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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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS 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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I.

INTRODUCTION

As the parties' briefs make clear, resolution of the first part of this Motion to Dismiss First Amended Complaint ("Motion") largely turns on the application of *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), to the case at bar. Lexington offers several arguments for not enforcing *Whole Woman's Health* in this context, but none are persuasive. The Court should grant the Motion on the ground that Defendants—Judge Mueller and Chief Judge Welmas—are not adverse to Plaintiff Lexington. Absent such adversity, the complaint fails to satisfy Article III's case or controversy requirement, and thus deprives the Court of jurisdiction over the action. As to the alternative basis for dismissal, Lexington has failed to show why this case should not be dismissed under Federal Rule of Civil Procedure ("Rule") 19.

II.

ARGUMENT

A. APPLYING *WHOLE WOMAN'S HEALTH* DEPENDS ON A SENSIBLE, NOT AN OVERLY BROAD, READING OF THE DECISION

Lexington accuses Defendants of advancing an "overly broad" reading of *Whole Woman's Health*, one that purportedly would jettison decades of federal court decisions that never questioned the existence of a case or controversy in *Ex parte Young* actions to enjoin tribal courts from alleged unlawful assertions of tribal jurisdiction over non-Indians. Rather than being radical, it is the natural consequence of a Supreme Court decision that did two things. First, it reiterated that judges and court clerks typically are not adverse to litigants, and so litigation against these persons generally fails to satisfy Article III's case or controversy requirements. Second, the decision refocused a doctrine that had drifted off course since it was first announced against state government officials in 1908, and (in this Circuit) extended to tribal officials in 1991. *See Ex parte Young*, 209 U.S. 123 (1908); *Burlington N. R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901 (9th Cir. 1991),

overruled on other grounds by Big Horn Cty. Elec. Coop. v. Adams, 219 F.3d 944 (9th Cir. 2000).

Lexington does not seriously engage Defendants' argument that they are not legally adverse to Lexington for purposes of Article III.[1] Lexington does, however, argue strenuously in favor of continuing to recognize *Ex parte Young* suits against tribal court officers even though such suits are foreclosed against state court counterparts. What Lexington fails to do is explain why.

Ex parte Young has been applied to suits against tribal officials in the same way, and for the same reason, it originally applied to state officials: to allow federal courts to vindicate federal rights. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011).

Now that the Supreme Court has unequivocally held that judges are not proper defendants in an *Ex parte Young* action seeking to enjoin state officials' alleged violations of federal law, there is no compelling reason for allowing such suits against tribal court judges, whom the federal courts have likened to state judges. *See Oertwich v. Traditional Vill. of Togiak*, 29 F.4th 1108, 1118 (9th Cir. 2022) (holding that "a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges"). Indeed, permitting suits against tribal court judges would both sanction the type of interference with court administration that the Supreme Court barred in *Whole Woman's Health*, 142 S. Ct. at 532, and undermine "the longstanding federal policy supporting the development of tribal courts." *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850 (8th Cir. 2003).

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[1] Suffice it to say if the state court judge was not deemed adverse to the plaintiffs in *Whole Woman's Health*, Judge Mueller is not adverse to Lexington. Chief Judge Welmas is differently situated because unlike Judge Mueller, he will never adjudicate matters involving Lexington. The Chief Judge is analogous to the clerk in *Whole Woman's Health*. The clerk "serve[d] to file cases as they arrive, not to participate as adversaries in those disputes." 142 S. Ct. at 532. Similarly, Chief Judge Welmas' relationship to Lexington is as a court administrator who assigns pro tem judges to court matters; he does not participate as an adversary in those cases. Thus, there is no case or controversy as between Lexington and the Chief Judge.

