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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 REPLY IN SUPPORT OF PLAINTIFF'S 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 Reservation Court presumptively lacks jurisdiction over Lexington. It is Defendants' burden to overcome that presumption, and they have not carried it. They have not demonstrated the applicability of the first *Montana* exception to the rule against a tribe's exercise of subject matter jurisdiction over nonmembers, as Lexington never entered or engaged in relevant activity physically on tribal land. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 333 (2008).

Nor have Defendants shown that subject matter jurisdiction exists under the theory that the Cabazon Band has a "right to exclude" Lexington from tribal land—because Lexington did not enter or otherwise conduct any activity on tribal land, the right to exclude does not apply here.

Defendants thus have not rebutted the presumption against tribal jurisdiction over nonmembers, and this Court should grant Lexington's cross-motion for summary judgment, permanently enjoin the Cabazon Reservation Court from continuing its unlawful proceedings against Lexington, and declare the Tribal Court lacks subject matter jurisdiction over the underlying action.

II. ARGUMENT

Tribal subject matter jurisdiction over nonmembers is "presumptively invalid." *Plains Com. Bank*, 554 U.S. at 330. That means the Cabazon Reservation Court may not exercise jurisdiction over Lexington, a nonmember of the Tribe, unless one of "two distinct frameworks" applies: (1) the *Montana* exceptions or (2) a tribe's inherent right to exclude nonmembers from its land. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017). The first *Montana* exception and the right to exclude do not apply because they require nonmember conduct to physically occur on tribal land, and there was no such conduct here. Defendants have not addressed the second *Montana* exception in their opposition and have therefore waived any argument that it applies. *Eberle v. City of Anaheim*, 901 F.2d 814, 817–18 (9th Cir. 1990). As a result, Defendants have not rebutted the presumption against tribal jurisdiction.

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

As dependent sovereign nations, tribes enjoy the "significant protection for the individual, territorial, and political rights of the Indian tribes" provided by federal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Incorporation into the United States "necessarily divested" tribes of some aspects of their sovereignty, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), including the ability to "try nonmembers in tribal courts." *Nat'l Farmers*, 471 U.S. at 853 n.14; *Montana v. United States*, 450 U.S. 544, 564 (1981) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers*.") (emphasis in original). The first step in analyzing tribal jurisdiction is looking "to the member or nonmember status of the unconsenting party," *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937 (9th Cir. 2009), as "[i]t is the membership status of the nonconsenting party, not the status of real property, that counts as the primary jurisdictional fact." *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) (Souter, J., concurring). Here, the nonconsenting party—Lexington—is a nonmember of the Tribe.

Because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565, efforts by a tribe to regulate nonmembers are "presumptively invalid." *Plains Com. Bank*, 554 U.S. at 330; *accord FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019) ("[T]here is a presumption against tribal jurisdiction over nonmember activity."). Here, then, there is a presumption against tribal jurisdiction over Lexington that Defendants must overcome.

While acknowledging that tribes "presumptively lack[] . . . authority over nonmembers" under the *Montana* framework, Defendants claim the underlying tribal action here does not fall under the *Montana* framework at all because Lexington's conduct "should be treated as having taken place on[] Cabazon's Reservation." Dkt. 44

