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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

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

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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

TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

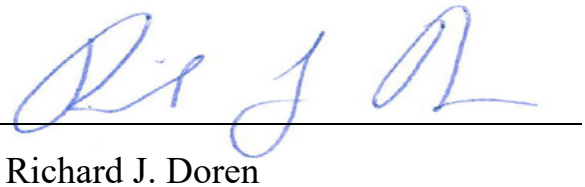
PLEASE TAKE NOTICE that on July 29, 2022, in the courtroom of the Honorable John W. Holcomb, United States District Judge, Central District of California, located at 411 W. 4th Street, Santa Ana, California 92701 in Courtroom 9D, or by remote conferencing, as directed by the Court, Plaintiff Lexington Insurance Company will and hereby does move the Court for an order granting summary judgment under Federal Rule of Civil Procedure 56, in favor of Lexington and against Defendants Martin A. Mueller and Doug Welmas, on Lexington's claims for injunctive and declaratory relief. Lexington requests a declaration under 28 U.S.C. § 2201 and Federal Rule of Civil Procedure Rule 57 that the Cabazon Reservation Court lacks jurisdiction over Lexington and the claims brought against Lexington in *Cabazon Band of Mission Indians v. Lexington Ins. Co.*, No. 2020-0103, and that the Cabazon Reservation Court's ongoing exercise of jurisdiction over Lexington and the aforementioned claims violates federal law. Lexington also requests a permanent injunction under Federal Rule of Civil Procedure 65 enjoining Defendants, their agents, employees, successors, appointees, and assigns from engaging in further proceedings involving Lexington before the Cabazon Reservation Court in *Cabazon Band of Mission Indians v. Lexington Ins. Co.*, No. 2020-0103.

Lexington is entitled to relief as a matter of law because the undisputed material facts show that the exercise of tribal jurisdiction over nonmember Lexington by Defendants, as judicial officials for the Cabazon Band of Cahuilla Indians, is in violation of federal law. This cross-motion for summary judgment is based on the Notice of Motion and Memorandum of Points and Authorities; the Joint Appendix of Certain Authorities in support of the parties' cross-motions for summary judgment; the Joint Statement of Undisputed Facts and Genuine Disputes; and any other matters that the Court may consider.

This motion is made following the conference of counsel pursuant to L.R.7-3, which took place on May 16, 2022.

DATED: June 3, 2022

GIBSON, DUNN & CRUTCHER LLP

By: 

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I. INTRODUCTION

The Cabazon Band of Cahuilla Indians (the "Tribe") sued Lexington Insurance Company in its own tribal court to obtain coverage for the business income it lost at the beginning of the COVID-19 pandemic. The threshold problem with that lawsuit—which has prompted this second litigation—is that the tribal court has no jurisdiction over non-tribal member Lexington (the Plaintiff in this action), and the time and effort Lexington continues to spend litigating in tribal court is causing it irreparable harm. This Court can and should halt the tribal-court litigation.

Tribal courts have extremely limited jurisdiction and generally may decide only disputes between members of the relevant tribe. They may adjudicate disputes involving nonmembers only in rare cases. The insurance-coverage suit brought by the Tribe is not such a case, yet the tribal court continues to exercise jurisdiction in violation of federal law. This Court has the authority to, and should, permanently enjoin Defendants, the tribal judges overseeing the tribal action, from continuing to violate the law in this way. *See Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133–34 (9th Cir. 1995).

Policyholders have filed literally hundreds of cases across the country over pandemic-related business-income losses just like those the Tribe claims to have suffered. State and federal courts, including this Court, have dismissed the vast majority of them. *See, e.g.*, *Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7769880, at *3–4 (C.D. Cal. Dec. 30, 2020). Indeed, *every* federal and state appellate court to consider these issues has joined that consensus, including the Ninth Circuit and the California Court of Appeal.[1] The substance of the Tribe's case is identical to those

[1] *E.g.*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *Inns by the Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688 (2021); *see also, e.g.*, *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Goodwill Indus. of Cent. Okla. Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *SA Palm Beach, LLC*

other cases. The only difference is where this case was brought: a tribal court.

That court is not the proper forum for the Tribe's insurance-coverage claims. Because Indian tribes are "distinct, independent political communities" with limited sovereign powers, their authority is confined to "the land held by the tribe" and "tribal members," and does not, as a general matter, extend to "non-Indians who come within their borders." *Plains Com. Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008). As a result, tribal courts *presumptively* lack jurisdiction over nonmembers. Only in exceptional circumstances may a tribal court exercise jurisdiction over a nonmember. The Supreme Court recognized two such circumstances in *Montana v. United States*, 450 U.S. 544 (1981), authorizing the exercise of tribal court jurisdiction over a nonmember when the nonmember's conduct (1) on tribal land arises from a consensual relationship with the tribe or its members or (2) imperils the tribe's political or economic well-being. *Id.* at 565–66. In addition to those two "*Montana* exceptions," the Ninth Circuit has created a third exception, the right-to-exclude doctrine, in which a tribe's power to exclude nonmembers from its land includes "the lesser authority to set conditions on their entry through regulations." *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 811 (9th Cir. 2011) (per curiam).

Each of these exceptions applies only rarely, and none applies here. The first *Montana* exception permits tribal jurisdiction only when a nonmember's conduct took place "on the land," within the territorial boundaries of a tribe, and only when the exercise of such jurisdiction is essential to protect tribal self-government and control internal relations. *Plains Com.*, 554 U.S. at 334, 336–37. The second *Montana* exception applies only when a tribe's very "subsistence" is threatened. *Id.* at 341. The right-to-exclude doctrine applies only when nonmembers physically engage in activity on tribal land. *Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756, 757 (9th Cir. 2020).

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v. Certain Underwriters at Lloyd's London, 32 F.4th 1347 (11th Cir. 2022); *Indiana Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App. 2022); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545 (Iowa Apr. 22, 2022); *Colectivo Coffee Roasters, Inc. v. Society Ins.*, — N.W.2d — (Wis. June 1, 2022).

