HONORABLE DAVID G. ESTUDILLO

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

LEXINGTON INSURANCE COMPANY, et al.,

Plaintiffs,

v.

CINDY SMITH, in her official capacity as Chief Judge for the Suquamish Tribal Court, et al.,

Defendants,

and

THE SUQUAMISH TRIBE, a federally-recognized Indian Tribe,

Intervenor Defendant.

No. 3:21-cv-05930-DGE

PLAINTIFFS' OPPOSITION TO DEFENDANT-INTERVENOR THE SUQUAMISH TRIBE'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: June 17, 2020

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Suquamish Tribe claims it was wrongly denied coverage under its property insurance policies for the economic losses it sustained due to the COVID-19 pandemic. The Tribe sued its insurers[1] in the Suquamish Tribal Court. The insurers objected to that court's exercise of jurisdiction over them. After exhausting their tribal court remedies, the insurers sued the tribal-court judges in this Court under *Ex Parte Young*, 209 U.S. 123 (1908) to secure a declaration that those judges have no power to adjudicate the suit brought by the Tribe. The Tribe and its corporate arm, Port Madison Enterprises, have intervened in this case to represent the interests of the tribal-court judges. The Court should deny the Tribe's motion for summary judgment because there is no basis for the Tribal Court to exercise jurisdiction over the insurer Plaintiffs. Plaintiffs are not members of the Tribe. They do not maintain operations, employees, or offices on or within the Tribe's reservation and have not engaged in any relevant conduct—the denial of Defendants' insurance claims, for example—on the Tribe's land. Rather, as related to this action, Plaintiffs have acted only in their respective *off-reservation* places of incorporation or business. Because Plaintiffs' conduct did not occur on Suquamish land, this case should not have gotten off the ground in the Tribal Court. *See Nevada v. Hicks*, 533 U.S. 353, 392 (2001); *Jackson v. Payday Fin. LLC*, 764 F.3d 765, 782 (7th Cir. 2014).

The Supreme Court has made clear that a tribal court's subject matter jurisdiction is circumscribed by federal law, which dictates that tribal courts presumptively *do not* have jurisdiction over non-tribal members, particularly where, as is in this case, the dispute does not implicate the Tribe's inherent sovereign authority and encompasses an industry (insurance) that is heavily regulated by state law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330

[1] 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.

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(2008). To overcome this presumption, the party asserting jurisdiction must show that the nonmembers had a physical presence on tribal land. "[T]ribal jurisdiction is, of course cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). Suquamish tribal laws impose similar geographic limitations. Suquamish Tribal Code § 3.2.1 (jurisdiction is limited to "cases and controversies within the territorial jurisdiction of the Suquamish Tribe").

Further, the Tribal Court does not have personal jurisdiction over Plaintiffs in the underlying tribal action. The Tribe has the burden of establishing that Plaintiffs had minimum contacts with the reservation. Yet Plaintiffs have never entered the territory nor directed any activities toward it. Lexington Insurance Company, for example, is a Delaware corporation with its principal place of business in Massachusetts; it was served in California; it has never entered, and conducts no business on, Suquamish tribal land; and it did not consent to the tribal court's jurisdiction. The story is much the same for the other insurers. Plaintiffs' only—and indirect—contact with the forum is their participation, through a third party, in a *nationwide* insurance program that happened to include Defendants. Plaintiffs did not specifically target the tribal forum or purposefully avail themselves of the Tribe's laws.

Accordingly, this Court should deny the Tribe's motion for summary judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Underlying Insurance Contracts

The Tribe is a federally recognized Indian tribe, and Port Madison Enterprises (the other Defendant-Intervenor) is the Tribe's corporate arm. Dkt. 48 ¶¶ 35–36. Both the Tribe and PME are located on the Port Madison Indian Reservation on the Kitsap Peninsula, where they operate various businesses, including a casino. *Id.* The Tribe and PME are insured through a nationwide property insurance program known as the Tribal Property Insurance Program ("TPIP"), *id.* ¶ 37, which is part of a larger property insurance program known as the Alliant Property Insurance Program that also insures municipalities, hospitals, and non-profit organizations. Dkt. 56 ¶ 2. Various insurance companies, including each Plaintiff in this action, participate in these programs by providing insurance and underwriting services at different layers of coverage and varying

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percentages of risk insured by those layers. *Id.* ¶ 3; Dkt. 56-1 at 12–26, 28–32, 44–45, 53, 77; Dkt. 56-2 at 13–27, 29– 3, 108–09, 117, 141.

