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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' CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: July 29, 2022
Hearing Time: 9:00 AM
Hon. John W. Holcomb

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Defendants Martin A. Mueller and Doug Welmas ("Defendants") respectfully submit the following Memorandum of Points and Authorities in support of their Cross-Motion for Summary Judgment.

I.

INTRODUCTION

Defendants, each sued in his official capacity as a judge of the Cabazon Reservation Court,[1] move for summary judgment under Federal Rule of Civil Procedure ("Rule") 56. Defendants request this Court to affirm the Tribal Court of Appeals' determinations that the Tribal Court has both subject matter and personal jurisdiction in the case between the Cabazon Band of Cahuilla Indians ("Cabazon" or "Tribe") and Lexington Insurance Company ("Lexington").

In this case, Lexington entered into an insurance contract with Cabazon. Lexington accepted premium payments from Cabazon over several years under the contract to insure tribal property located on lands held in trust for the Tribe by the United States on the Cabazon Indian Reservation (the "Reservation"). Lexington knew when it issued multiple property insurance policies to the Tribe (collectively, the "Lexington Policies") that the insured property was on the Tribe's Reservation. At the heart of this case is Lexington's breach of its contract with the Tribe to insure on-Reservation property. After Cabazon tendered its insurance claim, Lexington conducted a woefully inadequate investigation and wrongfully denied the Tribe's claim. In light of the direct relationship between the Lexington Policies issued by Lexington and the Tribe's trust lands, and the consensual relationship between Lexington and Cabazon, the Tribal Court has jurisdiction over this matter.

The Tribal Court has subject matter jurisdiction over this case under both tribal and federal law. In addition, Lexington's conduct in insuring tribal property on the

[1] The Cabazon Reservation Court is composed of a trial court (the "Tribal Court") and a court of appeals (the "Tribal Court of Appeals"). (Joint Statement of Undisputed Facts and Genuine Disputes ("JS") No. 70.)

Reservation has made Lexington subject to the personal jurisdiction of the Tribal Court. The Tribal Court of Appeals upheld the Tribal Court's findings of subject matter and personal jurisdiction, and this Court should as well.

II.

BACKGROUND

A. THE PARTIES AND THE INSURANCE CLAIM

Cabazon is a federally recognized Indian tribe. (JS No. 1.) The Tribe is the beneficial owner of the Reservation near Indio, California, the lands of which are held in trust for the Tribe by the United States. (*Id.* No. 2.) The Tribe owns and operates the Fantasy Springs Resort Casino ("Casino"), located within the Reservation on trust lands. (*Id.* Nos. 2, 3.)

Lexington is an insurance company. (*Id.* No. 8.) Lexington participates as an insurer in the Tribal Property Insurance Program ("TPIP"). (*Id.* No. 8.) TPIP is a specialized program of Alliant Underwriting Solutions and/or Alliant Insurance Services, Inc. (referred to collectively herein as "Alliant"). (*Id.* No. 11.) TPIP is administered by "Tribal First," a trade name used by Alliant. (*Id.* No. 10.) The Tribe bought multiple property insurance policies issued by Lexington under the TPIP (hereinafter the "Lexington Policies"). (*Id.* No. 14.) The Lexington Policies insure property owned by the Tribe, including the Casino and other property on the Reservation, against "all risk of direct physical loss or damage" to property. (*Id.* No. 73.)

Included among the documents that comprised the TPIP were declaration pages associated with the Lexington Policies issued to the Tribe. (*Id.* No. 35; FAC, Exh. A.) In each of the declaration pages, Lexington is identified as the Insurer. (*Id.* No. 36.) The TPIP "evidence of coverage" document identifies the Tribe as the insured and Lexington (and other insurance companies) as the insurers. (*Id.* No. 75.)

There is no dispute that under the Lexington Policies, Lexington is the insurer and the Tribe is the insured. (*Id.* No. 71.) As the Tribe's insurer, Lexington (and not

Alliant) is required to provide coverage to the Tribe when the relevant terms, conditions, limitations, and exclusions of coverage have been satisfied under the Master Policy and any relevant endorsement. (*Id.* No. 72.)

The Lexington Policies relevant to this action were for the policy period from July 1, 2019, to July 1, 2020. (*Id.* No. 15.) The Tribe paid $594,492 in premiums for the TPIP for policy year 2019-2020. (*Id.* No. 88.) Lexington did not have direct contact with the Tribe before issuing the Lexington Policies to the Tribe. (*Id.* No. 19.) Lexington learned of the Tribe as a potential TPIP insured through Alliant. (*Id.* No. 21.) The Tribe dealt with Alliant, acting as Lexington's agent. The Tribe obtained the Lexington Policies through Alliant. (*Id.* No. 16.) Alliant processed the Tribe's submissions for insurance. (*Id.* No. 22.) Alliant collected premiums from the Tribe and remitted them to Lexington. (*Id.* No. 23) Annually over the last decade, an Alliant employee visited the Reservation to meet with Tribal employees to gather information relevant to the renewal of the Tribe's policies with Lexington. (*Id.* No. 77.)

