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

(1) UNITED PLANNERS FINANCIAL SERVICES OF AMERICA, L.P., Plaintiff, vs. (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

PLAINTIFF UNITED PLANNERS FINANCIAL SERVICES OF AMERICA'S RESPONSE TO DEFENDANTS SAC AND FOX NATION AND SAC AND FOX HOUSING AUTHORITY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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February 24, 2015

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I. INTRODUCTION

For approximately 12 years—from 1994 until 2006—Plaintiff United Planners Financial Services of America provided financial advisement services to Defendants Sac and Fox Nation and Sac and Fox Nation Housing Authority. Almost five years after the relationship ended, Defendants filed an action against Plaintiff in Sac and Fox District Court ("2011 Tribal Court Action"), seeking "relief against the defendant for its misconduct, negligence, breach of contract, breach of fiduciary duty, breach of Tribal policies, breach of US Government policies, breach of industry customs, practices, rules and regulations, and failure to supervise."

In 2013, the Sac and Fox Nation Supreme Court held that "since this Court finds and holds that any dispute arising under the broker agreements between the parties should be adjudicated in arbitration, this case is remanded to the District Court with instructions to dismiss." See *Order and Judgment*, Doc. 1, Exhibit 1.

After submitting their claims to the arbitration process, Defendants filed a motion to dismiss their own action. The arbitration panel granted Defendants' motion to dismiss their own arbitration proceedings. See Doc. 1, Exhibit 7.

The day following dismissal of the FINRA proceedings, Defendants filed a new complaint in the Sac and Fox Nation's District Court [2014 Tribal Court Action] asking "for relief against the defendant for its misconduct, negligence, breach of contract, breach

of fiduciary duty, breach of Tribal policies, breach of US Government policies, breach of industry customs, practices, rules and regulations, and failure to supervise." Verbatim, the same relief sought in the 2011 Tribal Court Action.

This lawsuit seeks to enjoin the Defendants' unlawful assertion of tribal court jurisdiction in the 2014 Tribal Court Action. In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985), the Supreme Court held that federal question jurisdiction under 28 U.S.C. § 1331 is invoked when a tribe unlawfully attempts to hale nonmembers into its courts. Defendants' seeks to have this lawsuit dismissed pursuant to Rules 12(b)(1) (subject-matter jurisdiction) and 12(b)(2) (personal jurisdiction). Defendants argue that (1) Defendants are entitled to sovereign immunity in this case, (2) Plaintiff's Complaint fails to raise a question of federal law, and (3) Plaintiff has failed to exhaust tribal court remedies. Defendants are mistaken on all counts.

First, Plaintiff has properly pled and invoked this Court's jurisdiction. Rulings of the Supreme Courts of both the United States and the Sac and Fox Nation have established that federal-question jurisdiction exists on the facts present here. Nontribal members have a federal right to be free from unlawful tribal court interference, a right that does not hinge on Defendants waiver of sovereign immunity. Neither does it infringe upon Defendants' status as a sovereign entity.

Second, Plaintiff exhausted its tribal court remedies in the 2011 Tribal Court Action and, as a result, the tribal court lacks jurisdiction and its lack of jurisdiction is clear. Further, even if it had not exhausted its tribal court remedies (which Plaintiff has),

"exhaustion" does not apply to the facts presented in Plaintiff's Complaint because (1) the Nation's Supreme Court has already determined the Nation's District Court does not have jurisdiction over disputes arising under the broker agreements and (2) Defendants have asserted tribal court jurisdiction in bad faith.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

Plaintiff has more than sufficiently met that burden here and Defendants' motion to dismiss should be denied.

II. STATEMENT OF CASE

In its Complaint, Plaintiff detailed the tribal court proceedings. In their motion to dismiss, Defendants agree that their motion "requires consideration of . . . the tribal court proceedings." Plaintiff agrees that the history of the dispute between the parties and the ruling handed down by the Nation's Supreme Court support Plaintiff's claim for relief and hereafter provides an overview of these proceedings.