TPIP is maintained and administered by a third-party service called "Tribal First," which is a specialized program of Alliant Underwriting Solutions and/or Alliant Insurance Services, Inc., which are California corporations located in California. Dkts. 55-1, 55-2, 55-3. Through their insurance broker Brown & Brown, the Tribe and PME bought multiple property insurance policies issued by Plaintiffs under TPIP for the policy period from July 1, 2019, to July 1, 2020.[2] Dkt. 48 ¶ 11; Dkt. 56-1 at 12, 17, 22; Dkt. 56-2 at 13, 18, 23. The Tribe and PME obtained these property insurance policies not directly from Plaintiffs but through Alliant and Brown & Brown, Dkt. 48 ¶ 11, based on underwriting guidelines established between Alliant and Plaintiffs. Dkt. 56 ¶ 4. Plaintiffs themselves negotiated and entered into separate contracts with Alliant and/or brokers setting forth each Plaintiff's obligations under TPIP. *Id.* ¶ 5. Plaintiffs did not have direct contact with the Tribe and PME before the issuance of their property insurance policies, Dkt. 48 ¶ 11, and Plaintiffs learned of potential TPIP insureds, including the Tribe and PME, only through Alliant. Dkt. 56 ¶ 6. Alliant (not Plaintiffs) processed the Tribe's and PME's submissions for insurance; collected premiums from the Tribe and PME; prepared and provided quotes, cover notes, policy documentation, and evidences of insurance to the Tribe and PME; and developed and maintained an underwriting file for the Tribe and PME. *Id.* ¶ 7.

Each property insurance policy provided through TPIP to the Tribe and PME for the 2019–2020 policy period incorporates a master policy form that sets forth the terms, conditions, and exclusions of coverage applicable to the Tribe and PME (the "Policy"). Dkt. 56-1 at 46–113; Dkt. 56-2 at 110–77. The Policy does not contain any provision through which Plaintiffs consent to the jurisdiction of the Tribe or its Tribal Court. *Id.* Nor does the Policy contain any provision through which Plaintiffs consent to the laws of the Tribe governing the interpretation of the Policy. *Id.*

[2] In their statement of facts, Defendants allege that Plaintiffs added communicable-disease or virus exclusions to Defendants' policies covering the periods before and after the relevant policy period. Dkt. 52 at 3 & n.1. Those allegations are irrelevant to the jurisdictional question at issue in Defendants' motion for summary judgment because the merits of Defendants' breach-of-contract claims are not at issue here, let alone contracts outside of the relevant policy period.

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The Policy does not specifically name any TPIP insured, including either the Tribe or PME, or any TPIP insurer, including Plaintiffs. *Id.* The Policy instead states that the "Named Insured" is "shown on the Declaration page, or as listed in the Declaration Schedule Addendum attached to this policy," and that Tribal First (i.e., Alliant) maintains a "Named Insured Schedule" in its files. Dkt. 56-1 at 50; Dkt. 56-2 at 114.

Copies of the Policy and other related documents were prepared by Alliant, *id.* ¶ 4, and provided to the Tribe and PME by Alliant and/or Brown & Brown (not Plaintiffs). Dkt. 48 ¶ 11. Included among those documents were declaration pages associated with the Lexington property insurance policies issued to the Tribe and PME. Dkt. 56-1 at 12, 17, 22; Dkt. 56-2 at 13, 18, 23. In each of those declaration pages, the "Named Insured" is identified as "All Entities listed as Named Insureds on file with Alliant Insurance Services, Inc.," and the "Mailing Address of Insured" is identified as the one "on file with Alliant Insurance Services, Inc." in "Thousand Oaks, CA." *Id.* The Tribe and PME also received documents entitled "Tribal Property Insurance Program Evidence of Coverage." Dkt. 56-1 at 2–10; Dkt. 56-2 at 2–11. The "Evidence of Coverage" documents are printed on "Tribal First Alliant Underwriting Solutions" letterhead and signed by Ray Corbett, Senior Vice President of Alliant Specialty Insurance Services. *Id.* They indicate that they were prepared by Alliant and "based on facts and representations supplied to [Alliant] by [the Tribe and PME]." Dkt. 56-1 at 9; Dkt. 56-2 at 10. They also indicate that any "Notification of Claims" must be sent to "Tribal First" in San Diego, California. Dkt. 56-1 at 8; Dkt. 56-2 at 9.

B. The Tribe's and PME's COVID-19-Related Insurance Claims

In March 2020, the Tribe and PME temporarily suspended some of their non-essential business operations because of the COVID-19 pandemic, and in March and April 2020, the Tribe and PME submitted related insurance claims under the Policy to their insurance broker, who then sent them to Lexington/AIG Claims, Inc. Dkt. 48 ¶ 54; Dkt. 57-1 at 3, 6; Dkt. 57-2 at 2, 4. Lexington issued letters and emails to the Tribe and PME reserving "all rights and defenses under the policy and the law." Dkt. 48 ¶ 59; Dkt. 57-3 at 10; Dkt. 57-4 at 10. The letters and emails were sent by or on behalf of Lexington from outside the territorial boundaries of the Tribe, on non-

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Reservation and non-tribal land. Dkt. 57 ¶ 2. In fact, all of Lexington's activities related to the Policy and to the Tribe's and PME's claims occurred away from the Reservation and tribal land. *Id.*

On June 4, 2020, the Tribe and PME sued Lexington (and the other insurers who are Plaintiffs in this action) in their own Tribal Court. Dkt. 48 ¶¶ 63, 67; *Suquamish Tribe v. Lexington Insurance Company*, No. 200601-C. This lawsuit came before Lexington issued a decision on the Tribe's and PME's insurance claims. Dkt. 55-4 ¶ 54. The Tribe and PME claimed the insurers breached the contract and sought a declaration that their COVID-19-related financial losses were covered under the Policy. Dkt. 48 ¶ 69; Dkt. 55-4 ¶¶ 55–60; 61–65. Defendant Cindy Smith presides over the Tribal Court action. Dkt. 48 ¶ 68.