1 at 8. Defendants are wrong. Lexington's conduct could not have taken place on tribal
2 land because the alleged activity—Lexington's interpretation of the Master Policy's
3 terms and the denial of the Tribe's insurance claims—"arose off the reservation."
4 *Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 957 (D.S.D. 2007) (no
5 tribal jurisdiction over nonmember insurance company because allegedly poor handling
6 and denial of tribal member's claim took place off reservation).
7 Even if Lexington's conduct had occurred on tribal land, the *Montana* framework
8 would still apply because federal law "restricts tribal authority over nonmember
9 activities *taking place on the reservation*," and "tribes do not, as a general matter,
10 possess authority over non-Indians who come *within their borders*." *Plains Com. Bank*,
11 554 U.S. at 328 (emphases added). As Justice Souter outlined in his concurrence in
12 *Hicks*, "as a general matter, a tribe's civil jurisdiction does not extend to the 'activities
13 of non-Indians *on reservation lands*,' and that the only such activities that trigger civil
14 jurisdiction are those that fit within one of *Montana's* two exceptions." 533 U.S. at 353,
15 380–81 (Souter, J., concurring) (emphasis added). Thus, "the general rule of *Montana*
16 applies to both Indian and non-Indian land." *Id.* at 360; *accord id.* at 388 (O'Connor, J.,
17 concurring) ("[T]he majority is quite right that *Montana* should govern our analysis of
18 a tribe's civil jurisdiction over nonmembers both on and off tribal land."). Because
19 Lexington is not a member of the Tribe, the *Montana* framework controls this action.
20 **1. The First *Montana* Exception Does Not Apply**
21 As *Montana* and its progeny make clear, tribal subject matter jurisdiction over a
22 nonmember is proper only if the nonmember physically enters tribal land, initiates and
23 engages in a transaction or business venture "on the land," and deliberately intends to
24 do business with the tribe or its members. If so, "the nonmember has consented" to "the
25 laws and regulations that govern tribal territory . . . by his actions." *Plains Com. Bank*,
26 554 U.S. at 337. Here, Lexington never set foot on tribal land for any purpose, never
27 solicited any tribal member for business opportunities, and never denied the Tribe
28 insurance coverage under the Master Policy while within tribal territorial boundaries.

1 Lexington's *conduct* as an insurance carrier has only ever occurred *off* the reservation.
2 Subject matter jurisdiction was not created simply because Lexington entered into
3 an insurance contract with the Tribe to insure tribal property. The Supreme Court has
4 explained that the "consensual relationship" exception applies only to business dealings
5 and contracts involving transactions *on the land*. *Plains Com. Bank*, 554 U.S. at 334,
6 337; *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *United States v. Cooley*, 141
7 S. Ct. 1638, 1643 (2021). In other words, "*Montana* and its progeny permit tribal
8 regulation of nonmember conduct inside the reservation that implicates the tribe's
9 sovereign interests." *Plains Com. Bank*, 554 U.S. at 332 (emphasis omitted). A
10 "consensual relationship" between a nonmember and a tribe is not enough; the
11 relationship must involve the nonmember's conduct on the tribe's land, not conduct off
12 tribal land that merely *relates* to tribal land. *Id.* at 334. Thus, notwithstanding the
13 parties' insurance relationship, which was brokered by other parties, tribal jurisdiction
14 does not exist because Lexington never actually entered tribal land, much less conducted
15 business on it. *Philip Morris*, 569 F.3d at 938 ("The jurisdiction of tribal courts does
16 not extend beyond tribal boundaries.").
17 Defendants rely on *Allstate Indemnity Company v. Stump*, 191 F.3d 1071 (9th Cir.
18 1999) to argue that tribal court jurisdiction can be established solely by a nonmember's
19 agreement to insure property on tribal land. Dkt. 44 at 16. But *Allstate* held only that a
20 nonmember challenging tribal jurisdiction must first exhaust remedies in tribal court
21 before bringing the challenge in federal court. 191 F.3d at 1076. Defendants' other
22 cited cases, like *Allstate*, address only the threshold question of exhaustion of tribal-
23 court remedies, not the ultimate question of jurisdiction. *DISH Network Serv. L.L.C. v.*
24 *Laducer*, 725 F.3d 877, 883 (8th Cir. 2013); *AT&T Corp. v. Oglala Sioux Tribe Util.*
25 *Comm'n*, 2015 WL 5684937, at *8 (D.S.D. Sept. 25, 2015); *Sprint Comm'n Co. L.P. v.*
26 *Wynne*, 121 F. Supp. 3d 893, 901 (D.S.D. 2015); *Brown v. W. Sky Fin., LLC, 84 F. Supp.*
27 3d 467, 481 (M.D.N.C. 2015). In such cases, "the standard . . . is lower" because for
28 exhaustion to apply, the argument for tribal jurisdiction need only be colorable. *Rincon*