Lexington contends that *Whole Woman's Health* should not be construed to have recast how *Ex parte Young* is litigated in the Ninth Circuit because a panel decision from two months ago recognized the possibility of suing tribal judges without even mentioning the Supreme Court's recent opinion. *See Oertwich*, *supra*. Given that the *Oertwich* panel took the case under submission six months before the Supreme Court decided *Whole Woman's Health* (and affirmed dismissal of the tribal judges based on judicial immunity, not sovereign immunity), it seems dubious to infer anything other than the parties briefed and the court decided the case based on principles that pre-existed *Whole Woman's Health*. As the Supreme Court has clearly announced that judges are not appropriate defendants in an *Ex parte Young* action, this Court should take that affirmative holding at face value rather than draw inferences from *Oertwich*.

B. BECAUSE *WHOLE WOMAN'S HEALTH* IS CLEARLY IRRECONCILABLE WITH PRIOR CIRCUIT AUTHORITY, IT SHOULD BE APPLIED TO THIS CASE

Lexington contends that the Ninth Circuit is bound to follow its prior practice of allowing *Ex parte Young* actions against tribal court judges because doing so is not "clearly irreconcilable" with the *Whole Woman's Health* decision. *See Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (*en banc*) (reciting the standard). Defendants disagree.

In its Opposition, Lexington argues that *Whole Woman's Health* is readily reconcilable with Ninth Circuit precedent permitting suits against tribal court judges because the former has so little in common factually with the latter. *Whole Woman's Health* involved a pre-enforcement challenge under *Ex parte Young* to enjoin a state court judge and clerk from taking any action to enforce a statute that plaintiffs argued was unconstitutional. By contrast, Lexington has brought this *Ex parte Young* action against *tribal court* judges to enjoin them from exercising jurisdiction over an insurance coverage dispute allegedly in violation of federal law.

While the circumstances surrounding *Whole Woman's Health* and the case at bar are dissimilar, any two cases are often readily distinguished based on their facts. The more relevant question, however, is whether there is a principled basis for distinguishing the *legal principle* applicable to the two cases. There is not. Just as the plaintiffs in *Whole Woman's Health* sought to prevent the state court from enforcing a state law alleged to violate federal law, so too, here, Lexington seeks to prevent the tribal court from enforcing tribal law—a provision of the Cabazon Judicial Code—the enforcement of which against Lexington would allegedly violate federal law.[2]

Lexington counters that there is something materially different in a challenge to a tribal court ruling because "tribal judges *enforce* tribal jurisdiction." Opp. at 12:10 (emphasis in original). But this is a simplistic characterization. In a courtroom, judges neutrally interpret and apply the laws relevant to the dispute, whether the laws are jurisdictional or more substantive in nature. *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994). In this regard, Lexington cannot escape the Supreme Court's explanation of why state court judges exercising adjudicatory authority are not proper defendants in an *Ex parte Young* action:

> Judges 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 . . . [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.

Whole Woman's Health, 142 S. Ct. at 532. Tribal judges play the identical role: they resolve controversies in accordance with applicable law. Therefore, if state court judges are not proper targets in an *Ex parte Young* action, neither are tribal court judges. To hold otherwise would be clearly irreconcilable with *Whole Woman's Health*. Accordingly, *Gammie* is no barrier to applying the Supreme Court's holding

[2] See § 9-102 of the Cabazon Judicial Code, attached to the Declaration of Jonathan Rosser ("Rosser Decl.") in support of Defendants' Motion to Dismiss.

to this case and granting Defendants' motion to dismiss for lack of jurisdiction as to both Defendants.

C. LEXINGTON CANNOT STATE A CLAIM FOR RELIEF AGAINST CHIEF JUDGE WELMAS AND ALSO LACKS STANDING TO DO SO

1. Welmas Lacks a Sufficient Connection with the Enforcement of the Challenged Law

As explained above, Lexington cannot state a claim against either Defendant because, under *Whole Woman's Health*, they are not appropriate defendants in an *Ex parte Young* action. Lexington also cannot state a claim for relief against Chief Judge Welmas for an additional reason: he lacks the requisite "fairly direct" connection to the enforcement of the challenged law.

