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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 OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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

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I. INTRODUCTION

The Cabazon Band of Cahuilla Indians (the "Tribe") claims it was wrongly denied coverage under its property insurance policies for the economic losses it sustained due to the COVID-19 pandemic. The Tribe sued its insurer, Lexington Insurance Company, in the Cabazon Reservation Court. Lexington objected to that court's exercise of jurisdiction over it. After exhausting its tribal-court remedies, Lexington sued in this Court, under *Ex Parte Young*, 209 U.S. 123 (1908), defendants Judge Martin A. Mueller, the tribal-court judge presiding over the action, and Chief Judge Doug Welmas, Chairman of the Tribe and the chief judge who oversees the administration of the tribal court. Lexington seeks to secure a declaration that those judges have no power to adjudicate the suit brought by the Tribe. The Court should deny Defendants' motion for summary judgment because there is no basis for the Tribal Court to exercise jurisdiction over Lexington.

The Supreme Court has made clear that a tribal court's subject matter jurisdiction is circumscribed by federal law, which dictates that tribal courts presumptively *do not* have jurisdiction over non-tribal members. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). To overcome this presumption, the party asserting jurisdiction must show that the nonmembers had a physical presence on tribal land. "[T]ribal 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). Cabazon tribal laws impose similar geographic limitations: for subject matter jurisdiction to apply, the tribal defendant must "*enter[] onto or transact[] business within the Cabazon Indian Reservation* and the cause of action [must] arise[] out of activities or events which have occurred *within the Reservation boundaries*." Cabazon Tribal Code § 9-102(b)(2)(c) (emphases added). Lexington is not a member of the Tribe. It does not maintain operations, employees, or offices within the Tribe's reservation and has not engaged in

1 any relevant conduct—the denial of the Tribe's insurance claims, for example—on the
2 Tribe's land. Rather, as related to this action, Lexington has acted only in its *off-*
3 *reservation* place of incorporation or business. Because Lexington's conduct did not
4 physically occur on tribal land, this case should not have proceeded in the Tribal Court.
5 *See Nevada v. Hicks*, 533 U.S. 353, 392 (2001); *Jackson v. Payday Fin. LLC*, 764 F.3d
6 765, 782 (7th Cir. 2014).

7 Moreover, the exercise of tribal jurisdiction over nonmembers is permissible *only*
8 *when necessary* to protect tribal self-government or to control internal relations; in other
9 words, a tribe cannot exercise jurisdiction over nonmembers when its inherent sovereign
10 authority is not implicated. *Plains Commerce Bank*, 554 U.S. at 332; *see also Nat'l*
11 *Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537,
12 545 (6th Cir. 2015); *Jackson*, 764 F.3d at 783; *Kodiak Oil & Gas (USA) Inc. v. Burr*,
13 932 F.3d 1125 (8th Cir. 2019). This dispute involves an industry (insurance) that is
14 heavily regulated by state law, defeating any notion that adjudicating this dispute is
15 necessary to preserve tribal self-government.

16 Because the Tribal Court lacks jurisdiction, the Court should deny Defendants'
17 motion for summary judgment and grant Lexington's motion instead.

18 ## II. FACTUAL AND PROCEDURAL BACKGROUND

19 ### A. The Parties and the Underlying Insurance Contracts

20 The Tribe is a federally recognized Indian tribe near Indio, California, where it
21 operates a resort and casino. Joint Stmt., Nos. 1–3. The Tribe is insured through a
22 nationwide property insurance program called the Tribal Property Insurance Program
23 ("TPIP"), which is part of a larger property insurance program called the Alliant
24 Property Insurance Program that also insures municipalities, hospitals, and non-profit
25 organizations. Joint Stmt., Nos. 4–6. Insurance companies, including Lexington,
26 participate in these programs by providing insurance and underwriting services at
27 different layers of coverage and varying percentages of risk insured by those layers.
28 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 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. Nowhere in the Master Policy did Lexington consent to the jurisdiction of the Tribe or its Tribal Court or consent to the laws of the Tribe governing the interpretation of the policies. Joint Stmt., Nos. 27–28. The Master Policy does not specifically name any TPIP insured, including 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 its non-essential business operations because of the COVID-19 pandemic and submitted a related insurance claim under the Master Policy to Tribal First, which then sent them to Lexington/AIG Claims, Inc. Joint Stmt., Nos. 44–45. After an investigation by Lexington's claims adjustor, Lexington issued a letter to the Tribe denying coverage in April 2020. Joint Stmt., Nos. 46–49. The letter was sent 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 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 its 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

1 faith and fair dealing and sought a declaration that its COVID-19-related financial losses
2 were covered under the Master Policy. Joint Stmt., No. 53. Defendant Martin A.
3 Mueller presides over the Tribal Court action. Joint Stmt., No. 54. Chief Judge Welmas
4 oversees the administration of the Tribal Court. Joint Stmt., No. 55.

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

6 Before a federal court may consider "whether a tribal court has exceeded the
7 lawful limits of its jurisdiction," the tribal court itself must first be given a "full
8 opportunity" to evaluate and determine its own jurisdiction. *Nat'l Farmers*, 471 U.S. at
9 856–57. Once "tribal remedies" have been exhausted, a tribal court's determination of
10 its own jurisdiction is subject to review by a federal court. *Id.* at 853. To exhaust tribal-
11 court remedies, "tribal appellate courts must have the opportunity to review the
12 determinations of the lower tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9,
13 17 (1987). Thus, exhaustion is complete when tribal appellate review is complete. *Id.*;
14 *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844 (9th Cir.
15 2009); *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216–17 (9th Cir. 2007).

