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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

DEFENDANTS' OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

OTHER TRIBAL COURT CASES

FEDERAL STATUTES, REGULATIONS AND RULES

I.

INTRODUCTION

Lexington Insurance Company ("Lexington") entered into a contract with the Cabazon Band of Cahuilla Indians ("Cabazon" or "Tribe") to insure tribal property on lands held in trust for the Tribe by the United States within the Cabazon Indian Reservation (the "Reservation"). Lexington accepted substantial premium payments from Cabazon over several years under a contract that renewed each year. 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. The Tribe then sued Lexington in the Cabazon Reservation Court. Lexington moved to dismiss the Tribe's claims based on lack of jurisdiction, but the Tribal Court denied Lexington's motion, and the Tribal Court of Appeals upheld this ruling. Lexington subsequently initiated suit in this Court against Defendants in their official capacities as judges of the Cabazon Reservation Court, and is now moving for summary judgment, arguing that the Cabazon Reservation Court lacks subject matter jurisdiction under federal law.

This Court should deny Lexington's Cross-Motion for Summary Judgment and hold, in conformity with the Cabazon Reservation Court of Appeals, that the Cabazon Reservation Court has subject matter jurisdiction over the Tribe's claims under the Tribe's power to exclude and regulate non-member conduct on tribal lands and, to the extent the Court deems the analysis necessary, under the first exception established in *Montana v. United States*, 450 U.S. 544 (1981).

II.

BACKGROUND

Defendants set forth in detail the pertinent factual and procedural background in their Memorandum of Points and Authorities in Support of Defendants' Cross-Motion for Summary Judgment. (Dkt. No. 39-1.) For brevity, Defendants address here only the undisputed material facts most pertinent to their Opposition to Lexington's Cross-Motion for Summary Judgment.

A. THE PARTIES AND THE INSURANCE CLAIM

Cabazon is a federally recognized Indian tribe. (Joint Statement of Undisputed Facts and Genuine Disputes ("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 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 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.)

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 (defined below) 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. 81.) The Lexington Policy premiums

were remitted to Lexington. (*Id.* No. 23.) For years, the Tribe has been insured by Lexington for damage or loss to its property on its Reservation, including the Casino. (Joint Exhibit at 2 ¶ 6.)

The Tribe obtained the Lexington Policies through Alliant; Alliant processed the Tribe's submissions for insurance, and Alliant collected premiums from the Tribe and remitted them to Lexington. (JS Nos. 16, 22, 23.) Lexington knew it was issuing insurance for, and agreed to insure, the Tribe's property and businesses on the Reservation. (*Id.* Nos. 73, 76.)

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.)

On March 17, 2020, because of the COVID-19 pandemic, Cabazon had to close operations at some of its businesses including the Casino. (*Id.* Nos. 44, 79.) 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.* Nos. 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 notified Tribal First/Alliant. (*Id.* Nos. 45, 43.) Tribal First/Alliant conveyed the claim to Lexington, which undertook an investigation through Lexington's 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 Lexington to the Tribe at its address 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

After Lexington denied its claim, the Tribe sued Lexington in the Cabazon Reservation Court for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. (*Id.* Nos. 52–53; First Amended Complaint ("FAC") ¶¶ 57–59.) The Cabazon Reservation Court, which is composed of a trial court (the "Tribal Court") and a court of appeals (the "Tribal Court of Appeals"), is the judicial branch of the Cabazon tribal government. (JS No. 70.)

Filing suit in the Tribal Court was consistent with the Tribe's contractual agreement with Lexington. Each of the Lexington Policies 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 Cabazon Reservation Court litigant is a non-Indian,[1] such as Lexington, Cabazon retains *pro tem* judges who have no affiliation or other relationship 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.*)

Consistent with this policy, both Defendant Mueller, the Tribal Court judge, and the three Tribal Court of Appeals judges were designated as *pro tem* judges of the Cabazon Reservation Court. (*Id.* Nos. 54, 80.)[2] After full briefing and oral argument,

[1] Courts generally use the terms nonmember and non-Indian relatively interchangeably. *See, e.g.*, *Montana*, 450 U.S. at 547. Defendants do so throughout this brief as well.

