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SHINGLE SPRINGS BAND OF MIWOK INDIANS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Plaintiff,

v.

UNITE HERE INTERNATIONAL UNION, DOES 1-100;

Defendant.

Case No. 2:16-cv-01057-TLN-EFB

PLAINTIFF SHINGLE SPRINGS BAND OF MIWOK INDIANS' OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

UNITE HERE International Union's (the "Union") motion to dismiss (the "Motion") must be denied because bedrock principles of federal law clearly state that it is within the province of the courts to determine the question of arbitrability. Despite this longstanding principle, the Union attempts to circumvent the Court's authority to have an arbitrator determine the scope of the arbitration provision, including what matters the parties agreed to arbitrate, and the remedies available to the parties in the arbitration proceeding.

The Union's Motion should also be denied because Shingle Springs' second and third claims are ripe for judicial determination – the parties clearly have an existing dispute concerning the scope of the arbitration clause and the available remedies under the arbitration agreement. This is a question of substantive arbitrability that must be resolved by this Court. *Granite Rock Co. v. Int'l*

Bhd. Of Teamsters (2010) 561 U.S. 287. The Union's assertion that the arbitrator must first interpret the agreement is wrong because again, the Court must first interpret the agreement to determine the scope of the arbitration provision. *See id.* Further, the Court does not have to wait, as the Union argues, until an arbitrator awards a remedy to make a determination on what remedies are available under the arbitration provision. The issue of whether joint meetings as a remedy is within the scope of the agreement is a present controversy between the parties. See *Addington*, 606 F.3d at 1179 (a litigant need not await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly* impending, that is enough).

Simply put, the Complaint concerns the scope of the arbitration provision and its enforceability to the disputes at issue. This is exactly the type of case which warrants judicial guidance, and the Court should exercise its jurisdiction to award declaratory relief. Accordingly, the Union's Motion must be denied.

II.
RELEVANT FACTUAL AND PROCEDURAL HISTORY

Shingle Springs Band of Miwok Indians (the "Tribe") and UNITE HERE International Union ("Union") have not entered into a collective bargaining agreement. Rather, the Tribe and the Union entered into a Memorandum of Agreement ("MOA") that sets forth the parameters for the representation process which is expressly limited to the following three purposes:

- To ensure an orderly environment for the exercise by Bargaining Unit Employees of their rights under the TLRO;
- To avoid strikes, picketing, and/or other adverse economic or public relations activity directed at the Tribe in the event the Union decides to conduct an organizing campaign among Eligible Employees; and
- Implementation of a Card Check Recognition Process pursuant to the terms of this Agreement. (Complaint, ¶ 11.)

The MOA also includes a limited dispute resolution provision and states, in relevant part as follows:

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> The Parties agree that any disputes over the interpretation or application of this Agreement shall be submitted […] to expedited and binding arbitration before an arbitrator selected from the TLP. The arbitrator shall not modify, add to or subtract from this Agreement. The arbitrator shall follow the arbitration procedures prescribed in the TLRO. The arbitrator shall have the authority to order the non-compliant party to comply with the Agreement. The Parties hereto agree to comply with any order of the arbitrator, which shall be final and binding, and shall be enforceable as provided in the TRLO. (Complaint, Exhibit A, MOA Section 10.)

On or about November 18, 2015, the Union sent the Tribe a letter falsely alleging that the Tribe violated Section 5 of the MOA (Section 5 requires the Tribe to remain neutral with respect to an employee's decision on Union representation.). Among the Union's false allegations was that the Tribe's termination of employee, Christopher Garrigues, violated Section 5 of the MOA. (Complaint, ¶ 12.)

On January 7, 2016, the Tribe and the Union mediated multiple issues, but did not resolve any issues regarding intramural personnel decisions including the discipline and/or termination of any Tribe employees. (Complaint, ¶ 13.)

On or about February 4, 2016, notwithstanding the mediation and in recognition of the inherent issues with negotiating over the terms and conditions of employment, the Tribe advised the Union that proceeding with dispute resolution concerning the employment terminations of two employees was tantamount to a grievance arbitration which would violate tribal and federal law. The Tribe further informed the Union that the Tribe could not agree to arbitrate the termination of any employment relationship during the term of the MOA or until such time as the Union demonstrates that it has majority support as provided in the MOA. Indeed, although the Union was acting as if it already had majority support and represented the employees of the Tribe, the Union did not and does not represent any of the Tribe's employees at present time. (Complaint, ¶ 14.)

