IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRANKLIN J. MORRIS, as Personal Representative of the Wrongful Death Estate of MARCELLINO MORRIS, JR., (Deceased),

Plaintiff,

vs. No. 1:15-cv-00055-JCH-LF

GIANT FOUR CORNERS, INC. d/b/a GIANT #7251 and ANDY RAY DENNY, an Individual,

Defendants.

DEFENDANT GIANT FOUR CORNERS, INC.'S RULE 12(B)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR WRONGFUL DEATH OR, IN THE ALTERNATIVE, TO STAY THE CASE PENDING PLAINTIFF'S EXHAUSTION OF HIS TRIBAL COURT REMEDIES

Plaintiff Franklin J. Morris filed this lawsuit on behalf of Marcellino Morris, Jr., in New Mexico state court in December 2014. But Plaintiff previously filed a virtually identical complaint in the Navajo Nation tribal court, almost one year earlier, on January 13, 2014. By filing that lawsuit in that court first, Plaintiff affirmatively elected the Navajo Nation tribal court as the proper forum in which to pursue the claims that he now attempts to bring in this Court. But Defendant Giant Four Corners filed a motion for summary judgment in the tribal court proceeding because Plaintiff failed to timely file that complaint under the Navajo Nation Code's two-year statute of limitations. It was only after Plaintiff interacted with the tribal court, during the tribal court's hearing on Giant Four Corners' summary judgment motion, that Plaintiff filed this case's complaint in state court. In March 2015, the Navajo National tribal court dismissed

Plaintiff's complaint as untimely. Plaintiff's appeal of that dismissal to the Navajo Nation Supreme Court is currently pending.

At best, Plaintiff's present lawsuit that is before this Court is nothing more than Plaintiff asking for a second bite at the apple, and improper forum shopping at worst. Under comity principles and the res judicata doctrine, this Court should give preclusive effect to the Navajo Nation tribal court's dismissal. Giant Four Corners, therefore, moves this Court, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Plaintiff's complaint, or in the alternative, to stay further proceedings pending resolution of Plaintiff's appeal pending in the Navajo Nation Supreme Court.

BACKGROUND

This case arises from a two-car crash that occurred within the Navajo Nation on December 30, 2011, which resulted in the death of Marcellino Morris, Jr. (*See* Compl. for Wrongful Death Case, filed Dec. 18, 2014 in New Mexico state court ("State Complaint"), attached as Exhibit A to Def.'s Notice of Removal [Doc. 1].) Marcellino Morris, Jr., was a member of the Navajo Nation. (*See* Compl. for Wrongful Death and Jury Demand, filed Jan. 13, 2014 in the District Court of the Navajo Nation ("Tribal Complaint"), attached as Ex. A). Plaintiff was a resident of Tohatchi, New Mexico, which also is located within the Navajo Nation. (*See id.*)

On January 13, 2014, Plaintiff filed his Tribal Complaint in the District Court of the Navajo Nation, Judicial District of Crownpoint, New Mexico, affirmatively invoking the Navajo Nation tribal court's civil jurisdiction. Plaintiff named the same parties as defendants in the Tribal Complaint as he names in the State Complaint, alleged virtually identical facts common to all counts, and alleged the same causes of action. (*Compare* State Complaint at 1, ¶¶ 10-39, ¶¶

47-55, ¶¶ 58-65, ¶¶ 66-73, *with* Tribal Complaint at 1, ¶ 11-40, ¶¶ 48-56, ¶¶ 60-67, ¶¶ 68-76.) Plaintiff affirmatively pleaded that the Navajo Nation tribal court has both subject-matter and personal jurisdiction over these same claims. (*See* Tribal Complaint ¶¶ 8-9.)

On July 31, 2014, Giant Four Corners moved for summary judgment under the Navajo Rules of Civil Procedure on the grounds that "based on the statute of limitation, relying only on evidence that Plaintiff produced in response to discovery," Plaintiff filed his Tribal Complaint after expiration of the Navajo Nation Code's 2-year limitations period. (Mot. for Summ. J. Based on Statute of Limitation at 1, 3 (citing 7 N.N.C. § 602(A)(1)), relevant portions of which are attached as Ex. B.) Plaintiff responded to the summary judgment motion asserting, in part, that he "commenced" the lawsuit in tribal court "on December 27, 2013," and that the claims were therefore "not time-barred." (Resp. in Opp'n to Def.'s Mot. for Summ. J. at 1, relevant portions of which are attached as Ex. C.)

