APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEXINGTON INSURANCE COMPANY, a Delaware corporation, Plaintiff-Appellant / Cross-Appellee, v. MARTIN A. MUELLER, in his official capacity as Judge for the Cabazon Reservation Court; DOUG WELMAS, Defendants-Appellees / Cross-Appellants.	Nos. 23-55144, 23-55193 D.C. No. 5:22-cv-00015-JWH-KK MEMORANDUM* Dec. 6, 2024

Appeal from the United States District Court
for the Central District of California
John W. Holcomb, District Judge, Presiding

Argued and Submitted February 16, 2024
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BOGGS,** NGUYEN, and LEE, Circuit Judges.

Plaintiff Lexington Insurance Company and defendants Judges Martin Mueller and Doug Welmas cross-appeal the district court's dismissal and summary-judgment decisions. Lexington insures businesses run by the Cabazon Band of Cahuilla Indians, a federally recognized Native American tribe. The Cabazon Band temporarily closed businesses during the COVID-19 pandemic. It submitted an insurance claim for these financial losses, but Lexington denied coverage. The Cabazon Band sued Lexington in the Cabazon Reservation Court. Lexington then sued defendants, who are Reservation Court judges,[1] in federal district court for declaratory and injunctive relief against their continued exercise of jurisdiction over the Cabazon Band's claims. The district court granted in part and denied in part the defendants' motion to dismiss, granted the defendants' summary-judgment motion, and denied Lexington's summary-judgment motion. Both sides cross-appealed. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We first address whether *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), forecloses Lexington's standing to sue the defendants for injunctive relief in federal court. The answer is no. Admittedly, there is some tension between *Whole Woman's Health* and our precedents allowing tribal judges to be sued under *Ex*

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

[1] Judge Mueller presided over the action in the Reservation Court. Judge Welmas is the Reservation Court's Chief Judge and oversees the court's administration.

parte Young, 209 U.S. 123 (1908). Article III grants federal courts "the power to resolve only 'actual controversies arising between adverse litigants,'" *Whole Woman's Health*, 595 U.S. at 39 (quoting *Muskrat v. United States*, 219 U.S. 346, 361 (1911)), but judges are not adverse to the parties whose cases they decide, *id.* at 40. At first blush, it is not clear why this rationale would not apply to tribal judges.

We are bound by circuit precedent because it is not "clearly irreconcilable" with *Whole Woman's Health*. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). This is a high bar, and we must apply our prior circuit precedent if we can do so without "'running afoul' of the intervening authority." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012)). Such is true here. *Whole Woman's Health* involved only a suit against state-court judges (not a suit against tribal-court judges) and an attack only against a statute's constitutionality (not an attack on the jurisdiction of a judge's court). And *Whole Woman's Health* itself recognized the possibility that its rationale does not foreclose *Ex parte Young* actions when a plaintiff seeks "an injunction only to prevent the judge from enforcing a rule of her own creation," rather than statutory law. *Whole Woman's Health*, 595 U.S. at 42. Thus, *Whole Woman's Health* is not clearly irreconcilable with our circuit's longstanding recognition that the remedy to contest tribal-court jurisdiction is to seek prospective injunctive relief against a tribal-court judge. *See, e.g.*, *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 857, 861 (9th Cir. 1986); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012).

We review de novo the district court's determination of tribal-court jurisdiction, *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc), its decision to grant a motion to dismiss, *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019), and its decision to grant summary judgment, *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1104 (9th Cir. 2016). We may affirm the district court's judgment on any ground supported by the record. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014).

This case is squarely addressed by this court's decision in *Lexington Insurance Co. v. Smith*, 94 F.4th 870 (9th Cir. 2024), *reh'g en banc denied*, 2024 WL 4195334 (9th Cir. Sept. 16, 2024). We concluded in *Smith*—on facts indistinguishable from the facts in this case—that a tribal court had jurisdiction to hear a tribe's insurance claims against Lexington. *Smith* concerned an insurance-contract suit brought by the Suquamish Tribe and its businesses against Lexington. *Id.* at 876. Like the Cabazon Band, the Suquamish Tribe ran businesses that were insured by Lexington and temporarily closed during the pandemic. *Id.* at 876–77. The Suquamish Tribe filed insurance claims, which Lexington contended might not be covered. *Id.* at 877. As a result, they sued Lexington in Suquamish Tribal Court. *Id.* After Lexington's motion to dismiss was rejected by the Suquamish Tribal Court and Suquamish Tribal Court of Appeals, Lexington sued the tribal-court judges in district court and argued that the Suquamish Tribal Court lacked jurisdiction. *Id.* at 878. The district court ruled against Lexington, who then appealed to this court. *Id.*

On appeal, we "conclude[d] that Lexington's conduct occurred not only on the reservation, but on tribal lands." *Id.* at 880. We emphasized that "a tribe has regulatory jurisdiction over a nonmember who 'enters tribal lands *or conducts business with the tribe*.'" *Id.* at 881 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982)). We then "easily conclude[d] that Lexington's business relationship with the Tribe satisfies the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation and triggering the presumption of jurisdiction." *Id.* at 882. We also determined that "Lexington's insurance contract with the Tribe squarely satisfies [the] consensual-relationship exception" from *Montana v. United States*, 450 U.S. 544, 565 (1981), to tribal lack of jurisdiction over nonmembers due to Lexington's relationship with the tribe through commercial dealing. *Smith*, 94 F.4th at 883–84.

For the same reasons, we conclude here that the Reservation Court has jurisdiction. We affirm the district court, albeit on the alternative ground that Lexington's insurance contract with the Cabazon Band satisfies *Montana*'s consensual-relationship exception.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

LEXINGTON INSURANCE COMPANY, a Delaware corporation, *Plaintiff*, v. MARTIN A. MUELLER, in his official capacity as Judge for the Cabazon Reservation Court; and DOUG WELMAS, in his official capacity as Chief Judge of the Cabazon Reservation Court, *Defendants.*	Case No. 5:22-cv-00015-JWH-KK ORDER ON DEFENDANTS' MOTION TO DISMISS [ECF No. 33] and PLAINTIFF AND DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT [ECF Nos. 39 & 40] Feb. 3, 2023

This case calls for the application of federal Indian law to an insurance coverage action. No material dispute of fact exists, so this case is ripe for resolution on summary judgment. The parties acknowledge as much; they have helpfully filed mirror-image cross-motions. After reviewing the parties' respective well-drafted papers and considering the argument of counsel at the hearing on September 2, 2022, the Court concludes that the Tribal Court is the appropriate forum to decide the underlying insurance coverage dispute.

I. BACKGROUND

The Cabazon Band of Cahuilla Indians (the "Tribe") is a federally recognized Native American tribe and is the beneficial owner of the Cabazon Indian Reservation (the "Reservation"), which is near Indio, California. The Tribe owns and operates the Fantasy Springs Resort Casino, which is located within the Reservation. The Tribe purchased property insurance through a nationwide program known as the Tribal Property Insurance Program ("TPIP"). TPIP is maintained and administered by a service called "Tribal First," which is a trade name used by non-party and non-tribal member Alliant Insurance Services, Inc. Through TPIP, the Tribe purchased multiple property insurance policies from Plaintiff Lexington Insurance Company. When the Tribe purchased those policies, it worked with Alliant exclusively.

In 2020, the Tribe sued Lexington in Tribal Court—the Cabazon Reservation Court—after Lexington denied one of the Tribe's insurance claims. The Tribal Court held that it possessed jurisdiction over the Tribe's dispute with Lexington. Lexington commenced the instant action to challenge the Tribal Court's exercise of jurisdiction over it. Specifically, Lexington asserts claims for relief against two Tribal Court judges: Judge Martin A. Mueller and Chief Judge Doug Welmas (jointly, "Defendants").

Presently before the Court are three motions:

- Defendants' Motion to Dismiss Lexington's Amended Complaint;[1]

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[1] Defs.' Mot. to Dismiss (the "Motion to Dismiss") [ECF No. 33].

- Defendants' Motion for Summary Judgment;[2] and
- Lexington's Motion for Summary Judgment.[3]

After considering the papers filed in support and in opposition,[4] the Court orders that the Motion to Dismiss is **GRANTED-in-part** and **DENIED-in-part**, Defendants' motion for summary judgment is **GRANTED**, and Lexington's motion for summary judgment is **DENIED**, for the reasons set forth herein.

A. Procedural History

Lexington commenced this action in January 2022,[5] and it filed its operative Amended Complaint three months later. Defendants filed their Motion to Dismiss shortly thereafter. A month later, in June 2022, the parties filed their instant cross-motions for

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[2] Defs.' Mot. for Summ. J. (the "Defendants' MSJ") [ECF No. 39]

[3] Pl.'s Mot. for Summ. J. (the "Lexington's MSJ") [ECF No. 40].

[4] The Court considered the documents of record in this case, including the following: (1) First Am. Compl. (the "Amended Complaint") (and its attachments) [ECF No. 19]; (2) the Motion to Dismiss (and its attachments); (3) Pl.'s Opp'n to the Motion to Dismiss (the "MTD Opposition") [ECF No. 36]; (4) Defs.' Reply in Supp. of the Motion to Dismiss [ECF No. 38]; (5) Defendants' MSJ (and its attachments); (6) Pl.'s Opp'n to Defendants' MSJ ("Lexington's MSJ Opposition") [ECF No. 45]; (7) Defs.' Reply in Supp. of Defendants' MSJ [ECF No. 47]; (8) Lexington's MSJ; (9) Defs.' Opp'n to Lexington's MSJ [ECF No. 44]; (10) Pl.'s Reply in Supp. of Lexington's MSJ [ECF No. 46]; (11) Jt. Statement of Undisputed Facts and Genuine Disputes (the "Joint Statement") [ECF No. 41]; and (12) Jt. Ex. in Supp. of the Parties' Cross-Motions for Summ. J. (the "Joint Exhibit") [ECF No. 39-2].

