KRISTIN L. MARTIN (SBN 206528)
ERIC B. MYERS (SBN 223125)
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201
E-mail: klm@dcbsf.com

Attorney for Plaintiff
UNITE HERE International Union

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITE HERE INTERNATIONAL UNION,

Plaintiff,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, DOES 1-100;

Defendant.

Case No. 2:16-cv-000384-TLN-EFB

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND TO STRIKE AFFIRMATIVE DEFENSES

[Fed. R. Civ. P. 12(c), (f)]

Introduction

The Shingle Springs Band of Miwok Indians ("the Tribe") says nothing surprising. Every argument the Tribe makes was anticipated in the opening brief that UNITE HERE International Union ("the Union") filed. Arbitration should be compelled forthwith so that the Tribe cannot continuing evading its promise to the Union.

Argument

A. There are no disputed material facts that preclude judgment on the pleadings.

The Tribe says that the Union's motion should be denied because there are disputed material facts, but the Tribe then concedes all of the material facts:

- There is no dispute that the Union and Tribe entered into a written contract (the MOA).
- There is no dispute about what the MOA says.
- There is no dispute that the MOA contains an arbitration clause or about what that arbitration clause says.
- There is no dispute that the parties mediated their dispute, which is the pre-arbitration step that the MOA's arbitration clause requires.

See Respondent's Opposition to Petitioner's Motion for Judgment on the Pleadings ("Resp. Op."), at 1-2. For this reason, the parties agreed in the Joint Status Report that they do not anticipate a trial in this case, or even a need for discovery. *See* Docket No. 19.

The Tribe's opposition brief contains a section entitled "Statement of Relevant Facts" but the only disputed fact that the Tribe identifies is the reason why the Tribe terminated Christopher Garrigues. The Union believes that the Tribe terminated Mr. Garrigues because he solicited support for the Union during his break. *See* Complaint, ¶ 18. The Tribe says it terminated Mr. Garrigues for a different reason. *See* Resp. Op., at 2. This motion can be decided without deciding whether the Union or the Tribe is correct. Why the Tribe terminated Mr. Garrigues is not material to the question the motion puts before the Court: whether the parties' dispute about his termination is covered by the MOA's arbitration clause. Put differently, the Tribe's obligation to arbitrate does not depend on whether the Tribe is correct (or incorrect) when it asserts that it terminated Mr. Garrigues for a permissible reason. That fact is for the arbitrator to determine.[1]

The rest of the so-called "disputed facts" are the Tribe's arguments about why it should not be compelled to arbitrate its dispute with the Union. The Tribe repeats over and over that it did not agree to

[1] That fact will matter when the parties are before the arbitrator. The MOA's neutrality clause prohibits the Tribe from terminating employees for union activity. The Union does not contend that the MOA otherwise limits the Tribe.

arbitrate employment termination decisions but a dispute over what the parties agreed does not preclude judgment on the pleadings. The correct interpretation of a labor agreement presents a question of law. *Assn. of Flight Attendants v. Mesa Air Group*, 567 F.3d 1043, 1046 (9th Cir. 2009); *Carpenters Health & Welfare Trust Fund v. Bla-Delco ConsResp., Inc.*, 8 F.3d 1365, 1367 (9th Cir. 1993); *Rathgeb v. Air Cal, Inc.*, 812 F.2d 567, 570 (9th Cir. 1987).

B. The Union is entitled to judgment as a matter of law.

1. The parties' dispute is arbitrable.

The Tribe repeats over and over that disputes about substantive arbitrability are for the Court to decide. That is true as a general proposition, but there are two reasons why that general rule does not apply here. Both were set out in the Union's opening brief (as well as in briefing on the related case), but the Tribe does not respond squarely to either.

a. The parties used language in the MOA that gives the arbitrator authority to decide disputes about arbitrability.

Paragraph 10 of the MOA (its arbitration provision) says that parties will arbitrate "any disputes over the interpretation or application of this Agreement." An agreement giving the arbitrator authority to decide "disputes regarding the interpretation or application" of the agreement delegates authority to the arbitrator to decide whether a dispute is arbitrable. By giving the arbitrator authority to interpret and apply the agreement, the parties agreed that the arbitrator could decide whether the agreement gives him jurisdiction. *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, 1345 (9th Cir. 1990). The Tribe simply ignores this case law.

