The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID WILLIAM TURPEN,

Plaintiff,

vs.

KATHERINE ARQUETTE TURPEN, et al.,

Defendants.

No. 2:22-cv-0496-JCC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: May 5, 2023

This suit is a challenge to the assertion of jurisdiction by the Muckleshoot Tribal Court over the dissolution of Plaintiff David Turpen and Katherine Arquette Turpen. Plaintiff's complaint alleges that the Tribal Court lacks jurisdiction over the divorce proceeding initiated by Mrs. Turpen because the couple resides outside of the Muckleshoot Indian Reservation and Plaintiff is not a member of the Tribe. Doc. 1. The Muckleshoot Tribal Court and the Muckleshoot Court of Appeals both concluded that Plaintiff is wrong, and maintain that position today. As explained in

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detail below, the courts of the Muckleshoot Indian Tribe are expressly granted jurisdiction over just such a matter by the laws of the Tribe, a grant of jurisdiction that is consistent with its inherent sovereign powers as well as federal law. Further, Plaintiff has entered into significant consensual relationships with both the Tribe and one of its members, Mrs. Turpen. For these reasons, Defendants respectfully ask this Court to grant summary judgment in favor of defendants.

Facts

On March 16, 2021, Katherine Arquette Turpen, an enrolled member of the Muckleshoot Indian Tribe (Muckleshoot or Tribe), filed to dissolve her marriage to David William Turpen, a non-Indian, in the Muckleshoot Tribal Court. MTC0005–06 (Petition for Decree of Dissolution, Mar. 16, 2021); MTC0147–50 (Tribal Court Order re Pl.'s Mot. to Dismiss, Apr. 30, 2021).[1] Katherine Arquette Turpen and David William Turpen were married in King County, Washington on May 18, 2014.[2] MTC0019–22 (Response to Petition, Apr. 19, 2021).

Before their marriage, until approximately December 2013, the Turpens resided at 180th Avenue Southeast, Auburn, Washington, in a home leased to Mrs. Turpen by the Muckleshoot Housing Authority; this home is located on the Muckleshoot

[1] The complete file of the proceedings before the Muckleshoot Tribal Court and the Muckleshoot Court of Appeals are attached to the Third Declaration of Trent Crable filed herewith, the Tribal Court documents are Bates numbered with the prefix MTC and the Court of Appeals documents are Bates numbered with the prefix MCA.

[2] Mrs. Turpen asserts, in the Petition for Decree of dissolution filed in the Muckleshoot Tribal Court, that the date of the marriage was May 18, 2012. MTC0005. Mr. Turpen asserts in his Response to Petition that the date of the marriage was May 18, 2014. MTC0020. The Tribal Court's Finding of Fact state that the date of marriage was May 18, 2012. MTC0148.The Opinion of the Muckleshoot Tribal Court of Appeals notes that this was a "simple mistake" that is irrelevant for the appeal purposes. MCA0079. This Motion assumes the correct date is May 18, 2014.

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Indian Reservation (Reservation). Decl. Hatch ¶ 2;[3] MTC0045 (Decl. David Turpen June 1, 2021) ("Katherine and I did stay on the reservation for a few months while purchasing a home, but that was in 2013—over eight years ago."). From December 2013 until they moved into the home they purchased through the Muckleshoot Home Loan Program (June 26, 2014), the Turpens resided at 1004 M Street Southeast, Auburn, Washington, in a home leased to Mrs. Turpen by the Muckleshoot Housing Authority; this home is not located on the Reservation. Decl. Hatch ¶ 3.[4]

On or about June 26, 2014, with substantial financial assistance from the Tribe, the couple purchased a home at 19627 SE Auburn-Black Diamond Road, Auburn, Washington, and resided there together until March 16, 2021, the date of their separation. MTC0051. This home is not on the Reservation. The initial purchase was made with loan assistance from the Muckleshoot Home Loan Program totaling $214,5338.17, and the down payment in the amount of $40,282 for the home was made with funds from the Muckleshoot Housing Authority Grant Program. This assistance was available to the couple solely because of Mrs. Turpen's status as a member of the Tribe and in part due to her status as an elder. The couple executed a Declaration of Restrictive Covenant, Muckleshoot Home Loan Program Deed of Trust, Muckleshoot Tax Fund Housing Assistance Program Grant Agreement and

[3] The Declaration of Andrea Hatch is filed herewith.