[5] *See* Compl. [ECF No. 1].

summary judgment. All three motions are fully briefed.

B. Facts

1. TPIP

As mentioned above, "Tribal First" is a trade name used by non-party and non-tribal member Alliant Insurance Services, Inc.[6] Lexington, which is likewise not a member of the Tribe, participates in TPIP by providing insurance and underwriting services.[7] Under TPIP, the Tribe purchased multiple Lexington-issued property insurance policies (the "Lexington Policies").[8] The Tribe did not purchase those policies from Lexington directly; instead, it purchased them through Alliant.[9] In the course of buying the Lexington Policies, the Tribe never dealt with Lexington employees, and no Lexington employee ever set foot on the Reservation to conduct Lexington company business.[10] The Tribe obtained the Lexington Policies based upon underwriting guidelines established between Alliant and Lexington.[11] Moreover, Alliant (not Lexington): (1) processed the Tribe's submissions for insurance; (2) collected premiums from the Tribe and remitted those premiums to Lexington; (3) prepared and provided quotes, cover notes, policy documentation, and evidence of insurance to the Tribe; and

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[6] Amended Complaint ¶¶ 32 & 39.

[7] *Id*. at ¶¶ 33.

[8] *Id.* at ¶ 34.

[9] *Id.* at ¶¶ 35-36.

[10] *Id*. at ¶ 51.

[11] *Id.* at ¶ 17.

(4) developed and maintained the Tribe's underwriting file.[12]

2. The Master Policy

The Lexington Policies that are relevant to the instant action covered the policy period from July 2019 to July 2020.[13] For that policy period, each Lexington Policy at issue incorporates a master policy form that sets forth the terms, conditions, and exclusions of coverage applicable to the Tribe (the "Master Policy").[14] Copies of that Master Policy were prepared by Alliant.[15] Similarly, Alliant provided the Tribe with copies of that Master Policy.[16]

The Master Policy's "Service of Suit (U.S.A.)" provision recites that the parties agree that:

> in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the

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[12] *Id.* at ¶¶ 32-35.

[13] *Id.* at ¶ 34.

[14] *Id.* at ¶ 39.

[15] *Id.* at ¶ 44.

[16] *Id.* at ¶ 45.

> United States. It is further agreed that . . . Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.[17]

The Lexington Policies do not have a choice-of-law provision,[18] nor does the Master Policy explicitly name any TPIP insurer or insured, including Lexington and the Tribe.[19] Instead, the Master Policy states that the "Named Insured" is "shown on the Declaration page, or as listed in the Declaration Schedule Addendum attached to this policy."[20]

Alliant prepared and provided the declaration pages associated with the Lexington Policies.[21] In each of those declaration pages, the "Named Insured" is identified as "All Entities listed as Named Insureds on file with [Alliant]."[22] Meanwhile, the declaration pages identify Lexington as the Insurer.[23]

Alliant prepared and transmitted "Evidence of Coverage" documents to the Tribe.[24] Those documents are printed on "Tribal First Alliant Underwriting Solutions" letterhead, and they are signed by an Alliant executive.[25]

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[17] *Id.* at ¶ 42, *see also id.*, Ex. A, Tribal First Policy Wording ("Exhibit A") [ECF No. 19-1] 39-40.

[18] *Id.* at ¶ 41.

[19] *Id.* at ¶¶ 43.

[20] *Id.* at ¶ 44.

[21] *Id.* at ¶ 45.

[22] *Id*.

[23] *Id*.

[24] *Id.* at ¶ 46.

[25] *Id*.

3. The Tribal Court Action

In March 2020, the Tribe suspended some of its business operations in response to the COVID-19 pandemic.[26] That same month, the Tribe submitted a claim for business interruption losses to Tribal First.[27] Shortly thereafter, Alliant transmitted the Tribe's insurance claim to Lexington.[28] In response, Lexington's claims adjustor investigated the Tribe's claim.[29] One month later, Lexington issued a letter to the Tribe denying coverage.[30] The decision to deny coverage was made by Lexington.[31]

In response to the denial of coverage, the Tribe sued Lexington in the Cabazon Reservation Court.[32] In that lawsuit (the "Tribal Court Action"), the Tribe accused Lexington of breach of contract and of violating the implied covenant of good faith and fair dealing.[33] Defendant Judge Martin A. Mueller presides over the Tribal Court Action, and Defendant Chief Judge Doug Welmas oversees the administration of the Tribal Court.[34]

In early 2021, Lexington made a limited special appearance and moved to dismiss the Tribal Court Ac-

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[26] *Id.* at ¶ 47.

[27] *Id.* at ¶ 48.

[28] *Id.* at ¶ 49.

[29] *Id.* at ¶ 51.

[30] *Id.*

[31] *Id*.

[32] *Id.* at ¶ 54.

[33] *Id.* at ¶ 57.

[34] *Id.* at ¶56.

tion for lack of subject matter and personal jurisdiction, under tribal law and federal law.[35] Two months later, after full briefing and oral argument, Judge Mueller denied Lexington's motion.[36] The next month, Lexington appealed Judge Mueller's decision to the Tribal Court of Appeals.[37] In late 2021, again after full briefing and oral argument, a three-judge panel of the Tribal Court of Appeals affirmed Judge Mueller's order.[38] In November 2021, the Tribal Court issued a minute order in response to the Tribal Court of Appeals decision, lifting the stay on the Tribal Court action.[39] The Tribal Court Action remains pending, and the Tribal Court continues to assert jurisdiction over Lexington.[40]

4. Lexington's Relationship with the Tribe and the Reservation

When the Tribe purchased insurance coverage, it never dealt with Lexington directly.[41] Similarly, no Lexington employee has conducted Lexington-related business on Tribal land.[42] Nevertheless, the parties agree that under the Lexington Policies, Lexington was the insurer and the Tribe was the insured.[43] The parties also agree that under the Lexington Policies, Lexington is required to provide coverage to the Tribe

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[35] *Id.* at ¶ 60.

[36] *Id.* at ¶ 61.

[37] *Id.* at ¶ 62.

[38] *Id.* at ¶ 65.

[39] *Id*. at ¶ 66.

[40] *Id*. at ¶ 67.

[41] *Id.* at ¶ 11.

[42] *Id.* at ¶ 10.

[43] *Id.* at ¶¶ 34-36.

when the relevant terms, conditions, limitations, and exclusions of coverage have been satisfied under the Master Policy and any relevant endorsement.[44]

Subject to their terms, conditions, limitations, and exclusions of coverage, the Lexington Policies insure certain assets owned by the Tribe, including the Fantasy Springs Resort Casino and other property on the Reservation. The Lexington Policies insure against "all risk of direct physical loss or damage" to the covered property.[45] The Tribe's insurance claim was based upon losses allegedly suffered by a Tribe-owned business located on the Reservation.[46] Lexington acknowledges that it issued the Lexington Policies through TPIP to the Tribe and that those policies provide coverage for certain property owned by the Tribe, including property located on the Reservation subject to the policies' terms, conditions, limitations, and exclusions of coverage.[47]

II. LEGAL STANDARD

A. Rule 12(b)(1)—Motion to Dismiss for Lack of Standing

As the party seeking to invoke the federal court's jurisdiction, the plaintiff has the burden of alleging specific facts sufficient to prove Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). When the plaintiff may lack standing, Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for dismissal based upon lack of subject matter jurisdiction. The plaintiff bears the

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[44] *Id.* at ¶ 39.

[45] *Id.* at ¶ 45, *see also* Exhibit A 24.

[46] *Id.* at ¶ 47.

[47] *Id.* at ¶ 33.

burden of demonstrating standing "for each claim" and "for each form of relief" that it seeks. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 352 (2006) (internal citations and quotations omitted). The court should dismiss an action when the face of the complaint does not demonstrate a basis for standing. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); Fed. R. Civ. P. 8(a) & 12(b)(1).

"Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A ***facial*** attack accepts the plaintiff's allegations as true but asserts that they "are insufficient on their face to invoke federal jurisdiction." *Id.* (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). The court resolves a facial attack "as it would a motion to dismiss under Rule 12(b)(6)": in accepting the plaintiff's allegations as true and drawing all reasonable inferences in her favor, the court determines "whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.*

By contrast, a ***factual*** attack contests "the truth of the plaintiff's factual allegations," typically by introducing evidence outside the pleadings. *Id.* "When the defendant raises a factual attack, the plaintiff must support her jurisdictional allegations with 'competent proof,' under the same evidentiary standard that governs in the summary judgment context." *Id.* (internal citation omitted). The plaintiff bears the burden of proving—by a preponderance of the evidence—that she meets each of the requirements for subject-matter jurisdiction, with one caveat: if the ex-

istence of jurisdiction turns on "disputed factual issues," then the court itself may resolve those factual disputes. *Id.*

B. Rule 12(b)(6)—Motion to Dismiss for Failure to State a Claim

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on a Rule 12(b)(6) motion, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002). Although a complaint attacked by a Rule 12(b)(6) motion "does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." *Twombly*, 550 U.S. at 555 (citations and footnote omitted). Accordingly, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," which means that a plaintiff must plead sufficient factual content to "allow[] the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A complaint must contain "well-

pleaded facts" from which the Court can "infer more than the mere possibility of misconduct." *Id.* at 679.

C. Rule 15(a)—Leave to Amend

A district court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a). The purpose underlying the liberal amendment policy is to "facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Therefore, leave to amend should be granted unless the Court determines "that the pleading could not possibly be cured by the allegation of other facts." *Id.* (quoting *Doe v. United States*, 8 F.3d 494, 497 (9th Cir. 1995)).

D. Rule 56—Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the non-moving party. *See Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). The substantive law determines the facts that are material. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Factual disputes that are "irrelevant or unnecessary" are not counted. *Id.* A dispute about a material fact is "genuine" "if the evidence is

such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Under this standard, the moving party has the initial burden of informing the court of the basis for its motion and identifying the portions of the pleadings and the record that it believes demonstrate the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. *See id.* at 325. Instead, the moving party need only prove there is an absence of evidence to support the nonmoving party's case. *See id.*; *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The party seeking summary judgment must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250.

