No. 15-6117

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED PLANNERS FINANCIAL SERVICES OF AMERICA, LP.

Appellant/Plaintiff

v.

SAC AND FOX NATION, SAC AND FOX NATION HOUSING AUTHORITY, SAC AND FOX NATION DISTRICT COURT, AND DARRELL R. MATLOCK, JR.

Appellees/Defendants.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA,
CASE NO. 14-CV-1278-HE
THE HONORABLE JOE HEATON PRESIDING

ORAL ARGUMENT REQUESTED

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October 26, 2015

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Appellant/Plaintiff United Planners Financial Services of America, LLP ("United Planners") submits the following reply brief in the above-referenced case in order to counter the Response Brief filed by Appellees/Defendants Sac and Fox Nation and Sac and Fox Nation Housing Authority (collectively "Nation") and the Response Brief filed by Appellees/Defendants Sac and Fox Nation District Court and Darrell R. Matlock, Jr. (collectively "Nation's Court")[1] and respectfully requests that this Court reverse the trial court's Order granting a motion to dismiss in favor of all Defendants. In further support for this request, United Planners states as follows:

INTRODUCTION

"INDEED, UNITED PLANNERS PREVAILED BEFORE THE NATION'S SUPREME COURT." This statement of fact and law is found in 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" filed in the District Court. See *Appellant's Appendix*, at 124, fn. 5 (hereinafter "Aplt. Appx.") (emphasis added). Yet, after the Supreme Court of the Sac and Fox Nation issued the above-referenced opinion stating that "the Nation may pursue its claims in

[1] The Nation and Nation's Court were allowed to file separate briefs because of the government exemption provided in 10th Cir. R. 31.3(D). In responding to these two briefs, United Planners responds in Proposition I to specific arguments raised by Nation in its brief. These responses also apply to similar arguments made by Nation's Court in its brief. In Proposition II, United Planners responds separately to specific arguments raised by the Nation and the Nation's Court.

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,"2 the Nation admits that it is "returning later, to the same court, with the same underlying claim." Nation's Brf. at 20. The Nation and the Nation's Court assert that the Supreme Court decision means nothing—the Nation can refile the same action based upon the same contracts that were at issue in the same case decided by the previously by the Supreme Court. United Planners asserts that the Supreme Court decision did mean something—the Supreme Court indisputably held that the Nation's Court did not have jurisdiction over United Planners involving any dispute arising from the contractual relationship between the parties. United Planners has exhausted its tribal court remedies, the Nation's Supreme Court has answered the issue of Nation Court's lack of jurisdiction over United Planners in any action arising from the contractual relationship between the parties and the District Court erred in dismissing United Planners' Complaint.

SCOPE OF REVIEW

United Planners asserts that this Court reviews *de novo* a District Court's dismissal for failure to exhaust tribal court remedies. Both the Nation and Nation's Court assert the appropriate standard of review is for abuse of discretion.[3] The

[2] Aplt. Appx. at 28.

[3] See *Brief of Appellees Sac and Fox Nation and Sac and Fox Housing Authority* (October 8, 2015), pp. 11-12 (hereinafter "*Nation Brf.*"); *Brief of Appellees, The*

proper standard for review is *de novo.* The Nation attempts to create an intra-circuit conflict that does not exist. Nation's Brf. p. 12. Both *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir., 2012) and *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir., 1993) stand for the proposition that "the proper scope of the tribal exhaustion rule . . . is a matter of law which we review *de novo*." *Texaco*, 5 F.3d at 1376.

The Nation argues that *Texaco* requires this Court to "review a dismissal on exhaustion grounds for an abuse of discretion." Id. Nation urges the abuse of discretion for exhaustion applies instead of the *de novo* review on the scope of the tribal exhaustion rule, "[b]ecause this case involves a straightforward application of the exhaustion-of-tribal remedies doctrine to undisputed facts." Nation's Brf. pp. 11-12.

As this Court discussed in *Enlow v. Moore*, 134 F.3d 993, 994 (10th Cir. 1998):

> We review a dismissal for failure to exhaust only for an abuse of discretion. *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir.1993). The proper scope of the tribal exhaustion rule, however, is a matter of law which we review de novo. Id. Thus, if the district court exceeded the scope of the rule, then the district court necessarily abused its discretion in dismissing for failure to exhaust.

Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr. (filed October 8, 2015), p. 5 (hereinafter "*Court Brf.*")

Contrary to Nation's assertion, this is not a straight-forward application of the exhaustion rule. Rather, it is the scope of the exhaustion rule that is under review on this appeal. In *Enlow*, this Court reversed the District Court's dismissal on failure to exhaust tribal court remedies after determining that "the highest tribal court had the 'opportunity to review the determinations of the lower tribal court,' thus exhausting Enlow's tribal court remedies."[4] *Id*. at p. 996.

As discussed at length in United Planners' Brief in Chief (September 4, 2015), the issue before the District Court was whether the Nation's Supreme Court had already ruled on subject matter jurisdiction and the merits of the case. These issues go to the scope of the exhaustion rule and whether United Planners had already exhausted its tribal court remedies. The proper standard for such review is *de novo*.

ARGUMENT AND AUTHORITIES

PROPOSITION I: The District Court correctly held that sovereign immunity did not deprive the Court of subject matter jurisdiction.

The Nation argues the District Court erred[5] in holding that the Nation's

[4] The remainder of the quote is the following citation: "See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S.Ct. 971, 977, 94 LO.Ed.2d 10 (1987); see also *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir.1992) (holding that tribal court remedies are deemed exhausted upon appellate review within the tribal court system)." *Id*.

[5] While the Nation asserts the District Court erred on the issues of sovereign immunity and subject matter jurisdiction, the Nation failed to appeal either of these determinations. As this Court has held: "failure to appeal the lower court's implicit findings . . . that it had subject matter jurisdiction is fatal even if the

"sovereign immunity does not deprive the court of subject matter jurisdiction to consider United Planners claim for prospective injunctive and declaratory relief." Nation's Brf. at 13, *citing* Aplt. App. at 255. However, the District Court was correct on both the sovereign immunity determination and the determination that it had subject matter jurisdiction.

A. The District Court correctly held that sovereign immunity did not bar United Planners from pursuing its action against the Nation and Nation's Court.

This is not a case where United Planners is waging war on the principles of tribal sovereign immunity. This is a case where United Planners is asserting its 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 Nation's permission (waiver of sovereign immunity).

The District Court's finding that sovereign immunity was not a bar to an action seeking to prevent the Nation's unlawful assertion of jurisdiction over a nonmember of the tribe follows the reasoning of the United States Supreme Court in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985). In that case, the Supreme Court gave no weight to the defendants' professed immunity. Instead the Court merely held that, in most cases, a non-Indian

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district court's finding was erroneous." *Missouri Pacific R. Co. v. Cartwright Transfer & Storage, Inc.*, 968 F.2d 20 (10th Cir. 1993). United Planners, however, will address the issues raised as they relate to the District Court's error in granting the motions to dismiss.

must exhaust tribal remedies, as United Planners 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.").

The District Court was correct in finding sovereign immunity was not a bar to its exercise of subject matter jurisdiction. 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).

The District Court correctly found that sovereign immunity was not a bar to the court's exercise of jurisdiction.

B. The District Court correctly held that it had subject matter jurisdiction over United Planners claims.

The Nation first acknowledges the "general rule, '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." Nation's Brf. at 17 (citing *National Farmers Union*, 471 U.S. at 852). But then alleges that, in this case, the District Court erred in finding subject matter jurisdiction because "United Planners' Complaint does not present a federal question." Id. The Nation's arguments against federal question do not support this contention.

First, the Nation states that United Planners "ignores the Supreme Court's actual disposition of the appeal: it dismissed the case *without prejudice*." Nation's Brf. at 19-20. Nation contends this authorizes Nation to "return[] later, to the same court, with the same underlying claim. Id.

Whatever the dismissal without prejudice may or may not mean, it is indisputable that the Supreme Court has resolved the issue of jurisdiction of the Nation's Court over United Planners in any action arising from the contracts.

> "While the broker agreements **do preclude the claims from being adjudicated in a judicial forum**, the same parties to the agreement could very well amend or waive the part of the agreement and consent to have their claims heard in court, assuming jurisdiction exists."

Aplt. Appx. at 68.

The Nation's admission that it is pursuing the same action based upon the same contracts between the parties clearly supports United Planners' position that the Nation's Supreme Court has already ruled upon this matter, to-wit: the Nation is precluded from adjudicating these claims in a judicial forum.

