rosser Decl. ¶ 5.) When a tribal court litigant is a non-Indian, such as Lexington, the Tribe retains *pro tem* judges who have no affiliation or any commercial dealings with the Tribe or any of its departments. The aim is both to provide an entirely impartial forum and to avoid even the appearance of bias. (Rosser Decl. ¶¶ 6-7.) *Pro tem* judges are appointed by the Chief Judge of the Cabazon Reservation Court, who currently is Defendant Welmas. (Welmas Decl. ¶ 3). The Chief Judge does not have the authority to remove a *pro tem* judge, however. (Welmas Decl. ¶ 8). That power is reserved exclusively to the Cabazon General Council, the Tribe's governing body. (Rosser Decl. ¶ 14). A *pro tem* judge "may be suspended or removed from office by the Cabazon General Council only upon grounds of gross misconduct involving moral turpitude or neglect of duty involving misfeasance, malfeasance or nonfeasance." (Rosser Decl. ¶ 14, Exh. 1, §9-103(f)).

B. THE TRIBE'S LAWSUIT AGAINST LEXINGTON IN TRIBAL COURT

On November 24, 2020, the Tribe sued Lexington in the Cabazon Reservation trial court over an insurance coverage dispute. (FAC ¶¶ 57–59.) The case was assigned to Judge Mueller, who was then sitting as the Cabazon Reservation Court's *pro tem* trial judge. Lexington moved to dismiss for lack of subject matter and

1 personal jurisdiction. (FAC ¶ 60.) Following briefing and a hearing at which both
2 parties were represented by counsel, as well as his own analysis of federal law and the
3 Cabazon Rules of Civil Procedure, the trial judge (Defendant Mueller) concluded that
4 the trial court did have jurisdiction to hear the dispute. (FAC ¶ 61.) Lexington
5 appealed.

6 The appeal was heard by the Cabazon Reservation Court of Appeals. Like
7 Judge Mueller, the appellate judges had been appointed in accordance with the Tribe's
8 policies for appointing *pro tem* judges in matters involving non-Indians. (Rosser Decl.
9 ¶ 8). Following briefing and argument, the Court of Appeals affirmed in a carefully
10 reasoned opinion. (FAC ¶ 65.) After filing an initial Complaint, Lexington then filed
11 the FAC against these Defendants in their official capacity as tribal court judges
12 seeking to enjoin them under *Ex parte Young*, 209 U.S. 123 (1908), from exercising
13 jurisdiction in further tribal court proceedings involving Lexington. (FAC ¶¶ 16, 24.)
14 Lexington seeks declaratory and injunctive relief in the same vein. (FAC ¶ 25.)

15 **III.**

16 **ARGUMENT**

17 **A. THIS COURT LACKS JURISDICTION DUE TO AN ABSENCE OF A**
18 **CASE OR CONTROVERSY BETWEEN PLAINTIFF AND EITHER**
19 **DEFENDANT**

20 Pursuant to Article III of the Constitution, the Court's jurisdiction over the case
21 "depends on the existence of a 'case or controversy.'" *GTE Cal., Inc. v. FCC*, 39 F.3d
22 940, 945 (9th Cir. 1994). The "plaintiff 'must show in his pleading, affirmatively and
23 distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does
24 not do so, the court, on having the defect called to its attention or on discovering the
25 same, must dismiss the case, unless the defect be corrected by amendment.'" *Gonzalez*
26 *v. Law Office of Allen Robert King*, 195 F. Supp. 3d 1118, 1123 (C.D. Cal. 2016)
27 (quoting *Tosco Corp. v. Comtys. For a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001),
28 *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010)). Because

Lexington has not pled, and cannot plead, the existence of a case or controversy between itself and either Defendant, this Court must dismiss the FAC under Rule 12(b)(1).

1. Because Neither Defendant Has an Adverse Legal Interest With Respect to Plaintiff, There is No Case or Controversy Under Article III

Article III of the Constitution, "affords federal courts the power to resolve only 'actual controversies arising between adverse litigants.'" *Whole Woman's Health*, 142 S. Ct. at 532 (quoting *Muskrat v. United States*, 219 U.S. 346, 361 (1911)); *see also Grant v. Johnson*, 15 F.3d 146, 147 (9th Cir. 1994) ("Article III prevents federal courts from adjudicating claims when the parties lack the required adverse legal interests."). Article III's case or controversy requirement typically is not met when a litigant sues a judge, for "[j]udges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation." *Whole Woman's Health*, 142 S. Ct. at 532; *see also id.* ("[N]o case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.") (internal quotation marks and citation omitted). The Ninth Circuit has elaborated at some length on this point:

> Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. . . . Almost invariably, they have played no role in the statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made (for example, by the United States Supreme Court). In part for these reasons, one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute.