If the moving party sustains its burden, the nonmoving party must then show that there is a genuine issue of material fact that must be resolved at trial. *See Celotex*, 477 U.S. at 324. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Oracle Corp. Sec. Litig.*, 627 F.3d at 387 (citing *Anderson*, 477 U.S. at 252). The non-moving party must make this showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. *See Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 252.

Furthermore, a party "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). "The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Advisory Committee Notes, 2010 Amendment, to Fed. R. Civ. P. 56. Reports and declarations in support of an opposition to summary judgment may be considered only if they comply with Rule 56(c), which requires that they "be made on personal knowledge, set forth facts that would be admissible evidence, and show affirmatively that the declarant is competent to testify to the matters stated therein." *Nadler v. Nature's Way Prod., LLC*, 2015 WL 12791504, at *1 (C.D. Cal. Jan. 30, 2015); *see also Loomis v. Cornish*, 836 F.3d 991, 996–97 (9th Cir. 2016) (noting that hearsay statements do not enter into the analysis on summary judgment).

III. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants move to dismiss Lexington's Amended Complaint under both Rule 12(b)(1) and Rule 12(b)(6). Defendants argue that: (1) the Court lacks subject matter jurisdiction over this action because there is no case or controversy between Lexington and Defendants; (2) prospective injunctive relief is not available to persons who are sued in their official capacity as judges; (3) the Tribe is a required party, but it cannot be joined to the case.

1. *Ex parte Young*, *Whole Women's Health*, and the Presence of a Case or Controversy

Defendants contend that under *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021), Defendants are not adverse to Lexington.[48] Therefore, Defendants argue, the Court must dismiss Lexington's Amended Complaint under Rule 12(b)(1) because Lexington fails to satisfy Article III's case or controversy requirement[49] Defendants then assert that the Court must dismiss the Amended Complaint under Rule 12(b)(6) because, absent an adverse defendant, Lexington fails to state a claim upon which relief may be granted.[50] In making that argument, Defendants rely again on *Whole Women's Health*.[51]

"The jurisdiction of federal courts depends on the existence of a 'case or controversy' under Article III of the Constitution." *GTE California, Inc. v. F.C.C.*, 39 F.3d 940, 945 (9th Cir. 1994). Defendants contend that Lexington fails to present a "case or controversy" because under the Supreme Court's holding in *Whole Women's Health*, tribal judges are not adverse to litigants in the cases over which they preside.[52] In *Whole Women's Health*, the Supreme Court observed that "[j]udges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation." *Whole Women's Health*, 142 S. Ct.

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[48] *See* Motion to Dismiss 4:4-5:22.

[49] *Id*.

[50] *Id.* at 7:1-10:6.

[51] *Id*.

[52] *Id.* at 4:5-16.

at 532. Therefore, "no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Id.* (quotation omitted).

Defendants also rely on *Grant v. Johnson*, 15 F.3d 146 (9th Cir. 1994), to support their argument that Lexington fails to present a "case or controversy" here.[53] In *Grant*, the Ninth Circuit observed that "one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute . . . . One typically does not sue the court or judges who are supposed to adjudicate the merits of the suit that the enforcement official may bring." *Id.* at 148.

Defendants acknowledge, however, that before the Supreme Court issued its opinion in *Whole Women's Health*, "it was not unheard of for federal courts to permit *Ex parte Young* actions against state and tribal court judges sued in their official capacity."[54] Thus, Defendants implicitly concede that until *Whole Women's Health* was decided, a plaintiff could sue a tribal judge and still satisfy Article III's case or controversy requirement. The question is, therefore, whether *Whole Women's Health* overruled existing precedent that allowed a plaintiff to commence an *Ex parte Young* action against a tribal judge.

More than a century ago, in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court "recognized a narrow exception" to the sovereign immunity doctrine "that allows certain private parties to seek judicial or-

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[53] *Id.* at 4:8-5:10.

[54] *Id.* at 8:14-16.

ders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Women's Health*, 142 S. Ct. at 532 (citing *Ex parte Young*, 209 U.S. at 159-60). Defendants do not dispute that until *Whole Women's Health*, the Ninth Circuit permitted a plaintiff to seek relief against tribal judges under *Ex parte Young* if that plaintiff sought "prospective injunctive relief against the tribal officers acting in their official capacities." *BNSF Ry. Co. v. Ray*, 297 F. App'x 675, 676 (9th Cir. 2008); *see also Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012) (permitting *Ex parte Young* action against tribal court judge).

Defendants aver that under *Whole Women's Health*, courts must no longer permit *Ex parte Young* actions against tribal judges.[55] Defendants make a powerful argument. *Whole Women's Health* involved a pre-enforcement challenge to a Texas law restricting the performance of abortions. *See Whole Women's Health*, 142 S. Ct. at 529-30. Alleging that the law violated the federal Constitution, the petitioners sought an injunction to prevent an array of defendants—including a state court judge and state court clerk—from taking steps to enforce the law. *Id.* at 530. Because the judge and clerk were surely state "officials," the petitioners argued that relief was available under *Ex parte Young*. *Id.* at 531–32. The Supreme Court rejected the petitioners' argument and instead held that *Ex parte Young* "does not normally permit federal courts to issue injunctions against state-court judges or clerks." *Id.* at 525. Indeed, the Supreme Court observed that "'an injunction against

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[55] *Id.* at 8:26-28.

a state court' or its 'machinery' 'would be a violation of the whole scheme of our Government.'" *Id.* at 532 (quoting *Ex parte Young*, 209 U.S. at 163). In addition, as noted above, the *Whole Women's Health* Court held that "no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Id.* (quotation omitted).

Defendants contend that *Whole Women's Health* applies not merely to state court judges, but also to tribal court judges. While that argument has merit, it falls short for one key reason: the Supreme Court does not address ***tribal*** judges in *Whole Women's Health*. Defendants try to sidestep that fact by highlighting the similarities between tribal courts and state courts.[56] In evaluating those arguments, this Court first "acknowledge[s] the long-standing rule that Indian tribes possess inherent sovereign powers," *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)), that are often comparable to the sovereign powers of states. Additionally, the Court must be "mindful of 'the federal policy of deference to tribal courts' and [mindful] that '[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts.'" *Id.* (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)). Thus, as tribal courts are the judicial instruments of a sovereign entity, there are substantial similarities between tribal courts and state courts. *See, e.g.*, *Acres Bonusing, Inc*

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[56] *Id.* at 10:12-22.

v. Marston, 17 F.4th 901, 915 (9th Cir. 2021), *cert. denied sub nom. Acres Bonusing, Inc. v. Martson*, 142 S. Ct. 2836 (2022) ("[judicial] immunity extends to tribal court judges . . .").

Neither party disputes, however, that until *Whole Women's Health* was decided, *Ex parte Young* actions were permitted against tribal judges. This Court is bound by that precedent unless "intervening Supreme Court authority is ***clearly irreconcilable*** with our prior circuit authority." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (emphasis added). Because the Supreme Court does not mention tribal courts in *Whole Women's Health*, the Court cannot now conclude that continuing to allow *Ex parte Young* actions against tribal (rather than state) judges is "clearly irreconcilable" with prior Ninth Circuit authority. Accordingly, Defendants' Motion to Dismiss is **DENIED** with respect to their arguments that depend upon *Whole Women's Health*.

2. Chief Judge Welmas

Defendants argue separately that Lexington lacks standing to sue Chief Judge Welmas.[57] To have standing to sue, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016) (citations omitted). "To establish redressability, a plaintiff must show that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *see*

[57] *See id.* at 5:23-6:26.

also Gonzales v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982) ("Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury.").

Here, Defendants contend that Lexington "lacks standing to sue Chief Judge Welmas because he cannot redress [Lexington's] injury even if this Court were to rule in Lexington's favor."[58] Lexington argues in its opposition that "Lexington's injury is traceable to the Chief Judge because he has the power to and did appoint Judge Mueller, who continues to exercise unlawful jurisdiction over Lexington."[59] Moreover, Lexington avers, if "Lexington prevails in this action, Lexington will seek injunctive relief against Chief Judge Welmas to prevent him from appointing any other judges to hear the tribal action against Lexington."[60] In making that argument, however, Lexington fails to invoke any authority suggesting that an *Ex parte Young* action against a chief judge can be sustained when that chief judge acts solely as an administrator.

Here, Chief Judge Welmas lacks the direct connection to the Tribal Court's exercise of jurisdiction over Lexington that an *Ex parte Young* action requires. "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Ex parte Young*, 209 U.S. at 157). That connection "must be fairly direct; a generalized

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[58] *Id.* at 6:6-7.

[59] MTD Opposition 9:19-21.

[60] *Id.* at 9:25-27.

duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Id.* (quotation omitted). Here, Chief Judge Welmas's general supervisory responsibilities over the Tribal Court are too attenuated from the enforcement of tribal jurisdiction to establish standing. Accordingly, Lexington's claims against Chief Judge Welmas are **DISMISSED**. Moreover, because Lexington had a full opportunity to brief whether it had standing to sue Chief Judge Welmas, and because it failed to persuade the Court, that dismissal is **without leave to amend**.

3. Required Parties

Defendants contend that the inability to join a required party—the Tribe—requires the Court to dismiss the Amended Complaint under Rule 19.[61] Defendants are wrong for the simple reason that the Ninth Circuit has addressed Defendants' argument in similar cases and has held that Rule 19 does not apply. *See, e.g.*, *Yellowstone Cnty. v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996); *Salt River Project*, 672 F.3d at 1177 ("the tribe is not a necessary party because the tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief can be accorded among the existing parties without the tribe"). Accordingly, Defendants' Motion to Dismiss is **DENIED** with respect to their Rule 19 argument.

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[61] Motion to Dismiss 13:18-19.