16 Lexington exhausted all available remedies before the Tribal Court and the Tribal
17 Court of Appeals. Soon after the Tribal Court action began, in January 2021, Lexington
18 made a limited special appearance and moved to dismiss the Tribal Court action for lack
19 of subject matter and personal jurisdiction under both Cabazon tribal law and federal
20 law. Joint Stmt., No. 56. Judge Mueller denied this motion in March 2021, reasoning
21 that tribal jurisdiction applied under the right-to-exclude doctrine and the first *Montana*
22 exception because Lexington consensually entered into an insurance contract with the
23 Tribe, despite Lexington's lack of physical presence on tribal land. Joint Stmt., No. 57.
24 Lexington timely noticed its appeal. Joint Stmt., Nos. 58–59. The three-judge panel of
25 the Tribal Court of Appeals affirmed the Tribal Court's order in November 2021. Joint
26 Stmt., No. 59. In January 2022, Lexington filed an answer to avoid default. Joint Stmt.,
27 No. 60. The Tribal Court action remains ongoing, and the Tribal Court continues to
28 assert jurisdiction over Lexington. Joint Stmt., 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. Based on representations made by the Tribe, 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.[1] 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 only when, viewing the evidence "in the light most favorable to the nonmoving party," the district court finds "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); Fed. R. Civ. P. 56(a). When the moving party must prove an issue at trial, that party "bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact," as well as then "affirmatively demonstrat[ing] that no reasonable trier of fact could find other than for the moving party." *Soremekun*, 509 F.3d at 984.

When determining whether a tribe has jurisdiction over a nonmember, a federal district court should show "some deference" to the findings of fact made by the tribal court. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) ("[T]ribal courts . . . develop the factual record in order to serve the 'orderly administration of justice in the federal court.'"). But there is no deference on legal questions; the district court reviews those *de novo* and has "no obligation to follow" the tribal court's initial determination on jurisdiction. *Id.* at 1314. This is because "federal courts are the final arbiters of federal law, and the question of tribal jurisdiction is a federal question." *Id.*

[1] 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 July 29, 2022.

IV. ARGUMENT

A. The Tribal Court Lacks Subject Matter Jurisdiction Over Lexington and the Tribal Action Under Federal Law

Under well-established Supreme Court precedent, the Tribal Court presumptively lacks jurisdiction over Lexington because it is a nonmember of the Tribe and has no connection to tribal land. It is Defendants' burden to overcome that presumption, but they have not carried it. Instead, they have tried to shoehorn this case into one of the two narrow exceptions to the presumption that were recognized by the Supreme Court in *Montana v. United States*, 450 U.S. 544, 565–66 (1981). But the undisputed facts confirm those exceptions do not apply here because Lexington's relevant activity did not physically occur on tribal land as required by the first exception, nor does it threaten the Tribe's very "subsistence" as required by the second exception. *Plains Commerce Bank*, 554 U.S. at 341. The same is true of an exception that the Ninth Circuit has recognized, which relates to a tribe's "right to exclude" nonmembers from its land. *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (per curiam).

1. The *Montana* Framework and Its Presumption Against Tribal Jurisdiction Over Claims Against Nonmembers Control This Action

The Tribe, as a dependent sovereign nation, is subject to the plenary power of the federal government. *Nat'l Farmers Union*, 471 U.S. at 851; *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) ("Due to their incorporation into the United States, . . . 'the sovereignty that the Indian tribes retain is of a unique and limited character.'"). The Tribal Court may not exercise subject matter jurisdiction in any way that exceeds the bounds set by federal law. *Nat'l Farmers Union*, 471 U.S. 845 at 851–52. Under federal law, tribal-court subject matter jurisdiction over non-tribal members is "presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330; *see also FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019) ("There is a presumption against tribal jurisdiction over nonmember activity . . . ."). This is because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the

tribe," except under certain limited circumstances. *Montana*, 450 U.S. at 565.

The party invoking jurisdiction "bears the burden of establishing such jurisdiction as a threshold matter" and overcoming the presumption as to nonmembers. *Water Wheel*, 642 F.3d at 819. Here, Lexington is not a member of the Tribe. Thus, under Supreme Court and Ninth Circuit law, the Tribal Court presumptively lacks authority over Lexington, and the Tribal Court's exercise of subject matter jurisdiction over Lexington and this insurance dispute is presumptively invalid.

Defendants first deny the presumption exists. Instead, they argue "the presumption favors tribal court" when the nonmember's activity occurs on "tribal trust lands." Dkt. 39-1 at 12. For this proposition, Defendants rely on *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), but subsequent Supreme Court cases have made clear that Defendants' reading of *Iowa Mutual* is wrong. "[I]n explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana*: that as a general matter, a tribe's civil jurisdiction does not extend to the 'activities of non-Indians on reservation lands,' and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana*'s two exceptions." *Hicks*, 533 U.S. at 353, 380–81 (Souter, J., concurring). Thus, when analyzing tribal jurisdiction, the first step is to look "to the member or nonmember status of the unconsenting party," not the status of the land. *Philip Morris*, 569 F.3d at 932, 937. Here, the party declining to consent to tribal jurisdiction is Lexington, which is not a member of the Tribe. Thus, there is a presumption against the exercise of tribal jurisdiction over Lexington.