Grant, 15 F.3d at 148 (citation omitted); *see also Wolfe v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004).

In light of the foregoing, no case or controversy exists as between Plaintiff and

either Defendant. Judge Mueller is named as a defendant for having determined that federal and tribal law, when applied to the facts surrounding issuance and interpretation of Lexington's insurance policy, authorized the exercise of tribal court jurisdiction over the parties' dispute. Judge Mueller did not play any role in the enactment or development of the applicable laws or legal principles bearing on the proper exercise of tribal court jurisdiction, nor did he influence in any way the initiation of the tribal court lawsuit. In short, like the state court judge in *Grant*, Judge Mueller sat as an "arbiter[] without a personal or institutional stake on either side of the" lawsuit brought before him. *See Grant*, 15 F.3d at 148 (citation omitted). That does not render Judge Mueller adverse to the Plaintiff for purposes of Article III.

The argument against the existence of a case or controversy is even stronger for Chief Judge Welmas. Chief Judge Welmas never has been assigned to serve as a judge in the tribal court action between the Tribe and Lexington and has played no role in that case. (Welmas Decl. ¶ 5). Nor is there a prospect of this ever occurring: Lexington's non-Indian status ensures that the Cabazon Reservation Court would only appoint a *pro tem* judge with no affiliation or commercial dealings with the Tribe (Rosser Decl. ¶¶ 7-8). Chief Judge Welmas, as Chairman of the Tribe, would never qualify. Therefore, Chief Judge Welmas has even less of a role or stake than Defendant Mueller in the tribal court's assertion of jurisdiction over Lexington.

In sum, neither Defendant is legally adverse to Lexington. In the absence of such adversity, Plaintiff's suit fails to satisfy Article III's case or controversy requirement, thereby warranting dismissal under Rule 12(b)(1).

2. There is No Case or Controversy as between Plaintiff and Chief Judge Welmas Because Plaintiff Cannot Establish Standing to Sue Him

The Cases and Controversies clause of Article III of the Constitution requires that a plaintiff establish standing to sue. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable

to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* To establish the third prong—redressability—a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Here, Plaintiff lacks standing to sue Chief Judge Welmas because he cannot redress Plaintiff's injury even if this Court were to rule in Lexington's favor. Judge Mueller is a duly appointed *pro tem* judge of the Cabazon Reservation Court, presiding over the suit between the Tribe and Lexington. Plaintiff has not pled that Chief Judge Welmas has authority to prohibit Judge Mueller (or any judge *pro tem* appointed in his stead) from exercising the Tribe's judicial power in good faith, even if that results in a ruling later determined to be in error. Nor could Plaintiff do so, for the Cabazon Code clearly demonstrates that Chief Judge Welmas lacks such authority: "A Judge of the Cabazon Reservation Court may be suspended or removed from office *by the Cabazon General Council* only upon grounds of gross misconduct involving moral turpitude or neglect of duty involving misfeasance, malfeasance or nonfeasance." (Rosser Decl., Exh. 1 § 9-103(f) (emphasis added).) In short, under the Tribe's law, Judge Mueller could be prohibited from continuing to exercise jurisdiction over the Cabazon-Lexington lawsuit only if he engages in acts of gross misconduct (which has not been alleged in this case), and even then, it would be the Tribe's General Council (its governing body), not Chief Judge Welmas, that could impose that discipline.

Given these facts, a ruling in Lexington's favor enjoining Chief Judge Welmas would not redress Lexington's alleged injury. Accordingly, Lexington lacks standing as to Chief Judge Welmas, and thus cannot satisfy the Constitution's case or controversy requirement. This warrants dismissal of the FAC as to Chief Judge Welmas under Rule 12(b)(1).

B. BECAUSE *EX PARTE YOUNG* DOES NOT AUTHORIZE INJUNCTIVE RELIEF AGAINST EITHER DEFENDANT, PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (RULE 12(b)(6))

Rule 12(b)(6) requires dismissal when a plaintiff's allegations fail "to state a claim upon which relief can be granted." To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility does not equate to probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* As shown below, the injunctive relief sought by Plaintiff depends on applications of *Ex parte Young* that have been expressly rejected by the Supreme Court. Necessarily, this precludes the court from drawing a reasonable inference that the Plaintiff is entitled to relief, and thus warrants dismissal under Rule 12(b)(6).

