UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CASE NO.: 18-cv-00836-JB-SCY

WORLD FUEL SERVICES, INC.,

Petitioner,

v.

NAMBE PUEBLO DEVELOPMENT CORPORATION

Respondent.
_____/

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioner World Fuel Services, Inc. ("World Fuel") responds in opposition to Respondent Nambe Pueblo Development Corporation's ("Nambe") Motion to Dismiss [DE 14] as follows.

INTRODUCTION

In enacting the Federal Arbitration Act (FAA), Congress promulgated a liberal federal policy favoring arbitration and the speedy adjudication of petitions to enforce arbitration agreements. Further, while state courts may hear actions to compel arbitration under parallel state laws, Congress expressly provided for federal courts to be the exclusive forum to hear petitions to compel arbitration under Section 4 of the FAA. It did so because it could control the procedures employed by a federal court, and thus ensure that petitions to compel arbitration would be expeditious summary proceedings.

By insisting on exhaustion of tribal proceedings, Nambe seeks to turn the text and policy of the FAA on its head. In effect, Nambe seeks to drag out the litigation regarding the preliminary question of whether to enforce the parties' arbitration agreement in at least two tiers

of tribal courts before World Fuel may seek enforcement in this Court. This is so even though this Court is the only court that Congress has empowered to hear petitions under Section 4 of the FAA and even though the parties' arbitration clause already contemplates resolving disputes in a non-tribal forum.

Accepting Nambe's argument would mean that an arbitration on the merits could occur only after at least three rounds of litigation in three different courts, two of them non-federal. If the FAA means anything, it is that a party seeking to enforce an arbitration clause, designed for speedy and less expensive adjudication, is not required to go through multiple layers of review in non-federal courts before having the opportunity to seek an order compelling arbitration from a federal court. It cannot be the law that every time a party and a tribal corporation contractually agree to arbitration, the tribal corporation has a virtual veto power over the contractually-agreed-to forum through invocation of the tribal exhaustion doctrine. If that is the case, arbitration agreements with tribes and tribal entities might as well be meaningless.

Nambe's motion to dismiss should be denied for several reasons. Two threshold issues bar the Court from even considering Nambe's exhaustion argument. First, Nambe's argument concerns issues that the Supreme Court has held must be decided by the arbitrators, not a court. It is for the arbitrators in the first instance to determine if World Fuel has satisfied all conditions precedent, including exhaustion of tribal proceedings to the extent required. Likewise, the validity of the parties' agreement is an issue for the arbitrators, not a court. Second, Nambe's motion to dismiss improperly relies on matters extrinsic to World Fuel's petition and allegations contrary to World Fuel's factual allegations. Such arguments are improper on a motion to dismiss.

Even if the Court reaches the merits of Nambe's tribal exhaustion argument, Nambe's

motion must be denied for several independent reasons. First, the tribal exhaustion doctrine is inapplicable to petitions to compel arbitration under Section 4 of the FAA, especially where (as here) the petition was not filed in an attempt to circumvent the tribal entity's invocation of a parallel proceeding in tribal court and the underlying controversy is not an intra-tribal dispute. The tribal exhaustion doctrine simply cannot be reconciled with Congress's goal of efficient and speedy resolution of petitions to compel arbitration or the FAA's text of requiring Section 4 petitions to be heard summarily by a federal district court. Second, the parties' arbitration clause—an agreement to resolve disputes in a non-tribal forum and to have petitions to compel arbitration heard in "any court"—is a waiver of any otherwise applicable tribal exhaustion rule. Finally, the tribal exhaustion doctrine is inapplicable where, as here, there is no pending parallel proceeding in a tribal court. For the foregoing reasons, Nambe's motion to dismiss must be denied.

FACTS

World Fuel is a Texas corporation in the business of supplying fuel to distributors. [DE 1 ¶¶ 1–2.] Nambe is a federally-chartered corporation formed under Section 17 of the Indian Reorganization Act, 28 U.S.C. § 477. [*Id.* ¶ 3.] Nambe operates the Nambe Falls Travel Center, where it operates a gasoline station. [*Id.* ¶ 4.]