[4] Whether the Turpens lived on reservation at the time of their marriage is unclear from the record. The information provided above is what the Defendants understand to be true. But numerous documents provided by the Turpens as part of their application to the Muckleshoot Home Loan Program list their residence as the home on 180th Avenue Southeast, which is on the reservation, as late as June 25, 2014. Decl. O'Brien ¶ 5. The declaration of Cheryl O'Brien is filed herewith.

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Promisor Note, and Muckleshoot Housing Assistance Program Subordinate Deed of Trust, all dated June 25, 2014. Both the Deed of Trust and the Subordinate Deed of Trust contain a Governing Law, Jurisdiction, and Venue clause that provides that for homes purchased off the Reservation, any dispute related to the security agreement would be governed by state law and jurisdiction would be held by the state court of the county in which the property is located. Doc. 1 at 5 (¶ 4.3).

On or about April 9, 2015, the couple executed a Pay Back Deed of Trust,[5] the Muckleshoot Indian Tribe Tribal Housing Program Elders Residency/Pay Back Agreement, and the Declaration of Restrictive Covenant. Decl. Hatch Exs. 1,2. The Pay Back Deed of Trust was made by and among Katherine Arquette Turpen and David W. Turpen, as a married couple, WFG National Title Company, and the Muckleshoot Indian Tribe and provided the couple a grant in the amount of $214,538.17 in exchange for the promises and oblations in the Deed of Trust and Elders Residency/Pay Back Agreement, which includes a provision that the home remain the principle residence of Mrs. Turpen. Decl. Hatch Exs. 1, 2. The Elders Residency/Pay Back Agreement provides a further benefit to the married couple, an annual 7% reduction in the amount of the grant that would be owed in the event the couple sold the home (e.g., if they sold the home within the first year, they would be required to pay back 100% of the grant, after the first year 93%, after the second 86%, and so on). Decl. Hatch Ex. 1.

[5] The Notary Public dated the certification April 8, 2015.

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Mr. Turpen was an employee of the Tribe for more than a decade, from approximately 2005 (Decl. O'Brien Ex. 1, p. 1) to approximately 2018 (MTC0045).

Procedural History

The Tribal Court set out the procedural history as follows:

> 1. On March 16, 2021, Petitioner filed a Summons and Petition for Decree of Dissolution.
>
> 2. A Temporary Restraining Order was issued on March 19, 2021, setting a hearing for March 30, 2021.
>
> 3. On or about March 29, 2021, Respondent contacted a clerk of the court and requested a copy of the Summons and Complaint and the Temporary Restraining Order be emailed to him at his email address.
>
> 4. The clerk of the court complied by emailing a copy of the Summons and Complaint and Temporary Restraining Order to Respondent at his email address.
>
> 5. The clerk of the court filed a Certificate of Service on March 29, 2021 certifying that service was made of the Petition for Decree of Dissolution, Summons, Decree of Dissolution and Temporary Restraining order by emailing them to David Turpen at imn2bnfit@gmail.com on Monday March 29. 2021.
>
> 6. The parties appeared without counsel on March 30, 2021 and the Court entered an Order pursuant to the hearing held on March 30, 2021 titled re Mediation and Temporary Restraining Order with a date of April 1, 2021. The Order contains the following provisions: mediation with Judge Cardoza; a civil standby so that Respondent could remove a silver Infinity automobile from the family home premises that the Respondent requested he be allowed to secure; setting a review for April 21, 2021, to determine whether an agreement had been reached with regard to disposition of the family home and personal possessions Respondent still had at the family home that he wanted to secure; and other miscellaneous provisions not pertinent to the procedural history.
>
> 7. An Amended Order re Silver lnfiniti Automobile was entered on April 5, 2021, which provided procedures tor Respondent to pick up the silver lnfiniti automobile from the family home.
>
> 8. On April 5, 2021 an Additional Order re Mediation was entered which indicated that Respondent was requesting that his obtaining his

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check books, covid vaccine card record, mail and stimulus check would be a part of the mediation set for April 6, 2021 with Judge Cardoza. And that if an agreement was reached at the mediation so that the King County Police would be advised about the transfer of additional items at 6 pm April 8, 2021.

