Case No. 15-6117
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED PLANNERS FINANCIAL SERVICES OF AMERICA, L.P.

Plaintiff-Appellant
v.
SAC AND FOX NATION; SAC AND FOX NATION HOUSING AUTHORITY;
SAC AND FOX NATION DISTRICT COURT,
AND DARRELL R. MATLOCK, JR.

Defendants/Appellees

BRIEF OF APPELLEES SAC AND FOX NATION AND SAC AND FOX HOUSING AUTHORITY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
UNITED STATES DISTRICT JOE HEATON
Case No. 4-10-CV-1278-HE

Oral Argument is Not Requested

Randall K. Calvert, OBA #14154
Rabindranath Ramana, OBA #12045
CALVERT LAW FIRM
1041 NW Grand Boulevard
Oklahoma City, Oklahoma 73118
Telephone: (405) 848-5000
Facsimile: (405) 848-5052
Email:rcalvert@calvertlaw.com
rramana@calvertlaw.com
Counsel for Defendants/Appellees
Sac and Fox Nation and Sac and Fox Housing Authority

October 8, 2015

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I. STATEMENT REGARDING PRIOR OR RELATED APPEALS.

There are no prior or related appeals.

II. JURISDICTIONAL STATEMENT.

The Sac and Fox Nation ("the Nation") and the Sac and Fox Housing Authority ("the Housing Authority") agree with the Appellant United Planners ("United Planners") that on June 19, 2015, United Planners filed a timely notice of appeal from the district court's order of dismissal (filed on June 16, 2015). This Court has appellate jurisdiction.

However, for the reasons set forth below, the Nation and the Housing Authority do not agree that the district court had subject matter jurisdiction.

United Planners' claims involve the interpretation of a ruling of the Sac and Fox Nation Supreme Court. The question at issue is whether that court's order and judgment remanding the Nation's and the Housing Authority's claims against United Planners for dismissal without prejudice allowed the Nation and the Housing Authority to file a second action in the Sac and Fox Nation District Court after dismissal of arbitration proceedings before the Financial Industry Regulatory Authority (FINRA). The interpretation of the Sac and Fox Nation Supreme Court's decision does not involve a federal question: the federal district court did not need to engage in "careful examination of tribal sovereignty, the extent to which that

sovereignty has been altered, divested or diminished, as well as detailed study of relevant statutes, Executive Branch policy as embedded in treatises and elsewhere, and administrative or judicial decisions." *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

III. ISSUES PRESENTED FOR REVIEW.

A. Indian tribes and subdivisions of those tribes are entitled to sovereign immunity. They may not be sued for damages or for declaratory or injunctive relief unless Congress has abrogated their immunity or the tribe itself has waived it. Here, United Planners has sued the Nation and the Housing Authority in the federal district court. Congress has not abrogated the Nation's immunity, and the Nation has not waived it. Did the district court err in declining to rule that the Nation and the Housing Authority are entitled to sovereign immunity?

B. In order to raise federal questions, issues regarding tribal court's jurisdiction must require the application of federal law. Here, United Planners argues that the Sac and Fox Nation District Court lacks jurisdiction because of an arbitration provision in an account agreement and the terms of a FINRA rule. Did the district court err in concluding that the interpretation the arbitration provision and the FINRA rule raised federal questions such that the court had subject matter jurisdiction over this case?

C. Federal courts should abstain from hearing cases challenging tribal court jurisdiction until tribal court remedies have been exhausted. Here, in tribal court proceedings, United Planners has filed a motion to dismiss the claims brought against it by the Nation and the Housing Authority. The tribal court has not yet ruled on that motion, and no tribal court appeal has been filed. Did the federal district court abuse its discretion in dismissing United Planners' federal court action on the grounds that United Planners has not yet exhausted its tribal court remedies?

D. If a party has failed to exhaust tribal court remedies, a federal district court has discretion to either dismiss the case without prejudice or hold it in abeyance. Abatement is warranted if it is necessary to protect a litigant's opportunity to subsequently raise a federal court challenge to the exercise of tribal court jurisdiction. Here, there is no indication that United Planners will lose the opportunity to bring a subsequent federal court challenge if this case is not held in abeyance now. Did the district court abuse its discretion in dismissing the case without prejudice rather than holding it in abeyance?

IV. STATEMENT OF THE CASE.

Adjudication of this case requires consideration of (A) the tribal court proceedings involving United Planners and the Nation; and (B) United Planners' allegations in this federal court action; (C) the motions to dismiss filed by the Nation,

the Housing Authority, the Sac and Fox Nation District Court, and the Honorable Darrell R. Matlock, Jr.; and (D) the District Court's ruling granting the motions to dismiss.