A. 2011 Tribal Court Action

Defendants filed their first Complaint against Plaintiff on January 30, 2011. Plaintiff filed an answer, asserting as affirmative defenses the court's lack of personal jurisdiction over United Planners and the Court's lack of subject matter jurisdiction.

Plaintiff subsequently served a Demand for Arbitration on Defendants pursuant to the arbitration clause in the agreements between the parties which stated "Arbitration must be commenced by services upon the other party of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such election within (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned."

Consistent with the Arbitration clause in the agreements between the parties, Plaintiff filed a *Statement of Claim* with the Financial Industry Regulatory Authority ("FINRA") on behalf of Defendants. In response to Plaintiff's filing the statement of claim, Defendants filed a motion to enjoin Plaintiff from continuing with the FINRA arbitration proceedings. Plaintiff then filed its own motion for an injunction to compel Defendants to participate in the FINRA arbitration proceedings.

The Sac and Fox Nation District Court conducted a hearing on both parties' motions for injunctive relief. At the conclusion of the hearing, the District Court Judge announced that the "Plaintiff's [Nation and Housing Authority] application to stay is granted, preventing all arbitration proceedings. The Defendant's [United Planners] application is denied."

Plaintiff appealed the District Court order to the Sac and Fox Nation Supreme Court.

B. Sac and Fox Nation Supreme Court

The Sac and Fox Nation Supreme Court reversed the District Court's Order stating "the Nation may pursue its claims in arbitration if it so chooses to adjudicate its claim

against [United Planners], but ***it may not proceed with its case in the District Court or any other court.***" Doc. 1, Exhibit 1, p. 11 (emphasis added).

Defendants filed a *Motion to Modify Order* with the Supreme Court, asking that the Court "stay, hold in abeyance, or administratively close the case pending FINRA's ruling on eligibility." The Sac and Fox Nation Supreme Court denied the Defendants' motion to modify and remanded the case back to the District Court with instructions to dismiss. Doc. 1, Exhibit 2.

On April 30, 2014, the Sac and Fox District Court entered an Order on Mandate. Doc. 1, Exhibit 3.

C. FINRA Arbitration Proceedings

On the same day Defendants filed the Motion to Modify with the Supreme Court, they filed with FINRA a *Motion to Dismiss Under FINRA Rule 12206(a).* A copy of the Motion is attached as Exhibit 9. FINRA Rule 12206(a) authorizes dismissal of claims that are more than six years old at the time the demand for arbitration is filed. Doc. 13, Exhibit 1. In the motion, Defendants stated they were seeking damages for actions taken by Plaintiff prior to 2004--more than eight years prior to the filing of the arbitration action.

After the motion to dismiss was filed, FINRA sent a letter to Defendants informing them they had not yet filed a Submission Agreement and, unless such an agreement was submitted within 30 days, the case would be closed. Defendants did not respond to that letter. Thereafter, FINRA sent a "FINAL NOTICE" to Defendants stating

the deficiencies previously identified had not been corrected and if the Submission Agreement was not submitted within 30 days then the case would be closed.

On March 7, 2014, Defendants acknowledged FINRA's jurisdiction over the dispute between the parties when they filed their executed Submission Agreements with FINRA. The Submission Agreements signed and filed by both Defendants state "the undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." Doc. 1, Exhibit 5 and Exhibit 6.

On August 28, 2014, the FINRA arbitration panel conducted an Initial Pre-Hearing Conference. During the conference, Defendants re-asserted their motions to dismiss their own arbitration proceeding. The panel subsequently considered Defendants' motion that the request for arbitration be dismissed because the claims asserted arose more than six years before the filing of the *Statement of Claims* and thus not eligible for arbitration under FINRA Rule 12206(a).