[2] The *pro tem* judges engaged by the Tribe to sit as the Tribal Court of Appeals are three of the most well-respected Federal Indian Law professors in the country. They were Kevin K. Washburn, Dean of the University of Iowa College of Law and former

both the Tribal Court and Tribal Court of Appeals concluded, in written opinions, that the Cabazon Reservation Court had jurisdiction to hear the dispute. (*Id*. Nos. 57, 60; FAC ¶ 65 and Exh. B.)[3] The Tribe and Lexington have since stipulated to stay further Tribal Court proceedings 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 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. (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 12(b)(1), (6), (7) and 19. 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. The Parties filed Cross-Motions for Summary

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Assistant Secretary of the Interior for Indians Affairs; Alex Skibine, S. J. Quinney Professor of Law at the University of Utah College of Law and former Deputy Counsel for Indian Affairs, Committee on Interior and Insular Affairs, U.S. House of Representatives; and Matthew L.M. Fletcher, MSU Foundation Professor of Law, Michigan State University, official Reporter for the American Law Institute's Restatement of the Law, the Law of American Indians, and co-author of *Cases and Materials on Federal Indian Law* (2020).

[3] In addition to the Cabazon Reservation Court, three other tribal courts around the country have held, in four separate cases, that they have subject matter and personal jurisdiction over Lexington in COVID-19–related insurance coverage actions involving the same insurance policy. *Red Earth Casino v. Lexington Ins. Co.*, Case No. CVTM-2021-0001-GC (Intertribal Ct. S. Cal. Sept. 23, 2021); *Suquamish Indian Tribe v. Lexington Ins. Co*., Case No. 200601-C (APPEAL) (Suquamish Tribal Ct. App. Sept. 29, 2021); *Port Gamble S'Klallam Tribe v. Lexington Ins. Co*., Case No. POR-AP-2021-0001 (Port Gamble Tribal Ct. App. Sept. 27, 2021); *Jamul Indian Village Dev. Corp. v. Lexington Ins. Co*., Case No. CVJ-2020-003-GC (Intertribal Ct. S. Cal. Feb. 2, 2021). Copies of each of these decisions are filed concurrently herewith in the Supplement to Joint Appendix of Certain Authorities in Support of the Parties' Cross-Motions for Summary Judgment.

Judgment on June 3, 2022.

III.

ARGUMENT

A. THE CABAZON RESERVATION COURT HAS SUBJECT MATTER JURISDICTION

This Court should hold 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. Alternatively, insofar as the Court determines that a *Montana* analysis is appropriate, the Court should hold that the Tribal Court has jurisdiction pursuant to *Montana*'s first exception. 450 U.S. at 565.

1. Cabazon's Inherent Authority Over Lexington's Conduct on and Affecting the Tribe's Reservation Land Provides the Cabazon Reservation Court with Subject Matter Jurisdiction Over a Lawsuit Arising Out of That Conduct

(a) The Cabazon Reservation Court Has Jurisdiction Over Lexington Without Regard to *Montana*

Supreme Court precedent establishes that Indian tribes possess inherent sovereign powers, including the authority to exclude persons from tribal land. *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."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them."). "From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808–09 (9th Cir. 2011) (per curiam) (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (recognizing that a tribe's power to exclude includes the incidental power to regulate)); *see also Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013). And, as the Supreme Court has held, "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) (cleaned up); *see also Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017) ("[T]ribes retain adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude."); *Water Wheel*, 642 F.3d at 810 (holding that where "regulatory jurisdiction exists and neither Congress nor the Supreme Court have said otherwise, the tribal court may also exercise adjudicative jurisdiction").

Whereas a tribe has inherent regulatory and adjudicative authority over nonmembers' conduct on tribal land, it presumptively lacks such authority over nonmembers on *non-tribal land*. *See Montana*, 450 U.S. at 565 (holding that subject to certain exceptions, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

Decision after decision in the Ninth Circuit has recognized that "*Montana* limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on *non-Indian land*, not on tribal land." *Water Wheel*, 642 F.3d at 810 (emphasis added); *see also McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir. 2002) (same). "[A] tribe's inherent authority over tribal land may provide for regulatory authority over non-Indians on that land without the need to consider *Montana*." *Grand Canyon Skywalk*, 715 F.3d at 1204; *see also Water Wheel*, 642 F.3d at 811–12 (recognizing that "*Montana* does not affect this fundamental principle [to exclude] as it relates to regulatory jurisdiction over non-Indians on Indian land").