1. *Ex parte Young* Does Not Authorize Plaintiff's Suit Against Judge Mueller to Enjoin His Exercise of Adjudicatory Authority

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health*, 142 S. Ct. at 532. Suits against state officials in their official capacity are not treated as suits against the named defendants but against the officials' offices, and thus implicate the State's immunity from suit as if the suits were against the State itself. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Under the narrow doctrine established in *Ex parte Young*, however, sovereign immunity will not generally bar a suit against a state official in his or her official capacity if the complaint asserts an ongoing violation of federal law and seeks only prospective injunctive relief. *Whole Woman's Health*, 142 S. Ct. at 532; *Verizon Md., Inc. v. Public Service Comm'n of Md.*, 535

1 U.S. 635, 645 (2002).

2 The state official sued under *Ex parte Young* must have some connection with
3 the enforcement of the act that is "fairly direct." *Snoeck v. Brussa*, 153 F.3d 984, 986
4 (9th Cir. 1998). "The doctrine does not allow a plaintiff to circumvent sovereign
5 immunity by naming some arbitrarily chosen governmental officer or an officer with
6 only general responsibility for governmental policy." *Jamul Action Comm. v.*
7 *Simermeyer*, 974 F.3d 984, 994 (9th Cir. 2020).

8 The *Ex parte Young* doctrine originally was conceived to address state officials'
9 violations of federal law. The "doctrine has been extended to tribal officials sued in
10 their official capacity such that tribal sovereign immunity does not bar a suit for
11 prospective relief against tribal officers allegedly acting in violation of federal law."
12 *Burlington N. Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citations
13 and internal quotation marks omitted).

14 Prior to the *Whole Woman's Health* decision, it was not unheard of for federal
15 courts to permit *Ex parte Young* actions against state and tribal court judges sued in
16 their official capacity. *See, e.g., BNSF Ry. v. Ray*, 297 Fed. Appx. 675, 676–77 (9th
17 Cir. 2008) (mem.) (tribal court judge and tribal court clerk); *Wolfe*, 392 F.3d at 365
18 ("Wolfe's claims against Chief Justice George, Justice Strankman, and Ms. Silva fall
19 within the *Ex parte Young* exception to sovereign immunity."); *Big Horn Cty. Elec.*
20 *Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (applying *Ex parte Young* to tribal tax
21 commissioner, tribal utility commissioners, and tribal court judges); *Rie v. California*,
22 No. CV 07-4582 CAS, 2007 WL 9761326, at *8 (C.D. Cal. Dec. 3, 2007) ("To the
23 extent that plaintiff is suing the State Court Judge defendants in their official
24 capacities, for injunctive and not monetary relief, then plaintiff's claims against them
25 fall within the *Ex parte Young* exception to sovereign immunity.").

26 In *Whole Woman's Health*, however, the Supreme Court made clear that *Ex*
27 *parte Young* does not authorize an injunction against a judge's exercise of adjudicatory
28 authority. *Whole Woman's Health* involved a pre-enforcement challenge to a Texas

law restricting the performance of abortions. 142 S. Ct. at 529–30. Alleging that the law violated the federal constitution, the petitioners sought an injunction to prevent an array of defendants, including a state court judge and state court clerk, from taking steps to enforce the law. *Id.* at 530. As the judge and clerk were surely state "officials," the petitioners argued that relief was available under *Ex parte Young*. *Id.* at 531–32.

The Supreme Court rejected this view. While *Ex parte Young* contemplates relief against "state executive officials," it "does not normally permit federal courts to issue injunctions against state-court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties." *Id.* at 532; *see also Ortiz v. Foxx*, No. 19-cv-02923, 2022 WL 991965, at *5–8 (N.D. Ill. Mar. 31, 2022) (relying in part on *Whole Woman's Health* to reject *Ex parte Young* action against state court judges).

Applying *Ex parte Young* in this way, and its focus on "the enforcement" (not the adjudication) of unconstitutional laws (209 U.S. at 159), *Whole Woman's Health* did not break new ground so much as return to the fundamentals of *Young* itself. In *Ex parte Young*, the Supreme Court made it clear that

> the right to enjoin an individual, even though a state official, . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . . . The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

209 U.S. at 163.

Here, Lexington argues that the Tribe, through its tribal court, has violated federal law by exercising jurisdiction over the Tribe's insurance coverage suit against Lexington. Because sovereign immunity would prevent Plaintiff from suing the Tribe directly, Lexington, relying on *Ex parte Young*, seeks to enjoin the Cabazon

Reservation Court trial judge (Mueller) in his official capacity. But this is the very relief that the Supreme Court held was unavailable against state court personnel in *Whole Woman's Health*, and there is no principled reason for finding otherwise in this suit to enjoin Judge Mueller. Therefore, the Court should find that Plaintiff has failed to state a claim against Judge Mueller upon which relief can be granted, and dismiss the FAC as against him pursuant to Rule 12(b)(6).