Defendants also argue that the *Montana* framework and its presumption against tribal jurisdiction apply only when the nonmember's conduct occurs on non-Indian fee land within the reservation. Dkt. 39-1 at 12. But as the Supreme Court has explained, federal law "restricts tribal authority over nonmember activities *taking place on the reservation*," and "tribes do not, as a general matter, possess authority over non-Indians who come *within their borders*." *Plains Commerce Bank*, 554 U.S. at 328 (emphases added). Thus, *Montana* and the presumption against tribal jurisdiction apply to all

1 land—tribal land within a reservation, non-Indian fee land within a reservation, and non-
2 tribal land outside of a reservation—with the presumption being "particularly strong" on
3 non-Indian fee land because the tribe has even less control over fee land. *Id.* The
4 presumption becomes outright insurmountable when the nonmember conduct occurs
5 entirely outside of tribal territory. This is because "tribal jurisdiction is, of course,
6 *cabined by geography*." *Philip Morris*, 569 F.3d at 938 (emphasis added).

7 To overcome the presumption against the exercise of jurisdiction over
8 nonmembers, Defendants are required to show that either one of the *Montana* exceptions
9 apply as recognized by the Supreme Court in *Montana* or the right-to-exclude doctrine
10 as recognized by the Ninth Circuit in *Water Wheel*. Defendants have not addressed the
11 second *Montana* exception in their motion and have therefore waived any argument that
12 it applies. *Eberle v. City of Anaheim*, 901 F.2d 814, 817–18 (9th Cir. 1990). Neither
13 the first *Montana* exception nor the Tribe's right to exclude applies either for the same
14 basic reason: Lexington, as the nonmember being subjected to foreign jurisdiction,
15 never entered onto tribal land or physically engaged in any activity on tribal land.

16 **a. The First *Montana* Exception Does Not Apply**

17 Under *Montana*'s first exception, tribes have jurisdiction to "regulate, through
18 taxation, licensing, or other means, the activities of nonmembers who enter consensual
19 relationships with the tribe or its members." 450 U.S. at 565–66. In interpreting and
20 applying this exception, the Supreme Court has explained that its "*Montana* cases"
21 upholding tribal jurisdiction for consensual relationships "have always concerned
22 nonmember conduct *on the land*." *Plains Commerce Bank*, 554 U.S. at 334 (emphasis
23 added). The Supreme Court repeatedly has held that for subject matter jurisdiction over
24 a nonmember to exist, the nonmember must have a *physical presence* on tribal land. *Id.*
25 at 332 ("*Montana* and its progeny permit tribal regulation of nonmember conduct *inside*
26 *the reservation* that implicates the tribe's sovereign interests.") (emphasis added); *Hicks*,
27 533 U.S. at 392 ("[T]ribes retain sovereign interests in activities that occur *on land*
28 owned and controlled by the tribe.") (emphasis added); *see also Jackson*, 764 F.3d at

782 ("[T]ribal regulation of nonmember conduct [is limited to] conduct *inside the reservation*.") (emphasis added). The Supreme Court has never embraced an interpretation of *Montana* that permits jurisdiction over a nonmember merely because the nonmember contracted with a tribe irrespective of the nonmember's physical presence on tribal land. 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," reinforcing just how narrowly *Montana* has been interpreted and applied. *Hicks*, 533 U.S. at 359–60 (emphasis added). Here, Lexington has never entered Cabazon tribal land for any reason. It did not engage in ongoing business, enter into any transaction, or negotiate the Lexington Policies on Cabazon tribal land. The first *Montana* exception therefore does not apply.

Defendants argue that Lexington both "directly negotiate[d] the terms of the insurance contract" and "physically set foot on the Reservation" by "act[ing] through its agent Alliant," thus satisfying any requirement of physical presence on tribal land. Dkt. 39-1 at 8, 13–14. But Alliant is not an agent of Lexington, and Defendants have not identified any evidence to support their legal conclusion that the relationship between Lexington and Alliant constitutes an agency relationship. And even if Alliant were an agent of Lexington, Defendants have not cited any authority to support the proposition that the conduct of an agent on tribal land is sufficient to confer subject matter jurisdiction over the principal under the first *Montana* exception. As the Supreme Court and federal courts have made clear repeatedly, it is the conduct at issue of the nonmember being subjected to tribal jurisdiction that must take place on tribal land in order for jurisdiction to apply. *E.g.*, *Plains Commerce Bank*, 554 U.S. at 334. Here, the conduct at issue is not Alliant's activities on tribal land but Lexington's decision to deny coverage under the Master Policy, which occurred off reservation at Lexington's headquarters and offices.

For example, in *Progressive Specialty Insurance Co. v. Burnette*, 489 F. Supp. 2d 955, 955 (D.S.D. 2007), a nonmember insurer, "through an insurance agency," sold an

automobile policy to a tribal member. *Id.* at 955–56. When the member suffered a car accident on tribal land, her claims of bad faith and negligence against the insurer for allegedly poorly handling her claim did not create a basis for tribal jurisdiction because "all such omissions and commissions, if any, arose off the reservation." *Id.* at 957. Here, the sale of the Lexington Policies or any other alleged activity on tribal land by *Alliant* does not create a basis for the Tribe's claims against *Lexington* because the alleged conduct at issue—Lexington's interpretation of the Master Policy's terms and the denial of the Tribe's insurance claims (i.e. the "omissions and commissions")—took place at Lexington's headquarters located off the reservation.

