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

UNITED PLANNERS FINANCIAL SERVICES OF AMERICA, L.P., Plaintiff, v. SAC AND FOX NATION; SAC AND FOX NATION HOUSING AUTHORITY; SAC AND FOX NATION DISTRICT COURT; and THE HONORABLE DARRELL R. MATLOCK, JR., Defendants.	)	No. 14-cv-1278-HE Honorable Joe Heaton

MOTION OF THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR., TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT

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MOTION OF THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR., TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT

Defendants, the Sac and Fox Nation District Court (the "Tribal Court") and the Honorable Darrell R. Matlock, Jr. ("Judge Matlock"), in his official capacity as judge of the Sac and Fox Nation District Court (collectively the "Tribal Court Defendants"), hereby move to dismiss the claims asserted against them by the plaintiff, United Planners Financial Services of America, L.P. ("United Planners"), pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(5) for lack of subject matter jurisdiction, pursuant to the doctrine of tribal sovereign immunity, and for insufficient service of process. In support, the Tribal Court Defendants submit the following brief.

INTRODUCTION

In seeking to enjoin the Sac and Fox Nation District Court and one of its judges from ruling on pending matters, United Planners asks this Court to ignore important and longstanding tenets of federal law, Indian law, and comity. Tribal courts and judges are shielded by immunity from unconsented suits subject only to the limited doctrine of *Ex parte Young*—an exceedingly narrow exception when applied to tribal courts. United Planners' claims pending before the tribal court concern the substance of an arbitration agreement—not an unlawful exercise of tribal jurisdiction over nonmembers under federal common law. The latter—absent here—is the only type of claim for which the *Ex parte Young* exception to sovereign immunity can apply.

United Planners' claim against the Nation's judiciary further ignores the tribal

exhaustion doctrine, which requires that tribal courts be allowed to determine the extent of their own jurisdiction before federal court review. United Planners has challenged tribal court jurisdiction, but has yet to allow the tribal court to decide the matter. Federal law has long recognized that important interests of tribal sovereignty, self-governance, and comity preclude a litigant from prematurely seeking federal court review of tribal court jurisdiction. The claims against Tribal Court Defendants should therefore be dismissed so that the matter may properly proceed to a resolution in tribal court.

UNDISPUTED JURISDICTIONAL FACTS

The following jurisdictional facts are undisputed as reflected by United Planners' Complaint and Tribal Defendants' Motion to Dismiss and Brief in Support, or are not in genuine dispute, as evidenced by the attached exhibits:

1. Tribal Defendants filed their original complaint against United Planners in Tribal Court on January 31, 2011, Tribal Case No. CIV-11-06. The case was assigned to Judge Matlock. (Doc. 1 ¶ 11, at 5 (Complaint); Doc. 13, at 2 (Mot. of Tribal Defs. to Dism. & Br.)

2. United Planners filed an answer to the Tribal Court complaint on February 23, 2011. In the answer, United Planners asserted affirmative defenses that the Tribal Court lacked personal and subject matter jurisdiction, but did not move to dismiss. (Doc. 1 ¶¶ 12-13, at 5; Doc. 13, at 2.)

3. On May 24, 2011, United Planners moved to compel arbitration and to stay the Tribal Court action. United Planners asserted that, pursuant to terms of certain broker

agreements that were the subject of the business relationship, the parties had agreed to arbitration as the sole venue to resolve disputes. (Doc. 1 ¶ 14, at 5; Doc. 13, at 2.)

4. On November 8, 2011, Judge Matlock denied United Planners' motion and directed the parties to engage in mediation. (Ex. "A" (Sac & Fox Nation Dist. Ct. Order); Doc. 1 ¶ 14, at 5; Doc. 13, at 2.)

5. On January 17, 2012, United Planners initiated arbitration on behalf of Tribal Defendants before the Financial Industry Regulatory Authority ("FINRA"). (Doc. 1 ¶ 16, at 6; Doc. 13, at 2.)