1 *Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012). As the Ninth Circuit
2 has explained, this preliminary exhaustion analysis does not involve "deciding whether
3 the tribe actually has jurisdiction under the . . . *Montana* exception[s]." *Id.* Instead, "the
4 tribal courts get the first chance to decide" whether they have jurisdiction, and "[i]f the
5 tribal courts sustain jurisdiction and [the nonmember] is unhappy with that
6 determination, it may then repair to federal court." *Id.* Thus, *Allstate* and Defendants'
7 other exhaustion cases do not stand for the broad proposition that an insurance contract
8 alone is sufficient to establish tribal jurisdiction.

9 Defendants' final case, *State Farm Insurance Cos. v. Turtle Mountain Fleet Farm*
10 *LLC*, 2014 WL 1883633 (D.N.D. May 12, 2014), is an unpersuasive outlier. Dkt. 44 at
11 16. The court's conclusion that an agreement to insure tribal property is enough to
12 support tribal jurisdiction was based on a misreading of *Allstate* and another exhaustion
13 case, *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). Both held only
14 that a basis for jurisdiction *might* exist, not that it did. *Allstate*, 191 F.3d at 1076 ("The
15 district court dismissed this case because it affirmatively concluded that the tribal court
16 had jurisdiction. We decline to go so far."); *Iowa Mutual*, 480 U.S. at 17. Curiously,
17 the *State Farm* court recognized that *Allstate* and *Iowa Mutual* "are all 'exhaustion
18 cases' for which there only need be a colorable claim of jurisdiction to require
19 exhaustion," but nevertheless treated those cases as answering a jurisdictional question
20 they never reached. 2014 WL 1883633, at *11 & n.6.

21 The Supreme Court has warned against construing the *Montana* exceptions in a
22 manner that could "swallow the rule [against tribal jurisdiction] or severely shrink it."
23 *Plains Com. Bank*, 554 U.S. at 330. Defendants argue the first *Montana* exception
24 should no longer be considered a narrow one because the Supreme Court has "expressly
25 rejected" the long-standing rule. Dkt. 44 at 12. Defendants rely on *United States v.*
26 *Cooley*, 141 S. Ct. 1638 (2021), a case that found jurisdiction under the second *Montana*
27 exception, which is not at issue here. Far from "expressly reject[ing]" the warning that
28 the *Montana* exceptions should not "swallow . . . or severely shrink" the general rule

1 against tribal jurisdiction, the Supreme Court in *Cooley* expressly reiterated that "the
2 *Montana* exceptions are 'limited.'" 141 S. Ct. at 1645.
3 Defendants also argue Lexington's assertion that "it never consented to the
4 jurisdiction of the Tribe or its courts" is irrelevant because "no 'consent' is necessary to
5 trigger subject matter jurisdiction." Dkt. 44 at 12. But the Supreme Court has held just
6 the opposite: the exercise of tribal authority can "be fairly imposed on nonmembers
7 only if the nonmember has *consented*, either expressly or by his actions." *Plains Com.*
8 *Bank*, 554 U.S. at 337 (emphasis added). At the heart of the Supreme Court's limitation
9 on tribal jurisdiction is "the fact that full tribal jurisdiction would require the application
10 of tribal laws to non-Indians who do not belong to the tribe and consequently had no say
11 in creating the laws that would be applied to them." *Cooley*, 141 S. Ct. at 1644.
12 As *Montana* and its progeny make clear, tribal subject matter jurisdiction over a
13 nonmember is proper only if the nonmember physically enters tribal land, initiates and
14 engages in a transaction or business venture on the land, and deliberately intends to do
15 business with the tribe or its members. If so, "the nonmember has consented" to "the
16 laws and regulations that govern tribal territory . . . by his actions." *Plains Com. Bank*,
17 554 U.S. at 337. Here, Lexington never set foot on tribal land for any purpose, never
18 solicited any tribal member for business opportunities, and never denied the Tribe
19 insurance coverage under the Master Policy while within tribal territorial boundaries.
20 Lexington's conduct as an insurance carrier has only ever occurred off the reservation.
21 Defendants also attempt to impose a "foreseeability" requirement on the
22 "consensual relationship" test for tribal subject matter jurisdiction, arguing that the
23 possibility of being haled into tribal court should not have come as a "surprise" because
24 of a litigation involving Lexington in the Chehalis Tribal Court from over ten years ago.
25 Dkt. 44 at 14. In *Confederated Tribes of the Chehalis Reservation d/b/a Lucky Eagle*
26 *Casino v. Lexington Insurance Company*, No. CHE-CIV-11/08-262 (Chehalis Tribal
27 Ct., Apr. 21, 2010), the Chehalis Tribal Court analyzed a property insurance policy
28 issued by Lexington to the Confederated Tribes of the Chehalis Reservation containing