Defendants say Lexington's assertion that "it never consented to the jurisdiction of the Tribe or its courts" is irrelevant because "no 'consent' is necessary to trigger subject matter jurisdiction." Dkt. 39-1 at 14. But the Supreme Court has held just the opposite: the exercise of tribal authority can "be fairly imposed on nonmembers only if the nonmember has *consented*, either expressly or by his actions." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). At the heart of the Supreme Court's limitation on tribal jurisdiction is "the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently have no say in creating the laws that would be applied to them." *Cooley*, 141 S. Ct. at 1644.

As *Montana* and its progeny make clear, tribal subject matter jurisdiction over a nonmember is proper only if the nonmember physically enters tribal land, initiates and engages in a transaction or business venture on the land, and deliberately intends to do business with the tribe or its members. If so, "the nonmember has consented" to "the laws and regulations of the tribe . . . by his actions." *Plains Commerce Bank*, 554 U.S. at 337. Here, Lexington never set foot on tribal land for any purpose, never solicited any tribal member for business opportunities, and never denied the Tribe insurance coverage under the Master Policy while within tribal territorial boundaries. Lexington's conduct as an insurance carrier has only ever occurred off the reservation.

Defendants also attempt to impose a "foreseeability" requirement on the

1 "consensual relationship" test for tribal subject matter jurisdiction, arguing that the
2 possibility of being haled into tribal court "was entirely foreseeable by Lexington"
3 because of a litigation involving Lexington in the Chehalis Tribal Court from over ten
4 years ago. Dkt. 39-1 at 15. In *Confederated Tribes of the Chehalis Reservation d/b/a*
5 *Lucky Eagle Casino v. Lexington Insurance Co.*, No. CHE-CIV-11/08-262 (Chehalis
6 Tribal Ct., Apr. 21, 2010), the Chehalis Tribal Court analyzed a property insurance
7 policy issued by Lexington to the Confederated Tribes of the Chehalis Reservation
8 containing similar policy language, finding that tribal subject matter jurisdiction existed
9 under the first *Montana* exception. J.A. of Certain Auths., Ex. 3 at 68. Lexington was
10 correct not to rely on the Chehalis Tribal Court's interpretation of tribal jurisdiction
11 because it conflates the test for subject matter jurisdiction with the one for personal
12 jurisdiction, *id.*, which is the incorrect standard. The Supreme Court has drawn a
13 distinction between the two, making it clear that *Montana* and its analysis of tribal
14 jurisdiction "pertain[] to subject-matter, rather than merely personal, jurisdiction."
15 *Hicks*, 533 U.S. at 367 n.8; *see also Progressive Specialty Ins. Co.*, 489 F. Supp. 2d at
16 957 (tribal court committed error "in confusing questions of personal jurisdiction with
17 questions of subject matter jurisdiction"). If the Chehalis Tribal Court's proposition that
18 tribal subject matter jurisdiction is premised on "traditional notions of fair play and
19 substantial justice" were to be accepted, it would render the *Montana* analysis
20 unnecessary, as courts would have to decide only whether they had personal jurisdiction
21 over the parties.

22 Defendants also rely on *State Farm Insurance Cos. v. Turtle Mountain Fleet Farm*
23 *LLC*, 2014 WL 1883633 (D.N.D. May 12, 2014), for the proposition that there is no
24 requirement a nonmember be physically present on tribal land for jurisdiction to apply,
25 but that decision is an unpersuasive outlier. Dkt. 52 at 16. The court's conclusion that
26 an agreement to insure tribal property is enough to support tribal jurisdiction was based
27 on a misreading of *Allstate Indemnity Company v. Stump*, 191 F.3d 1071 (9th Cir. 1999),
28 and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), two cases holding

only that nonmembers had to exhaust their remedies in tribal court before bringing their jurisdictional challenges to federal court. *Allstate*, 191 F.3d at 1076; *Iowa Mutual*, 480 U.S. at 17. *Allstate* and *Iowa Mutual* held only that a basis for jurisdiction *might* exist, not that it did. *Allstate*, 191 F.3d at 1076 ("The district court dismissed this case because it affirmatively concluded that the tribal court had jurisdiction. We decline to go so far."); *Iowa Mutual*, 480 U.S. at 17. Curiously, the *State Farm* court recognized that *Allstate* and *Iowa Mutual* "are all 'exhaustion cases' for which there only need be a colorable claim of jurisdiction to require exhaustion," but nevertheless treated those cases as answering a jurisdictional question they never reached. 2014 WL 1883633, at *11 & n.6.

Defendants' other cited cases, like *Allstate* and *Iowa Mutual*, address only the threshold question of exhaustion of tribal-court remedies, not the ultimate question of jurisdiction. *AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n*, 2015 WL 5684937, at *8 (D.S.D. Sept. 25, 2015); *Sprint Comm'n Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 901 (D.S.D. 2015); *Brown v. W. Sky Fin., LLC*, 84 F. Supp. 3d 467, 481 (M.D.N.C. 2015). In such cases, "the standard . . . is lower" because for exhaustion to apply, "tribal jurisdiction need only be 'colorable' or '*plausible*.'" *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (emphasis in original). The Ninth Circuit has explained this preliminary exhaustion analysis does not involve "deciding whether the tribe actually has jurisdiction under the . . . *Montana* exception[s]." *Id.* Instead, "the tribal courts get the first chance to decide" whether they have jurisdiction, and "[i]f the tribal courts sustain jurisdiction and [the nonmember] is unhappy with that determination, it may then repair to federal court." *Id.* Defendants' cases do not stand for the broad proposition that an insurance contract alone is sufficient to establish tribal jurisdiction.

