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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

UNITE HERE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Date: August 25, 2016
Time: 2:00 p.m.
Dept: Courtroom 2, 15th Floor

Introduction

The Tribe supplies no reason why the Court should allow this case to proceed.

The Tribe's first claim seeks a declaration that the parties' dispute is not arbitrable. The Tribe does not really challenge the arbitrability; it disagrees with the Union's interpretation of the Memorandum of Agreement's neutrality clause. But even if the dispute were about arbitrability, the parties expressly agreed that disputes about how to interpret the MOA's arbitration clause are for the arbitrator to decide. The Tribe simply ignores abundant Ninth Circuit law interpreting labor agreements with precisely the same language.

The Tribe's second and third claims seek declarations that what the Union seeks through arbitration would violate the National Labor Relations Act. These claims are not ripe because an arbitrator has not yet interpreted the MOA as the Union does or awarded the Union the remedies it seeks. Here, too, the Tribe ignores Ninth Circuit law holding that such claims do not ripen until the arbitrator has issued an award.

Argument

A. The dispute about whether the Tribe violated the MOA's neutrality clause is arbitrable.

The Tribe spends most of its brief arguing that it cannot be compelled to arbitrate the dispute over employee terminations because it did not intend to submit such disputes to arbitration. The Tribe casts this as a dispute about arbitrability for the Court to decide, but the Tribe's logic is flawed.

The parties' dispute is about whether paragraph 5 of the MOA, which requires the Tribe to be neutral with respect to union organizing, prohibits the Tribe from discharging employees because of the employees' union activity. The Union says that it does; the Tribe says that it does not. *See* Complaint, ¶¶ 12-15. This is a dispute about "the interpretation or application" of paragraph 5 which the parties agreed would be resolved through arbitration. *See* Complaint, ¶¶ 7-8 & Exh. A (¶ 10).

The Tribe is correct that disputes about substantive arbitrability – that is, whether the parties agreed to arbitrate – are often for the courts to decide. That result flows logically from the uncontroversial principle that the duty to arbitrate can only arise from an agreement to do so. But this case does not present a dispute about substantive arbitrability. Disputes about substantive arbitrability typically take two forms. If one party disputes that it entered into an agreement containing a promise to

arbitrate, the court must decide whether a contract was even formed. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). The other category of cases arises when the promise to arbitrate is limited and expressly excludes some disputes from its reach. *See, e.g.*, *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). This dispute is not of either type, as the Complaint allegations demonstrate. The Tribe alleges that it entered into the MOA with the Union; the MOA contains an agreement to arbitrate; and there are no exclusions to that promise. Complaint, ¶¶ 7-8 & Exh. A.

Even if this case did present a true dispute about substantive arbitrability, the first cause of action should still be dismissed. Contracting parties can agree to arbitrate disputes about the scope of their agreement to arbitrate (i.e., the second type of substantive arbitrability dispute), *Granite Rock*, 561 U.S. at 297-98 n.5; *AT&T Technologies*, 475 U.S. at 649; and the Ninth Circuit holds that an agreement giving the arbitrator authority to decide "all disputes regarding the interpretation or application" of the agreement does just that. *Pacesetter Construction Co. v. Carpenters*, 116 F.3d 436, 439 (9th Cir. 1997); *Local 1780 v. Desert Palace*, 94 F.3d 1308, 1310 (9th Cir. 1996); *So. Cal. Dist. Council of Laborers v. Berry Const.*, 984 F. 2d 340, 344 (9th Cir. 1993); *New England Mechanical, Inc. v. Laborers Local Union 294*, 909 F.2d 1339, 1354 (9th Cir. 1990).[1] In other words, by giving the arbitrator authority to interpret and apply the agreement, the parties give the arbitrator authority to interpret and apply the arbitration clause and thereby decide his jurisdiction. The MOA's arbitration provision (paragraph 10) contains the exact phrase analyzed in the Ninth Circuit opinions: it applies to "any disputes over the interpretation or application of this Agreement." The Tribe simply ignores this case law.

The Tribe asserts that the Court should disregard this federal common law of labor arbitration[2] because Tribe's agreement with the Union concerns organizing employees who do not have a union

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[1] Other language may accomplish the same result. *See, e.g.*, *Teamsters Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507, 510-511 (9th Cir. 1987) (arbitration clause that covered "any grievance or controversy" granted arbitrator authority to decide arbitrability).