B. The Parties' Cross-Motions for Summary Judgment

The sole—and dispositive—issue here is whether "the exercise of tribal jurisdiction over nonmember Lexington by Defendants, as judicial officials for the [Tribe], is in violation of federal law."[62] Lexington and Defendants agree that summary judgment is appropriate—one way or the other—because there are no genuine disputes of material fact.[63] The Court concurs. *See Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 947 (9th Cir. 2000) (reviewing courts may resolve challenges to tribal court jurisdiction on summary judgment).

A reviewing court "review[s] de novo tribal courts' legal rulings on tribal jurisdiction . . . ." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 930 (9th Cir. 2019). At the same time, the reviewing court must "recognize[] that because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to some deference." *Id.*

1. Tribal Law

The Court must afford the Tribal Court "proper respect" "because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *see also Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) ("Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction.").

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[62] Lexington's MSJ 2:21-23.

[63] *See generally* Defendants' MSJ; Lexington's MSJ.

In upholding the Tribal Court's conclusion that it possesses subject matter jurisdiction, the Tribal Court of Appeals relied on the Cabazon Rules of Court, which provide as follows:

> Subject matter jurisdiction. The [Cabazon] Reservation Court shall have jurisdiction over . . . [a]ll civil causes of action arising within the exterior boundaries of the Cabazon Indian Reservation in which: . . . [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.[64]

At the same time, as Lexington observes in its opposition, the Cabazon Tribal Code limits jurisdiction to "any limitation imposed by the . . . Constitution of the United States." Cabazon Tribal Code § 9-102(a). Accordingly, the Court need not rule on whether the Tribal Court interpreted tribal law properly. Instead, the Court will determine whether the Tribal Court has subject matter jurisdiction and personal jurisdiction over Lexington under federal law.

2. Subject Matter Jurisdiction

"In considering the extent of a tribe's civil authority over non-Indians on tribal land, [the Court] first acknowledge[s] the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011). Generally, a tribe can have jurisdiction

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[64] Joint Exhibit 5-6.

over nonmembers based upon the tribe's right to exclude, or the applicability of the two "*Montana* exceptions." *See, e.g.*, *Grand Canyon*, 715 F.3d 1196; *see also Montana v. United States*, 450 U.S. 544 (1981). Because the Court concludes that the right to exclude applies, it need not conduct a *Montana* analysis.

Defendants argue that the Tribe's power to exclude and to regulate Lexington's conduct on Reservation land provides the Tribal Court with subject matter jurisdiction.[65] "A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (citations omitted). That exclusionary power "is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members . . . ." *Water Wheel*, 642 F.3d at 811 (quotation omitted). From that power to exclude, moreover, "flow[s] lesser powers, including the power to regulate non-Indians on tribal land." *Id.* at 808-09 (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)). The "right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government." *Water Wheel*, 642 F.3d at 812.

The right to exclude—and the associated lesser powers—apply to "non-Indian[s'] conduct or continued presence on the reservation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145 (1982). "Where the non-Indian's activity in question occurred on tribal land, the activity interfered directly with the tribe's

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[65] Defendants' MSJ 9:11-13.

inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction." *Grand Canyon Skywalk*, 715 F.3d at 1204 (quoting *Water Wheel*, 642 F.3d at 814).

In its opposition, Lexington contends that the right to exclude does not apply here and that the "Ninth Circuit has repeatedly held that tribal jurisdiction under this doctrine hinges on whether the nonmember is present on tribal land . . . ."[66] To support that argument, Lexington points to *Emps. Mut. Cas. Co. v. McPaul,* 804 F. App'x 756 (9th Cir. 2020). That case, which is not precedential, is distinguishable from the instant matter. In *McPaul*, no party disputed that the non-Indian's "relevant conduct . . . occurred entirely outside of tribal land . . . ." *Id.* at 757. Here, Defendants argue that while Lexington never physically entered tribal land, its conduct took place on federal land. Lexington cites two more cases to support its argument that the right to exclude requires physical presence on tribal land.[67] Those cases use physical presence to support the applicability of the right to exclude; they do not require physical presence. *See Water Wheel*, 642 F.3d at 802; *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 513 (2019).

The Tribe's right to exclude includes the right to regulate Lexington's provision of insurance to tribal entities operating on tribal land. *See Water Wheel*, 642 F.3d at 812. That conclusion is bolstered by the facts that while Lexington never entered tribal land, it surely conducted activity on tribal land by providing

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[66] Lexington's MSJ Opposition 17:23-25.

[67] *Id.* at 18:6-24.

insurance to the Tribe. *See Grand Canyon Skywalk*, 715 F.3d at 1204. In addition, its agent—Alliant—did conduct business on tribal land.

Lexington's use of ellipses throughout its briefing is telling. For example, Lexington quotes a Ninth Circuit opinion that observes that "[t]here is a presumption against tribal jurisdiction over nonmember activity . . . ."[68] But the full quotation is essential to understand the presumption at issue: "There is a presumption against tribal jurisdiction over nonmember activity ***on non-Indian fee land***." *FMC Corp.*, 942 F.3d at 932 (emphasis added). Here, nonmember Lexington's activity took place ***on tribal land***, so that presumption does not apply.

The Supreme Court "has held that 'where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" *Id.* at 941 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)) (other internal quotation marks omitted). The Ninth Circuit has observed, moreover, 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 landowner is enough to support regulatory jurisdiction without considering *Montana*. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dis-

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[68] *Id.* at 7:26-27.

> positive and would improperly limit tribal sovereignty without clear direction from Congress.

Water Wheel, 642 F.3d at 814. Thus, because the tribe has regulatory jurisdiction over that activity, it also possesses civil jurisdiction over disputes associated with that activity. To hold otherwise would allow parties to skirt tribal jurisdiction over activity occurring on tribal land through agency (as was the case here, since Alliant was Lexington's agent) or through virtual tools such as Zoom. Such a holding would degrade a tribe's inherent authority to manage its own affairs.

3. Personal Jurisdiction

In their summary judgment motion, Defendants assert that the Tribal Court may exercise personal jurisdiction over Lexington.[69] Lexington responds that Defendants' assertion "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 . . . . Thus, any argument about personal jurisdiction is tangential and has no bearing on the parties cross-motions for summary judgment."[70] Lexington is correct. Because Lexington's prayer for relief does not mention personal jurisdiction, the Court need not rule on that issue. In sum, because the Court concludes that the Tribal Court has subject matter jurisdiction over Lexington, Defendants' motion for summary judgment is **GRANTED**

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[69] *See* Defendants' MSJ 17:2-23:16.

[70] Lexington's MSJ Opposition 22:16-20 (emphasis in original).

and Lexington's motion for summary judgment is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. Defendants' Motion to Dismiss is **GRANTED** with respect to Lexington's claims against Chief Judge Welmas. Lexington's claims against Chief Judge Welmas are **DISMISSED without leave to amend**. Defendants' Motion to Dismiss is otherwise **DENIED.**

2. Defendants' motion for summary judgment is **GRANTED**.

3. Lexington's motion for summary judgment is **DENIED**.

4. Judgment will issue accordingly.

IT IS SO ORDERED.

Dated:
February 3, 2023

/s/ John W. Holcomb
John W. Holcomb
UNITED STATES
DISTRICT JUDGE

APPENDIX C

CABAZON RESERVATION COURT OF APPEALS

CABAZON BAND OF MISSION INDIANS Appellee, v. LEXINGTON INSURANCE COMPANY Appellant,	)	NO: CBMI 2020-0103 Nov. 12, 2021

Fletcher, **J**., for the court.

ORDER AND OPINION

The trial court order of March 11, 2021 is **AFFIRMED**. This matter is remanded to the trial court for proceedings consistent with this opinion.

We hold that the Cabazon Band of Mission Indians Tribal Court possesses jurisdiction under the Cabazon Band Code over the Appellant.

Governing Law

Section 9-102(d) of the Code of the Cabazon Band of Mission Indians provides:

> In deciding all cases before it, the Cabazon Reservation Court and the Cabazon Reservation Court of Appeals shall apply (i) the Articles of Association, this Code and the ordinances, regulations, resolutions and other laws of the Cabazon Band, and (ii) applicable federal law. In the absence of persuasive tribal or federal law, the Cabazon Reservation

> Court and the Cabazon Reservation Court of Appeals may look to the laws of the State of California, or any other state or jurisdiction, for guidance.

We presume for purposes of this appeal that "applicable federal law" includes federal laws that explicitly bind this court. In the absence of controlling federal law and where relevant, we treat federal law as persuasive authority. In general, the parties have presented federal authority as the primary source of law in this case.

Additionally, we note that where we may be assessing the "extraterritorial jurisdiction" of the court, the tribal code provides that federal law is, indeed, governing. Cabazon Code § 9-102(a) ("The Reservation Court shall also exercise such extraterritorial jurisdiction *as may be authorized under federal law*.") (emphasis added).

Standard of Review

The standard of review of an appeal from the denial of a motion to dismiss is *de novo*. The Cabazon Code is silent as to the standard of review. We adopt and apply federal law that employs a *de novo* standard of review. *E.g.*, *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) ("A decision regarding tribal court jurisdiction is reviewed *de novo*, and factual findings are reviewed for clear error.").

We must also view the facts alleged in the light most favorable to the plaintiff. *E.g.*, *Burlington Northern & Santa Fe R. Co. v. Vaughn*, 509 F.3d 1085, 1088 (9th Cir. 2007) (viewing the facts "in the light

most favorable to [the plaintiff], as required on a motion to dismiss . . .”). Again, since the tribal code is silent, we follow federal law on this point.

Facts

We turn to the alleged facts most relevant to the issue before us, which is the jurisdiction of the court over this matter.

Plaintiff, the Cabazon Band of Mission Indians (Cabazon), brought suit in the trial court alleging that Defendant, Lexington Insurance Company (Lexington), unreasonably and in bad faith denied coverage obligations to Cabazon connected to business interruption losses incurred as a result of the COVID-19 pandemic. Complaint ¶¶ 1-2, at 2.

