**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| **AMY COPPE,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**THE SAC & FOX CASINO HEALTHCARE PLAN and BENEFIT MANAGEMENT, INC.,**<br><br>**Defendants.** | **Case No. 2:14-cv-2598** |

**DEFENDANT SAC & FOX CASINO HEALTHCARE PLAN'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS**

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Defendant Sac & Fox Casino Health Plan (the "Plan") states as follows in Reply to Plaintiff's Opposition ("Opposition") to the Plan's Motion to Dismiss.

**INTRODUCTION**

Plaintiff's Opposition relies heavily upon a U.S. Supreme Court decision interpreting an entirely different and incredibly complex statutory scheme other than that presented by her Complaint. Plaintiff, confusing the nature of a cause of action with court jurisdiction, then directs this Court to a non-controlling authority that, with all due respect to the issuing court, is simply incorrect. ERISA claims, such as Plaintiff's, are by the plain language of ERISA specifically carved out of ERISA's grant of exclusive jurisdiction in federal courts. To find that the rule of tribal court exhaustion is defeated due to exclusive federal jurisdiction under ERISA would be to ignore the plain language of ERISA. Additionally, there is no "forum selection" clause in the Plan. The language simply sets forth the appealable nature of the Plan's final decision and states a legal truism that Plaintiff may bring a suit in federal court. Such a proposition does not defeat the rule of tribal court exhaustion; tribal court exhaustion is a rule (based upon U.S. Supreme Court precedent) *of the federal courts*. If the availability of federal court jurisdiction defeated the rule, there would be no rule at all.

The Plan demonstrated in its brief in support of its Motion to Dismiss that tribal court exhaustion is required in this case. Plaintiff, whose initial burden it is to demonstrate why it is not appropriate, has failed to counter the Plan's position.

## ARGUMENT

### I. PLAINTIFF'S CLAIMS ARE SPECIFICALLY EXCLUDED FROM ERISA'S OTHERWISE COMPLETE GRANT OF EXCLUSIVE JURISDICTION IN FEDERAL COURTS

On the face of her Complaint, Plaintiff's claims are brought pursuant to 29 U.S.C. § 1132(a)(1)(B). *See* Complaint at page 6, Count I. These claims are not subject to ERISA's grant of exclusive jurisdiction in federal courts. Tellingly, this is the *only* section of ERISA that is not subject to exclusive jurisdiction in federal court. ERISA at 29 U.S.C. 1132(e) provides, in pertinent part, "*Except* for actions under *subsection (a)(1)(B)* of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions brought under this subchapter." 29 U.S.C. § 1132(e) (emphasis added). Basic rules of statutory construction dictate that the plain language of the statute be given its obvious effect: ERISA claims brought pursuant to Section 1132(a)(1)(B) need not be adjudicated in federal court.

Despite the plain language of ERISA, Plaintiff attempts to cloud the issue by confusing causes of action with jurisdiction and attempting to import principles from an irrelevant statute. Plaintiff cites to *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) in a vain effort to counter the plain language of Section 1132(e). In *Aetna Health*, the claimant brought state law causes of action that were very similar in the relief they sought to claims under ERISA. The court ruled that such state law *claims* preempted were by ERISA writing,

> Therefore, any *state law causes of action* that duplicates, supplements, or supplants the ERISA civil enforcement *remedy* conflicts with the clear congressional intent to make *the ERISA remedy exclusive* and is therefor preempted.

*Aetna Health*, 543 U.S. at 209 (emphasis added). *Aetna Health* did not hold that all ERISA causes of action must be brought in federal court. Nor could have *Aetna Health* have held that as it would be contrary to the plain language of ERISA. *Aetna Health* stands for the proposition that all state

law causes of action seeking similar remedies as provided in ERISA were preempted by ERISA. There is no exclusive federal court jurisdiction for Plaintiff's ERISA claims.

Plaintiff relies heavily upon the U.S. Supreme Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). *Neztsosie* is a case dealing the Atomic Energy Act. Pub. L. No. 83-703 ("AEA") in particular, the AEA's provisions for "public liability" claims. *Neztsosie*, 525 U.S. at 476. The Atomic Energy Commission can become liable for such "public liability" claims under the AEA. *See* 42 U.S.C. § 2210(c). The *Neztsosie* court recognized the uniqueness of the AEA. Congress's intent was to avoid a multitude of separate cases brought in various different courts that could occur in the aftermath of a mass nuclear disaster. *Neztsosie,* 526 U.S. at 486. Notably, the AEA has specific provisions allowing the chief judge of a United States District Court to coordinate and consolidate multiple cases and subject them to special caseload management panels. 42 U.S.C. § 2210(n)(3). The *Neztsosie* court ruled that given the history, purpose and procedural provisions of the AEA, tribal court exhaustion principles were not appropriate for "public claims." *Neztsosie*, 526 U.S. at 486-87. Applying tribal court exhaustion to AEA "public liability" claims would "invite precisely the mischief of 'duplicative determinations' and consequent 'inefficiencies' that the [AEA] sought to avoid." *Id*. at 486.