A. The Tribal Court Proceedings.

The Sac and Fox Nation is a federally-recognized Indian tribe located in Stroud, Oklahoma and organized under the Oklahoma Indian Welfare Act. The Housing Authority is an administrative department of the Sac and Fox Nation. In January 2011, the Nation and the Housing Authority filed an action in the Sac and Fox Nation District Court (Case No. CIV-11-06) against United Planners. *See* Aplt.'s App. at 36-39. The complaint in the tribal court case included causes of action for negligence, breach of contract, breach of fiduciary duty, breach of tribal and federal policies, and breach of industry customs, practices, rules and regulations.

United Planners voluntarily participated in the Sac and Fox District Court proceedings for four months, answering the complaint, responding to requests for production of documents, and attending a scheduling conference. United Planners then filed a motion to compel arbitration, which the Sac and Fox Nation District Court denied. Despite that order, United Planners—purportedly on behalf of the Nation and the Housing Authority—sought to initiate arbitration proceedings with Financial Industry Regulatory Authority ("FINRA").

The Nation and the Housing Authority then filed a motion to enjoin United Planners from proceeding with the FINRA arbitration. On April 18, 2012, the Sac and Fox District Court granted the Nation's and the Housing Authority 's motion to enjoin and denied United Planners' motion for injunctive relief. Aplt.'s App. at 136-36.

United Planners appealed that decision to the Sac and Fox Supreme Court (Case No. APL-12-01). In an Order and Judgment issued on September 26, 2013, the Sac and Fox Supreme Court affirmed in part, reversed in part, and remanded with instructions to dismiss without prejudice. *See* Aplt.'s App. at 18-29. The Supreme Court held that (1) "the [Sac and Fox] Nation cannot be compelled to arbitrate against its claims with [United Planners]," *id.* at 27; but that (2) "if it chooses to do so, the Nation will have to adjudicate [its] claims in arbitration, in accordance with the broker agreements." *Id.* "Our holding is that, per the broker agreements, the Nation may pursue its claims in arbitration if it chooses to adjudicate its claim against Broker, but it may not proceed with its case in the District Court or any other court." *Id.* at 28.

The Sac and Fox Supreme Court expressly reserved the question of whether United Planners had consented to the exercise of Sac and Fox Nation District Court's jurisdiction:

> *The District Court did not rule and make any findings of law and fact on whether Broker 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*. . . . Since no claim arising under the broker agreements by Nation against Broker may be adjudicated in the District Court, this cause is remanded *with instructions to dismiss without prejudice.*

Id. (emphasis added).

In October 2013, the Nation and the Housing Authority filed a Motion to Modify Order. The Nation requested that the Sac and Fox Supreme Court stay the case, hold it in abeyance, or place it on administrative hold—rather than dismiss it without prejudice. The Sac and Fox Supreme Court denied that motion, reaffirming its holding that the case should be dismissed without prejudice. *Id.* at 30-31.

That same month, the Nation and the Housing Authority moved to dismiss the FINRA arbitration proceedings pursuant to FINRA Rule 12206. Rule 12206 provides, in part:

> (a) Time Limitation on Submission of Claims:
>
> No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.
>
> (b) Dismissal under Rule:
>
> *Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court.* By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining

> related claims without prejudice and may pursue all of the claims in court.

Id. at 77 (Emphasis added).

The Nation and the Housing Authority noted that none of their causes of action were eligible for FINRA arbitration because they all arose from occurrences and events more than six years before the filing of the Statement of Claim. On October 20, 2014, FINRA heard the Nation and the Housing Authority's Motion to Dismiss and granted it. *See* Aplt.'s App. at 43-45.

Two days later, the Nation and the Housing Authority filed a second complaint against United Planners in the Sac and Fox Nation District Court (Case No. CIV-14-14). *Id.* at 187-191. Again, they brought causes of action for negligence, breach of contract, breach of fiduciary duty, breach of tribal and federal policies, and breach of industry customs, practices, rules and regulations. United Planners responded by filing a "Special Appearance for the Sole Purpose Requesting the Court to Stay All Proceedings, Or, In the Alternative, Motion to Dismiss" in the tribal court proceedings. *See id.* at 79-87. The Nation and the Housing Authority filed a response to that motion, and it is now pending. *See id.* at 88-101.

B. United Planners' Federal Court Action.

On November 14, 2014, United Planners filed the instant federal court action against the Nation, the Housing Authority, the Sac and Fox Nation District Court, and the Honorable Darrell R. Matlock, Jr., a tribal court district judge. United Planners

asserted that it was entitled to (1) "a declaration that the Tribal District Court lacks jurisdiction over United Planners and the 2014 Tribal Court Action," *id.* at 15, and (2) "[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 16.