On May 17, 2017, World Fuel and Nambe entered into a Motor Fuel Supply Agreement (the "Agreement") by which Nambe agreed to purchase fuel from World Fuel. [*Id.* ¶ 7.] The parties' Agreement contains an arbitration clause, which states: "If any dispute arises between the parties over or in accordance with this Agreement and the parties, after good faith efforts, are unable to resolve the dispute between themselves, either party may serve notice in writing to the other of such dispute and demand that it be resolved through binding arbitration." [DE 9-1 ¶

18(a).] The arbitration clause provides that the arbitration panel "shall convene as soon as practicable" and that the panel "shall hear and decide the dispute within sixty (60) days of the notice to arbitrate." [*Id.*] The arbitration clause further provides that the panel's decision shall be "based on the laws of the State of New Mexico." [*Id.*]

The arbitration provision also contains an express waiver of Nambe's sovereign immunity from suit "for the limited and sole purposes of compelling arbitration or enforcing any binding arbitration decision . . . by any court having jurisdiction over the parties and the subject matter and for purposes of any such arbitration proceedings." [*Id.* ¶ 18(b)] (emphasis added). Separate and independent from that waiver in the Agreement, Nambe's corporate charter contains a "sue and be sued" clause, which states that Nambe "is expressly authorized and empowered . . . [t]o sue and be sued in its Corporate name in courts of competent jurisdiction within the United States."[1] [DE 1 ¶ 10.] That clause is another unequivocal waiver of sovereign immunity.

In May 2018, a dispute arose regarding unpaid taxes owed by Nambe to World Fuel under the parties' Agreement. [*Id.* ¶ 11.] After Nambe refused to pay an invoice from World Fuel for the amounts owed, World Fuel gave Nambe formal notice of the dispute and demanded arbitration pursuant to the terms of the Agreement. [*Id.* ¶¶ 12–13.] Nambe has not selected a

[1] The corporate charter waives sovereign immunity independently of the contractual waiver of sovereign immunity in the Agreement. *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989) ("One method in which express waiver may be made is by virtue of a provision allowing the tribe 'to sue or be sued,' found in the tribe's corporate charter."); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1304 (D.N.M. 2009) ("[T]here was tribal sovereign immunity by virtue of the § 477 corporate charter which was then unequivocally waived by the tribe's inclusion in the corporate charter of a 'sue and be sued' clause."). The narrower waiver in the Agreement does not negate the general waiver of immunity in the "sue and be sued" clause of Nambe's corporate charter—each waiver operates independently. *Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Cmty.*, 520 N.W.2d 167, 171 (Minn. Ct. App. 1994).

second arbitrator within ten days of its receipt of the notice as required by the Agreement, and has refused to proceed to arbitration. [*Id.* ¶ 13.]

On August 31, 2018, World Fuel filed a petition in this Court to compel arbitration pursuant to Section 4 of the FAA. [DE 1.] The petition expressly alleges that "[a]ll conditions precedent to the maintenance of this Petition have been performed, have been waived, or have occurred." [*Id.* ¶ 18.] Nambe moved to dismiss the petition solely on the ground that World Fuel did not exhaust tribal proceedings. According to Nambe, before World Fuel may avail itself of the summary procedures afforded under Section 4 of the FAA, which apply only to federal courts, it must bring its FAA claim in the Nambe tribal courts and engage in the exact type of protracted litigation about venue that the FAA was enacted to curb.

ARGUMENT

I. The issues raised in Nambe's motion to dismiss must be decided by arbitration.

Nambe's exhaustion argument is an issue to be decided in the first instance by arbitrators, not a court. Under the FAA, "procedural questions" such as whether the condition precedent of following a "grievance procedure" was satisfied "are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). An exhaustion of tribal proceedings argument is the exact type of "grievance procedure" argument that is reserved for an arbitrator. *See Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1060, 1068 (E.D. Ky. 2015) (holding that tribal exhaustion was issue for arbitrator to determine).

Though not expressly asserted as bases for dismissal, Nambe's contentions regarding the supposed invalidity of the parties' Agreement are likewise for the arbitrators to decide. The Supreme Court has held that "unless the challenge is to the arbitration clause itself, the issue of

the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006). "[A] a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Here, because Nambe's challenge is to the validity of the parties' agreement as a whole, and is not directed specifically to the arbitration clause, it is an issue for the arbitrators to first decide, not a court. *Id.*; *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case—as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene."). Accordingly, Nambe's motion to dismiss must be denied and the Court should summarily order the parties to arbitration.

II. Nambe's motion improperly relies on matters outside the four corners of World Fuel's petition.

To the extent the issues Nambe raises are for the Court to decide (they are not), it is axiomatic that a district court generally may not consider matters outside the four corners of the complaint on a motion to dismiss, and certainly may not consider matters directly contrary to the allegations in the complaint. *See, e.g., Archuleta v. Wagner*, 523 F.3d 1278, 1281 (10th Cir. 2008) (noting that, on a motion to dismiss, court is "limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint"). Nambe improperly relies on both. Nambe's motion to dismiss is almost entirely predicated on a self-serving affidavit of its CEO, which raises issues extrinsic to World Fuel's petition. At the pleading stage, the Court

must disregard the improper affidavit submitted by Nambe.