On September 16, 2014, the Honorable Irene Toledo issued an order that included findings of fact and conclusions of law, in which she determined that "there is one material fact in dispute and that is *when the Complaint was officially filed with the Court*." (Order at 2 (emphasis in original), attached as Ex. D.) Judge Toledo ordered counsel for both parties to "appear for a hearing on the motion for summary judgment filed by Defendant Giant with a focus on the issue noted in this order." (*Id.*)

On October 29, 2014, Judge Toledo held the hearing on the summary judgment motion, at which counsel for all parties attended. The parties presented oral arguments on the statute of limitations issue. (*See* Order (Summary Judgment) at 1, attached as Ex. E.)

Less than two months after the hearing on Giant Four Corners' summary judgment motion, on December 18, 2014, Plaintiff filed his State Complaint. Conspicuously absent from

this second complaint is any mention of Plaintiff's identical proceeding pending in Navajo Nation tribal court. Giant Four Corners timely removed the State Complaint to this Court in January 2015.

On March 10, 2015, Judge Toledo granted summary judgment, ruling that "[t]he *original* Complaint for Wrongful Death and Jury Demand was filed with the [Navajo Nation] Court on January 21, 2014,' and that "Plaintiff's Complaint was filed after the two (2) year Statute of Limitations." (Order (Summary Judgment) ¶¶ 4-5, at 1.)

Plaintiff has appealed the Navajo Nation tribal court's dismissal of the Tribal Complaint to the Navajo Nation Supreme Court. (*See* Rule 10(b) Notice, attached as Ex. F.) The appeal has been fully briefed and is awaiting decision by the Navajo Nation Supreme Court.

For the past ten months, Plaintiff was provided the opportunity to develop additional facts to support claims that he did not bring in the tribal court proceeding. He did not do this. And because Plaintiff did not develop any additional theories or claims, it is now clear that Plaintiff brings this lawsuit for the sole purpose of attempting to relitigate in this Court the exact same claims that the Navajo Nation tribal court already decided. Comity principles and the res judicata doctrine bar Plaintiff from proceeding any further in this forum.

This Court should give effect to the Navajo Nation tribal court's final judgment in Giant Four Corners' favor and dismiss Plaintiff's State Complaint because he chose to pursue his claims in the forum of the Navajo Nation tribal court and the res judicata doctrine precludes him from relitigating those claims here.

LEGAL AUTHORITIES

A. Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

"The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). "Generally, the sufficiency of a complaint must rest on its contents alone." *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1192 (D.N.M. 2013) (Browning, J.) (citing *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010)). And a court asked to consider matters outside of the pleadings must generally convert that motion into a summary judgment motion. *See* Fed. R. Civ. P. 12(d). There are three exceptions to this general rule, however, which allow the court to consider particular matters outside the pleadings without converting the motion to dismiss into a summary judgment motion. *See Goldstone*, 952 F. Supp. 2d at 1192 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)). One of those exceptions is that a court may consider matters outside of the pleadings "'of which the court may take judicial notice.'" *Id.* (quoting *Tellabs, Inc.*, 551 U.S. at 322). "[I]f a party requests that the court take judicial notice of certain facts and supplies the necessary information to the court, judicial notice is *mandatory*." *Id.* (citing Fed. R. Evid. 201(d)).

Under this judicial notice exception to the Rule 12(b)(6) general rule, "[i]t is settled that the district court can take judicial notice of . . . records in a prior case involving the same parties." *Merswin v. Williams Cos.*, 364 F. App'x 438, 441 (10th Cir. 2010) (unpublished) (citing *Amphibious Partners, LLC v. Redman*, 534 F.3d 1357, 1361-62 (10th Cir. 2008); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979)).