To the extent that Lexington suggests that the tribal "power to exclude" is nothing more than any landowner's right to exercise "commercial discretion" in how his or her land is used, (Dkt. No. 40 at 22), that contention is wrong. As the Supreme Court has plainly stated, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). And, as discussed above, tribal power to exclude or condition the activities of non-members affecting tribal lands carries with it the

concomitant rights to regulate and adjudicate disputes concerning those non-member activities, for "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts." *Id*.

It follows from the foregoing principles that Cabazon's dispute with Lexington is properly before the Cabazon Reservation Court if Lexington's conduct took place on, or should be treated as having taken place on, Cabazon's Reservation. That is precisely the case, as explained below.[4]

(b) That Lexington, Itself, Has Not Physically Entered the Cabazon Reservation Does Not Bar the Tribal Court's Exercise of Jurisdiction over the Insurance Coverage Lawsuit

Lexington argues that the Tribe's right to exclude (and, thus, the ancillary rights to regulate and adjudicate) is dependent upon Lexington's physical presence on tribal land. (Dkt. No. 40 at 21.) This contention is inconsistent with the decisions of this circuit and others.

Grand Canyon Skywalk is instructive. *Grand Canyon Skywalk* arose out of a revenue sharing contract between the non-Indian plaintiff ("GCSD") and a tribally-chartered corporation owned by the Hualapai Indian Tribe, for the development and operation of a glass skywalk on land held in trust for the tribe on its reservation. *Grand Canyon Skywalk*, 715 F.3d at 1199, 1205. Subsequently, the Tribe invoked its powers of eminent domain to acquire GCSD's interest in the contract and excluded GCSD from the skywalk. *Id*. at 1199.

GCSD filed suit in federal district court seeking a declaration that the tribe lacked authority to condemn its contract rights and seeking a TRO preventing the tribe from enforcing its purported right of eminent domain. *Id*. The district court denied the motion because tribal court jurisdiction was not plainly lacking, and thus the tribal

[4] As explained in Section III.A.2, *infra*, even if *Montana* applies to this case, the Tribe would have jurisdiction over Lexington under the "first" or "consensual relationship" exception to *Montana*'s general rule.

court should have the right to consider its jurisdiction in the first instance. *Id.* at 1199–00.

The Ninth Circuit affirmed. *Id.* at 1200–01. As an initial matter, the Court held that *Montana* was unlikely to apply because "the dispute centers on Hualapai trust land and there are no obvious state interests at play." *Id.* at 1205. Moreover, the Court found that these considerations—the fact that the dispute directly involved tribal trust land and did not implicate state interests—provided a sufficient basis for holding that tribal court jurisdiction was not plainly lacking. The Court's conclusion shows that a non-Indian's physical presence on tribal land was not necessary for the tribal court's exercise of jurisdiction. The tribal court lawsuit stemmed from the Tribe's alleged violation of the non-Indian party's contractual rights. To be sure, those rights directly concerned the non-Indian's use of tribal land but the dispute itself did not arise out of the non-Indian's activities on tribal land.

Lexington cites the *McPaul* decision for the proposition that "when a nonmember has *not* physically entered and engaged in activity on tribal land, the 'right to exclude' does not apply." (Dkt. No. 40 at 21–22.) *See Emp'rs Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144 (D. Ariz. 2019) ("Branch"), *aff'd sub nom.*, *Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756 (9th Cir. 2020) (mem.) ("McPaul"). Not only is *McPaul* readily distinguishable on its facts, but the district court judge's reasoning supports the outcome advocated by Defendants.

McPaul involved the Navajo Tribal Court's assertion of jurisdiction over a suit filed by the Navajo Nation against an Iowa-based insurance company (Empire Mutual) and two companies it insured. 804 F. App'x at 756. The insureds, both non-Indian corporations, were sued for their role in an on-reservation gasoline leak. *Id.* at 756–57. Empire Mutual, by contrast, had "never contracted with any tribal members or organizations," nor had it or its agents ever stepped foot on the Navajo Reservation. *Branch*, 381 F. Supp. 3d at 1145, 1149. Empire Mutual's "insurance contracts [did] not mention liability arising from activities on the reservation, [and bore] no direct

connection to tribal lands." *McPaul*, 804 F. App'x at 757 (citation and internal quotation marks omitted). Because Empire Mutual's only connection to the Tribe was "negotiating and issuing general liability insurance contracts to non-Navajo entities" (which negotiations "occurred entirely outside of tribal land"), the district court and the Ninth Circuit both held that "tribal court jurisdiction [could not] be premised on the Navajo Nation's right to exclude." *Id*.