2. *Ex parte Young* Does Not Afford Relief Against Chief Judge Welmas Because He Does Not Have a Fairly Direct Connection With Enforcing the Law Challenged by Plaintiff

Similarly, *Ex parte Young* provides no relief against Chief Judge Welmas under the particular facts of this case.

Under *Ex parte Young*, injunctive relief must be sought against an official who has "some connection with the enforcement" of the law alleged to violate the plaintiff's federal rights. 209 U.S. at 157; *see also Snoeck*, 153 F.3d at 986 (*Ex parte Young* contemplates relief against a defendant who has a "fairly direct" connection with the enforcement of the challenged law). "[A] generalized duty to enforce [the challenged] law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck*, 153 F.3d at 986 (citation omitted). Absent the requisite "fairly direct" connection, the suit "is merely making [the government official] a party as a representative of the [sovereign], and thereby attempting to make the [sovereign] a party." *Id.* (quoting *Ex parte Young*, 209 U.S. at 157).

The necessary "fairly direct" connection is surely absent with respect to Defendant Welmas. Chief Judge Welmas is not responsible for interpreting or enforcing the laws concerning the tribal court's jurisdiction over Lexington, nor is there any prospect of his exercising any judicial power with respect to Lexington. To be sure, under the Tribe's Code, Chief Judge Welmas has certain administrative responsibilities within the Court. (§ 9-104(b)). But the Judicial Code does not

1 suggest, and no evidence will show, that Chief Judge Welmas has a "fairly direct
2 connection" with the tribal court's continued assertion of jurisdiction over Lexington.
3 *See Jamul Action Committee*, 974 F.3d at 995 (holding that the plaintiff "fail[ed] to
4 articulate any connection" between the defendant tribal officers and the allegedly
5 unlawful conduct). In fact, Chief Judge Welmas has had nothing to do with the tribal
6 court litigation at issue in this case. (Welmas Decl., ¶ 5). And, as noted above, he has
7 no power to remove a *pro tem* tribal judge. The most that can be said about Chief
8 Judge Welmas' connection to the assertion of tribal court jurisdiction is his "general
9 supervisory power over" Judge Mueller—"the person[] responsible for enforcing the
10 challenged provision" of tribal law. *Snoeck*, 153 F.3d at 986. That generalized
11 authority, however, does not suffice to subject Chief Judge Welmas to an *Ex parte*
12 *Young* action. *See id.*

13 For these reasons, Plaintiff fails to state a claim on which relief can be granted
14 against Chief Judge Welmas.

15 **3. <u>The Eight Circuit's *Kodiak Oil* Decision Does Not Compel a Different</u>**
16 **<u>Result Because it is Poorly Reasoned and Inconsistent With Supreme</u>**
17 **<u>Court and Ninth Circuit Case Law</u>**

18 Lexington will argue that under the Eight Circuit Court of Appeals' decision in
19 *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), Chief Judge
20 Welmas is a proper defendant in an *Ex parte Young* action. Because *Kodiak Oil* is
21 unpersuasive and inconsistent with Supreme Court and Ninth Circuit case law, it is
22 best disregarded.

23 *Kodiak Oil* stemmed from a tribal court action brought by members of the Three
24 Affiliated Tribes against several oil and gas companies that operated wells on the Ft.
25 Bethold Reservation. 932 F.3d at 1129. After unsuccessfully challenging the tribal
26 court's jurisdiction in the tribe's trial and supreme courts, the oil and gas companies
27 filed suit in federal district court against the tribal court plaintiffs and the chief judge
28 and clerk of the tribal court. *Id.* The oil and gas companies argued that the tribal court

lacked jurisdiction over them and sought declaratory and injunctive relief under *Ex parte Young*. *Id.*

The tribal court chief judge and court clerk argued that the suit was barred by tribal sovereign immunity notwithstanding *Ex parte Young* because neither had been directly involved with the tribal court action. *Id.* at 1131. They argued that the companies should have named the presiding judge as a defendant (as the chief judge had not presided over the tribal court lawsuit and had not determined that there was jurisdiction over the companies). *Id.*

The federal district court rejected this argument, and the court of appeals affirmed. *Id.* at 1129–30. Because the oil and gas companies had elected not to name as a defendant the judge who actually made the jurisdictional ruling in tribal court, the Eight Circuit had to consider whether the tribal court officials who were sued had "a sufficient connection to the improper exercise of jurisdiction" to subject them to suit for declaratory and injunctive relief under *Ex parte Young*. *Id.* at 1131. The Eighth Circuit held that the requisite connection was present "[b]ecause the chief district court judge and clerk of court have supervisory and administrative duties related to the tribal court case." *Id*. at 1132.