Lexington appears to argue that the Chief Judge has the necessary connection because he is the administrator of the Court and has the authority appoint *pro tem* judges. But a Chief Judge's power to appoint judges such as Judge Mueller does not carry the corresponding power to remove them. Rosser Decl. ¶ 14, Attachment § 9-103(f). Moreover, there is no evidence (and Lexington does not suggest) that the Chief Judge has authority to interfere with a *pro tem* judge's legal rulings, including a determination of Tribal Court jurisdiction. Chief Judge Welmas' authority to appoint judges may constitute a "general supervisory power over the persons responsible for enforcing" the Court's jurisdiction, but that is too attenuated a connection to make him a proper *Ex parte Young* defendant under applicable Ninth Circuit standards. *See Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). As Chief Judge Welmas lacks the required "fairly direct" connection to the enforcement of the tribal law in this case, Lexington fails to state a claim against him in this *Ex parte Young* action.

2. Lexington Lacks Standing

The facts that demonstrate Chief Judge Welmas lacks a sufficiently direct connection to the Tribal Court's assertion of jurisdiction over Lexington likewise show

why Lexington lacks standing to enjoin him: The Cabazon Judicial Code, which is the source of the Chief Judge's authority over Tribal Court matters, does not authorize him to remove Judge Mueller or interfere with his day-to-day administration of the Lexington case pending before him. Thus, a favorable ruling from this Court as to Chief Judge Welmas will not address Lexington's alleged harm from the Tribal Court's current assertion of jurisdiction. To the extent that Lexington seeks an injunction prohibiting Chief Judge Welmas from assigning future *pro tem* judges, this Court should refuse: as noted in Section 1, *supra*, the Supreme Court's decision in *Whole Woman's Health*, 142 S. Ct. at 532, was partly a reaction against federal court interference with court systems. Moreover, refusing to apply *Whole Woman's Health* to tribal judges would not just leave tribal courts worse off than state courts for no obvious reason, but would undermine longstanding federal policies favoring the development of tribal courts and tribal self-determination more generally. *See* Section II.A, *supra*.

D. *WHOLE WOMAN'S HEALTH* WILL NOT PREVENT NON-INDIAN DEFENDANTS FROM CHALLENGING ASSERTIONS OF TRIBAL JURISDICTION INCONSISTENT WITH FEDERAL LAW

Clearly, *Whole Woman's Health* heralds changes to litigation under *Ex parte Young*.[3] However, applying *Ex parte Young* as recently clarified by the Supreme Court will not leave tribal court defendants without an avenue for challenging alleged unlawful assertions of tribal jurisdiction.

As an initial matter, *Whole Woman's Health* only precludes suits against judges acting in their adjudicative capacity. The decision does not foreclose *Ex parte Young* actions against any other tribal officials allegedly acting in excess of their authority under federal law. *See, e.g.*, *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085,

[3] *See, e.g.*, *Ortiz v. Foxx*, No. 19-cv-02923, 2022 WL 991965, at **1, 7–8 (N.D. Ill. Mar. 31, 2022) (finding lack of justiciable case or controversy under *Whole Woman's Health* and declining to enjoin chief and presiding state court judges from applying state law as enacted).

1088 (9th Cir. 2007) (permitting suit against tribal official responsible for enforcing a tribal tax while declining suit against tribal chair who had no alleged enforcement responsibilities to collect tax).

Second, post-*Whole Woman's Health*, there are still checks on a tribe that attempts to enforce a tribal court judgment issued in excess of its jurisdiction under federal law. If a tribe were to seek to enforce a tribal court money judgment in the Superior Court, the defendant could defend under the Tribal Court Civil Money Judgment Act on various grounds, including that the tribal court lacked personal or subject matter jurisdiction. *See* Cal. Civ. Proc. Code § 1737(b)(1)(2). And again, an affirmative federal action under *Ex parte Young* remains an option as the suit would seek to enjoin the tribal official enforcing the tribal court award, and thus not be barred under *Whole Woman's Health*. These options may not be as expedient as the one available to tribal court defendants prior to *Whole Woman's Health*, but that should not be confused with an inadequate remedy. *Cf. Okla. Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 514 (1991) ("There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.").