9. On April 15, 2021 a Notice of Appearance on behalf of Respondent was filed by 0. Yale Lewis Ill.

10. At some point, the exact date of which is unclear, Respondent filed a document titled: "List of Dave's items for pickup on Saturday April 17th 2021 at a time to be determined". It is a three page document and lists a variety of items Respondent wanted to pick up. It also contained the following: "I have received our stimulus card. How would Katherine like to receive her half? I can cash it and pay her with a check subtracting any fees evenly from both our amounts. I can pass the money on to my dad to go toward her car loan as well. I'll wait to hear from the court."

11. On April 19, 2021, a Response to Petition was filed by Mr. Lewis on behalf of Respondent alleging that the Muckleshoot Tribal Court lacked jurisdiction over the family home, personal jurisdiction over the husband, subject matter jurisdiction over the marriage, and in rem jurisdiction over the family home.

12. A hearing was held on April 22, 2021 resulting in an Order Re Mediation, Court Review dated April 23, 2021 and attorney representation of Petitioner. This hearing was attended in person by Petitioner, Respondent appearing by telephone, and Mr. Lewis appearing by telephone.

13. On April 23, 2021 Respondent in this action filed a Petition for Dissolution of the marriage in King County Superior Court.

14. The Order re Mediation. Court Review and Attorney Representation dated April 23, 2021 struck the mediation, the review set for May 10, 2021. setting a hearing for June 15, 2021 with the only issue being if Petitioner is going to have attorney representation, and that the further course of the case will be determined at the June 15, 2021 hearing.

15. On May 11, 2021 Emily Schultz filed a Notice of Appearance for Petitioner.

16. On June 1, 2021, Respondent filed a Motion to Dismiss for lack of jurisdiction over Respondent, in rem jurisdiction over the property, and subject matter jurisdiction over the marriage.

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17. On June 25. 2021 Petitioner filed a Response to Motion to Dismiss.

18. On July 6, 2021, Respondent filed a Memo in Response to Motion to Dismiss for Lack of Jurisdiction.

19. A hearing was held on the Motion to Dismiss by Respondent on July 19, 2021.

MTC0147–48 (Tribal Court Order at 1–2).

On August 30, 2021, the Tribal Court denied Mr. Turpen's motion to dismiss for lack of jurisdiction. MTC00147–50. Mr. Turpen appealed that denial to the Muckleshoot Court of Appeals on September 8, 2021. MCA0005–07. The Court of Appeals denied Mr. Turpen's appeal on April 7, 2022. MCA0079–82.

Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the case's outcome. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if there is enough evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* at 49. At this stage, evidence must be viewed in the light most favorable to the nonmoving party, and all justifiable inferences must be drawn in the nonmovant's favor. *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011).

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Argument

A. The Muckleshoot Tribal Courts have jurisdiction over the Turpens' dissolution of marriage proceeding.

Muckleshoot has jurisdiction over the subject divorce proceeding under its inherent, retained sovereign powers. Since its inception, the United States has treated Indian tribes as sovereign entities. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The Indian nations ha[ve] always been considered as distinct, independent political communities[.]"); *see also* U.S. Const. art. I, § 8 (Tribes are sovereigns with which Congress may regulate commerce.). Tribes "remain separate sovereigns pre-existing the Constitution," and continue to "exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). Indeed, tribes retain all attributes of sovereignty that have not been "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

"As the Supreme Court has repeatedly explained, the powers of tribes extend over not only their territory but also their members[.]" *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1256 (10th Cir. 2001) (citing *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) ("Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory' . . . .")); *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); *Sidney v. Zah*, 718 F.2d 1453, 1456 (9th Cir. 1983) ("Membership is . . . another aspect of tribal sovereignty which exists separate and apart from the territorial jurisdiction of the tribe."). The Ninth

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Circuit has made "clear that any allocative significance that exists in the concept of Indian country" as a limit on tribal jurisdiction "pertains to a tribe's territorial power over its land, not its members." *John v. Baker*, 982 P.2d 738, 757 (Alaska 1999). Thus, in determining whether tribes retain a sovereign power, "the United States Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of events," and federal law provides "the premise that tribal sovereignty with respect to issues of tribal self-governance exists unless divested." *Id.* at 752. There has been no divestment of tribal self-governance here.