C. Exhaustion of Tribal Court Remedies

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

Plaintiffs exhausted all available remedies before the Tribal Court and the Tribal Court of Appeals. Soon after the Tribal Court action began, in August 2020, Plaintiffs made limited special appearances and moved to dismiss the Tribal Court action for lack of subject matter and personal jurisdiction under both Suquamish tribal law and federal law. Dkt. 48 ¶ 71. Judge Smith denied those motions in March 2021, reasoning that the Tribal Court had jurisdiction because of the Tribe's rights to exclude nonmembers from tribal land and to regulate the insurance contract between the parties, despite Plaintiffs' lack of physical presence on tribal land. *Id.* ¶ 75; Dkt. 55-

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5 at 13, 17.

Plaintiffs timely moved for permission to appeal, which was granted. Dkt. 48 ¶ 76. The three-judge panel of the Tribal Court of Appeals (Defendants Eric Nielsen, Bruce Didesch, and Steven Aycock) affirmed the Tribal Court's order in September 2021. *Id.* ¶¶ 77–81. The Tribal Court of Appeals issued an amended decision in October 2021. *Id.* ¶ 81; Dkt. 55-6.

A few days later, the Tribe and PME filed a first amended complaint in the Tribal Court action, Dkt. 48 ¶ 82; Dkt. 55-4, to which Plaintiffs filed answers on December 1, 2021, to avoid default. Dkt. 48 ¶ 85. The Tribal Court action remains ongoing, and the Tribal Court continues to assert jurisdiction over Plaintiffs. *Id.* ¶ 87.

On December 22, 2021, Plaintiffs filed this action, naming the tribal judges who denied Plaintiffs' jurisdictional challenge as defendants under the doctrine of *Ex Parte Young*. Dkt. 1. On March 16, 2022, the Suquamish Tribe waived its sovereign immunity from suit for the limited purpose of defending the jurisdiction of the Suquamish Tribal Court in this action, and this Court granted the Tribe's unopposed motion to intervene on March 29, 2022. Dkts. 38–39, 47. The parties stipulated to filing cross-motions for summary judgment. Dkt. 38.

III. LEGAL STANDARD

Summary judgment should only be granted when, viewing the evidence "in the light most favorable to the nonmoving party," the trial court finds "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); Fed. R. Civ. P. 56(a). When the moving party must prove an issue at trial, that party "bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact," as well as then "affirmatively demonstrat[ing] that no reasonable trier of fact could find other than for the moving party." *Soremekun*, 509 F.3d at 984.

When determining whether a tribe has jurisdiction over a nonmember, a federal district court should show "some deference" to the *findings of facts* made by the tribal court on the issue. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) ("tribal courts . . . develop

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the factual record in order to serve the 'orderly administration of justice in the federal court'"). "As to legal questions," the district court reviews *de novo* and has "no obligation to follow" the tribal court's initial determination on jurisdiction. *Id.* at 1314. This is because "federal courts are the final arbiters of federal law, and the question of tribal jurisdiction is a federal question." *Id.*

IV. ARGUMENT

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

A tribe's authority cannot exceed the bounds set by federal law. *Nat'l Farmers Union*, 471 U.S. at 851. Suquamish tribal law acknowledges this limitation. Suquamish Const., art. I ("jurisdiction . . . shall not be inconsistent with applicable Federal and State laws"); *id.*, art. III(i) (the tribe's regulatory authority is limited to the extent "allowed under applicable Federal Law"). Further, the Suquamish Tribal Code limits the tribal court's subject matter jurisdiction to "all cases and controversies *within the territorial jurisdiction* of the Suquamish Tribe." Suquamish Tribal Code § 3.2.1 (emphasis added). In turn, the Constitution recognizes that the Tribe's territory consists only of the "Port Madison Reservation" and "any other lands which may be acquired for or by, and held in the name of, the Suquamish Tribe." Suquamish Const., art. I. Together, the Suquamish Constitution and Tribal Code establish a geographical limit on subject matter jurisdiction, extending the tribal court's reach to only those "cases or controversies within" the territorial bounds of the Suquamish Reservation.

Because all relevant activity by Plaintiffs occurred outside of those territorial bounds, there can be no subject matter jurisdiction under Suquamish tribal law. The insurance contract between the parties was not negotiated or entered into on the reservation, all decisions regarding coverage under the Policy occurred at Plaintiffs' various headquarters off-reservation, and Plaintiffs never entered tribal lands. The mere existence of an insurance contract between the parties that relates to tribal property is insufficient to establish a case or controversy arising "within the confines" of the Tribe's territorial bounds.

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

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

Under well-established Supreme Court precedent, the Tribal Court presumptively lacks jurisdiction over Plaintiffs because they are nonmembers of the Tribe and have no connection to tribal land. It is Defendants' burden to overcome that presumption, but they have not carried it. Instead, they have tried to shoehorn this case into narrow exceptions to the general presumption that tribal courts lack jurisdiction over nonmembers, but the undisputed facts confirm that none of those exceptions applies here. *Montana v. United States*, 450 U.S. 544 (1981). The same is true of a further exception that the Ninth Circuit has recognized, which relates to a tribe's "right to exclude" nonmembers from its land.

