No. 15-6117

In The
United States Court of Appeals
for the Tenth Circuit

UNITED PLANNERS FINANCIAL SERVICES OF AMERICA, LP,

Plaintiff-Appellant,

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-Appellees.

On Appeal from an Order of Dismissal Entered by the Honorable Joe Heaton, United States District Court for the Western District of Oklahoma, No. CIV-14-1278-HE.

BRIEF OF APPELLEES, THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR.

STEPHEN R. WARD, ESQ.
DANIEL E. GOMEZ, ESQ.
CONNER & WINTERS, LLP
4000 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172-0148
(918) 586-8978

Attorneys for the Appellees, the Sac and Fox Nation Court and the Honorable Darrell R. Matlock, Jr.

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the appellees, the Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr., hereby make the following disclosures:

For purposes of this action, the following are the parent companies and publicly held corporations, along with their subsidiaries and affiliates, that own a ten percent (10%) or more interest in the disclosing parties, or that have a financial interest in the outcome of this litigation:

> None. The Sac and Fox Nation District Court is a part of the judicial branch of a federally-recognized Indian nation, and the Honorable Darrell R. Matlock, Jr., is one of its duly appointed judges.

Respectfully submitted,

s/ Daniel E. Gomez
Stephen R. Ward, Esq.
Daniel E. Gomez, Esq.
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

Attorneys for Appellees, the Sac and Fox Nation Court and the Honorable Darrell R. Matlock, Jr.

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(1), the Defendants/Appellees Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr., have no prior or related appeals to disclose.

JURISDICTIONAL STATEMENT

As set forth in more detail below, the District Court properly recognized that its federal question jurisdiction under 28 U.S.C. § 1331 was limited to the issue of the scope of tribal court jurisdiction under federal common law, and did not extend to ancillary non-jurisdictional matters. The Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr., otherwise agree with the Appellant's jurisdictional statement with respect to timeliness of the appeal and parties on appeal.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Did the District Court properly refuse to exercise federal question jurisdiction or to apply the *Ex parte Young* except9ion to tribal sovereign immunity over matters that did not concern tribal court jurisdiction under federal common law?

2. Did the District Court properly exercise its discretion in dismissing the case pursuant to the tribal exhaustion doctrine because the tribal courts had not yet been given an opportunity to rule on a challenge to their jurisdiction?

STATEMENT OF THE CASE

In 2011, the Sac and Fox Nation and its Housing Authority (collectively the "Nation") sued United Planners Financial Services of America, L.P. ("United Planners"), in Sac and Fox Nation District Court, in a case assigned to Judge Darrell R. Matlock, Jr. (collectively the "Tribal Court"). At issue was a broker agreement. United Planners moved to compel arbitration under a clause in the broker agreement, but the Tribal Court

denied the motion on the basis that the contract did not contain a valid waiver of sovereign immunity. (Aplt. Appx. 131.) The Nation's Supreme Court subsequently reversed, holding that the Nation was required to bring its claims in arbitration. (Aplt. Appx. 143-48.) An arbitration proceeding was commenced before the Financial Industry Regulatory Authority ("FINRA"), and the Nation moved to dismiss the arbitration under FINRA Rule 12206(a) on the basis that the subject actions occurred more than six years prior to the arbitration. (Aplt. Appx. 183-86.) The arbitration panel granted dismissal.

In 2014, after the arbitration was dismissed, the Nation filed another complaint in Tribal Court. (Aplt. Appx. 187-91.) The 2014 Complaint contained the same substantive allegations as the 2011 Complaint, except that it asserted a new basis as authority to proceed in Tribal Court—that FINRA Rule 12206(b) authorizes court proceedings if arbitration is commenced and is later dismissed. (Aplt. Appx. 189.) United Planners filed a "Special Appearance" in the Tribal Court but subsequently filed an action in the United States District Court for the Western District of Oklahoma (the "District Court Case") to enjoin the Tribal Court proceedings. (Aplt. Appx. 79-87.) United Planners' primary allegation is that the order entered by the Nation's Supreme Court enforcing the arbitration clause precludes any and all future actions in Tribal Court, or any court. United Planners characterizes its legal position as jurisdictional, but it is based almost entirely on the order of the Nation's Supreme Court enforcing the arbitration clause against the Nation. (Aplt. Appx. 79-87.)