In any event, the Supreme Court itself was perfectly clear: "*Montana* and its progeny permit tribal regulation of nonmember conduct *inside the reservation* that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332

(emphasis added and removed). Further, the Supreme Court has instructed courts to look to "*Montana*'s list of cases fitting within the first exception" to understand "the type of activities the Court had in mind" for how the first *Montana* exception should be applied. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (citation omitted); *Hicks*, 533 U.S. at 372. Those cases involved: "nonmember purchasers of cigarettes from tribal outlet[s]" on tribal lands; a "general store on the Navajo reservation"; "ranchers grazing livestock and horses on Indian lands 'under contracts with individual [tribal] members'"; and a tax on "nonmembers for the 'privilege . . . of trading within the borders'" of tribal lands. *Hicks*, 533 U.S. at 372; *see Plains Commerce Bank*, 554 U.S. at 332–33 (summarizing cases). In short, the "*Montana* cases have always concerned nonmember conduct *on the land*." *Plains Commerce Bank*, 554 U.S. at 334 (emphasis added). Defendants are therefore wrong that a nonmember's "physical presence" on tribal land is not required. Dkt 39-1 at 15–16.

A Seventh Circuit decision, *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), illustrates the jurisdictional requirement that nonmember conduct must occur on tribal land in cases like this one. There, Illinois consumers who were not tribal members entered into loan agreements with companies owned by a tribal member. *Id.* at 781–82. After the consumers sued in state court, the companies owned by the tribal member argued the case had to proceed in tribal court, in part because of the first *Montana* exception, but the Seventh Circuit rejected that argument. *Id.* at 782. It explained that the "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*." *Id.* at 782 n.42 (emphases in original). The nonmember consumers "ha[d] not engaged in *any* activities inside the reservation"; "did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents"; merely "applied for loans in Illinois by accessing a website"; and "made payments on the loans and paid the financing charges from Illinois." *Id.* at 782 (emphasis in original).

Here, Lexington has not directly engaged with the Tribe on Cabazon tribal land and has conducted its business through another nonmember, Alliant, on non-tribal land.

Defendants' theory of this case is that tribal courts gain subject matter jurisdiction over nonmembers whenever those nonmembers happen to enter into a contractual relationship involving a tribal member or a member's tribal property. The Supreme Court has thrown cold water on that theory, explaining that the *Montana* exceptions cannot be interpreted in a way that "swallow[s]" or "severely shrinks" the general rule that tribal regulation of nonmembers is invalid. *Plains Commerce Bank*, 554 U.S. at 330. The Court should not interpret the first *Montana* exception so expansively that the general presumption against tribal jurisdiction over nonmembers disappears.

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

The Supreme Court has further held that the exercise of tribal jurisdiction over nonmembers is permissible *only when necessary* to protect tribal self-government or to control internal relations; in other words, a tribe cannot exercise jurisdiction over nonmembers when its inherent sovereign authority is not implicated. *Plains Commerce Bank*, 554 U.S. at 332; *see also Nat'l Labor Relations Bd.*, 788 F.3d at 545; *Jackson*, 764 F.3d at 783; *Kodiak Oil*, 932 F.3d at 1125.

The Eighth Circuit's analysis in *Kodiak Oil* is instructive. There, the Eighth Circuit concluded that a tribe lacked jurisdiction over claims regarding nonmember leases of wells on tribal land. 932 F.3d at 1129–30. The Eighth Circuit framed its analysis under the first *Montana* exception and held that, although the leases constituted "consensual relationships with tribal members," a "consensual relationship alone is not enough." *Id.* at 1138. "Even where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities *only where* the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Id.* (emphasis added) (quoting *Plains Commerce Bank*, 554 U.S. at 336). The court explained that the federal regulation

of oil and gas leases defeated the notion that tribal regulation in this area was "necessary for tribal self-government." *Id.* (separately finding under the second *Montana* exception that the dispute did "not involve conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'").

Similarly, in *Jackson*, the Seventh Circuit held that "a nonmember's consent to tribal authority [wa]s *not sufficient* to establish the jurisdiction of a tribal court." 764 F.3d at 783 (emphasis added). Because the tribal defendants had "made no showing that the present [contract] dispute implicate[d] *any* aspect of 'the tribe's inherent sovereign authority,'" tribal jurisdiction under *Montana* did not apply. *Id.* (emphasis in original).

As in *Kodiak Oil* and *Jackson*, the Tribe's sovereign authority is not at issue here because this case does not concern the Tribe's ability "to set conditions on entry, preserve tribal government, or control internal relations." *Kodiak Oil*, 932 F.3d at 337; *Jackson*, 764 F.3d at 783. The underlying tribal-court action concerns the interpretation of a property insurance policy and whether it covers the Tribe's claimed economic losses. It in no way implicates the Tribe's ability to self-govern. It does not involve the Tribe's inherent sovereign authority to "set conditions on entry," as Lexington has not entered the Tribe's land; it does not involve the Tribe's inherent sovereign authority to "preserve tribal government," as the matter is a contract dispute concerning business property and alleged business income losses; and it does not involve the Tribe's inherent sovereign authority to "control internal relations," as the matter concerns the obligations of Lexington, who is a nonmember, under the property insurance policy at issue. Instead, this insurance matter is heavily regulated by state law and related jurisprudence and is wholly independent of the Tribe's inherent sovereign authority to self-regulate and self-govern.

Just as the federal government regulated oil and gas leases in *Kodiak Oil*, the State of California extensively regulates the insurance industry, while the Tribe does not. There is no risk to the Tribe's continuing political existence if it were disallowed from exercising jurisdiction over the underlying insurance dispute before its Tribal Court.