6. On February 8, 2012, Tribal Defendants filed a motion in Tribal Court to enjoin the arbitration proceedings. (Doc. 1 ¶ 17, at 6; Doc. 13, at 3.)

7. On March 16, 2012, Judge Matlock granted Tribal Defendants' motion to enjoin the arbitration proceedings. In support of his ruling, an order was issued on May 18, 2012. (Ex. "B" (Sac & Fox Nation Dist. Ct. Order & Opinion); Doc. 1 ¶ 19, at 6; Doc. 13, at 3.)

8. No party requested that the Tribal Court decide whether United Planners had consented to Tribal Court jurisdiction, or whether the Tribal Court could otherwise assert civil jurisdiction over United Planners and the subject matter of Tribal Defendants' complaint. Accordingly, no ruling was entered on these issues. (Exs. "A" & "B.")

9. United Planners timely filed its notice of appeal to the Sac and Fox Nation Supreme Court on April 5, 2012. (Doc. 1 ¶ 20, at 6; Doc. 13, at 3.)

10. On September 26, 2013, the Nation's Supreme Court affirmed Judge

Matlock's opinion in part, and reversed in part. (Ex. "C" (Sac & Fox Sup. Ct. Order & Judgment).)

11. The opinion was affirmed with respect to Judge Matlock's ruling that the arbitration clause at issue was not properly or validly approved by the Nation to the extent it could be held under federal law to serve as a waiver of tribal sovereign immunity, and that Tribal Defendants, therefore, could not be compelled to arbitrate. The Supreme Court determined that "[t]he District Court's ruling that the Nation's sovereign immunity has not been validly waived to compel the Nation to participate in arbitration is AFFIRMED." (Ex. "C" at 11.)

12. The Nation's Supreme Court reversed Judge Matlock, however, on his order that the matter proceed on the merits in Tribal Court. The Nation's Supreme Court held that, although the arbitration clause could not be enforced to compel Tribal Defendants to participate in arbitration, if Tribal Defendants intended to pursue claims against United Planners, they "must seek to adjudicate such claims in arbitration and not in the Nation's courts or any other judicial forum, as required by the parties' agreements." (Ex. "C" at 2.) The Nation's Supreme Court therefore ruled that "[t]he case is hereby REMANDED to the District Court with instructions to dismiss without prejudice consistent with this ruling." (Ex. "C" at 12.)

13. The Supreme Court memorialized in its opinion, consistent with paragraph 8 above, that

> "[t]he District Court did not rule and make any findings of law and fact on whether [United Planners] 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."

(Ex. "C" at 11.)

14. On April 15, 2014, the Nation's Supreme Court denied Tribal Defendants' motion to modify the order to require a stay of the Tribal Court proceeding as opposed to dismissal with prejudice. (Ex. "D" (Sac and Fox Sup. Ct. Order).)

15. Judge Matlock complied with the Nation's Supreme Court ruling and, on April 30, 2014, issued an "Order on Mandate" dismissing the Tribal Court proceeding without prejudice. (Ex. "E" (Sac & Fox Dist. Ct. Order on Mandate).)

16. The arbitration proceeding remained pending, but on October 20, 2014, FINRA granted Tribal Defendants' motion to dismiss. As presented to Tribal Court, the dismissal was based on FINRA Rule 12206, which states follows:

> "(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."

(Doc. 1 ¶ 26, at 7; Doc. 13, at 4; Doc. 13-1 (Ex. 1 to Mot. of Tribal Defs. to Dism.).)

17. On October 22, 2014, Tribal Defendants filed a new complaint with the Tribal Court, Tribal Case No. CIV-14-14. (Doc. 1, at 9 ¶ 33; Doc. 13, at 4-5.)

18. On November 14, 2014, United Planners filed this federal court action requesting declaratory and injunctive relief to prevent the matter from proceeding in Tribal Court. (Doc. 1.)

