Case No. CIV-14-1278-HE
Judge Joe Heaton, United States District Judge, Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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(1) UNITED PLANNERS FINANCIAL SERVICES OF AMERICA,

Plaintiff,

v.

(2) SAC AND FOX NATION, a federally recognized Indian Tribe, (3) SAC and FOX NATION HOUSING AUTHORITY, an administrative Department of the Sac and Fox Nation; (4) SAC AND FOX NATION DISTRICT COURT, and (5) THE HONORABLE DARRELL R. MATLOCK, JR., in his official capacity as Judge of the Sac and Fox Nation District Court,

Defendants.

DEFENDANTS SAC AND FOX NATION AND SAC AND FOX HOUSING AUTHORITY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT

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Dated: February 3, 2015

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IN THE UNITED STATES DISTRICT COURT
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(1) UNITED PLANNERS FINANCIAL SERVICES OF AMERICA, Plaintiff v. (2) SAC AND FOX NATION, a federally recognized Indian Tribe, (3) SAC and FOX NATION HOUSING AUTHORITY, an administrative Department of the Sac and Fox Nation; (4) SAC AND FOX NATION DISTRICT COURT, and (5) THE HONORABLE DARRELL R. MATLOCK, JR., in his official capacity as Judge of the Sac and Fox Nation District Court, Defendants.	Case No. CIV-14-1278-HE

DEFENDANTS SAC AND FOX NATION AND SAC AND FOX HOUSING AUTHORITY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT

Pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Defendants the Sac and Fox Nation and the Sac and Fox Nation Housing Authority (collectively "the Nation," unless otherwise stated) respectfully request this Court to dismiss the Complaint filed by the Plaintiff United Planners Financial Services of America ("United Planners") on the grounds that (1) the Sac and Fox Nation and the Housing Authority are entitled to sovereign immunity from this action; (2) United Planners' Complaint fails to raise a question of federal law; and (3) United Planners has failed to exhaust its tribal court remedies.

I. STATEMENT OF CASE

Adjudication of this motion requires consideration of (A) the tribal court proceedings involving United Planners and the Nation; and (B) United Planners' allegations in this federal court action.

A. The Tribal Court Proceedings.

The Sac and Fox Nation is a federally-recognized Indian tribe located in Stroud, Oklahoma and organized under the Oklahoma Indian Welfare Act. The Housing Authority is an administrative department of the Sac and Fox Nation. In January 2011, the Nation (the Sac and Fox Nation and the Housing Authority) filed an action in the Sac and Fox Nation District Court (Case No. CIV-11-06) against United Planners. The Complaint included causes of action for negligence, breach of contract, breach of fiduciary duty, breach of tribal and federal policies, and breach of industry customs, practices, rules and regulations.

United Planners voluntarily participated in the Sac and Fox District Court proceedings for four months, answering the Nation's Complaint, responding to the Nation's First Requests for Production of Documents, and attending a scheduling conference. United Planners then filed a motion to compel arbitration, which the Sac and Fox Nation District Court denied. Despite that order, United Planners—purportedly on the Nation's behalf—sought to initiate arbitration proceedings with Financial Industry Regulatory Authority ("FINRA").

The Nation then filed a motion to enjoin United Planners from proceeding with the FINRA arbitration. On April 18, 2012, the Sac and Fox District Court granted the Nation's Motion to Enjoin and denied United Planners' Motion for Injunctive Relief.

United Planners appealed that decision to the Sac and Fox Supreme Court (Case No. APL-12-01). In an Order and Judgment issued on September 26, 2013, the Sac and Fox Supreme Court affirmed in part, reversed in part, and remanded with instructions to dismiss without prejudice. *See* Rec. Doc.1 (Complaint), **Ex. "1**" (Order and Judgment of the Supreme Court for the Sac and Fox Nation). The Supreme Court held that (1) "the [Sac and Fox] Nation cannot be compelled to arbitrate against its claims with [United Planners] " Order and Judgment at 10, but that (2) "if it chooses to do so, the Nation will have to adjudicate [its] claims in arbitration, in accordance with the broker agreements." *Id.* "Our holding is that, per the broker agreements, the Nation may pursue its claims in arbitration if it chooses to adjudicate its claim against Broker, but it may not proceed with its case in the District Court or any other court." *Id.* at 11.