On October 21, 2014, the arbitration panel granted Defendants' motion to dismiss their own arbitration claim. Doc. 1, Exhibit 7.

FINRA Rule 12206(b) provides:

> *Dismissal of a claim under this rule does not prohibit a party form 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 claims without prejudice and may pursue all of the claims in court.***

Doc. 13, Ex. 1. (The italicized sentence is emphasis added by Defendants in their motion to dismiss. Doc. 13, p. 4. The remainder of the rule is emphasis added by Plaintiff).

D. 2014 Tribal Court Action

On October 22, 2014, the day after the arbitration proceedings were dismissed, Defendants filed a new complaint in the Nation's District Court. A copy of the 2014 Tribal Court Action Complaint is attached as Exhibit 10.[1] As stated in the introduction, Defendants seek, verbatim, the same relief sought in the 2011 Tribal Court Action. Plaintiff filed a special appearance and moved to dismiss Defendants' action in the Sac and Fox Nation District Court or, in the alternative, stay any further proceedings until this Court has had the opportunity to consider Plaintiff's federal court claim.

III. ARGUMENT AND AUTHORITIES

This is not a case where Plaintiff is waging war on the principles of tribal sovereign immunity. This is a case where the Plaintiff is asserting Plaintiff's federal right to be free from unlawful tribal court interference after it has exhausted its tribal court remedies. Vindicating that federal right does not hinge on the tribe's permission (waiver of sovereign immunity): this Court thus has jurisdiction over the subject matter and the parties. In contrast, the Nation's District Court clearly lacks jurisdiction over Plaintiff and the claims advanced in Nation's District Court. *See e.g.* Doc. 1, Exhibit 1, p. 11 ("the Nation may pursue its claims in arbitration if it so chooses to adjudicate its claim against

[1] In preparing this response brief, Plaintiff discovered that it had inadvertently attached the 2011 Tribal Court Action Complaint as Exhibit 8 the Federal Court Complaint instead of the 2014 Tribal Court Action as identified in the Complaint.

[United Planners], but ***it may not proceed with its case in the District Court or any other court.***") (emphasis added). If the Court agrees, it need proceed no further and should deny the motion to dismiss.

A. Plaintiff's Action Does Not Depend on Waivers of Sovereign Immunity

Defendants argue that this action should be dismissed "on the grounds that they are entitled to tribal sovereign immunity." Doc. 13, p. 7. Plaintiff does not attack the sovereign immunity of the Nation or the Housing Authority. This case involves an action where Plaintiff is seeking to prevent a tribe's unlawful assertion of jurisdiction over a nonmember of the tribe. The essential characteristic of a *National Farmers Union* action is that federal law may intervene to prevent a tribe's unlawful activity. When federal law applies, it is supreme. U.S. CONST. Art. VI, cl. 2. Neither Defendants argument nor cases cited in support thereof is applicable here.

The facts of *National Farmers Union* demonstrate that sovereign immunity provides no defense because the matter was actually litigated in that case. The plaintiffs in *National Farmers Union* had "named as defendants the Crow Tribe of Indians, the Tribal Council, the Tribal Court, judges of the court, and the Chairman of the Tribal Council," as well as two tribe members. *National Farmers,* 471 U.S. at 848.

Despite the fact that a sovereign immunity defense "sufficiently partakes of the nature of a jurisdictional bar" that it must be given effect if applicable, and may be raised for the first time even in the highest court, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), the Supreme Court in *National Farmers Union* gave no weight to the defendants' professed immunity. Instead the Court merely held that, in most cases, a non-Indian must

exhaust tribal remedies, as Plaintiff has done here, before bringing an action to declare tribal jurisdiction unlawful. *National Farmers Union*, 471 U.S. at 856 & n.21. The Court did not suggest that sovereign immunity imposed a hurdle, and its remand order left the lower court with discretion to keep the tribe and other tribal defendants in the case as defendants pending exhaustion. *See id.* at 857. That result would not have obtained if the tribal defendants enjoyed immunity from suit. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002) ("Sovereign immunity does not merely constitute a defense to monetary liability . . . . it provides an immunity from suit.").