19. On November 17, 2014, United Planners filed in Tribal Court a "Special Appearance for the Sole Purpose Requesting [sic] the Court to Stay All Proceedings, or, In the Alternative, Motion to Dismiss." (Doc. 13-2.)

20. On December 8, 2014, Tribal Defendants filed a response to United Planners' special appearance and motion. (Doc. 13-3.)

21. The matter currently is pending in Tribal Court and has not been ruled upon by Judge Matlock.

STANDARDS OF REVIEW

The question of whether tribal sovereign immunity bars an action is a matter of subject matter jurisdiction and is properly challenged under Federal Rule of Civil Procedure 12(b)(1). *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). Where the motion challenges the factual basis underlying a plaintiff's assertion of subject matter jurisdiction, as opposed to a facial challenge to the substantive allegations in a plaintiff's pleading, a court may look beyond the pleadings and may consider documentary and similar evidence concerning the challenged jurisdictional facts. *See Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v.*

Continental Carbon Co., 428 F.3d 1285, 1292-93 (10th Cir. 2005).

In deciding a motion to dismiss for lack of subject matter jurisdiction under tribal sovereign immunity, a court is not required to take any of a plaintiff's allegations as true. *See id*. The motion is not to be converted into a motion for summary judgment where, as here, the jurisdictional facts have no relation to the merits of the plaintiff's substantive claim. *See Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000). As with other motions challenging the court's subject matter jurisdiction, a motion seeking a dismissal on the basis of tribal sovereign immunity is a threshold matter to be determined before any other issue.[1] *See Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1992) (noting "Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation").

SUMMARY OF THE ARGUMENT

As members of the judicial branch of a federally recognized Indian nation, the Tribal Court Defendants are shielded from suit under the doctrine of tribal sovereign

[1] In view of the importance of the doctrine, a challenge to a federal court's jurisdiction on the basis of tribal sovereign immunity ordinarily is raised at the start of litigation, and an order denying the defense is immediately appealable. *See, e.g., Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept. of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999) (applying collateral order doctrine to administrative order rejecting tribal sovereign immunity defense); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 147, 113 S. Ct. 684, 689 (1993); *Garramone v. Romo*, 94 F.3d 1446, 1452 (10th Cir. 1996). Without such interlocutory review, the value of the immunity to the sovereign could be lost. *See Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, 113 S. Ct. at 689 (noting immediate appeals of denials of immunity are necessary to ensure that sovereigns' interests are fully vindicated); *see also* 17A *Moore's Federal Practice* § 123.51, at 123-153 (3d ed. 2012) (noting an immediate appeal is necessary "because the value of immunity would be lost as litigation proceeds past motion practice").

immunity. Under the doctrine of *Ex parte Young*, a limited exception to the bar of immunity exists to permit federal court review of the decisions of tribal judges, but only to prevent the exercise of tribal jurisdiction beyond the limits proscribed by federal common law, but such is not at issue in this case. United Planners' primary contention concerns interpretation of a *contractual arbitration agreement*—not that the Tribal Court is exercising jurisdiction in violation of federal common law. The *Ex parte Young* exception is thus inapplicable, and this Court lacks subject matter jurisdiction over United Planners' claims against the Tribal Court Defendants.

Additionally, United Planners' claims are premature because it failed to pursue them to a conclusion prior to seeking federal court review. Under the tribal exhaustion doctrine, federal courts are required to dismiss or stay proceedings and allow the tribal court to determine jurisdictional matters in the first instance. United Planners incorrectly asserts that a prior determination from the Nation's Supreme Court satisfies the exhaustion requirement. The current Tribal Court case involves new issues that were not present in the prior adjudication. The court should not hear this case until United Planners exhausts its tribal court remedies.

Finally, aside from the Court's lack of jurisdiction over this matter, United Planners also failed to obtain proper service of process on the Tribal Court Defendants. Under the Sac and Fox Nation's Code of Laws, service on the tribal government or its branches requires service on the Nation's Attorney General. United Planners failed entirely to comply with this requirement, and its service of process is therefore

insufficient as a matter of law. Aside from the threshold jurisdictional issues, the claims against the Tribal Court Defendants should be dismissed pursuant to Rules 12(b)(5).