Lexington is organized under the laws of Delaware and is physically located in Massachusetts. *Id*. ¶ 5, at 3. Lexington is owned by American International Group, Inc. *Id*. Lexington insures Cabazon's property:

> Subject to the terms, conditions and exclusions hereinafter contained, this Policy insures all property of every description both real and personal (including improvements, betterments and remodeling), of the Named Insured, or property of others in the care, custody or control of the Named Insured, for which the Named Insured is liable, or under the obligation to insure.

Id. ¶ 12, at 5 (quoting the insurance policy). Lexington also insures Cabazon against business interruption losses:

> Against loss resulting directly from interruption of business, services or rental value

> caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of this Policy. In the event of such loss or damage the Company shall be liable for the actual loss sustained by the Named Insured for gross earnings as defined herein and rental value as defined herein resulting from such interruption of business, services, or rental value; less all charges and expenses which do not necessarily continue during the period or restoration. Due consideration shall be given to the continuation of normal charges and expenses including ordinary payroll expenses to the extent necessary to resume operations of the Named Insured with the same quality of service which existed immediately preceding the loss.

Id. ¶ 13, at 5 (quoting the insurance policy). The policy includes additional relevant provisions we need not discuss here. *Id*. ¶¶ 14-18, at 5-7. An agent of Lexington, Tribal First Alliant Underwriting Solutions, issued the insurance policy to Cabazon. *Id*. ¶ 9, at 4.

Fantasy Springs Resort (Resort) is Cabazon's insured property and business insured by Lexington. *Id*. ¶ 4, at 2-3. Cabazon's property is located, and its business is conducted, on lands owned by the United States and held in trust for Cabazon's benefit. *Id*. Lexington accepted premiums sent from the reservation to Lexington. Respondent's Brief at 4. Lexington agreed to insure property and business activity conducted exclusively on the reservation. *Id*. During the investigation following the losses alleged by Cabazon, Lexington's agent "engaged in conference calls with

Cabazon representatives while such representatives were on Reservation land." *Id*. Lexington also corresponded with Cabazon through the mail, which was sent by Lexington to Cabazon officials on reservation lands. *Id*.

Because of the COVID-19 pandemic, Cabazon closed operations at the Resort on March 17, 2020. Complaint, ¶ 30, at 8-9. In the months leading up to the closing of the Resort, it hosted more than 4000 guests per day; Cabazon expected more than 5000 guests per day in late March due to a professional tennis tournament occurring nearby. *Id*. ¶ 31, at 9. Cabazon alleges significant losses. *Id*. ¶ 40, at 11. After Cabazon sought coverage from Lexington, a Lexington agent investigated by phone. *Id*. ¶ 44, at 12. Lexington denied coverage. *Id*. ¶ 42, at 12.

On November 24, 2020, Cabazon brought suit against Lexington in the tribal court pleading several causes of action. Cabazon sought a declaratory order that Lexington has a duty to provide coverage. *Id*. ¶ 53, at 14. Cabazon also sought consequential damages from breach of contract. *Id*. ¶ 62, at 16. Cabazon next sought consequential damages, attorney fees, and punitive damages for bad faith. *Id*. ¶¶ 70-72, at 18-19.

After Lexington moved to dismiss the action, the Cabazon Reservation Court denied the motion. Ruling on Motion to Dismiss, *Cabazon Band of Mission Indians v. Lexington Insurance Company*, No. CBMI 2020-0103 (March 11, 2021).

Lexington appealed. We accepted that appeal on May 18, 2021.

Analysis

We hold that, under Cabazon law, the court possesses personal jurisdiction over Lexington, an entity that purposefully availed itself to the benefits and protections of Cabazon law. We further hold that, under relevant federal law, Cabazon possess subject matter jurisdiction over this case involving Lexington, a non-member. We take these matters in turn.

I. Personal Jurisdiction over Lexington

We hold the court possesses personal jurisdiction over Lexington. The personal jurisdiction inquiry is a two-step determination. The first step is to determine whether the tribal code provides for jurisdiction over Lexington in this court. The second step is to determine whether the exercise of this court's jurisdiction is consistent with due process.

A. Cabazon Long-Arm Statute

We first hold that the tribal code allows for jurisdiction over Lexington. Section 9-102(b)(2) of Cabazon code provides that the court has jurisdiction over:

> All civil causes of action arising within the exterior boundaries of the Cabazon Indian Reservation in which . . . [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"

Cabazon argues that "Lexington accepted insurance premiums from Cabazon in exchange for its agreement to insure tribal property against perils which occur within the Reservation boundaries." Respondent's Brief at 3. Lexington argues that "Cabazon tribal law

. . . establishes a geographical limit on subject matter jurisdiction . . . ." Appellant's Brief at 16. Lexington adds that no Lexington agent has ever set foot on Cabazon lands; that in fact, Lexington is merely the successor in interest to another entity, "Tribal First Alliant Underwriting Solutions," that conducted business with Cabazon. *Id*. at 3-4. Lexington's argument on the scope of the Cabazon long-arm statute rests on whether the statute limits this court's jurisdiction to the physical boundaries of the reservation.

Lexington's argument has a modicum of superficial force, but is unpersuasive after a closer look. Cabazon's code is the kind of long-arm statute sometimes referred to as a "laundry list." *Green v. Wilson*, 565 N.W.2d 813, 815 (Mich. 1997). "Laundry list" long-arm statutes "enumerate specific acts that give rise to personal jurisdiction." *Id*. Conversely, a "self-adjusting" long-arm statute is one that "stretches automatically to extend jurisdiction wherever the Due Process Clause permits." *Id*. Section 9-102(b)(2) lists the kinds of activities by Lexington over which this court would have jurisdiction. The provision certainly includes a geographic limitation, but physical, geographic entry is not the only activity that is contemplated under the Cabazon long-arm statute.

Lexington did, in fact, transact business on the Cabazon reservation. As the Respondent points out, Lexington agreed to insure reservation property and business activity. Respondent's Brief at 4. Lexington accepted premiums. *Id*. Lexington's agent "engaged in conference calls with Cabazon representatives." *Id*. Lexington also corresponded with Cabazon through the mail. *Id*. In short, by entering into a contract to insure reservation property and business operations, Lexington transacted business on Cabazon territory.

One would be hard-pressed to find any state or federal court that would reach a contrary conclusion. *E.g.*, *Nova Biomedical Corp. v. Moller*, 629 F.2d 190, 194 (1st Cir. 1980) (interpreting Mass. Gen. Laws ch. 223A, § 3(a)) and finding foreign defendant transacted business by sending demand letter to in-state party); *Commodigy OG Vegas Holdings LLC v. AMD Labs*, 417 F. Supp. 3d 912, 919-20 (N.D. Ohio 2019) (interpreting Ohio Rev. Code. § 2307.382(A)(1) and finding that foreign company that communicated via email, received money, and phoned in-state business did transact business in the state); *Fischbarg v. Doucet*, 880 N.E.2d 22, 29 (N.Y. 2007) (interpreting N.Y. CPLP § 302 and finding personal jurisdiction where foreign defendant retaining a lawyer in the state). Lexington's repeated and forceful claims that no Lexington agent ever set foot on Cabazon land does not refute the reality that Lexington successfully transacted business there.

B. Federal Due Process Rights

We next hold that this court's exercise of jurisdiction over Lexington does not run afoul of our obligations to guarantee due process to litigants. The Indian Civil Rights Act (ICRA) compels this court to guarantee "due process" to "any person within its jurisdiction." 25 U.S.C. § 1302(a)(8). In accordance with Cabazon's governing law statute, we apply federal law. We hold that ICRA's due process clause is coterminous with the Fourteenth Amendment's Due Process Clause for purposes of analyzing the personal jurisdiction of this court over Lexington.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger*

King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Referencing *International Shoe* as the "canonical" case, the Supreme Court stated this year that "[a] tribunal's authority depends on the defendant's having such 'contacts' with the forum . . . that 'the maintenance of the suit' is 'reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1024 (2021) (quoting *International Shoe*, 326 U.S. at 316-17). "By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' [citation,] the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit[.]'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), other citation omitted).

In this case, where Lexington is not "essentially at home," *Ford Motor*, 141 S. Ct. at 1024, we must determine whether this court possess "specific jurisdiction" over Lexington. *Id*. "The contacts needed for [special] jurisdiction often go by the name 'purposeful availment.'" *Id*. (quoting *Burger King*, 471 U.S. at 475). The out-of-forum defendant must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The defendant's contacts "must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Ford Motor*, 141 S. Ct. at 1025 (quoting *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984)). The contacts

"must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor*, 141 S. Ct. at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)).

The Supreme Court has identified "two sets of values—treating defendants fairly and protecting 'interstate federalism.'" *Burger King*, 141 S. Ct. at 1025 (quoting *Worldwide Volkswagen*, 444 U.S. at 293). *International Shoe* reflects the value of "reciprocity between a defendant and a State: When (but only when) a company 'exercises the privilege of conducting activities within a state—thus 'enjoy[ing] the benefits and protection of [its] laws'—the State may hold the company to account for related misconduct." *Ford Motor*, 141 S. Ct. at 1025 (quoting *International Shoe*, 326 U.S. at 319)). *Burger King* reflects the value of providing "defendants with 'fair warning'—knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign.'" *Ford Motor*, 141 S. Ct. at 1025 (quoting *Burger King*, 471 U.S. at 472). Finally, *World-Wide Volkswagen* points out that a defendant "can thus 'structure [its] primary conduct' to lessen or avoid exposure to a given State's courts." *Ford Motor*, 141 S. Ct. at 1025 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).[1]

We begin by noting what the Eleventh Circuit recognized not so long ago: "Since the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355

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[1] While federalism principles may or may not be perfectly on point here, we find that no harm is done to Lexington by replacing the interests of states with the interests of tribes in this analysis.