The factual predicate for tribal jurisdiction in this case is far more compelling than in *McPaul*. Here, the Lexington Policies were issued directly to the Tribe for the purpose of insuring tribal property on Reservation lands. (JS Nos. 73, 76.) The policies identified Lexington as the insured (*Id.* No. 75) and obligated Lexington to insure the tribal property against all risk of direct physical loss or damage. (*Id.* No. 73.) Annually, employees of Alliant, Lexington's agent, would visit the Cabazon Reservation to gather information relevant to the renewal of the Tribe's Lexington Policies. (*Id.* No. 77.) Lexington, itself, decided to deny coverage of the Tribe's claim; after doing so, a letter denying coverage was mailed by Lexington to the Tribe's director of legal affairs on the Reservation. (*Id.* Nos. 49–50.) It is Lexington's breach of its obligation to insure the Tribe's property—property it knew was on tribal lands when it agreed to insure the Tribe—that prompted the Tribe's suit in the Cabazon Reservation Court. In short, unlike the insurer in *McPaul*, Lexington's policies and its conduct targeted the Cabazon Reservation and directly spawned the Tribal Court litigation.

Moreover, even the district court in *McPaul* acknowledged that a tribal court could lawfully assert jurisdiction over an insurance company in the circumstances present between Cabazon and Lexington.

> This outcome is consistent with the handful of cases, cited by Defendants, in which courts suggested it may be possible to sue an insurance company in tribal court despite the absence of any physical presence on tribal land. All but one of those cases involved circumstances where the insurance

> company contracted directly with a tribal member when selling the policy and thereafter engaged in conduct directed toward the reservation.

Branch, 381 F. Supp. 3d at 1149–50 (citing *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999); *State Farm Ins. Cos. v. Turtle Mt. Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. May 12, 2014)).

Even if physical presence were necessary for a finding of a tribe's inherent right to exclude, Tribal First/Alliant, which acted as Lexington's agent, 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. 77.)

In sum, the Court can and should concur with the Tribal Court of Appeals and find that the Cabazon Reservation Court has subject matter jurisdiction over Lexington based upon the Tribe's power to exclude and without regard to *Montana*. *Water Wheel*, *Grand Canyon Skywalk*, and *Window Rock* all support this conclusion.

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

For the reasons set forth above, the Court can and should affirm Tribal Court jurisdiction in this case without the need to consider *Montana*. If the Court chooses to conduct a *Montana* analysis, however, the Court will still find that the Tribal Court's assertion of jurisdiction over Lexington is lawful because jurisdiction arises out of Lexington's consensual relationship with the Tribe through commercial dealings.

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 a non-Indian under two "exceptions" to its general presumption. Under the "first" or "consensual relationship" 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).[5]

The course of business pursued by Lexington and Cabazon clearly demonstrates a consensual, commercial relationship between the parties. Lexington has transacted business with the Tribe for years. Under the Lexington Policies, Lexington was the insurer and the Tribe was the insured. (JS No. 71.) Lexington accepted payment of premiums in exchange for providing insurance. (*Id.* Nos. 23, 81.) Lexington is the party that will issue the check in coverage of the Tribe's bona fide claims. (*Id.* No. 72.) Annually, an Alliant employee would meet with the Tribe's representatives on the Reservation to gather information relevant to the renewal of the Tribe's policies with Lexington.[6] (*Id.* No. 77.) 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.) After receiving the Tribe's claim in March 2020, Lexington's claims adjustor investigated the claim (*Id.* Nos. 47–48.) Based on that investigation, Lexington, itself, denied the claim in a letter sent on its behalf to the Tribe's director of legal affairs on the Reservation. (*Id.* Nos. 49–50.)

In its discussion of *Montana*, Lexington contends that the Court laid down a hard and fast rule precluding tribal court jurisdiction over non-members with two "narrow" or "limited" exceptions that cannot be construed to "swallow" or "severely shrink" the rule. (Dkt. No. 40 at 10–11.) But in its most recent pronouncement on *Montana*, issued just a year ago, the Supreme Court expressly rejected this contention.