The Tribe's February 4, 2016, letter also informed the Union that the MOA is not a collective bargaining agreement under which the parties may lawfully arbitrate an employment termination decision and that the MOA does not give the Union the right to negotiate any of the terms and conditions of the employees of the Tribe. The Tribe further reminded the Union that the decision to terminate an employee was purely an intramural personnel matter governed by the tribal court only

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and therefore not subject to arbitration under the MOA. Moreover, the terminated former Tribe employees are not parties to the MOA and therefore they have no standing to enforce the Tribe's sovereign immunity waiver contained in Section 14(b) of the MOA. The Tribe has not waived its sovereign immunity with respect to any action or proceeding by any employee. (Complaint, ¶ 15.)

On February 8, 2016, the Union responded to the Tribe's February 4, 2016 correspondence advising it would seek an order to compel arbitration regarding the employment terminations of Christopher Garrigues and Kerry Bond. The Union further informed the Tribe that it wanted to arbitrate the alleged neutrality provisions. (Complaint, ¶ 16.)

On February 23, 2016, the Union requested that meetings be held with employees attended by Union representatives to explain the terms of the MOA. (Complaint ¶ 17.) The Tribe responded the next day advising the Union that it parties must comply with the MOA, and that the MOA does not authorize joint activities of any nature between the parties. The Tribe further informed the Union that it would not agree to the proposed meetings between its employees and Union representatives unless compelled to do so in accordance with the MOA. (Complaint ¶ 18.)

The Tribe correctly contends that the MOA does not authorize joint activities of any nature between the Tribe and Union. The Tribe also properly asserts that joint activities are reserved for organizations the Tribe supports, and any showing of Union support by the Tribe violates Section 8(a)(2) of the NLRA, as well as similar provisions under the MOA and the TLRO. (Complaint ¶ 20.)

On February 22, 2016, the Union improperly filed a petition to compel arbitration of the Tribe's intramural personnel decisions to terminate two employees pursuant to Section 10 of the MOA. (See *UNITE HERE International Union v. Shingle Springs Band of Miwok Indians*; Related Case No. 2:16-cv-00384-TLN-EFB; Dkt#2.) Because Section 10 of the MOA is limited to disputes over the interpretation or application of the MOA, the Tribe's intramural personnel decisions (i.e., the termination of employment) are not governed by Section 10. To be sure, the MOA has nothing to do with the Tribe's employment decisions including, but not limited to, employee discipline and/or termination and is silent on any employee remedies such as back pay and/or reinstatement. Moreover, employees of the Tribe are not parties to the MOA and therefore they do not have

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standing to seek any relief under the MOA. Accordingly, the Tribe correctly refuses to arbitrate any employee termination and/or disciplinary action under the MOA because it is not a collective bargaining agreement. (Complaint ¶ 19.)

Through the parties' respective communications, however, it became clear there was a dispute concerning the scope of the MOA's arbitration provision and the parties' respective rights pursuant to the clause. As a result, in order to seek judicial clarification regarding the scope of the MOA's arbitration provision, the Tribe filed a Complaint for Declaratory Relief on May 18, 2016, seeking: (1) a declaratory judgment that intramural personnel issues affecting the terms and conditions of employment are not arbitrable under the MOA; (2) a declaratory judgment that arbitrating intramural personnel issues affecting the terms and conditions of employment violates federal law and would therefore render the MOA and/or the arbitration provision contained in Section 10 illegal; and (3) a declaratory judgment that joint activities of any kind, including the Union's requested remedy of joint meetings, are beyond the scope of the MOA and such remedies violate federal law.

On July 28, 2016, the Union filed the instant Motion to Dismiss the Complaint pursuant to FRCP 12(b)(1) and (6).

III.
LEGAL ARGUMENT

A. The Court Has Jurisdiction To Rule on The Tribe's Complaint

The Union erroneously contends that the Court does not have jurisdiction over the Tribe's Complaint for declaratory relief and instead an arbitrator should determine the applicability of the MOA. The U.S. Supreme Court, however, has explicitly and unanimously reserved the question of arbitrability for the courts. "Under our decisions, whether or not [a party] was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 (1963).