The Tribal Court and the Nation each separately moved to dismiss the District

Court Case on the grounds of tribal sovereign immunity and the tribal exhaustion doctrine. (Aplt. Appx. 55-76; 103-27.) United Planners again asserted that the order by the Nation's Supreme Court barred any and all future claims in the Tribal Court, or any court, and that it constituted exhaustion, even though the Nation had asserted a new argument as authority to proceed. (Aplt. Appx. 159-82; 207-34.) The District Court granted a dismissal, holding that neither the Tribal Court nor the Nation's Supreme Court had addressed jurisdiction as a general matter, and that no exception to the tribal exhaustion doctrine was applicable. (Aplt. Appx. 250-59.) United Planners filed this appeal of the District Court's dismissal.

United Planners' special appearance and arguments to avoid the proceedings in the Tribal Court—including its response to the Nation's assertion that dismissal of the arbitration under FINRA Rule 12206(b) allows it to proceed in court—remain pending before the Tribal Court, and are not the subject of final rulings. Therefore Tribal Court—as was the case in the District Court—takes no positions on, and makes no arguments for or against, the merits of the issues in the underlying litigation. References to the parties' positions herein are solely made for purposes of addressing the bounds of the Tribal Court's jurisdiction, and to explain the limited nature of federal court review of tribal court proceedings permitted under federal law.

SUMMARY OF THE ARGUMENT

Although United Planners has made cursory allegations concerning the jurisdiction of the Tribal Court, its overriding argument has been, and continues to be

related to the merits of its legal positions—namely, that the order of the Nation's Supreme Court enforcing the arbitration clause bars further action in Tribal Court or any other court. The District Court correctly found that these arguments "treat as jurisdictional portions of the tribal supreme court's ruling which were not." (Aplt. Appx. 255.) The District Court then properly concluded that its federal question jurisdiction extended only to "the scope of a tribal court's jurisdiction[.]" (Aplt. Appx. 255.)

The District Court was correct in differentiating between the issues of tribal court jurisdiction and the enforceability of an arbitration clause. Federal question jurisdiction exists only on the issue of the scope of tribal court jurisdiction under *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), and its progeny. As it concerns other matters—in this case, contract interpretation and application of arbitration rules—federal question jurisdiction is lacking. The distinction also is important to the narrow exception to tribal sovereign immunity under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), which allows claims against tribal officials—in this case Judge Matlock—only where it is alleged that the court is exceeding its jurisdiction under *Montana*. United Planners' arguments concerning the arbitration clause and arbitration rules do not fit the exception.

The District Court's dismissal was correct for several key reasons and should be affirmed. First, United Planners' arguments concerning the arbitration clause, the order of the Nation's Supreme Court, and the application of the FINRA rules, are not issues over which federal courts can exercise federal question jurisdiction. Second, these arguments do not allege the unlawful exercise of tribal court jurisdiction under *Montana*

as would be required to proceed under *Ex parte Young*. Finally, the tribal exhaustion doctrine requires that the Tribal Court be allowed an opportunity to address all challenges to its jurisdiction before being subject to federal court review. The matters that are the subject of United Planners' District Court Complaint are currently pending before the Tribal Court which has not issued a decision. Tribal exhaustion, therefore, has not occurred.

