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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

LEXINGTON INSURANCE COMPANY;
HOMELAND INSURANCE COMPANY OF
NEW YORK; HALLMARK SPECIALTY
INSURANCE COMPANY; ASPEN
SPECIALTY INSURANCE COMPANY;
ASPEN INSURANCE UK LTD.; CERTAIN
UNDERWRITERS AT LLOYD’S, LONDON
AND LONDON MARKET COMPANIES
SUBSCRIBING TO POLICY NO. PJ193647;
CERTAIN UNDERWRITERS AT LLOYD’S,
LONDON SUBSCRIBING TO POLICY NO.
PJ1900131; CERTAIN UNDERWRITERS AT
LLOYD’S, LONDON AND LONDON
MARKET COMPANIES SUBSCRIBING TO
POLICY NO. PJ1933021; CERTAIN
UNDERWRITERS AT LLOYD’S, LONDON
SUBSCRIBING TO POLICY NOS. PD-
10364-05 AND PD-11091-00; AND
ENDURANCE WORLDWIDE INSURANCE
LIMITED (T/AS SOMPO
INTERNATIONAL) SUBSCRIBING TO
POLICY NO. PJ1900134-A,

Plaintiffs,

v.

CINDY SMITH, in her official capacity as
Chief Judge for the Suquamish Tribal Court,
ERIC NIELSEN, in his official capacity as
Chief Judge of the Suquamish Tribal Court of
Appeals, BRUCE DIDESCH, in his official
capacity as Judge of the Suquamish Tribal
Court of Appeals, and STEVEN AYCOCK, in
his official capacity as Judge of the Suquamish
Tribal Court of Appeals,

Defendants.

No. 3:21-cv-05930

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

JURY DEMAND

I. INTRODUCTION

1
2 1. Indian tribes exist in the United States as “distinct, independent political
3 communities” with necessarily *limited* sovereign powers. *Plains Commerce Bank v. Long Family*
4 *and Cattle Co.*, 554 U.S. 316, 327 (2008). The sovereignty they wield centers only “on the land
5 held by the tribe and on tribal members” and does not, as a general matter, extend to “non-Indians
6 who come within their borders.” *Id.* If a tribe imposes its authority on nonmembers beyond the
7 limits of tribal jurisdiction, particularly over nonmembers who have not entered tribal land or done
8 anything to affect tribal self-government or internal relations, federal courts are empowered to
9 declare the tribe’s exercise of jurisdiction unlawful and enjoin it.

10 2. Plaintiffs in this action (collectively, the “Insurers”) urgently request such
11 declaratory and injunctive relief against the judicial officials of the Suquamish Tribe (the “Tribe”),
12 who continue to subject the Insurers to the unlawful jurisdiction of the Tribe and its tribal court,
13 the Suquamish Tribal Court (the “Tribal Court”). Without this Court’s intervention, the Insurers
14 are and imminently will be subject to the orders and judgments of a court that lacks authority over
15 them.¹

16 3. This case arises from an insurance dispute. The Tribe and its corporate arm, the
17 Port Madison Enterprises (“PME”), own and operate various businesses on the Kitsap Peninsula
18 in Washington, including a casino. In March 2020, like countless other businesses and business
19 owners across the country, the Tribe and PME suspended non-essential operations to slow the
20 spread of COVID-19 throughout their community. The resulting pause in commercial activity
21 resulted in alleged financial losses to the Tribe and PME, and they in turn sought “business
22 interruption” coverage under their property insurance policies. Lexington, as the primary insurer
23

24 ¹ Plaintiffs in this action are: Lexington Insurance Company; Homeland Insurance Company of
25 New York; Hallmark Specialty Insurance Company; Aspen Specialty Insurance Company;
26 Aspen Insurance UK Ltd.; Certain Underwriters at Lloyd’s, London and London market
27 companies subscribing to Policy No. PJ193647; Certain Underwriters at Lloyd’s, London
28 and London market companies subscribing to Policy No. PJ1900131; Certain Underwriters at Lloyd’s, London and London
market companies subscribing to Policy No. PJ1933021; Certain Underwriters at Lloyd’s,
London subscribing to Policy Nos. PD-10367-05 and PD-11091-00; and Endurance
Worldwide Insurance Limited (t/as Sompo International) subscribing to Policy No.
PJ1900134-A.

1 for both the Tribe and PME, began investigating their claims, but while that investigation was
2 pending, the Tribe and PME filed a lawsuit against the Insurers, for declaratory judgment and
3 breach of contract.

4 4. Hundreds of similar COVID-19-related lawsuits have been filed by policyholders
5 throughout the country, and insurers have prevailed in the overwhelming majority of those cases,
6 including the only cases decided so far by state and federal appellate courts. *Mudpie, Inc. v.*
7 *Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati*
8 *Ins. Co.*, ___ F.4th ___, 2021 WL 5833525 (7th Cir. 2021); *Santo's Italian Café LLC v. Acuity Ins.*
9 *Co.*, 15 F.4th 398 (6th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th
10 Cir. 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, ___ F. App'x ___,
11 2021 WL 3870697 (11th Cir. 2021) (per curiam); *Inns by the Sea v. Cal. Mut. Ins. Co.*, 71 Cal.
12 App. 5th 688 (2021); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 2021 WL 5816448 (Ohio Ct. App.
13 2021). In each of those cases, the court explained that there can be no coverage under a property
14 insurance policy unless property is damaged or lost. Mere loss of use of property is not enough to
15 trigger coverage. *See, e.g., Mudpie*, 15 F.4th at 892 (rejecting argument that a property insurance
16 policy's requirement of "direct physical loss of or damage to" property is synonymous with "loss
17 of use," because "intangible," "incorporeal," or "economic" losses are distinguishable from
18 "physical" ones). These rulings are consistent with Washington law. *See, e.g., Seattle Tunnel*
19 *Partners v. Great Lakes Reins. (UK) PLC*, 18 Wash. App. 2d 600, 621 (2021) ("Washington case
20 law shows that if a policy provides coverage for 'physical' loss, it does not provide coverage for
21 loss of use unless that loss of use arises out of or as a result of the physical loss.").

22 5. The questions of insurance law presented by the Tribe and PME's suit against their
23 insurers are no different from those presented by the hundreds upon hundreds of cases in state and
24 federal courts in which insurers have prevailed. (Insurers have won dismissal or summary
25 judgment in at least 665 cases—over 90% of those filed. *See* University of Pennsylvania Law
26 School, Covid Coverage Litigation Tracker, Trial Court Rulings on the Merits in Business
27 Interruption Cases, <https://cclt.law.upenn.edu/judicial-rulings/> (last visited Dec. 21, 2021).) This
28 case is different from those cases only because of where it was brought: Tribal Court.

1 6. The Tribe and PME filed their suit in their Tribal Court in an effort to find a
2 friendlier forum for their claims—which would likely be dismissed if filed in state or federal court.

3 7. As a general rule, tribes *presumptively* lack adjudicatory authority over
4 nonmembers like the Insurers. Only in exceptional circumstances may a tribe exercise jurisdiction
5 over a nonmember through its tribal court. The Supreme Court recognizes two exceptions, under
6 *Montana v. United States*, 450 U.S. 544 (1981), and the Ninth Circuit recognizes a third, under the
7 right-to-exclude doctrine.

8 8. The *Montana* exceptions authorize the exercise of tribal jurisdiction by a tribal
9 court when (1) the nonmember’s conduct arises from a consensual relationship with the tribe or its
10 members, or (2) the nonmember’s conduct imperils the tribe’s health, welfare, or political or
11 economic wellbeing. *Montana*, 450 U.S. at 565–66. In either case, however, the exercise of tribal
12 jurisdiction must be based on the nonmember’s conduct “on the land,” within the territorial
13 boundaries of the tribe, and it must be necessary to protect tribal self-government and control
14 internal relations. *Plains Commerce Bank*, 554 U.S. at 334, 336–37.

15 9. Under the right-to-exclude doctrine, a tribe’s sovereign power to exclude
16 nonmembers from its land grants it “the lesser authority to set conditions on their entry through
17 regulations.” *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 804–05 (9th Cir.
18 2011) (per curiam). But such an exclusionary power cannot apply where nonmembers have not
19 physically entered or engaged in activity on tribal land. *Emp’rs Mut. Cas. Co. v. McPaul*, 804 F.
20 App’x 756, 757 (9th Cir. 2020).

21 10. These exceptional circumstances do not exist here. Although the Insurers
22 contracted with the Tribe and PME to insure their property, contractual relationships alone are not
23 enough to establish tribal jurisdiction. The Insurers’ contract-based activities—reviewing and
24 determining coverage under the policies issued to the Tribe and PME—have not occurred *on the*
25 *land* held by the Tribe, as none of the Insurers has ever entered the Tribe’s borders.

26 11. Instead, the Insurers’ relevant conduct occurred outside the Tribe’s borders in their
27 respective off-reservation places of business. The insurance policies themselves were issued as
28 part of a nationwide property insurance program administered and maintained by a third party,

1 Alliant Insurance Services, Inc. The Tribe and PME participate in this program and procured
2 insurance through Alliant, not directly from the Insurers. And the Insurers, along with other
3 carriers, participate in this program through contracts with Alliant and/or wholesale brokers to
4 provide insurance and underwriting services to any members of the program who meet set
5 underwriting standards. In this case, there was no direct contact between the Insurers and the
6 insureds (the Tribe and PME) when the insurance policies were negotiated and issued.