While motions to dismiss for lack of jurisdiction may be based on extrinsic evidence, Nambe's motion to dismiss is not based on a lack of jurisdiction. The Supreme Court has made clear that, when applicable, the tribal exhaustion doctrine "is required as a matter comity, not as a jurisdictional prerequisite." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). Accordingly, Nambe's motion raises no jurisdictional issue and the Court is confined to the four corners of World Fuel's petition, taking the factual allegations as true.

World Fuel undoubtedly states a claim under Section 4 of the FAA. In its petition, World Fuel alleges that it and Nambe entered into a written contract that includes an arbitration clause, and that Nambe has failed to arbitrate a dispute that has arisen between the parties and that is within the scope of the arbitration clause. [DE 1 ¶¶ 7–8, 11–13.] The petition also states that all conditions precedent to this suit have been performed, have been waived, or have occurred. Any counterfactual arguments that Nambe seeks to present—including regarding the validity of the Agreement or an affirmative defense regarding exhaustion of tribal proceedings—must be made at trial, not on a motion to dismiss.

The FAA expressly requires that if there is a factual issue (and the factual issue is for the court instead of the arbitrator to decide) "the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4; *see Howard v. Ferrellgas Partnes, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (Gorsuch, J.) ("What happens when it's just not clear whether the parties opted for or against arbitration? The FAA tells district courts to 'proceed summarily to the trial' of the relevant facts."). A court reversibly errs by summarily denying a petition to compel arbitration in the face of a factual dispute instead of proceeding to trial as required by the FAA's express terms. *Howard*, 748 F.3d at 978–79. Therefore, Nambe's motion to dismiss must be denied. At best,

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Nambe raises an issue for trial.

III. The tribal exhaustion doctrine is inapplicable to this case.

A. The tribal-court exhaustion doctrine is inapplicable to petitions to compel arbitration under Section 4 of the FAA, which may only be heard by federal courts.

1. The text and congressional policy of the FAA is inconsistent with a tribal exhaustion requirement.

The tribal exhaustion doctrine is merely a judicially-created, non-jurisdictional rule, which must yield in the face of contrary congressional directives, such as those in the FAA. To be sure, the purpose of the doctrine is to serve a congressional policy of promoting tribal self-governance. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999). It thus has no application where Congress has contrarily "expressed an unmistakable preference for a federal forum" or application of the doctrine would frustrate a "congressional policy of immediate access to federal forums." *Id.* at 484–86. Separately, the Supreme Court has held that the tribal exhaustion doctrine does not apply in cases where it is clear that the tribal court lacks jurisdiction and that the exhaustion requirement would serve "no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Thus, the inapplicability of the tribal exhaustion doctrine is even more apparent when Congress, through legislation such as the FAA, expresses a preference for a federal forum specifically because it intends to provide for speedy proceedings.

The FAA clearly expresses not just Congress's preference, but its requirement, that petitions brought under Section 4 of the FAA be heard by federal district courts: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such

arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (emphasis added). No other courts—including tribal courts—are empowered to hear petitions to compel arbitration brought under Section 4 of the FAA. Indeed, the FAA states: "The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." *Id.* (emphasis added).[2]

Confirming that Congress envisaged a federal forum, the FAA also provides that service of a petition to compel arbitration "shall be made in the manner provided by the Federal Rules of Civil Procedure" and that if a trial is warranted "the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose." *Id.* These provisions, too, demonstrate that the FAA contemplates that petitions to compel arbitration under Section 4 will be heard only in federal court. It would be absurd (and raise troubling issues of comity and tribal self-government, the very policies underlying the tribal exhaustion doctrine) to presume that Congress intended to foist the Federal Rules of Civil Procedure on tribal courts, which is what this Court would have to hold if it determined that the tribal exhaustion doctrine applied to petitions under Section 4 of the FAA. It is clear that Congress required Section 4 petitions to be heard by federal courts because it could only require federal courts to follow the summary procedures that Section 4 mandates.

Notably, the Supreme Court has repeatedly cautioned lower courts against inferring that its holding that the substantive law embodied in Section 2 of the FAA applies to state-court proceedings means that Section 4 of the FAA also applies to state-court proceedings—and has

[2] Furthermore, the title of Section 4 is "Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination." 9 U.S.C. § 4 (emphasis added).

strongly doubted that Section 4 applies to courts other than federal courts. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (stating that the FAA calls for "a procedural framework applicable in federal courts" while also providing for the application federal substantive law regarding arbitration in state and federal courts (emphasis added)); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476–77 & n.6 (1989) ("While we have held that the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court." (emphasis added; internal citations omitted)); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) ("In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings." (emphasis added)). The reason is obvious: Section 2 does not contain the textual limitations of applicability to only federal district courts that are contained in Section 4. *See Volt*, 556 U.S. at 477 & n.6 (noting that argument that Section 4 only applies to federal district courts "is not without some merit" and noting the express textual limitations in Section 4 of applicability to only federal courts).