STANDARDS OF REVIEW

The Tribal Court moved to dismiss for tribal sovereign immunity under Rule 12(b)(1), which would be subject to a *de novo* standard of review. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). The District Court, however, dismissed the action on the basis of the tribal exhaustion doctrine. (Aplt. Appx. 259.) Dismissal under the tribal exhaustion doctrine is a discretionary matter for the District Court. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857, 105 S. Ct. 2447, 2454 (1985). A discretionary decision can be reversed on appeal only if it constitutes an abuse of discretion, which exists only if the court "makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." *BancInsure, Inc. v. F.D.I.C.*, 796 F.3d 1226, 1239 (10th Cir. 2015).

ARGUMENT & AUTHORITIES

I. THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE JURISDICTION OVER NON-JURISDICTIONAL MATTERS RAISED BY UNITED PLANNERS

The District Court properly recognized the important distinction between tribal court jurisdiction under federal common law—over which the federal courts can in some instances exercise federal question jurisdiction—and non-jurisdictional issues such as contract interpretation and arbitration rules—over which federal question jurisdiction does not exist. Specifically, the District Court correctly determined that

> "[t]his case does not present the typical situation of a non-tribal member challenging a tribal court's exercise of jurisdiction. At least in part, United Planners argues here that the Tribal Court lacks jurisdiction over it not because it is not a member of the Sac and Fox Nation, but because of the decision of the Nation's Supreme Court enforcing the parties' arbitration agreement. That argument appears to treat as jurisdictional portions of the tribal supreme court's ruling which were not."

(Aplt. Appx. at 255) (internal citations omitted). The District Court then held that federal question jurisdiction existed, but only as to "the scope of a tribal court's jurisdiction[.]" (Aplt. Appx. 255.)

The scope of tribal court jurisdiction is defined by federal common law through *Montana* and subsequent federal court decisions, and federal question jurisdiction is limited to that issue. The distinction also is important in applying *Ex parte Young*, because a claimant must allege that a tribal court is exceeding its jurisdiction under *Montana*, which is not the subject of United Planners' briefing or complaint.

A. Federal Question Jurisdiction and the *Ex parte Young* Exception to Sovereign Immunity Both Are Limited to Tribal Court Jurisdiction under *Montana*

Federal common law has long recognized the importance of tribal courts to tribal sovereignty and self-government. In *Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 272 (1959), the Supreme Court held that tribal courts have jurisdiction over nonmembers who transact business in Indian country. To hold otherwise "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id*. The Supreme Court has since affirmed that "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15, 107 S. Ct. 971, 975-76 (1987) (internal citation omitted).

More recent decisions from the Supreme Court have focused on the jurisdictional parameters of tribal courts when nonmembers of the tribe are involved. The "pathmarking case" in this area is *Montana*, which set forth two situations in which tribal courts can exercise jurisdiction.[1] *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S. Ct. 1404, 1409 (1997). First, a tribal court can exercise jurisdiction over nonmembers "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329, 128 S. Ct. 2709, 2720 (2008) (citing *Montana*).

[1] As discussed in *Strate*, the issue in *Montana* was a tribe's regulatory and legislative authority, not adjudicative authority, but the *Montana* standard was adopted in determining adjudicative jurisdiction. *See id*. at 453, 1413 (holding that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

Second, tribal courts may exercise jurisdiction over the conduct of nonmembers "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" *Id*.

The Supreme Court has since set forth the limitation of federal question jurisdiction over tribal courts. It has held that "federal courts have authority to determine, as a matter 'arising under' federal law, *see* 28 U.S.C. § 1331, whether a tribal court has exceeded the limits of its jurisdiction." *Strate*, 520 U.S. at 448, 117 S. Ct. at 1411 (citing *Nat'l Farmers Union*, 471 U.S. at 852-53, 105 S. Ct. at 2451-52). The reason is that tribal court jurisdiction requires "careful examination of tribal sovereignty" and the extent it has been altered by federal law and policy. *Nat'l Farmers Union*, 471 U.S. at 855-56, 105 S. Ct. at 2453-54. Thus, federal court review of tribal courts is limited to addressing whether a tribal court has exercised jurisdiction outside of the *Montana* parameters with a focus on tribal sovereignty and federal law and policy.

