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. CIV-14-1278-HE Honorable Joe Heaton

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

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Defendants, the Sac and Fox Nation District Court ("Tribal Court") and the Honorable Darrell R. Matlock, Jr. ("Judge Matlock"), in his official capacity as a judge of the Sac and Fox Nation District Court (collectively the "Tribal Court Defendants"), pursuant to W.D. Okla. Civ. R. 7.1(i), hereby submit this reply in support of their motion to dismiss (Doc. 17) and in response to the opposition brief filed by the plaintiff, United Planners Financial Services of America, L.P. ("United Planners") (Doc. 20).

INTRODUCTION & SUMMARY

In prior tribal court litigation, United Planners was successful in having a contractual arbitration agreement enforced. The tribal courts, however, correctly addressed *only* the arbitration agreement while *expressly not* addressing whether, as a general matter, the tribal courts could exercise jurisdiction over United Planners and the substance of the Sac and Fox Nation's ("Nation's") complaint under federal common law. The two issues—(1) contractual agreements to arbitrate and (2) tribal court jurisdiction—are separate and distinct matters of law. In its response brief, United Planners incorrectly conflates these issues, which invalidates the vast majority of its arguments and objections to dismissal.

Currently before the tribal court is a second proceeding in which the Nation is again attempting to gain access to the tribal courts *but for reasons different than what was asserted in the prior case*. After the prior litigation, the Nation dismissed the

arbitration on its own behalf under an arbitration rule which it claims allows it to re-file in tribal court. The current matter concerns the effect of the arbitration rule—not enforceability of the arbitration agreement. The former was decided previously, the latter has not yet been decided. Important to this case, tribal court jurisdiction over United Planners and the substance of the Nation's second complaint remains unresolved in the Tribal Court.

As a whole, United Planners' response brief fails to recognize the important distinction between contractual interpretation of an arbitration agreement and general tribal court jurisdiction over non-members under federal common law. Under *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-54 (10th Cir. 2011), only tribal court jurisdiction over non-members is subject to federal court review, and only if, and after, the matter has been exhausted in the tribal courts. Since the matter has not yet been litigated in the tribal courts, this case should be dismissed for lack of subject-matter jurisdiction.[1]

ARGUMENT & AUTHORITIES

I. THE NATION'S SUPREME COURT *EXPRESSLY* DID NOT DETERMINE TRIBAL JURISDICTION AND UNITED PLANNERS IS REQUIRED TO EXHAUST THE MATTER IN SAC AND FOX COURTS

As evidenced by United Planners' response brief, the fundamental law underlying this action is not in dispute—namely, that (1) the Tribal Court Defendants enjoy

[1] The Tribal Court Defendants have no interest in the ultimate outcome of the underlying litigation. At issue in this case is the recognized legal right of tribal courts to determine their own jurisdiction and to adjudicate claims within the jurisdiction of tribal courts.

sovereign immunity unless an exception applies; (2) that under *Crowe & Dunlevy v. Stidham*, only a narrow exception exists by which a federal court can review tribal court jurisdiction over non-members; and (3) that the tribal exhaustion doctrine is applicable to this case. United Planners seeks to invoke this court's jurisdiction under the narrow exception to sovereign immunity by arguing that the ruling by the Nation's Supreme Court concerning enforceability of an arbitration agreement also addressed general tribal court jurisdiction, and therefore satisfies the requirement for tribal exhaustion. To the contrary, the Nation's Supreme Court *expressly* held it was *not* deciding that the tribal courts lacked jurisdiction as a general matter, but merely was holding that an arbitration agreement was enforceable.

United Planners fails to acknowledge the key and critical portion of the decision of the Nation's Supreme Court, which states as follows:

> "We are mindful that, while seeking to have the Nation's claims heard in arbitration, [United Planners] has been participating in the District Court proceedings without special appearance and challenging tribal court jurisdiction; *further, [United Planners] has not sought dismissal for lack of jurisdiction or otherwise.* [United Planners] has filed an Answer, participated in discovery and hearings, and has even sought affirmative relief before the District Court (e.g., entering into joint motions to extend deadlines . . .).
>
> The 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."

(Doc. 17-3, at 10-11) (emphasis added).

The Nation's Supreme Court further described this important limit on its ruling in

a footnote to the above passage which states as follows:

> "Notably, the record does not reveal that [United Planners] has really challenged the subject matter jurisdiction of the District Court. In its Motion to Compel arbitration, [United Planners] even requests a stay of the case until the arbitration proceedings are completed, suggesting that the District Court maintains jurisdiction over the parties and the subject matter, but that the court proceedings will be on hold until after arbitration. This is not consistent with a position that the District Court lacks jurisdiction."

(Doc. 17-3, at 10-11 n.13.)