B. The principles of comity that guide the effect of tribal court judgments in federal courts.

"Tribal 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 (1987) (internal citation omitted). "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978). For this reason, "[t]he Supreme Court . . . has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).

Also for this reason, the federal courts, including the United States Court of Appeals for the Tenth Circuit, give effect to civil judgments rendered by the tribal courts. *See U.S. v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011); *Burrell*, 456 F.3d at 1159. In the Tenth Circuit, a tribal court judgment is entitled to preclusive effect under the res judicata doctrine. *See Burrell*, 456 F.3d at 1167 ("The threshold issue on appeal is whether any grounds exist that would prevent us from giving preclusive effect or otherwise recognizing the tribal court's . . . decision."). "'[U]nless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering the issues decided by the tribal court.'" *Id.* at 1168 (quoting *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002)).

Federal district courts within the Tenth Circuit analyze whether to give preclusive effect to a "tribal judgment under principles of comity derived from foreign relations law." *Shavanaux*, 647 F.3d at 998 (citing *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)). The Tenth Circuit instructed lower courts to look to the criteria enumerated in the Restatement (Third) of

Foreign Relations § 482 ("Restatement") when assessing whether to recognize tribal judgments under comity principles:

> The Restatement lists two grounds upon which a court in the United States must refuse to recognize the judgment of a foreign court: (1) "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law"; or (2) "the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421."

Id. at 999 (internal citations omitted). The Tenth Circuit adhered to this Restatement analysis in several recent cases.

In its most recent decision regarding recognition of tribal judgments under comity principles, the Tenth Circuit gave effect to tribal court judgments that the defendant contended were rendered under procedures incompatible with due process, finding compelling the policy that a refusal to give effect to "valid judgments of a foreign jurisdiction according to that sovereign's laws . . . . risks imposing inappropriately sweeping standards upon diverse tribal governments, institutions and cultures." *Shavanaux*, 647 F.3d at 999-1000 (internal quotation marks & citations omitted).

Before that, with regard to the first Restatement criterion, the Tenth Circuit held that a tribal court judgment indicated a lack of procedures compatible with due process, where there was a close relationship between tribal officials who were named defendants in the tribal proceeding, where the one-page order was issued by a newly appointed judge, rather than the former judge who presided over the two-day evidentiary hearing, and where there was no means to appeal of the judgment. *Burrell*, 456 F.3d at 1173. With regard to the second Restatement criterion, the Tenth Circuit held that "amorphous and incomplete" temporary restraining orders issued by a tribal court were not entitled to preclusive effect where it held that "the Navajo

Nation court did not possess jurisdiction over" the vast majority of the plaintiffs' claims. *MacArthur v. San Juan County*, 497 F.3d 1057, 1076 (10th Cir. 2007).

Other state and federal courts also rely on Restatement § 482 to analyze whether to give preclusive effect to tribal judgments. *See Bird v. Glacier Elec. Coop.*, 255 F.3d 1136 (9th Cir. 2000) (cited with approval in *MacArthur*, 497 F.3d at 1067); *Beltran v. Harrah's Arizona Corp.*, 202 P.3d 494, 498 (Ariz. Ct. App. 2008).

In *Beltran*, the Arizona Court of Appeals relied on principles of comity and Restatement § 482 to give preclusive effect to a tribal court judgment entered because the tribal law statute of limitations had run. *See Beltran*, 202 P.3d at 498. In that case, the plaintiffs filed a complaint in the Ak-Chin Indian Community Court in July 2006 based on a trip-and-fall accident that occurred inside Harrah's Ak-Chin Casino in August 2005. *Id.* at 496. In June 2007, the tribal court dismissed the plaintiffs' complaint for their failure to add the Ak-Chin Indian Community ("Community"), an indispensable party, as a defendant. *Id.* Because the Community's laws provided a one-year limitations period for personal-injury claims, and because the plaintiffs consciously decided not to add the Community as a defendant when they filed the original complaint, the tribal court concluded that an amendment to add the community would not relate back, and thus dismissed the suit. *Id.* The plaintiffs appealed the tribal court's dismissal to the Southwest Intertribal Court of Appeals. While the appeal was pending, the plaintiffs filed a separate complaint in Arizona state court. *Id.* The defendants moved to dismiss the state court complaint based on res judicata and collateral estoppel, and the state trial court granted that motion, reasoning: "Plaintiff elected to file his litigation in the Ak-Chin Community Court. Having elected to seek his remedy there, he is collaterally estopped from re-litigating the issue in this Court.'" *Id.* (citation omitted).