Since United Planners has sued the Tribal Court and Judge Matlock, the District Court's jurisdiction also is limited by the doctrine of *Ex parte Young*. It is not disputed in this case that the Tribal Court and its judges enjoy tribal sovereign immunity unless an exception applies. (Aplt. Appx. at 254.) In this case, the only relevant exception is *Ex parte Young*, which this Court has held applicable to tribal judges in their official capacities.[2] However, application of *Ex parte Young* in this context is limited in the same

[2] *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F. 3d 1140, 1153-54 (10th Cir. 2011); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1235 (10th Cir. 2014).

manner as federal question jurisdiction. A plaintiff must allege an ongoing violation of federal common law. *See Crowe & Dunlevy*, 640 F.3d at 1155-56. In *Crowe & Dunlevy*, this Court made clear that, in this context, the allegation must be of "the unlawful exercise of tribal court jurisdiction" under *Montana*.[3] *Id*. at 1155. All other matters that fall outside of this narrow exception are not reviewable by federal courts because the claims are barred by tribal sovereign immunity.

The District Court's recognition that United Planners' arguments concerning the arbitration clause were not jurisdictional is therefore important. It was a proper recognition of the limitations on its ability to review tribal court proceedings, and the federal policy of respect for tribal court authority. (Aplt. Appx. at 255.) Interpretation of an arbitration clause between two parties and interpretation of arbitration rules does not concern federal policy on tribal sovereignty. It is therefore not a federal question, nor do such claims qualify to invoke *Ex parte Young*. If a federal court were to review such non-jurisdictional issues it would be acting as a *de facto* appeals court. Such would be contrary to the long-standing federal policy of respect for tribal court authority and, more importantly, would be outside of its federal question jurisdiction and outside of the *Ex parte Young* exception to tribal sovereign immunity.

The District Court's ruling therefore was correct. In affirming that decision, this Court should similarly recognize and affirm important concepts of tribal sovereignty and

[3] The court's direct citation is to *Nevada v. Hicks*, 533 U.S. 353, 358-59, 121 S. Ct. 2304, 2309-10 (2001), which is a more recent case that cites and applies *Montana* as expressing the limits of tribal court jurisdiction.

the authority and independence of tribal courts as it concerns substantive issues.

B. The Arguments Raised by United Planners in the District Court and in this Court Are Not Addressed to Tribal Court Jurisdiction

The key distinction drawn by the District Court was that United Planners' primary argument—that the order by the Nation's Supreme Court enforcing the parties' arbitration agreement prevents a second court proceeding against it—"treat[s] as jurisdictional portions of the tribal supreme court's ruling which were not." (Aplt. Appx. at 255). United Planners' brief on appeal continues this error by focusing almost entirely on the order of the Nation's Supreme Court and ignoring tribal court jurisdiction under *Montana*. The District Court's dismissal was therefore proper.

In its arguments, United Planners quotes repeatedly to a single line of text in the order of the Nation's Supreme Court, which states 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 [Nation's] District Court or any other court." (Aplt. Appx. at 148.) The context of that ruling was that it held earlier in its opinion that the Nation could not be *compelled* to arbitrate because there was no valid waiver of sovereign immunity, but that the arbitration clause was otherwise valid and that if the Nation *chose* to pursue a claim, it was required to do so in arbitration. (Aplt. Appx. at 143-47.)

The very end of the cited text—that the claim could not be brought in Tribal Court "*or any other court*"—is important in determining what the court held and what it did not

hold. (Aplt. Appx. at 148) (emphasis added). The court was not making any determination on the unique parameters of tribal court jurisdiction under federal common law, but was a ruling based solely on interpretation of an arbitration clause. It was addressing the agreed forum, or venue, for hearing the dispute (arbitration), not jurisdiction.[4] The order later states that "the record does not reveal that [United Planners] has really challenged the subject matter jurisdiction of the [Nation's] District Court" and that "[t]he [Nation's] District Court did not rule and make any findings of law and fact on whether [United Planners] has effectively consented to tribal court jurisdiction[.]" (Aplt. Appx. at 147-48.) The order, thus, expressly makes clear that tribal court jurisdiction as a general matter had not been raised by United Planners.