similar policy language, finding that tribal subject matter jurisdiction existed under the first *Montana* exception. J.A. of Certain Auths., Ex. 3 at 68. But that interpretation of tribal jurisdiction conflates the test for subject matter jurisdiction with the one for personal jurisdiction, *id.*, which is the incorrect standard. The Supreme Court has drawn a distinction between the two, making it clear that *Montana* and its analysis of tribal jurisdiction "pertain[] to subject-matter, rather than merely personal, jurisdiction." *Hicks*, 533 U.S. at 367 n.8; *see also Progressive Specialty Ins. Co.*, 489 F. Supp. 2d at 957 (tribal court committed error "in confusing questions of personal jurisdiction with questions of subject matter jurisdiction"). If the Chehalis Tribal Court's proposition that tribal subject matter jurisdiction is premised on "traditional notions of fair play and substantial justice" were to be accepted, it would render the *Montana* analysis unnecessary, as courts would have to decide only whether they had personal jurisdiction over the parties.

Here, Lexington did not engage in business, enter into any transaction, or negotiate the Lexington Policies on Cabazon tribal land. Thus, the first *Montana* exception does not serve as a basis for tribal court jurisdiction.

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

When determining whether tribal jurisdiction exists under the *Montana* framework, the Supreme Court additionally requires the exercise of jurisdiction "stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com. Bank*, 554 U.S. at 336–37; *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 545 (6th Cir. 2015) ("*Montana* made plain that tribal power over non-members extends only as far as 'necessary to protect tribal self-government or to control internal relations.'"). Here, the tribal court lacks jurisdiction because the Tribe's inherent sovereign authority is not at issue. To find that the first *Montana* exception applies without implicating the Tribe's inherent sovereign authority (or, as discussed, without