Lexington knew it was issuing insurance for, and agreed to insure, the Tribe's property and businesses on the Reservation. (*Id.* Nos. 73, 76.) For years, the Tribe has been insured by the Lexington Insurance Company for damage or loss to its property on its Reservation, including the Casino. Rosser Decl. ¶ 6. If the Tribe were to prevail in the Tribal Court suit, Lexington would pay the Tribe's insurance claim because, under the Lexington Policies, Lexington is required to provide coverage to the Tribe when the relevant terms, conditions, limitations, and exclusions of coverage have been satisfied under the Master Policy and any relevant endorsement. (*Id.* No. 72.)

On March 17, 2020, because of the COVID-19 pandemic, Cabazon had to close operations at some of its businesses including the Casino. (*Id.* No. 44, 79.) The Casino was one of the Tribal properties insured under the Lexington Policies. (*Id.* No. 73.) The Tribe's decision to suspend operations of its on-Reservation businesses, including the Casino, resulted in the loss of use of those facilities and cost the Tribe millions of

dollars in lost business revenues. (*Id.* No. 78, 79.) The revenues derived from the Tribe's businesses on the Reservation, including the Casino, are vital sources used to support the Tribe's essential services to tribal members and persons visiting and doing business on the Reservation. (*Id.* No. 78.)

When the Tribe decided to initiate a business interruption claim in March 2020, the Tribe's Staff Attorney and Acting Director of Legal Affairs, in accordance with the TPIP, notified Tribal First (Alliant's trade name). (*Id.* Nos. 45, 43.) Tribal First conveyed the claim to Lexington, which undertook an investigation through its claims adjuster Crawford & Company ("Crawford"). (*Id.* Nos. 46–48.) In April 2020, Lexington issued a letter to the Tribe denying coverage. (*Id.* Nos. 49–50.) The letter was mailed by or on behalf of Lexington to the attention of Jonathan Rosser and addressed to a location on the Reservation. (*Id.* No. 50.) The decision to deny coverage to the Tribe was made by Lexington, not by Alliant, Crawford, or any other party. (*Id.* No. 49.)

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

As a component of its tribal government, the Tribe has established and operates the Cabazon Reservation Court, which is composed of the Tribal Court and the Tribal Court of Appeals. (*Id.* No. 70.).

After Lexington denied its claim, the Tribe sued Lexington in the Tribal Court on November 24, 2020, for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. (*Id.* No. 52; FAC ¶¶ 57–59.) Filing suit in the Tribal Court was consistent with the Tribe's contractual agreement with Lexington. Each of the Lexington Policies provided through the TPIP to the Tribe for the 2019-2020 policy period incorporates a master policy form that sets forth the terms, conditions, and exclusions of coverage applicable to the Tribe (the "Master Policy"). (*Id.* No. 26.) The Master Policy contains the following dispute resolution language: "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, 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." (*Id.* No. 27.)

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 to preside over the proceedings. (*Id.* No. 80.) The aim is both to provide an entirely impartial forum and to avoid even the appearance of bias. (*Id.*) As such a *pro tem* judge, Defendant Judge Mueller was assigned the Tribe's case against Lexington. (*Id.* No. 54.)

Lexington moved to dismiss the case, arguing lack of subject matter and personal jurisdiction. (*Id.* No. 66.) Following full briefing and oral argument at a hearing at which both parties were represented by counsel, as well as his own written analysis of federal law and the Cabazon Judicial Code, Judge Mueller concluded that the Tribal Court did have jurisdiction to hear the dispute. (*Id.* No. 57.) Lexington appealed. (*Id.* No. 58–59.)

The appeal was heard by the Tribal Court of Appeals. (*Id.* Nos. 59–60.) Like Judge Mueller, the appellate judges were appointed in accordance with the Tribe's policies for appointing *pro tem* judges in matters involving non-Indians. (*Id.* No. 80.) Following full briefing and oral argument, the Tribal Court of Appeals affirmed the Tribal Court's jurisdiction in a written opinion. (*Id.* No. 60; FAC ¶ 65 & Exh. B.) The Tribe and Lexington stipulated and agreed to stay the underlying action in the Tribal Court until a final appealable judgment is issued by this Court. (Dkt. No. 28.)

C. LEXINGTON FILES COMPLAINT IN FEDERAL COURT TO AVOID TRIBAL COURT JURISDICTION

Lexington filed its FAC against the Defendants in their official capacity as tribal court judges, seeking to enjoin them under *Ex parte Young*, 209 U.S. 123 (1908), from exercising jurisdiction in further Cabazon Reservation Court proceedings involving Lexington, including enjoining Chief Judge Welmas from appointing a successor to Judge Mueller. (FAC ¶¶ 16, 24.) Lexington seeks declaratory and injunctive relief in

the same vein. (FAC ¶ 25.)