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[5] Cabazon is not making any claim under *Montana*'s second exception.

[6] The fact that Lexington conducted *a portion* of the business dealings through its agent, Tribal First/Alliant, is of no moment. Lexington does not deny that Tribal First/Alliant acted as its agent. Tribal First/Alliant's negotiations and transactions on Lexington's behalf through actual or apparent authority were part and parcel of a commercial relationship between Lexington and Cabazon, satisfying *Montana's* first exception.

In *United States v. Cooley*, 141 S. Ct. 1638 (2021), the Court traced some of the history of its decisions relating to tribal authority over non-Indians. With respect to *Montana* and its progeny, the Court stated clearly "that *Montana*'s 'general proposition' was not an absolute rule[;] . . . we set forth two important exceptions. *Id*. at 1643 (emphasis added). The Court then went on to find that "the second exception . . . fits the present case, almost like a glove," *id*, while rejecting the argument that in finding that exception applicable, the Court was "inappropriately expanding the second *Montana* exception." *Id*. at 1645 (cleaned up). Rather, the Court said, "we have also repeatedly acknowledged the existence of the exceptions and preserved the possibility that certain forms of nonmember behavior may sufficiently affect the tribe as to justify tribal oversight." *Id*. (citation and internal quotation marks omitted). In such a case, the Court concluded, the concerns about unnecessarily expanding *Montana*'s exceptions were meritless and the exception should be applied. *Id*.

So, too, here. Where the operative facts fit *Montana*'s consensual relationship exception "almost like a glove," this Court should not hesitate to so find.

In addressing the first *Montana* exception, Lexington has also repeatedly asserted it never consented to the jurisdiction of the Tribe or its courts. (Dkt. No. 40 at 5.) However, no "consent" is necessary to trigger subject matter jurisdiction—it is the business relationship itself which must be consensual. In this case, it was consensual, as the aforementioned facts make clear.

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, which includes Tribal Court, 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).

Moreover, Lexington cannot claim surprise that a tribal insured or its court has interpreted the Master Policy to authorize tribal court jurisdiction over a coverage dispute, for this exact situation involving the exact forum selection language arose 12 years ago. In *Confederated Tribes of the Chehalis Reservation v. Lexington Insurance Co.*, the Chehalis Tribe filed suit in its tribal court against Lexington over a coverage dispute. (Joint Appendix of Authorities "AOA", Exh. 3.) The forum selection clause in the Chehalis policy was identical to the one that appears in the Lexington Policies with Cabazon. (*Id.*, Exh. 3, at 6–7.) The Chehalis Tribal Court found that it had subject matter jurisdiction over the coverage dispute. (*Id.* at 7.) Had Lexington wanted to avoid a similar outcome with another Tribe, it could have drafted an appropriate forum selection clause, but it did not do so.

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

(a) 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 Mt. 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 does not dispute a nexus exists; rather, it attempts to avoid subject matter jurisdiction by improperly grafting a territorial requirement onto *Montana's* first exception. While many courts have upheld tribal jurisdiction under *Montana*'s consensual relationship exception based on non-Indian conduct occurring on tribal land, no Supreme Court or Ninth Circuit case has ever held that such physical presence is *required*. In fact, many courts have held, expressly or impliedly, that a non-Indian's physical presence is not a necessary predicate for the exercise of tribal jurisdiction.

Allstate Indemnity Co. v. Stump is one such case. 191 F.3d 1071 (9th Cir. 1999). That case involved a single car accident on the Chippewa Cree Tribe's Rocky Boy Reservation, killing the two passengers. *Id*. at 1072. The three occupants of the car were members of the Tribe. *Id.* The driver was insured by Allstate under a policy that had been purchased through an independent agent located outside the Reservation. *Id.* Premiums were paid to the independent agent. *Id.* Allstate mailed the policy and premium statements to the insured's address on the Reservation. *Id.*

When Allstate denied coverage, the estates of the deceased tribal members sued the insurer in tribal court for refusing settle the claim in violation of Montana insurance law. *Id.* at 1073. Allstate filed suit in federal court to contest the tribal court's jurisdiction. *Id.* The district court dismissed Allstate's complaint outright, holding that the tribal court had jurisdiction under *Montana*'s consensual relationship exception. *Id.*