Moreover, it is black-letter law that tribal jurisdiction may "not exceed [the Tribe's] legislative jurisdiction." *Strate*, 520 U.S. at 453; *see also Plains Commerce Bank*, 554 U.S. at 330 ("reaffirm[ing]" principle and "hold[ing] that the Tribal Court lacks jurisdiction to hear" claim exceeding bounds of Tribe's "legislative jurisdiction"); *Jackson*, 764 F.3d at 782 ("[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."). So, because the Tribe "does not have the authority to regulate [the insurance industry], the [Tribal Court] similarly lacks jurisdiction to hear a claim based on that activity." *Jackson*, 764 F.3d at 782 (citing *Plains Commerce Bank*, 554 U.S. at 330). Further, it is not enough that a nonmember's conduct "*could be* permissibly regulated by tribal law, as determined by *Montana* and its two exceptions"—it must be that the conduct "*has been* regulated by tribal law." *See Kodiak Oil*, 932 F.3d at 1135 & n.4 (emphasis in original).

The Tribe therefore has no authority to exercise subject matter jurisdiction over Lexington through the underlying tribal-court action because that action does not implicate the Tribe's sovereign interests.

2. The Right to Exclude Does Not Apply

The Ninth Circuit has recognized another exception to the general presumption that tribal courts presumptively lack jurisdiction over nonmembers: a tribe's right to exclude. Under this doctrine, tribal jurisdiction is premised on a tribe's inherent right to exclude nonmembers from tribal land, which "includes the lesser authority to set conditions on their entry through regulations." *Water Wheel*, 642 F.3d at 811. But this exception, like the *Montana* exceptions, is extremely narrow. The Ninth Circuit has repeatedly held that tribal jurisdiction under this doctrine hinges on whether the nonmember is present on tribal land:

- *Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756 (9th Cir. 2020): In a dispute concerning an insurance company's refusal to defend or indemnify an insured entity for allegedly causing a gasoline leak on Navajo tribal land, the

insurance company challenged the jurisdiction of the Navajo Nation's tribal court over it as a nonmember. *Id.* at 756. The Ninth Circuit held that because the insurance company's "conduct . . . occurred entirely outside tribal land, tribal court jurisdiction cannot be premised on the Navajo Nation's right to exclude." *Id.* at 757.

- *Water Wheel*, 642 F.3d at 802 (per curiam): In an action involving a nonmember's refusal to leave tribal land when he breached his lease with the tribe, thus turning him into a trespasser, the Ninth Circuit held that "where the non-Indian activity in question occurred *on tribal land*," "the activity interfered directly with the tribe's inherent *powers to exclude and manage its own lands*, and there are no competing state interests at play, the tribe's status as a landowner is enough to support regulatory jurisdiction." *Id.* at 814 (emphases added).
- *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 513 (2019): A nonmember tribal employee, the Tribal Administrator for the Cedarville Rancheria Tribe, was sued by the tribe in tribal court for various acts of financial misconduct "committed by the nonmember on tribal lands during the scope of her employment." *Id.* at 894. Key to the Ninth Circuit's finding of tribal jurisdiction under the tribe's right to exclude was the fact that "the nonmember defendant *while on tribal land* allegedly used her position as Tribal Administrator to violate the terms of her employment in a wide variety of ways that were significantly detrimental to the management and financial security of the Tribe." *Id.* at 901. (emphasis in original).

Here, Lexington was never physically on tribal land, so the right-to-exclude doctrine cannot apply.

Defendants argue they need not prove any connection to tribal land. First, they say that "[t]he issue is not merely whether Cabazon has the right to physically exclude

Lexington and its agents from the Tribe's land, but also whether Cabazon can prevent and/or exclude Lexington from doing business, or regulate that business, on the Reservation." Dkt. 39-1 at 10. That argument misses the point. Defendants conflate the Tribe's commercial discretion with sovereign authority. What the Tribe may or may not be able to do as a party deciding the terms of a business relationship cannot be confused with what it is permitted to do as a tribal sovereign seeking to regulate a nonmember that has not engaged in conduct on tribal lands. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982) (cautioning against "confus[ing] the Tribe's role as commercial partner with its role as sovereign"). As the district court in *McPaul* explained, the hook for the right-to-exclude doctrine to apply is whether the nonmember *actually entered* tribal land, which then provides the tribe power to "exclude" the nonmember. When the nonmember "is not being sued for conduct that occurred while it, or one of its agents, was *physically present* on the tribal land," it is "difficult to fathom how the right-to-exclude framework could be construed to confer tribal jurisdiction over a lawsuit against" the nonmember. *Emps. Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1149 (D. Ariz. 2019), *aff'd sub nom. McPaul*, 804 F. App'x 756 (9th Cir. 2020) (emphasis added). Because the nonmember has "never set foot on [tribal land]," the tribe cannot "exclude" or "regulate" the nonmember's conduct at issue, and "it follows that the 'right to exclude' framework doesn't supply a valid pathway to tribal jurisdiction." *Id.*