ARGUMENT & AUTHORITIES

I. SOVEREIGN IMMUNITY BARS CLAIMS AGAINST THE SAC AND FOX NATION JUDICIARY, AS A BRANCH OF TRIBAL GOVERNMENT

It is settled law—confirmed very recently by the United States Supreme Court in unequivocal terms—that Indian tribes are sovereign governments that enjoy immunity from unconsented lawsuits. *See Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S. Ct. 2024, 2030-31 (2014); *see also, inter alia, Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702 (1998). Immunity from suit has long been recognized as a fundamental aspect of an Indian nation's inherent sovereignty. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978). The doctrine is based on federal law and the treatment of Indian tribes as distinct sovereign nations that were not included in the federal system.[2] *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 2583 (1991) (noting "it would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties").

It is further settled law that tribal sovereign immunity extends to individual tribal

[2] Tribal sovereign immunity is recognized as a "a necessary corollary to Indian sovereignty and self-governance." *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986).

officers and employees acting in their official capacities and within the scope of their authority.[3] *See, e.g.*, *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). Accordingly, it has been expressly held that a tribe's immunity shields tribal court judges individually "so long as they are acting within the scope of their official capacities." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F. 3d 1140, 1153-54 (10th Cir. 2011); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1235 (10th Cir. 2014). Without the protection of such immunity tribal courts effectively would lose their ability to function independently.

Finally, in keeping with its overall nature and importance to tribal sovereignty, tribal sovereign immunity may be waived only through express and unequivocal waivers from the tribe or through an act of Congress. *See, e.g*., *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (6th Cir. 2009); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1139-40 (N.D. Okla. 2001). Waivers of tribal sovereign immunity cannot be implied, but rather must be "unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 715 (10th Cir. 1989) (holding immunity waivers are strictly construed and cannot be implied). Without a valid, unequivocal waiver of tribal sovereign immunity, claims

[3] As it applies to tribal officials and tribal employees acting in their representative capacity and within the scope of their authority, this immunity is identical to that enjoyed by the tribe itself. *See Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

against a tribe, its arms, and its officials are barred.

In this case, United Planners does not—and cannot—point to any waiver or consent from the Nation's government for claims against its judiciary or judges, or any act of Congress allowing such claims. Absent any such waiver or consent, claims against Nation's judiciary and its judges are barred by the doctrine of tribal sovereign immunity. Not only are the claims against the Nation's judiciary absolutely barred, but the there is no available exception to the bar of immunity in this case.

II. THE CLAIMS AND DEFENSES CURRENTLY PENDING BEFORE THE TRIBAL COURT DO NOT IMPLICATE THE *EX PARTE YOUNG* EXCEPTION TO THE BAR OF SOVEREIGN IMMUNITY

Federal courts may in some instances have jurisdiction to review acts of tribal officers that may violate federal law and federal rights under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), but only under limited circumstances, and under even more limited circumstances when such review is sought with respect to ongoing tribal court cases. This exception does not permit such review in this case because the primary claims and defenses currently pending before the Tribal Court involve a contractual arbitration clause, and not the type of jurisdictional matters or other matters over which federal courts have authority. In the absence of any claim that implicates federal laws or rights, the tribal courts retain sole jurisdiction over the claims at issue, subject to review only by the Nation's Supreme Court.

Federal common law has long recognized the importance of tribal courts to tribal sovereignty and self-governance. In *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269 (1959),

the Supreme Court held that tribal courts have jurisdiction over non-members who transact business in Indian country. *See id*. 358 U.S. at 223, 79 S. Ct. at 272. The Court reasoned that to hold otherwise "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id*. In *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), the Court, citing *Williams*, held that a tribe's civil jurisdiction extended to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and "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" *Id*. 450 U.S. at 565-66, 101 S. Ct. at 1258.