It makes sense that tribal immunity is irrelevant when a non-Indian invokes *National Farmers Union* to vindicate his federal rights. Though immunity is generally lost only through abrogation or waiver, it exists only "[a]s a matter of federal law." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Under *National Farmers Union*, federal courts are entrusted with policing a federal right to be free from unlawful tribal court interference. The balance of interests thus dictates that, when a nonmember plaintiff brings suit to enjoin the unlawful exercise of tribal-court power, a tribe lacks immunity to waive.

Indeed, since *National Farmers Union* was decided, not a single Supreme Court decision has even hinted that a tribal waiver is necessary before a federal court can apply federal law to declare that a tribal court's exercise of jurisdiction exceeds federal limits. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 366-69 (2001) (suit brought against tribal court; tribal court lacked jurisdiction and exhaustion was not required); *Strate v. A-1*

Contractors, 520 U.S. 438, 445 (1997) (suit brought against both a tribal court and tribal judge; tribal court proceedings declared unlawful).

In sum, the Defendants incorrectly presuppose that a waiver of sovereign immunity is required to maintain this *National Farmers Union* action. That view is incompatible with *National Farmers Union* itself. This Court has jurisdiction. The Tribal Court does not.

B. This Court has Subject Matter Jurisdiction over Plaintiff's Claim.

In *National Farmers Union*, the Supreme Court held that a non-Indian has a "federal right," enforced by federal courts, to be free from unlawful tribal court interference.

> This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. . . . **[W]hen [petitioners] invoke the jurisdiction of a federal court under § 1331, they must contend that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum**.
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> * * *
>
> Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, **it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference**. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331. **The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction**.

National Farmers Union, 471 U.S. at 851-53 (emphasis added).

The Tenth Circuit applies this principle.

> The Supreme Court has repeatedly held that whether a tribal court has exceeded its jurisdictional authority is a question of federal common law. As the Court explained in *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* "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." [citation omitted]

Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226 (10th Cir. 2014).

This Court applies this principal:

> Clearly, the question whether a tribe can compel a non-Indian to submit to tribal civil-adjudicatory jurisdiction "must be answered by reference to federal law and is a 'federal question' under § 1331." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); *accord Kerr–McGee Corp. v. Farley*, 115 F.3d 1498, 1501 (10th Cir.1997).

Muhammad v. Comanche Nation Casino, 742 F.Supp.2d 1268, 1276 (W.D. Okla, 2010)

Thus, it is no surprise that Defendants concede correctly that "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." Doc. 13, p. 8 (citing *National Farmers Union*, 471 U.S. at 852).

Having conceded the fact that an assertion of the right of freedom from Tribal Court interference is a federal question under § 1331, Defendants assert that the Court need not conduct "the federal law-based, jurisdictional inquiry regarding tribal court adjudicatory authority that the Supreme Court described in *National Farmers* [because Plaintiff] merely seeks *post-judgment review of an order of a tribal appellate court.*" Doc. 13, p. 12. (emphasis added).

Plaintiff is not seeking a post judgment review. The Sac and Fox Nation Supreme Court entered a final ruling in this case. *See* Doc. 1, Exhibit 1, p. 11 ("the Nation may pursue its claims in arbitration if it so chooses to adjudicate its claim against [United Planners], but ***it may not proceed with its case in the District Court or any other court.***")

(emphasis added). Despite this pronouncement by the Nation's Supreme Court, Defendants are "returning later, to the same court, with the same underlying claim." Doc. 13, p. 10 [citation omitted]. That claim may be pursued in arbitration but not in the District Court. The Nation's Supreme Court could not have made it any clearer. Defendants' protestations change nothing.