On appeal to the Arizona Court of Appeals, the plaintiffs argued that the "tribal court judgment should 'not have been recognized nor given any effect whatsoever' because the tribal court had been 'biased' against them, the judgment had been obtained through 'deception' by appellees' counsel, and recognition of the judgment would be contrary to Arizona public policy." *Id.* at 498. Analyzing the appeal under the comity principles articulated in Restatement § 482, the Arizona Court of Appeals noted that the plaintiffs' first argument -- that the tribal was biased against them -- was "essentially, an allegation that they were denied due process." *Id.* The plaintiffs alleged fraudulent or deceptive acts done to them by the Community's counsel throughout the litigation in tribal court. But the Arizona Court of Appeals found that the record did not support these contentions. *Id.* at 498-99. The Arizona Court of Appeals also rejected the plaintiffs' contention that, given that the tribal court refused their request to amend their complaint, public policy and fairness weighed against giving effect to the tribal court judgment in the Arizona state court. The Arizona Court of Appeals pointed out that, while a mistake may weigh in favor of allowing amendment instead of dismissal, it did not in this case, because the plaintiffs made a conscious litigation decision not to name the Community as a defendant. So neither fairness nor public policy weighed in favor of granting them relief from the proper dismissal that resulted from that litigation decision. *Id.* at 499-500.

C. The res judicata doctrine and claim and issue preclusion.

"Under res judicata . . . a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the prior action." *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002). The res judicata doctrine includes "'two distinctive effects of a judgment separately characterized as 'claim preclusion' and 'issue preclusion.'" *U.S. v. Hopkins*, 927 F. Supp. 2d

1120, 1166 (D.N.M. 2013) (Browning, J.) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4402, at 7 (2d ed. 2002)). Under claim preclusion, when judgment is entered in the defendant's favor, the plaintiff's claim is extinguished or barred. *See id.* at 1166-67 (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach.*, 575 F.2d 530, 535-36 (5th Cir. 1978)). Under issue preclusion, suits addressed to particular claims "'bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties.'" *Id.* (quoting *Kaspar Wire Works, Inc.*, 575 F.2d at 535-36).

The Tenth Circuit recognized that issue preclusion – otherwise known as collateral estoppel, *see id.* at 1167 – is the proper analysis of the preclusive effect that a tribal court judgment may have on a later federal court proceeding. *See Burrell*, 456 F.3d at 1167. The Tenth Circuit's test for issue preclusion consists of four elements:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully 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.

Adams v. Kinder-Morgan, Inc., 340 F.3d 1083, 1093 (10th Cir. 2003) (internal quotation marks & citations omitted).

ARGUMENT

Plaintiff consciously decided to pursue his wrongful death claims in Navajo Nation tribal court. Almost a year before filing his State Complaint that was removed to this Court, he filed his Tribal Complaint in that forum against the same defendants which alleged the same facts and causes of action. Moreover, rather than abandoning his claims in tribal court, he voluntarily undertook discovery, engaged in legal briefing, and took full advantage of the additional oral argument that the Navajo Nation tribal court granted him. Plaintiff had a full and fair

opportunity to litigate his claims in that forum. It was only after that vigorous litigation fared poorly during the argument on Giant Four Corners' summary judgment motion that he quickly filed his virtually identical State Complaint that is before this Court. And since filing this action, Plaintiff has done nothing to distinguish it from the earlier filed, and still pending, action in Tribal Court. Given these circumstances, and given the principles of comity that govern federal courts' enforcement of tribal court judgments, this Court should dismiss Plaintiff's claims here.