Thus, the authority of federal courts to review the jurisdiction of tribal courts is limited, in relevant part, to determinations of whether a tribal court is attempting to exercise jurisdiction over a non-member outside the *Montana* parameters. This was precisely the holding in *Crowe & Dunlevy*. In that case, the court held that in determining whether *Ex parte Young* applied, the relevant inquiry was whether the claim against the tribal court judges was one to prevent "the unlawful exercise of tribal court jurisdiction" with reference to *Montana* and its subsequent applications.[4] 640 F.3d at 1155; *see also Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845,

[4] The court's direct citation is to *Nevada v. Hicks*, 533 U.S. 353, 358-59, 121 S. Ct. 2304, 2309-10 (2001), which is a more recent case that cites and applies *Montana* as expressing the limits of tribal court jurisdiction.

852-53, 105 S. Ct. 2447, 2452 (1985) (holding that federal question jurisdiction is limited to determining scope of tribal court jurisdiction over nonmembers under federal common law). Thus, under *Ex parte Young* and *Crowe & Dunlevy*, a limited exception to tribal sovereign immunity exists for claims against a tribal court judge, *but only if the claim concerns the outer limits of tribal court jurisdiction under federal common law*.

This conclusion is confirmed by the limitations on federal power to control tribal courts and judges. Federal common law does *not* provide federal courts with the power to hear appeals from tribal courts concerning the merits of a claim or decision where jurisdiction under *Montana* and its progeny is not at issue. To allow federal courts to, in effect, hear appeals of substantive issues from tribal courts would destroy entirely the fundamental concept of tribal self-government through tribal judiciaries. More importantly, however, determinations of substantive issues are beyond the federal question jurisdiction of this Court. *See Nat'l Farmers Union*, 471 U.S. at 852-53, 105 S. Ct. at 2452.

In this case, United Planners' primary contention is that the Tribal Defendants cannot assert the same substantive claims in Tribal Court as its previous complaint because the Nation's Supreme Court held that, pursuant to the arbitration clause in the broker agreements, the claim could only be brought in arbitration. The Tribal Defendants respond that they are re-asserting the claim in Tribal Court because the arbitration proceeding was dismissed under an arbitration rule that allows the claim to be brought in court after dismissal. The Tribal Defendants further assert that the Nation's Supreme

Court ordered dismissal "without prejudice" thereby authorizing a second suit of the same substantive claim. They assert that the procedural posture of its current complaint is different than what was previously adjudicated—namely, that the matter was submitted to arbitration but dismissed under an arbitration rule that allows for subsequent adjudication by a court.

The matter has been briefed to Tribal Court but has not yet been ruled upon and currently is under advisement. As it concerns this action, however, the Tribal Court Defendants assert that this Court is without authority to review the matter, even if a Tribal Court ruling had already been made. What is at issue is *not* the jurisdiction of the Tribal Court over a non-member under *Montana*; instead, the issue is an interpretation of a contractual arbitration clause, and whether it is enforceable. This particular claim does not implicate a violation of federal law or of a federal right, and *Ex parte Young* cannot properly be invoked.

The matters at issue in the complaint are beyond the federal question jurisdiction of this Court, and the inherent sovereignty of the Sac and Fox Nation requires that the Tribal Court be allowed to rule on substantive issues subject only to appellate review by the Nation's Supreme Court. For the foregoing reasons, United Planners' claim against Judge Matlock to enjoin a ruling on the pending Tribal Court action should be dismissed for lack of subject matter jurisdiction because no exception to sovereign immunity exists that would permit federal court intervention at this stage of the proceedings.

III. THE TRIBAL EXHAUSTION DOCTRINE PRECLUDES THIS ACTION BECAUSE THE SAC AND FOX COURTS HAVE NOT YET RULED ON THE MATTER OF TRIBAL COURT JURISDICTION

A fundamental and longstanding tenet of federal law is that tribal courts are entitled to determine the extent of their own jurisdiction before being subjected to federal court review. This rule—known as the tribal exhaustion doctrine—precludes a litigant from prematurely seeking a determination of tribal court jurisdiction in federal court. Thus, to the extent United Planners characterizes its defense to the Tribal Court proceedings as jurisdictional, this Court should dismiss or, at a minimum, stay this case pending a resolution of the jurisdictional questions in the Sac and Fox tribal courts, including any appeals to the Nation's Supreme Court.