Corresponding to the requirement of a federal forum, under the FAA a federal district court must exercise its jurisdiction when confronted with a petition to compel arbitration. The FAA's language is mandatory. It states that "[t]he court shall hear the parties." 9 U.S.C. § 4 (emphasis added). It further states that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order

directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* (emphasis added); *see also id.* ("If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."); *id.* ("If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue."); *id.* ("Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose."); *id.* ("If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.") (all emphases added).

Again, such congressional commands could only be made to federal courts, which is why Congress required a federal forum in the first place. *See Keating*, 465 U.S. at 16 n.10 ("Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings."); *Whitfield v. City of Knoxville*, 756 F.2d 455, 461 (6th Cir. 1985) ("As a general rule, neither Congress nor the federal courts may require state courts to follow federally preferred procedures."); *Wilson v. U.S. Dep't of Agric., Food & Nutrition Serv.*, 584 F.2d 137, 141 (6th Cir. 1978) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.").

There is no room for a tribal exhaustion requirement in this mandatory congressional

directive to federal courts to exercise jurisdiction and follow summary procedures.[3] *Cf. Dean Witter Reynold, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."). To infer such an exhaustion requirement, without any support in the text of the FAA, would frustrate both Section 4's requirement of "an expeditious and summary hearing" and the "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22–23 (1983) (emphasis added); *see also id.* at 29 ("The Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses."). As then-Judge Gorsuch put it, speaking for the Tenth Circuit, when describing the FAA: "The object is always to decide quickly—summarily—the proper venue for the case, whether it be the courtroom or the conference room, so the parties can get on with the merits of their dispute." *Howard*, 748 F.3d at 977 (Gorsuch, J.). Applying an exhaustion doctrine would mean that a party could never take advantage of the quick resolution offered by Section 4 of the FAA, as satisfying the exhaustion requirement would always add delay. *Cf. Preston*, 552 U.S. at 357.

The Supreme Court's unanimous decision in *Neztsosie* is particularly instructive. There, the Court considered whether the tribal exhaustion doctrine applies to claims brought under the

[3] And if Congress wanted to except arbitration agreements involving Native American tribal corporations from enforcement in federal courts under Section 4 of the FAA, it easily could have done so. *See, e.g.*, *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1152 (10th Cir. 2011) ("Congress specifically exempted Indian tribes from the definition of 'employers' subject to Title VII's requirements."). In the FAA itself, Congress expressly excepted FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Congress's silence regarding other exceptions demonstrates its intent to not make an exception for other arbitration agreements—including those with tribal corporations.

Price-Anderson Act. The Court held that, regardless of whether a tribal court would have jurisdiction over Price-Anderson claims, the comity rationale underlying the tribal exhaustion doctrine does not apply to such claims because Congress "expressed an unmistakable preference for a federal forum" for litigating them. *Neztsosie*, 526 U.S. at 484–85. The Court reasoned that "[a]ny generalized sense of comity toward non-federal courts is obviously displaced" by the statutory provisions from which the Court inferred a preference for a federal forum. *Id.* at 485.

Further, the Court explained that the reasons underlying the Act's "congressional policy of immediate access to federal forums are as much applicable to tribal—as to state—court litigation." *Id.* at 485–86 (emphasis added). Citing provisions of the statute that provided particular procedures to apply in federal district court, the Court explained that the Act "provides clear indications of the congressional aims of speed and efficiency." *Id.* at 486. Requiring tribal exhaustion would invite precisely the inefficiencies that Congress sought to avoid. *Id.* at 486–87 ("[T]he Act's insistence on efficient disposition of public liability claims . . . would of course be curtailed by an exhaustion requirement. It is not credible that Congress would have uniquely countenanced, let alone chosen, such a delay when public liability claims are brought in tribal court."). Accordingly, tribal exhaustion was not required.

Because Congress expressly required a federal forum for Section 4 petitions in the plain text of the FAA, as discussed *supra*, the Court here need not infer a "preference" for a federal forum for claims bought under Section 4 of the FAA. And like in the Price-Anderson Act, Congress provided for specific procedures in the FAA to be followed by federal district courts adjudicating Section 4 petitions to ensure prompt and efficient resolution. *See, e.g.*, *Moses H. Cone*, 460 U.S. at 29 ("The Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses."); *Howard*, 748 F.3d at 978 (Gorsuch, J.)

("The Act requires courts process the venue question quickly so the parties can get on with the merits of their dispute in the right forum."). Requiring exhaustion would thwart both Congress's requirement of a federal forum and its policy goal of speedy resolution—either of which alone is sufficient to determine that the comity rationale of the tribal exhaustion requirement yields to Section 4 of the FAA.