Instead, the Tribe relies on a fifty-year old case (*Communications Workers of Am. v. Pac. NW Bell Tel. Co.*, 337 F.2d 455, 459 (9th Cir. 1964)) to argue that the Court may ignore the MOA's clear language and consider parol evidence. The Ninth Circuit has since clarified that parol evidence cannot alter the unambiguous meaning of a labor contract. *Trustees of S. Cal. IBEW-NECA Pension Trust Fund v. Flores*, 519 F.3d 1045, 1048 (9th Cir. 2008); *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1160 (9th Cir. 2000). This is especially true where the parties expressed their intent to exclude parol

evidence in the agreement itself by including a "zipper" or "entire agreement" clause. *Id.* at 1159. The MOA contains such a clause. *See* MOA, ¶ 14(c) ("This Agreement is the entire agreement between the Parties and supersedes all prior written and oral agreements, if any, with respect to the subject matter hereof.") In any event, the Tribe does not identify any extrinsic evidence that alters the MOA's meaning. Rather, the Tribe admits that the "express language of the MOA" "demonstrate" what the Union and Tribe agreed. Resp. Op., at 8. As we explain in the next section, the "evidence" that the Tribe wants to offer – how it thinks the MOA should be interpreted -- does not pertain to the arbitration clause.

b. What the Tribe casts as a dispute about arbitrability is really a dispute about whether the Tribe breached the MOA's neutrality clause.

Two examples demonstrate this point well. The MOA's neutrality clause (paragraph 5) states the Tribe "shall not directly or indirectly state or imply opposition" to the employees' selection of the Union as their collective bargaining representative. For the first example, imagine that the Tribe told employees, "We do not want the Union to represent our employees and so we will fire any employee who selects the Union as his or her collective bargaining representative." Imagine also that the Union invoked the arbitration clause to seek a remedy for this clear violation of paragraph 5. The Tribe could not create a dispute about arbitrability by asserting that it did not intend that paragraph 5 would limit what it says to employees.

Next, imagine that the Tribe told employees, "We don't think unions are necessary in the 21st century." Imagine also that, in response, the Union claimed that statement violated paragraph 5 because it "indirectly implies opposition" to employees' choosing the Union to be their representative. The Tribe could not create a dispute about arbitrability by asserting that it did not intend that paragraph 5 would prevent it from saying to employees, "We don't think unions are necessary in the 21st century." That is exactly the argument the Tribe is making here. The Union thinks that the Tribe indirectly implied opposition to employees selecting the Union by terminating two employees because they solicited support for the Union. The Tribe apparently claims that it did not terminate the employees for that reason or, if it did, the act of terminating their employment did not imply opposition. The Tribe admits that its dispute with the Union is over how to interpret and apply paragraph 5. *See* Resp. Op., at

15 ("The Union attempts to mischaracterize the employment termination decisions of two employees as an alleged violation of paragraph 5 of the MOA.") For purpose of this motion, what matters is that the parties have a dispute about what the Tribe did and whether it violates paragraph 5. They do not have a dispute about how to interpret the arbitration clause.[2]

The Tribe says that *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1963) supports its argument, but that is not so. In *Warrior &* Gulf, there was a dispute about whether the arbitration clause applied because the clause expressly excluded disputes arising under one section of the agreement, and the employer asserted that the union's grievance arose under that section. *Id.* at 583. The same is not true here. The MOA's arbitration clause covers disputes about all of the MOA's provisions. On its face, the Tribe's promise to arbitrate disputes about "interpretation or application" of the MOA extends to disputes about how to interpret or apply paragraph 5. There are no exclusions. *Cf. Teamsters Local Union No. 688 v. Indus. Wire Prods., Inc.*, 186 F.3d 878, 882 (8th Cir. 1999) (where there is a broad arbitration clause, "[a]bsent any clear exclusionary language . . . the presumption in favor or arbitration carries the day"). Even the Tribe does not argue that the parties agreed to exclude disputes involving paragraph 5 from the arbitration clause. The Tribe's argument is that paragraph 5 does not preclude it from firing union supporters.