1 Lexington's physical presence within tribal territorial boundaries) would do exactly
2 what the Supreme Court has cautioned against—it would construe the "limited"
3 *Montana* exceptions "in a manner that would swallow the rule or severely shrink it."
4 *Plains Com. Bank*, 554 U.S. at 330.
5 Defendants claim the Ninth Circuit and Supreme Court have never acknowledged
6 this requirement. Dkt. 44 at 19. The Ninth Circuit has not specifically addressed the
7 requirement, and certainly has not rejected it. The Supreme Court has addressed the
8 requirement, expressly holding that a tribe must show its regulation of nonmembers
9 "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve
10 tribal self-government, or control internal relations." *Plains Com. Bank*, 554 U.S. at
11 337; *accord Strate*, 520 U.S. at 459 (a tribe's inherent authority does not reach "beyond
12 what is necessary to protect tribal self-government or to control internal relations").
13 "The logic of *Montana* is that certain activities on non-Indian fee land . . . may intrude
14 on the internal relations of the tribe or threaten tribal self-rule," and thus may be
15 regulated only "[*t*]*o the extent* they do." *Plains Com. Bank*, 554 U.S. at 334–35
16 (emphasis added); *accord Hicks*, 533 U.S. at 359 ("Where nonmembers are concerned,
17 the 'exercise of tribal power beyond what is necessary to protect tribal self-government
18 or to control internal relations is inconsistent with the dependent status of the tribes, and
19 so cannot survive without express congressional delegation.'"). Hence, the Tribe has no
20 authority to regulate nonmembers outside of these specified areas of sovereign concern.
21 Defendants argue that the Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of*
22 *Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) held that the first *Montana* exception
23 "does not require any showing . . . other than a consensual relationship and a nexus
24 between the regulated conduct and the relationship." Dkt. 44 at 20. But Defendants
25 misinterpret the Fifth Circuit's reasoning. *Dolgencorp* involved the alleged sexual
26 assault of a minor tribal member by his nonmember employer while on the reservation.
27 746 F.3d at 169. The Fifth Circuit decided that "one specific relationship, in itself"—
28 i.e. "a single employment relationship between a tribe member and a [nonmember]

1 business"—could not possibly threaten internal relations or self-rule. *Id.* at 175. Thus,
2 the requirement must be applied "at a higher level of generality." *Id.* Although that
3 "single employment relationship" did not carry the requisite impact on tribal self-rule,
4 the Fifth Circuit held "the ability to regulate the working conditions (particularly as
5 pertains to health and safety) of tribe members employed on reservation land" did. *Id.*
6 "Simply put, the tribe [was] protecting its own children on its own land," *id.* at 173,
7 which undoubtedly implicates the inherent sovereign authority of the tribe. Here, by
8 contrast, there is no such interest. Defendants concede the Tribe does not regulate
9 insurance. Joint Stmt., No. 69. And as the Eighth Circuit has explained, jurisdiction
10 over a nonmember only exists if the nonmember's conduct "*has been* regulated by tribal
11 law." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1135 & n.4 (8th Cir. 2019)
12 (emphasis in original).

13 Defendants further argue even if there were a separate requirement that the
14 underlying tribal action implicate "the tribe's inherent sovereign authority to set
15 conditions on entry, preserve tribal self-government, or control internal relations,"
16 *Plains Com. Bank*, 554 U.S. at 336–37, "this case [would] clearly meet[] that test"
17 because it "presents a challenge to the jurisdiction and authority of the Cabazon
18 Reservation Court, a component of the Tribe's government." Dkt. 44 at 21. But
19 Defendants conflate the sovereign tribal interests implicated in *this* action—whether the
20 Tribal Court has regulatory and adjudicatory authority over Lexington as a
21 nonmember—with the insurance contract dispute of the underlying tribal court action.
22 It is exactly because the insurance matter, which is heavily regulated by state law, does
23 *not* implicate the authority of the Tribe that the Tribal Court does not have jurisdiction.

24 Defendants also conflate the requirements of the second *Montana* exception with
25 the requirement that the Tribe's exercise of jurisdiction stems from its inherent sovereign
26 authority. Defendants argue the closure of the Tribe's casino, the property insured under
27 the Lexington Policies and "the Tribe's most significant source of revenue," threatened
28 the Tribe's "ability to govern, maintain the health and safety of persons within its

jurisdiction, and provide essential governmental services to tribal members." Dkt. 44 at 21–22. This is the test for the second *Montana* exception, which allows tribal jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565. Defendants cannot attempt to bypass their waiver of this argument by collapsing the *Montana* requirements into one supercharged exception.