Kodiak Oil's holding is unpersuasive for several reasons. As an initial matter, after acknowledging that the defendant in an *Ex parte Young* action must have some connection to the enforcement of the challenged law, the Eighth Circuit reasoned that the tribal court officials could be enjoined because they "have supervisory and administrative duties related to the tribal court case." *Id.* But having duties "related to the tribal court case" is not the same as having a connection to the enforcement of the challenged law. The *Kodiak Oil* decision did not offer a single fact tending to show that either tribal court official had *any* connection to the tribal court's exercise of jurisdiction over the oil and gas companies. In short, there was no showing that that the oil and gas companies satisfied the test that the Eighth Circuit purported to apply.

Second, *Kodiak Oil*'s holding does not grapple with—indeed, it seems oblivious

to—*Ex parte Young*'s admonition that "the right to enjoin an individual, even though a state official, . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature." 209 U.S. at 163. Nor does *Kodiak Oil*'s holding follow "*Ex parte Young*'s express teaching against enjoining the 'machinery' of courts." *Whole Woman's Health*, 142 S. Ct. at 533 (quoting *Ex parte Young*, 209 U.S. at 163). These two points animated the Supreme Court's refusal in *Whole Woman's Health* to enjoin judges (who resolve disputes) and clerks (who set in motion the court's machinery).

Finally, even if one ignores that the Eighth Circuit's *Kodiak Oil* decision is unsupported by evidence and at odds with *Ex parte Young*, the decision is inconsistent with Ninth Circuit case law. In this circuit, as explained above, an *Ex parte Young* plaintiff must show that the defendant has a "fairly direct" connection to the *enforcement* of the challenged law; a "generalized duty to enforce" the challenged law or "general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck*, 153 F.3d at 986 (citation omitted). As *Kodiak Oil* does not apply these principles, it is not persuasive authority for the issuance of injunctive relief against Defendants.

C. THE INABILITY TO JOIN A REQUIRED PARTY—THE CABAZON BAND—REQUIRES DISMISSAL OF THIS ACTION UNDER RULE 19

1. Legal Standard

Rule 19 requires that an absent party be joined when litigation may impair its ability to protect its interest. Where a required party cannot feasibly be joined, equity and good conscience may require dismissal of the action. *See Jamul Action Comm.*, 974 F.3d at 996 (citing Rules 19(a) and 19(b)); *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 851 (9th Cir. 2019) (citing Rules 19(a), 19(b) and 12(b)(7)).

"Whether an action should be dismissed under Rule 19 involves a two-part

analysis." *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996). "First, the district court must determine whether the absent party is a 'necessary party.'" *Id.* (citation omitted). Rule 19(a) guides this determination, requiring that "if feasible" an entity "must be joined" if the entity "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Rule 19(a)(1)(B)(i). Second, "[u]nder Rule 19, if the party 'who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.'" *Diné Citizens*, 932 F.3d at 851 (quoting Rule 19(b)). "If it cannot proceed, a motion to dismiss under Rule 12(b)(7) for failure to join a party is properly granted." *Id.*

"Rule 19 is designed to protect the interests of absent parties, as well as those ordered before the court, from multiple litigation, inconsistent judicial determinations or the impairment of interests or rights." *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911 (9th Cir. 1991). The inquiry under Rule 19(a) is practical and fact specific, *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014), and "the court may consider evidence outside the pleadings." *Camancho v. Major League Baseball*, 297 F.R.D. 457, 460–61 (S.D. Cal. 2013) (citing *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960)).

2. <u>The Tribe is a Required Party</u>

"Under Rule 19(a)(2)(i), absent parties are necessary if they 'claim[ ] an interest relating to the subject of the action and [are] so situated that the disposition of the action in the [parties'] absence may . . . as a practical matter impair or impede the [parties'] ability to protect that interest.'" *Kescoli*, 101 F.3d at 1309 (alterations in original) (quoting Rule 19(a)(2)(i)).

(a) The Tribe Has Interests in the Action That Will Be Impaired Absent the Tribe's Involvement

The Ninth Circuit has noted that "the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest." *Shermoen v. United States,* 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original). "Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Id.* "To satisfy Rule 19, an interest must be legally protected and must be 'more than a financial stake.'" *Diné Citizens*, 932 F.3d at 852 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)). "[A]n interest that 'arises from terms in bargained contracts' may be protected, but . . . such an interest [must] be 'substantial.'" *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970 (9th Cir. 2008) (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002)). "If a legally protected interest exists, the court must further determine whether that interest will be *impaired or impeded* by the suit." *Diné Citizens*, 932 F.3d at 852 (quoting *Makah Indian Tribe*, 910 F.2d at 558) (emphasis in original).