Second, Defendants rely on *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200–01 (9th Cir. 2012), claiming the Ninth Circuit recognized "a nonmember entering a contract with a tribe that relates directly to tribal land effectively constitutes 'activity . . . on tribal land,' regardless of any 'physical presence.'" Dkt. 39-1 at 11. Not only is Defendants' argument misleading, it fails to recognize that *Grand Canyon Skywalk* is another exhaustion case holding only that the tribal court in that case should first determine its own jurisdiction. *Grand Canyon Skywalk*, 715 F.3d at 1206. Further, *Grand Canyon Skywalk* does not support the

exercise of tribal jurisdiction here. There, a non-tribal corporation entered into an agreement with a tribal corporation to build and manage a tourist destination on tribal land. The Ninth Circuit emphasized that the "essential basis for the agreement" was "*access* to" tribal land, and thus, because the contract "interfered with the [tribe's] ability to exclude [the nonmember] from the reservation," jurisdiction over the related contract dispute was "not plainly lack[ing]." *Id.* at 1203–05 (emphasis added). Here, by contrast, the essential basis for the insurance contract is not to provide Lexington with "access" to the Tribe's insured property, let alone the reservation. Nor does the Tribe's dispute with Lexington concern any purported contractual right by Lexington to enter the land. So, unlike the contract in *Grand Canyon Skywalk*, the insurance contract here in no way "interferes" with the Tribe's ability to exclude Lexington from its lands.

Defendants also argue that even if there must be a physical connection to tribal land under the right-to-exclude doctrine, Alliant's presence on Cabazon tribal land, as "agents" of Lexington, satisfies that requirement. Dkt. 39-1 at 10. That is wrong for the same reason Defendants' arguments about the first *Montana* exception are wrong—Defendants have not cited any evidence supporting an agency relationship between Lexington and Alliant. And even if they had, Alliant's conduct is not at issue; rather, it is Lexington's off-reservation decision to deny coverage that is the conduct over which the Tribe is seeking to exercise jurisdiction.

In short, the Tribe's "right to exclude" Lexington from its tribal land is not at issue in this action, and the doctrine does not apply. Unlike the trespasser in *Water Wheel* who refused to pay rent for land he leased from the Colorado River Indian Tribes, refused to vacate tribal lands, and then continued to operate his business illegally on tribal lands, 642 F.3d at 804–08, and unlike the employee in *Knighton* who had been a Tribal Administrator for approximately sixteen years and "was responsible for the overall supervision and management of tribal operations and carrying out tribal projects consistent with the Tribal Constitution, 922 F.3d at 904, Lexington never had any presence on Cabazon tribal land nor "interfered directly" with the Tribe's inherent

powers to exclude or manage its own lands. *Water Wheel*, 642 F.3d at 814. Thus, the right-to-exclude doctrine does not give the Tribe jurisdiction over nonmember Lexington, and Defendants are not entitled to judgment as a matter of law.

B. The Tribal Court Lacks Subject Matter Jurisdiction Over Lexington and the Tribal Action Under Tribal Law

A tribe's authority cannot exceed the bounds set by federal law. *Nat'l Farmers Union*, 471 U.S. at 851. Thus, when a federal court assesses tribal jurisdiction, it is unnecessary to establish whether *tribal law* allows for subject matter jurisdiction over a nonmember, as "the governing rule of decision [concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians] has been provided by *federal law*." *Id.* at 852 (emphasis added).

Even if tribal law had bearing on the federal limits on tribal jurisdiction, Cabazon law acknowledges that its tribal court's authority is circumscribed by federal law. Cabazon Tribal Code § 9-102(a) ("The Reservation Court shall . . . exercise such extraterritorial jurisdiction *as may be authorized under federal law*.") (emphasis added); *see also* Cabazon Arts. of Assoc. § 6(A) ("The General Council shall have . . . powers and responsibilities . . . subject to *any limitation imposed by the . . . Constitution of the United States*.") (emphasis added). Further, the Cabazon Tribal Code limits the Tribal Court's jurisdiction to "civil causes of action arising *within the exterior boundaries* of the Cabazon Indian Reservation." Cabazon Tribal Code § 9-102(b)(2) (emphasis added). Specifically, the Tribal Code grants jurisdiction only if "[t]he defendant has *entered onto* or *transacted business within* the Cabazon Indian Reservation and the cause of action arises out of activities or events which have occurred *within the Reservation boundaries*." *Id.* § 9-102(b)(2)(c) (emphases added). Thus, under tribal law, subject matter jurisdiction depends entirely on the nonmember's activity on tribal land. This construction comports with the Cabazon Articles of Association, which "establish rules of procedure to govern [the Cabazon Band's] tribal authority and jurisdiction" and mandate that the "jurisdiction of the Band *shall extend to the land . . . within the Cabazon*

Reservation." Cabazon Arts. of Assoc. § 1 (emphasis added).

Because all relevant activity by Lexington occurred outside of tribal land, there can be no subject matter jurisdiction under Cabazon tribal law. The insurance contract between the parties was not negotiated or entered into on the reservation, all decisions regarding coverage under the Lexington Policies occurred at Lexington's headquarters off the reservation, and Lexington never entered tribal land. Lexington did not "enter[] *onto*" or "transact[] business *within*" Cabazon tribal territory, and the cause of action did not "occur[] *within* Reservation boundaries." Cabazon Tribal Code § 9-102(b)(2) (emphases added). The mere existence of an insurance contract between the parties that relates to tribal property is insufficient to establish a case or controversy arising "within the Reservation boundaries." *Id.*

In short, Defendants cannot establish as a matter of law that the Cabazon Reservation Court has subject matter jurisdiction under tribal law.