The ruling was limited to the following proposition, which appears in the opinion immediately after the above passage:

> "Our holding is that, per the broker agreements, 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. 17-3, at 11) (emphasis added). It is clear that the ruling did *not* concern tribal court jurisdiction under federal common law.

The ruling that the arbitration agreement precluded the action from proceeding "in the District Court *or any other court*" makes clear that the Nation's Supreme Court was *not* ruling on the unique limitations of tribal court jurisdiction under federal common law, but was holding merely that the arbitration agreement was enforceable. In this regard, the court held that the arbitration clause was "akin to a forum selection clause" further making clear that tribal court jurisdiction under federal common law was not being determined. (Doc. 17-3, at 10.) The holding was that, because the arbitration agreement was enforceable, the matter could not be heard in court—*any court*—not merely the tribal court, and not for reasons concerning the unique limitations on tribal court jurisdiction

established by federal common law.[2]

The overriding flaw in United Planners' argument is its failure to acknowledge the difference between jurisdiction and venue. *See, e.g., Robinson v. Okla. Emp't Sec. Comm'n*, 932 P.2d 1120, 1123 (Okla. 1997) (holding "venue is not a jurisdictional requirement, but is merely one of procedure"). *See generally* 92A C.J.S. *Venue* § 1 (West 2010) (stating generally "[j]urisdiction describes the power of a court to try a case while venue relates to the locale where the trial is to be held"). Furthermore, an arbitration clause is, as the Nation's Supreme Court pointed out, akin to a forum selection clause and is a matter not of jurisdiction but of contract interpretation. *See Samson Res. Co. v. Int'l Bus. Partners, Inc.*, 906 F. Supp. 624, 627 (N.D. Okla. 1995) (holding that "arbitration is a matter of contract" and that "the question of arbitrability is for the court to decide").

In this case, United Planners did not challenge the general jurisdiction of the tribal court by motion, and the matter was not litigated. Indeed, as the Nation's Supreme Court points out, United Planners asked the tribal court for substantive relief by asking it to enforce the arbitration agreement.[3] The ruling of the Nation's Supreme Court was

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[2] As described in more detail in Tribal Court Defendants' opening brief, federal common law concerning the limits of tribal court jurisdiction is set forth in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), and subsequent applications.

[3] United Planners asserts with respect to Jurisdictional Fact No. 8 that it "did assert affirmative defenses of lack of personal and subject matter jurisdiction"; however, it does not dispute that it did not move to dismiss on this basis. Instead, it moved to enforce the arbitration agreement. Tribal Court Defendants therefore disagree with United Planners' alteration of Jurisdictional Fact No. 8. As the Nation's Supreme Court made clear, United Planners did not ask the tribal courts to dismiss for lack of tribal court jurisdiction and the only issue before the tribal court and on appeal to the Nation's Supreme Court concerned the arbitration agreement.

limited to that issue alone and did not determine whether, as a general matter, the tribal courts had jurisdiction as proscribed by federal common law. Under *Crowe & Dunlevy v. Stidham*, only tribal court jurisdiction over non-members is reviewable by federal courts, and the matter must first be exhausted in the tribal courts.[4]

The tribal courts have not yet ruled on the matter of whether it can assert jurisdiction over United Planners and the subject matter of the Nation's complaint under federal common law. The contours of this jurisdiction under federal law is the only matter that is reviewable by this Court under *Crowe & Dunlevy v. Stidham*, and only after the matter has been exhausted in the tribal courts. Since the matter has not yet been litigated in tribal court, this Court lacks jurisdiction and this case should be dismissed.[5]

II. THE PRIOR ADJUDICATION CONCERNED A DIFFERENT ISSUE THAN CURRENTLY IS PENDING BEFORE THE TRIBAL COURT

Another major flaw in United Planners' arguments is its failure to recognize the key distinction between the issue that was resolved in the prior litigation and the issue now pending before the tribal courts. In the prior case, the Nation argued that the arbitration agreement was unenforceable. The Nation's Supreme Court held otherwise

[4] In Section III(C) of its response, United Planners argues that the tribal courts do not have jurisdiction under a *Montana* analysis, but that is precisely the issue under the tribal exhaustion doctrine that is required to be presented first in, and adjudicated by, the tribal courts before a federal court can review the matter.

[5] In Section III(D) of its brief, United Planners argues that an exception to the tribal exhaustion doctrine applies because "it is clear that the tribal court lacks jurisdiction, such that the exhaustion requirement would serve no purpose other than delay." In support, United Planners simply re-asserts the erroneous argument that the ruling by the Nation's Supreme Court enforcing the arbitration agreement is coextensive with a lack of jurisdiction under *Montana* and federal common law. For the reasons stated above, this argument fails as a matter of law.

and dismissed the case holding that if the Nation wanted to assert its claims, it had to do so in arbitration before the Financial Industry Regulatory Authority ("FINRA"). The case was brought in arbitration but dismissed at the request of the Nation. In the current case, the Nation no longer is challenging enforceability of the arbitration agreement, but instead is arguing that a FINRA rule governing dismissal allows it re-file in tribal court.