1. There Is a Presumption Against Tribal Jurisdiction Over Claims Against Nonmembers

The Tribe, as a dependent sovereign nation, is subject to the plenary power of the federal government. *Nat'l Farmers Union*, 471 U.S. at 851; *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) ("Due to their incorporation into the United States, . . . 'the sovereignty that the Indian tribes retain is of a unique and limited character.'"). Accordingly, the Tribal Court may not exercise subject matter jurisdiction in any way that exceeds the bounds set by federal law. *Nat'l Farmers Union*, 471 U.S. 845 at 851–52. The Constitution and Bylaws of the Suquamish Tribe mandate the same limitation. Suquamish Const. art. I ("jurisdiction . . . shall not be inconsistent with applicable Federal and State laws"); *see also id.* art III(i) (regulatory authority is limited to the extent "allowed under applicable Federal law").

Under federal law, tribal court subject matter jurisdiction over non-tribal members is "presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330; *see also FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019) ("There is a presumption against tribal jurisdiction over nonmember activity. . . ."). This is because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," except under certain limited circumstances. *Montana*, 450 U.S. at 565. The party invoking jurisdiction "bears the burden of establishing such jurisdiction as a threshold matter" and overcoming the presumption as to nonmembers. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 819 (9th

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Cir. 2011). Here, Plaintiffs are not members of the Suquamish Tribe. Thus, under well-established Supreme Court and Ninth Circuit precedents, the Tribal Court presumptively lacks authority over Plaintiffs, and the Tribal Court's exercise of subject matter jurisdiction over Plaintiffs and this insurance dispute is presumptively invalid.

Defendants first deny the presumption exists. They argue the presumption runs the other way—that when a nonmember's "relevant conduct is directly tied to tribally owned and tribally occupied trust land on the Tribe's reservation," "jurisdiction over such activities presumptively lies in the tribal courts." Dkt. 52 at 10. For this proposition, Defendants rely on *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), but subsequent Supreme Court cases have made clear that Defendants' reading of *Iowa Mutual* is wrong. "[I]n explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana*: that as a general matter, a tribe's civil jurisdiction does not extend to the 'activities of non-Indians on reservation lands,' and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana*'s two exceptions." *Hicks*, 533 U.S. at 353, 380–81. Thus, when analyzing tribal jurisdiction, the first step is to look "to the member or nonmember status of the unconsenting party," not the status of the land. *Philip Morris*, 569 F.3d at 932, 937. Here, the parties declining to consent to tribal jurisdiction are Plaintiffs, who are not members of the Tribe. Thus, there is a presumption against the exercise of tribal jurisdiction over Plaintiffs.

Defendants argue this presumption applies only when the nonmember's conduct occurs on non-Indian fee land within the reservation, but as the Supreme Court has explained, federal law "restricts tribal authority over nonmember activities *taking place on the reservation*," and "tribes do not, as a general matter, possess authority over non-Indians who come *within their borders*." *Plains Commerce Bank*, 554 U.S. at 328 (emphases added). Thus, the presumption applies to both tribal land and non-Indian fee land, but is "particularly strong" on non-Indian fee land, or fee simple land owned by nonmembers within a tribe's territory, because the tribe has even less control over fee land. *Id.* This presumption becomes insurmountable when the nonmember has never entered tribal territory, as is the case here, because "tribal jurisdiction is, of course, *cabined by geography*." *Philip Morris*, 569 F.3d at 938 (emphasis added).

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2. The *Montana* Exceptions Do Not Apply

To overcome the presumption against the exercise of jurisdiction over nonmembers, Defendants are required to show the matter (i) implicates "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal government, or control internal relations" (*Plains Commerce Bank*, 554 U.S. at 337), and (ii) falls under at least one of two exceptions to the presumption recognized by the Supreme Court in *Montana*. 450 U.S. at 565–66. These requirements should be narrowly applied, as the Supreme Court has warned against interpreting the exceptions "in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (cleaned up); *Cooley*, 141 S. Ct. at 1639. Neither of these requirements has been or can be met here, and Defendants are therefore not entitled to judgment as a matter of law.

a. The First *Montana* Exception Does Not Apply

Under *Montana*'s first exception, tribes have jurisdiction to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 565–66. In interpreting and applying this exception, the Supreme Court has explained that "our *Montana* cases [upholding tribal jurisdiction for consensual relationships] have always concerned nonmember conduct *on the land*." *Plains Commerce Bank*, 554 U.S. at 334 (emphasis added). The Supreme Court has held repeatedly that for subject matter jurisdiction over a nonmember to exist, the nonmember must have a *physical presence* on tribal land. *Id.* at 332 ("*Montana* and its progeny permit tribal regulation of nonmember conduct *inside the reservation* that implicates the tribe's sovereign interests.") (emphasis added); *see also Hicks*, 533 U.S. at 392 ("tribes retain sovereign interests in activities that occur *on land* owned and controlled by the tribe" (emphasis added)); *Jackson*, 764 F.3d at 782 ("tribal regulation of nonmember conduct [is limited to] conduct *inside the reservation*" (emphasis added)). The Supreme Court has never embraced an interpretation of *Montana* that permits jurisdiction over a nonmember merely because the nonmember contracted with a tribe irrespective of the nonmember's physical presence on tribal land. In fact, "with one minor exception, [the Supreme Court has] *never* upheld under *Montana* the extension of tribal civil authority over nonmembers

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on non-Indian land," reinforcing just how narrowly *Montana* has been interpreted and applied. *Hicks*, 533 U.S. at 359–60 (emphasis added).