The Defendants filed a Motion to Dismiss the FAC on April 27, 2022, based on Rules 19 and 12(b)(1), (6), and (7). Dkt. No. 33. Lexington filed an Opposition to the Motion to Dismiss the FAC on May 23, 2022, Dkt. No. 36, to which the Tribe filed a Reply on June 2, 2022, Dkt. No. 38.

III.

ARGUMENT

A. LEGAL STANDARD

Reviewing courts may resolve challenges to tribal court jurisdiction on summary judgment. *See Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000). When, as here, "there is no genuine issue as to any material fact," summary judgment is appropriate "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)). As the Ninth Circuit has held, "tribal courts are competent law-applying bodies," and therefore a "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) (internal quotation marks omitted) (quoting *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) ("*Water Wheel*")). A tribal court's legal holdings are reviewed *de novo* and its factual findings are reviewed for clear error. *Id.* Here, the material facts establishing the Tribal Court's jurisdiction are undisputed.

B. THE CABAZON RESERVATION COURT HAS SUBJECT MATTER JURISDICTION

The Tribal Court of Appeals correctly concluded that the Tribal Court has both subject matter and personal jurisdiction under both tribal and federal law in the dispute between the Tribe and Lexington.

1. Tribal Law Provides the Cabazon Reservation Court with Subject Matter Jurisdiction

The Tribal Court of Appeals carefully analyzed tribal law and correctly affirmed that the Tribal Court had jurisdiction over this case. (FAC, Exh. A at 16–26.) When examining whether the Tribal Court has jurisdiction under tribal law, 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). In upholding subject matter jurisdiction, the Tribal Court of Appeals relied on the Cabazon Rules of Court, which provide that:

> Subject matter jurisdiction. The [Cabazon] Reservation Court shall have jurisdiction over . . . [a]ll civil causes of action **arising** within the exterior boundaries of the Cabazon Indian Reservation in which: . . . [t]he defendant has entered onto or transacted business within the Cabazon Indian Reservation and the cause of action **arises out of** activities or events which have occurred within the Reservation boundaries.

(Joint Exhibit at 5–6 (Rosser Decl.) (§ 9-102(b)(2)(c) (emphasis added)); FAC, Exh. B. at 6, 24.).

Subject matter jurisdiction is appropriate under tribal law as Lexington accepted insurance premiums from Cabazon in exchange for its agreement to insure **tribal property** against perils which occur **within the Reservation boundaries**. (JS No. 73.) Section 9-102(b)(2)(c) does not impose a physical, geographical limitation, but if it does, as Lexington contended in the Cabazon Reservation Court, this action clearly arises within the exterior boundaries of the Reservation.

The insurance claim that is the subject of the underlying Tribal Court case was for loss or damage to tribal property located within the Reservation boundaries. (*Id.* No. 73.) Lexington accepted the Tribe's payment in exchange for Lexington's promise to insure tribal property. (*Id.* Nos. 23, 71.) The term "arising" and phrase "arises out of" are extremely broad and readily encompass Cabazon's claims against Lexington. *See Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998) ("the general consensus [is] that the phrase 'arising out of' should be given a broad reading such as 'originating from' or 'growing out of' or 'flowing from' or 'done in connection with'—that is, it requires some causal connection to the injuries suffered,

but does not require proximate cause in the legal sense."). Indeed, the events here are the direct, central subject of the insurance claim and this case. The business relationship between Lexington and Cabazon falls squarely within the scope of § 9-102(b)(2)(c).

Lexington would have this Court believe that it did not transact business with Cabazon, despite Lexington's undisputed status as the Tribe's insurer (JS No. 71) because Lexington did not directly negotiate the terms of the insurance contract or physically set foot on the Reservation prior to the Tribe filing its claim. However, Lexington acted through its agent Alliant on both accounts. Alliant processed the Tribe's submissions for insurance and the Tribe obtained the Lexington Policies through Alliant. (*Id.* Nos. 16, 22.) Alliant collected premiums from the Tribe and remitted them to Lexington. (*Id.* No. 23.) Annually over the last decade, an Alliant employee visited the Reservation to meet with Tribal employees to gather information relevant to the renewal of the Lexington Policies. (*Id.* No. 77.) Lexington ultimately was the insurer that evaluated, approved, and issued an insurance contract it knew was for property located on the Reservation. (*Id.* Nos. 71, 73.) Lexington knew of the Tribe as a potential TPIP insured through Alliant. (*Id.* No. 21.) Lexington received and benefitted from the Tribe's premiums and Lexington ultimately denied the Tribe's insurance claim under the Lexington Policies. (*Id.* Nos. 22, 49, 81.) Lexington denied coverage to the Tribe through a letter addressed to the Tribe's Reservation. (*Id.* No. 50.) If the Tribe were to prevail in the Tribal Court suit, Lexington would pay the Tribe's insurance claim because, under the Lexington Policies, Lexington is required to provide coverage to the Tribe when the relevant terms, conditions, limitations, and exclusions of coverage have been satisfied under the Master Policy and any relevant endorsement. (*Id.* No. 72.)