C. The Defendants-Appellees' Motions to Dismiss.

All of the defendants in the federal court action filed motions to dismiss. *See id.* at 55-102 (motion to dismiss filed by the Nation and the Housing Authority); at 103-158 (motion to dismiss filed by the Sac and Fox Nation District Court and Judge Matlock). They asserted that they were entitled to sovereign immunity, that the federal court lacked subject matter jurisdiction, and that United Planners had failed to exhaust the available tribal court remedies. The Sac and Fox District Court and Judge Matlock also argued that they had not been property served.

D. The District Court's Ruling Granting the Motions to Dismiss.

On June 16, 2015, the district court issued an Order granting the Defendants' Motions to Dismiss. *Id.* at 250-59.

The court first rejected the arguments of the Nation and the Housing Authority that they were entitled to sovereign immunity. It reasoned that "sovereign immunity does not deprive the court of subject matter jurisdiction to consider United Planners'

claim for prospective declaratory and injunctive relief." *Id.* at 255 (citing *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153 (10th Cir. 2011).

Next, the court ruled that it had subject matter jurisdiction because United Planners' Complaint presented a federal question: the scope of the Nation's court's jurisdiction. *See* Aplt.'s App. at 256 (stating that "it is well settled that 'the scope of a tribal court's jurisdiction is a federal question over which federal district court's have jurisdiction.'") (quoting *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1501 (10th Cir. 1997).

Finally, the court turned to the question of whether United Planners had exhausted its tribal remedies. It concluded that United Planners had not done so. It reasoned that, in its decision regarding the 2011 litigation, the Sac and Fox Supreme Court did not address the question of whether United Planners had consented to the tribal court's jurisdiction. In addition, the federal district court said, the tribal court had not yet considered "the extent that any jurisdictional inquiry is affected by the intervening dismissal of the arbitration." *Id.* at 257.

The federal district court also ruled that the exceptions to the exhaustion requirement did not apply. Contrary to United Planners' assertions, the tribal court did not clearly lack jurisdiction. Thus, "'the federal court may benefit from the tribal court's legal analysis' as to the extent of its jurisdiction." Aplt.'s App. at 258 (quoting *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1235 (10th Cir.

2014)). Additionally, United Planners had failed to establish that the Nation and the Housing Authority had acted in bad faith when they brought the second case against it in the tribal court in 2011.

Accordingly, the district court dismissed United Planners' action.

V. SUMMARY OF THE ARGUMENT.

The district court's dismissal of United Planners' action is warranted on three grounds.

First, the Nation and the Housing Authority are entitled to sovereign immunity. The Nation is a federally recognized Indian tribe and the Housing Authority is one of its subdivisions. Congress has not abrogated their immunity, and the Nation and the Housing Authority have not waived it. Because tribal sovereign immunity applies to claims for declaratory and injunctive relief as well as claims for damages, the district court should have dismissed United Planners' claims against the Nation and the Housing Authority because they are immune from suit.

Second, the district court should have dismissed United Planners' claims for lack of subject matter jurisdiction. United Planners' challenge to the exercise of jurisdiction by the Sac and Fox Nation District Court is not based on federal law. Instead United Planners' challenge is based upon its reading of an arbitration clause in an account agreement and a FINRA rule. Those non-federal sources do not raise federal questions.

Nevertheless, the district court did not abuse its discretion in dismissing United Planners' action for failure to exhaust tribal court remedies. At the time that United Planners filed this federal court action, it had already filed a motion to dismiss the action in the Sac and Fox Nation District Court. That motion is pending and an adverse ruling can be appealed to the Sac and Fox Nation Supreme Court. Because United Planners has not yet exhausted its tribal court remedies, the district court acted reasonably in dismissing this case.

Finally, the district court did not abuse its discretion in dismissing the case rather than holding it in abeyance. Abatement is not necessary to protect United Planners' opportunity to return to federal district court.

For all of these reasons, this Court should affirm the district court's dismissal of United Planners' action.

VI. STANDARDS OF REVIEW

This Court has issued conflicting decisions regarding the standard of review for district court decision involving application of the doctrine of exhaustion of tribal court remedies. In *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993), the Court stated that it "review[s] a dismissal on exhaustion grounds for an abuse of discretion." It added that "[t]he proper scope of the tribal exhaustion rule, however, is a matter of law which we review de novo." *Id.*

In contrast, in *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir. 2012), the Court stated that "[o]ur review of the district court's exhaustion decision is *de novo*."