On appeal, United Planners likewise does not challenge the jurisdiction of the Tribal Court under *Montana*. The only part of its briefing that might be considered jurisdictional is its discussion on whether it consented to jurisdiction in the first Tribal Court proceeding by filing an answer and participating in motion practice. (Aplt. Brf. at 28-32.) 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." *Plains Commerce Bank*, 554 U.S. at 329, 128 S. Ct. at 2720 (citing *Montana*). The Tribal Court

[4] *See* 92A C.J.S. *Venue* § 1 (West 2010) (explaining "[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"); *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").

was not asked to address whether the broker agreement, in and of itself, satisfies the first *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. *See* Section II, *infra*.

United Planners also devotes a significant portion of its response to the Nation's argument that FINRA Rule 12206(b) allows it to re-file its complaint. This issue was not raised in the first Tribal Court proceeding because it became an issue only after the arbitration was dismissed. As discussed below, the issue has not been addressed in Tribal Court and the tribal exhaustion doctrine precludes the argument in federal court. But more important, the issue is one interpreting an arbitration rule; it does not concern tribal court jurisdiction under *Montana*. Whether the Tribal Court can exercise jurisdiction over United Planners under *Montana* is an entirely separate issue. The latter is the sole issue on which federal question jurisdiction can exist and on which *Ex parte Young* can possibly provide a waiver of tribal sovereign immunity. The District Court correctly declined to enter any ruling on the matters of the arbitration clause or application of FINRA rules which is solely within the jurisdiction of the Tribal Court to decide.[5]

Neither *Montana* nor any of the United States Supreme Court rulings based on *Montana* are cited by the Nation's Supreme Court, and they are not substantively

[5] The District Court offered some personal opinions on the merits of the Nation's arguments of consent by participation and interpretation of the FINRA rule argued by the Nation, but they appear in footnotes and were not holdings or orders by the Court. (Aplt. Appx. 258-59.) The District Court properly deferred to Tribal Court to address these matters.

addressed by United Planners in its opening appellate brief. It could not be clearer that the issues before the District Court and on appeal here are not that of tribal court jurisdiction under *Montana* and are therefore beyond the federal courts' ability to adjudicate. Federal law and policy on tribal sovereignty require that federal courts decline to address substantive issues and to defer to tribal courts' independence to make such rulings.

Unless and until the Tribal Court's jurisdiction under *Montana* is challenged, the federal court lacks federal question jurisdiction and claims against the Tribal Court and its judges are barred by tribal sovereign immunity. In affirming the District Court's dismissal, this Court should similarly recognize the key distinctions between jurisdictional and non-jurisdictional issues. The distinction is of utmost importance to the matter of federal court review of tribal court proceedings.

II. THE DISTRICT COURT PROPERLY DISMISSED THE CASE UNDER THE TRIBAL EXHAUSTION DOCTRINE

The tribal exhaustion doctrine is well established in federal Indian law. As described by the U.S. Supreme Court

> "[o]ur cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. . . .Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."

Nat'l Farmers Union, 471 U.S. at 856-57, 105 S. Ct. at 2454; *see also Crowe & Dunlevy*, 640 F. 3d at 1149 (holding "[t]he tribal exhaustion rule provides that, absent 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.' " *Thlopthlocco Tribal Town*, 762 F.3d at 1237 (same).