Defendants focus their arguments on the first *Montana* exception and the right-to-exclude doctrine, but fail to satisfy their burden in establishing either as a ground for subject matter jurisdiction. If a tribe imposes its adjudicatory authority on nonmembers on these grounds absent any nonmember activity on tribal land, federal courts are empowered to permanently enjoin the tribe's officials from engaging in such unlawful conduct. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). The Court should exercise that power here. Although Lexington entered into a property insurance policy with the Tribe, it has never entered or engaged in relevant activity *on tribal land*. Contractual relationships alone are not enough to establish tribal court jurisdiction. Lexington's contract-based activities that are the subject of the tribal court action—determining there is no coverage under the policies at issue because there is no "direct physical loss or damage" to property, for example—have not occurred *on tribal land*, as Lexington has never entered the Tribe's borders.

Appellate courts, including the Ninth Circuit, have affirmed decisions invalidating or enjoining similar contract-based disputes that were wrongfully initiated in tribal courts against nonmember companies who, like Lexington, had never entered or engaged in relevant conduct on the tribal lands at issue. In *McPaul*, for example, the Ninth Circuit affirmed a judgment declaring that tribal court jurisdiction could not be exercised over a nonmember insurance company whose "relevant conduct" occurred "entirely outside of tribal land." 804 F. App'x at 757. And in *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207–09 (7th Cir. 2015), the Seventh Circuit affirmed a preliminary injunction against tribal court proceedings over the validity of bonds issued by nonmember financial entities. The court held that the nonmembers had not engaged in any relevant "activities on the reservation" and that the tribal court action did "not seek redress for any of [their] consensual activities on tribal land." *Id.*

Like the plaintiffs in *McPaul* and *Stifel*, Lexington has done nothing within the Tribe's borders; its relevant conduct occurred only in its off-reservation places of

business. And the insurance policies themselves were issued as part of a nationwide property insurance program administered and maintained by a third party, Alliant Insurance Services, Inc. The Tribe participates in this program and obtained insurance through Alliant, not directly from Lexington. Likewise, Lexington participates in this program through contracts with Alliant and/or brokers to provide insurance and underwriting services to program insureds who meet specific underwriting standards. As a result, there was no direct contact between Lexington and the Tribe when the relevant policies were negotiated and issued.

The Tribe's exercise of adjudicatory authority over disputes arising from the policies here cannot be justified by reference to its own sovereign interests. Because Lexington is a nonmember whose relevant activities occurred far from the reservation, regulating its conduct does not implicate tribal self-governance or internal tribal affairs. And as the Supreme Court has held, "a tribe's adjudicative jurisdiction [can]not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). Notably, the Tribe does not regulate insurance. That fact undermines any suggestion that the Tribe's exercise of authority over Lexington now is somehow "necessary for tribal self-government or controlling internal relations." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138–39 (8th Cir. 2019).

This Court should apply established precedent and enjoin Defendants' continued exercise of unlawful authority over Lexington. Courts regularly issue injunctions to stop unlawful tribal court actions similar to these, finding each of the elements necessary for an injunction satisfied. *See* Section IV.B, *infra* (collecting authorities). Here, as in those cases, Lexington will "suffer irreparable harm if [it is] compelled to litigate the dispute in a forum which does not have jurisdiction." *Washington v. Tribal Ct. for Confederated Tribes & Bands of Yakama Nation* (*Yakama*), 2013 WL 139368, at *3 (E.D. Wash. Jan. 10, 2013). Moreover, the Tribe will not be "deprived of a forum to entertain their claims because those claims" could be heard in another court, tipping the "balance of equities" in Plaintiff's favor. *Id.* And it is "in the public interest that the parties' dispute be

resolved in the forum which is properly vested with subject matter jurisdiction." *Id.*

Lexington respectfully requests this Court grant summary judgment in its favor, declaring that the Tribal Court lacks jurisdiction over Lexington and issuing a permanent injunction enjoining Defendants from continuing their exercise of invalid jurisdiction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Underlying Insurance Contracts

The Tribe is a federally recognized Native American tribe near Indio, California, where it operates a resort and casino. Joint Stmt., Nos. 1–3. The Tribe is insured through a nationwide property insurance program called the Tribal Property Insurance Program ("TPIP"), which is part of a larger property insurance program called the Alliant Property Insurance Program that also insures municipalities, hospitals, and non-profit organizations. Joint Stmt., Nos. 4–6. Insurance companies, including Lexington, participate in these programs by providing insurance and underwriting services at different layers of coverage and varying percentages of risk insured by those layers. Joint Stmt., Nos. 7–8. Lexington is not a member of the Tribe. Joint Stmt., No. 9.

TPIP is maintained and administered by a third-party service called "Tribal First," which is a specialized program of Alliant Underwriting Solutions and/or Alliant Insurance Services, Inc., which are California corporations located in California. Joint Stmt., Nos. 10–13. The Tribe bought multiple property insurance policies issued by Lexington under TPIP for the policy period from July 1, 2019 to July 1, 2020 (the "Lexington Policies"). Joint Stmt., Nos. 14–15. The Tribe obtained the Lexington Policies not directly from Lexington, but through Alliant, based on underwriting guidelines established between Alliant and Lexington. Joint Stmt., Nos. 16–17. Lexington itself negotiated and entered into separate contracts with Alliant and/or brokers setting forth Lexington's obligations under TPIP. Joint Stmt., No. 18. Lexington did not have direct contact with the Tribe before the issuance of the Lexington Policies, and Lexington learned of potential TPIP insureds, including the Tribe, only through Alliant. Joint Stmt., Nos. 19–21. Alliant (not Lexington) processed the Tribe's

submissions for insurance; collected premiums from the Tribe; prepared and provided quotes, cover notes, policy documentation, and evidences of insurance to the Tribe; and developed and maintained an underwriting file for the Tribe. Joint Stmt., Nos. 22–25.