A. Principles of comity counsel the Court to give effect to the Navajo Nation tribal court's judgment.

Federal courts recognize that tribal courts are "'appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians,'" and that "'civil jurisdiction over non-Indians on reservation lands presumptively lies in the tribal courts.'" *Burrell*, 456 F.3d at 1168 (quoting *Martinez*, 436 U.S. at 65-66; *Enlow v. Moore*, 134 F.3d 993, 996 (10th Cir. 1998)). Additionally, these comity principles stem from recognition that "development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged," and thus that "Federal courts must also be careful to respect tribal jurisprudence." *Bird*, 255 F.3d at 1142 (internal quotations & citations omitted). Thus, "[w]hen the activity at issue arises on the reservation, policies almost always dictate that the parties exhaust their tribal remedies before resorting to a federal forum." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993).

Those policies favoring exhaustion of tribal remedies are even stronger here, where Plaintiff affirmatively invoked the Navajo Nation tribal court's civil jurisdiction; Plaintiff made a conscious litigation decision and elected to file his Tribal Complaint first, a year before filing his State Complaint. (*See* Tribal Complaint.)[1] And Plaintiff litigated vigorously that tribal court

[1] Plaintiff may take issue with attachment of the pleadings from his Tribal Court proceeding to

proceeding, and continues to do so today; his appeal of the tribal court judgment is fully briefed and pending. Moreover, Plaintiff's claim arose on "reservation lands." *Burrell*, 456 F.3d at 1168. And Plaintiff went so far as to affirmatively plead that the Navajo Nation tribal court has both subject-matter and personal jurisdiction over the claims and the parties. (*See* Tribal Complaint ¶ 8.) Thus, just like the plaintiffs in *Beltan*, Plaintiff here made "a conscious" election regarding the pursuit of his civil claims in tribal court. *Id.* at 500. And as in *Beltan*, "plaintiff's deliberate, though ultimately erroneous or unwise, tactical choice cannot . . . defeat a statute of limitations defense." *Id.* Thus, just as the Tenth Circuit held that it was proper under comity principles to give effect to the tribal court judgment in *Shavanaux*, this Court should do so here.

Indeed, should this Court not give preclusive effect to Judge Toledo's judgment under *Shavanaux*, this Court would in effect second-guess and override the Navajo Nation tribal court's proper dismissal of the Tribal Complaint under its Navajo Nation statute of limitations law. To do so runs directly contrary to the Supreme Court and Tenth Circuit's comity principles.

The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Plante*, 480 U.S. at 14. And it repeatedly has pointed out that this policy is based on "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Here, the Navajo Nation made its own laws, including 7 N.N.C. § 602. This law provides a two-year limitation period on personal claims that occur on reservation lands. And it was Judge Toledo's

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this motion. However, this Court properly may take judicial notice of these pleadings. *See Merswin*, 364 F. App'x at 441 ("It is settled that the district court can take judicial notice of . . . records in a prior case involving the same parties."). The Court may take judicial notice of these pleadings, as facts "not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *See SEC*, 952 F. Supp. 2d at 1217 (Court must take judicial of facts and documents entitled to notice under Fed. R. Evid. 201, including "notice of . . . documents, which, the Court concludes, are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'").

proper application of this law – including her consideration of Plaintiff's 14-page response brief and oral argument in October 2014 – that resulted in summary judgment in Giant Four Corners' favor and dismissal of Plaintiff's Tribal Complaint. By filing this lawsuit only days after this face-to-face interaction with the Navajo Nation tribal court, Plaintiff asks this Court to ignore the Navajo Nation's own laws and jurisprudence, and to undercut its self-governance.

At bottom, to allow Plaintiff to proceed in this Court on the same facts and claims that the Navajo Nation tribal court dismissed properly is to give him a second bite at the apple. Allowing this ignores completely the policy that federal review of tribal court jurisdiction is *not* "an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance." *Wilson*, 127 F.3d at 811. Comity principles thus support that this Court should recognize and give preclusive effect to the Navajo Nation tribal court's judgment and dismissal of the Tribal Complaint.

B. Once given effect, the Navajo Nation's dismissal of the Tribal Complaint has preclusive effect in this Court, and the Court must dismiss Plaintiff' State Complaint.