The Muckleshoot Tribal Courts were correct in finding that they possessed jurisdiction over the subject divorce proceeding: first, because Muckleshoot has jurisdiction over its member, Mrs. Turpen, it has jurisdiction over the dissolution of marriage proceeding; and second, due to his contacts and relationship with the Tribe, it has jurisdiction over Plaintiff.

1. *Tribal courts have jurisdiction to dissolve the marriage of a tribal member regardless of where that member resides or where she married.*

The Muckleshoot Tribal Court's assertion of jurisdiction over the dissolution proceeding was authorized by the applicable tribal law. *See* Doc. 46 at 3–5. Under Muckleshoot law, "[t]he Tribal Court has jurisdiction to dissolve a marriage if one party is a member of the Muckleshoot Indian Tribe. The Court retains jurisdiction to resolve matters pertaining to the dissolution." Muckleshoot Tribal Code 14.01.030; Second Decl. Crable (Doc. 46-1 at 9). There is no domicile requirement.

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As Plaintiff argued in his motion, a dissolution of marriage proceeding in state court "a proceeding for dissolution of marriage, or change of marital status, is a proceeding in rem." Doc. 45 at 6. A proceeding in rem may proceed even if the court lacks personal jurisdiction over a party. For example, a "bankruptcy court's 'jurisdiction is premised on the res, not on the persona'"; its "in rem jurisdiction 'allows it to adjudicate the debtor's discharge claim without in personam jurisdiction over the State.'" *United States v. Obaid*, 971 F.3d 1095, 1100–01 (9th Cir. 2020) (quoting *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450, 453 (2004)). "This conclusion follows because in an in rem action, 'jurisdiction over the person is irrelevant if the court has jurisdiction over the property." *Id.* The same is true in admiralty proceedings. *Id.* at 440.

Because of the in rem nature of divorces, state courts have jurisdiction to hear dissolution proceedings involving a spouse over which the court does not have personal jurisdiction, and they regularly assert that jurisdiction. *See, e.g.*, *Hudson v. Hudson*, 670 P.2d 287, 293 (Wash. Ct. App. 1983) (Finding Indiana state courts had jurisdiction to dissolve marriage despite lacking personal jurisdiction over one party, but lacked jurisdiction to settle the "incidences of marriage."); *In re Marriage of Rinderknecht*, 367 N.E.2d 1128, 1134, 1137 (Ind. Ct. App. 1977) (same); *In re Marriage of Vavra*, 776 N.W.2d 111 (Iowa Ct. App. 2009).[6] State court jurisdiction over these in rem proceedings is rooted in the residency of the petitioning party.

[6] In finding a lack of jurisdiction to settle the "incidences of marriage," *Hudson* and *Rinderknecht* both rely heavily on *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977). The reasoning and extent of the holding in *Shaffer* has been questioned and distinguished in more recent cases. *See, e.g.*, *Obaid*, 971 F.3d at 1100–03.

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While state court power is typically territorial, a tribal court's jurisdiction may extend to tribal members not domiciled on the reservation. *See, e.g., Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001); *supra* Argument A. The Tribe has determined that it is in its interest to provide a forum for its tribal members to seek a dissolution of marriage in the Tribe's court system. Under Muckleshoot law, "[t]he Tribal Court has jurisdiction to dissolve a marriage if one party is a member of the Muckleshoot Indian Tribe. The Court retains jurisdiction to resolve matters pertaining to the dissolution." Muckleshoot Tribal Code 14.01.030; Second Decl. Crable (Doc. 46-1 at 9). There is no domicile requirement. The Supreme Court has explained that:

> [t]he marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [sic] commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.