Each Lexington Policy provided through 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"). Joint Stmt., No. 26. The Master Policy does not contain any provision through which Lexington consents to the jurisdiction of the Tribe or its Tribal Court. Joint Stmt., No. 27. Neither the Master Policy nor the Lexington Policies includes a choice-of-law provision through which Lexington consents to the laws of the Tribe governing the interpretation of the policies. Joint Stmt., No. 28. The Master Policy does not specifically name any TPIP insured, including either the Tribe, or any TPIP insurer, including Lexington. Joint Stmt., Nos. 29–30. The Master Policy instead states that the "Named Insured" is "shown on the Declaration page, or as listed in the Declaration Schedule Addendum attached to this policy," and that Tribal First (i.e., Alliant) maintains a "Named Insured Schedule" in its files. Joint Stmt., Nos. 31–32.

Copies of the Master Policy and other related documents were prepared and provided to the Tribe by Alliant (not Lexington). Joint Stmt., Nos. 33–34. Included among those documents were declaration pages associated with the Lexington Policies issued to the Tribe. Joint Stmt., No. 35. In each of those declaration pages, the "Named Insured" is identified as "All Entities listed as Named Insureds on file with Alliant Insurance Services, Inc.," and the "Mailing Address of Insured" is identified as the one "on file with Alliant Insurance Services, Inc." in "Thousand Oaks, CA." Joint Stmt., Nos. 36–37. The Tribe also received documents entitled "Tribal Property Insurance Program Evidence of Coverage." Joint Stmt., No. 38. The "Evidence of Coverage" documents are printed on "Tribal First Alliant Underwriting Solutions" letterhead and signed by Ray Corbett, Senior Vice President of Alliant Specialty Insurance Services. Joint Stmt., Nos. 39–40. They were prepared by Alliant "based on facts and

representations supplied to [Alliant] by [the Tribe]." Joint Stmt., Nos. 41–42. They also indicate that any "Notification of Claims" must be sent to "Tribal First" in San Diego, California. Joint Stmt., No. 43.

B. The Tribe's COVID-19-Related Insurance Claims

In March 2020, the Tribe temporarily suspended some of their non-essential business operations because of the COVID-19 pandemic and submitted a related insurance claim under the Master Policy to Tribal First, who then sent them to Lexington/AIG Claims, Inc. Joint Stmt., Nos. 44–45. After an investigation by Lexington's claims adjustor, Crawford & Company, Lexington issued a letter to the Tribe denying coverage in April 2020. Joint Stmt., Nos. 46–49. The letter was sent by or on behalf of Lexington from outside the territorial boundaries of the Tribe, on non-Reservation and non-tribal land. Joint Stmt., No. 50. In fact, all of Lexington's activities related to the Lexington Policies and to the Tribe's claims occurred away from the Reservation and tribal land. Joint Stmt., No. 51.

On November 24, 2020, the Tribe sued Lexington in their own Tribal Court. Joint Stmt., No. 52; *Cabazon Band of Mission Indians v. Lexington Ins. Co.*, No. 2020-0103. The Tribe claimed the insurers breached the contract and the implied covenant of good faith and fair dealing and sought a declaration that their COVID-19-related financial losses were covered under the Master Policy. Joint Stmt., No. 53. Defendant Martin A. Mueller presides over the Tribal Court action. Joint Stmt., No. 54. Chief Judge Welmas oversees the administration of the Tribal Court. Joint Stmt., No. 55.

C. The Tribal Court Action and Exhaustion of Tribal Court Remedies

Before a federal court may consider "whether a tribal court has exceeded the lawful limits of its jurisdiction," the tribal court itself must first be given a "full opportunity" to evaluate and determine its own jurisdiction. *Nat'l Farmers*, 471 U.S. at 856–57. Once "tribal remedies" have been exhausted, a tribal court's determination of its own jurisdiction is subject to review by a federal court. *Id.* at 853. To exhaust tribal court remedies, "tribal appellate courts must have the opportunity to review the

determinations of the lower tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). Thus, exhaustion is complete when tribal appellate review is complete. *Id.*; *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844 (9th Cir. 2009); *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216–17 (9th Cir. 2007).

Lexington exhausted all available remedies before the Tribal Court and the Tribal Court of Appeals. Soon after the Tribal Court action began, in January 2021, Lexington made a limited special appearance and moved to dismiss the Tribal Court action for lack of subject matter and personal jurisdiction under both Cabazon tribal law and federal law. Joint Stmt., No. 56. Judge Mueller denied this motion in March 2021, reasoning that tribal jurisdiction applied under the right-to-exclude doctrine and the first *Montana* exception because Lexington consensually entered into an insurance contract with the Tribe, despite Lexington's lack of physical presence on tribal land. Joint Stmt., No. 57. Lexington timely noticed its appeal, which was accepted. Joint Stmt., Nos. 58–59. The three-judge panel of the Tribal Court of Appeals affirmed the Tribal Court's order in November 2021. Joint Stmt., No. 59. In January 2022, Lexington filed an answer to avoid default. Joint Stmt., No. 60. The Tribal Court action remains ongoing, and the Tribal Court continues to assert jurisdiction over Lexington. Joint Stmt., at No. 61.

On January 5, 2022, Lexington filed this action, naming the tribal judges who denied Lexington's jurisdictional challenge as defendants under the doctrine of *Ex Parte Young*. Dkt. 1. Lexington filed its first amended complaint on April 13, 2022, removing the tribal appellate judges as defendants and naming Chief Judge Doug Welmas, who is also Chairman of the Tribe.[2] Dkt. 19. By agreement, the parties filed cross-motions for summary judgment on June 3, 2022. Dkt. 28. The hearing on the parties' cross-motions is set for July 29, 2022. Dkt. 31.

III. LEGAL STANDARD

Summary judgment should be granted when "there is no genuine dispute as to any

[2] Defendants also filed a motion to dismiss the first amended complaint, Dkt. 33, which has been fully briefed and is scheduled to be heard on June 24, 2022.

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Where the nonmoving party . . . bear[s] the burden of proof at trial on a dispositive issue," but "fails to make a showing sufficient to establish the existence of an element essential to [its] case," summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 US 317, 322–24 (1986). This is because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

"[P]ermanent injunctions may be granted on summary judgment, given the proper record." *S.E.C. v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). The standard for determining whether a permanent injunction should issue is essentially the same as the standard for a preliminary injunction, except that the Court determines the movant's actual success on the merits rather than the movant's likelihood of success on the merits. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987). A permanent injunction should issue where a moving party establishes "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Declaratory relief is appropriate where there is a "a case of actual controversy," 28 U.S.C. § 2201(a), and "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue," "terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.*, 873 F.2d 229, 231 (9th Cir. 1989).

