**COLORADO RIVER INDIAN TRIBES**
**APPEALS COURT**
**Parker, Arizona**

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COLORADO RIVER INDIAN TRIBES

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| **COLORADO RIVER INDIAN TRIBES**<br><br>PLAINTIFF/APPELLEE,<br><br>VS.<br><br>**ALLIANT INSURANCE SERVICES; WILLIS TOWERS WATSON INSURANCE SERVICES WEST, INC.; LEXINGTON INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND LONDON MARKET COMPANIES SUBSCRIBING TO POLICY NUMBER PJ193647; CERTAIN UNDERWRITERS AT LLOYD'S AND LONDON MARKET COMPANIES SUBSCRIBING TO POLICY NUMBER PJ1900131; CERTAIN UNDERWRITERS AT LLOYD'S AND LONDON MARKET COMPANIES SUBSCRIBING TO POLICY NUMBER PJ1900124; ENSURANCE WORLDWIDE INSURANCE LTD SUBSCRIBING TO POLICY NO. PJ1900134; UNDERWRITERS AT LLOYD'S-ASPEN SPECIALITY INSURANCE COMPANY SUBSCRIBING TO POLICY NUMBER PX006CP19;ASPEN INSURANCE UK,LTD.; HALLMARK SPECIALITY INSURANCE COMPANY; HOMELAND ISURANCE COMPANY OF NEW YORK; JOHN DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS and/or OTHER ENTITIES 1-10.**<br><br>DEFENDANTS /APPELLANTS. | **CASE NO. CV-AP-2023-0003**<br><br>**TRIAL COURT NO. CV-CO-2021-0141**<br><br>**ORDER DENYING PETITIONS TO APPEAL** |

Before the Court are Appellants' Petitions for Appeal. For the foregoing reasons, we conclude that the appeals from the tribal court's denial of their motions to dismiss are not final orders or judgments under Colorado River Indian Tribes' tribal law and therefore their Petitions for Appeal must be Denied.

*Procedural History*

On December 7, 2023, the Colorado River Indian Tribes Tribal Court, Hon. Robert Alan Hersey, Deputy Judge, denied motions to dismiss claims made by the Tribes against Defendant insurers. Defendants/Appellants ("Appellants") Petitioned for Appeal beginning December 27, 2023, following the tribal court's order denying their motions to dismiss filed December 8, 2023. Other Defendants thereafter joined the effort. Plaintiff/Appellee ("Appellee") objects to the effort on the ground that a trial court's denial of a motion to dismiss is not a final order or judgment.[1] While this is a close question, we agree with Appellee and deny the requested appeals.

*Relevant Law*

Section 211 of the Colorado River Indian Tribes' Law and Order Code provides in relevant part:

> (a) The Appeals Court shall have only appellate jurisdiction over criminal and civil matters. Any party to any final order or final judgment of the Tribal Court shall have the right to petition for appeal of that order or judgment to the Appeals Court.

[1] Some Appellants objected to the Appellee's response to the Petition to Appeal and moved to strike that pleading. Some Appellants also sought a stay of the tribal court proceedings. We deny both motions as moot.

*Discussion*

In general, appeals following the denial of a motion to dismiss are not appealable final judgments. Examples in the caselaw are legion. *See, e.g., Nice v. L-3 Communications Vertex Aerospace LLC,* 885 F.3d 1308, 1311-13 (11th Cir. 2018) (dismissing appeal of denial of motion to dismiss for lack of subject matter jurisdiction under the political question doctrine); *Fred v. Washoe Tribe of Nevada and California*, 525 Fed. Appx. 616, 617-18 (9th Cir. 2013) ("A denial of a motion to dismiss for lack of subject matter jurisdiction generally is not appealable."); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755–56 (2d Cir. 1998) ("When an ordinary, non-sovereign litigant's motion to dismiss for lack of jurisdiction is denied, the denial is entirely reviewable on appeal from final judgment. That is why denials of motions to dismiss for jurisdictional reasons cannot ordinarily be the subject of interlocutory appeals."); *Lucas v. Pinney*, 1998 WL 35434247, at *1 (Shoshone and Arapaho App. Ct. 1998) ("The Law and Order Code allows for appeals of final orders, those involving injunctions and writs of execution, and those involving the transfer of property. It does not allow for appeals outside of those, such as Appellants' interlocutory appeal [of the denial of a motion to dismiss on the basis of jurisdiction]."); *Tulalip Tribes of Washington v. Seven Arrows, LLC*, 4 NICS App. 183, 184 (Tulalip Tribal Ct. App. 1997) (agreeing with the parties that "the trial court's determination of jurisdiction and denial of Seven Arrow's motion to dismiss is not a final order"). Appellee notes several other examples in their opposition to the Petitions for Appeal. *See* Opposition, *supra* at 3-4 (citing *Catlin v. United States*, 324 U.S. 229, 234 (1945) (rejecting appeal in Army condemnation proceedings where court had granted the government's *ex parte* motion to condemn private party but before the court adjudicated the just compensation

issue); *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003) (rejecting appeal of denial of motion to dismiss on personal jurisdiction grounds in an anti-SLAPP suit context); other cases omitted). We note these cases not to declare them the law of the Colorado River Indian Tribes, but to note that the weight of authority in the United States disfavors appeals from denial of motions to dismiss.