The Sac and Fox Supreme Court expressly reserved the question of whether United Planners had consented to the exercise of Sac and Fox Nation District Court's jurisdiction:

> *The District Court did not rule and make any findings of law and fact on whether Broker has effectively consented to tribal court jurisdiction and, by both parties participating in the District Court, the preclusion in the broker agreement against judicial remedies has been waived or tacitly amended to permit adjudication in court. Therefore, that issue is not before us on appeal*. . . . Since no claim arising under the broker agreements by Nation against Broker may be adjudicated in the District Court, this cause is remanded *with instructions to dismiss without prejudice.*

Id. at 11 (emphasis added).

In October 2013, the Nation filed a Motion to Modify Order. The Nation requested that the Sac and Fox Supreme Court stay the case, hold it in abeyance, or place it on administrative hold—rather than dismiss it without prejudice. The Sac and Fox Supreme Court denied that motion, reaffirming its holding that the case should be dismissed without prejudice. Rec. Doc 1 (Complaint), **Ex. "2"** (Order filed April 15, 2014).

That same month, the Nation moved to dismiss the FINRA arbitration proceedings pursuant to FINRA Rule 12206. Rule 12206 provides, in part:

> (a) Time Limitation on Submission of Claims
>
> No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.
>
> (b) Dismissal under Rule
>
> *Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court.* By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(emphasis added). *See* Nation's **Ex. "1"** (FINRA Rule 12206) (attached to this brief).

The Nation noted that none of its causes of action were eligible for FINRA arbitration because they all arose from occurrences and events more than six years before the filing of the Statement of Claim. On October 20, 2014, FINRA heard the Nation's Motion to Dismiss and granted it. *See* Rec. Doc. 1 (Complaint), **Ex. "7"** (FINRA dismissal order).

Two days later, the Nation filed a second complaint against United Planners in the Sac and Fox Nation District Court (Case No. CIV-14-14). Again, it brought causes of action for

negligence, breach of contract, breach of fiduciary duty, breach of tribal and federal policies, and breach of industry customs, practices, rules and regulations. United Planners responded by filing a "Special Appearance for the Sole Purpose Requesting the Court to Stay All Proceedings, Or, In the Alternative, Motion to Dismiss" ("Special Appearance"). *See* Nation's **Ex. "2."** The Nation filed a response to that motion, and it is now pending. *See* Nation's **Ex. "3."**

B. United Planners' Federal Court Action.

On November 14, 2014, United Planners filed the instant federal court action against the Sac and Fox Nation, the Housing Authority, the Sac and Fox District Court, and the Honorable Darrell R. Matlock, Jr. United Planners asserts that it is entitled to (1) "a declaration that the Tribal District Court lacks jurisdiction over United Planners and the 2014 Tribal Court Action," Rec. Doc. 1 (Complaint), at ¶ 40, and (2) "[p]reliminary and final injunctive relief against the Nation and Housing Authority enjoining them from proceeding against [United Planners] in the Tribal District Court." *Id.* at 11.

II. ARGUMENT

A. The Sac and Fox Nation and the Housing Department Are Entitled to Sovereign Immunity and Should be Dismissed from This Action.

As United Planners' Complaint acknowledges, the Sac and Fox Nation is an Indian tribe that is headquartered in Lincoln County, Oklahoma near Stroud. Rec. Doc. 1 (Complaint), ¶2. The Housing Authority is an administrative department of the Nation. *Id.* ¶ 3.

It has long been recognized that Indian tribes are sovereign governments that possess immunity from suit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Breakthrough Management Group, Inc., v. Chukchansi Gold Casino and Resort,* 629 F.3d 1173, 1182 (10th Cir. 2010). "[S]overeign immunity [is] an inherent part of the concept of sovereignty and what it means to be a sovereign." *Breakthrough Management*, 629 F.3d at 1182. "[I]mmunity . . . is necessary to 'promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy.'" *Id.* (quoting *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985)). Tribes "possess immunity from suit to the extent that Congress has not abrogated that immunity and the tribe has not clearly waived its immunity." *Breakthrough Management*, 629 F.3d at 1182 (citing *Santa Clara Pueblo*, 436 U.S. at 58).

Tribal sovereign immunity extends to subdivisions of the tribe, "provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *Breakthrough Management*, 629 F.3d at 1182; *see also Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2051 n.4 (2014) (observing that "[l]ower courts have held that tribal immunity shields not only Indian tribes themselves, but also entities deemed 'arms of the tribe'"); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 7.05(1)(a) (2005 ed.) ("[I]mmunity extends to entities that are arms of tribes[.]").