1. This is not an issue of whether Plaintiff has consented to tribal court jurisdiction.

Defendants argue that the Nation's Supreme Court "expressly acknowledged that by participating in the proceedings in the 2011 [Tribal Court Action], United Planners may have 'effectively consented to tribal court jurisdiction,' thereby waiving the arbitration provisions of the broker agreements." Doc. 13, p. 10.

First, the Nation's Supreme Court stated that the District Court in the 2011 Tribal Court Action "did not rule and make any findings of law and fact on whether [Plaintiff] has effectively consented to tribal court jurisdiction and . . . Therefore, that issue is not before us on appeal."

Second, the 2011 Tribal Court Action was dismissed. Doc. 1, Exhibit 3. Defendants apparently understood the import of this dismissal as it relates the argument they are now making and attempted to dissuade the Supreme Court from entering the dismissal order. Immediately after the Supreme Court issued its order and judgment, Defendants filed a pleading with the Supreme Court styled "*Motion to Modify Order*." A copy is attached hereto as Exhibit 11. In it, Defendants "request[] this Court to modify the third holding, to stay the case, hold it in abeyance, or place it on administrative hold, rather

than dismissing it without prejudice." Id. at p. 1. In other words, the Nation was imploring the Supreme Court to do anything but dismiss the action. In denying the motion, the Supreme Court stated "this Court entered in this case its *Order and Judgment* holding, among other things, that, per the parties' broker agreements, Appellees [Defendants] **may pursue their claims in arbitration if they so choose, but they may not proceed with their claims in the District Court.**" Doc. 1, Exhibit 2, p. 1. (emphasis added)

Third, while Plaintiff did assert the district court lacked personal and subject matter jurisdiction in the 2011 Tribal Court Action, the question of whether Plaintiff consented to jurisdiction in the 2011 Tribal Court Action is not relevant to the 2014 Tribal Court Action. Defendants correctly state that they are pursuing the same claim in the 2014 Tribal Court Action that they pursued in the 2011 Tribal Court Action.[2] The claim arises from the same broker's agreement that the Nation's Supreme Court has said the Nation "**may pursue . . . in arbitration if they so choose, but they may not proceed with their claims in the District Court.**" Doc. 1, Exhibit 2, p. 1. (emphasis added). In the 2014 Tribal Court Action, Plaintiff challenges Nation's District Court personal and subject matter jurisdiction. *See* Doc. 13, Exhibit 2. There is no issue of consent to jurisdiction in the 2014 Tribal Court Action.

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008), the United States Supreme Court ruled that nonmember consent is an essential ingredient of tribal court jurisdiction. The ingredient is absent from this case. The

[2] The Nation is "returning later, to the same court, with the same underlying claim." Doc. 13, p. 10 [citation omitted].

Nation's Supreme Court was clear in its determination that the broker agreements between the parties required arbitration of any dispute. The Supreme Court has rendered its decision and it is undisputed the District Court does not have jurisdiction over the person or subject matter of the 2014 Tribal Court Action.

2. FINRA Rule 12206 neither confers jurisdiction to the Nation's District Court over the Plaintiff nor grants Defendants a cause of action.

Defendants imply that the FINRA proceedings defeat federal question jurisdiction under § 1331. Defendants state: "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* involve application of federal law regarding the scope of a tribal court adjudicatory authority over a non-Indian defendant." Doc. 13, p. 11. (emphasis in document). First, as discussed throughout this response, the Supreme Court ruled that the dispute over the broker agreements had to be submitted to arbitration. The Supreme Court spoke nothing about filing a second action in the Nation's District Court. It stated emphatically on two separate occasions that Defendants "**may not proceed with their claims in the District Court.**" Doc. 1, Exhibit 1, p. 11 (*Order and Judgment*); Doc. 1, Exhibit 2, p. 1. (*Order* (denying motion to modify)) (emphasis added).