"It is axiomatic that 'when faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.'" *See United States v. Rosales–Miranda*, 755 F.3d 1253, 1261 (10th Cir. 2014) (quoting *Haynes v. Williams*, 88 F.3d 898, 900 n. 4 (10th Cir.1996)); *accord United States v. Cruz Camacho*, 137 F.3d 1220, 1224 n. 2 (10th Cir.1998).

Accordingly, this Court should follow the earlier decision (*Texaco v. Zah*) and review the district court's dismissal of United Planners' action for an abuse of discretion. Because this case involves a straightforward application of the exhaustion -of-tribal remedies doctrine to undisputed facts, "the proper scope of the tribal exhaustion rule," *Zah*, 5 F. 3d at 1376, is not at issue. Therefore, *de novo* review is not warranted.

This Court also reviews the district court's decision to dismiss the case without prejudice (rather than hold it in abeyance) for an abuse of discretion. *See Thlopthlocco* 762 F.3d at 1241.

VII. ARGUMENT.

For the reasons set forth below, the Nation and the Housing Authority are entitled to sovereign immunity, and the district court should have dismissed United

Planners' claims against them on that ground. In addition, United Planners' claims do not raised federal questions, and, as a result, the district court lacked subject matter jurisdiction. United Planners also failed to exhaust its tribal court remedies, and dismissal is warranted for that reason as well.

Finally, the district court did not abuse its discretion in dismissing the case without prejudice rather than holding it in abeyance.

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

As United Planners' Complaint acknowledges, the Sac and Fox Nation is an Indian tribe that is headquartered in Lincoln County, Oklahoma near Stroud. Aplt.'s App. at 8. The Housing Authority is an administrative department of the Nation. *Id.*

Nevertheless, the district court rejected the assertion of the Nation and the Housing Authority that they are entitled to sovereign immunity and should be dismissed from this action. The court reasoned that "defendants' sovereign immunity does not deprive the court of subject matter jurisdiction to consider United Planners claim for prospective injunctive and declaratory relief. " Aplt.'s App. at 255 (citing *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011). The district court erred: the Nation and the Housing Authority are entitled to sovereign immunity and should be dismissed from this action.

It has long been recognized that Indian tribes are sovereign governments that possess immunity from suit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Breakthrough Management Group, Inc., v. Chukchansi Gold Casino and Resort,* 629 F.3d 1173, 1182 (10th Cir. 2010). "[S]overeign immunity [is] an inherent part of the concept of sovereignty and what it means to be a sovereign." *Breakthrough Management*, 629 F.3d at 1182. "[I]mmunity . . . is necessary to 'promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy.'" *Id.* (quoting *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985)). Tribes "possess immunity from suit to the extent that Congress has not abrogated that immunity and the tribe has not clearly waived its immunity." *Breakthrough Management*, 629 F.3d at 1182 (citing *Santa Clara Pueblo*, 436 U.S. at 58).

Tribal sovereign immunity extends to subdivisions of the tribe, "provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *Breakthrough Management*, 629 F.3d at 1182; *see also Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2051 n.4 (2014) (observing that "[l]ower courts have held that tribal immunity shields not only Indian tribes themselves, but also entities deemed 'arms of the tribe'"); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 7.05(1)(a) (2005 ed.) ("[I]mmunity extends to entities that are arms of tribes[.]").

Tribal sovereign immunity applies not only to claims for damages but to claims for declaratory and injunctive relief. Thus, in *UTE Distribution Corp. v. UTE Indian Tribe*, 149 F.3d 1260, 1262 (10th Cir. 1998), this Court held that a tribe was entitled to immunity from a declaratory judgment action involving water rights. Similarly, in *Miner Electric Inc. v. Muskogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007), the court held that an action against an Indian tribe challenging a civil forfeiture order and seeking declaratory and injunctive relief was barred by the immunity doctrine. *See id.* at 1011 (stating that "in an action against an Indian tribe, we conclude that [28 U.S.C. § 1331] will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity"); *see also In re Mayes*, 294 B.R. 145, 154–55 (10th Cir. BAP 2003) (rejecting the argument that the immunity doctrine did not apply to a claim for declaratory relief).

Contrary to the district court's reasoning, this Court's decision in *Crowe*, 640 F.3d at 1154, does not divest the Nation and the Housing Authority of their sovereign immunity, even as to United Planners' claims for declaratory and injunctive relief. In *Crowe*, this Court applied the exception to sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908). *Ex Parte Young* "carved out an exception to Eleventh Amendment immunity for suits *against state officials* seeking to enjoin alleged ongoing violations of federal law." *Crowe*, 640 F.3d at 1154 (emphasis

added). This Court held that "*Ex parte Young* may be applied to enjoin a violation of federal common law, namely, the unlawful exercise of tribal court jurisdiction." *Id.* It concluded that the defendant in the case before it—a tribal court judge—was not entitled to immunity because the plaintiff had filed a federal court action seeking "prospective relief to enjoin *a tribal official* from enforcing an order in contravention of controlling federal law." *Id.* at 1156.