Tribal sovereign immunity applies not only to claims for damages but to claims for declaratory and injunctive relief. Thus, in *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1262 (10th Cir. 1998), the Tenth Circuit held that a tribe was entitled to immunity

from a declaratory judgment action involving water rights. Similarly, in *Miner Electric Inc. v. Muskogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007), the court held that an action against an Indian tribe challenging a civil forfeiture order and seeking declaratory and injunctive relief was barred by the immunity doctrine. *See id.* at 1011 (stating that "in an action against an Indian tribe, we conclude that [28 U.S.C. § 1331] will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity"); *see also In re Mayes*, 294 B.R. 145, 154–55 (10th Cir. BAP 2003) (rejecting the argument that the immunity doctrine did not apply to a claim for declaratory relief).

Here, the Sac and Fox Nation and the Housing Authority are entitled to tribal sovereign immunity. As noted above, United Planners' own Complaint acknowledges that the Sac and Fox Nation is a federally-recognized Indian tribe and that the Housing Authority is an administrative department of the Sac and Fox Nation. Neither exception to immunity applies: Congress has not abrogated the Housing Authority's immunity, and United Planners has not alleged that the Housing Authority has waived its immunity in any manner.

Accordingly, this Court should dismiss United Planners' claims against the Sac and Fox Nation and the Housing Authority on the grounds that they are entitled to tribal sovereign immunity.

B. United Planners' Federal Court Action Should Also Be Dismissed For Lack of Subject Matter Jurisdiction.

United Planners' Complaint asserts that this matter presents a federal question under 28 U.S.C. § 1331—"the scope of adjudicative jurisdiction of the Tribal District Court and

the exhaustion of tribal court remedies." Rec. Doc. 1 (Complaint) ¶6. Despite this assertion, United Planners' Complaint does not present a federal question.

Generally, "whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). Most issues of tribal court jurisdiction raise federal questions because their resolution requires "careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-56.

Two Tenth Circuit decisions—*Kerr-McGee Corporation v. Farley*, 115 F.3d 1498 (10th Cir. 1997) and *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014)—illustrate the application of federal law to questions of the scope of a tribal court's jurisdiction.

In *Kerr-McGee*, the court considered the jurisdictional provisions of the Price Anderson Act, 42 U.S.C. § 2014(w), 2210 (n). It concluded that those provisions did not expressly prohibit the exercise of tribal court jurisdiction over the operation of a uranium processing mill. 115 F.3d at 1505. In light of the lack of an express prohibition, the court also considered two general "congressional concerns: comity interests flowing from tribal sovereignty and nuclear energy regulation." *Id.* at 1507. After noting these concerns, the Tenth Circuit concluded that the tribal court had jurisdiction to proceed. *Id.*

Similarly, in *Thlopthlocco Tribal Town,* the court applied federal law to conclude that the scope of tribal court authority presented a federal question. The plaintiff tribe had been recognized by the federal government as a sovereign, and, as a result of that recognition, the tribe had rights under federal law. The allegation that the courts of a second Indian tribe were "attempting to trample on those federally-recognized rights" was sufficient to establish the subject matter jurisdiction of the federal district court. 762 F.3d at 1234.

In contrast, in this case, United Planners' allegations do not require this Court to apply federal law concerning the scope of a tribal court's adjudicatory authority. Although United Planners' Complaint briefly asserts that the Tribal Court's exercise of jurisdiction over the 2014 Tribal Court Action and United Planners is "contrary to federal constitutional requirements [and] to other federal law," Rec. Doc. 1 (Complaint), at ¶ 41, the gist of its contentions is a particular ruling by the Sac and Fox Supreme Court, *i.e.*, that "the Nation cannot be compelled to arbitrate its claims with Broker, but, if it chooses to do so. The Nation will have to adjudicate such claims in arbitration, in accordance with the broker agreements[,]" Rec. Doc. 1 (Complaint), **Ex. "1"**, at 10 (Order and Judgment), and that "per the broker agreements, the Nation may pursue its claims it arbitration if it so chooses to adjudicate its claims against Broker, but it may not proceed with its case in the District Court or any other court." *Id.* at 11.

The parties now disagree about the meaning of that ruling by the Sac and Fox Supreme Court. United Planners reads that ruling to state that the Nation "may [*never*] proceed with its case in the District Court or any other court." *See id.*

In contrast, the Nation maintains that United Planners' strained interpretation is belied by the Supreme Court's Order and Judgment itself, as well as by further developments in the tribal court litigation. In particular, United Planners' ignores the Supreme Court's actual disposition of the appeal: it dismissed the case "*without prejudice*." Rec. Doc. 1 (Complaint), **Ex. "1"** at 11 (Order and Judgment) (emphasis added).[1] In this case, the Nation has done exactly what a tribunal contemplates when it dismisses a matter without prejudice—"returning later, to the same court, with the same underlying claim." *Semtek Intern., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506 (2001).