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The Tribe's Complaint seeks a determination regarding the scope of the MOA's arbitration provision and specifically whether it applies to the Tribe's intramural personnel decisions, such as employment terminations. The Tribe contends that the question of substantive arbitrability can only be resolved by this Court. (Complaint, Exhibit 2 (MOA, Section 10); *Granite Rock Co. v. Int'l Bhd. Of Teamsters* (2010) 561 U.S. 287, 287 (courts determine threshold issues as the scope of the arbitration clause and its enforceability, as well as whether and when the parties agreed to the clause); *Litton Fin. Printing Division v. NLRB* (1991) 501 U.S. 190, 209 (although the court may not decide the merits of the grievance, the court "must determine whether the parties agreed to arbitrate this dispute, and [the court] cannot avoid that duty because it requires [the court] to interpret a provision of a bargaining agreement."). [1]

This Court, and not an arbitrator, has the exclusive right to determine if the MOA requires the parties to arbitrate the termination of the Tribe's employees. The arbitration provision in the MOA does not give an arbitrator the power to determinate arbitrability and therefore only this Court can make that determination. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 n. 7 (1963); *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986) (unless parties clearly and unmistakably provide otherwise, question of whether parties agreed to arbitrate is to be decided by court, not arbitrator). Indeed, labor arbitrators have authority to resolve labor disputes only because the parties agreed to submit their grievances to arbitration. *Gateway Coal Co. v. United Mine Workers* (1974) 414 U.S. 368, 374. Accordingly, this matter is properly before the Court, and the Union's Motion must be denied.

1. Only the Court, and Not an Arbitrator, Can Determine Whether the Tribe's Employment Termination Decisions are Subject to the MOA's Arbitration Provision.

The Union argues that only an arbitrator can decide whether the employment terminations violate the MOA. The Union has it wrong. The Tribe never agreed to arbitrate purely intramural personnel decisions such as employment terminations and nothing in the MOA requires arbitration of the Tribe's personnel decisions. In fact, there is no provision within the MOA regarding

[1] The U.S. Supreme Court in *Litton* "appeared to instruct that the judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance[.]" *IBEW v. GKN Aero. N. Am., Inc.* (8th Cir. 2005) 431 F.3d 624, 528.

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employee discipline and/or termination. The MOA is further silent on any grievance procedure or accompanying remedies for employee disciplinary actions, such as back pay and/or reinstatement. *Litton Fin. Printing Division v. NLRB* (1991) 501 U.S. 190, 209 (although the court may not decide the merits of the grievance, the court "must determine whether the parties agreed to arbitrate this dispute, and [the court] cannot avoid that duty because it requires [the court] to interpret a provision of a bargaining agreement."). [2]

Rather, the MOA clearly states that the Tribe does not waive, limit or modify its sovereign immunity from suit except in the three instances: (1) the enforcement of any award of money damages by arbitration; (2) injunctive relief and specific performance to perform any obligation under the MOA; and (3) an action to compel arbitration. (Complaint, Exhibit A, MOA, Section 14(b).). The Union has already filed a purported action to compel arbitration and it does not seek damages in this action. Therefore, the only remedy available to the Union in this action is seeking an order requiring the Tribe to perform under the MOA. As stated above, there is nothing in the MOA that requires the Tribe to arbitrate intramural personnel decisions.

In spite of the MOA's clear limitations, the Union attempts to circumvent longstanding federal labor law by arguing that employment termination decisions fall within the scope of the arbitration provision. However, it is clear that intramural personnel matters do not and cannot fall within the scope of Section 10. *Granite Rock Co. v. Int'l Bhd. Of Teamsters* (2010) 561 U.S. 287, 287 (courts determine threshold issues as the scope of the arbitration clause and its enforceability, as well as whether and when the parties agreed to the clause). Such a determination would interfere with Tribe's "exclusive rights of self-governance in purely intramural matters." *Donovan v. Coeur d'Alene Tribal Farm* (9th Cir. 1985) 751 F.2d 1113, 1116 (citations omitted). The Union's position is unavailing.

It is a fundamental labor principle that "arbitration is strictly 'a matter of consent' and thus 'is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration[.]" *Granite Rock Co.*, 363 U.S. at 299 (internal citations omitted). In determining the

[2] The U.S. Supreme Court in *Litton* "appeared to instruct that the judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance[.]" *IBEW v. GKN Aero. N. Am., Inc.* (8th Cir. 2005) 431 F.3d 624, 528.