The Supreme Court's decision in *Preston* also demonstrates that the tribal exhaustion doctrine is inapplicable here. In *Preston*, the Court held that the FAA displaced a state law that delayed arbitration until state administrative proceedings were exhausted. 552 U.S. at 349–50, 356–59. An attorney who provided services to those in the entertainment industry got into a fee dispute with his client, television personality "Judge Alex." *Id.* at 350. The attorney made a demand for arbitration pursuant to the parties' agreement, but the client petitioned the California Labor Commissioner to determine that the parties' contract was void under the California Talent Agencies Act (TAA) because the attorney acted as a talent agent without a license as required by the TAA. *Id.* The attorney sought to compel arbitration, but the lower court held that the attorney first had to exhaust administrative remedies before the California Labor Commissioner. *Id.* at 351.

The Supreme Court reversed, holding that "the FAA overrides a state law vesting initial adjudicatory authority in an administrative agency." *Id.* at 351–52.[4] The reason for the Court's decision was that imposing an exhaustion requirement would unduly delay the proceedings "in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Id.* at 357. (emphasis added).

The parallels between this case and *Preston* are striking. In both cases, the plaintiff filed

[4] The Court also held that the question of whether the parties' contract was void under the TAA should have first been determined by an arbitrator, not an administrative agency. *Id.* at 353–54.

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an action to compel arbitration and the defendant sought to require the plaintiff to first exhaust proceedings in some other forum that would hear, prior to the arbitrator, a dispute about the validity of the parties' agreement. Although *Preston* involved an exhaustion of state administrative proceedings to litigate the validity of the parties' Agreement, while here Nambe seeks to require exhaustion of tribal proceedings to litigate the validity of the parties' Agreement, this is a distinction without a difference. Indeed, in *Preston* itself, the Court rejected a proposed distinction between judicial and administrative proceedings, and opted for an expansive view of the FAA that "supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359. Just as the FAA precludes state administrative exhaustion, it precludes tribal exhaustion. The Court's decision in *Neztsosie* makes clear that the rationales for federal displacement of state-court proceedings are equally applicable to displacement of tribal proceedings. 526 U.S. at 485–86 ("The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal—as to state—court litigation.").

Here, there is no reason to single out tribal exhaustion as an unwritten exception to Congress's policy of speedy resolution of Section 4 petitions. The important point is that, regardless of whether the other forum is a state administrative agency or a tribal court, a requirement to exhaust proceedings in another forum necessarily engenders a delay that contravenes "Congress's intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston*, 552 U.S. at 357. Indeed, Nambe's correct assertion that the tribal exhaustion doctrine also requires exhaustion of tribal appellate proceedings means that the delay Nambe seeks to impose here would be at least doubly worse than that found impermissibly inconsistent with the FAA in *Preston*.

In short, the FAA demonstrates a congressional policy of rapid adjudication of petitions to compel arbitration disputes and an unmistakable congressional preference, if not requirement, for federal courts to hear petitions to compel arbitration properly brought under Section 4 of the FAA. 9 U.S.C. § 4 (party "may petition any United States district court," which "shall hear the parties" and "proceed summarily"). A requirement to initially exhaust tribal proceedings before petitioning this Court to compel arbitration is inconsistent with the FAA and disserves well-established congressional policy. *Howard*, 748 at 978 (Gorsuch., J.) ("FAA requires 'an expeditious and summary hearing, with only restricted inquiry into factual issues.'" (quoting *Moses H. Cone*, 460 U.S. at 22)). The tribal exhaustion doctrine is therefore inapplicable.

2. The Court should not follow the non-binding cases that Nambe cites.

Nambe cites several cases—none of which are binding—for the proposition that the tribal exhaustion doctrine applies to World Fuel's petition to compel arbitration under Section 4 of the FAA. Upon closer inspection, however, each of these cases are distinguishable or do not address the arguments that World Fuel raises here (or both), and thus should not be given any weight. The Tenth Circuit has never ruled on the issue of tribal exhaustion in the context of a petition under Section 4 of the FAA. This Court need not—and should not—blindly follow cases from other circuits that are based on distinguishable circumstances and that did not even consider the arguments raised here.

First, the Second Circuit's decision in *Basil Cook Enterprises v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997), is based on wholly distinguishable facts and did not consider any of the arguments that World Fuel raises here. In *Basil Cook*, the plaintiffs filed their petition to compel arbitration only after the tribe had sued them in tribal court. *Id.* at 64. The Second Circuit expressed concern about interfering with the tribal court's determination of its own jurisdiction

in an already pending proceeding. *Id.* at 65. The court also noted the intra-tribal nature of the parties' dispute—the plaintiffs were tribal members and the corporate defendant was controlled by tribal members. *Id.* at 66. Neither of those facts—an already-pending tribal proceeding nor an intra-tribal dispute—are present in this case.