The *Neztsosie* decision obviously did not involve ERISA, and this Court should reject Plaintiff's position that it somehow applies to this case. *Neztsosie* was dealing with a unique and complicated statutory scheme that had specific procedural and policy considerations that led to the holing of the case. ERISA does not contain the same procedural provisions, nor does it present the type of mass litigation concerns that were presented by the AEA. So while ERISA clearly preempts state *law causes of action*, it does not mandate that all ERISA claims be adjudicated by a federal court.

Plaintiff also relies upon *Vandever v. Osage Nation Enterprises*, No. 06-CV-380-GKF-TLW, 2009 WL 702776 (N.D.Okla. Mar. 16, 2009). In *Vandever*, the court did rule that ERISA preempts state court *claims* and thus tribal court exhaustion is likewise not appropriate; federal courts have exclusive jurisdiction. *Vandever*, at 5. However, in making its decision, the *Vandever* court relies upon the U.S. Supreme Court decisions in *Aetna Health* and *Neztsosie*. *Id*. As set forth in detail above, *Aetna Health* did not rule that ERISA claims must be brought in a federal court. It ruled that state law substantive causes of action are preempted by ERISA. The AEA as ruled on by the *Neztsosie* court is far too peculiar a statute upon which to base a general rule. This is especially true given the well-established principles of tribal court exhaustion and the specific exception from exclusive federal jurisdiction for Plaintiff's claims under ERISA. With all due respect to the Northern District of Oklahoma, *Vandever* was incorrectly decided and should not be relied on by this Court.

Plaintiff also argues that, as there is no specific grant of jurisdiction to tribal courts in ERISA, a tribal court could possibly have jurisdiction. This is not the case. "Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Burrell v. Armijo*, 456 F.3d 1159, 1167 (10th Cir. 2006), quoting *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978). Tribal Court jurisdiction is determined under the rules of U.S. Supreme Court precedent in cases like *Montana v. United States*, 450 U.S. 544 (1981). As set forth in facts and arguments in the Plan's opening brief, exercise of tribal court jurisdiction is appropriate in this matter because the claims arose on the reservation trust land, they involve a voluntary relationship with the Tribe

and will impact the Tribe's political integrity and treasury. Plaintiff offers no testimony to counter that set forth in the Plan's opening brief.[1]

## II. THE PLAN'S LANGUAGE THAT PLAINTIFF MAY BRING AN ACTION IN FEDERAL COURT IS NOT A "FORUM SELECTION CLAUSE"

Tribal court exhaustion is based upon comity between federal and tribal courts. It cannot be waived by the Plan. As a matter of comity, a federal court should abstain from hearing a matter if the matter appears to also be subject to tribal jurisdiction until the parties have exhausted tribal remedies. *Texaco v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993). Exhaustion of tribal remedies is not merely a defense to be raised or waived. Congressional concerns for tribal sovereignty create deeper considerations; it is important enough for a court to raise the issue *sua sponte*. *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991). Federal policy dictates that the federal court "stay its hand" in order to give the tribal court a full opportunity to determine its own jurisdiction. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). Thus, the principles at work here are not simply for the parties to raise or waive. This Court must conduct its own analysis of the issue as a matter of comity.

## CONCLUSION

The events that underlie Plaintiff's cause of action arose on Tribal trust land, involve a decision by the Tribal Council, a voluntary commercial relationship with the Tribe and an adverse decision will impact the Tribe financially. There is more than a reasonable basis for the Tribe's court to exercise jurisdiction over this matter and that court must be given the opportunity to explore and make a decision on its jurisdiction.

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[1] It should be noted that it is the Plan's denial of the Plan appeal that creates Plaintiff's cause of action, not the actual medical care.

Dated: March 9, 2015

The Sac & Fox Casino Healthcare Plan
Defendant,

By: /s/ Christopher C. Halbert

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 9th day of March 2015, service of the foregoing **Defendant Sac & Fox Casino Healthcare Plan's Reply to Plaintiff's Opposition to Motion to Dismiss** was submitted electronically for filing and/or service with the United States District Court of Kansas. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

Dean Nash
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Service of the foregoing **Defendant Sac & Fox Casino Healthcare Plan's Reply to Plaintiff's Opposition to Motion to Dismiss** was served via U.S. First Class Mail, postage prepaid, on the 9th day of March 2015 to:

Benefit Management, Inc.
1833 S. Morgan Road
Oklahoma City, OK 73128

/s/ Christopher C. Halbert