The United States Supreme Court has recognized the tribal exhaustion doctrine as critical element of the independent operation of tribal courts. *See, e.g.*, *Nat'l Farmers Union*, 471 U.S. at 856-57, 105 S. Ct. at 2454; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15, 107 S. Ct. 971, 975-76 (1987). The Court has explained that "[p]romotion of tribal self-government and self-determination require[s] that the Tribal Court have the first opportunity to evaluate the factual and legal bases for the challenge to its jurisdiction." *LaPlante*, 480 U.S. at 15-16, 107 S. Ct. at 976. Thus, challenges to a tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself." *Thlopthlocco Tribal Town*, 762 F.3d at 1237. Tribal exhaustion requires that the matter be heard not only in the tribal trial court, but also that it must be pursued through all tribal appellate courts. *See id.*

United Planners incorrectly asserts that the order from the Nation's Supreme Court in the prior proceeding constitutes tribal court exhaustion. In fact, the motion currently pending before Tribal Court involves *new issues* that were *not present in the prior proceedings* and that are based on *subsequent events*. After the prior case with dismissed without prejudice, an arbitration was initiated, but then dismissed on the basis of an arbitration rule, which the Tribal Defendants assert give it the right to return to court after dismissal. The question, then, is whether the inability to arbitrate and the rule cited by the Tribal Defendants allows the new case to proceed in Tribal Court. The arbitration rule relied upon by Tribal Defendants was not at issue in the prior case and Tribal Court is now faced with a new issue which it has not yet determined and which currently is under advisement.

Further, tribal court jurisdiction over United Planners and the subject matter of Tribal Defendants' substantive claims—as a general matter—was not determined in the prior proceeding. The prior proceeding concerned only the contractual arbitration clause. The Nation's Supreme Court memorialized that other jurisdictional issues were not determined when it stated in its opinion that

> "[t]he District Court did not rule and make any findings of law and fact on whether [United Planners] 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."

(Ex. "C" at 11.)

In this regard, United Planners has filed a "Special Appearance" and has moved to

stay or, alternatively, to dismiss Tribal Defendants' second complaint on the basis that the tribal court lacks jurisdiction. (Doc. 13-2.) The Tribal Defendants argue that, by participating in the prior proceeding, United Planners effectively consented to the jurisdiction of tribal court and also that, as a general matter, the tribal court has jurisdiction under federal common law established by *Montana* and subsequent cases.

As these arguments have not yet been ruled upon by the Nation's courts, this case should be dismissed, so that the tribal court may properly proceed in determining its own jurisdiction in the first instance consistent with the tribal exhaustion doctrine. United Planners plainly is incorrect that the prior adjudication by the Nation's Supreme Court constitutes an "exhaustion" of its remedies by the tribal court. The current posture of the case includes new issues that were not determined in the prior proceeding and, further, the Nation's Supreme Court order *expressly* stated that jurisdiction under *Montana* was not decided. United Planners cannot properly seek a determination prematurely from this Court on the matter of tribal jurisdiction.[5]

[5] The tribal exhaustion doctrine is subject to limited exceptions, none of which have been asserted by United Planners, and which nevertheless are inapplicable. The exceptions are (1) where "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[.]" *Thlopthlocco Tribal Town*, 762 F.3d at 1238. The exceptions are applied narrowly and a "substantial showing" must be made for them to apply. *See id.*

In this case, no argument has been made in support of any of these exceptions, and none can be sustained. The tribal court proceedings were at all times conducted fairly and in good faith—indeed, United Planners prevailed before the Nation's Supreme Court. There are no express jurisdictional prohibitions and United Planners has had an opportunity to challenge