The payment of covered claims is the heart of the promise of this contract. Lexington broke its own promise, not Tribal First/Alliant. The fact that Lexington issued the Lexington Policies and conducted other acts related to the Lexington

Policies through agents is irrelevant. Section 9-102(b)(2)(c) of the Cabazon Code expressly and unambiguously authorizes subject matter jurisdiction for this very type of matter, a dispute in which Lexington "entered onto" and "transacted business" within the Reservation.

2. Federal Law Provides the Cabazon Reservation Court with Subject Matter Jurisdiction

This Court should uphold the Tribal Court of Appeals' holding that, under federal law, the Tribal Court has subject matter jurisdiction over the conduct of Lexington and its agents pursuant to Cabazon's inherent power to exclude, and alternatively, under *Montana v. United States*, 450 U.S. 544 (1981).

(a) Cabazon's Power to Exclude and Regulate Lexington's Conduct on Reservation Land Provides the Cabazon Reservation Court with Subject Matter Jurisdiction

Cabazon's inherent power to exclude, regulate, and condition Lexington's conduct on Reservation land provides a basis for tribal court jurisdiction that is entirely independent of *Montana* and its exceptions.[2] As the Supreme Court has held, Indian tribes possess inherent sovereign powers, including the authority to exclude. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established."). The Ninth Circuit has further expounded on tribes' inherent right to exclude in *Water Wheel*, holding that "[f]rom a tribe's inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land. *South Dakota v. Bourland,* 508 U.S. 679, 689 (1993) (recognizing that a tribe's power to

[2] The Supreme Court has held that "[a]s to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, absent congressional direction enlarging tribal-court jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 440 (1997). In analyzing whether a tribal court has adjudicatory power over non-members, courts examine whether the tribe has regulatory power over the conduct at issue, and if so, the tribal court generally has adjudicatory power as well. *See, e.g.*, *Water Wheel*, 642 F.3d at 808–809; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.01, at 598 (Nell Jessup Newton ed., 2012) [hereinafter Cohen's Handbook] ("If a tribe has power to apply its law to govern a dispute involving a nonmember, then its courts likely can hear the claim.").

exclude includes the incidental power to regulate)." 642 F.3d at 808–09 (2009).

The right to exclude provides a basis independent from *Montana* for the Tribal Court to exercise subject matter jurisdiction over Lexington under federal law. *See id.* at 814 ("[When the] activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*."); *id.* at 810 ("T]he Supreme Court has recognized that a tribe's power to exclude exists independently of its general jurisdictional authority.") (citation omitted). Thus, the Tribe's inherent authority to exclude a non-Indian from conducting activities on tribal land arises separately from any *Montana* considerations.

As explained in Section III.B.1. *supra*, through its agents, Lexington first "entered onto" the Reservation to negotiate the Lexington Policies, and thereafter "transacted business" within the Reservation by accepting premium payments originating on the Reservation, sending its agents to inspect the Tribe's on-Reservation premises, and ultimately sending the Tribe notice that the Tribe's claim has been denied. (*Id.* Nos. 23, 49, 50, 77.) The relevant insurance policy bears a direct connection to tribal lands. The issue is also not merely whether Cabazon has the right to physically exclude Lexington and its agents from the Tribe's land, but also whether Cabazon can prevent and/or exclude Lexington from doing business, or regulate that business, on the Reservation. If Cabazon so chose, it could bar Lexington from insuring any and all tribal property, or alternatively, limit the types of tribal property to be insured or the amounts of such coverage, or prevent Lexington from conducting business on tribal land. It follows that Cabazon also has the power to regulate or place conditions upon Lexington's activities within the Reservation. As the Supreme Court has made clear, "where tribes possess authority to regulate the activities of nonmembers, civil 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) (emphasis added).

Lexington may also contend, as it did in the Cabazon Reservation Court, that Cabazon's right to exclude is somehow irrelevant because "No employee of Lexington has physically entered the Reservation at any time." (JS No. 51.) This argument is unpersuasive.

The Ninth Circuit has recognized that a nonmember entering a contract with a tribe that relates directly to tribal land effectively constitutes "activity . . . on tribal land," regardless of any "physical presence." *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1205–06 (9th Cir. 2013) (finding tribal jurisdiction under the tribe's right to exclude and first *Montana* exception when nonmember "voluntarily entered into a contract" regarding development of tribal land without any requirement of physical presence on tribal land). Thus, no physical presence is necessary.

Even if physical presence were necessary for a finding of a tribe's inherent right to exclude, Tribal First/Alliant, which acted on behalf of Lexington, did enter the Reservation with Lexington's knowledge and for Lexington's benefit precisely to engage in negotiations regarding policy renewals at least annually over the last decade. (JS No. 80.)