Furthermore, in *Basil Cook*, the plaintiffs did not make, and the court did not consider, any arguments regarding the text or congressional policy of the FAA. Instead, the plaintiffs' sole challenge to the applicability of the tribal exhaustion doctrine was that the tribal court at issue was a nullity, and thus lacked any jurisdiction, because it was created in violation of the tribal constitution. *Id.* at 66. Such a challenge directly implicates an area of tribal expertise and a concern for allowing the tribal court to rule on the issue so as not to infringe on tribal self-government. It is starkly different from World Fuel's basis for challenging the applicability of the tribal exhaustion doctrine in this case, which implicates the text and intent of the FAA rather than an area of tribal expertise.

Unsurprisingly, when the Second Circuit was faced with different facts and arguments, it distinguished *Basil Cook*. In *Garcia v. Akwesasne Housing Authority*, the Second Circuit held that the tribal exhaustion doctrine did not apply to a case where there was no pending proceeding in tribal court. 268 F.3d 76, 83 (2d Cir. 2001). It explained that in *Basil Cook* exhaustion was appropriate because "the plaintiff was litigating a previously-filed, ongoing tribal court action, and was asking the federal court to interfere with those tribal proceedings." *Id.* at 80. Contrarily, the reasoning of such cases "and the policy considerations that underlie them militate in favor of the opposite result in this case: the comity and deference owed to a tribal court that is adjudicating an intra-tribal dispute under tribal law does not compel abstention by a federal court where a non-member asserts state and federal claims and nothing is pending in the tribal court."

Id.

The Second Circuit reasoned that "the existence of a federal proceeding does not implicate or in any way impair the authority of the tribal court to proceed" and noted that "[i]f a tribal proceeding were pending, our analysis might well be different." *Id.* at 83. Adding to its analysis and its distinguishing of *Basil Cook*, the court explained that the dispute was based on federal and state law, not tribal law, and the plaintiff was not a tribal member so the dispute was not "intra-tribal." *Id.* The court thus held that "where no ongoing tribal proceeding exists, and a non-member of the tribe properly invokes the jurisdiction of a federal court to litigate non-tribal law, the tribal exhaustion rule does not mandate abstention, and the district court must therefore fulfill its unflagging obligation to exercise its discretion." *Id.* at 84.

Notably, each case Nambe relies on for the proposition that tribal exhaustion is required when a plaintiff seeks to compel arbitration was animated by the fact that the plaintiff filed a suit to compel arbitration only in response to the tribe or tribal member already filing suit in tribal court. *See Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 846 (8th Cir. 2003) ("Approximately one month after the Band filed its action in tribal court, Gaming World filed this petition in federal court seeking a declaratory judgment that the March 6, 1992 agreement is valid as approved by IBIA, as well as an order compelling arbitration."); *Bank One, N.A. v. Shumake*, 281 F.3d 507, 510 (5th Cir. 2002) ("Upon receipt of notice of the Tribal Court actions, Bank One promptly filed suits in the federal district court under § 4 of the FAA against each Cardholder seeking to compel arbitration of their Tribal Court claims . . . ."); *LECG, LLC v. Seneca Nation of Indians*, 518 F. Supp. 2d 274, 277 (D.D.C. 2007) ("LECG filed suit in this Court seeking enforcement of a binding arbitration provision when an action involving the same issues had been pending in Peacemakers Court for six months.").

While the Tenth Circuit has held that a parallel tribal proceeding is not required for the tribal exhaustion requirement to apply, it has not held that the absence of such a parallel proceeding is irrelevant to the analysis. To the contrary, the language it has used suggests an individualized case-by-case approach is necessary.[5] Indeed, other courts, while doubting that the tribal exhaustion doctrine applies in the absence of a pending tribal proceeding, have noted that "even Circuits favoring a broad reading of the tribal exhaustion rule find it necessary to examine the factual circumstances of each case." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993) (citing the Tenth Circuit as example of such circuits favoring a broad reading).

In *Altheimer*, the court held that even if it followed the approach of the circuits that applied the doctrine in cases where there was no pending tribal proceeding, it would still not apply the doctrine based on the lack of a pending tribal proceeding combined with other factors, including a choice-of-law clause that chose non-tribal law. *Id.* ("The tribal court's potential task of interpreting unfamiliar law, however, does show the dissimilarity of the present case as compared with *National Farmers* and *Iowa Mutual.* Here, there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law.").

Here, these factors and more are present and demonstrate that any comity concerns are at their lowest in this case. There is no pending tribal proceeding. The parties' contract requires that it be interpreted according to New Mexico state law. The FAA requires the application of federal

[5] *See, e.g., United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) (stating only that the exhaustion rule "does not require" a parallel tribal proceeding to apply); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) ("The fact that Smith apparently has not yet presented his case to a tribal court does not diminish the comity considerations present in this case." (emphasis added)).

substantive law regarding arbitration. The parties' dispute is not intra-tribal. The contract expressly provides for a petition to compel arbitration being heard in "any court having jurisdiction" (thus demonstrating an agreement to litigation in non-tribal courts). The arbitration clause itself is a type of forum-selection clause that selects a non-tribal forum for adjudication. Indeed, the Agreement recognizes the need for moving quickly, as it provides that the arbitration should conclude within 60 days of the formal demand for arbitration. These facts render the contrary case law cited by Nambe completely distinguishable and inapposite.