Here, Plaintiffs never entered Suquamish tribal land for any reason. They did not engage in ongoing business, enter into any transaction, or negotiate the Policy on Suquamish tribal land. The first *Montana* exception therefore doesn't apply.

Defendants' argument to the contrary (Dkt. 52 at 11) is premised on misreading cases. For example, relying on *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006), Defendants argue that when a nonmember chooses "to affiliate with the Indians or their tribes" and the claim "bear[s] some direct connection to tribal lands," the nonmember "may anticipate tribal jurisdiction when their contracts affect the tribe." Dkt. 52 at 5 (quoting *Smith*, 434 F.3d at 1135). In fact, the holding of *Smith* is nowhere near that broad; the Ninth Circuit there explained that "[s]imply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember." 434 F.3d at 1138. Further, *Smith* involved a nonmember *plaintiff* voluntarily bringing suit in tribal court against a tribal entity. *Id.* at 1129. *Smith*'s central holding, that "a nonmember who knowingly enters tribal court[] for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship,'" has no bearing on this case, where the insurers were dragged unwillingly into tribal court. *Id.* at 1140.

Defendants also rely on *Smith* to argue that the "'consensual relationship' analysis under *Montana* 'resembles the [Supreme] Court's Due Process Clause analysis for purposes of personal jurisdiction,' including purposeful availment and minimum contacts." Dkt. 52 at 11. That is also wrong. The Supreme Court has drawn a distinction between the two, making it clear that *Montana* and its analysis of tribal jurisdiction "pertain[] to subject-matter, rather than merely personal, jurisdiction." *Hicks*, 533 U.S. at 367 n.8; *see also Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 957 (D.S.D. 2007) (tribal court committed error "in confusing questions of personal jurisdiction with questions of subject matter jurisdiction"). If Defendants' proposition were accepted, it would render the *Montana* analysis unnecessary, as courts would only have to decide whether they had personal jurisdiction over the parties.

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In any event, there is no need to consult lower-court decisions on the meaning of *Montana* because the Supreme Court itself was perfectly clear: "*Montana* and its progeny permit tribal regulation of nonmember conduct *inside the reservation* that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis added and removed). Further, the Supreme Court has instructed courts to look to "*Montana*'s list of cases fitting within the first exception" to understand "the type of activities the Court had in mind" for how the first *Montana* exception should be applied. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (citation omitted); *Hicks*, 533 U.S. at 372. Those cases involved: "nonmember purchasers of cigarettes from tribal outlet[s]" on tribal lands; a "general store on the Navajo reservation"; "ranchers grazing livestock and horses on Indian lands 'under contracts with individual [tribal] members'"; and a tax on "nonmembers for the 'privilege . . . of trading within the borders'" of tribal lands. *Hicks*, 533 U.S. at 372; *see Plains Commerce Bank*, 554 U.S. at 332–33 (summarizing cases). In short, the "*Montana* cases have always concerned nonmember conduct *on the land*." *Plains Commerce Bank*, 554 U.S. at 334 (emphasis added). Defendants are therefore dead wrong that a nonmember's "physical presence" on tribal land is "not require[d]." Dkt 52 at 17.

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

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Suquamish tribal land, and have conducted their business through another nonmember, Alliant, on non-tribal land.

Defendants otherwise cite a smattering of cases that address only issues of tribal exhaustion, not the separate issue of tribal-court jurisdiction. They first rely on *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) for the proposition that there is no requirement a nonmember be physically present on tribal land for jurisdiction to apply. Dkt. 52 at 17. In *Allstate*, a tribal member sued his nonmember automobile insurer in tribal court for refusing to settle a personal-injury action arising from a car accident occurring on tribal land. 191 F.3d at 1072. The Ninth Circuit did not hold that the tribal court had jurisdiction. *Id.* at 1075. Instead, it held that, under the doctrine of tribal exhaustion, the tribal court should have had the first opportunity to decide its own jurisdiction before it was challenged in federal court. *Id.* at 1073. Exhaustion in the tribal court is necessary unless the argument for jurisdiction is so "frivolous or obviously invalid" as to undermine the need for tribal exhaustion. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013). *Allstate* therefore held only that a basis for jurisdiction *might* exist, not that it did. 191 F.3d at 1076 ("The district court dismissed this case because it affirmatively concluded that the tribal court had jurisdiction. We decline to go so far."). Accordingly, the Ninth Circuit vacated the district court's decision and remanded with instruction that the trial court stay the action while the nonmember insurer exhausted its remedies in tribal court. *Id.*

Further, at least one court, *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Ct.*, 2012 WL 1144331, at *6 (N.D. Cal. Apr. 4, 2012), has called into question the "viability of *Allstate's* holding" since the Supreme Court's decisions in *Hicks* and *Plains Commerce Bank*, two cases that have limited tribal jurisdiction significantly. *See Hicks*, 533 U.S. at 359–60 ("with one minor exception, [the Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land"); *Plains Commerce Bank*, 554 U.S. at 334 (the "*Montana* cases have always concerned nonmember conduct on the land"). *Allstate* thus does not stand for the broad proposition that tribal court jurisdiction exists whenever a nonmember insurer agrees to insure tribal members or tribal property.