U.S. 220, 223 . . . (1957), it has been the law that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts." *Mutual Service Ins. Co. v. Frit Industries, Inc.*, 358 F.3d 1312, 1320-21 (11th Cir. 2004). In short, a fairly strong presumption exists in federal law that out-of-forum insurance companies who insure property or business activity in another forum can be said to have purposefully availed themselves of the forum.

Lexington's argument repeats its earlier claims about the long-arm statute, that Lexington "has no presence, or contacts with, Cabazon tribal land. It has never entered Cabazon tribal land, conducted any business on Cabazon tribal land, or invoked the protections of tribal law." Appellant's Brief at 18. Further, Lexington argues (again) that it merely "contracted with Alliant (a California corporation), which contracted with [Cabazon]." *Id*. Lexington further claims the insurance policy "itself does not name any insurers . . . [or] name the insured . . . ." *Id*. at 4. Cabazon responds by explaining that "Lexington is the party to the insurance contract, the primary recipient of the premium, and the entity that will issue a check paying out the claim . . . ." Respondent's Brief at 20. Cabazon notes that the Policy Declarations, incorporated into the policy by reference, include the names and insured and insurer. *Id*. at 20 n. 10.

Lexington's arguments are unpersuasive. First, Lexington knew that it was doing business with an Indian tribe regarding tribal property and business activities. The in-forum activity is insuring the Cabazon property and business activities, which occurred entirely on the reservation. But for the reservation

activity, there would be nothing to insure. Lexington's promise to insure reservation property and business activities in exchange for the payment of premiums is purposeful availment of that reservation activity. Lexington makes no claim (nor could it) that it had no fair warning that property and business activity it insures was located outside of tribal jurisdiction. Lexington acquired the obligations of the policy from a company called *Tribal* First. The policy documents noted that the insured was Cabazon. Cabazon is a federally-recognized tribal nation and has been listed as such as long as the United States has formally published an annual list. *See* Department of the Interior, Indian Tribal Entities that have a Government to Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 4, 1979). Lexington accepted the premium payments from Cabazon, paid with funds that apparently came from the reservation activity. Lexington's agents knew it was talking to Cabazon representatives about reservation property and business activity when the tribe called the insurance company about its COVID-related losses. Finally, Lexington has in numerous instances entered into business relationships with Indian tribes. *E.g.*, *Port Gamble S'Klallam Tribe v. Lexington Insurance Co.*, No. POR-AP-2021-0001 (Port Gamble S'Klallam Court of Appeals Sept. 29, 2021), *reprinted in* Respondent's Notice of Significant New Authority at 4-19; *Suquamish Indian Tribe v. Lexington Insurance Co.*, No. 200601-C (Suquamish Tribal Court of Appeals Sept. 29, 2021), *reprinted in* Respondent's Notice of Significant New Authority at 21-40; *Red Earth Casino v. Lexington Insurance Co.*, No. CVTM-2021-0001-GC (Intertribal Court of Southern California for the Torres Martinez Cahuilla Indians Sept. 23, 2021), Respondent's Notice

of Significant New Authority at 43-57. In short, Lexington had "fair warning" it could be subject to tribal jurisdiction. *Burger King*, 471 U.S. at 472. For Lexington to prevail on this point, it would have to demonstrate its surprise that the Cabazon Band's casino was not on reservation lands or that it had no notice that the insured was an Indian tribe.

Lexington further availed itself of the tribe's regulatory structure, which in this case does not provide for the regulation of insurance companies. Lexington is aware that Cabazon does not regulate the insurance industry within its lands. Appellant's Brief at 11. In a colloquy with Justice Washburn at oral argument, Lexington acknowledged that it was not licensed in the State of California. Later, in a colloquy with Justice Fletcher, Cabazon acknowledged that it could but does not regulate insurance companies within its jurisdiction. The import here is that Lexington likely received an advantage by conducting business on the Cabazon reservation, which does not license or regulate insurance companies. California, it would seem, does. *See generally* Cal. Insurance Code § 12919 et seq. (describing the regulatory powers of the Insurance Commissioner). Even if California's regulation of insurance providers is minimal, Lexington is hardly prejudiced by accessing Cabazon's jurisdiction because Cabazon imposes no regulatory burden. In the language of the Supreme Court, Lexington "enjoyed the benefits" of the tribal forum. *International Shoe*, 326 U.S. at 319.

Lexington next claims that since the forum selection clause, which provides for disputes to be adjudicated by a "court of competent jurisdiction," Lexington did not consent to tribal jurisdiction, nor presumably could it have predicted it would be haled into tribal

court. Appellant's Brief at 18. Cabazon responds by arguing that a tribal court is a court of competent jurisdiction. Respondent's Brief at 20. In the United States, it is not unusual for a contract dispute with a sovereign to be litigated in the sovereign's own courts. Cabazon points out that if Lexington wanted to prevent the possibility of tribal court jurisdiction, it could have negotiated for that right to be included in the policy. *Id*. at 20-21. Cabazon further points out that Lexington had previously litigated this very question with a different Indian tribe more than a decade ago in *Confederated Tribes of the Chehalis Reservation d/b/a Lucky Eagle Casino v. Lexington Insurance Co.*, No. CHE-CIV-11/08-262 (April 21, 2010), reproduced in Appendix to Certain Authorities in Support of Respondent's Brief at 53-59. In sum, this issue was predictable when the insurance contract was written and when it was adopted by Lexington.

We agree with Cabazon. Lexington knew from its purchase of the insurance policy from Tribal First and from the Policy Declarations that it was insuring an Indian tribe's reservation property. Lexington also knew from its prior litigation experience involving insuring tribal gaming entities that a tribal court could very well find that the forum selection clause would be interpreted to provide jurisdiction in a tribal court:

> In our facts, the dispute is directly related to the Lexington policy providing insurance coverage to the Lucky Eagle Casino. The language of Lexington's policy states that "[i]n the event of a failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the insured, will

> submit to the jurisdiction of any court of competent jurisdiction within the United States . . . ."

Chehalis, at 6-7, Appendix at 58-59. The language in the Chehalis policy, adjudicated more than a decade ago, tracks the language in Cabazon's policy. Given its experience in the Chehalis tribal court, Lexington's claim at oral argument here that it understood the "court of competent jurisdiction" language to mean any American court *except* tribal courts rings hollow.

Finally, Lexington claims the relevant test for personal jurisdiction is whether the defendant "targeted" the forum. Appellant's Brief at 18 (quoting *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011)). Lexington further cites *World-Wide Volkswagen* and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

All three cases are distinguishable. In *Nicastro*, the plaintiff sued the foreign manufacturer of a metal-shearing machine used in New Jersey. 564 U.S. at 878. The accident occurred in New Jersey but the machine was manufactured in England. *Id*. The company marketed its product in the United States, but not specifically in New Jersey. *Id.* at 866. A third-party distributor, not the manufacturer, sold the machine to operators in New Jersey. *Id*. *Bristol-Myers* is similar. There, the plaintiffs sued a New York pharmaceutical company incorporated in Delaware that made a drug called Plavix. *Id.* at 1777-78. The plaintiffs sued in California but "were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id*. at 1781. The same is true for Lexington's last case, *World-Wide Volkswagen*. In that case, plaintiffs sued a foreign car

company in Oklahoma. 444 U.S. at 288. The plaintiffs bought the car in New York and passed briefly through Oklahoma, where the accident occurred. *Id*.

Here, Lexington specifically and intentionally undertook to provide insurance to Cabazon, an Indian tribe, for property and business activities conducted on the reservation. Lexington knew this to be the case when it made that undertaking. For *Nicastro*, *Bristol-Myers*, or *World-Wide Volkswagen* to be relevant, Lexington's insurance product would have had to be a tangible item that Cabazon would have purchased and physically brought to the reservation without Lexington's knowledge or expectation.

McGee v. International Life Ins. Co., 355 U.S. 220 (1957), is a far more relevant case. There, a plaintiff seeking to enforce a life insurance policy brought suit in California against the insurance company, which was based in Texas. *Id.* at 221. The insurance company had never solicited or done any business in California. *Id*. at 222. Even so, the Supreme Court found personal jurisdiction in California courts. *Id*. at 223-24. The Court found, "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id*. at 223. In all relevant ways, Lexington's conduct is the same.

It is true *McGee* is an older case, but the courts have not undone the general principle that insurance companies are subject to suit in the forum where the property or activities they insure is located. If an insurance policy describes the territory where the insurance coverage extends, the large majority of courts hold that the insurance company may be sued there. *See generally* Douglas R. Richmond, *Mapping Territorial Limitations on Insurance Coverage*, 55 San Diego

L. Rev. 853, 877 & n.189 (2018) ("Where an insurance policy includes a state within its coverage territory, courts frequently hold that the insurer purposely availed itself of the benefits and privileges of conducting business in the state and thus established the minimum contacts necessary for specific personal jurisdiction"; and collecting cases).

Cabazon also cites a relevant case, *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir. 1986). There, the court assessed whether a California court could exercise personal jurisdiction and assert California law against an insurance company located in the Cayman Islands. *Id.* at 1395. The defendant was an insurance fund located in the Caymans, organized under Cayman Islands law, all designed to avoid California insurance law. *Id*. The Ninth Circuit concluded that California law should apply to claims against the Cayman Islands defendant, noting that:

> [F]unding for reimbursement made by the Fund is generated exclusively from premiums paid by the members of the Grass Valley Medical Quality Association who are insured by the Fund and the earnings from such premiums. The Fund, then, provides a self-contained plan, whereby premiums from California physicians are disbursed to California physicians who suffer loss due to malpractice liability. Moreover, the district court found that the reason for the Fund's existence was "for the benefit of California residents; to wit, California doctors."

Id. at 1398. The court added that the insured doctors resided and worked exclusively in California. *Id*. The court concluded: "Thus, the effect in California was

not only foreseeable, it was contemplated and bargained for. A defendant who enters into an obligation which she knows will have effect in the forum state purposely avails herself of the privilege of acting in the forum state." *Id*.