The District Court correctly applied the rule and dismissed the case because neither the Tribal Court nor the Nation's Supreme Court ever addressed their jurisdiction under *Montana*. United Planners never brought the matter to the Tribal Court for a ruling and several issues are pending. And even if the matters of the arbitration clause or FINRA rules were subject to federal court review—which, as set forth above, they are not—the latter issue has never been addressed by the Tribal Court. United Planners prematurely filed this lawsuit in federal court while the matter was pending in Tribal Court. The District Court's dismissal should be affirmed.

A. The District Court Properly Applied the Tribal Exhaustion Doctrine Because the Tribal Court Has Not Yet Ruled on the Challenge to its Jurisdiction

As set forth above, the District Court held that its federal question jurisdiction was limited to the narrow issue of tribal court jurisdictional under federal common law. It further held that "that issue has plainly not been considered by the tribal courts." (Aplt. Appx. 257.) It also is true that neither the Tribal Court nor the Nation's Supreme Court ever addressed whether FINRA Rule 12206(b) allows the Nation to proceed in Tribal Court after dismissal of the arbitration because dismissal did not occur until after the first

Tribal Court proceeding was dismissed. Thus, even if that issue was reviewable in federal court—which it is not—it too must first be exhausted in Tribal Court.

United Planners plainly is incorrect in its contention that the order by the Nation's Supreme Court enforcing the arbitration agreement was a final resolution of the Tribal Court's jurisdiction. It discusses generally the enforceability of forum selection clauses, which was the basis of the order by the Nation's Supreme Court. It does *not* address tribal court jurisdiction under *Montana* and federal common law. (Aplt. Brf. at 18-32.) It is well-established that "arbitration is a matter of contract" and therefore is not jurisdictional. *Samson Res. Co. v. Int'l Bus. Partners, Inc.*, 906 F. Supp. 624, 627 (N.D. Okla. 1995). United Planners, in fact, acknowledges that tribal court jurisdiction under *Montana* was not resolved by the Tribal Court or the Nation's Supreme Court. (Aplt. Brf. at 19 n.5.) Its sole proposition is that the decision on the enforceability of the arbitration clause was jurisdictional, which the District Court properly rejected.

United Planners further is plainly incorrect that issue preclusion is applicable with respect to any matter currently pending in the Tribal Court. (Aplt. Brf. at 24-25.) It correctly cites the requirements for issue preclusion being

> "(1) the issue previously decided is identical to the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

(Aplt. Brf. at 24) (quoting *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004)).

United Planners' argument, however, unequivocally fails the first, second, and fourth requirements. First, the "issue previously decided" was enforceability of the arbitration clause; the issue currently pending before the Tribal Court is whether FINRA Rule12206(b) allows the Nation to proceed in court after the arbitration was dismissed. Second, United Planners argues that the substantive allegations in both the 2011 and 2014 Tribal Court complaint are identical, but it never was required to defend the allegations on the merits. The same makes the fourth requirement inapplicable. The substantive issues never were litigated, and applicability of FINRA Rule 12206(b) has not been addressed by the Tribal Court. Issue preclusion plainly does not apply.

United Planners further misses the mark in arguing that FINRA Rule 12206(b) "does not confer jurisdiction in the Nation's Court." (Aplt. Brf. at 25-27.) This mischaracterizes the Nation's argument to the Tribal Court. The argument is not that the rule somehow creates jurisdiction under *Montana* or through any other means. The argument appears to accept the order of the Nation's Supreme Court that the arbitration clause was enforceable, but that after dismissal, the rule authorizes court proceedings. (Aplt. Appx. 204.) It also is addressed to interpretation and application of an arbitration rule, not tribal court jurisdiction under federal common law. *See* Section I, *supra*. In any event, it also has not been ruled upon by the Tribal Court. The issue, therefore, has not been exhausted in Tribal Court.

United Planners finally has failed to establish that any of the exceptions to the tribal exhaustion doctrine are applicable to this case. United Planners asserts only two of

the four recognized exceptions to exhaustion. It argues that exhaustion is not required because (1) "it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay," and (2) that "assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith[.]" *Thlopthlocco*, 762 F.3d at 1238. The exceptions are "applied narrowly[,]" and a "substantial showing" must be made for them to apply. *Id*.