Second, the Supreme Court held that arbitration was Defendants sole recourse in the dispute giving rise to the cause of action in the 2011 Tribal Court Action. Defendants make much of the fact, although not really relevant to their motion, that the FINRA arbitration panel dismissed the arbitration proceedings because the claims were more than

six years old. There is no dispute that FINRA dismissed the arbitration with prejudice. The effect of that dismissal is Defendants' problem. Defendants cite the portion of FINRA Rule 12206(b) which states "[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court." Doc. 13, p. 12. However, the remainder of Rule 12206(b) reads "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 claims without prejudice and may pursue all of the claims in court." (emphasis added). Defendants were the moving party to dismiss their own arbitration proceeding. See Exhibit 9. Two facts are evident from the language 12206(b): (1) only the non-moving party may is conferred the right to pursue all claims in court (in this case, Defendants were the moving party), and (2) nowhere does it confer jurisdiction of any court over either party to the arbitration proceedings.

Defendants concede that the question whether a tribe can compel a non-Indian to submit to tribal civil-adjudicatory jurisdiction must be answered by reference to federal law and is a federal question under § 1331. Defendants then spend the remainder of their argument trying to distinguish facts in the case from the United States Supreme Court guidance in *National Farmers Union.* The facts set forth in Plaintiff's Complaint support a *National Farmers Union*' determination of jurisdiction by this Court and Defendants' motion to dismiss should be denied.

C. Plaintiff has Exhausted its Tribal Court Remedies

Quoting *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140,1149 (10th Cir. 2011), Defendants point out that "[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." Doc. 13, p.12.

Defendants continue outlining the exhaustion doctrine [Id.]: "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,* 762 F.3d at 1237. Doc. 13, p. 12. The facts set forth in Plaintiff's Complaint clearly support the legal conclusion that Plaintiff has exhausted its tribal court remedies. As detailed throughout this response, the Nation's Supreme Court has issued an *Order and Judgment* in the 2011 Tribal Court Action. Plaintiff has exhausted its tribal court remedies.

D. Even if Plaintiff had not Exhausted its Tribal Court Remedies, which it has, this Court Would Have to Apply the Exceptions to the Exhaustion Doctrine.

As this Court has held, the "rule of tribal court exhaustion is a matter of comity and not jurisdiction." *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568, at *1 n.2 (W.D. Okla. Oct. 27, 2010) (DeGiusti, J.). *See also General Rock & Sand Corp. v. Chuska Dev. Corp.*, 55 F.3d 1491, 1492 (10th Cir. 1995) (stating that dismissal under for lack of subject matter jurisdiction is inappropriate "because the exhaustion rule is one of comity and not a jurisdictional limitation").

Moreover, "[a]s a prudential rule based on comity, the exhaustion rule is not without exception." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011); *see also Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (listing exceptions to exhaustion rule). Comity does not require tribal exhaustion here for two independent reasons: (1) it is clear, as determined by the Nation's Supreme Court, that

the Nation's District Court does not have jurisdiction to consider the 2014 Tribal Court Action and (2) the facts of this case support a conclusion that Defendants action in initiating the 2014 Tribal Court Action is motivated by a desire to harass and/or is brought in bad faith.

1. The Nation's District Court Lacks Jurisdiction

"Exhaustion is not required if it is clear that the tribal court lacks jurisdiction, such that the exhaustion requirement would serve no purpose other than delay." *Crowe*, 640 F.3d at 1150 (internal quotations omitted). In *Crowe*, the Tenth Circuit thoroughly analyzed the tribal court's jurisdiction over the non-tribal member plaintiff, and found it lacking. *Id.* at 1150-53. Accordingly, in the absence of any compelling argument establishing tribal court jurisdiction, the Court of Appeals held that "the exhaustion requirement would serve no purpose, and there is no need to require further tribal court litigation before the exercise of federal jurisdiction in this case." *Id.* at 1153.