On appeal, the Ninth Circuit strongly suggested that it would have affirmatively upheld the assertion of tribal court jurisdiction and dismissed the federal court case had it concluded that the dispute arose from the parties' contractual relationship. *Id.* at 1076. But because the estates' claim arose from the insurer's alleged violation of state law, the Ninth Circuit required Allstate to exhaust its tribal court remedies in the first instance. *Id.* The court held exhaustion was warranted because "[t]he [legal] authorities thus suggest that the estates' bad faith claim should probably be considered to have arisen on the reservation." The court so held because "Allstate's conduct [was]

related to the reservation[;] Allstate sold an automobile insurance policy and mailed monthly premium statements to an Indian resident of the reservation[; and a]fter the accident on the reservation, Allstate's agents communicated with the Indians and their counsel." *Id.* at 1075. *Stump* unequivocally stands for the proposition that an insurance company's physical presence is not essential to a tribal court's assertion of jurisdiction over the company with respect to a claim arising on the reservation.

Many other courts have considered and rejected any purported "physical presence" requirement. *See, e.g.*, *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 884–85 (8th Cir. 2013) (rejecting idea that tribal court jurisdiction was lacking under *Montana's* first exception if non-Indian's conduct occurred off Indian lands); *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); *State Farm Ins. Cos.*, 2014 WL 1883633 at *11 (holding that, despite a lack of physical presence by the insurer on-reservation, an insurer "enter[ing] into an agreement to provide property damage and loss coverage for [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").

Lexington cites two Seventh Circuit decisions for the proposition that *Montana's* consensual relationship exception has a territorial requirement. *See Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015); *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014). Even assuming *Montana* applies to this case (*but see supra*, Section III.A.1), these decisions should be disregarded for several reasons. As a preliminary matter, neither *Jackson* nor *Stifel* expressly holds that a non-Indian party is subject to a Tribe's jurisdiction only if based on conduct undertaken while physically present on the Tribe's lands. Thus, these cases do not stand for Lexington's proposition.

Second, not only are *Jackson* and *Stifel* not binding in this Court, but they are inconsistent with the Ninth Circuit's decisions holding that a non-Indian's physical presence on tribal lands is not a necessary prerequisite for the Tribe's assertion of jurisdiction. *See, e.g.*, *Grand Canyon Skywalk* and *Stump*.

Third, the Seventh Circuit decisions are readily distinguishable on their facts: none of the agreements in *Jackson* or *Stifel* bore any connection, direct or indirect, to tribal lands, whereas the Lexington Policies and the actions of Lexington and its agents quite clearly implicate Cabazon's use and regulation of tribal lands and damages to tribal property thereon. Indeed, the Lexington Policies serve no other purpose than to insure tribal property located on-Reservation.[7]

Lexington argues that *Philip Morris* also supports its proposition that its physical presence on Cabazon's Reservation is necessary to be subject to the Cabazon Reservation Court's jurisdiction. Not so. The Ninth Circuit ruled against tribal court jurisdiction in that case because of the absence of a nexus between the tribal court lawsuit and the cigarette manufacturer's consensual commercial dealings on the tribe's reservation. *Philip Morris*, 569 F.3d at 942–43. In contrast, the claims at issue in this case arise directly out of a contract between Cabazon and Lexington.

Lastly, Lexington relies on *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316 (2008) and *Strate* for adding a territorial requirement to *Montana's* first exception. (Dkt. No. 40 at 12–13.) But each case is readily distinguishable.

In *Plains Commerce*, the Supreme Court held that a tribe may not regulate the **sale** of non-Indian fee land, as opposed to the **conduct** of non-Indians on fee land and therefore the tribal court lacked jurisdiction over a non-Indian's sale of non-Indian fee

[7] Lexington cites another out-of-circuit decision, *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) as properly overlaying a territorial requirement on *Montana*. But the Ninth Circuit has expressly distinguished *Hornell* in the course of holding that an insurance company could be subject to tribal court jurisdiction despite never physically entering the reservation where its insured resided. *See Stump*, 191 F.3d at 1075.

land. 544 U.S. at 334. Here, the Tribe is not attempting to regulate the sale of any non-Indian fee land; rather, this case involves a non-Indian entity whose conduct was knowingly and inextricably bound up with the Tribe's land.