Williams v. North Carolina, 317 U.S. 287, 298–99 (1942). While a state's interest in the marriage of a nonresident may be limited, especially vis-à-vis the interest of other states, a tribe's interest in its members is not so limited. The Muckleshoot Indian Tribe, in the Domestic Relations chapter of its code, found that:

> . . . as a sovereign native nation, the Tribe's inherent authority to decide matters relating to family relations is an integral part of Tribal self-governance and of the Tribe's history and culture. It is exceedingly important to the Tribe to ensure the safety and vitality of families because doing so promotes the safety and vitality of the Tribe itself.

Muckleshoot Tribal Code 14.01.020; Second Decl. Crable (Doc. 46-1 at 8).

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The Ninth Circuit has recognized a tribal court's power to hear a dissolution of marriage proceeding involving a nonmember where the both spouses lived on that tribe's reservation. *See Sanders v. Robinson*, 864 F.2d 630, 634 (9th Cir. 1988). But whether a tribal court has jurisdiction over a dissolution proceeding involving nonresidents has not been answered by the Circuit Court. There are, however, cases that are instructive, including several from Alaska.

As a result of the history of Alaska, where the Alaska Native Claims Settlement Act "extinguished all Native claims to land in Alaska and revoked all but one Indian reservation in the state," the courts of Alaska "have had to examine the inherent, non-territorial sovereignty of Indian tribes, a question of federal law that other courts have not had occasion to tease apart." *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 262 (Alaska 2016) (internal quotation marks omitted) (*Central Council*). *Central Council*, a case that found tribal courts have jurisdiction over child support matters related to a tribal member child regardless of the residence and tribal status of the parents, addresses the non-territorial jurisdiction of tribes at substantial length, and is analogous to this case.[7]

In *Central Council*, the Court explained that the Alaska courts, in considering the "non-territorial subject matter jurisdiction" of tribal courts,

> have implicitly recognized two separate dimensions of this jurisdiction. Both dimensions reflect our understanding that inherent, non-territorial subject matter jurisdiction derives from "a tribe's ability to retain fundamental powers of self-governance." The first dimension of

[7] The *Central Council* court found support in several other decisions from both the federal and state courts of Alaska, including: *Kaltag Tribal Council v. Jackson*, No. 3:06-CV-211 TMB, 2008 WL 9434481 (D. Alaska Feb. 22, 2008), aff'd, 344 F. App'x 324 (9th Cir. 2009); *Simmonds v. Parks*, 329 P.3d 995, 999 (Alaska 2014); and *John v. Baker*, 982 P.2d 738 (Alaska 1999).

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> this jurisdiction relates to the character of the legal question that the tribal court seeks to decide, while the second relates to the categories of individuals and families who might properly be brought before the tribal court.

Central Council, 371 P.3d at 262 (citing *John v. Baker*, 982 P.2d 738, 758 (Alaska 1999)). "[I]n determining whether tribes retain their sovereign powers, the United States Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of events." *Id.* The court noted that child support orders are: part of the "inherent power of tribes to conduct internal self-governance functions," and a "family law matter integral to tribal self-governance [that] is part of the set of core sovereign powers that tribes retain." *Id.* at 265.

Central Council then held "[b]ecause child support jurisdiction is tied to a tribe's inherent sovereignty, *Montana v. United States* does not apply." *Id.* at 268. It noted that the U.S. Supreme Court "has repeatedly and explicitly emphasized the context-bound nature of each of its rulings on tribal court civil jurisdiction," and then discussed *Montana* at length.[8] *Id.* at 269. It concluded that the limitations on tribal jurisdiction over nonmembers provided in *Montana* and subsequent cases apply only to the exercise of the tribe's territorial jurisdiction, and thus are not applicable to assertions of a tribe's membership-based jurisdiction. *Id.* at 271–72.