As a result, the Court can and should find subject matter jurisdiction on this basis alone, given that "the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*." *Water Wheel*, 642 F.3d at 814. Any "[f]inding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositive and would improperly limit tribal sovereignty without clear direction from Congress." *Id.*

(b) Alternatively, *Montana's* First Exception Establishes Subject Matter Jurisdiction Because Lexington Entered a Consensual Relationship with Cabazon

In addition to the jurisdiction provided under both tribal law and the Tribe's inherent right to exclude (as recognized under federal law), the first exception in

Montana applies and provides an alternative basis for subject matter jurisdiction. This is because Lexington entered a consensual relationship with the Tribe.

i. *Montana's* Context and Limitations

As the Ninth Circuit has recognized, "[t]he narrow question the [Supreme] Court considered in light of [*Montana*] concerned the tribe's exercise of regulatory jurisdiction over non-Indians on *non-Indian* land within the reservation." *Id.* at 809. The Supreme Court has made clear that "*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers **on non-Indian land within a reservation**." *Strate*, 520 U.S. at 446 (emphasis added).

The character of the Reservation land is crucial to the existence of a Tribe's jurisdiction. Thus, in *Strate*, the Supreme Court refined its holding in *Montana*, distinguishing between tribal trust lands (where the presumption favors tribal court jurisdiction) and non-Indian fee land (where the presumption is the opposite). *Id.* at 454 & n.8. As to trust lands, the Court stated unequivocally in *LaPlante*:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

480 U.S. at 451 (citations omitted).

"Since deciding *Montana,* the Supreme Court has applied its exceptions almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent." *Water Wheel*, 642 F.3d at 809. This is not one of those cases. This case involves loss or damage to tribal business property *on tribal trust land within Reservation boundaries*, and a non-Indian's breach of a contract with the Tribe that was entered into to protect that business on those lands. (JS Nos. 71, 73.)

In light of the general rule that limits *Montana* to cases arising on non-Indian land, *Montana* need only be examined if the Court determines this action does not, in fact, arise from loss or damage to tribal property located on Reservation trust lands.

"Doing otherwise would impermissibly broaden *Montana's* scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government." *Id.* at 814.

ii. The Lexington Policies and Lexington's Commercial Dealing with Cabazon Constitute a Consensual Relationship under *Montana*

Even if the Court decides to conduct a *Montana* analysis, it will find a clear basis for tribal court jurisdiction in this case. According to *Montana*, there exists a general presumption against tribal regulatory jurisdiction over non-Indian conduct on non-Indian land within a reservation. Even in that situation, however, (which is **not** the situation in this case) *Montana* recognized that tribal courts may exercise jurisdiction over non-Indian conduct under what has come to be called *Montana*'s "first exception." Under the first *Montana* exception,

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter *consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements*.

450 U.S. at 565 (emphasis added).

Lexington does not and cannot deny it is a party to a private contract with the Tribe, a consensual relationship under the first *Montana* exception. Clearly, Lexington has transacted business with the Tribe—it has accepted payment of premiums in exchange for its agreement to provide insurance. (JS Nos. 23, 71.) Lexington was also the party that investigated, adjusted, and denied the subject claim, and Lexington is the party that will issue the check in payment of the Tribe's claims. (*Id.* Nos. 47–49, 72.) Lexington deliberately, knowingly, and purposefully did business with the Tribe for Lexington's own benefit—at least until the Tribe filed a claim. (*Id.* Nos. 71, 74.)

It cannot be disputed that Lexington entered a "consensual relationship" with the Tribe, through "commercial dealing." Lexington does not deny Tribal First/Alliant

acted as its agent. The fact that Lexington conducted *a portion* of the business dealings through its agent, Tribal First/Alliant, is of no moment. The negotiations by Tribal First/Alliant on Lexington's behalf through actual or apparent authority were part and parcel of a "private commercial" relationship between Lexington and Cabazon, satisfying *Montana's* first exception.

In addressing the first *Montana* exception, Lexington has repeatedly asserted it never consented to the jurisdiction of the Tribe or its courts. However, no "consent" is necessary to trigger subject matter jurisdiction—it is the business relationship itself which must be consensual. Plainly, Lexington consented to the commercial transaction with Cabazon.

Furthermore, under the Master Policy, which is incorporated into the Lexington Policies, Lexington expressly agreed that it "will submit to the jurisdiction of a Court of competent jurisdiction within the United States." (JS No. 27.) A "court of competent jurisdiction is a court with the power to adjudicate the case before it." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017). As the drafter of the Lexington Policies, Lexington's decision to submit to any court of competent jurisdiction is significant. *See, e.g., Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 950 (9th Cir. 2002) (the insurer as drafter of the policy is obligated to draft using clear terms and consistent with the insured's reasonable expectations).