Lexington's reliance on *Strate* is similarly flawed. *Strate* arose from a traffic accident involving two nonmembers of the governing tribes on non-tribal land within the Fort Berthold Reservation. 520 U.S. at 442–43. One of the drivers sued the other, and the other's employer (A-1 Contractors, also a nonmember), in tribal court. *Id.* A-1 had a subcontract with a tribal-owned corporation to perform landscaping work on the reservation. *Id.* The tribal court asserted jurisdiction over the dispute, a decision that A-1 appealed to the Supreme Court. *Id.* at 444.

The Court held the tribal court lacked adjudicatory jurisdiction because "[a]lthough A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a consensual relationship with the Tribes, [the nonmember plaintiff] was not a party to the subcontract, and the [T]ribes were strangers to the [underlying traffic accident]." *Id.* at 457 (internal quotation marks omitted). In other words, the nonmember plaintiff did not have a direct contractual relationship with the tribe, and there was no nexus between A-1's contract with the tribe and the underlying claim. Here, by contrast, Lexington is the contracting party and there is an obvious connection between the consensual relationship and the claims—Cabazon asserts that Lexington failed to satisfy its coverage obligations to Cabazon under the contract between them.

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.

(b) The First *Montana* Exception Does Not Require Any Additional Showing Apart from a Consensual Relationship and a Nexus; Nonetheless, This Case Raises Issues of Tribal Self-Government

To avoid the inevitable conclusion that *Montana*'s consensual relationship exception is satisfied in this case (assuming *Montana* applies at all), Lexington further argues that in order for either of *Montana*'s exceptions to apply, the tribal exercise of jurisdiction over non-members must "stem from its inherent sovereign authority to set conditions on entry, preserve tribal self-government or control internal relations." (Dkt. No. 40 at 16 (quoting *Plains Commerce*, 554 U.S. at 336–37).) In other words, like its fallacious territorial argument, Lexington again seeks to add another requirement to the applicability of *Montana*'s exceptions: that the Tribe must demonstrate that the exercise of tribal jurisdiction involves or implicates a tribe's sovereign interests.

But this position finds no support in any Supreme Court or Ninth Circuit decision. Rather, Lexington's argument is constructed by cherry-picking sentences out of context and by conflating the basis for *Montana*'s general presumption with the reasons for its "important exceptions" to that general rule.

The Court's most recent decision discussing *Montana* plainly shows that Lexington's argument is incorrect. Last year, in *Cooley*, the Supreme Court discussed in detail what the *Montana* exceptions required and why they had been established. 141 S. Ct. at 1643–46. Nowhere in that detailed discussion did the Court include any reference to Lexington's purported "sovereign interest" test as being a separate requirement for application of either *Montana* exception. And then, perhaps even more significantly, the Court went on to find that the second *Montana* exception applied to the facts of that case; again, without any mention of the "sovereign interest" test that Lexington argues is a requirement for application of either of *Montana*'s exceptions. *Id.* at 1643. Rather, the Court made clear that *Montana* and its progeny acknowledged that tribes continue to have and exercise some aspects of "inherent sovereignty" over non-Indians and the *Montana* exceptions "recognize[] that inherent authority." *Id*. at 1644. In other words, Cooley teaches us that the *Montana* exceptions were based upon and incorporate principles of inherent tribal sovereignty and that no

additional showing of "sovereign interests" is necessary for those exceptions to be applied. Thus, *Cooley* clearly rebuts Lexington's argument on this issue.

Additionally, other case law shows the erroneous nature of Lexington's contention. Indeed, the Fifth Circuit expressly rejected Lexington's proposition in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014), *aff'd by an equally divided court per curiam sub nom. Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016). There, the court held that *Plains Commerce* does not require any showing under *Montana's* first exception other than a consensual relationship and a nexus between the regulated conduct and the relationship. *Id.* As the Fifth Circuit held in *Dolgencorp*, *Plains Commerce* is not applicable because *Plains Commerce* held that *Montana* does not permit jurisdiction over the *sale* of non-member fee land. *Id.* No *sale* of land is at issue here either, only the *conduct* of a non-member.