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Neither do the other authorities cited by Defendants. *F.T.C. v. Payday Finance, LLC* is not controlling law and acknowledges that "the majority opinion in *Plains Commerce Banks* seemed to tether both *Montana* exceptions to the nonmember's conduct *on tribal land*." 935 F. Supp. 2d 926, 928 (D.S.D. 2013) (emphasis added). Defendants' remaining four cases, like *Allstate*, address only the threshold question of exhaustion of tribal court remedies, not the ultimate question of jurisdiction. *AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n*, 2015 WL 5684937, at *8 (D.S.D. Sept. 25, 2015); *Sprint Comm'n Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 901 (D.S.D. 2015); *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1186–87 (D.S.D. 2014); *Brown v. W. Sky Fin., LLC*, 84 F. Supp. 3d 467, 481 (M.D.N.C. 2015).

Defendants' theory of this case is that tribal courts gain subject matter jurisdiction over nonmembers whenever those nonmembers happen to enter into a contractual relationship involving a tribal member or a member's tribal property. The Supreme Court has thrown cold water on that theory, explaining that the *Montana* exceptions cannot be interpreted in a way that "swallow[s]" or "severely shrinks" the general rule that tribal regulation of nonmembers is invalid. *Plains Commerce Bank*, 554 U.S. at 330; *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001). The Court should not interpret the first *Montana* exception so expansively that the general presumption against tribal jurisdiction over nonmembers disappears.

b. The Second *Montana* Exception Does Not Apply

Under *Montana's* second exception, tribes have jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565. Although Defendants advise the Court that it "need not reach the issue," Defendants nonetheless contend that "[t]he health risks posed by the COVID-19 pandemic" and Defendants' resulting "financial losses" satisfy the second *Montana* exception. Dkt. 52 at 20 n.8. But Plaintiffs' alleged financial losses, including the circumstances in which they arise, do not meet the particularly "elevated threshold" for *Montana*'s second exception. *Plains Commerce Bank*, 554 U.S. at 341. Instead, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Id.* The exception is a break-the-glass failsafe that confers

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jurisdiction only when it is "necessary to avert catastrophic consequences." *Id.* (citation omitted). And the Seventh Circuit considered and rejected an argument similar to the one Defendants make here, explaining that "if the second exception were so broad, it would swallow the rule. The only questions raised in the tribal court action are the enforceability of commercial agreements; it does not address any on-reservation actions by the [nonmembers], much less actions that threaten tribal self-rule." *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015).

Defendants have not established that they are entitled to judgment as a matter of law under the second *Montana* exception.

c. The Tribe's Inherent Sovereign Authority Also Is Not a Basis for the Exercise of Tribal Jurisdiction

The Supreme Court has further held that the exercise of tribal jurisdiction over nonmembers is permissible *only when necessary* to protect tribal self-government or to control internal relations; in other words, a tribe cannot exercise jurisdiction over nonmembers when its inherent sovereign authority is not implicated. *Plains Commerce Bank*, 554 U.S. at 332.

Defendants reject this precedent and point to a case from the Fifth Circuit, *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014). Dkt. 52 at 14. But the Fifth Circuit in *Dolgencorp* merely reasoned that "one specific relationship, in itself," could not possibly threaten internal relations or self-rule; the Fifth Circuit then went on to apply the requirement, just at a higher level of generality. 746 F.3d at 175. The dispute in *Dolgencorp* involved the alleged sexual assault of a minor tribal member by his nonmember employer while on the reservation, and although that "single employment relationship" did not carry the requisite impact on tribal self-rule, the Fifth Circuit held, "the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land" did. *Id.*

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Although the Ninth Circuit has not specifically addressed this Supreme Court requirement, it certainly has not rejected it.[3] And numerous other circuits have expressly recognized it. *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 545 (6th Cir. 2015); *Jackson*, 764 F.3d at 783; *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). The Eighth Circuit's analysis in *Kodiak Oil & Gas (USA) Inc. v. Burr* is instructive. There, the Eighth Circuit concluded that a tribe lacked jurisdiction over claims regarding nonmember leases of wells on tribal land. 932 F.3d at 1129–30. The Eighth Circuit framed its analysis under the first *Montana* exception and held that, although the leases constituted "consensual relationships with tribal members," a "consensual relationship alone is not enough." *Id.* at 1138. "Even where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities *only where* the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Id.* (emphasis added) (quoting *Plains Commerce Bank*, 554 U.S. at 336). The court explained that the federal regulation of oil and gas leases defeated the notion that tribal regulation in this area was "necessary for tribal self-government." *Id.* (separately finding under the second *Montana* exception that the dispute did "not involve conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'").