The Ninth Circuit has found that Indian tribes satisfy this Rule 19 standard in a wide range of cases involving commercial, cultural and governmental interests. *See, e.g.*, *Jamul Action Comm.*, 974 F.3d at 988, 997–98 (challenging federal recognition of tribal government); *Diné Citizens*, 932 F.3d at 847 (questioning adequacy of environmental review of on-reservation mining permit); *White*, 765 F.3d at 1015 (asserting historic and cultural claims to Native American human remains); *Am. Greyhound Racing*, 305 F.3d 1015, 1018, 1022 (9th Cir. 2002) (protecting tribal interest in tribal-state gaming compact); *Kescoli*, 101 F.3d at 1307 (protection of sacred tribal burial sites); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (enforcement of tribal lease agreement). The common denominator in all these cases is that the absent tribe asserted a protected interest in the subject matter of the case that would be impaired if the case were decided in the tribe's absence. And that is precisely the situation presented by this motion.

Here, the scope and extent of the Cabazon Reservation Court's jurisdiction and authority are to be determined without the Tribe's involvement. But, the Tribe has a crucial sovereign interest at stake in this action—its ability to resolve disputes and enforce legal requirements in its own courts, which is a key aspect of tribal sovereignty. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], at 207 (Nell Jessup Newton ed., 2012) (tribal sovereignty includes the ability "to resolve disputes and enforce legal requirements in tribal courts").

The Supreme Court has also recognized that "[t]ribal courts play a vital role in tribal self-government and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987) (citing *United States v. Wheeler*, 435 U.S. 313, 332 (1978), *superseded by statute on other grounds*). As such, the Supreme Court encourages federal courts to stay their hands in cases challenging tribal court jurisdiction, finding that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can [] impair the authority of tribal courts." *Id.* at 15. Adjudication over reservation affairs "by any nontribal court also infringes upon tribal law-making authority." *Id.* at 16. Moreover, "where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (alterations in original) (quoting *Iowa Mut. Ins. Co.*, 480 U.S. at 18).

In addition, Congress—which exercises plenary authority over Indian affairs under the Constitution—has similarly recognized the importance of a functioning tribal judiciary to a tribe's sovereign interests. Under the Indian Tribal Justice Support Act of 2009, Congress expressly noted that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," 25 U.S.C.§ 3601(2), and that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring . . . the political integrity of tribal governments." *Id.* § 3601(5).

As these authorities make clear, then, the Cabazon Band has a legally protectable interest in the operation of its tribal court that is directly related to the subject matter of this case. The Cabazon Band also has a legally protectable interest as an insured under the insurance contract with Lexington, which is the subject of the underlying tribal court action. This Court's interpretation of the contract in order to determine jurisdiction will directly affect the Tribe's legally protectable contractual interests.

(b) <u>Existing Parties Will Not Adequately Represent the Tribe's Interests</u>

A determination under Rule 19(a)(1) that an absent party's ability to protect its interest will be impaired, requires evaluation of whether the existing parties will adequately represent the absent party's interest. *Diné Citizens*, 932 F.3d at 852. The Ninth Circuit considers three factors in this analysis:

> [1] whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; [2] whether the party is capable of and willing to make such arguments; and [3] whether the absent party would offer any necessary element to the proceedings that the present parties would neglect.

Id. (quoting *Alto v. Black*, 738 F.3d 1111, 1127–28 (9th Cir. 2013)).

As outlined in the Declaration of Jonathan Rosser, Judge Mueller has only a contractual relationship with the Tribe; he is not a Cabazon tribal member or employee and has no particular knowledge of the Tribe's history, culture or governmental structure. In fact, as Mr. Rosser notes, the Tribe intentionally selects *pro tem* judges who have no connection to the Cabazon Band so as to avoid any appearance of bias or partiality toward the Tribe in their rulings. (Rosser Decl., ¶¶ 11-14.) Additionally, Judge Mueller cannot assert the same sovereign immunity argument available to the Tribe and is therefore not in a position to make the same arguments as the Tribe is making here to dismiss under Rules 12(b)(7) and 19.

The addition of Chief Judge Welmas as a new defendant in its FAC does not solve the Plaintiff's "lack of adequate representation" problem for at least three

1 reasons.

2 First, as discussed above, *supra* pages 3-11, under *Whole Woman's Health* and
3 other authorities, Welmas is not a proper defendant in this *Ex parte Young* action.
4 Inasmuch as this proceeding fails to state a claim against him and asserts no case or
5 controversy against him, Chief Judge Welmas cannot adequately represent the
6 Cabazon Band's sovereign interest in this case.