In support of the first exception, United Planners simply re-asserts its argument that the order from the Nation's Supreme Court bars any and all future attempts to litigate in Tribal Court. (Aplt. Brf. at 35-36.) As discussed above, the argument is not addressed to tribal court jurisdiction under federal common law and federal question jurisdiction is lacking. It also is not an issue currently pending in Tribal Court; the Nation has asserted a new theory to proceed in Tribal Court (FINRA Rule 12206(b)) and that issue has yet to be addressed by the Tribal Court. It is a novel argument and United Planners has cited no case law that makes a ruling so clear that exhaustion "would serve no purpose other than delay." *Thlopthlocco*, 762 F.3d at 1238. Comity and the well-established federal policy of respect for tribal courts requires that the Tribal Court be allowed to decide the matter, and the tribal exhaustion doctrine requires that federal courts not address it at least until the Tribal Court has ruled. United Planners has failed to make a showing, "substantial" or otherwise, to invoke this exception to the tribal exhaustion rule.

In support of the bad faith exception, United Planners again re-asserts its argument that the order from the Nation's Supreme Court is a bar to all future suits and that the

2014 complaint therefore was bad faith or harassment. This argument fails, first, for the same reasons stated above. The Nation has asserted a new basis for attempting to proceed in Tribal Court, and the Tribal Court is entitled to rule on it before being subject to federal court review. The exception also "requires bad faith or a desire to harass in the *assertion of tribal court jurisdiction.*"[6] The argument cannot be one concerned with the merits. *See id*. United Planners makes no argument that the *Tribal Court* has acted unjustly towards them in hearing claims. The Tribal Court is entitled to hear the issues before it and to adjudicate them. United Planners submits no evidence of bias or unfairness by the Tribal Court and has not met its substantial burden to invoke the bad faith exception to tribal exhaustion.

The District Court was therefore correct in requiring that the issue of tribal court jurisdiction, and all other pending matters, be determined first in Tribal Court. Its ruling was consistent with federal law and policy and should be affirmed.

B. The District Court Properly Exercised its Discretion by Dismissing the Case as Opposed to Issuing a Stay Pending Exhaustion

From its inception, the tribal exhaustion doctrine has placed broad discretion in the district court to either dismiss the case, or to hold the case in abeyance pending tribal court exhaustion. *See Nat'l Farmers Union*, 471 U.S. at 857, 105 S. Ct. at 2454. In this case, the District Court determined that dismissal was preferable to abeyance. As set forth above, a discretionary decision can be reversed only if it constitutes an abuse of

[6] *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1331-32 (D. Kan. 1998) (citing *Nat'l Farmers Union*, 471 U.S. at 856, 2454 n.21) (emphasis in original).

discretion which exists only where the court "makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." *BancInsure, Inc.*, 796 F.3d at 1239.

Because of its discretionary nature, courts have addressed the matter on a case-by-case basis and based on particular facts. No bright lines have been drawn as to when courts determine to dismiss or to stay a case pending exhaustion of tribal remedies. In *Hartman v. Kickapoo Tribe Gaming Comm'n*, 176 F. Supp. 2d 1168, 1182 (D. Kan. 2001), the district court chose dismissal because "dismissal without prejudice will allow plaintiff to return to federal court once she has exhausted her tribal court remedies" and because "[e]xhaustion includes, at a minimum, tribal appellate court review." In *Valenzuela v. Silversmith*, 699 F.3d 1199, 1208 n.4 (10th Cir. 2012), this Court affirmed dismissal because the plaintiff did not have good cause for not litigating first in the tribal court.