If Lexington wanted to prevent such jurisdiction, however, it should have negotiated that into the Lexington Policies (such as with a different forum selection provision and an express choice of law provision) as it is well aware from its multiple dealings with other tribes that tribal jurisdiction could be invoked. Indeed, Lexington previously litigated this very question with a different Indian tribe more than a decade ago. *See Confederated Tribes of the Chehalis Reservation d/b/a Lucky Eagle Casino v. Lexington Insurance Co.*, No. CHE-CIV-11/08-262 (Chehalis Tribal Ct., Apr. 21, 2010) ("*Chehalis*"). As in the case at bar, that case involved a suit by a tribe in its

tribal court over Lexington's non-payment of a claim, and Lexington moved to dismiss for lack of jurisdiction. In denying the motion, the tribal court judge focused on the language in Lexington's policy, which stated "[i]n the event of a failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States." *Chehalis*, No. CHE-CIV-11/08-262, at 7. This language is nearly identical to the language in the Master Policy. In sum, this issue was entirely foreseeable by Lexington when issued the Lexington Policies.

Through the Lexington Policies and Lexington's commercial dealing with Cabazon, this Court has the power to adjudicate this case under *Montana's* consensual relationship exception.

iii. The Consensual Relationship and a Nexus Between Cabazon's Claims and the Consensual Relationship Are Sufficient to Establish Subject Matter Jurisdiction by the Cabazon Reservation Court

Under *Montana's* first exception, the non-Indian activity the Tribe seeks to regulate must have a nexus to the consensual relationship. *Philip Morris USA Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 941–42 (9th Cir. 2009). Cabazon's claims all arise directly out of Lexington's breach of the insurance policy—the very contract which sets forth the terms of their consensual relationship. As such, a nexus exists between the consensual relationship and Cabazon's claims, and the Cabazon Reservation Court may exercise subject matter jurisdiction on that basis.

Lexington attempts to avoid this result by inserting a territorial requirement. Such a restriction would severely limit tribes' ability to exercise adjudicatory jurisdiction over non-Indians, even when such parties agree to tribal court jurisdiction. And no Supreme Court case has ever required non-Indians to physically enter tribal land to establish jurisdiction under *Montana's* consensual relationship exception, as the Tribal Court and Tribal Court of Appeals recognized. While some cases applying *Montana* certainly do involve a physical presence on tribal land, none has suggested,

much less found, a physical presence *requirement*.

Courts have repeatedly considered and rejected any purported "physical presence" requirement. *See, e.g.*, *AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n*, No. CIV 14-4150, 2015 WL 5684937, at *6 (D.S.D. Sept. 25, 2015); *see also Sprint Commc'ns Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 899–900 (D.S.D. 2015); *Brown v. Western Sky Fin., LLC*, 84 F. Supp. 3d 467, 479 (M.D.N.C. 2015).

Indeed, the U.S. District Court for the District of North Dakota has held that an insurance company "enter[ing] into an agreement to provide property damage and loss coverage for [real property] owned by tribal members located on [a r]eservation . . . [constitutes] a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 at *11 (D.N.D. May 12, 2014). Similar to Lexington, the insurance company in *State Farm* argued that certain activities such as "entering into the insurance contract" and "the decisions regarding coverage" were conducted off-reservation. *Id.* at *9. However, the court in *State Farm* was unpersuaded, finding that the insurance company "ignore[d] the other elements, such as where the [tribal members'] reliance on being fairly dealt with (including receipt of any necessary communications) took place and, perhaps, more importantly, where the harm occurred." *Id.* at *10. The court concluded that fundamentally the insurance company's argument failed because "the first *Montana* exception . . . is not limited to where the conduct necessary to establish a particular element of a claim for breach of contract or tort took place but rather, more broadly, is whether there is a sufficient nexus between the claims being asserted and the consensual relationship." *Id.* As shown above, the Tribe has established a nexus to the consensual relationship.

For all these reasons, if the Court decides to consider jurisdiction under *Montana's* first exception, such jurisdiction is established by Lexington's consensual relationship with Cabazon and the direct nexus of the claim at issue to that very

contract.

C. THE CABAZON RESERVATION COURT HAS PERSONAL JURISDICTION OVER LEXINGTON

As the Tribal Court of Appeals held, the Tribal Court also has personal jurisdiction over Lexington that is entirely consistent with the Due Process Clause of the Indian Civil Rights Act ("ICRA").

Although most federal constitutional provisions do not apply to tribes (Cohen's Handbook, § 14.03[1], at 944), ICRA is a separate federal source of some of those requirements. Under ICRA, a tribe may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8). ICRA "is intended both to protect individual rights and to preserve tribal sovereignty" and as such "tribal courts are the final arbiters of the meaning of ICRA." *Id.* at § 7.02[2], at 604–05. Tribal courts analyzing application of ICRA's Due Process Clause may, but are not obligated to, refer to Supreme Court and other federal court precedent analyzing the Fourteenth Amendment's Due Process Clause.