7 12. The Tribe need not adjudicate disputes arising from the insurance policies to protect
8 its self-government or control its internal relations. Because the Insurers are nonmembers whose
9 relevant conduct occurred far from the reservation, regulating their conduct cannot be justified by
10 reference to tribal governance or internal tribal affairs. The Tribe, through its extensive tribal law
11 and order code, regulates many types of reservation activities, such as hunting, fishing, gaming,
12 crime, marriage and divorce, vehicle traffic, utility services, labor and employment, and
13 commercial activity concerning tobacco, fireworks, and marijuana, among others. But insurance
14 is not one of them, undermining any suggestion that the Tribe's exercise of authority over the
15 Insurers is necessary to protect the Tribe's sovereign interests.

16 13. In short, the Tribe has imposed its adjudicatory authority on the Insurers based on
17 the mistaken notion that it has jurisdiction over any nonmember it does business with. But such a
18 view is not only contrary to law, it swallows the general rule against tribal jurisdiction over
19 nonmembers and expands the Tribe's otherwise limited sovereign powers.

20 14. The Insurers have been subjected to the Tribal Court's jurisdiction for nearly a year
21 and a half. During this time, the Insurers have vigorously contested the Tribal Court's jurisdiction
22 before the Tribal Court itself, as well as its Court of Appeals, to no avail: The Tribal Court
23 continues to impose its jurisdiction on the Insurers. The Insurers were required to engage in these
24 tribal court proceedings under a federally imposed exhaustion requirement, to provide the Tribe
25 and its tribal court with the opportunity to consider its own jurisdiction before any federal
26 challenge could be brought. But tribal remedies have now been fully exhausted, and this case is
27 ripe for federal review and intervention.

28

- 1 a. Homeland is not a member of the Tribe and does not maintain any operations,
2 offices, employees, or agents within the Reservation.
- 3 b. Homeland and other Insurers were sued by the Tribe and PME in the Tribal
4 Court Action.
- 5 c. Homeland and the other Insurers moved by limited special appearance to
6 dismiss the Tribal Court Action for lack of jurisdiction. Following the Tribal
7 Court's denial of the motions, Homeland and the other Insurers appealed from
8 the decision to the Tribal Court of Appeals.

9 19. Plaintiff Hallmark Specialty Insurance Company ("Hallmark") is a Texas
10 corporation with its principal place of business in Texas.

- 11 a. Hallmark is not a member of the Tribe and does not maintain any operations,
12 offices, employees, or agents within the Reservation.
- 13 b. Hallmark and other Insurers were sued by the Tribe and PME in the Tribal
14 Court Action.
- 15 c. Hallmark and the other Insurers moved by limited to dismiss the Tribal Court
16 Action for lack of jurisdiction.
- 17 d. Hallmark, Aspen Specialty Insurance Company, and Aspen Insurance UK, Ltd,
18 also brought separate motions to dismiss based on failure to state a
19 claim/ripeness and based upon lack of due process.
- 20 e. Following the Tribal Court's denial of the motions, Hallmark and the other
21 Insurers appealed from the decision to the Tribal Court of Appeals.

22 20. Plaintiff Aspen Specialty Insurance Company ("Aspen Specialty") is a North
23 Dakota surplus lines insurance company with its principal place of business in New Jersey.

- 24 a. Aspen Specialty is not a member of the Tribe and does not maintain any
25 operations, offices, employees, or agents within the Reservation.
- 26 b. Aspen Specialty and other Insurers were sued by the Tribe and PME in the
27 Tribal Court Action.
- 28

1 c. Aspen Specialty and the other Insurers moved by limited to dismiss the Tribal
2 Court Action for lack of jurisdiction.

3 d. Aspen Specialty, Hallmark, and Aspen Insurance UK, Ltd., also brought
4 separate motions to dismiss based on failure to state a claim/ripeness and based
5 upon lack of due process.

6 e. Following the Tribal Court's denial of the motions, Aspen Specialty and the
7 other Insurers appealed from the decision to the Tribal Court of Appeals.

8 21. Plaintiff Aspen Insurance UK, Ltd. ("Aspen Insurance UK"), is a United Kingdom
9 domiciled insurer with its principal place of business in London, England.

10 a. Aspen Insurance UK is not a member of the Tribe and does not maintain any
11 operations, offices, employees, or agents within the Reservation.

12 b. Aspen Insurance UK, and other Insurers were sued by the Tribe and PME in
13 the Tribal Court Action.

14 c. Aspen Insurance and the other Insurers moved by limited to dismiss the Tribal
15 Court Action for lack of jurisdiction.

16 d. Aspen Insurance UK, Aspen Specialty, and Hallmark, also brought separate
17 motions to dismiss based on failure to state a claim/ripeness and based upon
18 lack of due process.

19 e. Following the Tribal Court's denial of the motions, Aspen Insurance UK and
20 the other Insurers appealed from the decision to the Tribal Court of Appeals.

21 22. Plaintiffs Certain Underwriters at Lloyd's, London and London market companies
22 subscribing to Policy No. PJ193647 are all organized and registered under the laws of the United
23 Kingdom. Plaintiffs Certain Underwriters at Lloyd's, London subscribing to Policy No.
24 PJ1900131 are organized and registered under the laws of the United Kingdom. Plaintiffs Certain
25 Underwriters at Lloyd's, London and London market companies subscribing to Policy
26 No. PJ1933021 are organized and registered under the laws of the United Kingdom. Plaintiffs
27 Certain Underwriters at Lloyd's, London subscribing to Policy Nos. PD-10364-05 and PD-11091-
28 00 are organized and registered under the laws of the United Kingdom. Plaintiff Endurance

1 Worldwide Insurance Limited (t/as Sompo International) subscribing to Policy No. PJ1900134-A
2 is organized and registered under the laws of the United Kingdom. The entities identified in this
3 paragraph (referred to collectively as the “London-based Carriers”) have their principal places of
4 business in the United Kingdom.

- 5 a. The London-based Carriers are not members of the Tribe and do not maintain
6 any operations, offices, employees, or agents within the Reservation.
- 7 b. The London-based Carriers and the other Insurers were sued by the Tribe and
8 PME in the Tribal Court Action.
- 9 c. The London-based Carriers and the other Insurers moved by limited special
10 appearance to dismiss the Tribal Court Action for lack of jurisdiction.
11 Following the Tribal Court’s denial of the motions, the London-based Carriers
12 and the other Insurers appealed from the decision to the Tribal Court of
13 Appeals.

14 23. Defendant Cindy Smith is the Chief Judge for the Tribal Court and currently
15 presides over the Tribal Court Action. She is sued only in her official capacity. Upon information
16 and belief, Defendant Smith has authority to terminate the Tribal Court Action against the Insurers.
17 Upon information and belief, Defendant Smith is a resident of the State of Washington.

18 24. Defendant Eric Nielsen is the Chief Judge of the Tribal Court of Appeals and
19 presided over the Tribal Court Appeal. He is sued only in his official capacity. Upon information
20 and belief, Defendant Nielsen has authority to terminate the Tribal Court Action against the
21 Insurers. Upon information and belief, Defendant Nielsen is a resident of the State of Washington.

22 25. Defendant Bruce Didesch is a Judge of the Tribal Court of Appeals and presided
23 over the Tribal Court Appeal. He is sued only in his official capacity. Upon information and
24 belief, Defendant Didesch has authority to terminate the Tribal Court Action against the Insurers.
25 Upon information and belief, Defendant Didesch is a resident of the State of Washington.

26 26. Defendant Steven Aycock is a Judge of the Tribal Court of Appeals and presided
27 over the Tribal Court Appeal. He is sued only in her official capacity. Upon information and
28

1 belief, Defendant Aycock has authority to terminate the Tribal Court Action against the Insurers.
2 Upon information and belief, Defendant Aycock is a resident of the State of Idaho.

3 III. JURISDICTION, VENUE, AND EXHAUSTION OF TRIBAL REMEDIES

4 A. Jurisdiction

5 27. This Court has jurisdiction over the subject matter of this action under 28 U.S.C.
6 § 1331. Whether the Tribal Court may exercise jurisdiction over the nonmember Insurers is an
7 issue arising under federal law and thus presents a federal question. *Plains Commerce Bank*, 554
8 U.S. at 324.

9 28. The Insurers have standing to bring this action. The Insurers have suffered “injury
10 in fact” because they have been and continue to be subjected to the Tribal Court’s unlawful
11 determination and exercise of jurisdiction over them, and because they have been and imminently
12 will be subject to the Tribal Court’s orders and judgments, injuries which are traceable to
13 Defendants and can be redressed by a favorable decision of this Court. *See Lujan*, 504 U.S. at
14 561–62 (holding that if a plaintiff “is himself an object of” a government’s unlawful regulation,
15 there is “little question that the action . . . has caused him injury, and that a judgment preventing
16 . . . the action will redress it”); *Plains Commerce Bank*, 554 U.S. at 326 (holding that a nonmember
17 “was injured by the Tribal Court’s exercise of jurisdiction over [a] claim” against it and that
18 “[t]hose injuries can be remedied by a ruling in favor of the [nonmember] that the Tribal Court
19 lacked jurisdiction and that its judgment on the . . . claim is null and void”).

20 29. The Insurers seek declaratory and injunctive relief under the doctrine established in
21 *Ex Parte Young*, 209 U.S. 123 (1908), which authorizes such suits against state or tribal officials.
22 Under *Ex Parte Young* and its progeny, this Court has authority to enjoin tribal officials from
23 violating federal law. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014).
24 Defendants are judges of the Tribal Court or Tribal Court of Appeals and so are officials of the
25 Tribe. Each Defendant is involved in the Tribal Court’s ongoing exercise of jurisdiction over the
26 Insurers in violation of federal law.