Crowe did not expand the scope of the *Ex Parte Young* exception to the immunity doctrine beyond actions against tribal officials for prospective declaratory and injunctive relief. There is no indication in that decision that the sovereign immunity of a federally-recognized Indian tribe and an administrative department of that tribe has been abrogated.

Accordingly, the Nation and the Housing Authority are entitled to tribal sovereign immunity. Congress has not abrogated their Housing Authority's immunity, and United Planners has not alleged that the Housing Authority have waived their immunity in any manner. This Court should direct the district court to dismiss United Planners' claims against the Sac and Fox Nation and the Housing Authority on the grounds that they are entitled to tribal sovereign immunity.

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

United Planners' Complaint asserts that this matter presents a federal question under 28 U.S.C. § 1331—"the scope of adjudicative jurisdiction of the Tribal District Court and the exhaustion of tribal court remedies." Aplt.'s App. at 9. The district court agreed with that assertion. It ruled that "the complaint does present a federal question and the court therefore has subject matter jurisdiction." Aplt.'s App. at 256. The district court erred: United Planners' Complaint does not present a federal question.

The Nation and the Housing Authority acknowledge that, as a 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." *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). Most issues of tribal court jurisdiction raise federal questions because their resolution requires "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.

Two of this Court's decisions—*Kerr-McGee Corporation v. Farley*, 115 F.3d 1498 (10th Cir. 1997) and *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014)—illustrate the application of federal law to questions of the scope of a tribal court's jurisdiction.

In *Kerr-McGee*, the Court considered the jurisdictional provisions of the Price Anderson Act, 42 U.S.C. §§ 2014(w), 2210 (n). It concluded that those provisions did not expressly prohibit the exercise of tribal court jurisdiction over the operation of a uranium processing mill. 115 F.3d at 1505. In light of the lack of an express prohibition, the court also considered two general "congressional concerns: comity interests flowing from tribal sovereignty and nuclear energy regulation." *Id.* at 1507. After noting these concerns, the Court concluded that the tribal court had jurisdiction to proceed. *Id.*

Similarly, in *Thlopthlocco Tribal Town,* the Court applied federal law to conclude that the scope of tribal court authority presented a federal question. The plaintiff tribe had been recognized by the federal government as a sovereign, and, as a result of that recognition, the tribe had rights under federal law. The allegation that the courts of a second Indian tribe were "attempting to trample on those federally-recognized rights" was sufficient to establish the subject matter jurisdiction of the federal district court. 762 F.3d at 1234.

In contrast, in this case, United Planners' allegations do not require this Court to apply federal law concerning the scope of a tribal court's adjudicatory authority. Although United Planners' Complaint briefly asserts that the Tribal Court's exercise of jurisdiction over the 2014 Tribal Court Action and United Planners is "contrary to federal constitutional requirements [and] to other federal law," Aplt.'s App. at 15, the gist of its contentions is a particular ruling by the Sac and Fox 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[,]" *id.* at 27, 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 28.

The parties now disagree about the meaning of that ruling by the Sac and Fox Supreme Court. United Planners reads that ruling to state that the Nation "may [*never*] proceed with its case in the District Court or any other court." *See id.*

In contrast, the Nation and the Housing Authority maintain that United Planners' strained interpretation is belied by the Supreme Court's Order and Judgment itself, as well as by further developments in the tribal court litigation. In particular, United Planners' ignores the Supreme Court's actual disposition of the

appeal: it dismissed the case "*without prejudice*." *Id.* at 28 (emphasis added).[1] In this case, the Nation and the Housing Authority have done exactly what a tribunal contemplates when it dismisses a matter without prejudice— "returning later, to the same court, with the same underlying claim." *Semtek Intern., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506 (2001).

United Planners' interpretation is further undermined by other aspects of the Sac and Fox Supreme Court's Order and Judgment. As noted above, the 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." Aplt.'s App. at 28. The court did not "rule or make any findings of fact" on this jurisdictional question. However, the express discussion of the possibility that United Planners has waived its jurisdictional challenge establishes that the Supreme Court had no intention of

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[1] *"The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim*. That will also ordinarily (though not always) have the consequence of not barring the claim from other courts, but its primary meaning relates to the dismissing court itself. Thus, BLACK'S LAW DICTIONARY (7th ed.1999) defines 'dismissed without prejudice' as 'removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim,' . . . and defines 'dismissal without prejudice' as '[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.'" *Semtek Intern., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (emphasis added).

barring subsequent adjudication the Nation and the Housing Authority's claims in the tribal courts *after* the arbitration proceedings have concluded.