More importantly, none of the cases cited by Nambe for the misleadingly overbroad proposition that "duty to exhaust tribal remedies applies even when plaintiff seeks to compel arbitration under the Federal Arbitration Act" have addressed the specific arguments raised in this response. In particular, none of the cases have grappled with the plain text of Section 4 of the FAA, including Congress's requirement of a federal forum for Section 4 petitions and its mandate of particular procedures to be employed by the federal district court to further the policy of rapid adjudication.[6] Nor have they considered the Supreme Court's analogous and more recent

[6] In *Shumake*, the Fifth Circuit considered *Neztsosie* but not the plain language of the FAA. The Fifth Circuit found *Neztsosie* inapplicable primarily because the FAA does not provide an independent basis for federal subject-matter jurisdiction. (The Fifth Circuit also unpersuasively distinguished the Price-Anderson Act on the ground that Price-Anderson provides a federal forum to resolve the merits of a controversy. But the FAA still requires a federal forum to resolve the merits of the Section 4 petition.) But that distinction is irrelevant for several reasons. In *Neztsosie*, the Supreme Court considered the Price-Anderson Act's independent grant of jurisdiction as evidence of Congress's preference for a federal venue, not as a requirement for its holding to apply to other statutes. Here, the FAA expressly requires that a federal court adjudicate Section 4 petitions, and supplies procedures that Congress may only require of a federal court. There is no need to imply a preference for a federal forum in the FAA when one is expressly required. Furthermore, the fact that the FAA does not apply to petitions where the underlying controversy is outside the scope of federal subject-matter jurisdiction does not change the fact that it does apply to petitions, such as World Fuel's, that undisputedly are based on an underlying controversy for which there would be federal subject-matter jurisdiction. Finally, *Shumake* predates, and thus does not address, *Preston*, which made clear that Congress's goal of speedy resolution of arbitration petitions overrides exhaustion requirements that inevitably—and

decision in *Preston* holding that the delays inherent in an exhaustion requirement are inconsistent with, and must give way to, the congressional policy embodied in the FAA of resolving arbitration-enforcement disputes "as quickly and easily as possible." *Preston*, 552 U.S. at 357. Accordingly, this Court should perform an independent analysis rather than blindly rely on non-binding cases with distinguishable facts and incomplete analyses. Such an analysis compels the conclusion that the tribal exhaustion doctrine is inapplicable to this case.

B. Nambe contractually waived any requirement to exhaust tribal proceedings.

In their Agreement, Nambe expressly agreed "to waive its immunity protection for the limited and sole purposes of compelling arbitration or enforcing any binding arbitration decision . . . by any court having jurisdiction over the parties and the subject matter and for purposes of any such arbitration proceedings." [DE 9-1 ¶ 18(b)] (emphasis added). In other words, Nambe agreed to have "any court" of competent jurisdiction preside over an action to compel arbitration. Nambe thus waived any requirement that tribal proceedings be exhausted.

The Supreme Court's decision in *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), is instructive. In *C & L*, the parties' contract contained an arbitration clause and an agreement to the enforcement of the arbitration clause or arbitral awards "in any court having jurisdiction thereof." *Id.* at 414–15. When sued in state court in an action to enforce an arbitration award (rendered in an arbitration in which the tribe refused to participate), the tribe asserted that the state court lacked jurisdiction due to the tribe's sovereign immunity. *Id.* at 416, 420–21. The tribe argued that nothing in the contract expressly waived its sovereign immunity, and that no court was a "court having jurisdiction" because the tribe never waived its sovereign immunity. *Id.* at 421.

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contrary to congressional policy—delay proceedings.

The Supreme Court rejected the tribe's argument. It held that it was irrelevant that the contract did not use the express words "sovereign immunity" because the clear import of having an arbitration agreement is allowing judicial enforcement of an arbitration award. *Id.* at 422. ("The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration."). The Supreme Court agreed that the arbitration clause would be meaningless if it did not constitute a waiver of sovereign immunity. *Id.* Thus, the arbitration clause in the parties' contract was an express waiver of sovereign immunity and the state court could enforce the arbitration award. *Id.* at 422–23.