27 30. The Insurers also seek declaratory and injunctive relief pursuant to Rules 57 and 65
28 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202, which grant this Court

1 authority to declare the rights and legal relations surrounding questions of actual controversy that
2 exist between parties. A case of actual controversy exists between the Insurers and Defendants
3 with respect to the Tribal Court’s ongoing exercise of jurisdiction over the Insurers in violation of
4 federal law.

5 **B. Venue**

6 31. Venue is proper within the United States District Court for the Western District of
7 Washington pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise
8 to this action occurred in this judicial district.

9 **C. Exhaustion of Tribal Remedies**

10 32. Challenges to a tribal court’s jurisdiction are subject to an exhaustion requirement.
11 Before a federal court may consider the question “whether a tribal court has exceeded the lawful
12 limits of its jurisdiction,” the tribal court itself must first be given a “full opportunity” to evaluate
13 and determine its own jurisdiction. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471
14 U.S. 845, 856–57 (1985). Once “tribal remedies” have been exhausted, a tribal court’s
15 determination of its own jurisdiction is subject to review by a federal court. *Id.* at 853.

16 33. To exhaust tribal remedies, “tribal appellate courts must have the opportunity to
17 review the determinations of the lower tribal courts.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9,
18 17 (1987). Thus, exhaustion is complete when tribal appellate review is complete. *Id.*; *see also*
19 *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844 (9th Cir. 2009); *Ford Motor*
20 *Co. v. Todecheene*, 488 F.3d 1215, 1216–17 (9th Cir. 2007).

21 34. The Insurers have exhausted all available tribal remedies before the Tribal Court
22 and Tribal Court of Appeals. Making a limited special appearance, the Insurers moved to dismiss
23 the Tribal Court Action for lack of jurisdiction. The motions were heard and denied by the Tribal
24 Court, and the Insurers sought interlocutory appellate review of the Tribal Court’s decision. The
25 Tribal Court of Appeals accepted interlocutory review and affirmed the lower court’s decision.
26 The Insurers have therefore exhausted tribal remedies. *See, e.g., Big Horn Cty. Elec. Coop., Inc.*
27 *v. Big Man*, 2018 WL 4603276, at *3 (D. Mont. Sept. 25, 2018) (“In *Elliot* [sic] and *Ford Motor*
28 *Co.*, the Ninth Circuit instructed once the issue of jurisdiction has been decided by the tribal

1 appellate court, a non-Indian has satisfied the exhaustion requirement even if the merits remain to
2 be determined.”).

3 **IV. BACKGROUND AND PROCEDURAL HISTORY**

4 **A. The Underlying Insurance Contracts**

5 35. The Suquamish Tribe (referred to previously and throughout as the “Tribe”) is a
6 federally recognized Indian tribe located in Suquamish, Washington, and situated on the Port
7 Madison Indian Reservation (referred to previously and throughout as the “Reservation”).

8 36. The Port Madison Enterprises (referred to previously and throughout as “PME”) is
9 a corporate arm of the Tribe. PME is located in Suquamish, Washington, and is situated on the
10 Reservation. PME operates various businesses owned by the Tribe within the exterior boundaries
11 of the Reservation, including the Suquamish Clearwater Casino and Resort, Kiana Lodge, and
12 White Horse Golf Club, among others.

13 37. The Tribe and PME are insured through a nationwide property insurance program
14 known as the Tribal Property Insurance Program (“TPIP”), which is part of a larger property
15 insurance program known as the Alliant Property Insurance Program (“APIP”) that also insures
16 municipalities, hospitals, and non-profit organizations.

17 38. TPIP is maintained and administered by a third-party service called “Tribal First,”
18 which is a specialized program of Alliant Specialty Insurance Services, Inc. and/or Alliant
19 Insurance Services, Inc. (collectively, “Tribal First” or “Alliant”). Alliant Specialty Insurance
20 Services, Inc. and Alliant Insurance Services, Inc. are registered California corporations located in
21 Newport Beach, California. In maintaining and administering TPIP, Alliant processes submissions
22 for insurance; collects premiums; prepares and provides quotes, cover notes, policy documentation
23 and evidences of insurance; and develops and maintains an underwriting file for each insured under
24 TPIP.

25 39. Various insurance carriers, including the Insurers, participate in APIP (and its
26 subprogram TPIP) by providing insurance and underwriting services at different layers of coverage
27 and varying percentages of risk insured by those layers. Several of the layers of coverage provided
28

1 to TPIP insureds are subject to aggregate coverage limits. As a result, covered losses paid to one
2 insured can reduce the coverage limit available to other insureds during any single policy period.

3 40. Through TPIP, the Tribe was issued multiple property insurance policies by the
4 participating carriers for the policy period from July 1, 2019, to July 1, 2020, including but not
5 limited to Lexington Policy No. 017471589/06 (Dec 37) 9619; Homeland Policy No. 798000253;
6 Hallmark Policy Nos. 73PRX19A1BE and 73PRX19A1F4; Aspen Specialty Policy No.
7 PX006CP19A; Aspen Insurance UK Policy No. PRAGET719; and the London-based Carriers
8 Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-11091-00, and PJ1900134-A.

9 41. Likewise, through TPIP, PME was issued multiple property insurance policies by
10 the participating carriers for the policy period from July 1, 2019, to July 1, 2020, including but not
11 limited to Lexington Policy No. 017471589/06 (Dec 16) 9261; Homeland Policy No. 798000259;
12 Hallmark Policy Nos. 73PRX19A1BE and 73PRX19A1F4; Aspen Specialty Policy No.
13 PX006CP19A; Aspen Insurance UK Policy No. PRAGET719; and the London-based Carriers
14 Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, and PJ1900134-A.

15 42. The Tribe and PME negotiated and obtained their property insurance policies for
16 the 2019-2020 policy period through Alliant, based on underwriting guidelines established
17 between Alliant and the TPIP carriers.²

18 43. The Tribe and PME did not negotiate or obtain their property insurance policies for
19 the 2019-2020 policy period directly from the Insurers or any other TPIP carrier.

20 44. The Insurers and the other TPIP carriers negotiated and entered into separate and
21 independent contracts with Alliant setting forth each TPIP insurer's obligations under TPIP.

22 45. The Insurers and the other TPIP carriers did not have direct contact with potential
23 TPIP insureds, including the Tribe and PME, before the issuance of the property insurance policies
24 for the 2019-2020 policy period. The Insurers the other TPIP carriers learned of potential TPIP
25 insureds, including the Tribe and PME, only through Alliant. On information and belief, Alliant
26 (not the Insurers) processed the Tribe's and PME's submissions for insurance; collected premiums

27 ² Upon information and belief, the Tribe and PME also purchased insurance coverage through a
28 broker, Brown & Brown.

1 from the Tribe and PME; prepared and provided quotes, cover notes, policy documentation and
2 evidences of insurance to the Tribe and PME; and developed and maintained an underwriting file
3 for the Tribe and PME.

4 46. Each property insurance policy issued through TPIP to the Tribe and PME for the
5 2019-2020 policy period incorporates a master policy form referred to as the Tribal First Policy
6 Wording, TPIP USA Form No. 15, which sets forth the terms, conditions, and exclusions of
7 coverage applicable to the Tribe and PME (collectively, the “Policy”).

8 47. The Policy does not contain any provision through which the Insurers consent to
9 the jurisdiction of the Tribe or its Tribal Court.

10 48. The Policy does not contain any provision through which the Insurers consent to
11 the laws of the Tribe governing the interpretation of the Policy.

12 49. The Policy contains a “Service of Suit (U.S.A.)” provision, which states as follows:

13 **AE. SERVICE OF SUIT (U.S.A.)**

14 It is agreed that in the event of the failure of the Underwriters hereon to pay any
15 amount claimed to be due hereunder, the Underwriters hereon, at the request of the
16 Named Insured (or Reinsured), will submit to the jurisdiction of a Court of
17 competent jurisdiction within the United States. Nothing in this Clause constitutes
18 or should be understood to constitute a waiver of Underwriters’ rights to commence
19 an action in any Court of competent jurisdiction in the United States, to remove an
20 action to a United States District Court, or to seek a transfer of a case to another
21 Court as permitted by the laws of the United States or of any State in the United
22 States. It is further agreed that service of process in such suit may be made upon:

23 FLWA Service Corp, c/o Foley and Lardner LLP, 555 California Street, Suite 1700,
24 San Francisco, CA 94104-1520 (applicable to all markets except as noted below)
25 and that in any suit instituted against any one of them upon this contract,
26 Underwriters will abide by the final decision of such Court or of any Appellate
27 Court in the event of an appeal.

28 The above-named are authorized and directed to accept service of process on behalf
of Underwriters in any such suit and/or upon the request of the Named Insured (or
Reinsured) to give a written undertaking to the Named Insured (or Reinsured) that
they will enter a general appearance upon Underwriters’ behalf in the event such a
suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States
which makes provision therefore, Underwriters hereon hereby designate the
Superintendent, Commissioner or Director of Insurance or other officer specified
for that purpose in the statute, or his successor or successors in office, as their true
and lawful attorney upon whom may be served any lawful process in any action,
suit or proceeding instituted by or on behalf of the Named Insured (or Reinsured)
or any beneficiary hereunder arising out of this contract of insurance (or

1 reinsurance), and hereby designate the above-named as the person to whom The
2 said officer is authorized to mail such process or a true copy thereof.

3 50. The Policy itself does not specifically name any TPIP insured, including either the
4 Tribe or PME. And the Policy does not specifically name any TPIP carrier, including the Insurers.

5 51. The Policy states that the “Named Insured” is “shown on the Declaration page, or
6 as listed in the Declaration Schedule Addendum attached to this policy,” and that Tribal First (*i.e.*,
7 Alliant) maintains a “Named Insured Schedule” in its files.