Lexington also cites *Strate* and *Montana* for its proposition, but both cases are factually distinguishable from this case in that neither involved trust land or a nexus between the conduct regulated and a consensual relationship with a tribe. *Strate*, 520 U.S. at 440–41 (holding no nexus between consensual relationship of non-Indian contractor and tribe and a "run-of-the-mill" accident involving non-Indian contractor and non-Indian plaintiff on state highway (which Court held was equivalent to non-Indian fee land)); *Montana*, 450 U.S. at 547, 565–66 (involving tribe's attempt to regulate hunting and fishing of non-Indians on non-Indian fee land, and no consensual relationship existed between non-Indians and tribe).

The other cases Lexington relies upon for its proposition are similarly distinguishable from this case. The language Lexington cites from the District of North Dakota case, *WPX*, is actually from *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). Regardless, neither case is applicable. The court in *WPX* denied tribal court jurisdiction due to plaintiffs' failure to exhaust remedies with the Bureau of Indian Affairs. 2022 WL 1572097, at *3. And the court in *Kodiak* denied

tribal court jurisdiction because the plaintiff had federal claims; as such, permitting tribal court jurisdiction would have deprived defendants of access to a federal forum for such federal claims. 932 F.3d at 1135. Here, the case concerns contract claims, not federal claims, by the Tribe regarding on-Reservation property, and the Tribe is not required to exhaust any administrative remedies.

Finally, even if this Court were to require a separate showing that the underlying dispute between Cabazon and Lexington implicates the Tribe's sovereign interests and self-government, this case clearly meets that test. This case presents a challenge to the jurisdiction and authority of the Cabazon Reservation Court, a component of the Tribe's government (JS No. 70), and as such clearly implicates sovereign tribal interests. Congress so stated in the *Indian Tribal Justice Support Act of 2009*, 25 U.S.C. § 3601(5): "[T]ribal justice systems are an essential part of tribal governments and serve as important forums for ensuring . . . the political integrity of tribal governments." The Supreme Court has likewise recognized the close connection between tribal courts and tribal sovereignty. *LaPlante*, 480 U.S. at 14–15 ("Tribal courts play a vital role in tribal self-government and the Federal government has consistently encourage their development.") (citation omitted).

Moreover, this case does not involve an assertion of adjudicative jurisdiction over persons or property with which the Tribe has some tenuous connection unrelated to the dispute. The Tribe is attempting to enforce Lexington's obligation, under the policies it issued, to insure a tribally owned business located on the Reservation. If these were the only known facts, they would squarely implicate the Tribe's sovereign interest.

The main property at issue, however, is not just any business: it is Fantasy Springs Resort & Casino, the Tribe's most significant source of revenue. The Casino's revenues 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.) Without Casino revenues, the Tribe would be severely limited in its ability to govern,

maintain the health and safety of persons within its jurisdiction, and provide essential governmental services to tribal members. The Tribe's decision to suspend operations of its on-Reservation businesses as a result of the pandemic resulted in the loss of use of those facilities and cost the Tribe millions of dollars in lost business revenues. (*Id.* Nos. 78, 79.) Lexington's failure to honor its contractual obligations directly implicates the Tribe's sovereign interests and self-government in this way, as well.

B. THE CABAZON RESERVATION COURT HAS PERSONAL JURISDICTION OVER LEXINGTON UNDER TRIBAL OR FEDERAL LAW

The Tribal Court of Appeals concluded it had personal jurisdiction over Lexington pursuant to Tribal and federal law. (Dkt. No. 42 at 5–20.) Lexington does not challenge these conclusions, which is sufficient for treating them as conclusively established. *See e.g.*, *Moroccanoil, Inc. v. Marc Anthony Cosmetics, Inc.*, CV 13-02747 DMG (AGRx), 2014 WL 12591804, at *3 n.3 (C.D. Cal. May 29, 2014) (declining to address argument raised for first time in reply to motion for summary judgment) (citing *United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) ("[A]rguments not raised by a party in its opening brief are deemed waived.")).

C. LEXINGTON IS NOT ENTITLED TO A PERMANENT INJUNCTION

Lexington's permanent injunction request rises and falls with the merits of its summary judgment motion. As Lexington's motion for summary judgment fails, the Court need not independently consider the permanent injunction motion.

IV.

CONCLUSION

For the reasons stated above, the Defendants respectfully request that the Court deny Lexington's Cross-Motion for Summary Judgment, grant the Defendants' Motion and confirm the Tribal Court's subject matter and personal jurisdiction over the underlying insurance coverage case.

DATED: July 1, 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
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