C. The Tribal Court Also Lacks Personal Jurisdiction Over Lexington

Defendants' argument that the tribal court has *personal* jurisdiction over Lexington, Dkt. 39-1 at 17, is irrelevant to the question of *subject matter* jurisdiction. Lexington's prayer for injunctive and declaratory relief in this action has always been limited to the question of tribal-court subject matter jurisdiction. *See generally* Dkt. 1. Thus, any argument about personal jurisdiction is tangential and has no bearing on the parties cross-motions for summary judgment—even if the Tribal Court had personal jurisdiction over Lexington, it lacks subject matter jurisdiction and as a matter of law, must be enjoined from exercising its authority in violation of federal law.

Even if personal jurisdiction had some relevance to this matter, it would not apply here. A tribal court's exercise of personal jurisdiction must comport with due process under the Indian Civil Rights Act, which mirrors the Fourteenth Amendment of the U.S. Constitution by providing that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any persons of liberty or property without due process of law." 25 U.S.C. §1302(a)(8). A bedrock requirement of personal jurisdiction is that

"the defendant's conduct and connection with the forum [] are such that he could reasonably anticipate being haled into court." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *see also In re J.D.M.C.*, 739 N.W.2d 796, 811 (S.D. 2007) ("[A]n essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that [court]."). The Tribal Court therefore has personal jurisdiction over Lexington only if it satisfies due-process requirements. Courts apply "the minimum contacts standard," expressed in *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), which requires "sufficient minimum contacts with the forum state such that the suit does not offend 'traditional notions of fair play and substantial justice.'" *Water Wheel*, 642 F.3d at 819. Courts consider a "variety of interests" in determining whether personal jurisdiction is present, but the "primary concern" is "the burden on the defendant." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017).

Factors weighing on the sufficiency of a defendant's minimum contacts with a forum include the extent of the defendant's presence in the forum, whether the cause of action arose from the contacts with the forum, and whether the defendant took advantage of the forum's laws and benefits. *Int'l Shoe*, 326 U.S. at 318–19. Here, Lexington did not purposefully direct its activities toward the Tribe or tribal land, enter tribal land, conduct any business on tribal land, or invoke the protections of Cabazon tribal law. Thus, as a matter of law, the Tribal Court lacked personal jurisdiction over Lexington.

This case is very different from cases like *Water Wheel*, where there was clearly tribal jurisdiction over a nonmember. There, a non-tribal member lived on tribal land, was served with process on tribal land, operated a business on tribal land, and had notice through a lease agreement that he was subject to tribal laws. 642 F.3d at 819–20. The Ninth Circuit therefore held that the exercise of personal jurisdiction over the nonmember was proper, because it was "reasonable to anticipate that he could be haled into court." *Id.* at 819–20. Here, Lexington lacks sufficient minimum contacts with the tribal forum. Lexington is a Delaware corporation with its principal place of business

in Massachusetts. Lexington has no presence on, or contacts with, Cabazon tribal land—it did not enter or conduct business on that land. Instead, Lexington contracted with Alliant, a California corporation, to partake in a *nationwide* insurance program. The Master Policy at issue, in turn, says nothing about Cabazon tribal law or the Tribal Court. Lexington thus could not reasonably anticipate being haled into tribal court. Lexington, moreover, did not invoke the protections of tribal law or purposefully avail itself of the privilege of conducting activities on tribal land; not only has Lexington never conducted business within tribal territory, but the Tribe does not regulate the insurance industry in any way.

Further, personal jurisdiction may exist "only where the defendant can be said to have targeted the forum"—that a defendant "might have predicted that goods [would] reach the forum" is "not enough." *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (emphasis added). The mere fact that a customer uses a product or service in a certain area likewise does not automatically subject its provider to suit in that location. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–97 (1980). The Supreme Court, for example, has expressly rejected the argument that a non-California defendant's "decision to contract with a California company . . . to distribute [a drug] nationally" was sufficient to establish personal jurisdiction in California. *Bristol-Myers Squibb*, 137 S. Ct. at 1783. Here, Lexington contracted with Alliant, a California company, to provide insurance as part of a nationwide program—there is no evidence that Lexington *specifically* targeted the Tribe. In the face of such lack of minimum contacts, it would violate "traditional notions of fair play and substantial justice" to subject Lexington to the foreign court's jurisdiction. *Int'l Shoe*, 326 U.S. at 316.

Defendants also say Lexington included a "forum selection clause" in the Master Policy's Service of Suit clause, which states that Lexington will "submit to the jurisdiction of a Court of competent jurisdiction within the United States." Dkt. 39-1 at 19. Defendants argue the Tribal Court qualifies. But a court of "competent jurisdiction"

1 is one that has subject matter jurisdiction, which the Tribal Court does not. *See Lightfoot*
2 *v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017). In any event, this provision
3 provides further support that Lexington did not specifically target this forum,
4 purposefully avail itself of Cabazon tribal laws and protections, or reasonably anticipate
5 being haled into Tribal Court. It does not mention Cabazon, the Reservation, or the
6 Tribal Court. Joint Stmt., No. 27. Instead, the provision contemplates litigation
7 proceeding in federal and state courts within the United States and indicates that service
8 of any lawsuit can be effected on a designated agent in San Francisco, California, or the
9 "Superintendent, Commissioner or Director of Insurance" of a relevant "state, territory
10 or district of the United States." *Id.* The Tribal Court's jurisdiction over Lexington is
11 not supported by any language in the provision.

12 In light of the insufficient minimum contacts between Lexington and Cabazon
13 tribal land, the Tribal Court does not have personal jurisdiction over Lexington in this
14 matter—an independent reason for denying Defendants' motion.

15 **V. CONCLUSION**

16 The Court should deny Defendants' motion for summary judgment.

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Respectfully submitted,

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