Second, the Nation states that the Nation's Supreme Court "expressly acknowledged that by participating in the proceedings in the 2011 case, United Planners may have 'effectively consented to tribal court jurisdiction,' thereby waiving the arbitration provisions of the broker agreements." Nation's Brf. at 20. However, United Planners' claim is not based on the 2011 case which was, as the Nation correctly states, dismissed. It is based upon the case filed in 2014. Aplt. Appx. at 187-191. The Nation understood the import of the dismissal of the 2011 case as it related to the argument Nation is now making and attempted to dissuade the Nation's Supreme Court from entering the dismissal order. Immediately after the Supreme Court issued its order and judgment, Nation filed a "*Motion to Modify*

Order." Aplt. Appx. at 192-194. In it, Nation asked the Supreme 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 192. In other words, the Nation was imploring the Nation's Supreme Court to do anything but dismiss the action. In denying the motion, the Nation's 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.**" Aplt. Appx. at 30 (emphasis added).

The Nation's Supreme Court held in the 2011 case that the agreements between the parties contained mandatory arbitration provisions. The 2014 case is based upon the same underlying agreements and, therefore, the only proper forum (with jurisdiction) is arbitration. United Planners has not consented to the jurisdiction of any forum but arbitration and the Supreme Court has so found.

Third, the Nation argues that "the conclusion of arbitration proceedings followed by adjudication of the Nation and the Housing Authority's cause of action in court proceedings—is contemplated by the applicable FINRA rules." Nation's Brf. at 21. Regardless of whatever FINRA rules might contemplate, FINRA rules cannot confer jurisdiction upon a court—assuming an action can be brought, the court would still have to have jurisdiction over the person and subject matter of the

litigation. These are both federal questions to be resolved by the District Court. There is no dispute that FINRA dismissed the arbitration with prejudice. The effect of that dismissal is the Nations' problem. The Nation recognizes the problem and attempts to create a convoluted interpretation of FINRA Rule 12206(b) that "gives effect to all the language used (i.e., the use of "party" in the first sentence and the use of "non-moving party" in the second sentence." Nation's Brf. at 21, fn.2. Under Nation's interpretation, "party" and "non-moving party" have the same meaning. FINRA Rule 12206(b) can only be read in that light to shore up the Nation's failing arguments. FINRA Rule 12206(b) begins with "[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court." Aplt. Appx. at 77. 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." Id. (emphasis added). The Nation's argument here obfuscates the real issue which is the Nation's Supreme Court ruling 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***." Aplt. Appx. at 28 (emphasis added).

The District Court was correct in ruling that it had subject matter jurisdiction over this matter because of the existence of federal issues, but erred in holding that United Planners had not exhausted its tribal court remedies.

PROPOSITION II: The District Court erred as a matter of law in dismissing United Planners' action for failure to exhaust tribal court remedies.

United Planners has/had exhausted its tribal court remedies. The District Court erred as a matter of law in dismissing United Planners' Complaint for failure to exhaust tribal court remedies.

A. Response to Nation's Assertions.

The Nation urges this Court to uphold the District Court determination because "this [Nation's Supreme Court] two-year-old, issued well before new and important developments in this case, does not establish that United Planners has exhausted its tribal court remedies." Nation's Brf. at 25. According to the Nation:

> 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 and the Housing Authority may now proceed with its claims in the Court, as FINRA Rule 12206(b) indicates.

Id. (emphasis by Nation)

The question presented is the same question that the Nation's Supreme Court decided previously, to-wit: whether the Nation may proceed against United

Planners in the Nation's District Court or whether the Nation is 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***." Aplt. Appx. at 28 (emphasis added).

The "question presented" has been answered. The Nation continues to attempt to litigate in the "same court, with the same underlying claim." Nation's Brf. at 20. United Planners has exhausted its tribal court remedies.