Lastly, the *Central Council* court held that even if *Montana* applied, the tribal court would still have jurisdiction over non-member parents of tribal member

[8] *Montana v. United States*, held that the Crow Tribe did not have jurisdiction to regulate the hunting and fishing of those who were not members of the tribe when conducted on land not owned by the tribe. 450 U.S. 544, 564 (1981). It provided two "exceptions" for when the activities of nonmembers could be subject to tribal territorial jurisdiction. *Id.* at 566.

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children because such jurisdiction would fall within both *Montana* exceptions. *Id.* at 272–75. The first exception would be met because a non-member parent would have necessarily entered into a significant consensual relationship with the tribe or one of its members. *Id.* at 272–73. The second exception would be met because the "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 273–75.

It is important to note that *Central Council* did not involve any one non-member parent, but rather the tribal court's power over any non-member parent regardless of his or her specific contacts with the tribe—the mere relationship with a tribal member child was sufficient to meet both *Montana* exceptions. Here Mr. Turpen's relationship with Muckleshoot is substantially greater than simply being the spouse of a member. *See supra* Facts. He at one time lived in tribally owned housing on the Reservation, then lived in tribally owned housing off the Reservation at the time of the marriage, and he and Mrs. Turpen entered into numerous agreements with the Tribe to gain funding to purchase their home, including: a Declaration of Restrictive Covenant, a Muckleshoot Home Loan Program Deed of Trust, a Muckleshoot Tax Fund Housing Assistance Program Grant Agreement and Promisor Note, and a Muckleshoot Housing Assistance Program Subordinate Deed of Trust. *Id.* He also was employed by the Tribe for approximately a decade. *Id.* Mr. Turpen's contacts with the Tribe have been extensive and long-lasting—indeed his obligations and benefits under the home loan agreements continue to this day. *Id.*

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While *Central Council* addresses a tribal court's power to order child support obligations on non-member parents, dissolution proceedings are of the same kind. The ability to dissolve the marriage of a tribal member and enter related orders (e.g., orders of protection) is also of critical importance to a tribe's ability to self-govern and protect core tribal interests (the health and safety of its members). This is precisely what Muckleshoot explains in its Domestic Relations Code:

> . . . as a sovereign native nation, the Tribe's inherent authority to decide matters relating to family relations is an integral part of Tribal self-governance and of the Tribe's history and culture. It is exceedingly important to the Tribe to ensure the safety and vitality of families because doing so promotes the safety and vitality of the Tribe itself.

Muckleshoot Tribal Code 14.01.020; Second Decl. Crable (Doc. 46-1 at 8).

For the reasons stated above, Muckleshoot has membership-based jurisdiction to dissolve the marriage of one of its members.[9] The Tribe does indeed have an interest in the marital status of its members regardless of domicile, interests not typically afforded states. For these reasons, and those explained above, the Tribal Court has jurisdiction over the dissolution proceeding, and summary judgment should be granted to Defendants.[10]

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[9] In the event Mr. Turpen believes he were treated unfairly by the Tribal Court, he would still have some recourse under Washington Superior Court Rule 82.5 (which provides a mechanism for the state courts to provide "full faith and credit" to tribal court orders *if* the tribal court has jurisdiction, and due process has been provided. In fact, the Muckleshoot Court of Appeals, in its decision, recognized that Plaintiff had later filed for divorce in the state courts, and "encouraged" the parties to seek a conference between the state and tribal courts, as provided for in Rule 82.5, "as soon as possible to settle any remaining jurisdictional issues between the two courts." MCA0079–82; Second Decl. Trent Crable (46-1 at 23 n.3). Plaintiff instead opted to file this lawsuit.

[10] Defendants do not claim that the Tribal Court's powers in a dissolution proceeding are unlimited as to a nonmember spouse.

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B. Further, Judicial Immunity bars Plaintiff's claims against the Defendant Tribal Court Judges.

Plaintiff's claims against the Defendant Tribal Court Judges, to the extent such claims are raised by his complaint, are barred by judicial immunity. Plaintiff has not and cannot overcome that immunity because the actions he objects to are unquestionably judicial acts that were not taken in the clear absence of all subject matter jurisdiction. Thus, the Defendant Tribal Court Judges are entitled to judgment as a matter of law and any and all claims against the Defendant Tribal Court Judges should be dismissed with prejudice.