Plaintiff's Tribal Complaint and State Complaint are virtually identical; they allege the same facts and bring the same claims against the same defendants. The first and third issue preclusion elements are therefore met beyond question. *See Adams*, 340 F.3d at 1093 (the first and third issue-preclusion elements are: "(1) the issue previously decided is identical with the one presented in the action in question, . . . (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication").

The second element is also met. Judge Toledo entered summary judgment in Giant Four Corners' favor, and against Plaintiff. "[S]ummary judgment operates as an adjudication on the merits." *E.g., Goichman v. City of Aspen*, 859 F.2d 1466, 1471 n.13 (10th Cir. 1988) (citing 10

C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2712, at 584 (1983)). Thus, "the prior action has been fully adjudicated on the merits." *Adams*, 340 F.3d at 1093.

Because Plaintiff fully briefed and argued the summary judgment motion, and given that he continues to litigate the appeal of Judge Toledo's ruling in Giant Four Corners' favor, Plaintiff had a full and fair opportunity to litigate the issue in the prior action. Thus, the fourth and final issue-preclusion element is also established.[2] *See Adams*, 340 F.3d at 1093 ("(4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action").

All four issue preclusion elements are established in this matter. The Navajo Nation tribal court's judgment in Giant Four Corners' favor thus precludes Plaintiff from relitigating his claims here.[3] The Court should therefore dismiss Plaintiff's State Complaint and this matter in its entirety.

As an alternative remedy, given that Plaintiff's appeal is pending before the Navajo Nation Supreme Court, the Court may choose to stay the case pending the resolution of that appeal. *See MacArthur*, 497 F.3d at 1065 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985)). This ruling would vacate the July 2016 Bench Trial noticed

[2] This fourth element – whether Plaintiff fully and fairly litigated the issue in the prior action – also necessarily establishes that this case, unlike *Burrell*, is not one in which the federal court cannot recognize the tribal court judgment because of due process concerns. *See Burrell*, 456 F.3d at 1172 (the comity principle that a court should not recognize a judgment if the tribal court denied a litigant due process equates with issue preclusion's fourth element, because "due process requires that a party have a full and fair opportunity to litigate its case" (internal quotation marks & citations omitted)). The only other comity principle that Restatement § 482 articulates (and that *Burrell* considered as one that weighs against giving preclusive effect to a tribal court judgment) deals with the tribal court's jurisdiction. But jurisdiction is not at issue here; Plaintiff already admits that the tribal court has jurisdiction over his claims. (*See* Tribal Complaint ¶¶ 8-9.)

[3] The Tenth Circuit holds that a judgment is final for issue preclusion purposes even if it is on appeal. *See Hopkins*, 927 F. Supp. 2d at 1166 ("'It does not matter that the plaintiff's first appeal had not been resolved at the time he filed his second suit because . . . the district court's order was final for res judicata purposes.'" (quoting *Leo v. Garmin Intern., Inc.*, 464 F. App'x 737, 740 (10th Cir. 2012)).

by the Court [Doc. 27] and all other pretrial deadlines and stay further proceedings in this Court pending resolution of Plaintiff's on-going appeal in the Navajo Nation Supreme Court.

CONCLUSION

Tenth Circuit precedent establishes that, under comity principles, this Court should give effect to the Navajo Nation tribal court judgment that dismissed the identical claims Plaintiff attempts to bring before this Court in the present action. Giving full weight to that judgment precludes Plaintiff from pursuing those claims in this Court. Giant Four Corners therefore asks that the Court dismiss Plaintiff's Complaint and enter judgment in Giant Four Corners' favor. Alternatively, Giant Four Corners asks that this Court stay the case pending the Navajo Nation Supreme Court's decision on Plaintiff's appeal of his tribal court proceeding.

Pursuant to D.N.M.LR-Civ. 7.1(a), Defendant's counsel conferred in good faith with opposing counsel, who opposes this motion.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 5, 2015, the foregoing *Motion to Dismiss Plaintiff's Complaint, or in the Alternative, to Stay Proceedings* was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record:

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