IV. ARGUMENT

Under well-established Supreme Court precedent, there is a presumption against tribal court jurisdiction over nonmembers that can be overcome only if one of a few rare exceptions applies. Although Lexington "bears the initial responsibility" to show that

there is no genuine dispute as to any material fact, Defendants, as the parties claiming jurisdiction over Lexington in the ongoing Tribal Court action, bear the burden of proving at least one of the exceptions applies. *See Celotex Corp.*, 477 U.S. at 323. But under the undisputed facts of this case, Defendants cannot do so. Lexington is therefore entitled to judgment as a matter of law and to a permanent injunction requiring Defendants to halt the Tribal Court action.

Lexington has unsuccessfully contested the Tribal Court's jurisdiction and will soon face burdensome discovery and motion practice, as well as a potential adverse judgment. Defendants, as judicial officials of the Tribe, have exercised and continue to exercise the Tribe's adjudicatory authority over Lexington in violation of federal decisional law. The unlawful use of authority in this manner will continue to result in irreparable harm to Lexington, who must continue to litigate and defend itself in the Tribal Court action unless and until an injunction is issued.

A. The Tribal Court Lacks Jurisdiction over Plaintiffs

When it "is clear that [a] Tribal Court does not have jurisdiction over [a] tribal lawsuit," a federal court should issue a permanent injunction because "the [nonmembers have] succeed[ed] on the merits of their tribal jurisdiction argument." *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 239 F. Supp. 2d 1213, 1218–19 (D.N.M. 2002).

Because Indian "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," the exercise of jurisdiction by a tribal court over a nonmember is "presumptively invalid." *Plains Com.*, 554 U.S. at 328, 330 (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). This general rule against tribal jurisdiction over nonmembers derives from the historically "unique and limited character" of tribal sovereignty. *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021). When tribes were incorporated into the United States, they became "dependent" sovereigns and "lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563–64. Among those lost attributes was the ability to freely and independently determine their external relations with nonmembers. *See Cooley*, 141 S. Ct. at 1642–43; *see also*

Plains Com., 554 U.S. at 328 ("This general rule restricts tribal authority over nonmember activities taking place on the reservation."); *Montana*, 450 U.S. at 564–65 ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). Here, it is undisputed that Lexington is a nonmember of the Tribe and has no say in the laws and regulations that govern the Tribe and the Tribe's lands and members. Thus, the Tribal Court's exercise of jurisdiction over Lexington is presumptively invalid. *See Plains Com.*, 554 U.S. at 330.

In *Montana*, the Supreme Court recognized two narrow exceptions to the general rule against tribal jurisdiction over nonmembers. First, a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservations when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Supreme Court has explained that the *Montana* exceptions are "limited" and must not be construed in a manner that would "'swallow the rule,'" or "'severely shrink' it." *Plains Com.*, 554 U.S. at 330. In fact, with "one minor exception, [the Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 359–60 (2001).

The "burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers." *Plains Com.*, 554 U.S. at 330. The Tribe cannot meet this burden, but the Tribal Court of Appeals nevertheless held that the exercise of tribal jurisdiction over Lexington was permissible. In doing so, the Tribal Court of Appeals misapplied the *Montana* exceptions, impermissibly expanding the reach of the Tribe's authority. Thus, this Court should declare that the Tribal Court lacks jurisdiction and enjoin Defendants from continuing to violate federal law in this way.

1. The *Montana* Exceptions Do Not Apply

a. The First *Montana* Exception Does Not Apply

The first *Montana* exception permits the exercise of tribal jurisdiction over the "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Although Lexington has a contractual insurance relationship with the Tribe, the first *Montana* exception does not provide a basis for tribal jurisdiction because none of Lexington's relevant contractual activities occurred on the Tribe's land.

The Supreme Court has explained that "*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind." *Strate* 520 U.S. at 456–57. And each of the cases on *Montana*'s list involves nonmember *activity on tribal land*. *See id.* at 446 ("*Montana* thus described a general rule that . . . Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation."). The first case cited by *Montana* was *Williams v. Lee*, which concerned a payment dispute between tribal customers and a nonmember's general store on tribal land. 358 U.S. 217, 217–18 (1959). Tribal jurisdiction was affirmed because the nonmember business owner "was on the reservation and the transaction with an Indian took place there." *Id*. at 223. The remaining three cases cited by *Montana* concerned the taxation of businesses owned and operated by nonmembers on tribal lands. *See Morris v. Hitchcock*, 194 U.S. 384, 390 (1904) (permit tax on nonmember-owned livestock within the territorial boundaries of a tribe); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (permit tax for nonmember trading posts within the territorial boundaries of a tribe); *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152–54 (1980) (tax on cigarette sales to nonmembers within reservation).

Montana was decided over 40 years ago, and the Supreme Court has discussed it several times. In its most recent cases, it has observed that its "*Montana* cases have *always* concerned nonmember conduct *on the land*." *Plains Com.*, 554 U.S. at 334 (emphases added); *accord id.* at 328 (the "general rule" announced in *Montana* "restricts

tribal authority over nonmember activities taking place on the reservation"); *Cooley*, 141 S. Ct. at 1643 ("We have subsequently repeated *Montana*'s proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation."). Tribal jurisdiction over nonmember conduct "on the land" comports with the territorial limitations on tribal sovereignty. *See Plains Com.*, 554 U.S. at 330 (tribal sovereignty "centers on the land held by the tribe"); *Hicks*, 533 U.S. at 392 ("tribes retain sovereign interests in activities that occur on land owned . . . by the tribe").