Moreover, this sequence of events—the conclusion of arbitration proceedings followed by adjudication of the Nation and the Housing Authority's causes of action in court proceedings—is contemplated by the applicable FINRA rules. As noted above, under FINRA Rule 12206(b), "*[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court.*" (Emphasis added).[2] The Nation

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[2] As noted above, the following sentence of FINRA Rule 12206(b) states that

> By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, *the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.*

(Emphasis added). United Planners now argues that the highlighted language means that *only* the non-moving party (here, United Planners itself) may return to court after an arbitration proceeding is dismissed by its adversary (here, the Nation and the Housing Authority).

The Nation and the Housing Authority do not agree with that reading of FINRA Rule 12206(b). The first sentence of the rule says that "a party" is not precluded from pursuing a claim in court. This sentence does not distinguish between moving and non-moving parties, and it therefore indicates that either party may return to court after dismissal of the arbitration provision.

The Nation's and the Housing Authority's interpretation of the rule is preferable to United Planners' interpretation of the rule because it 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). The Nation and Housing Authority's interpretation is also preferable because it comports with the strong policy favoring adjudication on the merits. *See In re Rains*, 946 F.2d 731, 732 (10th Cir. 1991).

In any event, the Nation's courts have not yet had the opportunity to interpret these provisions of Rule 12206(b), and, as the federal district court reasoned here, those courts should be afforded the opportunity to do so.

and the Housing Authority proceeded in accordance with the FINRA rule here: after FINRA ruled that the Nation and the Housing Authority's claims were ineligible for arbitration because "six years have elapsed from the occurrence or event giving rise to the claim[s]," *see* Aplt.'s App. at 77 (FINRA Rule 12206(a)), the Nation "pursu[ed] the claim[s] in court." *Id.*

In any event, what matters here is that a resolution of this dispute (*i.e.*, whether the Sac and Fox Supreme Court's ruling allows the Nation and the Housing Authority 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 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.*, (a) what the Sac and Fox Supreme Court meant to accomplish when it directed the Sac and Fox District Court to dismiss the 2011 case without prejudice; (b) whether the Sac and Fox Supreme Court's ruling was that the Nation and the Housing Authority "may [never] proceed with its case in the District Court or any other court," Aplt.'s App. at 28, or whether, to the contrary, it meant that the Nation and the Housing Authority "may not proceed with [their] case in the District Court or any other court [until the FINRA arbitration proceedings have concluded]"; and (c) whether FINRA Rule 12206(b), which states that "[d]ismissal of a claim under this rule does not prohibit a party from pursuing the

claim in court" and which was incorporated into the arbitration agreements, contemplates that the Nation and the Housing Authority may now adjudicate their claims against United Planners in the Sac and Fox Nation District Court.

None of these issues required the district court to conduct the federal law-based, jurisdictional inquiry regarding tribal court adjudicatory authority that the Supreme Court described in *National Farmers*—"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." 471 U.S. at 852. Instead, by filing this ill-advised action, United Planners merely seeks post-judgment review of an order of a tribal appellate court.

Accordingly, this Court should remand the case to the district court with directions to dismiss United Planners' Complaint on the grounds that the district court lacks subject matter jurisdiction.

C. The District Court Did Not Abuse Its Discretion in Ruling That United Planners' Action Should Be Dismissed on the Grounds That it Has Failed to Exhaust Available Tribal Court Remedies.

As the district court recognized, "[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). "The rule is based on strong policy interests recognizing tribal sovereignty, including (1) furthering congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary." *Thlopthlocco*, 762 F.3d at 1237 (quoting *Kerr–McGee Corp.*, 115 F.3d at 1507). "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 Tribal Town,* 762 F.3d at 1237.

1. United Planners Has Not Exhausted its Tribal Court Remedies.

Here, United Planners has not exhausted its tribal court remedies. In response to the Complaint filed by the Nation and the Housing Authority in the Sac and Fox Nation District Court, United Planners filed with that court (on November 17, 2014), a "Special Appearance for the Sole Purpose of Requesting this Court to Stay All Proceedings or, in the alternative, Motion to Dismiss." *See* Aplt.'s App. at 79-87. The Nation and the Housing Authority have responded to that motion, *see* id at 88-101, United Planners has filed a reply, and the motion remains pending with the Sac and Fox District Court. Moreover, as in the 2011 tribal court action, the unsuccessful party will have an opportunity to appeal the court's ruling on United Planners' motion to the Sac and Fox Nation Supreme Court.