United Planners has not established any abuse of discretion by the District Court in choosing to dismiss this case without prejudice as opposed to issuing a stay. As described in *Hartman*, United Planners can re-file, if necessary, after it has exhausted the matter in Tribal Court.[7] United Planners similarly has established no good cause for its premature filing with the District Court while the matters were pending in Tribal Court.

[7] United Planners also is the defendant in Tribal Court, so no concern for statutes of limitations is present that might weigh in favor of abatement as opposed to dismissal.

Its only argument for abatement is that the District Court expressed some doubt as to the Nation's ability to prevail in Tribal Court. This does not, however, establish any abuse of discretion. The District Court obviously was aware of its own opinions on the merits of the issues and determined anyway to dismiss and not abate. It was within the District Court's discretion to do so. The dismissal should be affirmed.

CONCLUSION

The District Court properly recognized its limitations on review of tribal court proceedings and that part of its decision should be affirmed. The District Court also properly exercised its discretion is dismissing the case and requiring that United Planners exhaust its remedies in Tribal Court. That decision also should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 10th Cir. R. 28.2(C)(4), the Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr., request an oral argument so as to be in a position to clarify directly any questions of the Court concerning the law and the record. This appeal presents several complex issues which are important in the area of the jurisdiction of tribal courts—an area of federal law that is constantly developing through decisional authority—and a decision in this case is likely to be of great importance as precedent. Oral argument would be beneficial to discuss these matters in detail and to give the Court a full understanding of these important matters and to ensure that the Court is fully advised in reaching its determination.

Respectfully submitted,

s/ Daniel E. Gomez
Stephen R. Ward, Okla. Bar No. 13610
Daniel E. Gomez, Okla. Bar No. 22153
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

Attorneys the Appellees, the Sac and Fox Nation Court and the Honorable Darrell R. Matlock, Jr.

October 8, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 10th Cir. Form 6, the appellant certifies as follows:

Please complete one of the following sections:

Section 1: Word Count

As required by Fed. R. App. P. 28(a)(10), 28(b), and 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,324 (maximum 14,000 words) in 13-point font (excluding certificates and statements regarding jurisdiction and oral argument).

Complete one of the following:

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Section 2: Line Count

My brief was prepared in a monospaced typeface and contains _____ lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief after a reasonable inquiry.

s/ Daniel E. Gomez
Stephen R. Ward, Esq.
Daniel E. Gomez, Esq.
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

Attorneys for the Appellees, the Sac and Fox Nation Court and the Honorable Darrell R. Matlock, Jr.

ECF PLEADING CERTIFICATION

Pursuant to Section II(I) of this Court's CM/ECF User's Manual, the Sac and Fox Nation District Court and the Honorable Darrell R. Matlock, Jr., certify as follows:

(1) All privacy redactions required by Fed. R. App. P. 25(a)(5) or otherwise have been made. Specifically, no information appears in this filing that would require privacy redactions and as such, no such redactions appear.

(2) The hard copies of this filing that have been submitted to this Court in compliance with this Court's local rules and procedures are exact copies of the filing that has been submitted through ECF.

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s/ Daniel E. Gomez

Stephen R. Ward, Esq.
Daniel E. Gomez, Esq.
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

Attorneys for the Appellees, the Sac and Fox Nation Court and the Honorable Darrell R. Matlock, Jr.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and 10th Cir. R. 25.3, 25.4, and 31.5, I hereby certify that on this the 8th day of October, 2015, seven (7) copies of the above and forgoing instrument, the "BRIEF OF APPELLEES, THE SAC AND FOX NATION DISTRICT COURT AND THE HONORABLE DARRELL R. MATLOCK, JR." was delivered to an express service for delivery the next day to the Clerk of Court, and I also electronically transmitted a full, true, and correct copy to the Clerk of the Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants (names only):

Gregory Bigler
Randall K. Calvert
Daniel E. Gomez
David McCullough
Rabindranath Ramana
Stephen R. Ward
Denielle N. Williams

s/ Daniel E. Gomez
Daniel E. Gomez, Esq.