8 52. Copies of the Policy and other related documents were prepared by Alliant and
9 provided to the Tribe and PME by Alliant (not any of the Insurers). True and correct copies of the
10 documents provided to the Tribe by Alliant are attached hereto as **Exhibit A**. True and correct
11 copies of the documents provided to PME by Alliant are attached hereto as **Exhibit B**. Included
12 among those documents were Declaration pages associated with the Lexington property insurance
13 policies issued to the Tribe and PME. In each of those Declaration pages, the “Named Insured” is
14 identified as “All Entities listed as Named Insureds on file with Alliant Insurance Services, Inc.,”
15 and the “Mailing Address of Insured” is identified as “As on file with Alliant Insurance Services,
16 Inc. c/o 325 E. Hillcrest Dr. Suite 250, Thousand Oaks, CA 91360.”

17 53. Also included among the documents related to the Policy that were prepared and
18 provided by Alliant (not any of the Insurers) to the Tribe and PME were documents entitled “Tribal
19 Property Insurance Program Evidence of Coverage.” The Evidence of Coverage documents are
20 printed on “Tribal First Alliant Underwriting Solutions” letterhead and signed by Ray Corbett,
21 Senior Vice President of Alliant Specialty Insurance Services. They indicate that they were
22 prepared by Alliant “as a matter of convenience” and were “based on facts and representations
23 supplied to [Alliant] by [the Tribe and PME, respectively].” They also indicate that any
24 “Notification of Claims” must be sent to “Tribal First” by way of a P.O. Box in San Diego,
25 California.

26 **B. The Tribe’s and PME’s COVID-19-Related Insurance Claims**

27 54. In March 2020, the Tribe and PME temporarily suspended some of their non-
28 essential business operations because of the COVID-19 pandemic.

1 55. In late March and early April 2020, the Tribe and PME submitted insurance claims
2 under the Policy to their broker, Brown & Brown:

3 a. On March 30, 2020, the Tribe submitted an insurance claim under the Policy to
4 Brown & Brown by email, stating in relevant part:

5 The Suquamish Indian Tribe and its wholly owned subsidiary, Suquamish Seafoods Enterprises have had a Business Income Loss from
6 loss of property use due to the coronavirus/COVID-19 outbreak in the greater Seattle metropolitan area. After local cases of COVID-19 arose
7 on the adjacent community of Bainbridge Island, the Suquamish Tribal Council in response, issued a Declaration of Emergency (resolution
8 2020-048), and a facility closure for tribal government buildings, including Suquamish Seafoods Enterprises (resolution 2020-050). In
9 addition, the Governor of Washington issued a stay at home order (Inslee Proclamation 20-25), prohibiting all persons subject to
10 Washington State jurisdiction (the vast majority of Suquamish Government employees) from leaving home unless engaged in essential
11 critical sectors of the economy. The COVID-19 crisis and the corresponding government actions have rendered much of Suquamish
12 Government property unusable and directly caused monetary loss. We would like to request that you assist the Suquamish Tribe in opening a
13 Business Income Claim under these circumstances.

14 b. On April 1, 2020, PME submitted an insurance claim under the Policy to Brown
15 & Brown by email, stating in relevant part:

16 Port Madison Enterprises (“PME”) closed its gaming facility, the Suquamish Clearwater Casino Resort, pursuant to order of the
17 Suquamish Tribal Council effective at 12:00 A.M. on March 17, 2020. Additional PME outlets including Kiana Lodge, White Horse Golf
18 Club, and Longhouse Texaco were closed pursuant to further order of the Suquamish Tribal Council effective March 27, 2020. These closures
19 are in effect until at least April 8, 2020. These Tribal Council orders mirror steps taken by Washington Governor Jay Inslee following the
20 Governor’s and the CDC’s declaration of a “State of Emergency” due to the presence of the COVID-19 virus. In addition, these closures were,
21 and continue to be, necessary in order to avoid further losses at Port Madison’s business locations caused by COVID-19.

22 PME requests the Insurers to open Business Interruption, Business Interruption by Civil Authority and Ingress/Egress, Extra Expense,
23 Accidental Contamination, Protection and Preservation of Property, Pollution Liability, and other applicable claims under these
24 circumstances.

25 56. Brown & Brown transmitted the Tribe and PME’s insurance claims to Tribal First.

26 57. Tribal First transmitted the Tribe and PME’s insurance claims to Lexington.

1 58. All contractual activity by Lexington related to the Policy and to the Tribe and
2 PME's insurance claims occurred away from the Reservation and did not occur on land held by
3 the Tribe or within the exterior boundaries of the Reservation.

4 59. After receiving the Tribe's insurance claim, Lexington requested additional
5 information from the Tribe concerning its insurance claim by an email dated April 30, 2020, and
6 a follow-up email dated May 6, 2020. On May 6, 2020, Lexington issued a letter to the Tribe,
7 reserving "all rights and defenses under the policy and the law." The April 30 and May 6 emails
8 and the May 6 letter were prepared, drafted, and emailed by or on behalf of Lexington from outside
9 the territorial boundaries of the Tribe, on non-Reservation and non-tribal land.

10 60. After receiving PME's insurance claim, Lexington requested additional
11 information from the Tribe concerning its insurance claim by an email dated April 30, 2020, which
12 was again sent May 8, 2020. On May 6, 2020, Lexington issued a letter to PME reserving "all
13 rights and defenses under the policy and the law." The April 30 and May 8 emails and the May 6
14 letter were prepared, drafted, and emailed by or on behalf of Lexington from outside the territorial
15 boundaries of the Tribe, on non-Reservation and non-tribal land.

16 61. On May 12, 2020, by email, counsel for PME provided to Lexington "preliminary
17 responses" to Lexington's requests for information.

18 62. On May 27, 2020, by email, counsel for the Tribe provided to Lexington
19 "preliminary responses" to Lexington's requests for information.

20 63. On June 4, 2020, the Tribe and PME initiated legal proceedings in the Tribal Court
21 against Lexington and other Insurers.

22 64. On June 17, 2020, by email, Lexington requested additional information from the
23 Tribe concerning any new information it may have regarding its insurance claim.

24 65. On June 17, 2020, by email, Lexington requested additional information from PME
25 concerning any new information it may have regarding its insurance claim.

26 66. Homeland was first notified of the Tribe and PME's insurance claims on June 22,
27 2020, when it received notice of the June 4, 2020 legal proceeding initiated by the Tribe and PME.
28

1 **C. The Tribal Court Action**

2 67. The Tribal Court Action is captioned *Suquamish Tribe v. Lexington Insurance*
3 *Company*, No. 200601-C.

4 68. Defendant Smith presides over the Tribal Court Action.

5 69. In its original complaint in the Tribal Court Action, the Tribe and PME brought
6 causes of action for declaratory judgment and breach of contract against the Insurers.

7 70. The Tribe and PME’s original complaint in the Tribal Court Action alleged only as
8 follows regarding jurisdiction:

9 Pursuant to Suquamish Tribal Code Chapter 3 Sections 2.1, 2.2(a), and 2.4,
10 jurisdiction is proper because the Defendants have entered into insurance contracts
11 with the Plaintiffs, who own and operate the Tribal Businesses that are located on
12 the Reservation. Moreover, the Tribal Court has jurisdiction over each of the
13 Defendants because each of the Defendants entered into consensual agreements,
14 i.e., the insurance contracts, with the Tribe and with PME, and otherwise subjected
15 themselves to Tribal jurisdiction. *See Montana v. United States*, 450 U.S. 544, 565-
16 66 (1981); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802
17 (9th Cir. 2011). In addition, the Tribal Court has jurisdiction over the Defendants
18 because each of the Defendants expressly agreed to “submit to the jurisdiction” of
19 any court of competent jurisdiction in the United States.

20 71. On August 17, 2020, Lexington moved to dismiss the Tribal Court Action for lack
21 of subject matter and personal jurisdiction under both Suquamish tribal law and federal law.³ The
22 other Insurers also moved to dismiss for lack of jurisdiction and joined Lexington’s motion.

23 72. On October 26, 2020, the Tribe and PME filed their opposition to the motions.

24 73. On November 16, 2020, the Insurers filed their replies in support of dismissal for
25 lack of jurisdiction.

26 74. On January 28, 2021, by videoconference, Defendant Smith, as presiding judge of
27 the Tribal Court, heard oral argument on the motions to dismiss for lack of jurisdiction.

28 75. On March 16, 2021, Defendant Smith, as presiding judge of the Tribal Court, issued
a written order denying the Insurers’ motions to dismiss for lack of jurisdiction.

76. On March 26, 2021, the Insurers moved for permission to appeal, which Defendant
Nielsen, as Chief Judge of the Tribal Court of Appeals, granted on April 27, 2021.

³ Lexington also moved to dismiss under the doctrine of *forum non conveniens*.

1 77. On June 7, 2021, the Insurers filed their opening appellate brief.

2 78. On July 7, 2021, the Tribe and PME filed their response brief.

3 79. On July 21, 2021, the Insurers filed their reply brief.

4 80. On September 7, 2021, by videoconference, Defendants Nielsen, Didesch, and
5 Aycock, as presiding judges of the Tribal Court of Appeals, heard oral argument on the appeal.

6 81. On September 29, 2021, Defendants Nielsen, Didesch, and Aycock, as presiding
7 judges of the Tribal Court of Appeals, issued a written decision affirming the Tribal Court's denial
8 of the Insurers' motions to dismiss for lack of jurisdiction. An amended decision was issued on
9 October 7, 2021. A true and correct copy of the Tribal Court of Appeals' amended written decision
10 is attached hereto as **Exhibit C**.