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

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[3] In an effort to support their interpretation of Supreme Court precedent, Defendants cite a denied petition for a writ of certiorari filed in *FMC Corp. v. Shoshone-Bannock Tribes*, 141 S. Ct. 1046 (2021). But a denial of certiorari does not imply approval or disapproval of a lower court's ruling. *Agoston v. Com. of Pa.*, 340 U.S. 844, 844 (1950) ("The [Supreme] Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.'"). Such a citation reflects the dearth of authority in support of Defendants' position.

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

Like the federal regulation of oil and gas leases in *Kodiak*, here, the State of Washington extensively regulates the insurance industry, while the Tribe does not. There is no risk to the Tribe's continuing political existence if it were disallowed from exercising jurisdiction over the underlying insurance dispute before its tribal court. Moreover, it is black-letter law that tribal jurisdiction may "not exceed [the Tribe's] legislative jurisdiction." *Strate*, 520 U.S. at 453; *see also Plains Commerce Bank*, 554 U.S. at 330 ("reaffirm[ing]" principle and "hold[ing] that the Tribal Court lacks jurisdiction to hear" claim exceeding bounds of Tribe's "legislative jurisdiction"); *Jackson*, 764 F.3d at 782 ("if a tribe does not have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim based on that activity"). So, because the Tribe "does not have the authority to regulate [the insurance industry], the [Tribal Court] similarly lacks jurisdiction to hear a claim based on that activity." *Jackson*, 764 F.3d at 782 (citing *Plains Commerce Bank*, 554 U.S. at 330). And given the absence of the Tribe's regulation of insurance and the lack of a basis for subject matter jurisdiction, Plaintiffs could not "have reasonably anticipated that its interactions with the Tribe might trigger tribal authority." Dkt. 52 at 12 (cleaned up).

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Thus, contrary to Defendants' assertions, the Tribe has no authority to exercise subject matter jurisdiction over Plaintiffs through the underlying tribal-court action because that action does not implicate the Tribe's sovereign interests.

3. The Right-to-Exclude Doctrine Does Not Apply

Although the "right to exclude" doctrine allows tribal jurisdiction based on a tribe's right to exclude nonmembers from tribal land, *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 811 (9th Cir. 2011) (per curiam), the Ninth Circuit has specifically held that tribal jurisdiction under this doctrine does not extend to nonmembers who have not entered or acted on tribal land. *See Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756, 757 (9th Cir. 2020). This is precisely the situation here.

Defendants argue, however, that the Ninth Circuit's decision in *McPaul* does not apply because the nonmember in that case had no interaction with tribal members. Dkt. 52 at 21. This misses the point. As the lower court in *McPaul* cogently explained, the hook for the right-to-exclude doctrine to apply is whether the nonmember had *actually entered* tribal land, which then provides the tribe power to "exclude" the nonmember:

> [The nonmember] is not being sued for conduct that occurred while it, or one of its agents, was physically present on the tribal land . . . . Thus, it's difficult to fathom how the right-to-exclude framework could be construed to confer tribal jurisdiction over a lawsuit against [the nonmember]. The theory underlying that framework is that, because a tribe has the sovereign right to exclude non-members from entering its land, the tribe must have the corollary right to adjudicate disputes arising from non-member conduct occurring on its land. Yet here, [the nonmember] never set foot on the Navajo Nation's land. Because the tribe couldn't have "excluded" [the nonmember] from engaging in the conduct at issue (i.e., selling insurance policies to non-member corporations at off-reservation locations), it follows that the "right to exclude" framework doesn't supply a valid pathway to tribal jurisdiction.

Emps. Mut. Cas. Co. v. Branch, 381 F. Supp. 3d 1144, 1149 (D. Ariz. 2019), *aff'd sub nom. McPaul*, 804 F. App'x 756 (9th Cir. 2020).

Numerous other Ninth Circuit cases (which Defendants themselves cite) make this clear: the right-to-exclude doctrine pertains solely to nonmember conduct *on tribal land*. *See Water Wheel*, 642 F.3d at 802, 814 (per curiam) ("where the non-Indian activity in question occurred *on tribal land*," and "the activity interfered directly with the tribe's inherent *powers to exclude and*

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manage its own lands, and there are no competing state interests at play, the tribe's status as a landowner is enough to support regulatory jurisdiction without considering *Montana*") (emphases added); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 901 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 513 (2019) ("[I]n the present case the nonmember defendant *while on tribal land* allegedly used her position as Tribal Administrator to violate the terms of her employment in a wide variety of ways that were significantly detrimental to the management and financial security of the Tribe.") (emphasis in original). And because a tribe's right to exclude is limited to tribal land, so too is its "lesser" power to regulate—and therefore adjudicate—nonmember conduct. *Knighton*, 922 F.3d at 899 ("From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate [nonmembers] *on tribal land*.") (emphasis added).

