UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(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 REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Pursuant to Rule 12(b)(1) and 12 (6) of the Federal Rules of Civil Procedure and Local Rule 7.1(i), the Defendants the Sac and Fox Nation and the Sac and Fox Nation Housing Authority (collectively "the Nation," unless otherwise stated) respectfully submit the following Reply Brief in support of their Motion to Dismiss. *See* Rec. Doc. 13. For the reasons set forth in the Nation's opening brief and below, the Complaint filed by the Plaintiff United Planners Financial Services of America ("United Planners") should be dismissed because (A) the Nation is entitled to sovereign immunity; (B) this Court lacks jurisdiction

over United Planners' claims; and (C) United Planners has failed to exhaust its tribal court remedies.

I. STATEMENT OF CASE

Ignoring well-established principles regarding tribal sovereign immunity, federal jurisdiction, and exhaustion of tribal court remedies, United Planners filed this federal court action against the Nation, the Sac and Fox Nation District Court, and the Honorable Darrell Matlock, Jr., seeking to enjoin ongoing tribal court litigation in the District Court of the Sac and Fox Nation.

In the tribal court proceedings, the Nation explained that it entered into a broker agreement with United Planners in or around 1994. Meetings and interactions between the Nation and United Planners occurred on tribal land, at the Nation's headquarters in Stroud, Oklahoma. United Planners then invested the Nation's funds improperly and in violation of proper practices dictated by industry custom and the rules and regulations of the Nation and the United States government.

In light of the issues raised in the tribal court litigation, the Sac and Fox District Court has jurisdiction to adjudicate the Nation's claims against United Planners—a non-Indian defendant. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) (holding that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and that "[a] tribe may also retain inherent power to exercise civil authority over 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"); *N.L.R.B. v. Pueblo of San Juan*, 280 F.3d 1278, 1284 (10th Cir. 2000) (stating that "[t]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians engaged in commercial activities on Indian land[,] noting "the inherent sovereign authority of Indian tribes over non-Indian commercial activities occurring on a reservation[,] and "existing precedent in this circuit regarding the inherent nature of [a] tribe's sovereign status as governmental entities").

Despite this precedent, United Planners now requests this Court to (1) issue "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) grant "[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. The Nation, the Sac and Fox Nation District Court, and Judge Matlock have all filed motions to dismiss United Planners' Complaint. *See* Rec. Docs. 13, 17.

In addition to filing this federal court action, United Planners has sought dismissal of the Nation's tribal court action. In the tribal court action, United Planners filed a "Special Appearance for the Sole Purpose Requesting the Court to Stay All Proceedings, Or, In the Alternative, Motion to Dismiss" ("Special Appearance"). *See* Rec. Doc. 13, **Ex. "2."** The Nation filed a response to that motion, and it is now pending in the tribal court. *See id.*, **Ex. "3."**

II. ARGUMENT

A. The Sac and Fox Nation and the Housing Authority Are Entitled to Sovereign Immunity and Should Be Dismissed from this Action.

In its brief in support of its Motion to Dismiss, the Nation noted that the Sac and Fox Nation and the Housing Authority are entitled to tribal sovereign immunity. 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. Congress has not abrogated the Nation's immunity, and United Planners did not allege that the Nation had waived its immunity in any manner. Tribal sovereign immunity applies not only to claims for damages but to claims for declaratory and injunctive relief—like those asserted by United Planners here. *See Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1262 (10th Cir. 1998).

In its response brief, United Planners argues that the Supreme Court's decision in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) somehow creates an exception to the well-established principles of tribal sovereign immunity. *See* Doc. 18, at 8-12. United Planners maintains that because the plaintiffs in *National Farmers* sued an Indian tribe, a tribal court, and various tribal officials, and because the Supreme Court's opinion does not address the question of immunity (but instead holds that the plaintiff was required to exhaust tribal court remedies, *see* 471 U.S. at 856), the Supreme Court's decision somehow allows it to proceed against the Nation in this federal court action. *See* Rec. Doc. 18, at 8-9 (contending that "the facts of National Farmers Union demonstrate that sovereign immunity provides no defense because the matter was actually

litigated in that case" and that "[i]t makes sense that tribal immunity is irrelevant when a non-Indian invokes *National Farmers Union* to vindicate his federal rights").

United Planners' argument for an exception to the immunity doctrine is misguided and should be rejected by this Court. Justice Stevens' opinion in *National Farmers* does not address immunity at all. Instead it concerns federal question jurisdiction, *see* 471 U.S. at 850-56, and exhaustion, *see id.* at 856-57.