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arbitrability of the dispute, courts must also consider the history of the parties' own interpretations of the agreement. *Commc'ns Workers of Am. v. Pac. Nw. Bell Tel. Co*. (9th Cir. 1964) 337 F.2d 455, 459. Indeed, the Ninth Circuit warned that:

> [The presumption regarding arbitrability] recognizes that if evidence of intent is of the 'most forceful' character, it need not be confined to the language of the contract; and it would appear clear that the decision whether such evidence dehors the agreement is of sufficient forcefulness is for the courts and not for the arbitrator. The Court, then, has not announced a rule of evidence; it has simply warned that the persuasive power of the evidence must be such that the truth emerges with forceful clarity. We apprehend, however, that it is still for the courts to search out the truth upon this issue.

Id.

Federal courts must also place practical and realistic construction on labor agreements, giving due consideration to the purpose which they are intended to serve. See *California Trucking Asso. v. Corcoran* (N.D. Cal. 1977) 74 F.R.D. 534 (courts engage in contract interpretation principles in determining arbitrability); see also *El Vocero De Puerto Rico v. Union De Periodistas* (D.P.R. 1981) 532 F. Supp. 13 (in context of labor agreement, great weight should be given to interpretation of the agreement by parties thereto, and what parties actually intended is of the utmost importance).

The Tribe never, at any point, agreed that intramural personnel decisions such as employment terminations would be subject to arbitration under the MOA, because it would violate federal law by giving the Union the right to negotiate over the terms and conditions of employees. Rather, the Tribe and the Union entered into the MOA for the following express purposes:

- To ensure an orderly environment for the exercise by Bargaining Unit Employees of their rights under the TLRO;
- To avoid strikes, picketing, and/or other adverse economic or public relations activity directed at the Tribe in the event the Union decides to conduct an organizing campaign among Eligible Employees; and
- Implementation of a Card Check Recognition Process pursuant to the terms of this Agreement.

(*See* Complaint, Exhibit 2, MOA, Recitals (D).)

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The Tribe and the Union entered into the MOA only for these three limited purposes, none of which remotely expressly or impliedly include an agreement to bargain and/or negotiate over the terms and conditions of employment. The MOA's limitations should not be a surprise to the Union as it certainly knows that a discharged union employee must first exhaust the grievance procedures provided by a collective bargaining agreement before seeking direct legal redress. *Edwards v. Teamsters Local Union No. 36, Bldg. Material & Dump Truck Drivers* (9th Cir. 1983) 719 F.2d 1036, 1038 (citing *Republic Steel Corp. v. Maddox* (1965) 379 U.S. 650). The MOA is not a collective bargaining agreement, and it does not contain any grievance procedure and/or applicable remedies for employees.

If Garrigues, Bond, or any other Tribe member wanted to challenge an employment decision made by the Tribe, they must raise their claims pursuant to the processes set forth in the Tribe's Employment Code which Garrigues and Bond have failed to exhaust.[3] The Union is clearly attempting to circumvent Tribal law by trying to arbitrate personal matters on behalf of these two Tribal members who are not even parties to the MOA. This must not be allowed.

Arbitration of these two employment claims would also violate the Tribe's right to sovereign immunity which is also reserved in the MOA. The MOA further confirms that the sovereign immunity waiver by the Tribe "shall not be enforced by any other party other than the Parties to the Agreement and shall not give rise to any claim or liability to any other third party other than the Parties hereto."[4] MOA, Section 14(b). As a result, Garrigues and Bond clearly have no standing under federal law or the MOA to pursue any employment-related claims against the Tribe. If Garrigues and Bond desire to bring claims against the Tribe arising out of their employment they must first exhaust the Tribe's internal dispute resolution process in accordance with Tribal law (*supra*).

[3] Title 6 of the Tribe's Employment Code allows employees to bring a discrimination, retaliation, and/or harassment claim to Tribal Court or arbitration.

[4] Federal law prohibits suits against Indian Tribes, unless the Tribe (or Congress) has clearly and unequivocally expressed consent to suit (which the Tribe has not done here). See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 56, 58-59 (Indian tribes may be sued only where the tribe or Congress unequivocally expresses consent to suit).