11 82. On October 13, 2021, the Tribe and PME filed a first amended complaint in the
12 Tribal Court Action.

13 83. The Tribe and PME's first amended complaint in the Tribal Court Action added the
14 following statement to their allegations regarding jurisdiction:

15 Tribal Court jurisdiction was recently confirmed by the Suquamish Tribal Court of
16 Appeals. *See Opinion, Suquamish Indian Tribe et al. v. Lexington Ins. Co., et al.*,
Case No. 200601-C (amended Oct. 7, 2021).

17 84. On November 10, 2021, the Insurers asked the Tribe and PME to stipulate to a
18 deadline time to respond to the amended complaint. The Tribe and PME agreed to give the Insurers
19 only until December 1, 2021, to file their responsive pleadings. On November 29, 2021, Lexington
20 moved the Tribal Court for an additional fourteen days to respond to the amended complaint, but
21 the Tribal Court did not act on the motion.

22 85. On December 1, 2021, the Insurers filed answers to the Tribe and PME's first
23 amended complaint to avoid default.

24 86. On December 20, 2021, the Tribal Court set a pretrial hearing for January 27, 2022.

25 87. The Tribal Court Action remains ongoing, and the Tribal Court continues to
26 exercise jurisdiction over the Insurers.

V. GENERAL ALLEGATIONS AND LEGAL AUTHORITIES

88. Under Supreme Court and other federal precedent, the Tribal Court does not have the authority to exercise jurisdiction over the Insurers, and the Tribal Court’s ongoing exercise of tribal jurisdiction over the Insurers is unlawful.

A. The Presumption Against Tribal Jurisdiction Over the Insurers

89. Indian “tribes do not, as a general matter, possess authority over non-Indians who come within their borders.” *Plains Commerce Bank*, 554 U.S. at 328. Thus, the exercise of jurisdiction by a tribal court over a nonmember is “presumptively invalid.” *Id.* at 330 (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)).

90. This general rule against tribal jurisdiction over nonmembers derives from the historically “unique and limited character” of tribal sovereignty. *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021). When tribes were incorporated into the United States, they became “dependent” sovereigns and “lost many of the attributes of sovereignty.” *Montana*, 450 U.S. at 563–64. Among those lost attributes was the ability to freely and independently determine their external relations with nonmembers. *See Cooley*, 141 S. Ct. at 1642–43 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)); *see also Plains Commerce Bank*, 554 U.S. at 328 (“This general rule restricts tribal authority over nonmember activities taking place on the reservation”); *Montana*, 450 U.S. at 564–65 (“[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”).

91. The Insurers are nonmembers of the Tribe and have no say in the laws and regulations that govern the Tribe and the Tribe’s lands and members.

92. Because the Insurers are nonmembers of the Tribe, the Tribal Court’s exercise of jurisdiction over them is presumptively invalid.

93. The Tribal Court of Appeals declined to apply the presumption against tribal jurisdiction over Lexington and Homeland because it found that there were “seemingly inconsistent rulings” from the Supreme Court on the issue. Specifically, the Tribal Court of Appeals was concerned with a single statement by the Supreme Court in *LaPlante* that tribal

1 jurisdiction over nonmembers “presumptively lies in the tribal courts unless affirmatively limited
2 by a specific treaty provision or federal statute.” 480 U.S. at 18.

3 94. Yet, as the Supreme Court clarified in *Strate v. A-1 Contractors*, 520 U.S. 438,
4 451–53 (1997), this statement in *LaPlante* refers only to the tribal exhaustion requirement, which
5 requires that questions of tribal jurisdiction over nonmembers first be heard by a tribal court rather
6 than a federal court. *LaPlante*, therefore, does not state an “inconsistent” ruling regarding the
7 presumption against tribal jurisdiction over nonmembers. Nor does *LaPlante* warrant ignoring the
8 presumption. As put by Justice Souter in his concurring opinion in *Nevada v. Hicks*, 533 U.S. 353,
9 381 (2001), “in explaining and distinguishing [*LaPlante*], we confirmed in *Strate* what we had
10 indicated in *Montana*: that as a general matter, a tribe’s civil jurisdiction does not extend to the
11 ‘activities of non-Indians on reservation lands’ and that the only such activities that trigger civil
12 jurisdiction are those that fit within one of *Montana*’s two exceptions.”

13 **B. The *Montana* Exceptions**

14 95. In *Montana*, the Supreme Court recognized two narrow exceptions to the general
15 rule against tribal jurisdiction over nonmembers. First, a tribe “may regulate, through taxation,
16 licensing, or other means, the activities of nonmembers who enter consensual relationships with
17 the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”
18 *Montana*, 450 U.S. at 565. Second, a tribe may “exercise civil authority over the conduct of non-
19 Indians on fee lands within its reservations when that conduct threatens or has some direct effect
20 on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566.

21 96. The Supreme Court has explained that the *Montana* exceptions are “limited” and
22 must not be construed in a manner that would “swallow the rule” or “severely shrink it.” *Cooley*,
23 141 S. Ct. at 1645 (citation omitted); *Plains Commerce Bank*, 554 U.S. at 330 (citations omitted).
24 Indeed, with “one minor exception, [the Supreme Court has] never upheld under *Montana* the
25 extension of tribal civil authority over nonmembers on non-Indian land.” *Hicks*, 533 U.S. at 359–
26 60.

1 97. Moreover, the “burden rests on the tribe to establish one of the exceptions to
2 *Montana*’s general rule that would allow an extension of tribal authority to regulate nonmembers.”
3 *Plains Commerce Bank*, 554 U.S. at 330.

4 98. The Tribe has not met and cannot meet this burden.

5 **1. The First *Montana* Exception Does Not Apply**

6 99. The Tribal Court of Appeals held that the first *Montana* exception permits the
7 exercise of tribal jurisdiction over the Insurers in the Tribal Court Action.

8 100. The Tribal Court of Appeals, however, misapplied the first *Montana* exception and
9 expanded the reach of the Tribe’s authority in violation of federal law.

10 101. The first *Montana* exception permits the exercise of tribal jurisdiction over the
11 “activities of nonmembers who enter consensual relationships with the tribe or its members,
12 through commercial dealing, contracts, leases, or other arrangements.” *Montana*, 450 U.S. at 565.

13 102. The Supreme Court has explained that “*Montana*’s list of cases fitting within the
14 first exception indicates the type of activities the Court had in mind.” *Strate*, 520 U.S. at 456–57.
15 Each of the cases on *Montana*’s list involves nonmember *activity on the land*, within the territorial
16 boundaries of a tribe. *See id.* at 446 (“*Montana* thus described a general rule that, absent a different
17 congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-
18 Indian land within a reservation . . .”).

19 103. The first case cited by *Montana* was *Williams v. Lee*, 358 U.S. 217 (1959).
20 *Williams* concerned a payment dispute between tribal customers and a nonmember’s general store
21 on tribal land. *Id.* at 217–18. Tribal jurisdiction was affirmed because the nonmember business
22 owner “was on the reservation and the transaction with an Indian took place there.” *Id.* at 223.
23 The remaining three cases cited by *Montana* concerned the taxation of businesses owned and
24 operated by nonmembers on tribal lands. *See Morris v. Hitchcock*, 194 U.S. 384, 390 (1904)
25 (permit tax on nonmember-owned livestock within the territorial boundaries of a tribe); *Buster v.*
26 *Wright*, 135 F. 947, 950 (8th Cir. 1905) (permit tax for nonmember trading posts within the
27 territorial boundaries of a tribe); *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447
28 U.S. 134, 152–54 (1980) (tax on cigarette sales to nonmembers within tribal reservation).

1 104. In keeping with *Montana* (which was decided in 1981) and *Strate* (which was
2 decided in 1997), the Supreme Court has since observed that its “*Montana* cases have *always*
3 concerned nonmember conduct *on the land*.” *Plains Commerce Bank*, 554 U.S. at 334 (emphases
4 added); *see also id.* at 328 (the “general rule” announced in *Montana* “restricts tribal authority
5 over nonmember activities taking place on the reservation”); *Cooley*, 141 S. Ct. at 1643 (“We have
6 subsequently repeated *Montana*’s proposition and exceptions in several cases involving a tribe’s
7 jurisdiction over the activities of non-Indians within the reservation.”).

8 105. Allowing tribal jurisdiction over nonmember conduct “on the land” fits squarely
9 within the territorial limitations on tribal sovereignty. *See Plains Commerce Bank*, 554 U.S. at
10 330 (tribal sovereignty “centers on the land held by the tribe”); *Hicks*, 533 U.S. at 392 (“tribes
11 retain sovereign interests in activities that occur on land owned and controlled by the tribe”). As
12 the Ninth Circuit has stated, “tribal jurisdiction is, of course cabined by geography: The
13 jurisdiction of tribal courts does not extend beyond tribal boundaries.” *Philip Morris USA, Inc. v.*
14 *King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009).

15 106. Other federal appellate courts have specifically observed that “*Montana* and its
16 progeny permit tribal regulation of nonmember *conduct inside the reservation*.” *Jackson v.*
17 *Payday Fin., LLC*, 764 F.3d 765, 782 (7th Cir. 2014) (citation omitted); *accord Hornell Brewing*
18 *Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091 (8th Cir. 1998) (“Neither *Montana* nor its
19 progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct
20 of non-Indians occurring *outside their reservations*.”).