The same is true here. Despite Defendants' protestations to the contrary, in this case the Sac and Fox Nation Supreme Court has made a final determination concerning its jurisdiction over any action arising from the account agreements, holding specifically that "any dispute arising under the broker agreements between the parties should be adjudicated in arbitration." Doc. 1, Exhibit 1, pp. 2-3. The Nation's Supreme Court went on to say that "the Nation may pursue its claims in arbitration if it so chooses to adjudicate its claim against [United Planners], but ***it may not proceed with its case in the District Court or any other court.***" Id. at p. 11 (emphasis added).

Further, unlike *Thlopthlocco*, where the Tenth Circuit agreed with the District Court determination that tribal remedies had not been exhausted because the tribal Supreme Court had not reached a final decision over its jurisdiction, in the present case, the Nation's Supreme Court has reached a final decision concerning the jurisdiction of the Nation's District Court to proceed with any action brought by Defendants arising from the broker agreements. As a result, tribal exhaustion would serve no purpose and therefor does not apply. *See Crowe*, 640 F.3d at 1153; *Strate,* 520 U.S. at 459; *Nevada*, 533 U.S. at 359-360.

2. Defendants Actions Constitute Harassment and Are Motivated by Bad Faith.

As detailed in Plaintiff's Complaint and throughout the response brief, Defendants litigated and lost the issue of whether any dispute under the broker agreements had to be submitted to arbitration or could be filed in the Nation's District Court. The Nation's Supreme Court decided that issue, stating The Nation's Supreme Court went on to say that "the Nation may pursue its claims in arbitration if it so chooses to adjudicate its claim against [United Planners], but ***it may not proceed with its case in the District Court or any other court***." Id. at p. 11 (emphasis added).

Following the Nation's Supreme Court decision, Defendants then submitted the dispute to FINRA arbitration proceedings but then immediately moved to dismiss, stating the claims were more than six-years old and thus not eligible for arbitration. The arbitration panel granted Defendants' motion and dismissed the arbitration claim with prejudice.

Having secured dismissal with prejudice the request for relief from the sole forum the Nation's Supreme Court stated was available, Defendants are now "returning later, to the same court, with the same underlying claim." Doc. 13, p. 10 [citation omitted]. When does the cycle end? According to Defendants it will never end until they get the decision they desire from the Nation's District Court:

> 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 [sic] 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 porced with its claims in this Court, as FINRA Rule 12206(b) indicates.[3]

Doc. 13, p. 14. (emphasis by Defendants)

The question presented is the same question that the Nation's Supreme Court decided previously, to-wit: whether the Defendants may proceed against Plaintiff in the Nation's District Court or whether Defendants were required to submit the dispute to an arbitration panel. The Nation's Supreme Court answered the question as follows: "the Nation may pursue its claims in arbitration if it so chooses to adjudicate its claim against [United Planners], but ***it may not proceed with its case in the District Court or any other court.***" Id. at p. 11 (emphasis added).

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[3] While Defendants focused on FINRA Rule 12206(a) and (b) in requesting the dismissal, Defendants never did consider FINRA Rule 12206(c) which states that the "six-year time limit on the submission of claims [does not] apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a member or associated person." Doc. 13, Exhibit 1. This provision was not brought to, or considered by, the arbitration panel. While the language might have authorized Defendants to pursue their claim in arbitration, it is now a moot point because Defendants solicited, and received, a dismissal with prejudice of the arbitration claim.

The "question presented" has been answered. Defendants continued attempts to litigate in the "same court, with the same underlying claim" [Doc. 13, p. 10] certainly constitutes harassment and bad faith on the part of Defendants which is an exception to the exhaustion doctrine.

IV. CONCLUSION

For the reasons set forth herein, Defendants' motion to dismiss must be denied.

Dated this 24th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2015, I electronically transmitted the foregoing document to the Clerk of the U.S. District Court for the Western District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/David McCullough
William David McCullough

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