United Planners' interpretation is further undermined by other aspects of the Sac and Fox Supreme Court's Order and Judgment. As noted above, the Court expressly acknowledged that by participating in the proceedings in the 2011 case, United Planners may have "effectively consented to tribal court jurisdiction," thereby waiving the arbitration provisions of the broker agreements. Rec Doc. 1 (Complaint), **Ex. "1,"** at 11 (Order and Judgment). Because this Court did not "rule or make any findings of fact" on this jurisdictional question, the Supreme Court did not address it. *Id.* However, the express discussion of the possibility that United Planners has waived its jurisdictional challenge

[1] *"The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim*. That will also ordinarily (though not always) have the consequence of not barring the claim from other courts, but its primary meaning relates to the dismissing court itself. Thus, BLACK'S LAW DICTIONARY (7th ed.1999) defines 'dismissed without prejudice' as 'removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim,' . . . and defines 'dismissal without prejudice' as '[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.'" *Semtek Intern., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (emphasis added).

establishes that the Supreme Court had no intention of barring subsequent adjudication the Nation's claims in the tribal courts *after* the arbitration proceedings have concluded.

Moreover, this sequence of events—the conclusion of arbitration proceedings followed by adjudication of the Nation's causes of action in court proceedings—is contemplated by the applicable FINRA rules. As noted above, under FINRA Rule 12206(b), "*[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court.*" (Emphasis added). The Nation proceeded in accordance with the FINRA rule here: after FINRA ruled that the Nation's claims were ineligible for arbitration because "six years have elapsed from the occurrence or event giving rise to the claim[s]," *see* Nation's **Ex. "1"** (FINRA Rule 12206(a)), the Nation "pursu[ed] the claim[s] in court." *Id.*

In any event, what matters here is that a resolution of this dispute (*i.e.*, whether the Sac and Fox Supreme Court's ruling allows the Nation to file a second action in the Sac and Fox District Court *after* an adjudication by FINRA that its claims were no longer eligible for arbitration) does *not* involved the application of federal law regarding the scope of a tribal court adjudicatory authority over a non-Indian defendant like United Planners. Instead, the dispute turns on matters wholly independent of that body of federal law, *i.e.*, (a) what the Sac and Fox Supreme Court meant to accomplish when it directed the Sac and Fox District Court to dismiss the 2011 case without prejudice; (b) whether the Sac and Fox Supreme Court's ruling was that the Nation "may [never] proceed with its case in the District Court or any other court," Rec. Doc. 1 (Complaint), **Ex. "1"** at 11 (Order and Judgment), or whether, to the contrary, it meant that the Nation "may not proceed with [its] case in the District Court

or any other court [until the FINRA arbitration proceedings have concluded]"; and (c) whether FINRA Rule 12206(b), which states that "[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court" and which was incorporated into the arbitration agreements, contemplates that the Nation may now adjudicate their claims against United Planners in the Sac and Fox Nation District Court.

None of these issues require this Court to conduct the federal law-based, jurisdictional inquiry regarding tribal court adjudicatory authority that the Supreme Court described in *National Farmers*—"careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 852. Instead, by filing this ill-advised action, United Planners merely seeks post-judgment review of an order of a tribal appellate court.

This Court lacks jurisdiction to conduct such a review, and for that reason it should dismiss United Planners' Complaint.

C. United Planners' Action Should Also Be Dismissed on the Grounds That it Has Failed to Exhaust Available Tribal Court Remedies.

"[A]bsent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011) (internal quotation marks and citation omitted). "The rule is based on strong policy interests recognizing tribal sovereignty, including (1) furthering congressional

policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary." *Thlopthlocco Tribal Town*, 762 F.3d at 1237 (quoting *Kerr–McGee Corp.*, 115 F.3d at 1507). "Until the tribal court's appellate review of the question presented in federal court is complete, the complaining party has not exhausted its tribal court remedies." *Thlopthlocco Tribal Town,* 762 F.3d at 1237.

Here, United Planners has not exhausted its tribal court remedies. In response to the Complaint filed by the Nation in the Sac and Fox Nation District Court, United Planners filed with that court (on November 17, 2014), a "Special Appearance for the Sole Purpose of Requesting this Court to Stay All Proceedings or, in the alternative, Motion to Dismiss." *See* Nation's **Ex. "2."** The Nation has responded to that motion, *see* Nation's **Ex. "3**," United Planners has filed a reply, and the motion remains pending with the Sac and Fox District Court. Moreover, as in the 2011 tribal court action, the unsuccessful party will have an opportunity to appeal the court's ruling on United Planners' motion to the Sac and Fox Nation Supreme Court.