We conclude that the court possesses personal jurisdiction over Lexington. We turn next to principles of federal law to which both parties dedicate the bulk of their briefing.

II. Subject Matter Jurisdiction

We hold that the tribe's inherent powers vest this court with subject matter jurisdiction over Lexington. Whether the tribal court possesses subject matter jurisdiction over Lexington, a nonmember entity, is dependent on whether the tribe can show either that Lexington has consented to tribal jurisdiction by entering into an insurance contract with the Tribe or whether Lexington's conduct impacts the political integrity, economic security, or health and welfare of the tribe or its members. This analysis originated in *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Alternatively, Cabazon's power over Lexington may also derive from the tribe's inherent power to exclude nonmembers. This analysis originated in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-48 (1982), and *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811-17 (9th Cr. 2011).

A. Montana's Consensual Relations Exception

Lexington's promise to insure Cabazon's reservation-based property and business activities is a consensual relationship sufficient to indicate consent to tribal jurisdiction under *Montana*.

Under default interpretative principles of federal Indian law, the scope and extent of the powers of Indian tribes are governed by treaties, Acts of Congress, and the federal duty of protection, usually known as the trust relationship. The Constitution vests Congress with the power to manage Indian affairs. *See* Restatement of the Law of American Indians, Proposed Final Draft § 7 (March 30, 2021) (Restatement).[2] The powers of Indian tribes normally can be limited or divested only by tribal agreement or by an Act of Congress. *See id*. § 15. The Supreme Court long ago held that where a tribe has not agreed to a limitation on its powers, an Act of Congress purporting to limit tribal powers "requires a clear expression of the intention of Congress." *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883). *See also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016) ("[U]nless and until Congress withdraws a tribal power . . . the Indian community retains that authority in its earliest form[.]"); Restatement, § 15, comment *a* ("Although the United States has plenary authority over tribes, . . . courts will not lightly assume that Congress in fact intends to restrict Indian self-government. The legislative intent to abrogate tribal authority must be clear.").

In assessing tribal powers over nonmembers like Lexington, however, the Supreme Court departed from those default interpretative rules. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes do not possess the power to prosecute non-Indian lawbreakers. *Id*. at 195. There, the Court concluded that there was a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do

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[2] The American Law Institute approved the final draft of the restatement on May 17, 2021.

not have the power to try non-Indians . . . ." *Id*. at 206. *See also id*. at 203 (noting that Congress held an "unspoken assumption" that tribes could not prosecute non-Indians). The Court found no Act of Congress or treaty provision that divested tribes of the power to prosecute.

Two years later, in *Montana*, the Court extended that analysis to the civil jurisdiction realm. There, the Court acknowledged "the general proposition that 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 (citing *Oliphant*). The Court described two exceptions to this general rule. The first exception (and the only exception that we need to consider today) is commonly called the consensual relations exception: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (citations omitted).

The Supreme Court itself has analyzed cases in which nonmembers have consented to tribal jurisdiction. For example, tribes may tax nonmembers who purchase products from tribal or Indian retailers. *E.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–154 (1980) ("At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on nontribal purchasers. We disagree."). Tribes may regulate nonmember hunting and fishing on tribal lands, certainly where those nonmembers purchase tribal hunting and fishing licenses, but even when they do not. *E.g.*, *New Mexico v. Mescalero*

Apache Tribe, 462 U.S. 324, 330 (1983) ("[O]n the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and *may also regulate the hunting and fishing by nonmembers*.") (emphasis added).

Given the rise of tribal governmental capacity and tribal economic activity in the last half century, nonmember consent to tribal powers to regulate and tax is the norm, not the exception. In Cabazon's experience, at least 4000 nonmembers enter tribal properties daily, presumably paying tribal taxes and other fees, subjecting themselves to tribal civil laws, and engaging in commercial activities. Complaint, ¶ 31, at 9. Nonmembers throughout Indian country consent in numerous ways to tribal jurisdiction. *E.g.*, *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 904 (9th Cir.) (nonmember consented to tribal jurisdiction through an employment relationship with tribal government), *cert. denied*, 140 S. Ct. 513 (2019); *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173-74 (5th Cir. 2014) (nonmember consented to tribal jurisdiction when it executed agreement with tribe agreeing to comply with tribal laws), *aff'd by equally divided Court*, 136 S. Ct. 2159 (2016); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1136 (9th Cir. 2006) (en banc) (nonmember consented to tribal jurisdiction over counterclaims against nonmember by initiating suit in tribal court); *Fox Drywall & Plastering, Inc. v. Sioux Falls Const. Co.*, 2012 WL 1457183, at *11 (D.S.D. Apr. 26, 2021) ("[P]laintiffs have consented to the Tribal Court's jurisdiction because plaintiffs knew their work was for the Tribe, the job site was the Tribally-owned motel, the Tribe's law governed because they were working on Tribal land, and any legal action would be decided by the same tribunal."); *Guggolz v.*

Farmer's Union Oil Co., 2007 WL 7274883, at *2 (Standing Rock Sioux Tribal Court Feb. 8, 2007) (non-member consented to tribal jurisdiction over tort claim by operating grocery store and maintaining parking lot where tort occurred). In light of all of this authority, we are inclined to find that Lexington consented to tribal jurisdiction when it endeavored to insure commercial properties and activity on tribal lands and accepted payment for this privilege.

We wish, however, to address Lexington's other objections to this conclusion. Initially, Lexington argues that consent-based jurisdiction under *Montana* rests on whether Lexington engaged in any conduct on Cabazon land. Appellant's Brief at 11-13. Lexington claims that the fact that property and business activity that Lexington insured was located on tribal property is not relevant. We have already rejected Lexington's arguments about whether its lack of *physical* presence on tribal lands is dispositive in the personal jurisdiction context. To repeat our holding, Lexington specifically and intentionally endeavored to insure tribal property in a policy it acquired through Tribal First, and it was aware that the property was held by Cabazon, an Indian tribe, and located on the reservation. Additionally, state and federal courts usually hold that insurance companies may be sued in the forum where insured property is located. *See* Richmond, 55 San Diego L. Rev. at 877 & n. 189.

Lexington cites numerous cases arising on reservation lands in an attempt to support its proposition that its consensual conduct must occur on lands located within a reservation. Appellant's Brief at 12-13 (citing *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008); *Montana*, 450 U.S. 544; *Jackson v. Payday Financial, LLC*, 764 F.3d

765 (7th Cir. 2014)). Cabazon responds by noting that "[n]o Supreme Court case has ever required non-Indians to physically enter tribal land to establish jurisdiction under *Montana*'s consensual relationship exception. While some cases applying *Montana* certainly do involve a physical presence on tribal land, this does not signify physical presence is a requirement." Respondent's Brief at 15. We agree with Cabazon. We find no language in any Supreme Court opinion barring tribal jurisdiction over nonmembers who knowingly and purposefully conduct business activities with Indian tribes, for example, from afar.

Lexington argues further that we should focus on where Lexington was located when it acted as an insurer denying Cabazon's claim. *Id*. at 14. Lexington cites several cases to support its proposition that "[i]n insurance law, particularly when analyzing choice-of-law issues over denial-of-coverage claims, like here, these two locations are distinct-the place where the decision to withhold benefits was made (the conduct) is separate and distinct from the place where the purported damage occurred (the insured property)." *Id*. Assuming for the sake of argument here that choice-of-law analysis is useful in assessing the consensual relations analysis under *Montana*, we address these cases individually.

The first case, *Cannon v. Wells Fargo N.A.*, 917 F. Supp. 2d 1025 (N.D. Cal. 2013), involved a suit brought in California against a California defendant for tort claims arising from a dispute over real estate in Florida. *Id*. at 1050-51. The court noted that there was an underlying mortgage that established Florida law as the governing law over any contract claims, leading the court to conclude that it made sense to apply Florida law to the tort claims as well. *Id*. at 1051.

Plaintiffs brought an additional claim for unfair competition under California law. *Id*. at 1055. The California defendant might have engaged in conduct in California that would have given rise to the claim under California law, but the court held that the plaintiff did not allege any California acts in its complaint, leading it to dismiss the claim. *Id*. at 1055-56. On one hand, *Cannon* is distinguishable because the case was driven by a clear contract provision establishing Florida law as the governing law. On the other hand, *Cannon* also tends to support Cabazon's position. The real estate that was the subject of the dispute was located in Florida, prompting the court again to point to Florida law. Here, the property and activities that give rise to the claim are located in Cabazon.

The next case, *Continental Casualty Co. v. Diversified Industries, Inc.*, 884 F. Supp. 937 (E.D. Pa. 1995), was brought by an Illinois insurance company for a declaration that it owed no coverage to its insured, a Delaware-organized company located in Missouri doing business (and allegedly committing torts) in Pennsylvania. *Id*. at 941. One defendant argued that since the insurance company's claim to deny coverage occurred in Illinois, establishing a state interest in the matter, then Illinois law should apply. *Id*. at 950. The court acknowledged that there were some cases that gave "considerable weight" to the location of the insurance company's acts, *id*. at 950-51, but ultimately the court chose to apply Pennsylvania law because the alleged tortious acts underlying the claim occurred there, *id*. at 952; *see also id*. (prioritizing "the place where the relationship of the parties is centered") (citing Restatement (Second) of Contracts § 145(2)). At best, *Continental Casualty* identifies some conflict in the cases about the importance of the location of the insurance company, but the location

where the insurance company makes a decision to deny coverage is far less important than the locus of the parties' dealings.