7 Second, Chief Judge Welmas played no substantive role in the underlying tribal
8 court proceeding. He did not appoint Judge Mueller, does not have the authority to
9 remove Judge Mueller from his current position, and played no role in the issuance of
10 the trial or appellate decisions of the tribal court at issue here. (Welmas Decl. ¶ 5,
11 6, 8).

12 Finally, as *Jamul Action Committee* teaches us, simply naming tribal officials
13 as defendants does not prevent dismissal under Rule 19. In that *Ex parte Young* case,
14 the plaintiff named a number of tribal officials as defendants in a case challenging the
15 federal recognition of the tribal government. As the Ninth Circuit correctly noted,
16 however, the remedies sought there "lie directly against the sovereign even when
17 styled as a claim for injunctive relief against an individual governmental officer."
18 *Jamul Action Committee,* 974 F.3d at 995 (citing *Idaho v. Coeur d'Alene Tribe of*
19 *Idaho*, 521 U.S. 261 (1997); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Ayers*,
20 123 U.S. 443 (1887)). As a result, the Ninth Circuit affirmed the dismissal of the
21 action under Rule 19.

22 So too, here. Chief Judge Welmas did not appoint Judge Mueller and has no
23 authority to remove him. In addition, Chief Judge Welmas has had nothing
24 whatsoever to do with the underlying tribal court litigation. As in *Jamul Action*
25 *Committee*, Plaintiff's challenge here goes to core sovereign interests of the Cabazon
26 Band, not to individual defendants, making the Cabazon Band the "real party in
27 interest" in this case. Under these circumstances, Defendant Welmas cannot
28 adequately represent the legal interests of the Cabazon Band.

1 As a result of the foregoing facts, neither of the Defendants in this action can
2 represent the interests of the Tribe and thus, the Tribe is a required party within the
3 meaning of Rule 19.

4 **3. <u>The Tribe Cannot Be Joined</u>**

5 The next step in the Rule 19 inquiry is to determine whether the Tribe can be
6 feasibly joined as a party to this litigation. *See Diné Citizens*, 932 F.3d at 856. Here,
7 the Tribe cannot be joined as a party due to tribal sovereign immunity.

8 Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and
9 self-governance." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)
10 (citation omitted). "Indian tribes are 'domestic dependent nations' that exercise
11 inherent sovereign authority over their members and territories. Suits against Indian
12 tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or
13 congressional abrogation." *Jamul Action Comm.*, 974 F.3d at 991 (quoting *Okla. Tax*
14 *Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991));
15 *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d
16 1150, 1159 (9th Cir. 2002) ("Federally recognized Indian tribes enjoy sovereign
17 immunity from suit, and may not be sued absent an express and unequivocal waiver
18 of immunity by the tribe or abrogation of tribal immunity by Congress." (citations
19 omitted)). "Tribal sovereign immunity extends to both the governmental and
20 commercial activities of a tribe, whether undertaken on or off its reservation." *Jamul*
21 *Action Comm.*, 974 F.3d at 991 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523
22 U.S. 751, 754–55 (1998); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th
23 Cir. 2008)). A tribal nation's sovereign immunity, "like all others, is subject to the
24 superior and plenary control of Congress. But 'without congressional authorization,'
25 the 'Indian Nations are exempt from suit.'" *Santa Clara Pueblo v. Martinez,* 436 U.S.
26 49, 58 (1978) (quoting *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512
27 (1940)). "It is settled that a waiver of sovereign immunity 'cannot be implied but must
28 be *unequivocally expressed*.'" *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 399

(1976)) (emphasis added).

Congress has not abrogated any aspect of the Tribe's sovereign immunity with respect to the issues raised in this action, nor has the Tribe waived its sovereign immunity here. (Rosser Decl., ¶ 19); *see Diné Citizens*, 932 F.3d at 856. Accordingly, joinder is not possible.

4. The Action Cannot Proceed In Equity and Good Conscience Without the Tribe

To determine whether an action may fairly proceed without a required party, Rule 19(b) establishes four non-exclusive factors:

> 1. the extent to which a judgment rendered in the [party's] absence might prejudice that [party] or the existing parties;
> 2. the extent to which any prejudice could be lessened or avoided by:
>   (a) protective provisions in the judgment;
>   (b) shaping the relief; or
>   (c) other measures;
> 3. whether a judgment rendered in the [party's] absence would be adequate; and
> 4. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

While a court should be "extra cautious" before dismissing an action where no alternative forum exists, "[i]f the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Kescoli*, 101 F.3d at 1311 (quoting *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)).