In addition, contrary to United Planners' suggestion, the immunity doctrine had been regularly applied in Supreme Court and Tenth Circuit decisions decided after *National Farmers*. *See, e.g., Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (stating that "unless and until Congress acts, the tribes retain their historic sovereign authority" and that "[a]mong the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers") (internal quotation marks and citations omitted); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1159 (10th Cir. 2014) ("The doctrine of tribal sovereign immunity dictates a federally recognized tribe 'is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'") (quoting *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998)).

Morever, United Planners' argument for a *National Farmers* exception to tribal sovereign immunity is based upon a fundamental misunderstanding about how the law develops. Despite United Planners' suggestion, legal doctrine is not formulated through the recitation of procedural details that are nowhere addressed in the holdings of controlling

opinions (*e.g.*, the fact that the plaintiff in *National Farmers* sued certain tribal entities that could have, but perhaps did not, assert that they were entitled to immunity). Instead, courts decide the issues that are presented to them and, in rare circumstances, issues raised *sua sponte*. *See generally United Food & Commercial Workers Union, Local 1564 v. Albertson's, Inc.*, 207 F.3d 1193, 1199 (10th Cir.2000) (explaining that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (internal quotation marks omitted).

Despite United Planners' arguments, the doctrine of tribal sovereign immunity remains robust. The Nation is entitled to immunity here.

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

In its motion to dismiss, the Nation further observed that United Planners' Complaint in this federal court action 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*, 471 U.S. at 852. However, the reason that most issues of tribal court jurisdiction raise federal questions is because they require "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.

No such examination is required in this action. Instead, United Planners' federal court challenge to the exercise of tribal court jurisdiction is based on several sentences in the opinion of the Sac and Fox Nation 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. The Nation maintains that the Sac and Fox's Supreme Court's actual disposition of the appeal—ordering dismissal"*without prejudice,*" Rec. Doc. 1 (Complaint), **Ex. "1"** at 11 (Order and Judgment) (emphasis added), indicates that the Nation's claims against United Planners may be brought in tribal court if the arbitration proceedings were no longer timely. *See* FINRA Rule 12206(b) (stating that"[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court"). In contrast, United Planners reads the Sac and Fox Supreme Court's ruling to state that the Nation "may [*never*] proceed with its case in the District Court or any other court." *See* Rec. Doc. 1 (Complaint), **Ex. "1"** at 11 (Order and Judgment) (emphasis added)*id.*

Resolution of this dispute does *not* involve 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.*, the proper interpretation of the Sac and Fox Supreme Court's ruling and FINRA Rule 12206(b).

In its response brief, United Planners invokes the general principle that questions of tribal court jurisdiction over non-Indians raise matters of federal law. *See* Rec doc. 18, at 10-15. However, its challenges to tribal court jurisdiction are notable for the absence of "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," *see National Farmers*, 471 U.S. at 852, *i.e.*, those considerations that generally turn tribal court matters into federal questions. The sources invoked by United Planners—the language in the Sac and Fox Supreme Court's opinion and the terms of FINRA Rule 12206—do *not* raise federal questions.

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

In its motion to dismiss, the Nation also noted that United Planners' federal court action should be dismissed for failure to exhaust available tribal court remedies. In particular, as noted above, United Planners has filed a motion to dismiss the Nation's tribal court action, and that motion remains pending in the Sac and Fox District Court. "[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). United Planners has not exhausted its tribal court remedies.

In its response brief, United Planners now argues that its initial appeal to the Sac and Fox Supreme Court was sufficient to exhaust its remedies. That is not so. After returning to FINRA (as directed by the Sac and Fox Supreme Court) and after FINRA's dismissal of the arbitration proceeding on timeliness grounds, the Nation has filed a new action in the tribal court, as allowed by both the Sac and Fox Supreme Court (by ordering dismissal of the first case without prejudice) and by FINRA Rule 12206 (b) (by stating that dismissal on timeliness grounds "does not prohibit a party" from pursuing the claim in court"). United Planners' motion to dismiss the new tribal court action, and an appeal from a ruling on that motion, offer tribal court remedies that United Planners has not exhausted.

United Planners also argues that the Nation's actions constitute harassment and that the Nation has acted in bad faith. *See* Rec. Doc. 18, at 18-19. That argument is not supported by the record. The Nation's filing of the second tribal court action is well-grounded in fact and law. The Sac and Fox Supreme Court ordered dismissal of the first case without prejudice. FINRA Rule 12206(b) contemplates precisely the very return to court after the dismissal of an untimely arbitration claim that occurred here. These authorities support the Nation's actions. Accordingly, there no grounds to invoke the bad faith exception to the tribal exhaustion doctrine.

In any event, the challenges that United Planners now invokes may and should be raised in the tribal court proceedings.

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 March 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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