As the Ninth Circuit has explained, "tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). And other circuits have observed that "[n]either *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091 (8th Cir. 1998). The Seventh Circuit, for example, held in *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014) that *Montana*'s first exception does not apply to off-reservation conduct arising from contracts between a nonmember and a tribe or its members. There, nonmember consumers brought a putative class action against several lenders owned by a tribal member who resided on tribal land. *Id.* at 768. The lenders argued that the dispute could be decided only in tribal court under the first *Montana* exception because the nonmember consumers obtained loans from companies owned by a tribal member through contracts that included forum-selection clauses requiring litigation to be conducted in tribal court. *Id.* at 781–82. The Seventh Circuit held that the tribal court could not exercise jurisdiction over the loan dispute, explaining that the plaintiffs had "not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute the loan documents." *Id.* at 782 (emphasis in original). And "[b]ecause the Plaintiffs' activities d[id] not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on the land,

the tribal courts d[id] not have jurisdiction over the Plaintiffs' claims." *Id.*

The Seventh Circuit reaffirmed this principle in *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), rejecting the tribal defendants' argument that "the court need not limit its consideration [of the *Montana* exceptions] to the on-reservation actions of [nonmembers]." *Id.* at 207. The court had "made clear in *Jackson* . . . that *Plains Commerce Bank* 'circumscribed' the already narrow *Montana* exceptions" and "that a tribe's authority to regulate nonmember conduct 'centers on the land.'" *Id.* Because none of the nonmember conduct at issue occurred "on tribal land," the court upheld a preliminary injunction barring tribal judicial officials from conducting tribal court proceedings. *Id.* at 207–09.

The story is much the same here. Lexington has "not engaged in *any* activities inside the reservation" to satisfy *Montana*'s first exception because Lexington never entered onto tribal land. *Jackson*, 764 F.3d at 782. Although Lexington has a contractual relationship with the Tribe, Lexington has not engaged in any activity related to that contract on the Tribe's land. Joint Stmt., No. 63. Instead, all conduct by Lexington concerning the insurance contract, including all review and consideration of the Tribe's claims, occurred remotely, far from tribal land. Joint Stmt., No. 64.

In buying insurance coverage, the Tribe never even dealt directly with Lexington. Joint Stmt., No. 65. Lexington contracted with Alliant or other brokers, all nonmembers of the Tribe, to join a nationwide insurance program in which the Tribe participates. Joint Stmt., No. 66. In its dealings with Alliant or these brokers, Lexington did not enter the Tribe's land and did not execute any documents on the Tribe's land, nor did Lexington interact directly with the Tribe. Joint Stmt., Nos. 67–68. As the Seventh Circuit noted in *Jackson*, "[t]he question of a tribal court's *subject matter jurisdiction* over a nonmember . . . is tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land*." 764 F.3d at 782 n.42 (emphases in original). As in *Jackson*, there can be no tribal court subject matter jurisdiction here.

The Tribal Court of Appeals rejected the common holding of federal courts that

"physical presence [on tribal land] is a requirement" for tribal jurisdiction, in part because it found "no language in any Supreme Court opinion barring tribal jurisdiction over nonmembers who knowingly and purposefully conduct business activities with Indian tribes . . . from afar." J.A. of Certain Authorities ("J.A."), Ex. 1 at 19. But in *Plains Commerce*, the Supreme Court explained that *Montana* has "always" concerned nonmember conduct "on the land" within the territorial boundaries of a tribe. 554 U.S. at 334. A nonmember's "physical presence" on tribal land is a requirement that inheres within the geographically limited nature of tribal jurisdiction and sovereignty.

In short, where an insurer has not engaged in relevant activity on a tribe's land, the first *Montana* exception does not apply. *See Jackson*, 764 F.3d at 782; *Stifel*, 807 F.3d at 208. Because Lexington has not engaged in any relevant activity while physically on the Tribe's land, the first *Montana* exception does not apply here.

b. The Second *Montana* Exception Does Not Apply

The second *Montana* exception permits the exercise of tribal jurisdiction over a nonmember whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Tribe has never asserted that this exception applies, and likewise, the Tribal Court of Appeals did not consider or evaluate it. There is a reason the Tribe has never argued this point: the second *Montana* exception does not apply here.

This exception has a particularly "elevated threshold." *Plains Com.*, 554 U.S. at 341. The challenged conduct "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community," and the exercise of tribal jurisdiction over that conduct must be "'necessary to avert catastrophic consequences.'" *Id.* This elevated threshold has not been met here. The nonmember conduct at issue does not threaten the political integrity, economic security, or health or welfare of the Tribe; imperil the subsistence of the Tribe's community; or require the exercise of jurisdiction to avert catastrophic consequences. The second *Montana* exception, therefore, does not provide a basis for jurisdiction over Lexington.

c. The Exercise of Tribal Jurisdiction Does Not Stem from the Tribe's Inherent Sovereign Authority

Neither *Montana* exception applies for another, more fundamental reason: the Tribe's exercise of jurisdiction does not "stem from [its] inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com.*, 554 U.S. at 336–37. This is a threshold requirement under *Montana*, as tribes may regulate nonmember "activities or land uses" *only when* they "intrude on the internal relations of the tribe or threaten self-rule." *Id.* at 334–35; *see also Strate*, 520 U.S. at 459 (the *Montana* exceptions apply only where tribal adjudicatory or regulatory authority "is needed to preserve the right of reservation Indians to make their own laws and be ruled by them"); *Montana*, 450 U.S. at 564 (the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes"); *WPX Energy Williston, LLC v. Fettig, et al.*, No. 1:21-cv-145, Order (D.N.D. Apr. 20, 2022) ("[U]nder the Supreme Court's analysis in *Plains Commerce*[], the first *Montana* exception is triggered when . . . such activities arising from the consensual relationship implicate the tribe's sovereign interests."). Thus, if the exercise of tribal jurisdiction over a nonmember "cannot be justified by reference to the tribe's sovereign interests," it is invalid. 554 U.S. at 336.