As the Ninth Circuit said, in its latest pronouncement on this issue:

> The balancing of equitable factors under Rule 19(b) almost always favor dismissal when a tribe cannot be joined due to tribal sovereign immunity. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *see also Diné Citizens*, 932 F.3d at 857 ("[T]here is a 'wall of

> circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.'" (alteration in original) (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028) (9th Cir. 2014)).

Jamul Action Comm., 974 F.3d at 998.

In light of the Tribe's sovereign immunity and the prejudice it will suffer if this action proceeds, this case cannot, in equity and good conscience, continue in the Tribe's absence, and should be dismissed on that basis.

5. The *Salt River* Case Does Not Warrant a Different Result

Against this "wall of circuit authority" requiring dismissal of actions against absent Indian tribes, the plaintiff may argue that a different result is warranted here on the supposed authority of *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012). That assertion would be incorrect. The inquiry under Rule 19 "is a practical one and fact specific." *Diné Citizens,* 932 F.3d at 851 (quoting *White*, 765 F.3d at 1026). Here, both the facts and the legal analysis discussed in *Salt River* are decidedly different than those presented in this case.

Salt River involved the termination of two employees of non-Indian companies doing business on the Navajo reservation and raised the question of whether Navajo employment laws and administrative remedies were applicable to those firings. 672 F.3d at 1177–78. The employers brought an *Ex parte Young* proceeding against a number of Navajo officials, arguing that those tribal officials should be enjoined from applying tribal law to the terminations. *Id.* In holding that Rule 19 did not warrant dismissal of that action, the court found that the Navajo officials would adequately represent the tribe's interest in the matter. *Id.* at 1181. The court called it a "routine application of *Ex parte Young*." *Id.* at 1177.

Both the facts and necessary legal analysis in the present case are dramatically

different. This case is not a "routine application" of the *Ex parte Young* doctrine. In this case, the only defendants are tribal judges. But *Ex parte Young* itself tells us that judges are not proper defendants in such cases. As the Supreme Court noted:

> It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . and an injunction against a State court would be a violation of the whole scheme of our government.
>
> * * *
>
> The difference between the power to enjoin an individual from doing certain things and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

Ex parte Young, 209 U.S. at 163.

More recently, the Court repeated this admonition in *Whole Woman's Health*, holding that the *Ex parte Young* exception to sovereign immunity did not apply to state court judges:

> To be sure, in *Ex parte Young*, this Court recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state *executive officials* from enforcing state laws that are contrary to federal law. But as *Ex parte Young* explained, this traditional exception does not normally permit federal courts to issue injunctions against state-court judges or clerks.
>
> * * *
>
> As *Ex parte Young* put it, "an injunction against a state court" or its "machinery" "would be a violation of the whole scheme of our Government."

142 S. Ct. 522, 532 (2021) (citations omitted) (emphasis added). Thus, far from being a "routine application" of *Ex parte Young* against "executive officials," the present case seeking to enjoin judicial (not executive) officers in fact falls outside the intended scope of that doctrine.

Finally, the situation presented here is far more amenable to the recent analysis in *Jamul Action Committee* than to *Salt River*.[2] As the *Jamul Action Committee* court correctly noted, merely naming individuals as defendants does not meet the *Ex parte Young* standard when the relief sought makes it clear that the Tribe, not the individuals, is the "real party in interest" in the case. *Jamul Action Comm.*, 974 F.3d at 995–96. In *Jamul Action Committee*, the court so held because the case threatened the tribe's "beneficial interest in its federal trust land." *Id*. at 995. Here, the threat to the Cabazon Band's sovereign interest—in protecting the scope, authority and integrity of the Cabazon Reservation Court; a component of its tribal government—makes an even stronger showing that the Cabazon Band, and not the named defendants, is the "real party in interest" in this case. As a result, *Jamul Action Committee*, not *Salt River*, provides the proper method of analysis here and, as discussed above, requires dismissal of this case under Rule 19.

[2] The panel in *Jamul Action Committee* was obviously aware of *Salt River*, as it cited *Salt River* in its opinion, 974 F.3d at 991, 994, 996, 997; yet the court in *Jamul Action Committee* reached a contrary result, dismissing the case on Rule 19 grounds.

IV.

CONCLUSION

For the reasons stated above, the Defendants respectfully request that the Court dismiss this action with prejudice.

DATED: April 27, 2022

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ATTESTATION

I, Morgan L. Gallagher, am the filer. I hereby certify pursuant to L.R. 5-4.3.4 that the content of this document is acceptable to all persons required to sign the document and that I have obtained authorization to file this document with all "/s/" electronic signatures appearing within the foregoing document which are not my own.

/s/ Morgan L. Gallagher
Morgan L. Gallagher