Finally, it is important to note that a person or business engaged in conduct on or affecting a Cabazon Indian Reservation ("Reservation") is not destined to litigate all eventual disputes in tribal court. This case illustrates the point: Lexington could have specified in the Cabazon Band of Cahuilla Indians' ("Cabazon Band's" or "Tribe's") insurance policy—a policy that Lexington drafted or approved—that disputes would be litigated in any court of competent jurisdiction *other* than a tribal court, or in the courts of the State of Massachusetts, for example. But rather than issue an insurance policy that identified a specific non-tribal forum or that rejected the Cabazon Reservation Court as a permissible venue, Lexington issued an insurance contract pursuant to which it expressly agreed to "submit to the jurisdiction of a Court

of competent jurisdiction within the United States." FAC, Exh. A at 84. Under these circumstances, of Lexington's own making, the fact that Lexington will not be able to challenge tribal court jurisdiction in this Court can be laid at Lexington's own doorstep.

E. THIS CASE SHOULD BE DISMISSED UNDER RULE 19

In its most recent pronouncement on the issue, the Ninth Circuit cited a "wall of circuit authority" in support of its decision to dismiss an *Ex parte Young* action involving the Jamul Indian Village on Rule 19 grounds. *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 998 (9th Cir. 2020) (quoting *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 857 (9th Cir. 2019) (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014))). In that opinion, the Court of Appeals discussed the long line of case law in this Circuit,[4] and the important legal principles at issue in these cases, all of which held that litigation involving important tribal interests cannot proceed in the tribes' absence.

Here, Lexington asks this Court to essentially ignore this body of Circuit authority and allow this case—involving important issues of tribal sovereignty and contractual obligations—to go forward without the participation of the Cabazon Band. It does so on the basis of a few cases that can be readily distinguished on their facts and by cherry-picking language from other cases while ignoring the actual reasoning and holdings of those cases. As a result, the Court should reject Lexington's arguments and find that this case must be dismissed under Rule 19.

1. The Cabazon Band Is A Required Party

In our Opening Brief, Defendants demonstrated that the Cabazon Band is a necessary party with a legally protectable interest in the outcome of this case, owing both to its sovereign interest in protecting the judicial branch of its tribal government and its contractual relationship with Lexington. Dkt 33-1 at 14–17. And the finding

[4] These cases are collected and discussed on page 15 of our Memorandum of Points and Authorities in Support of the Motion ("Opening Brief"). Dkt. 33-1 at 15.

that a party is "necessary" is based on a relatively low bar. As the Ninth Circuit has held, "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).

Lexington argues that the Cabazon Band does not have a legally protected interest in the establishment and operation of its tribal court system on the strength of *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996). Dkt. 36 at 18–19. In that case, a tribal member brought an action in tribal court challenging a county's right to tax the member's fee simple—not federal trust—land within the Crow Reservation. *Yellowstone*, 96 F.3d at 1170. The county filed a federal action contesting the tribal court's jurisdiction and the Court of Appeals affirmed the district court's holding that the Crow Tribe was not an indispensable party under Rule 19. *Id.* at 1170–71, 1177.

But *Yellowstone* can give Lexington no comfort here, as the facts of that case are readily distinguishable from the instant case and the court's reasoning is questionable, at best.

First, to the extent that *Yellowstone* suggests that tribes, as a general matter, do not have a legally protected interest in creating and operating tribal court systems, that suggestion is wrong and directly contradicted by the *Indian Tribal Justice Support Act of 2009*, 25 U.S.C. § 3601(5), ("[T]ribal justice systems are an essential part of tribal governments and serve as important forums for ensuring . . . the political integrity of tribal governments.") and by Supreme Court cases including *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987) ("Tribal courts play a vital role in tribal self-government and the Federal Government has consistently encouraged their development.") (citation omitted).