The Supreme Court and several federal appellate courts have expressly applied this threshold requirement in deciding there is no tribal jurisdiction. In *Plains Commerce*, the Supreme Court found that a tribal court lacked jurisdiction over a dispute involving the sale of non-Indian fee land by a nonmember bank, explaining that regulating the sale of non-Indian fee land could not be justified by the tribe's sovereign interests in "protecting internal relations and self-government" because the "mere fact of resale" had not threatened those interests. 554 U.S. at 336–37. Similarly, in *Jackson*, the Seventh Circuit rejected the argument that "a nonmember's consent to tribal authority" was "sufficient to establish the jurisdiction of a tribal court" because the tribal

court's jurisdiction over nonmembers must also "stem from the tribe's inherent sovereign authority." 764 F.3d at 783; *see also id.* (noting the dispute at issue, concerning off-reservation loan activity, did not implicate "*any* aspect of 'the tribe's inherent sovereign authority'" (emphasis in original)). The Eighth Circuit likewise held that a tribal court lacked jurisdiction over nonmember oil and gas companies accused of failing to pay royalties under leases with tribal members, explaining that although the leases were "consensual relationships with tribal members," a "consensual relationship alone is not enough" to establish tribal jurisdiction. *Kodiak Oil*, 932 F.3d at 1138. Instead, the court explained that tribal jurisdiction had to stem from the tribe's sovereign interests, and the regulation of nonmember companies and their lease-related activity was "not necessary for tribal self-government or controlling internal relations." *Id.*

Here, the exercise of tribal jurisdiction over Lexington in the Tribal Court action is not necessary to protect tribal self-government or to control internal relations, and is therefore invalid. The Tribal Court action concerns an insurance contract with a non-tribal insurer and its *off-reservation* conduct. As the Supreme Court and other federal appellate courts have emphasized time and again, "tribes retain sovereign interests in activities that occur *on land* owned and controlled by the tribe." *Hicks*, 533 U.S. at 392 (emphasis added); *Plains Com.*, 554 U.S. at 327 (tribal sovereignty "centers on the land held by the tribe and on non-tribal members within the reservation"); *see, e.g.*, *Stifel*, 807 F.3d at 207 ("The actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty."). That is simply not the case here.

As part of its analysis of the first *Montana* exception, the Tribal Court of Appeals found instructive the reference in *Plains Commerce* to *Williams v. Lee*, 358 U.S. 217 (1959), reasoning that *Williams* established that "contractual disputes are 'reservation affairs,'" over which tribal jurisdiction is "necessary in order for Indians to be able to make their own laws and be ruled by them." 554 U.S. at 332. But the Tribal Court of Appeals misread the holding in that case. *Williams* did not hold that all contractual disputes (regardless of whether they occurred on or off tribal lands) automatically

constitute "reservation affairs" for which tribal jurisdiction is necessary.

Instead, *Williams* affirmed the territorial limits of tribal sovereignty. *Williams* concerned a tribal court's jurisdiction over a contract dispute arising from the sale of merchandise by a nonmember to a tribal member on the reservation. *Id.* The Supreme Court held tribal jurisdiction was proper because the nonmember was "on the Reservation and the transaction with the Indian took place there." *Williams*, 358 U.S. at 223. Put differently, tribal jurisdiction was proper because *Williams* involved a tribe's inherent sovereign authority over internal reservation affairs. The transaction at issue in *Williams* (1) was with a tribal member, (2) occurred at a store on tribal land, and (3) involved a tribal defendant in the underlying suit, and, therefore, implicated tribal laws governing tribal members and reservation affairs. There are no similar facts here.

If further confirmation were needed that this case does not implicate tribal sovereignty, it would be found in the fact that the Tribe does not regulate insurance in the first place. Joint Stmt., No. 69. The Tribe does not dispute this. By comparison, in the state of California, the authority to set insurance policy and regulate insurance is vested in the California Department of Insurance and Insurance Commissioner, whose duties include rulemaking, investigation, emergency regulations, and oversight of a broad range of insurance matters. *See, e.g.*, Cal. Ins. Code §§ 12919–13555. The absence of insurance regulation by the Tribe indicates that the exercise of tribal jurisdiction over Lexington's conduct under the insurance policy has never been necessary to protect tribal self-government or to control internal tribal relations. A state or federal court of competent jurisdiction can and should decide the contractual dispute at issue here—without endangering or compromising the Tribe's sovereignty. *See Kodiak Oil*, 932 F.3d at 1138 (rejecting application of first *Montana* exception where "complete federal control of oil and gas leases on allotted lands—and the corresponding lack of any role for tribal law or tribal government in that process—undermine[d] any notion that tribal regulation in this area [was] necessary for tribal self-government"). State and federal courts have done just that in cases involving the same TPIP policy and

other federally recognized tribes. *See Menominee Indian Tribe of Wisconsin, v. Lexington Ins. Co.*, 556 F. Supp. 3d 1084, 1105 (N.D. Cal. 2021) (dismissing all claims with prejudice); *Yurok Tribe v. Lexington Ins. Co.*, No. CV2100805 (Cal. Super. Ct., Oct. 18, 2021) (same); *Lytton Rancheria v. Lexington Ins. Co.*, No. MSC21-1149 (Cal. Super. Ct., May 25, 2022) (same); *Kickapoo Tribe of Okla. v. Lexington Ins. Co.*, 2021 WL 5227331, at *7 (Okla. Dist. Ct. May 24, 2021) (granting summary judgment to Lexington); *see also Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Res. Cal. v. Lexington Ins. Co.*, No. 20CV01967 (Cal. Super. Ct. May 3, 2022) (same).

This absence of insurance regulation by the Tribe is significant because "a tribe's adjudicative jurisdiction [can]not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453; *see also Plains Com.*, 554 U.S. at 330 ("reaffirm[ing]" the principle that tribal courts lack jurisdiction to hear claims exceeding the bounds of a tribe's "legislative jurisdiction"). Because the Tribe does not regulate insurance and has not been granted regulatory authority by Congress over any aspect of the insurance industry, the Tribal Court cannot exercise adjudicative jurisdiction over Lexington's insurance activity. *See Jackson*, 764 F.3d at 783 ("[I]f a tribe does not have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim based on that activity.").