21 107. The Seventh Circuit, for example, has determined that *Montana*’s first exception
22 does not apply to off-reservation conduct arising from contractual relationships between a
23 nonmember and a tribe or its members. In *Jackson*, nonmember consumers brought a putative
24 class action against several loan companies owned by a tribal member who resided on tribal land.
25 764 F.3d at 768. The loan entities argued that the tribal court had jurisdiction under the first
26 *Montana* exception because the nonmember consumers entered into loan agreements with entities
27 owned by the tribal member through contracts that included forum-selection clauses requiring
28 litigation to be conducted in tribal court. *Id.* at 781–82. The Seventh Circuit held that the tribal

1 court could not exercise jurisdiction over the loan dispute, explaining that the plaintiffs had “not
2 engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the
3 loans, negotiate the loans, or execute the loan documents.” *Id.* at 782. And “[b]ecause the
4 Plaintiffs’ activities d[id] not implicate the sovereignty of the tribe over its land and its concomitant
5 authority to regulate the activity of nonmembers on the land, the tribal courts d[id] not have
6 jurisdiction over the Plaintiffs’ claims. *Id.*

7 108. The Seventh Circuit reaffirmed this principle in *Stifel, Nicolaus & Co. v. Lac du*
8 *Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015), rejecting
9 the argument of tribal defendants that “the court need not limit its consideration [of the first
10 *Montana* exception] to the on-reservation actions of [nonmembers].” The court had “made clear
11 in *Jackson* . . . that *Plains Commerce Bank* ‘circumscribed’ the already narrow *Montana*
12 exceptions” and “that a tribe’s authority to regulate nonmember conduct ‘centers on the land.’”
13 *Id.* On this basis, the court upheld a preliminary injunction enjoining tribal judicial officials from
14 pursuing further tribal-court proceedings, given that none of the nonmember conduct at issue
15 occurred “on tribal land.” *Id.* at 207–09.

16 109. The Tribal Court of Appeals rejected that “physical presence on tribal land is a
17 necessary requirement” for tribal jurisdiction, in part because it did “not find that any federal courts
18 have squarely addressed the issue.” The Tribal Court of Appeals, however, ignored that the
19 application of *Montana* has “always” concerned nonmember conduct “on the land,” within the
20 territorial boundaries of a tribe, *Plains Commerce Bank*, 554 U.S. at 334, and that a nonmember’s
21 “physical presence” on tribal land is a requirement that inheres within the geographically limited
22 nature of tribal jurisdiction and sovereignty.

23 110. The first *Montana* exception does not apply here.

- 24 a. The Insurers are nonmembers of the Tribe.
- 25 b. Although the Insurers have contractual insurance relationships with the Tribe
26 (and its tribal corporation, PME), the Insurers have not engaged in any activity
27 related to those contracts on the Tribe’s land or within the territorial boundaries
28 of the Tribe.

1 c. All conduct by the Insurers relating to their insurance contracts with the Tribe
2 (and PME), including all review and consideration of the insurance claims at
3 issue, occurred off the Tribe’s land, outside the territorial boundaries of the
4 Tribe.

5 d. The Tribal Court Action involves legal questions concerning the interpretation
6 of contractual terms and provisions and so does not concern specific conduct
7 by the Insurers on the Tribe’s land or within the territorial boundaries of the
8 Tribe.

9 e. Thus, the Tribal Court lacks the authority to exercise tribal jurisdiction over the
10 Insurers in the Tribal Court Action.

11 111. As part of its analysis of the first *Montana* exception, the Tribal Court of Appeals
12 relied on and found instructive *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999).
13 *Allstate* involved a car accident between tribal members on a tribal reservation and claims of bad
14 faith against a nonmember insurance company for refusing to settle the resulting personal-injury
15 action. *Id.* at 1074. The Ninth Circuit did *not* hold that tribal court jurisdiction applied to the
16 nonmember insurance company’s conduct. Instead, it recognized that a “colorable” argument for
17 tribal jurisdiction existed and required the parties to exhaust tribal remedies in tribal court. *Id.* at
18 1075.

19 112. Neither the Supreme Court nor any other federal appellate court has held that an
20 insurance relationship with a tribe or its members is enough to establish tribal jurisdiction over a
21 nonmember insurer. *See, e.g., Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 WL
22 1144331, at *6 (N.D. Cal. Apr. 4, 2012) (expressing doubt as to a tribal court’s jurisdiction over a
23 nonmember based merely on an insurance contract, because *Hicks* and *Plains Commerce Bank*
24 may have “alter[ed] the viability of *Allstate*’s holding”).

25 113. As part of its analysis of the first *Montana* exception, the Tribal Court of Appeals
26 also found instructive *State Farm Insurance Cos. v. Turtle Mountain Fleet Farm LLC*, 2014 WL
27 1883633 (D.N.D. May 12, 2014), an unpublished district court decision from North Dakota. The
28 court in *State Farm* held that tribal court jurisdiction existed over a nonmember insurance

1 company. *Id.* at *11. The court explained that the focus of the first *Montana* exception is “whether
2 there is a sufficient nexus between the claims being asserted and the consensual relationship,” not
3 “where the conduct [of the nonmember] took place.” *Id.* at *10. Although the exercise of tribal
4 jurisdiction must have a nexus to the consensual relationship between the tribal entity and
5 nonmember, this requirement does not *replace* the need for the exercise of tribal jurisdiction to
6 pertain to nonmember conduct on the land, as the court in *State Farm* (as well as the Tribal Court
7 of Appeals) incorrectly held.

8 114. As discussed, where an insurer has not engaged in relevant activity on a Tribe’s
9 land, the first *Montana* exception does not apply. *See Jackson*, 764 F.3d at 782; *Stifel*, 807 F.3d
10 at 208; *see also, e.g., Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D.
11 2007) (neither *Montana* exception applied to nonmember insurer that provided automobile
12 insurance to tribal members, because the insurer “never maintained an office or established any
13 other physical presence on the reservation” and never “entered tribal lands or . . . [directly]
14 conducted any business with the Tribe”); *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 783
15 (E.D. Pa. 2016) (finding no tribal jurisdiction over nonmember’s activities under a loan agreement,
16 all of which occurred “off of the reservation,” even though “contracts formed over the Internet
17 create ambiguity as to place”); *Hengle v. Asner*, 433 F. Supp. 3d 825, 862 (E.D. Va. 2020) (finding
18 no “colorable” basis for tribal court jurisdiction where nonmembers with loan agreements with
19 various tribal entities “obtained, negotiated and executed their loans from their residences in
20 Virginia through websites maintained by companies in Kansas, far from the Tribe’s reservation in
21 California,” and where the nonmembers “made loan payments from Virginia to payment
22 processors operating out of Kansas”).

23 2. The Second *Montana* Exception Does Not Apply

24 115. The second *Montana* exception permits the exercise of tribal jurisdiction over a
25 nonmember whose conduct “threatens or has some direct effect on the political integrity, the
26 economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566.

27 116. The Tribe has never asserted that this exception applies with regard to the Insurers
28 or the Tribal Court Action. Likewise, the Tribal Court of Appeals did not consider or decide

1 whether the second *Montana* exception permits the exercise of tribal jurisdiction over the Insurers
2 in the Tribal Court Action.

3 117. There is a reason the Tribe has never argued the point: The second *Montana*
4 exception does not permit the exercise of tribal jurisdiction over the Insurers.

5 118. The second *Montana* exception has a particularly “elevated threshold.” *Plains*
6 *Commerce Bank*, 554 U.S. at 341. The challenged conduct “must do more than injure the tribe, it
7 must ‘imperil the subsistence’ of the tribal community,” and the exercise of tribal jurisdiction over
8 that conduct must be “necessary to avert catastrophic consequences.” *Id.* (citation omitted).

9 119. The elevated threshold of the second *Montana* exception has not been met here.

10 a. None of the nonmember conduct at issue in the Tribal Court Action threatens
11 or has a direct effect on the political integrity, the economic security, or the
12 health or welfare of the Tribe, and the Tribe has provided no evidence of such
13 a threat or effect.

14 b. None of nonmember conduct at issue in the Tribal Court Action imperils the
15 subsistence of the Tribe’s community, and the Tribe has provided no evidence
16 of such imperilment.

17 c. The Tribal Court’s exercise of jurisdiction in the Tribal Court Action is not
18 necessary to avert catastrophic consequences, and the Tribe has provided no
19 evidence of such consequences.

20 **3. The Exercise of Tribal Jurisdiction Does Not Stem from the Tribe’s Inherent**
21 **Sovereign Authority**

22 120. As a threshold matter, for either *Montana* exception to apply, a tribe’s exercise of
23 jurisdiction “must stem from [its] inherent sovereign authority to set conditions on entry, preserve
24 tribal self-government, or control internal relations.” *Plains Commerce Bank*, 554 U.S. at 336–
25 37. The Tribe’s exercise of tribal jurisdiction here does not stem from such inherent sovereign
26 authority.

27 121. As the Supreme Court explained in *Plains Commerce Bank*, nonmember “activities
28 or land uses may be regulated” only to the extent that they “intrude on the internal relations of the

1 tribe or threaten self-rule.” *Id.* at 334–35. This is because “certain forms of nonmember behavior
2 . . . may sufficiently affect the tribe as to justify tribal oversight,” even though “tribes generally
3 have no interest in regulating the conduct of nonmembers.” *Id.* In other words, tribes “may
4 regulate nonmember behavior that implicates tribal governance and internal relations.” *Id.*

5 122. Indeed, this requirement is stated in *Montana* itself: The “exercise of tribal power
6 beyond what is necessary to protect tribal self-government or to control internal relations is
7 inconsistent with the dependent status of the tribes.” *Montana*, 450 U.S. at 564.