This court twice previously (in the same case) dismissed an appeal from the denial of a motion to dismiss for lack of jurisdiction. *See Colorado River Indian Tribes v. Water Wheel Camp Recreational Area, Inc.*, No. 08-002 (orders dated Feb. 12, 2008 and Apr. 2, 2008).[2] We then explained that in "the courts of the Colorado River Indian [Tribe], as in the federal district courts, a trial court order denying a motion to dismiss does not constitute a reviewable final order." *Id.* at 2-3 (order dated April 2, 2008) (citing *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993); *In re Cascade Energy and Metals Corp.*, 956 F.2d 935, 937 (10th Cir. 1992)). We further added that "no appealable order will exist until the Tribal Court has adjudicated the merits of the dispute and has either granted or denied the . . . order sought by the tribe." *Id.* at 3. Once a final order is entered, this court will have the authority to entertain an appeal based on the lack of jurisdiction. *Id.*

Appellants argue that because the CRIT Law and Order Code allows for appeals of a "final order *or* final judgment," orders and judgments are different creatures under the law. Defendant Insurers Reply in Support of Petition for Appeal at 2 (Jan. 10, 2024) ("Reply")

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[2] Appellants urge us not to treat these opinions as controlling precedent given that we chose to place the label, "NOT FOR PUBLICATION" in the caption. Reply, *supra* at 4. In almost the same breath, Appellants point to another case where this court accepted an appeal, *CRIT v. Van Fleet*, No. 07-0004, that predates *Water Wheel* and ask us to follow that decision's lead. *Id.* For purposes of this order, we will treat neither case as controlling. We do treat *Water Wheel* as persuasive authority, given its similarity to the subject matter of the instant appeal (tribal jurisdiction over nonmembers). Additionally, no party has explained to us why *Van Fleet* would be helpful to our analysis.

(quoting Law and Order Code § 211) (emphasis added to code provision). Appellants assert that either a final judgment or a final order could be appealed, attempting to derive controlling meaning from the use of the word "or." Defendant Insurers claim that the tribal court order similarly is an appealable "*final decision* regarding the Defendant Insurers' jurisdictional objections." Reply at 3 (emphasis added). Appellants ask us to reach this conclusion by pointing to the United States Supreme Court decision in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), which held that a federal court order dismissing a suit on the grounds of state court abstention was an appealable "final decision." *Id.* at 713. We disagree.

*Quackenbush* does not help the Appellants. First, the federal district court in that matter ordered the remand of a case that initially had been removed from state to federal court under 28 U.S.C. § 1441(a) or similar statutes. *See* 517 U.S. at 709. The Supreme Court concluded that such a remand order forcing the case out of federal court and into state court "put the litigants effectively out of court." *Id.* at 713 (quotations and citations omitted). Dueling concurrences from Justices Kennedy and Scalia indicate that the underlying concern involving that decision was federalism. *Id.* at 733 (Kennedy, J., concurring) ("The principal reason for the District Court's decision to dismiss the case was the threat posed to the state proceedings by different state and federal rulings on the question."); *id.* at 731 (Scalia, J., concurring) (rejecting Kennedy's concern). That situation is not this one. The tribal court did not dismiss the suit, did not order the parties to another court, or even issue a stay to allow the parties to litigate in another court. There is still a live matter awaiting in tribal court. Federalism is irrelevant here.

Second, *Quackenbush* alternatively relied on the collateral order doctrine that acknowledges limited and narrow exceptions to the general rule in federal court that appeals from denials of motions to dismiss are to be rejected. The collateral order doctrine applies to appeals arising from lower court orders that "conclusively determine a disputed question that is

completely separate from the merits of the action, [are] effectively unreviewable on appeal from a final judgment, and [are] too important to be denied review." *Quackenbush*, 517 U.S. at 712 (quotations and citations omitted). The tribal court's order denying the motion to dismiss on jurisdictional grounds meets the first element of the collateral order doctrine in that the question of jurisdiction is largely separate from the merits. However, the tribal court order on jurisdiction will remain appealable after the tribal court hears the case on the merits or otherwise proceeds to resolve the matter with finality. Appellants do not make a claim in regard to the third element, importance, which typically relates to governmental sovereign immunity or federalism concerns not present here. Appellants have not shown that the collateral order doctrine compels acceptance of this appeal.