In its complaint in this federal district court action, United Planners asserts that it has exhausted its tribal court remedies merely because it appealed this Court's initial ruling denying the motion to compel arbitration to the Sac and Fox Supreme Court. *See* Aplt.'s App. at 14 (citing the Sac and Fox Nation Supreme Court's Order and Judgment, filed September 26, 2013). Contrary to United Planners' argument, this two-year-old ruling, issued well before new and important developments in this case, does not establish that United Planners has exhausted its tribal court remedies. In order to be exhausted, "appellate review of the *question presented* [must be] *complete.*" *Thlopthlocco Tribal Town,* 762 F.3d at 1237 (emphasis added). 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 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 this Court, as FINRA Rule 12206(b) indicates.

That question is now before the Sac and Fox District Court, which will be the first one to consider it in the course of this litigation. Once that court rules on that question, either United Planners or the Nation and the Housing Authority may appeal its decision, and in that event, the Sac and Fox Supreme Court will be required to address it. Until appellate review of that specific question is complete, United Planners' tribal court remedies have not been exhausted. *See Thlopthlocco Tribal*

Town, 762 F.3d at 1237; *see also Columbe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1024-25 (8th Cir. 2013) (noting federal courts will not intervene before tribal courts have addressed pending issues relating to their own jurisdiction).

2. The Exceptions to the Exhaustion Requirement Are Not Applicable Here.

The Nation and the Housing Authority acknowledge that there are certain limited exceptions to the exhaustion requirement: (1) when "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith[;]" *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985); (2) "where the action is patently violative of express jurisdictional prohibitions[;]" *id.* (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction[;]" *id.*; and (4) where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve "no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (internal quotation marks omitted); *Grand Canyon Skywalk Dev. LLC v. 'Sa' Nya Wa, Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) (same). However, these exceptions are viewed narrowly, and courts may apply them only if a party makes a substantial showing that one of these required circumstances is present. *See Kerr–McGee*, 115 F.3d at 1502; *see also DISH Network Serv., L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) (noting that the bar set for avoiding tribal court jurisdiction is "quite high").

These circumstances are not present here. There is no indication that the Nation and the Housing Authority are motivated by bad faith or that proceeding in this tribal court would be "patently violative of an express jurisdictional prohibition." *National Farmers*, 471 U.S. at 856 n.21. Instead, the Nation and the Housing Authority followed the directive of the Sac and Fox Nation Supreme Court in its Order and Judgment, presenting their claims to FINRA and then, after FINRA concluded that the claims were no longer eligible for arbitration, filing a second action in the Sac and Fox Nation District Court. That course of action comports with both the Sac and Fox Nation Supreme Court's ruling that the 2011 case should be dismissed without prejudice and with FINRA Rule 12206(b), which provides that "[d]ismissal of a claim under this rule does not prohibit a party from pursuing the claim in court."[3]

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[3] In its brief to this Court, United Planners asserted that the Nation's motion to dismiss the FINRA arbitration proceedings as untimely somehow indicates that its 2014 tribal court action against United Planners is motivated by bad faith. United Planners points to the fact that, in the 2011 tribal court action, the complaint stated that the relationship between United Planners and the Nation "continued until 2006." Aplt.'s App. at 37. In contrast, in its motion to dismiss the FINRA arbitration, the Nation and the Housing Authority reported that they were seeking damages for losses in thirty-four accounts and that "[a]ll thirty-four accounts were closed no later than September 1, 2004, eight years prior to the filing of the arbitration." *Id.* at 184-85; *see* Aplt.'s Br. at 39-40 (discussing this difference).

This assertion does not indicate that the Nation and the Housing Authority have proceeded in bad faith. Their motion to dismiss the arbitration proceeding lists specific account agreements and the dates that they were closed. United Planners has made no showing that this information is inaccurate. The statement in the 2011 complaint that the relationship with United Planners "continued until 2006" does not

Moreover, United Planners cannot show that it lacks an opportunity to challenge the tribal court's jurisdiction. Indeed, as noted above, United Planners has made precisely such a jurisdictional challenge now, moving the Sac and Fox District Court to dismiss the case. In addition, contrary to United Planners' arguments, the Sac and Fox District Court has jurisdiction to proceed with the 2014 case. Finally, it is far from clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay. *See Hicks*, 533 U.S. at 369. As noted above, the Sac and Fox Supreme Court's directive that the 2011 case be dismissed without prejudice and the provisions of FINRA Rule 12206 (stating the claims deemed ineligible for arbitration may proceed in court) both establish that the Sac and Fox District Court has jurisdiction over the action filed by the Nation and the Housing Authority.