B. Response to Nation's Court Assertions.

The Nation's Court asserts the following:

> On appeal, United Planners likewise does not challenge the jurisdiction of the Tribal Court under *Montana* [*v. United States*, 450 U.S. 544 (1981)]. The only part of its briefing that might be considered jurisdictional is its discussion on whether it consented to jurisdiction in the first [2011] Tribal Court proceeding by filing an answer and participating in motion practice. . . The discussion is *not*, however, consent under the first *Montana* test for jurisdiction over nonmembers "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." [citation omitted] The Tribal Court was not asked to address whether the broker agreement, in and of itself, satisfies the *Montana* test. And, as to "consent by participation," even if it is considered jurisdictional, the Nation's Supreme Court expressly did not address it meaning that the matter has not been exhausted in Tribal Court.

Nation's Court Brf. at 11-12.

First, the Nation's Court asserts that United Planners does not challenge the jurisdiction of the Tribal Court under *Montana*. The Nation's Court raised *Montana* and progeny in its motion to dismiss. Aplt. Appx. at 119-124. United Planners responded to the *Montana* argument. Aplt. Appx. at 225-230. The Nation's Court replied to United Planners' response to the *Montana* argument. Aplt. Appx. at 242-243. The District Court order from which this appeal was taken does not contain a citation to, or discussion of, *Montana*. United Planners would assert that the District Court found that *Montana* did not apply to the facts of this case as more specifically discussed below.

Second, the Nation's Court asserts it did not have the opportunity to consider whether it would have jurisdiction based on the consensual relationship between the parties as evidenced by contract. The Nation's 2014 action against United Planners is based upon "a broker agreement with United Planners' broker" [Aplt. Appx. at 188] and the claim that "United Planners breached the agreements." Aplt. Appx. at 190. The Nation's 2011 action was based upon "a broker agreement with United Planners' broker" [Aplt. Appx. at 51] and the claim that "United Planners breached the agreements." Aplt. Appx. at 52.

As the Nation's Supreme Court found, "[t]here is no dispute that the Nation was engaged in a business relationship with [United Planners] and that certain broker agreements memorializing the relationship was a part of the transaction."

Aplt. Appx. at 21. It then stated that "the central issue before this Court is: which forum, if any, is the appropriate forum to adjudicate the Nation's claims against Broker. Aplt. Appx. at 19. The Court determined the answer to the central issue was that, as to those consensual broker agreements, the language concerning arbitration "is akin to a forum selection clause that may be agreed upon by any party to an agreement . . . 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." Aplt. Appx. at 27. The parties entered into a consensual relationship that recognized arbitration as the sole forum. That issue was resolved in the 2011 case. United Planners has exhausted its tribal court remedies and the District Court erred as a matter of law in dismissing United Planners' Complaint.

Third, as for the Nation's Court assertion of consent by participation, the Nation's Court points to language in the Nation's Supreme Court order that 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." Aplt. Appx. at 11. (emphasis added)

It must be noted that the Supreme Court first recognized that the agreements between the parties precluded judicial remedies. That is the law of the case as it pertains to the agreements between the parties on which the Nation's claims are based. Next, the 2011 case was dismissed. Finally, because the agreements precluded judicial remedies, there is no issue of consent to tribal court jurisdiction. The District Court erred in granting the Nation's Court motion to dismiss.

CONCLUSION

For the reasons set forth herein and in United Planners Brief-in-Chief, the District Court erred in granting the Nation's and Nation's Court's motion to dismiss for the reasons that United Planners had failed to exhaust its tribal court remedies or had not demonstrated an exception to the tribal court exhaustion requirement. This Court should reverse the District Court's grant of the motions to dismiss and instruct the District Court to reconsider these issues consistent with this Court's guidance. In the alternative, if this Court does not reverse the District Court's Order, the District Court should be instructed to hold United Planners case in abeyance until such time as the tribal court rules on its subject matter jurisdiction over the Nation's claim and its personal jurisdiction over United Planners.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument in this case. With the complexity and novelty of the issues involved, oral argument would help materially advance this appeal by providing this Court the opportunity to focus and clarify the issues that concern it the most.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). According to the firm's word processing system, Microsoft Word, I certify to the best of my belief and knowledge that there are **3,730** words in the this brief, excluding the table of contents, the table of citations, statement with respect to oral argument, this certificate, the title page, and any attachments or addendum hereto. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, size 14.

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I hereby certify that on October 26, 2015, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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CERTIFICATE OF DIGITAL SUBMISSION

This is to certify that:

1. All required privacy redactions have been made and, with the exception of any required redactions, this brief is an exact copy of the written brief filed with the Clerk (other than the digital signatures and this certificate), and

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