[2] Section 301authorizes federal courts to fashion rules of federal common law to govern suits involving labor contracts. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41 n.9 (1987).

and is not a collective bargaining agreement. Section 301 (29 U.S.C. § 185) is not limited to collective bargaining agreements; it governs all labor contracts. *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 25-26 (1962) ("'[C]ontracts' does include more than 'collective bargaining agreements,' at least as respondents would define them. . . . Congress was not indulging in surplusage: A federal forum was provided for actions on other labor contracts besides collective bargaining contracts."). It includes contracts, like the MOA here, that establish procedures for organizing unorganized employees. *See, e.g., Service Employees Int'l Union v. St. Vincent Medical Ctr.*, 344 F.3d 977, 979 (9th Cir. 2003); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 564-65 (2d Cir. 1993); *Hotel Employees & Restaurant Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1466 (9th Cir. 1992).

B. The Tribe's sovereign immunity from suit is not at issue.

The Tribe filed this suit for declaratory relief so its sovereign immunity *from* suit does not bar this case, and the Tribe did not seek a declaration that its sovereign immunity prevents it from being ordered to arbitrate. Even if it had, such a declaration would be unwarranted. A tribe waives sovereign immunity simply by agreeing to arbitrate. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). In the MOA, the Tribe expressly waived its immunity from suit "with respect to matters arising out of this Agreement" including in an "action to compel arbitration pursuant to this Agreement." Complaint, ¶ 11 & Exh. A (¶ 14(b)). The Tribe says that the discharged employees have "no standing" but it is the Union – not the discharged employees – that seeks to arbitrate and enforce the Union's right under the Agreement to a workplace untainted by violations of neutrality.[3]

The Tribe says that ordering arbitration would interfere with its "exclusive rights of self-governance in purely intramural matters" and cites *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) for that proposition. *See* Op. Br., at 7. That phrase appears in *Coeur d'Alene Tribal Farm* but it has no relation to what the Tribe agreed in the MOA to do, and it has no bearing on whether the Tribe may be compelled to arbitrate. The *Coeur d'Alene Tribal Farm* court held that

[3] The Tribe offers no support for the proposition that a waiver of sovereign immunity is invalid if a third party would benefit incidentally from that waiver.

federal laws of general applicability apply to tribes and then identified several exceptions to that rule. One of the exceptions is for laws that "touch[] exclusive rights of self-governance in purely intramural matters." *Id.* at 1116. The Court explained that "intramural matters" include "conditions of tribal membership, inheritance rules, and domestic relations," but operating a commercial business employing non-Indians is not an intramural matter. *Id.*

The *Coeur d'Alene Tribal Farm* exception is irrelevant to this case because the Union does not seek to use arbitration to compel the Tribe to comply with a federal statute. It seeks to compel the Tribe to keep the promises it made in the MOA. In addition, it is now well-established that a tribe's employment of non-Indians in a commercial business, including a tribal casino, is not an intramural matter so general federal employment laws apply. *See, e.g.*, *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999) (ADA applies to tribal entertainment complex); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180-81 (2d Cir. 1996) (OSHA applies to tribal construction company building casino); *Lumber Industry Pension Fund v. Warm Springs Forest Prods. Industries*, 939 F.2d 683, 685-86 (9th Cir. 1991) (ERISA applies to tribal business); *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 183 (9th Cir. 1991) (same). *Cf. Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (applying *Couer d'Alene Tribal Farm* to hold that FLSA governs a business on a reservation owned by tribal members).[4]

C. The Tribe's second and third claims for declaratory relief are not ripe.

Responding to the Union's ripeness argument, the Tribe primarily repeats its mantra that courts decide whether a dispute is arbitrable.[5] But the Union does not seek to dismiss on ripeness grounds the

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[4] The National Labor Relations Act also applies to tribal casinos. *See NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), *cert. denied* 136 S.Ct. 2508 (June 27, 2016); *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), *cert. denied* 136 S.Ct. 2509 (June 27, 2016); *San Manuel Indian Bingo & Casino*, 475 F.3d 1306, 1313 (D.C. Cir. 2007); *NLRB v. Chapa de Indian Health Program*, 316 F.3d 995, 998 (9th Cir. 2003). *Cf. NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (en banc) (in case involving tribal right-to-work law, clarifying that "that the general applicability of federal labor law is not at issue").