8 123. Thus, if the exercise of tribal jurisdiction over a nonmember “cannot be justified by
9 reference to the tribe’s sovereign interests,” it is invalid. *Plains Commerce Bank*, 554 U.S. at 336;
10 *see also Strate*, 520 U.S. at 459 (the *Montana* exceptions apply only where tribal adjudicatory or
11 regulatory authority “is needed to preserve the right of reservation Indians to make their own laws
12 and be ruled by them”).

13 124. The Supreme Court and several federal appellate courts have expressly applied this
14 threshold requirement in deciding there is no tribal jurisdiction.

15 a. *Plains Commerce Bank*, 554 U.S. at 336–37: The Supreme Court found that a
16 tribal court lacked jurisdiction over a dispute involving the sale of non-Indian
17 fee land by a nonmember bank. The Court explained that regulating the sale of
18 non-Indian fee land could not be justified by the tribe’s sovereign interests of
19 “protecting internal relations and self-government,” because the “mere fact of
20 resale” had not threatened those interests. Certain “uses to which land is put”
21 by a nonmember very well could implicate sovereign interests, but no such use
22 of land was at issue, and the tribe therefore lacked authority over the sale.

23 b. *Jackson*, 764 F.3d at 783 : The Seventh Circuit rejected the argument that “a
24 nonmember’s consent to tribal authority” was “sufficient to establish the
25 jurisdiction of a tribal court,” because the tribal court’s jurisdiction over
26 nonmembers must also “stem from the tribe’s inherent sovereign authority.”
27 And the dispute at issue, concerning off-reservation loan activity, did not
28 implicate “any aspect of ‘the tribe’s inherent sovereign authority.’”

1 c. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019):
2 The Eighth Circuit decided that a tribal court lacked jurisdiction over
3 nonmember oil and gas companies accused of failing to pay royalties under
4 leases with various tribal members. The Eighth Circuit explained that although
5 the leases were “consensual relationships with tribal members,” a “consensual
6 relationship alone is not enough” to establish tribal jurisdiction. The exercise
7 of tribal jurisdiction had to stem from the tribe’s sovereign interests, and the
8 regulation of nonmember companies and their lease-related activity was “not
9 necessary for tribal self-government or controlling internal relations.”

10 d. *Nat’l Lab. Rels. Bd. v. Little River Band of Ottawa Indians Tribal Gov’t*, 788
11 F.3d 537, 546 (6th Cir. 2015): The Sixth Circuit held that the National Labor
12 Relations Board had authority to regulate the labor-organizing activity of a
13 tribe’s casino employees and to prevent the tribe’s enforcement of conflicting
14 tribal laws, because imposing federal labor laws on the tribe did not interfere
15 with the tribe’s self-governance. The court reviewed “the law governing
16 implicit divestiture of tribal sovereignty” and concluded that in *Montana, Hicks*,
17 and *Plains Commerce Bank*, the Supreme Court has repeatedly made clear that
18 a tribe’s “power to regulate the activities of non-members is constrained,
19 extending only so far as ‘necessary to protect tribal self-government or to
20 control internal relations’” and that “[t]ribal regulations of non-member
21 activities must ‘flow directly from these limited sovereign interests.’” The
22 Sixth Circuit determined that labor regulations concerning tribal and non-tribal
23 casino employees did not sufficiently implicate those interests.

24 125. The exercise of tribal jurisdiction over the Insurers in the Tribal Court Action is not
25 necessary to protect tribal self-government or to control internal relations, and is therefore invalid.

26 126. The Tribal Court Action concerns the interpretation of contractual terms and
27 conditions affecting nonmember conduct occurring off the Tribe’s land, outside the Tribe’s
28 territorial boundaries. Thus, the exercise of tribal jurisdiction over the Insurers’ conduct under the

1 contracts does not implicate or stem from the Tribe’s “sovereign interests in activities that occur
2 *on land* owned and controlled by the tribe.” *Hicks*, 533 U.S. at 392 (emphasis added); *Plains*
3 *Commerce Bank*, 554 U.S. at 327 (tribal sovereignty “centers on the land held by the tribe and on
4 non-tribal members within the reservation”); *see, e.g., Stifel*, 807 F.3d at 207 (“The actions of
5 nonmembers outside of the reservation do not implicate the Tribe’s sovereignty.”).

6 127. Further, as an insurance contract dispute, this case does not implicate tribal
7 sovereignty because the Tribe does not regulate insurance in the first place. Of the 18 Titles that
8 make up the Suquamish Tribal Code, *none* concerns insurance. By comparison, in the State of
9 Washington, the authority to set insurance policy and to regulate insurance is vested in the
10 Insurance Commissioner, whose duties include rulemaking, investigation, and oversight of a broad
11 range of insurance matters. *See, e.g., RCW 48.02.010, RCW 48.02.060, et seq.; see also 15 U.S.C.*
12 *§ 1011* (“Congress hereby declares that the continued regulation and taxation by the several States
13 of the business of insurance is in the public interest, and that the silence on the part of the Congress
14 shall not be construed as to impose any barrier to the regulation or taxation of such business by the
15 several States.”). The absence of insurance regulation by the Tribe and the comparatively
16 exclusive regulation of insurance by the State of Washington, and others, indicates that the exercise
17 of jurisdiction by the Tribal Court over the Insurers’ conduct under the contracts is not and has not
18 been necessary to protect tribal self-government or to control internal relations. A state or federal
19 court of competent jurisdiction can just as easily decide the contractual dispute at issue here—
20 without endangering or compromising the Tribe’s sovereignty. *See Kodiak Oil*, 932 F.3d at 1138
21 (rejecting application of first *Montana* exception where “complete federal control of oil and gas
22 leases on allotted lands—and the corresponding lack of any role for tribal law or tribal government
23 in that process—undermine[d] any notion that tribal regulation in this area [was] necessary for
24 tribal self-government”).

25 128. The absence of insurance regulation by the Tribe is significant also because “a
26 tribe’s adjudicative jurisdiction [can]not exceed its legislative jurisdiction.” *Strate*, 520 U.S. at
27 453; *see also Plains Commerce Bank*, 554 U.S. at 330 (“reaffirm[ing]” the principle that tribal
28 courts lack jurisdiction to hear claims exceeding the bounds of a tribe’s “legislative jurisdiction”).

1 Because the Tribe does not regulate insurance and has not been granted regulatory authority by
2 Congress over any aspect of the insurance industry, the Tribal Court cannot exercise adjudicative
3 jurisdiction over Plaintiffs’ insurance activity. *See Jackson*, 764 F.3d at 782 (“[I]f a tribe does not
4 have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim
5 based on that activity.”).

6 129. The Tribal Court of Appeals erred by failing even to consider, let alone decide,
7 whether the exercise of tribal jurisdiction over the Insurers in the Tribal Court Action was
8 “necessary to protect tribal self-government or to control internal relations” or, similarly, whether
9 such adjudicatory authority exceeded the Tribe’s legislative authority.

10 **4. The Exercise of Tribal Jurisdiction Over the Insurers Swallows the General**
11 **Rule Against Tribal Jurisdiction Over Nonmembers**

12 130. The *Montana* exceptions “cannot be construed in a manner that would swallow the
13 rule” against tribal jurisdiction over nonmembers. *Cooley*, 141 S. Ct. at 1645 (citing *Plains*
14 *Commerce Bank*, 554 U.S. at 330). The exercise of tribal jurisdiction over the Insurers, however,
15 does just that.

16 131. By permitting the exercise of tribal jurisdiction over the Insurers, the Tribal Court
17 of Appeals has construed the first *Montana* exception in a way that allows the Tribe authority over
18 nonmembers based solely on the existence of a contractual relationship with the Tribe relating to
19 Reservation property, without accounting for the additional limiting requirements that the
20 nonmember’s relevant conduct occur *on the land* held by the Tribe and that the exercise of tribal
21 jurisdiction be justified by reference to the Tribe’s *sovereign interests*. This construction of the
22 first *Montana* exception is untenable.

- 23 a. It allows the Tribe to exercise jurisdiction over every nonmember it contracts
24 with, regardless of whether the nonmember’s relevant conduct actually takes
25 place on the Tribe’s land or implicates tribal self-government and internal
26 relations.
- 27 b. It allows the Tribe to regulate the terms of its “consensual relationships” with
28 nonmembers, even though the first *Montana* exception is confined to regulating

1 nonmember *conduct* on the land that implicates a tribe’s sovereign interests
2 rather than the consensual relationships themselves.

- 3 c. It provides the Tribe with adjudicatory and regulatory authority over every
4 contract the Tribe enters into with nonmembers, as if contracting with the Tribe
5 were equivalent to physically entering and acting on the Tribe’s lands.

6 **C. The Right to Exclude Does Not Apply**

7 132. The Ninth Circuit allows tribal jurisdiction over nonmembers based not just on the
8 two narrow *Montana* exceptions, but also the “right to exclude” doctrine. *Water Wheel Camp Rec.*
9 *Area, Inc. v. LaRance*, 642 F.3d 802, 804–05 (9th Cir. 2011) (per curiam). Under that doctrine, a
10 tribe’s “sovereign authority over tribal land” provides it with the power to exclude nonmembers
11 from the land, a power which “necessarily includes the lesser authority to set conditions on their
12 entry through regulations.” *Id.* at 811. The Supreme Court has not recognized the right-to-exclude
13 doctrine as a basis for tribal jurisdiction separate and apart from *Montana*. But under current Ninth
14 Circuit law, it applies independently from *Montana*: A tribe’s power to exclude applies to
15 nonmembers on “tribal land,” whereas a tribe’s powers under *Montana* apply to nonmembers on
16 “non-Indian fee land,” which is land held in fee simple by a nonmember. *Id.* at 812.