Moreover, the specific facts upon which the *Yellowstone* court relied are completely different from the facts of this case. *Yellowstone* involved a tax dispute between a tribal member and the local county, in the outcome of which the Crow Tribe

had no interest. 96 F.3d at 1170, 1173. In contrast, this case deals with a tribal court action brought against Lexington by the Tribe itself. In addition, the *Yellowstone* court noted that "unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), here the [Crow] Tribe cannot demonstrate that it is a party to a relevant commercial agreement . . . with one of the parties to the lawsuit." *Id.* at 1173 (footnote omitted). In this case, the Cabazon Band is a party to an insurance contract with Lexington, insuring tribal property located on tribal trust land of the Reservation, providing the critical factor that was missing in *Yellowstone*.

Given these disparities, the Court should have no trouble in finding that the Cabazon Band is a required party without whom this case should not proceed.

2. The Cabazon Band's Interests in This Case are Not Adequately Represented

The "adequate representation" standard under Rule 19 is the same as the one set forth in Rule 24(a) involving intervention. *Shermoen*, 982 F.2d at 1318. Under that standard, "[t]he burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Under this "minimal" standard, Defendants have demonstrated the inadequacy of representation for the Cabazon Band's governmental and commercial interests. Dkt. 33-1 at 17–19.

In response, Lexington argues that the two tribal court judges can adequately represent the Tribe. Dkt. 36 at 22–24. But its analysis ignores the fact that Judge Mueller is engaged by the Tribe on a part-time contractual basis, and has no authority to make or bind the Tribe to any policy. Lexington's analysis also ignores the fact that Chief Judge Welmas alone cannot promulgate policies or bind the Tribe, except through action of the elected Tribal Council. Finally, it ignores the teaching of the

Ninth Circuit in its most recent *Ex parte Young* Rule 19 case, *Jamul Action Committee*. In that case, the Court of Appeals made it clear that naming tribal officials as defendants would not meet the "adequacy of representation" test where the remedies sought "lie directly against the sovereign even when styled as a claim for injunctive relief against an individual government officer." *Jamul Action Comm.*, 974 F.3d at 995 (citations omitted). As surely as was the case in *Jamul*, the relief sought in this case will lie directly against the Cabazon Band, not the individual Defendants. So here, as in *Jamul*, the Tribe is the "real party in interest" in the case and its interests would not be adequately represented by tribal officials.

3. This Case Should be Dismissed Under Rule 19(b)

Lexington argues that under the four-part test of Rule 19, this case should not be dismissed. Dkt. 36 at 17–18, 24–25. But again, the Plaintiff is ignoring clear Ninth Circuit precedent.

For example, Lexington claims that the burden for dismissal under the four factors of Rule 19(b) is "a heavy one" and should be "employed only sparingly," while citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Dkt. 36 at 17–18. But the *Makah* court made no such holding. Lexington actually quotes a Fourth Circuit opinion, attempting to import a different Circuit's non-binding heavier burden into this case. *See Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir. 1999). Moreover, this heavier burden is directly contradicted by controlling Ninth Circuit authority. In *Kescoli v. Babbitt*, the Court of Appeals dismissed an action involving the protection of tribal burial sites and held that "[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.'" 101 F.3d 1304, 1311 (9th Cir. 1996) (quoting *Confederated Tribes of the Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *see also Jamul Action Comm.*, 974 F.3d at 998 ("The balancing of equitable factors under Rule 19(b) almost

always favor dismissal when a tribe cannot be joined due to tribal sovereign immunity."). Furthermore, the *Makah* court actually affirmed the dismissal of that case under Rule 19 with respect to the reallocation of treaty fishing quotas because of the absence of other Indian tribes party to that treaty. 910 F.2d at 559.

Because the Cabazon Band enjoys tribal sovereign immunity, this Court should follow *Jamul* and *Kescoli* and find that the case must be dismissed under Rule 19(b).

III.

CONCLUSION

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

DATED: June 2, 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