Defendants' other cited authorities are unavailing. *State Farm Insurance Companies v. Turtle Mountain Fleet Farm LLC*, 2014 WL 1883633 (D.N.D. May 12, 2014) is not "instructive" on this issue, as Defendants claim, because the court in that case did not even discuss the right-to-exclude doctrine. And *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200–01 (9th Cir. 2012) is another exhaustion case that merely held that the tribal court in that case should first determine its own jurisdiction. Further, *Grand Canyon Skywalk* does not support the exercise of tribal jurisdiction here. There, a non-tribal corporation entered into an agreement with a tribal corporation to build and manage a tourist destination on tribal land. The Ninth Circuit emphasized that the "essential basis for the agreement" was "*access* to" tribal land, and thus, because the contract "interfered with the [tribe's] ability to exclude [the nonmember] from the reservation," jurisdiction over the related contract dispute was "not plainly lack[ing]." *Id.* at 1203–05 (emphasis added). By contrast, the essential basis for the insurance contract here is not to provide Plaintiffs with "access" to the Tribe's insured property, let alone the reservation, nor does the Tribe's dispute with Plaintiffs concern any purported contractual right by Plaintiffs to enter the land. So, unlike the contract in *Grand Canyon Skywalk*, the insurance contract here in no way "interferes" with the Tribe's ability to exclude Plaintiffs from its lands.

Thus, the Suquamish Tribe's "right to exclude" Plaintiffs from its tribal land is not at issue in this action, and the doctrine should not be applied. Unlike the trespasser in *Water Wheel* who

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refused to pay rent for land he leased from the Colorado River Indian Tribes, refused to vacate tribal lands, and then continued to operate his business illegally on tribal lands (*Water Wheel*, 642 F.3d at 804–08), and unlike the employee in *Knighton* who had been a Tribal Administrator for approximately sixteen years and "was responsible for the overall supervision and management of tribal operations and carrying out tribal projects consistent with the Tribal Constitution" (*Knighton*, 922 F.3d at 904), Plaintiffs have never had any presence on Suquamish tribal land nor "interfered directly" with the Tribe's inherent powers to exclude or manage its own lands. *Water Wheel*, 642 F.3d at 814. Thus, the right-to-exclude doctrine does not confer jurisdiction onto the Tribe, and Defendants are not entitled to judgment as a matter of law.

C. The Tribal Court Lacks Personal Jurisdiction Over Plaintiffs

A tribal court's exercise of personal jurisdiction must comport with due process under the Indian Civil Rights Act ("ICRA"), which mirrors the Fourteenth Amendment of the U.S. Constitution by providing that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any persons of liberty or property without due process of law." 25 U.S.C. §1302(a)(8). Courts apply "the minimum contacts standard" expressed in *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), which requires "sufficient minimum contacts with the forum state such that the suit does not offend 'traditional notions of fair play and substantial justice.'" *Water Wheel*, 642 F.3d at 819. Defendants argue that Plaintiffs "voluntarily consented to the Tribal Court's personal jurisdiction" in the Policy's Service of Suit clause, and even if they had not, the minimum contacts standard here has been satisfied. Dkt. 52 at 22. Defendants are incorrect on both grounds.

Plaintiffs have not waived jurisdiction. The Service of Suit clause in the Policy states only that "Underwriters" "will submit to the jurisdiction of a Court of *competent* jurisdiction within the United States." Dkt. 56-1 at 84; Dkt. 56-2 at 148 (emphasis added). As the Supreme Court has explained, the phrase "court of competent jurisdiction" refers to "a court with the power to adjudicate the case before it." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017). But the phrase must not be read to grant courts "subject-matter jurisdiction over all cases involving [the contracting party] but to permit suit in any state or federal court *already endowed with subject-*

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matter jurisdiction." *Id.* (emphasis added). As discussed above, subject matter jurisdiction does not exist in this case.

Moreover, personal jurisdiction over a tribal court defendant must comport with due process. Factors weighing on the sufficiency of the tribal court defendant's minimum contacts with a forum include the extent of the defendant's presence in the forum, whether the cause of action arose from the contacts with the forum, and whether the defendant took advantage of the forum's laws and benefits. *Int'l. Shoe*, 326 U.S. at 318–19. Here, Plaintiffs did not purposefully direct their activities toward the Tribe or tribal land, enter tribal land, conduct any business on tribal land, or invoke the protections of Suquamish tribal law. Thus, as a matter of law, personal jurisdiction cannot apply.

Defendants rely on *Allstate*, 191 F.3d at 1072, but the Ninth Circuit found personal jurisdiction existed in part because the nonmember insurance company "not only sold a policy covering travel in the [tribal] Reservation, it sold the policy to a resident of the reservation." Here, however, Plaintiffs participated in a nationwide insurance program managed by Alliant, another nonmember, who in turn sold the policy at issue to Defendants. Plaintiffs did not specifically and purposefully avail themselves of the privilege of conducting activities under Suquamish tribal law, and "as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum," the defendant must have *targeted* the forum. *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011).

Because those facts do not exist here, Defendants are not entitled to judgment as a matter of law.

V. CONCLUSION

The Court should deny Defendants' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies, under penalty of perjury under the laws of the United States of America and the State of Washington, that on the 3rd day of June, 2022, the document attached hereto was delivered to the below counsel in the manner indicated:

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