Defendant Insurers cite to several cases in support of the claim that *Quackenbush* has led to a revolution of sorts in the collateral order doctrine where federal trial court orders denying a motion to dismiss on jurisdiction are instantly appealable. Defendant Insurers understandably but completely misread the first case cited, *Solomon v. St. Joseph Hospital*, 62 F.4th 54 (2d Cir. 2023). That case was another removal case similar in some respects to the *Quackenbush* case, though *Quackenbush* was not cited. In *Solomon*, after the federal district court had accepted the removal of the case from state court (where no party objected), the district court had denied the defendants' motion to dismiss (technically on statutory immunity grounds, not on jurisdictional grounds, but that matters little here). *Solomon*, 62 F.4th at 58-59. Appellants in that case brought an appeal on the denial of the motion to dismiss, but the Second Circuit instead chose *sua sponte* to address the removal question not contested below: "[W]e need not decide whether Defendants' interlocutory appeal is proper under the collateral-order doctrine. Solomon did not object to removal, but this court may *sua sponte* delve into the issue of whether there is a factual basis to support subject-matter jurisdiction." *Id.* at 59. The Second Circuit's sole focus was

whether removal was proper, not whether the denial of the motion to dismiss was proper.[3] Though the Second Circuit did accept an interlocutory appeal from the denial of a motion to dismiss, the court only did so to address the underlying concern that a federal court was in the process of deciding a case at the expense of state court jurisdiction. This is a federalism concern important to federal courts. There is no such overriding concern in the courts of the Colorado River Indian Tribes.

Appellants also cite to *Cabazon Band of Mission Indians v. Lexington Insurance Co.*, Acceptance of Review, No. CBMI 2020-0103 (Cabazon Band Ct. App. May 18, 2021). There, in a very similar case to one at bar, the tribal court had denied a motion to dismiss on jurisdictional grounds. *See Cabazon Band of Mission Indians v. Lexington Insurance Co.*, Order and Opinion at 5, No. CBMI 2020-0103 (Cabazon Band Ct. App. Nov. 12, 2021). Cabazon law on point did not explicitly require a "final" judgment. *See* Cabazon Tribal Code § 9-106(b) ("A party seeking to appeal *a judgment* of the Reservation Court shall file a written notice of appeal not later than thirty (30) days following entry of *the judgment or decision* to be appealed.") (emphasis added). Perhaps engaging in wishful thinking, the Appellants' quotation of the Cabazon law adds in the word "final" to describe the thrust of the code: "Similar to the language of the CRIT Law and Order Code, the Cabazon Tribal Code permitted appeal of a *final* 'judgment or decision.'" Reply at 3 (emphasis added). To be sure, the Cabazon appellate court characterized the order below as "final," Acceptance of Appeal, *supra* at 2, but that

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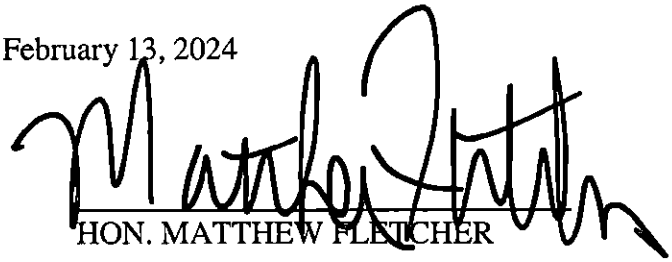
[3] In fact, because no party in the federal district court objected to removal, the court appointed amicus curiae to brief the question. *Solomon*, 62 F.4th at 59 & n. 1. Amicus curiae definitively stated that the court would have not jurisdiction to hear an appeal on the denial of the motion to dismiss through the collateral order doctrine. *See* Brief for Court-Appointed Amicus Curiae, 2023 WL 371000, at *13 ("[I]f the Court decides that it must confirm the propriety of Defendants' interlocutory appeal before querying the district court's subject-matter jurisdiction, it should dismiss the appeal for want of appellate jurisdiction and trust that the district court—on Plaintiff's motion or its own—will consider whether this case was properly removed.").

possibly erroneous or careless language from a different court is a thin reed upon which to base the appellate jurisdiction of *this* court.

The third case cited by Appellants, *Kang v. Chinle District Court*, 15 Am. Tribal Law 165 (Navajo Nation S. Ct. 2018), is also distinguishable. Once again, Appellants point to a holding suggestive of the proposition that denials of motions to dismiss on jurisdictional grounds are appealable, Reply, *supra* at 3-4, but *Kang* arose in a procedural context not relevant here — appellate writs of prohibition directed toward trial level judges. In *Kang*, the Navajo Nation Supreme Court issued a writ of prohibition to the trial court, where the trial court had not ensured the defendant was served with the suit. 15 Am. Tribal Law at 169-170. The same kind of procedural and fairness concerns are simply not present here. Appellants make a great deal of the language in *Kang* asserting that the power of the appellate court to issue writs of prohibition or mandamus derives from an appellate court's supervisory power. Reply, *supra* at 4. We are not persuaded that our supervisory authority over the tribal court allows us to disregard the finality mandate of the CRIT Law and Order Code. Regardless, Appellants do not seek a writ of prohibition or any other extraordinary writ against the tribal court.

We conclude the Appeals are premature and hereby **DENY** the appeal, and **DENY** the motion for a stay and the motion to strike the Appellees' pleadings, and remand to the tribal court for further proceedings.

Dated: February 13, 2024



HON. MATTHEW FLETCHER

Concur:
S. Edwards, Justice
A. Urbina, Justice