United Planners, in essence, argues issue or claim preclusion—an argument which fails for two primary reasons. First, as noted above, the issue that was resolved in the prior litigation was that the arbitration agreement was enforceable while, in the current litigation, the Nation is relying on a FINRA arbitration rule concerning dismissal. In order for issue or claim preclusion to apply, the issues or claims must be identical which, in this case, they are not. *See Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1172 (W.D. Okla. 1989). Second, it is irrelevant that the Nation's current complaint re-asserts the same claims for damages as its previous complaint because neither the tribal court nor an arbitration panel have ever reached the merits of those claims. Issue or claim preclusion also requires that the claims have been actually litigated and determined in the prior proceeding, which is not the case here. *See Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1100-02 (10th Cir. 2007).

United Planners also makes the irrelevant argument that the FINRA rule cited by the Nation does not "confer" jurisdiction on the Tribal Court. The Nation has not presented to the Tribal Court the argument that FINRA "confers" jurisdiction. (Doc. 13-3.) The argument the Nation has presented is that the rule provides—if the arbitration

is dismissed for a reason stated in the rule—that the court that originally had jurisdiction can again exercise jurisdiction over the claim since the arbitration failed. This was not an issue in the prior adjudication because the argument then was that the Nation was not required to submit to FINRA arbitration at all. By now relying on a FINRA rule in attempting to again assert its claims in Tribal Court, it appears that the Nation has accepted the ruling of the Nation's Supreme Court that the arbitration clause was enforceable. It is not trying to re-litigate that the arbitration agreement is unenforceable.[6] The matter is under advisement before the Tribal Court and a ruling has not yet been entered.

Thus, the Nation's arguments to gain access to the tribal courts in the prior adjudication and in the currently pending case are different. The first was enforceability of the arbitration agreement while the second is the applicability of a FINRA rule concerning dismissal of arbitration. Since the issues are different, United Planners' argument that the Nation's prior adjudication precludes the current case is incorrect. The Tribal Court has yet to rule on whether the FINRA rule allows the Nation access to court. As it relates to this proceeding for federal court review, these are matters of contract—not tribal court jurisdiction under federal common law—and this Court, therefore, lacks

[6] In Section III(D) of its response, United Planners argues that other parts of the FINRA rules defeat the Nation's argument. This argument should be made in the Tribal Court, not here, because it goes to the merits of the dispute that is currently pending in that court.

jurisdiction.[7] Tribal sovereignty requires that this case be dismissed and that the Tribal Court Defendants be allowed to proceed in issuing its ruling on these matters that are in dispute between the parties.

III. NATIVE AMERICAN TRIBES AND TRIBAL OFFICIALS ARE NOT SUBJECT TO SERVICE OF PROCESS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Although United Planners concedes that Rule 4 of the Federal Rules of Civil Procedure does not provide for service on Indian tribes or tribal officials, it nevertheless argues that service was proper under Rule 4 for individuals and entities "subject to suit in a common name." United Planners ignores entirely that, in an exercise of its sovereignty, the Nation has enacted its own law providing for service on it and its officials in a manner similar to that required for service on the federal government and federal officials under the Federal Rules of Civil Procedure. *See* Sac & Fox Code tit. 6, § 217(g) & (h). Specifically, it requires service on the Nation's Chief Executive Officer, and also on its Attorney General. United Planners failed to comply and its service was therefore insufficient as a matter of law.

It should not be surprising that the Nation has enacted a law for service on its government and its officials in a manner similar to that of the federal government. It has long been held that a tribes' inherent sovereignty is comparable to that of the federal government. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1150 (10th

[7] *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53, 105 S. Ct. 2447, 2452 (1985) (holding scope of federal question jurisdiction is limited to determining scope of tribal court jurisdiction over nonmembers under federal common law).

Cir. 2012) (holding that "[w]hile tribal sovereign immunity is not coextensive with that of the states, [t]ribal sovereign immunity *is* deemed to be coextensive with the sovereign immunity of the United States") (internal citations omitted). Thus, in a manner similar to that of the federal government, the Sac and Fox Nation's tribal government has provided by law the only means through which it and its officials can be served.

United Planners failed to obtain service on Tribal Court Defendants in accordance with Sac and Fox Tribal law which provides the exclusive means of serving the tribal government and its officials. Thus, in addition to the above matters, this case can be dismissed for insufficient service of process.

CONCLUSION

United Planners brief fails to establish any basis to deny Tribal Court Defendants' motion to dismiss. Tribal Court Defendants therefore request that the claims asserted against them be dismissed for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of March, 2015, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the "REPLY OF THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR., IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION," 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):

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