Accordingly, United Planners has failed to establish an exception to the exhaustion of tribal remedies requirement. Before it may proceed in this Court, United Planners must present its jurisdictional argument to the Sac and Fox District Court and, if it does not prevail there, to the Sac and Fox Supreme Court. Until those courts have ruled on the question of whether the 2014 action can proceed in the tribal courts, United Planners has not exhausted its remedies.

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preclude a specific listing of particular accounts when the timeliness of the FINRA arbitration proceedings was directly at issue.

Accordingly, the federal district court properly dismissed this action because United Planners has failed to exhaust its tribal court remedies.

D. The District Court Did Not Abuse Its Discretion in Dismissing United Planners Claims Without Prejudice Rather Then Holding Them in Abeyance.

Finally, United Planners argues that, if this Court requires exhaustion of tribal court remedies, it should direct the federal district court to hold this case in abeyance rather than dismissing the case without prejudice (as it did here). There are insufficient grounds to grant this request

As United Planners correctly notes, in applying the tribal exhaustion rule, a court has discretion as to whether to stay or to dismiss the federal action. *See National Farmers*, 471 U.S. at 857; *Iowa Mutual Ins. Co v. LaPlante*, 480 U.S. 9, 20 n. 14 (1987); *Thlopthlocco*, 762 F.3d at 1241 (noting that a court has discretion to abate a case rather than dismissing it for failure to exhaust).

A stay may be warranted if the circumstances indicate it is necessary to protect a litigant's right to return to federal court to raise the jurisdictional challenges at issue. *See Thlopthlocco*, 762 F.3d at 1241 (expressing the concern that subsequent developments in tribal politics and government might preclude a litigant from filing a new case in federal court and that "[a]batement will enable the district court to exercise its jurisdiction on the merits after exhaustion in tribal court regardless of the outcome there"); *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th

Cir.2003) (When "dismissal might mean that [the plaintiff] would later be 'barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations . . . the district court should . . . stay[ ], not dismiss[ ], the federal action pending the exhaustion of tribal remedies.").

Here, United Planners has failed to establish that the circumstances are present to warrant abatement rather than dismissal. In support of abatement, United Planners states only that "[u]nless the case is held in abatement, [it] will be exposed to unnecessary expense of defending the 2014 Tribal Court Action in the Nation's Court." Aplt.'s Br. at 45. The cost of defending a tribal court case is not sufficient to justify abatement over dismissal. Morever, there is no indication that abatement is necessary to ensure that United Planners will be afforded the opportunity to return to federal court to advance its jurisdictional challenges after it has exhausted its tribal court remedies. Finally, there is no indication that United Planners requested a stay from the district court. *See* Aplt.'s App. at 159-182; 207-34 (United Planners' responses to the motions to dismiss, which do not request a stay).

Accordingly, the district court did not abuse its discretion in dismissing this case rather than abating it.

VII. CONCLUSION

For the reasons set forth above, the Nation and the Housing Authority are entitled to sovereign immunity from United Planners' claims. In addition, the federal district court lacks subject matter jurisdiction to consider those claims. Finally, United Planners has failed to exhaust its tribal court remedies, and the exceptions to the exhaustion requirement do not apply.

This Court should remand the case to the district court with instructions to dismiss the claims against the Nation and the Housing Authority on the grounds of immunity and lack of subject matter jurisdiction. This Court should further hold that United Planners has failed to exhaust its tribal court remedies and that dismissal is warranted for that reason as well.

VIII. ORAL ARGUMENT STATEMENT

The Appellees Sac and Fox Nation and the Sac and Fox Housing Authority do not request oral argument. The law regarding the doctrine of tribal exhaustion is clear its application to the facts here presents no new or complex circumstances. The appeal should be decided on the briefs.

Respectfully submitted,

s/Randall K. Calvert
Randall K. Calvert, OBA #14154
Rabindranath Ramana, OBA #12045
CALVERT LAW FIRM
1041 NW Grand Boulevard
Oklahoma City, Oklahoma 73118
Telephone: (405) 848-5000
Facsimile: (405) 848-5052
Email: rramana@calvertlaw.com
Attorneys for Appellees Sac and Fox Nation and Sac and Fox Housing Authority

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2015, I electronically transmitted the attached document to the Tenth Circuit Court of Appeals, Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel or record herein:

David McCullough
Doerner, Saunders, Daniel & Anderson L.L.P.
1800 N. Interstate Dr., Suite 123
Norman, Oklahoma 73072
Attorney for United Planners' Financial Services of America

Gregory H. Bigler, Attorney General,
Sac and Fox Nation
PO Box 1927
Sapulpa, OK 74067
-and-
Stephen R. Ward
Daniel E. Gomez
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, OK 74172-0148
Attorneys for Defendants Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr.

s/Rabindranath Ramana
RABINDRANATH RAMANA

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RANDALL K. CALVERT