[5] For example, the Tribe cites a passage in *Aydin Corp. v. Union of India*, 940 F.2d 527 (9th Cir. 1991) that recites the uncontroversial proposition that a claim for declaratory relief about arbitrability is ripe prior to arbitration. But the main holding of *Aydin Corp.* – that a declaratory judgment regarding enforceability of an arbitral award is not ripe until the award issues – supports the Union's argument for dismissal of the Tribe's second and third claims.

Tribe's first claim for relief (which seeks a declaration that the dispute over employee terminations is not covered by the MOA's arbitration clause). The second and third claims do not concern arbitrability. In those claims, the Tribe requests declarations that what the Union seeks through arbitration would violate federal labor law.[6] Those claims will not ripen until the arbitrator issues a decision against the Tribe.

The Tribe relies on *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005) for the proposition that a suit seeking a declaration about a contract's meaning is ripe when the contracting parties disagree about the meaning. The contract in *Principal Life* did not have an arbitration clause. When the contract provides for arbitration, a dispute ripens prior to arbitration only if the disputed contract provision is unlawful on its face. If the contract can be interpreted in a lawful manner, the arbitrator must be allowed to interpret the contract. *United Food & Commercial Workers Int'l Union v. Alpha Beta Co.*, 736 F.2d 1371, 1376, 1380 (9th Cir. 1984); *see also Building Materials & Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1197 (9th Cir. 1988); *R.B. Elec., Inc. v. Local 569, IBEW*, 781 F.2d 1440, 1442 (9th Cir. 1986); *Hosp. & Institutional Workers Union Local 250 v. Marshal Hale Mem'l Hosp.*, 647 F.2d 38, 42 (9th Cir. 1981). The Tribe does not contend that the MOA is facially unlawful. It simply ignores Ninth Circuit law on this point.

The Tribe cites *Venitron Elec. Components, Inc.*, 221 NLRB 464 (1975) for its argument that an arbitration award ordering the Tribe and the Union to hold meetings with workers would be unlawful. *See* Op. Br., at 12 n.5. In that case, the NLRB decided that an employer unlawfully assisted a union by putting "considerable indirect pressure" on employees to attend union meetings while being paid and to sign union authorization cards while a manager observed them, and then recognized the union a few hours later without a neutral party verifying worker support. *Id.* at 465. The Union has not requested

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[6] If the Tribe's contention is that merely *arbitrating* the dispute would violate federal labor law, the Tribe is unquestionably wrong. Federal labor law encourages union and employers to resolve their disputes through arbitration, even when the union does not represent the employer's employees. *St. Vincent Medical Center*, 344 F.3d 977, 985 (9th Cir. 2003). The Tribe does not provide any authority for the bizarre idea that it would be illegal to resolve a labor dispute though arbitration. If merely demanding arbitration were unlawful, the Tribe could file an unfair labor practice charge against the Union. The Tribe has not done so.

that the arbitrator order the Tribe to do anything remotely similar. The Union merely requested that meetings be held with employees where the Tribe's management team can reaffirm its commitment to remaining neutral while employees decide whether to select the Union to represent them. Complaint, ¶17; Martin Dec., Exh. B. Holding such a meeting is lawful, even if the Union's representatives are present, as the cases cited in the Union's opening brief demonstrate. In any event, the Tribe's argument to the contrary will not ripen unless an arbitrator orders the Tribe to hold such meetings.

D. The Court may decline to hear this case.

The Union explained in its opening brief that this Court has discretion whether to decide a case brought under the Declaratory Judgment Act. This Court should decline this case because the only issue that the Tribe raises here that is ripe for review can be addressed in the related, earlier-filed Petition to Compel Arbitration that is pending before this Court. The Tribe does not offer any reason why this is not so.

Conclusion

For all of the foregoing reasons, the Tribe's Complaint for Declaratory Relief should be dismissed.

Dated: August 17, 2016

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

By: */s/ Kristin L. Martin*
Kristin L. Martin

Attorneys for UNITE HERE International Union

PROOF OF SERVICE

I am employed in the city and county of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is: DAVIS, COWELL & BOWE, LLP, 595 Market Street, Suite 800, San Francisco, California 94105.

On this 17th day of August, 2016, I caused to be served a true and correct copy of the foregoing:

- **UNITE HERE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

via ECF filing, properly addressed to the following:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 17th day of August, 2016 at San Francisco, California.

/s/ Suzanne Scanlon
Suzanne Scanlon