In its Complaint in this action, United Planners asserts that it has exhausted its tribal court remedies merely because it appealed this Court's initial ruling denying the motion to compel arbitration to the Sac and Fox Supreme Court. *See* Rec. Doc. 1 (Complaint) at 9, ¶ 36 (citing the Supreme Court's Order and Judgment, filed September 26, 2013). Contrary to United Planners' argument, this year-old ruling, issued well before new and important developments in this case, does not establish that United Planners has exhausted its tribal

court remedies. In order to be exhausted, "appellate review of the *question presented* [must be] *complete.*" *Thlopthlocco Tribal Town,* 762 F.3d at 1237 (emphasis added). Here, the "question presented" now is whether, *after* (a) the Sac and Fox Supreme Court ruled that "the Nation may pursue its claims in arbitration if is so chooses to adjudicate its claim against [United Planners]," and (b) FINRA dismissed the Nation's claims as untimely under FINRA Rule 12206(a), the Nation may now proceed with its claims in this Court, as FINRA Rule 12206(b) indicates. *See* Nation's **Ex. "1"** (FINRA Rule 12206(b) (stating that "dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court"*).*

That question is now before the Sac and Fox District Court, which will be the first one to consider it in the course of this litigation. Once that court rules on that question, either United Planners or the Nation may appeal its decision, and in that event, the Sac and Fox Supreme Court will be required to address it. Until appellate review of that specific question is complete, United Planners' tribal court remedies have not been exhausted. *See Thlopthlocco Tribal Town,* 762 F.3d at 1237; *see also Columbe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1024-25 (8th Cir. 2013) (noting federal courts will not intervene before tribal courts have addressed pending issues relating to their own jurisdiction).

The Nation acknowledges that there are certain limited exceptions to the exhaustion requirement: (1) when "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith[;]" (2) "where the action is patently violative of express jurisdictional prohibitions[;]" (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction[;]" and (4) where it is clear that

the tribal court lacks jurisdiction and that judicial proceedings would serve "no purpose other than delay." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (internal quotation marks omitted); *Grand Canyon Skywalk Dev. LLC v. 'Sa' Nya Wa, Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) (same). However, these exceptions are viewed narrowly, and courts may apply them only if a party makes a substantial showing that one of these required circumstances is present. *See Kerr–McGee*, 115 F.3d at 1502; *see also DISH Network Serv., L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) (noting that the bar set for avoiding tribal court jurisdiction is "quite high").

These circumstances are not present here. There is no indication that the Nation is motivated by bad faith or that proceeding in this tribal court would be "patently violative of an express jurisdictional prohibition." *National Farmers*, 471 U.S. at 856 n.21. Instead, the Nation followed the directive of the Sac and Fox Nation Supreme Court in its Order and Judgment, presenting their claims to FINRA and then, after FINRA concluded that the claims were no longer eligible for arbitration, filing a second action in the Sac and Fox District Court. That course of action comports with both the Sac and Fox Supreme Court's ruling that the 2011 case should be dismissed without prejudice and with FINRA Rule 12206(b), which provides that "[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court."

Moreover, United Planners cannot show that it lacks an opportunity to challenge the tribal court's jurisdiction. Indeed, as noted above, United Planners had made precisely such

a jurisdictional challenge now, moving the Sac and Fox District Court to dismiss the case. In addition, contrary to United Planners' arguments, the Sac and Fox District Court has jurisdiction to proceed with the 2014 case. Finally, it is far from clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay. *See Hicks*, 533 U.S. at 369. As noted above, the Sac and Fox Supreme Court's directive that the 2011 case be dismissed without prejudice and the provisions of FINRA Rule 12206 (stating the claims deemed ineligible for arbitration may proceed in court) both establish that the Sac and Fox District Court has jurisdiction over the action filed by the Nation.

Accordingly, United Planners has failed to establish an exception to the exhaustion of tribal remedies requirement. Before it may proceed in this Court, United Planners must present its jurisdictional argument to the Sac and Fox District Court and, if it does not prevail there, to the Sac and Fox Supreme Court. Until those courts have ruled on the question of whether the 2014 action can proceed in the tribal courts, United Planners has not exhausted its remedies. This federal court action should be dismissed for that reason as well.

III. CONCLUSION

For the reasons set forth above, this Court should dismiss United Planners' Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February 2015 I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel or record herein:

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