17 133. The Tribal Court of Appeals decided that the right-to-exclude doctrine here permits
18 the exercise of tribal jurisdiction over the Insurers, because the insurance contracts at issue “were
19 expressly directed and tied to the Tribe’s trust lands and businesses located on the Suquamish
20 Tribe’s Reservation” and the Tribal Court Action was based on losses that “occurred on Tribal
21 land within its Reservation.”

22 134. The Tribal Court of Appeals incorrectly applied the right-to-exclude doctrine,
23 which does not permit the exercise of tribal jurisdiction under these circumstances. Similar to the
24 first *Montana* exception, for the “right to exclude” to apply, a nonmember must physically enter
25 tribal land, and the nonmember’s physical presence on the land must be at issue and implicate that
26 tribe’s ability to manage its lands.

- 27 a. *Water Wheel*, 642 F.3d at 814: The Ninth Circuit affirmed a tribe’s regulatory
28 jurisdiction over a nonmember based on the right-to-exclude doctrine, “where

1 the non-Indian activity in question occurred on tribal land” and “the activity
2 interfered directly with the tribe’s inherent powers to exclude and manage its
3 own lands.”

4 b. *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 901 (9th
5 Cir. 2019): The Ninth Circuit held that a tribe had “authority to regulate [a
6 nonmember employee’s] conduct on tribal land pursuant to its sovereign
7 exclusionary powers,” given that the nonmember’s “alleged conduct violated
8 the [t]ribe’s regulations that were in place at the time of her employment,” while
9 she was “on tribal land.”

10 c. *Grand Canyon Skywalk Dev. v. ‘SA’ Nyu Wa Inc.*, 715 F.3d 1196, 1204–05 (9th
11 Cir. 2013): The Ninth Circuit found tribal jurisdiction “not plainly lacking”
12 with regard to a non-tribal corporation that entered into an agreement with a
13 tribal corporation to build and manage a tourist destination on tribal land.
14 Because the “essential basis for the agreement” was “access to” tribal land and
15 the agreement “interfered with the [tribe’s] ability to exclude [the non-tribal
16 corporation] from the reservation,” the tribe likely had regulatory and
17 adjudicatory authority over the parties, lands, and interests implicated by that
18 agreement.

19 135. When a nonmember has *not* physically entered tribal land and has *not* engaged in
20 activity on tribal land, the “right to exclude” does not apply. *See Emp’rs Mut. Cas. Co. v. McPaul*,
21 804 F. App’x 756, 757 (9th Cir. 2020). In *McPaul*, the Ninth Circuit held that because a
22 nonmember insurance company’s “relevant conduct—negotiating and issuing general liability
23 insurance contracts to non-Navajo entities—occurred entirely outside of tribal land,” a tribal
24 court’s jurisdiction could not be premised on the tribe’s right to exclude. *Id.* As the district court
25 in *McPaul* elaborated, the nonmember insurer “never set foot on reservation land, interacted with
26 tribal members, or expressly directed any activity within the reservation’s borders.” *Emp’rs Mut.*
27 *Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1149–50 (D. Ariz. 2019), *aff’d sub nom.*, *McPaul*, 804
28 F. App’x 756.

1 136. The Tribe’s right to exclude does not apply to the Insurers and therefore does not
2 permit the exercise of tribal jurisdiction over them.

3 a. The Insurers have not entered into, sent employees to, maintained operations
4 within, trespassed, or engaged in any activity on the Tribe’s land or within the
5 territorial borders of the Tribe.

6 b. The insurance contracts at issue do not provide the Insurers with access to the
7 Tribe’s land, nor do they contain terms that affect or impair the Tribe’s ability
8 to exclude individuals from its land.

9 137. As part of its analysis of the “right to exclude” doctrine, the Tribal Court of Appeals
10 held that the Tribe “could have excluded [the Insurers] from selling” insurance policies to the Tribe
11 regarding “on-reservation property and businesses.” But the Tribal Court of Appeals cited no
12 authority to support this proposition, which appears to conflate commercial discretion with
13 sovereign authority. What the Tribe may or may not be able to do as a private party deciding the
14 terms of a business relationship must not be confused with what it is permitted to do as a tribal
15 sovereign seeking to impose its authority on a nonmember. *See San Manuel Indian Bingo and*
16 *Casino v. Nat’l Lab. Rels. Bd.*, 475 F.3d 1306, 1312–13 (D.C. Cir. 2007) (“[T]ribal sovereignty is
17 not absolute, permitting a tribe to operate in a commercial capacity without legal constraint.”); *see*
18 *also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982) (cautioning against “confus[ing]
19 the Tribe’s role as commercial partner with its role as sovereign”); *Montana*, 450 U.S. at 565–66
20 (“Indian tribes have lost any ‘right of governing every person within their limits except
21 themselves’” but can “exercise some forms of civil jurisdiction over non-Indians *on* their
22 reservations” (emphasis added)). Indeed, when “a tribal government goes beyond matters of
23 internal self-governance and enters into off-reservation business transaction[s] with non-Indians,
24 its claim of sovereignty is at its weakest.” *San Manuel*, 475 F.3d at 1313.

25 138. Because the Insurers have not entered the Tribe’s land, there is nothing for the Tribe
26 to exclude, and thus the “right to exclude” doctrine does not permit the exercise of tribal
27 jurisdiction over the Insurers in the Tribal Court Action.

FIRST CAUSE OF ACTION
(Declaratory Relief)

139. Plaintiffs re-allege and incorporate by reference each of the allegations above.

140. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the ongoing exercise of jurisdiction by the Tribal Court over Plaintiffs and the claims brought against them in the Tribal Court Action. A declaration by this Court as to the Tribal Court's jurisdiction would terminate the controversy giving rise to this cause of action.

141. Plaintiffs are entitled to a judgment from this Court declaring that the Tribal Court lacks jurisdiction over Plaintiffs and the claims brought against them in the Tribal Court Action and that the ongoing exercise of such jurisdiction violates federal law.

SECOND CAUSE OF ACTION
(Injunctive Relief)

142. Plaintiffs re-allege and incorporate by reference each of the allegations above.

143. The Tribal Court has exercised and will continue to exercise jurisdiction over Plaintiffs and the claims brought against them in the Tribal Court Action.

144. The ongoing exercise of jurisdiction by the Tribal Court over Plaintiffs and the claims brought against them in the Tribal Court Action is unlawful.

145. Because of the ongoing and unlawful exercise of jurisdiction by the Tribal Court over Plaintiffs and the claims brought against them in the Tribal Court Action, Plaintiffs face irreparable injury for which no adequate legal remedy exists.

a. Plaintiffs have been and imminently will be subject to the orders and judgments of a court that lacks jurisdiction over Plaintiffs and the claims at issue.

b. Plaintiffs have been and imminently will be forced to expend unnecessary and unreasonable time, effort, and expense by litigating the Tribal Court Action before a court that lacks jurisdiction over Plaintiffs and the claims at issue.

146. The irreparable harm to Plaintiffs in the absence of injunctive relief outweighs any hardships to Defendants.

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Dated: December 22, 2021

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: s/ Richard J. Doren
Richard J. Doren*

By: s/ Matthew A. Hoffman
Matthew A. Hoffman*

By: s/ Bradley J. Hamburger
Bradley J. Hamburger*

By: s/ Daniel R. Adler
Daniel R. Adler*

By: s/ Kenneth H. Oshita
Kenneth H. Oshita*

**pro hac vice forthcoming*

333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Email: rdoren@gibsondunn.com
Email: mhoffman@gibsondunn.com
Email: bhamburger@gibsondunn.com
Email: dadler@gibsondunn.com
Email: koshita@gibsondunn.com

JENSEN MORSE BAKER PLLC

By: s/ Gabriel Baker
Gabriel Baker, WSBA No. 28473

By: s/ Benjamin J. Roesch
Benjamin J. Roesch, WSBA No. 39960

1809 Seventh Avenue, Suite 410
Seattle, WA 98101
Telephone: (206) 682-1550
Email: gabriel.baker@jmblawyers.com
Email: benjamin.roesch@jmblawyers.com

*Attorneys for Plaintiff Lexington Insurance
Company*

Dated: December 22, 2021

GORDON THOMAS HONEYWELL LLP

By: s/ Michael E. Ricketts
Michael E. Ricketts, WSBA No. 9387

520 Pike Street, Suite 2350
Seattle, WA 98101
Telephone: (206) 676-7500
Fax: (206) 676-7575

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Email: mricketts@gth-law.com

*Attorneys for Plaintiff Homeland Insurance
Company of New York*

Dated: December 22, 2021

LEATHER LAW GROUP

By: s/ Thomas Lether

Thomas Lether, WSBA No. 18089

By: s/ Eric J. Neal

Eric J. Neal, WSBA No. 31863

1848 Westlake Ave N, STE 100

Seattle, WA 98109

Telephone: (206) 467-5444

Fax: (206) 467-5544

Email: tlether@letherlaw.com

Email: eneal@letherlaw.com

*Attorneys for Plaintiffs Hallmark Specialty
Insurance Company, Aspen Specialty Insurance
Company, and Aspen Insurance UK Ltd*

Dated: December 22, 2021

FORSBERG & UMLAUF, P.S.

By: s/ Robert W. Novasky

Robert W. Novasky, WSBA No. 21682

1102 Broadway, Suite 510

Tacoma, WA 98402

Telephone: (253) 572-4200

Email: rnovasky@foum.law

*Attorneys for Plaintiffs Certain Underwriters at
Lloyd's, London and London market companies
subscribing to Policy Nos. PJ193647, PJ1900131,
PJ1933021, PD-10364-05, PD-11091-00, and
PJ1900134-A*