The Tribal Court of Appeals reasoned that the contract dispute at issue in the tribal court action implicated the Tribe's inherent sovereign authority because the insurance contract insured the Tribe's "most important source of tribal revenues . . . necessary to fund programs essential to tribal self-government." J.A., Ex. 1 at 25. But there is no casino exception to the presumption against the exercise of tribal jurisdiction. And the potential for economic harm here does not meet the "elevated threshold" for *Montana's* second exception, which more relevantly requires that conduct "do more than injure the tribe." *Plains Com.*, 554 U.S. at 341 (explaining that the second Montana exception concerns conduct that "'imperil[s] the subsistence' of the tribal community"). Indeed, the Seventh Circuit considered and rejected a similar argument, explaining that to find that the second *Montana* exception applies "whenever the economic effects of [a tribe's]

commercial agreements affect a tribe's ability to provide services to its members" would render the second exception "so broad, it would swallow the rule." *Stifel*, 807 F.3d at 209. The exercise of tribal jurisdiction over Lexington, as erroneously conceived by the Tribal Court of Appeals, does just that.

The Tribal Court of Appeals construed *Montana* in a way that would give the Tribe authority over a nonmember based solely on the existence of a contractual relationship with the Tribe relating to Reservation property, disregarding the additional limiting requirements that a nonmember's relevant conduct must physically occur *on tribal land* and that the exercise of tribal jurisdiction must be justified by reference to the Tribe's *sovereign interests*. This construction is untenable. It would allow the Tribe to exercise jurisdiction over every nonmember it contracts with (including via third-party brokers), regardless of whether the nonmember's relevant conduct occurs on tribal land, implicates tribal self-government and internal relations, or conforms to a tribe's legislative authority. And with regard to the first *Montana* exception, it allows the Tribe to regulate the terms of its "consensual relationship" with a nonmember, when the first *Montana* exception is confined to regulating nonmember *conduct* on tribal land that implicates a tribe's sovereign interests and not the consensual relationships themselves.

Tribal courts presumptively lack jurisdiction over nonmembers, and the *Montana* exceptions create jurisdiction only in the rare case. The Tribal Court of Appeals' decision flips that presumption on its head and makes tribal jurisdiction the rule rather than the exception. Tribal courts do not gain jurisdiction whenever a tribal member reaches outside of the reservation to enter into a commercial contract with a nonmember.

2. The Right to Exclude Does Not Apply

In addition to the narrow *Montana* exceptions, the Ninth Circuit has crafted another narrow exception to tribal jurisdiction over nonmembers: the right-to-exclude doctrine. *Water Wheel*, 642 F.3d at 804–05. Under that doctrine, a tribe's "sovereign authority over tribal land" provides it with the power to exclude nonmembers from the land, which "necessarily includes the lesser authority to set conditions on their entry

through regulations." *Id.* at 811. The Tribal Court of Appeals decided this doctrine permits the exercise of tribal jurisdiction over Lexington because Lexington "definitively conducts business on Cabazon lands by insuring Cabazon property located on . . . Cabazon lands," and "'setting foot' on the reservation can involve more than a mere physical presence in this era of long-distance business activities." J.A., Ex. 1 at 26–27. The Tribal Court of Appeals incorrectly applied the right-to-exclude doctrine, which does not permit the exercise of tribal jurisdiction under these circumstances.

The "right to exclude" does not apply here for much the same reason that the first *Montana* exception does not apply: the nonmember must have *physically entered* tribal land, and the nonmember's *physical presence on the land* must be at issue, thereby implicating that tribe's ability to manage its lands. The Ninth Circuit repeatedly has underscored that the right to exclude is connected to the nonmember defendant's presence on tribal land. For example, in *Water Wheel*, the Ninth Circuit affirmed a tribe's regulatory jurisdiction over a nonmember based on the right-to-exclude doctrine, "where the non-Indian activity in question occurred on tribal land" and "the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands." 642 F.3d at 812–14. Similarly, in *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 901–04 (9th Cir. 2019), the Ninth Circuit held that a tribe had "authority to regulate [a nonmember employee's] conduct on tribal land pursuant to its sovereign exclusionary powers," given that the nonmember's "alleged conduct violated the [t]ribe's regulations" in place at the time of her employment, while she was "on tribal land." And in *Grand Canyon Skywalk Dev. v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1204–05 (9th Cir. 2013), the Ninth Circuit decided tribal jurisdiction was "not plainly lacking" in regard to a non-tribal corporation and tribal corporation's agreement to build and manage a tourist destination on tribal land because the "essential basis for the agreement" was "access to" tribal land and the agreement "interfered with the [tribe's] ability to exclude" the non-tribal corporation.

Conversely, when a nonmember has *not* physically entered and engaged in

activity on tribal land, the "right to exclude" does not apply. *See McPaul*, 804 F. App'x at 757. In *McPaul*, the Ninth Circuit held that because a nonmember insurance company's "relevant conduct—negotiating and issuing general liability insurance contracts to non-Navajo entities—occurred entirely outside of tribal land," a tribal court's jurisdiction could not be premised on the tribe's right to exclude. *Id.* As the district court in the *McPaul* case elaborated, the nonmember insurer "never set foot on reservation land, interacted with tribal members, or expressly directed any activity within the reservation's borders." *Emp'rs Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1149–50 (D. Ariz. 2019). The Tribe's right to exclude does not apply to Lexington and, therefore, does not permit the exercise of tribal jurisdiction over it. Like the insurer in *McPaul*, Lexington has not entered, sent employees to, maintained operations within, trespassed on, or engaged in any activity on the Tribe's land. And the insurance contracts at issue neither provide Lexington access to tribal land nor contain terms affecting or impairing the Tribe's ability to exclude anyone from its land.

As part of its analysis of the "right to exclude" doctrine, the Tribal Court of Appeals found persuasive the Tribe's argument that 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." J.A., Ex. 1 at 26. But this proposition conflates commercial discretion with sovereign authority. What the Tribe may or may not be able to do as a private party deciding the terms of a business relationship must not be confused with what it is narrowly permitted to do as a tribal sovereign seeking to impose its authority on a nonmember. *See San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1312–13 (D.C. Cir. 2007) ("[T]ribal sovereignty is not absolute, permitting a tribe to operate in a commercial capacity without legal constraint."). The Supreme Court has cautioned against "confus[ing] the Tribe's role as commercial partner with its role as sovereign" in this manner. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982); *see also Montana*, 450 U.S. at 564 ("'The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving

the relations between an Indian tribe and nonmembers of the tribe.'" (emphasis in original)). When "a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction[s] with non-Indians, its claim of sovereignty is at its weakest." *San Manuel*, 475 F.3d at 1313.