The Ninth Circuit set forth the following three-part test to determine whether a court has specific personal jurisdiction over a defendant under the Fourteenth Amendment's Due Process Clause:

> (1) The non-resident defendant must purposefully direct his activities ***or*** consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (emphasis added) (citation omitted).

Once the plaintiff satisfies the first two prongs, "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)).

The case of *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474 (9th Cir. 1986), is illustrative of this test. There, a Missouri-based insurer agreed to provide a Kansas-based company's employees with health care coverage and the Ninth Circuit held the insurer was subject to the personal jurisdiction of the state court where the employees resided (California). This was because the insurer: (1) purposefully availed itself of the California forum through knowledge that the insureds would be outside the insurer's licensed business area, and through the insureds sending their applications from California, using a California address, and receiving insurance cards in California; (2) the lawsuit arose out of the insurer's alleged breach of contract, satisfying specific jurisdiction; and (3) the California court's exercise of jurisdiction over the insurer was reasonable because the insurer purposefully directed its activities to the employees, the employees had a strong, legitimate interest in litigation in California, and California had an interest in providing its residents with effective redress against insurers who refuse to pay claims. *Hirsch*, 800 F. 2d at 1479–81; *see also Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1320–21 (11th Cir. 2004) ("Since the Supreme Court's decision in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957), it has been the law that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts."). This case is essentially identical to *Hirsch*.

1. Lexington Consummated a Transaction with Cabazon in Extending Coverage under the Lexington Policies which Constitutes Purposeful Availment

Here, under the first prong of the Ninth Circuit's test, Lexington consummated a transaction with Cabazon, a consensual business relationship, by issuing the Lexington Policies to Cabazon. *See supra*, Section III.B.1. Lexington is the party to

the insurance contract, the recipient of the premium, and the entity that will issue a check paying out on the Tribe's claim. But for the Reservation activity, there would be nothing to insure. Lexington's promise to insure Reservation property and business activities in exchange for the payment of premiums is purposeful availment of that Reservation activity.

As the Tribal Court of Appeals held, by entering into a contract to insure Reservation property and business operations, Lexington transacted business on Cabazon territory, and this conclusion is supported by a broad range of federal and state court authority. *E.g.*, *Nova Biomedical Corp. v. Moller*, 629 F.2d 190, 194 (1st Cir. 1980) (interpreting Mass. Gen. Laws ch. 223A, § 3(a)) and finding foreign defendant transacted business by sending demand letter to in-state party); *Commodigy OG Vegas Holdings LLC v. AMD Labs*, 417 F. Supp. 3d 912, 919–20 (N.D. Ohio 2019) (interpreting Ohio Rev. Code § 2307.382(A)(1) and finding that foreign company that communicated via email, received money, and phoned in-state business did transact business in the state); *Fischbarg v. Doucet*, 880 N.E.2d 22, 29 (N.Y. 2007) (interpreting N.Y. CPLP § 302 and finding personal jurisdiction where foreign defendant retained a lawyer in the state).

The documents formalizing that business transaction, the Lexington Policies, are not silent on a forum for resolution of any disputes arising from the transaction. The Master Policy incorporated into the Lexington Policies provides that Lexington "will submit to the jurisdiction of a Court of competent jurisdiction." (JS No. 27.) As discussed *supra*, the Tribal Court is a court of competent jurisdiction, and as the drafter of the insurance policy, Lexington could have included a different forum selection clause—but it did not. *See, e.g.*, *Pension Trust Fund for Operating Eng'rs*, 307 F.3d at 950. These facts alone establish the first prong of the Ninth Circuit's test.

Further demonstrating the propriety of personal jurisdiction here, Lexington also purposefully directed its activities at the Tribal forum. As the Supreme Court has held, a forum "'does not exceed its powers under the Due Process Clause if it asserts

personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum[]' and those products subsequently injure forum consumers." *Rudzewicz*, 471 U.S. at 473 (citation omitted).

Lexington deliberately and knowingly reached out beyond its principal place of business in Massachusetts and its state of incorporation in Delaware to Cabazon through numerous directed activities. Lexington targeted Native American businesses specifically for its insurance policies by using Tribal First/Alliant to market and offer its insurance policy to tribal businesses, such as Cabazon and the Casino. Tribal First/Alliant targets Native Americans with its name, "Tribal First," its logo that is in the shape of an eagle, and motto of "Recognizing the Past While Protecting the Future." (FAC, Exh. A at 1.) Annually over the last decade, Alliant visited the Reservation for purposes of gathering information relevant to renewal of the Lexington Policies. (JS No. 77.) The Lexington Policies insure tribal property located within the Reservation. (*Id.* No. 73.) And Lexington issued a letter denying the Tribe coverage to an address on the Reservation. (*Id.* No. 50.) Lexington does not deny that it issued the Lexington Policies and is the insurer (*id.* No. 71), nor does Lexington argue that Tribal First/Alliant acted beyond the scope of its authority as an agent of Lexington.