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As set forth above, the express language of the MOA and bedrock principles of federal law demonstrate that the Tribe never agreed to arbitrate strictly intramural personnel decisions and no reasonable interpretation of the arbitration provision suggests otherwise. *California Trucking Assoc. v. Corcoran* (N.D. Cal. 1977) 74 F.R.D. 534. Indeed, neutrality agreements such as the MOA generally provide the framework for the representation process and may set forth provisions only to take effect if the union obtains majority status and becomes the exclusive representative of employees. See *Snow & Sons* (9th Cir. 1962) 134 N.L.R.B. 709, enforced, 308 F.2d 687 (the NLRB will enforce voluntary recognition agreements where the employer agrees to a private alternative to a Board election and, as a result of that alternative procedure, has knowledge of the union's majority status); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel* (2d. Cir. 1993) 996 F.2d 561 (employer and union entered into contract to govern conduct during union organizational campaign). However, unlike collective bargaining agreements, neutrality agreements like the MOA are not collective bargaining agreements and cannot be treated as such. *Ibid.*

The Union relies on *United Steelworkers of Am. v. Am. Mfg. Co. (American Manufacturing Co.),* 363 U.S. 564, 568, (1960) for the proposition that submitting this dispute to arbitration is proper. *American Manufacturing Co.* is inapplicable here because there is no collective bargaining agreement at issue in this action. In fact, the Supreme Court found that the question of arbitrability under the agreement in *American Manufacturing Co.* was for the courts to decide (and not the arbitrator). See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 583, ft. 7. The Union completely misapprehends the Tribe's central argument at issue here and claims (wrongly) that it is not the Court's function to interpret the MOA. As set forth above, questions of arbitrability are within the exclusive province of courts, not arbitrators, and only this Court can determine if the MOA requires arbitration of the two employment terminations. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 n. 7 (1963). Accordingly, the Union's motion to dismiss must be denied.

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B. The Second and Third Claims are Ripe for Review Because the Union has Raised an Immediate Concern Regarding the Parties' Rights and Obligations Under the MOA.

In order for a case to be justiciable under Article III, it must be ripe for review. *Aydin Corp. v. Union of India*, 940 F.2d527, 528 (9th Cir.1991). Ripeness is a question of timing. *See United States v. Streich*, 560 F.3d 926, 931 (9th Cir.2009). "For a suit to be ripe within the meaning of Article III, it must present 'concrete legal issues, presented in actual cases, not abstractions.'" *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947). "The ripeness doctrine demands that ... litigants' asserted harm is 'direct and immediate' rather than speculative or hypothetical." *Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir.1990). However, "[a]t the same time, a litigant need not await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly* impending, that is enough." *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir.2010). Courts will ask whether granting relief would serve a useful purpose, or whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest. *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 188–89 (1st Cir. 2011).

Here, the Union erroneously argues that the Tribe's second and third claims are not ripe because *the arbitrator* has not yet interpreted the MOA or issued a remedy. In support of this argument, the Union cites *Aydin Corp. v. Union of India*, 940 F.2d 527 (9th Cir. 1991). *Aydin Corp.*, however, actually supports the Tribe's position in this matter. In *Aydin Corp.* the plaintiff did not seek to avoid arbitration or contend that the arbitration clause in the agreement failed to encompass the underlying dispute. Based on those concessions, the Ninth Circuit found that "[u]nlike a typical declaratory judgment plaintiff who is uncertain of rights and obligations under a contract and seeks judicial guidance in determining what the appropriate next step should be, [plaintiff] points to no uncertainty in its contract's arbitration clause. The declaration [plaintiff] seeks would do nothing to clarify [plaintiff]'s contractual obligations." *Id.* at 528–29.

Conversely, the Tribe argues arbitration is improper because employment terminations are not encompassed (nor intended) within the MOA's arbitration provision. The Tribe therefore seeks a judicial determination to determine that the arbitration provision in the MOA does not apply to

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intramural personnel decisions including the two employment terminations at issue in this action. (*Aydin Corp).* *Id.* at 528–29. Indeed, courts have little difficulty in finding an actual controversy where, as here, all of the acts that are alleged to establish the right to declaratory relief have already occurred. *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1192 (9th Cir. 2000).

The Tribe's second claim seeks a declaration that arbitrating intramural personnel issues affecting the terms and conditions of employment violates federal law and would therefore render the MOA and/or the arbitration provision illegal. Requiring the Tribe to arbitrate intramural personnel decisions, including employee discipline and/or termination decisions under the MOA would violate federal law, including Section 8(a)(2) of the NLRA. (Complaint, ¶ 34.) The Union has already requested that the employment terminations of Garrigues and Bond be submitted to arbitration pursuant to Section 10 of the MOA (and filed a petition to compel arbitration of those terminations), which the Tribe has refused unless ordered by a federal court to do so. (Complaint, ¶ 37-38). In short, the Tribe's third claim concerns the *scope* of the arbitration provision and its applicability to the intramural personnel decisions at issue. As set forth more fully in Part A, *infra*, it follows that the Tribe's second claim must be resolved by the Court, not an arbitrator, so any arbitration decision is irrelevant to the determination of the Tribe's second claim. The Union's attempt to punt this matter into the arbitrator's jurisdiction is improper and contrary to bedrock federal labor law. *Granite Rock Co. v. Int'l Bhd. Of Teamsters* (2010) 561 U.S. 287, 287 (courts determine threshold issues as the scope of the arbitration clause and its enforceability, as well as whether and when the parties agreed to the clause). As such, the Tribe's second claim is ripe for judicial determination.