Because Lexington has not entered the Tribe's land, there is nothing for the Tribe to exclude, and thus the right-to-exclude doctrine does not permit the exercise of tribal jurisdiction here. This Court should halt Defendants' unlawful exercise of authority.

B. Lexington Is Entitled to a Permanent Injunction

Because there is an "absence of any genuine issue of fact material to the granting of the injunction," *Murphy*, 626 F.2d at 655, this Court should permanently enjoin Defendants from continuing their exercise of jurisdiction in violation of federal law.

1. Lexington Will Continue to Suffer Irreparable Harm if Defendants Are Not Enjoined

Absent injunctive relief from this Court, Lexington will continue to suffer irreparable harm from the unlawful exercise of jurisdiction over it in the tribal court. To date, Lexington has had no choice but to defend itself in a court that has no lawful authority over it. Lexington has had to appear and answer in Tribal Court, or else risk default. And it imminently will be required to engage in hearings, discovery, motion practice, and trial in Tribal Court. Lexington also faces the potential of an adverse judgment. These unfair and invalid proceedings will continue without an injunction.

Federal courts have recognized such ongoing and impending injuries as sufficient to warrant preliminary and permanent injunctions. The Seventh Circuit in *Stifel*, for example, affirmed a preliminary injunction that was based in part on the irreparable harm that nonmembers would suffer by being "forced to litigate" in a "court that likely lacks jurisdiction over them." 807 F.3d at 194, 214. The Eastern District of Washington found the same in *Yakama*. 2013 WL 139368, at *3. Litigating in a court that lacks jurisdiction results in "unnecessary time, money and effort," and thus demonstrates the requisite "unwarranted and irreparable harm." *Koniag, Inc. v. Kanam*, 2012 WL 2576210, at *5

(D. Alaska July 3, 2012). Courts have found that litigating in tribal court would irreparably harm nonmembers in a long list of other cases. *E.g.*, *McKesson Corp. v. Hembree*, 2018 WL 340042, at *10 (N.D. Okla. Jan. 9, 2018); *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938, at *6 (D. Ariz. Jan. 26, 2012); *Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000). This Court should find the same.

2. Remedies Available at Law Are Inadequate to Compensate for Plaintiffs' Injury

Lexington lacks any adequate remedy at law. Lexington seeks to put a stop to Defendants' invalid exercise of tribal jurisdiction over it. There is no remedy at law that could redress this injury, including damages. In fact, because tribal officials enjoy immunity from monetary suit, Lexington would be barred from seeking remedies at law under *Ex Parte Young*, 209 U.S. 123 (1908), which allows nonmembers to seek *only* injunctive and declaratory relief against tribal officials. *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013) ("[T]o the extent the complaint seeks monetary relief, such claims are barred under *Ex Parte Young*.").

3. Considering the Balance of Hardships, Defendants Will Suffer No Serious Injury if They Are Enjoined

The balance of hardships tips sharply in Lexington's favor. Lexington is suffering ongoing irreparable harm because it has been forced to litigate in a court that lacks jurisdiction over it without a right of merits review outside of the tribal court system. The Defendants, by contrast, face no serious risk of harm. If an injunction were issued against them, the only potential injury to them (and the Tribe) would be dismissal of the Tribal Court action. But the Tribe would not be without remedy. They would still be free to assert their claims in a state or federal court of competent jurisdiction, as courts have repeatedly observed in similar circumstances. *E.g.*, *Yakama*, 2013 WL 139368, at *3; *McKesson*, 2018 WL 340042, at *10; *Koniag*, 2012 WL 2576210, at *5; *Rolling Frito-Lay Sales*, 2012 WL 252938, at *6; *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1053 (D. Ariz. 1981). Because the threat of dismissal of the Tribal Court action to Defendants and the Tribe is far less significant than the threat to Lexington of

unnecessary and unlawful litigation, the balance of hardships favors Lexington.

4. An Injunction Against Defendants Is in the Public Interest

Federal courts have consistently recognized that it is in the public's interest to prevent excessive exercises of tribal court jurisdiction and, instead, have disputes resolved in their proper forums. For example, in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153 (10th Cir. 2011), the Tenth Circuit held that a tribal court lacked jurisdiction to order a nonmember law firm to return paid fees to a tribe. In affirming a preliminary injunction enjoining the tribal court's order, the Tenth Circuit was "not persuaded" that the invalid "exercise of tribal authority over . . . a non-consenting, nonmember, [was] in the public's interest." *Id.* at 1158. Rather, as other courts have held, the public's interest is better served by enjoining unlawful exercises of tribal jurisdiction and ensuring disputes proceed in "properly vested" forums. *See Yakama*, 2013 WL 139368, at *3 ("It is in the public interest that the parties' dispute be resolved in the forum which is properly vested with subject matter jurisdiction."); *accord Koniag*, 2012 WL 2576210, at *5; *McKesson*, 2018 WL 340042, at *10; *Rolling Frito-Lay Sales*, 2012 WL 252938, at *6. The same is true here.

C. Lexington Is Entitled to Declaratory Relief

Declaratory relief is proper because there is a clear "case of actual controversy" between Lexington and Defendants, 28 U.S.C. § 2201(a), as Defendants continue to violate Lexington's rights by exercising jurisdiction over it without any basis in law. Further, a finding by this Court that the Tribal Court lacks jurisdiction over Lexington will "clarify[] and settl[e] the legal relations" between the parties and "afford relief from the uncertainty, insecurity, and controversy" of Lexington's subjection to a foreign court's unlawful authority. *Eureka Fed. Sav.*, 873 F.2d at 231.

V. CONCLUSION

The Court should grant summary judgment in favor of Lexington, declaring that the Tribal Court lacks jurisdiction over Lexington and permanently enjoining Defendants from exercising jurisdiction over Lexington in violation of federal law.

Dated: June 3, 2022

Respectfully submitted,

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