Physical presence within a forum is not a requirement for establishing personal jurisdiction under well-established case law. When upholding jurisdiction against in Florida court over Michigan citizen who had never set foot in Florida, the Supreme Court explained:

> Jurisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State . . . . **[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts**

can defeat personal jurisdiction there.

Rudzewicz, 471 U.S. at 476 (emphasis added); *see also Hirsch*, 800 F. 2d at 1478–80.

Indeed, the Ninth Circuit has repeatedly upheld the exercise of personal jurisdiction over non-resident insurance companies that never set foot in the forum state. *See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1131 (9th Cir. 2003); *Hirsch*, 800 F. 2d at 1479–81; *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir. 1986).

When, as here, "individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Rudzewicz*, 471 U.S. at 474 (internal citation and quotation marks omitted). Lexington stood to benefit significantly from the relationship with Cabazon by receiving the vast majority of the $594,492 in insurance premiums paid by Cabazon just in 2019 for the policy. (FAC, Exh. A at 11.) Lexington cannot wield a territorial shield under ICRA's Due Process Clause to avoid jurisdiction in this case. Here, "[Lexington]'s conduct and connection with the forum State are such that [it] should reasonably anticipate being hauled into [the Tribe's] court." *Rudzewicz*, 471 U.S. at 474.

Thus, Cabazon has met the first prong of the Ninth Circuit's specific personal jurisdiction test.

2. Cabazon's Claim Arises Directly Out of the Insurance Contract Between Lexington and Cabazon

Under the second prong of the Ninth Circuit's test, Cabazon's claims directly arise out of and relate to Lexington's forum-related activities, namely, entering into the Lexington Policies with Cabazon and failing to perform its obligations to Cabazon under the Lexington Policies, which caused Cabazon harm. *See Hirsch*, 800 F. 2d at 1479–81; *supra*, Section III.B.2.b.iii. (discussing nexus).

3. Lexington Cannot Demonstrate a Compelling Case for How the Tribal Court's Exercise of Jurisdiction is Unreasonable

Because Cabazon has established prongs one and two of the Ninth Circuit's test, the burden shifts to Lexington to demonstrate a "compelling case" that this Court's exercise of personal jurisdiction here is somehow unreasonable. *Fred Martin Motor Co.*, 374 F.3d at 802. Lexington cannot do so.

In assessing whether the assertion of personal jurisdiction comports with "fair play and substantial justice," as the third prong of the Ninth Circuit's test requires, courts may also consider several factors. Such factors include, "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, [and] the interstate judicial system's interest in obtaining the most efficient resolution of controversies." *Id.* at 477 (internal quotation marks omitted). Here, all of these factors weigh in favor of Cabazon's choice of forum. First, Lexington does not and cannot argue it would be burdened by litigating the case in the Tribal Court. The Tribal Court advised that it conducts all pre-trial proceedings telephonically. Lexington also previously admitted it is presently litigating in state courts throughout California.

Second, the Tribal Court has a substantial interest in adjudicating this dispute, which concerns Cabazon in a contractual dispute, Tribal assets, and Tribal trust land.

Third, Cabazon has significant interest in obtaining convenient and effective relief, especially given that Lexington has already delayed providing insurance proceeds rightfully owed to Cabazon under the Lexington Policies for over two years. Fourth, the most efficient resolution of the controversy is in the Tribal Court because the evidence, witnesses, and proof necessary for Cabazon's claims are located at or near the Casino.

Lexington has produced no evidence of "fraud, undue influence, or overweening bargaining power" regarding the Lexington Policies or shown that proceedings in the Tribal Court would render litigation "so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in

court." *Rudzewicz*, 471 U.S. at 486. Instead, Lexington's refusal to make the contractually required payments to Cabazon caused foreseeable injuries to Cabazon in the Tribal forum. *See id.* at 480. It is therefore reasonable for Lexington "to be called to account there for such injuries." *See id.*

In sum, the Tribal Court, as the final arbiter of the meaning of ICRA, held that exercising personal jurisdiction over Lexington in this case comports with ICRA's Due Process Clause. There is no reason for this Court to hold differently. Lexington entered into the Lexington Policies, satisfying the first prong of the Ninth Circuit's test. Additionally, and alternatively, Lexington purposefully directed its activities at the tribal forum, satisfying the first prong of the test as well. As to the second prong, Cabazon's claims directly arise out of and relate to Lexington's forum-related activities, namely, the Lexington Policies and Lexington's failure to honor its obligations under the Lexington Policies.

Because Lexington cannot present a compelling case that the Tribal Court's exercise of personal jurisdiction is somehow unreasonable, this Court should uphold the Tribal Court's finding of personal jurisdiction over Lexington.

IV.
CONCLUSION

For the reasons stated above, the Defendants respectfully request that the Court grant the Tribe's Cross-Motion for Summary Judgment and confirm the Tribal Court's subject matter and personal jurisdiction in this case.

DATED: June 3, 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