The Tribe's third claim requests a declaration that joint activities of any kind, including the Union's requested remedy of joint meetings, are permitted under the MOA and in addition the Union's proposed remedies would violate federal law.[5] The MOA's arbitration provision sets forth the limitations for arbitration and provides that the arbitrator shall not modify, add to or subtract

[5] The Union's argument that there is no support for the Tribe's contention that joint activities are unlawful is unavailing. The Board has held that joint meetings of the nature contemplating by the Union violate Section 8(a)(2) of the NLRA. See e.g., *Vernitron Electrical Components, Inc., Beau Products Divis. And United Steelworkers of America, AFLl-CIO-CLC and Local 210* 221 NLRB No. 74 (1975) (Section 8(a)(2) violation where meeting with union attended by all employees during working time).

from the agreement. The provision further provides that the arbitrator's authority is limited to ordering the non-compliant party to comply with the MOA. (Complaint, ¶ 42.) The MOA further limits the Tribe's waiver of sovereign immunity to the following three instances: (1) the enforcement of any award of money damages by arbitration; (2) injunctive relief and specific performance to perform any obligation under the MOA; and (3) an action to compel arbitration. (Complaint, Exhibit A, MOA, Section 14(b).) The only remedy available in this matter is specific performance. Although the MOA makes clear that the Tribe may be ordered to perform an obligation under the MOA, there is no obligation under the MOA for the Tribe to participate in joint meetings or other joint activities with the Union.

Despite this, the Union contends that remedies such as joint meetings are within the scope of the MOA, and has already requested joint meetings with the Tribe and the Tribe's employees with Union representatives present to discuss the MOA. (Complaint, ¶ 44.) As with the Tribe's second claim, the essential facts establishing the right to declaratory relief have already occurred. *Boeing Co*, 207 F.3d at 1192. The Court is not required to wait for an arbitral award to issue a declaration regarding whether the MOA's scope includes joint activities of any kind See *Addington*, 606 F.3d at 1179 (a litigant need not await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly* impending, that is enough).

The Union has already requested joint meetings, and the Tribe has refused to issue such a remedy. The parties have found themselves in an unavoidable dispute over the meaning and scope of the arbitration provision. This matter is exactly the type of dispute that must be resolved by the court through a declaratory relief action. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005) (dispute over meaning of contract provisions was ripe for review). Accordingly, the Tribe's third claim is ripe for judicial determination, and the Court must deny the Union's motion to dismiss.

C. The Parties' Dispute Regarding the Rights and Obligations Under the MOA Presents a Substantial Controversy Requiring a Determination by The Court

If there is a case or controversy within its jurisdiction, the court must decide whether to exercise that jurisdiction. Courts "must balance concerns of judicial administration, comity, and

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fairness to the litigants." *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir.1991). Courts also consider whether the declaratory action will settle all aspects of the controversy, whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue and the availability and relative convenience of other remedies. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005).

The Union asserts that the Tribe's requested declarations will serve no purpose. That could not be farther from the truth. Applying the above factors makes clear that that this action will settle all aspects of the parties' controversy, clarify the parties' respective rights at issue and is the most efficient way to fully resolve all issues regarding the parties' disputes regarding the MOA. *See id.* The Court's ruling on the Tribe's Complaint will determine the two Tribal termination decisions at issue in the Union's petition to compel are arbitrable will also provide guidance on the specific disputes that are subject to the MOA's arbitration provision.

There is also no basis for the Union's assertion that the Tribe may have brought this case to delay arbitration. As made clear by the Tribe's Complaint, the Tribe's position is that any arbitration of the issues herein is improper and contrary to federal law. As such, it is the Tribe's position that no arbitration regarding any intramural personnel decision by the Tribe should take place. There is no merit to the Union's argument. Accordingly, the Court should exercise its discretion to hear the Tribe's declaratory relief Complaint.

IV.
CONCLUSION

For the reasons set forth above, the Tribe respectfully requests that the Court deny the Union's motion to dismiss.

Dated: August 11, 2016

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