The third case, *Keene Corp. v. Insurance Co. of North America*, 597 F. Supp. 934 (D.D.C. 1984), involved a suit against a Pennsylvania insurance company in the federal district court for the District of Columbia for nationwide claims arising from asbestos contamination. *Id.* at 937, 939. The plaintiff sought punitive damages, alleging that the insurance company engaged in fraudulent misrepresentation about its insurance product. *Id*. at 937. The plaintiff objected to the application of Pennsylvania law, insisting instead that because the insurer sold policies to the plaintiff in New Jersey that New Jersey law should apply instead. *Id*. at 939. The court disagreed, holding that a punitive damages claim arising from fraudulent misrepresentation about an insurance product implicated the interest of the state where the insurance company was located, that is, Pennsylvania. *Id*. at 938-39. Additionally, the insurance policy was executed in Pennsylvania, sold by a Pennsylvania broker, and provided that the "'principal state' of operations for computing general liability and product liability premiums was Pennsylvania." *Id*. Since Cabazon does seek punitive damages as part of its prayer, Complaint, Prayer For Relief, ¶ 3(c), at 20, there could be a state interest in the possible relief granted against Lexington. But *Keene* is still distinguishable in that a significant portion of the court's analysis focused on contract terms that repeatedly pointed to Pennsylvania. Here, the contract documents merely point to a "court of competent jurisdiction." Cabazon's claims for a declaratory judgment, compensatory damages, and attorney fees do not implicate a state interest. We leave it to the trial court on remand to

determine liability in the first instance, whether punitive damages are justified, and for an initial determination of the jurisdictional implications of any potential punitive damages award. We note that punitive damages are exceedingly rare in contract cases and it would be folly to use the remote possibility of punitive damages to govern the answer to the jurisdictional question.

The fourth case, *Edgewood Manor Apartment Homes LLC v. RSUI Indemnity Co.*, 2010 WL 11492420 (E.D. Wis. Mar. 8, 2010), involved a claim by a Wisconsin plaintiff against a Georgia insurance company. *Id.* at *5. The case arose from the destruction of property by Hurricane Katrina in Mississippi. *Id*. at *3. The insurance company rejected the plaintiff's insurance claim in its Georgia offices. *Id*. Contrary to the facts in this case, the defendant insurance company argued *against* the application of Georgia law, insisting that either Wisconsin or Mississippi law applied, where there were limitations periods advantageous to the insurance company. *Id*. at *4. Further deviating from the facts of this case, the Wisconsin federal court was required to apply the State of Wisconsin's "borrowing statute," Wis. Stat. § 893.07(1). *Id*. at *2. The borrowing statute required the court to determine where the "final significant event giving rise to a suable claim" occurred. *Id*. at *3. The court concluded that the final significant event was the place where "the rejection determination is made and communicated from." *Id*. As such, the court chose to apply Georgia law. *Id*. The application of Wisconsin's "borrowing statute" requiring the court to look to a particular moment in a series of transactions undercuts the utility of the case to this set of facts, where there is no such requirement.

The final case Lexington cites is no more compelling. There, a North Carolina life insurance policy beneficiary brought a claim against the Pennsylvania insurer. *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co.*, 319 F.2d 469, 470-72 (4th Cir. 1963). The court held that Pennsylvania law applied because the insurance company was located there and the denial of the insurance claim occurred there, giving Pennsylvania the most significant relationship. *Id*. at 474. The court further reasoned that the state of North Carolina, as the plaintiff's domicile, had comparatively little interest in the matter: "It would seem to make no difference in this case if Buchan had died elsewhere." *Id*. Importantly for our purposes, the court noted, "It cannot be said that there existed between the present parties an established relationship *having a particular location* . . . ." *Id*. (emphasis added). The case is distinguishable on the ground that Cabazon's property and business activities, indisputably linked to Cabazon's land, *do* establish a relationship between the parties to a particular location.

In short, as we held on the question of personal jurisdiction, Lexington has consented to tribal jurisdiction by virtue of agreeing to insure tribal property and business activities.

Lexington also argues that tribal court jurisdiction involving contracts indicating a consensual relation must also be necessary for tribal self-government. To be sure, after observing that *Montana* and its progeny permit tribal regulations of nonmember conduct implicating the tribe's sovereign interests, the Supreme Court in *Plains Commerce Bank v. Long Family Land and Cattle Co.* stated "*Montana* expressly

limits its first exception to the activities of nonmembers, allowing these to be regulated to the extent necessary to protect tribal self-government and to control internal relations." 554 U.S. 316, 332 (2008).

Although Lexington argued that disputes regarding the insurance contract at issue here did not impact tribal self-government because the tribe is not regulating such contracts, this argument misunderstands the scope of the first *Montana* exception. After remarking that the four cases cited in *Montana* to justify the first exception each involved regulation of non-Indian activities that had a discernable effect on the tribe and its members, the *Plains Commerce* Court mentioned that *Williams v. Lee*, 358 U.S. 217 (1959), "concerned a tribal court's jurisdiction over a contract dispute from the sale of merchandise by a non-Indian to an Indian on the reservation." 554 U.S. at 332.

The reference in *Plains Commerce* to *Williams v. Lee* as justifying the first exception is meaningful to the case before us. Although *Williams* was primarily a case about whether a reservation Indian could be sued in state court over a debt contracted on the reservation, the Court held that the state courts did not have jurisdiction because such cases should be adjudicated in tribal court. Thus, the *Williams* Court concluded, "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 220. In other words, the Court recognized that contractual disputes are "reservation affairs" and tribal court jurisdiction over them is necessary in order for Indians to be able to make their own laws and be ruled by them. *See id.* ("Essentially, absent governing Acts of Congress, the

question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

We believe that even if we were to concede for the purpose of the argument that tribal jurisdiction established through consensual relations in contracts also must be necessary to tribal self-government, implicit in *Montana*'s reliance on *Williams* for its first exception is that tribal court jurisdiction over such contracts is necessary to self-government. The facts of the present case confirm the soundness of this position. Tribal counsel at oral argument vehemently denied that interference with tribal self-government was a requirement under the first *Montan*a exception. However, when pushed by this Court to indicate why jurisdiction over the contract dispute in this case might be necessary to tribal self-government, tribal counsel mentioned that through this insurance contract the tribe was insuring its most important source of tribal revenues: revenues necessary to fund programs essential to tribal self-government.

B. The Power to Exclude

Though not necessary to the court's conclusions, we further hold that Cabazon possesses jurisdiction over Lexington by virtue of the tribe's inherent power to exclude nonmembers, power to control economic activity on the reservation, and the concomitant power to condition entry of nonmembers.

The Supreme Court has acknowledged the inherent power of Indian tribes to exclude nonmembers from tribally owned or controlled lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1983) ("a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands"). The *Merrion* Court

also acknowledged the inherent power of tribes to tax, partly due to "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Id*. at 137. *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983) ("tribes have the power to manage the use of its territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation") (citations omitted). Following *Merrion* and *Mescalero*, the Ninth Circuit has concluded that where "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 landowner is enough to support regulatory jurisdiction without considering *Montana*." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011).

The line of analysis under the tribal exclusion power is similar to the line of analyses under the personal jurisdiction regime and the consensual relations regime. In all three issues, the fundamental question is whether Lexington engages in activities on Cabazon reservation lands. As we concluded, Lexington definitively conducts business on Cabazon lands by insuring Cabazon property located on and business activities occurring on Cabazon lands.

On this issue, Cabazon argues "If Cabazon so chose, it could bar Lexington from insuring any and all tribal property, or alternatively, limit the types of tribal property to be insured or the amounts of such coverage." Respondent's Brief at 6. Lexington restates its same position all along: "Lexington has never entered into, sent employees to, or engaged in

any commercial transactions within the exterior borders of tribal land. Nor is there any allegation that Lexington has 'interfered directly' with the Tribe's inherent powers to exclude or manage its own lands." Appellant's Brief at 8.

Lexington cites *Employers Mutual Casualty Co. v. Branch*, 381 F. Supp. 3d 1144 (D. Ariz. 2019), *aff'd sub nom.*, 804 Fed. Appx. 756 (9th Cir. May 11, 2020). *Branch* involves a tort claim brought by the Navajo Nation against an Arizona business insured by an Iowa insurance company. *Id.* at 1146-47. The district court asserted, "This case involves an attempt by a tribal court to assert jurisdiction over a party that never set foot within the tribe's reservation, never contracted with any tribal members or organizations, and never expressly directed any activity within the reservation's confines." *Id.* at 1145. The insurance company there, like Lexington, "never set foot" on tribal lands. There, the insurance company was "selling insurance policies to non-member corporations at off-reservation locations." *Id.* at 1149. But that court acknowledged that "it may be possible to sue an insurance company in tribal court despite the absence of any physical presence on tribal land." *Id.* The court cited two cases in which the insurance company "contracted directly with a tribal member when selling the policy and thereafter engaged in conduct directed toward the reservation." *Id.* at 1149-50 (citing *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999); *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, 2014 WL 1883633 (D.N.D. 2014)). The *Branch* court noted that a tribe *could* exercise jurisdiction over an insurance company that issued a policy to a reservation entity or individual, if premium statements were mailed to the reservation, and if the

insurance company agents communicated with a reservation-based entity or individual. *Id*. at 1150 ("Here, in contrast, the insurance policies at issue were general liability policies issued to non-Indian corporations, there are no facts suggesting that monthly premium statements were mailed to the reservation, and there are no facts suggesting that EMC's agents communicated with any tribal members after the spill.").

Branch supports Cabazon's position far more than it supports Lexington's. Lexington insured reservation property and business activities. Lexington received premiums from Cabazon. Lexington's agents talked to Cabazon's agents. But like all incorporated businesses, Lexington's feet are figurative. "Setting foot" on the reservation can involve more than a mere physical presence in this era of long-distance business activities. We find Cabazon possess the power to exclude Lexington, the power to regulate Lexington (if it sees fit to do so), and the power to adjudicate civil disputes that arise from Lexington's reservation-based activities.

For all of the reasons discussed herein, the tribal court's order of March 11, 2021, is AFFIRMED.

Dated: November 12, 2021

Matthew L.M. Fletcher and Alex Skibine, Associate Judges *pro tem*

Kevin K. Washburn, Presiding Judge *pro tem*