IV. SERVICE OF PROCESS ON TRIBAL COURT DEFENDANTS WAS INSUFFICIENT AS A MATTER OF LAW

Finally, and aside from the jurisdictional defects in United Planners' attempt to circumvent the tribal courts, it has not properly provided notice of this action. While Rule 4 of the Federal Rules of Civil Procedure relating to service of process fail to acknowledge Indian tribes, the Sac and Fox Nation has provided for such procedures. These procedures provide for an organized and fair means by which service of process may be made, and in a manner that ensures the proper tribal officers in a small government are made aware of an action in a timely manner. United Planners' failure to follow these rules would warrant a dismissal even if the Court were to reach such a issue.

Under Title 6, Section 217(g) and (h) of the Sac and Fox Nation Code of Laws, service on the Nation, an officer, or agency of the Nation, must be procured by service on the Nation's Chief Executive Officer, and also by serving the Nation's Attorney General. (Ex. "F.") The Nation's law on service of process is nearly identical to that of Rule 4(i) of the Federal Rules of Civil Procedure, which requires that service on the federal government or a federal agency include service on the United States Attorney General. Under federal court interpretations of the rule, actual notice is insufficient, and failure to comply can result in dismissal. *See, e.g.*, *McMasters v. United States*, 260 F.3d 814, 817 (7th Cir. 2001) (holding actual notice insufficient); *George v. United States Dept. of*

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jurisdiction—its challenge, in fact, is currently pending in Tribal Court. Finally, the jurisdictional issues are complex and not subject to any "clear" result. The matter is under advisement and will be determined by Tribal Court in due course after a full evaluation and analysis of the facts and applicable law.

Labor, 788 F.2d 1115, 1116 (5th Cir. 1986) (dismissing for failure to serve Attorney General); *Brewer v. Baugh*, 370 F. Supp. 2d 988, 991-92 (D. Ariz. 2005) (same).

The same result should be applied here, where United Planners failed to serve Tribal Court Defendants as required by the Nation's laws. The insufficient service should be quashed, and dismissal would be proper under Rule 12(b)(5) for insufficient service of process.

CONCLUSION

Under well-settled federal law, the claims in this action are barred by the doctrine of tribal sovereign immunity, and, even absent this immunity, are premature. The Tribal Court Defendants request that the claims asserted against them be dismissed for lack of jurisdiction.

Respectfully submitted,

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Attorneys for Defendants, Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of February, 2015, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the "MOTION OF THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR., TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT," to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

Randall K. Calvert
Denielle Williams Chaney
Daniel E. Gomez
William David McCullough, Jr.
Rabindranath Ramana
Stephen R. Ward

s/ Stephen R. Ward

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APPENDIX OF EXHIBITS

The following exhibits are hereby submitted in support of the "MOTION OF THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR., TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT."

Exhibit No.	**Title/Description**
A.	Order, *Sac & Fox Nation v. United Planners Fin. Servs. of Am.*, No. CIV-11-06 (Sac & Fox Nation Dist. Ct. Nov. 9, 2011).
B.	Court Minute Order, *Sac & Fox Nation v. United Planners Fin. Servs. of Am.*, No. CIV-11-06 (Sac & Fox Nation Dist. Ct. Mar. 6, 2012).
C.	Order & Judgment, *Sac & Fox Nation v. United Planners Fin. Servs. of Am.*, No. APL-12-01 (Sac & Fox Nation Sup. Ct. Sept. 26, 2013).
D.	Order, *Sac & Fox Nation v. United Planners Fin. Servs. of Am.*, No. APL-12-01 (Sac & Fox Nation Sup. Ct. Apr. 15, 2014).
E.	Order on Mandate, *Sac & Fox Nation v. United Planners Fin. Servs. of Am.*, No. APL-12-01 (Sac & Fox Nation Sup. Ct. Apr. 30, 2014).
F.	Sac & Fox Nation Code of Laws, tit. 6, § 217(g).