It is well established that judges, including tribal court judges, are absolutely immune from liability for "their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v. Sparkman*, 435 U.S. 349, 356 (1978): *Sadoski v. Mosely*, 435 F.3d 106, 1079 (9th Cir. 2006); *Acres Bonusing, Inc., v. Marston*, 17 F.4th 901, 915 (9th Cir 2021), cert. denied sub nom. *Acres Bonusing, Inc. v. Martson*, 213 L.Ed. 2d 1065, 142 S.Ct. 2836 (2022) (citing *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003); Charles A. Wright, Arthur R. Miller & Richard D. Freer, 13D Fed. Prac. & Proc. Juris. § 3579 (3d ed., Apr. 2021 Update); William C. Canby., Jr., American Indian Law in a Nutshell 77 (7th ed. 2020); *Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992); *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976)).

Judicial immunity is overcome in two circumstances. The first is when a judge takes nonjudicial actions. Here, all of the Defendant Tribal Court Judges' acts complained of by the Plaintiff are unquestionably judicial acts. Doc. 1 at 5–8.

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The second circumstance where judicial immunity is overcome is when the judge's action is taken in "clear absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12 (1991); *Ashelman v. Poe*, 793 F.2d 1072 (9th Cir. 1986). The scope of a judge's jurisdiction is broadly construed because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction." *Stump*, 435 U.S. at 356 (quoting *Bradly v. Fisher*, 80 U.S. 335 (1871)). The focus of the analysis is whether the judge was acting clearly beyond the scope of subject matter jurisdiction. *Ashelman*, 793 F.2d at 1076.

The Supreme Court has provided the following illustration:

> if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump, 435 U.S. at 357 n.7. The Ninth Circuit explained that judicial immunity is lost "when a judge knows that he lacks jurisdiction or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction." *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980), overruled on other grounds by *Ashelman v. Pope*, 793 F.3d 1072 (9th Cir. 1986).

The Ninth Circuit provided additional guidance in *O'neil v. City of Lake Oswego*, explaining that a court that does not comply with all of the requirements of a

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statute conferring jurisdiction because of a mistake has discharged its authority imperfectly. 642 F.2d 367, 369–70 (1981). There, the defendant judge had mistaken the bench warrant for a charge of contempt of court and entered a guilty finding without the statutorily required affidavit. *Id.* The Ninth Circuit concluded that the defendant judge had merely acted in excess of jurisdiction and was entitled to judicial immunity. *Id.* at 368–69.

Plaintiff has not and cannot meet the high burden to overcome judicial immunity. First, as discussed at A, *supra*, the Muckleshoot Tribal Court has jurisdiction over the dissolution proceeding between the Plaintiff and Mrs. Turpen.

Second, even if this Court disagrees regarding Muckleshoot Tribal Court's jurisdiction, judicial immunity would still bar the claims against the Defendant Tribal Court Judges. The Defendant Tribal Court Judges applied federal law regarding tribal jurisdiction over nonmembers. Like in *O'Neil*, it would be an imperfect application of the complex body of law governing tribal jurisdiction. *Cnty. of Lewis v. Allen*, 163 F.3d 509, 513 (9th Cir. 1998) (Tribal jurisdictional disputes are "[t]he most complex problems in the field of Indian Law."); *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 849 (9th Cir. 2009) ("We have held repeatedly that determining the scope of tribal court jurisdiction is not an easy task."). Defendant Tribal Court Judges' actions would be akin to a criminal court convicting a defendant of a nonexistent crime rather than a probate judge trying a criminal case because tribes do have jurisdiction over nonmembers in some circumstances.

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Plaintiff cannot meet his burden to overcome judicial immunity. Judicial immunity bars all claims against the Defendant Tribal Court Judges, and as such Defendant Tribal Court Judges are entitled to judgment as a matter of law.

CONCLUSION

For the reasons explained above, Plaintiff's motion for summary judgment should be denied.

Respectfully submitted, this 7th day of April, 2023.

I certify that this memorandum contains 5,535 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

I certify that on April 7, 2023, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon all parties registered to receive such notice.

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