Here, the arbitration clause contains an express reference to immunity and "any court having jurisdiction." [DE 9-1 ¶ 18(b).] Just like the lack of an express reference to immunity in the contract in *C & L* did not bar a finding of a waiver of sovereign immunity, the lack of reference to "exhaustion of tribal proceedings" does not mean that Nambe did not waive an exhaustion defense. As *C &L* instructs, the Court must look to the "real world end" of what Nambe did agree to. 532 U.S. at 422. The "real world end" of agreeing to the enforcement of the arbitration clause in "any" court having jurisdiction[7] is that Nambe does not insist on an action compelling arbitration to be heard in a tribal court. Otherwise, the agreement to "any court" would be meaningless. "Any court" cannot mean "only the tribal court." *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (holding that, where parties' forum-selection

[7] For the reasons stated in Part A *supra*, the tribal court is not even a court that has jurisdiction over claims brought under Section 4 of the FAA. Only federal district courts may hear such claims.

clause provided for disputes to be determined in "in the Oglala Sioux Tribal Court or other court of competent jurisdiction," tribal exhaustion was not required because the tribe agreed that plaintiff could sue either in the federal district court (a court of competent jurisdiction) or in the tribal court and thus it agreed that disputes need not be litigated in tribal court).

C. Tribal exhaustion does not apply when there are no parallel proceedings.

The tribal exhaustion doctrine applies only when there are parallel proceedings pending in the tribal court at the time the federal action is filed.[8] The purpose of the doctrine is to allow the tribal court the first opportunity to determine its own jurisdiction before a federal court espouses its view of the tribal court's jurisdiction. Here, unlike in every Supreme Court case to apply the doctrine, no parallel proceeding is pending in any tribal court. And World Fuel has not filed this action to challenge the jurisdiction of any tribal court while depriving the tribal court of the first opportunity to determine its jurisdiction. Indeed, this case has nothing to do with the jurisdiction of any tribal court. Instead, this case was filed to enforce World Fuel's contractual

[8] World Fuel recognizes that the Tenth Circuit has stated that the tribal exhaustion doctrine may apply even when no parallel tribal proceedings are pending. However, the specific question of whether the tribal exhaustion doctrine applies when there are no pending parallel proceedings in a tribal court is the subject of a pending petition for a writ of certiorari for which the Supreme Court has entered an order calling for the views of the Solicitor General ("CVSG"). *See* Petition for Writ of Certiorari, *Harvey v. Ute Indian Tribe of Uintah ab Ouray Reservation*, Case No. 17-1301 (March 7, 2018), *available at* https://www.supremecourt.gov/DocketPDF/17/17-1301/38004 /20180307131150405_Harvey%20v.%20UTE%20et%20al.%20Petition.pdf. Of the 7,000 to 8,000 petitions for certiorari that the Supreme Court receives each year, it grants a CVSG order in only about 25 petitions per term. A CVSG order significantly increases the odds that the Court will grant certiorari. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 273–74 & n.153 (2009).

Moreover, while the Tenth Circuit has held that the absence of a parallel tribal proceeding is not a bar to the application of the tribal exhaustion doctrine, the Tenth Circuit recognizes that the question of whether to apply the doctrine still should be analyzed based on the facts of the particular case. *See, e.g.*, *Smith*, 947 F.2d at 444 ("The fact that Smith apparently has not yet presented his case to a tribal court does not diminish the comity considerations present in this case." (emphasis added)).

right to arbitrate a contractual dispute between the parties. The tribal exhaustion doctrine is simply inapposite. As multiple federal and state courts have persuasively explained, the doctrine is inapplicable in the absence of a pending tribal proceeding.[9] For this reason, too, Nambe's motion should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Nambe's motion to dismiss.

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Respectfully submitted,

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[9] *See, e.g.*, *Garcia*, 268 F.3d at 80 ("We conclude that the reasoning of these cases and the policy considerations that underlie them militate in favor of the opposite result in this case: the comity and deference owed to a tribal court that is adjudicating an intra-tribal dispute under tribal law does not compel abstention by a federal court where a non-member asserts state and federal claims and nothing is pending in the tribal court."); *Altheimer*, 983 F.2d at 814 (concluding that tribal exhaustion was not required because "there has been no attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law"); *Coeur d'Alene Tribe v. Johnson*, 405 P.3d 13, 19 (Idaho 2017) ("Because there is no pending action before the Tribal Court, the doctrine of exhaustion of tribal remedies is not applicable."); *Seneca v. Seneca*, 741 N.Y.S.2d 375, 379 (N.Y. App. Div. 2002) (holding that the tribal remedies exhaustion doctrine "does not apply to this case because there is no action pending in a . . . tribal court"); *Drumm v. Brown*, 716 A.2d 50, 64 (Conn. 1998) ("We conclude that exhaustion is not required in the absence of a pending action in the tribal court.").

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CERTIFICATE OF SERVICE

I certify that on October 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will serve a copy by email to all counsel of record.

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