Even if Defendants had properly argued for the second *Montana* exception to apply, the Tribe's alleged financial losses, including the circumstances in which they arose, do not meet the particularly "elevated threshold" of that exception. *Plains Com. Bank*, 554 U.S. at 341. "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Id.* This exception is a break-the-glass failsafe that confers jurisdiction only when it is "necessary to avert catastrophic consequences." *Id.* As the Seventh Circuit explained in considering arguments similar to Defendants' here, the second *Montana* exception cannot apply "whenever the economic effects of its commercial agreements affect a tribe's ability to provide services to its members," as this "would swallow the rule" against tribal jurisdiction over nonmembers. *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015).

Because the Tribe has never regulated insurance, and because its inherent sovereign authority is not implicated (nor has its subsistence been imperiled), no *Montana* exception provides a basis for tribal court jurisdiction.

B. The Right to Exclude Does Not Apply

The Ninth Circuit has recognized a separate exception to the rule that tribes lack jurisdiction over nonmembers: the "right to exclude" doctrine, which arises out of a tribe's "inherent powers to exclude and manage its own lands." *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011). The Ninth Circuit has made clear that tribal court jurisdiction may not be premised on the right to exclude

1 nonmembers *not on tribal land*. *See Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x
2 756, 757 (9th Cir. 2020). And because a tribe's right to exclude is limited to tribal land,
3 so too is its "lesser" power to regulate—and therefore adjudicate—nonmember conduct.
4 *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899 (9th Cir.
5 2019) ("From a tribe's inherent sovereign powers flow lesser powers, including the
6 power to regulate [nonmembers] *on tribal land*.") (emphasis added).

7 For a tribe to have the authority to regulate a nonmember based on its ability to
8 exclude that nonmember, the "non-Indian activity in question occur[ing] on tribal land"
9 must "interfere[] directly with the tribe's inherent powers to exclude and manage its own
10 lands." *Water Wheel*, 642 F.3d at 814. For example, in *Water Wheel*, a nonmember
11 refused to pay rent and vacate the tribal land he occupied when his lease with the tribe
12 expired. 642 F.3d at 814. Not only was the nonmember trespassing by continuing to
13 reside within the tribe's territory, he illegally profited off the land and the tribe by
14 collecting rent from subtenants and running a business *physically on the land*. *Id.*
15 Similarly, in *Knighton*, "the nonmember defendant *while on tribal land* allegedly used
16 her position as Tribal Administrator to violate the terms of her employment in a wide
17 variety of ways that were significantly detrimental to the management and financial
18 security of the Tribe." 922 F.3d at 901 (emphasis in original).

19 Defendants rely on *Grand Canyon Skywalk Development v. 'SA' Nyu Wa Inc.*,
20 715 F.3d 1196 (9th Cir. 2013) for the proposition that the Tribe's right to exclude is not
21 dependent on Lexington's physical presence on tribal land. But *Grand Canyon Skywalk*
22 is another exhaustion case, with the Ninth Circuit deciding that tribal jurisdiction was
23 "not plainly lacking" because the "essential basis for the agreement" at issue betweenthe
24 nonmember and tribal corporations was "access to" tribal land, "interfer[ing] with the
25 [tribe's] ability to exclude" the nonmember. *Id.* at 1204–05. Here, Lexington never had
26 any physical presence on tribal land. Nor is there any evidence that Lexington
27 "interfered directly" with the Tribe's inherent powers to exclude or manage its own
28 lands. *Water Wheel*, 642 F.3d at 814. Because Lexington "never set foot on reservation

land, interacted with tribal members, or expressly directed any activity within the reservation's borders," it cannot be "excluded" from tribal land, and the "right to exclude" doctrine cannot "supply a valid pathway to tribal jurisdiction." *Emp'rs Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1149–50 (D. Ariz. 2019), *aff'd sub nom. McPaul*, 804 F. App'x 756.

Defendants 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. 44 at 11. 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 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. Thus, the right-to-exclude doctrine does not give the Tribe jurisdiction over nonmember Lexington.

III. CONCLUSION

The Court should grant Lexington's motion for summary judgment.

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Respectfully submitted,

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