In *United Steel, Paper, etc. v. TriMas Corp.*, 531 F.3d 531 (7th Cir. 2008), the Seventh Circuit rejected an argument similar to the one the Tribe makes here. There, an employer and union disagreed about whether one of the employer's facilities was covered by a neutrality agreement. The employer offered evidence that, notwithstanding the agreement's language, the parties intended to exclude the facility, but the district court still compelled arbitration. The Seventh Circuit affirmed, explaining that this evidence of intent was irrelevant to whether the dispute was arbitrable:

[2] Arbitration should be compelled even if the Court doubts that the Tribe violated paragraph 5 by terminating the employees. Even frivolous disputes (which this is not) must be submitted to arbitration: "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960).

> The evidence TriMas offered was irrelevant to the question of arbitrability because it did not concern the interpretation of the arbitration clause itself. The scope of the arbitration clause is established by the text of the arbitration clause itself; because there is no evidence that the parties modified that clause, the scope of arbitrability remains the same. One does not remove issues from arbitration simply by changing the scope of the underlying agreement.

Id. at 536. The Court explained that this rule ensures that the party resisting arbitration cannot "relatively eas[ily] manufacture a dispute about arbitrability by raising extrinsic attacks on the contract" and cause the court to "become entangled in the merits of the dispute." *Id.* at 538.

That is the Tribe's approach here. It says that it did not agree to arbitrate employment termination decisions, and then says that its intent creates a dispute about arbitrability. The Tribe's argument should be rejected.

2. Interpreting the MOA as precluding the Tribe from firing employees who upport the Union does not violate the NLRA.

The Tribe seems to concede that a union and employer may agree to the conditions under which employees will decide whether they want union representation. *See, e.g.*, Resp. Op., at 1, 8, 12, 14. It would be frivolous to argue otherwise, as courts uniformly enforce organizing agreements requiring employer neutrality, and compel arbitration of disputes arising under those agreements. *See, e.g.*, *Service Employees Int'l Union v. St. Vincent Medical Ctr.*, 344 F.3d 977, 984-86 (9th Cir. 2003); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 563, 567-68 (2d Cir. 1993); *TriMas Corp.*, 531 F.3d at 536-38. But the Tribe also asserts that "the NLRA proscribes employers from favoring any union that has failed to demonstrate majority status." Resp. Op., at 12. That is simply wrong, as cases cited in the Union's opening brief make clear. "An employer is also permitted to express to employees a desire to enter into a bargaining relationship with a particular union." *Dana Corp.*, 356 NLRB 256, 259 (2010), *enfd. sub nom. Montague v. NLRB*, 698 F.3d 307, 309 (6th Cir. 2012) (pre-recognition agreement between union and employer did not violate § 8(a)(2)); *see also Hotel Employees & Restaurant Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1467 n.6 (9th Cir. 1992) (enforcing contract provision requiring employer to prefer union employees in hiring). The Tribe ignores this law.

The Tribe also seems to accept that employees have a federal-law right to support the Union and that the NLRA prohibits it from terminating employees for doing so. This is a rule of black-letter law. *See Burnup & Sims*, 379 U.S. 21, 22 (1964). But the Tribe then argues that it would violate the NLRA by agreeing to comply with the NLRA. That is illogical. A union and employer may not make an agreement establishing new terms and conditions of employment when the union lacks majority support because the Union does not represent employees and therefore cannot bargain for them. But an agreement to treat employees as federal law requires that they be treated does not establish new terms and conditions of employment. When a Union bargains for a neutrality clause, the Union is not acting as the employees' collective bargaining representative. It is bargaining for the conditions under which employees will decide whether they want union representation.[3] The Tribe offers no support for its novel theory that a neutrality agreement violates § 8(a)(2) of the NLRA.

Contrary to what the Tribe asserts, *ACTWU v. Facetglas, Inc.*, 845 F.2d 1250 (4th Cir. 1988) does support the Union's position. In that case, an employer and a union that did not represent the employer's employees agreed to an election in which employees would decide whether they wanted union representation. The union and the employer also agreed that the employer would not discriminate against employees who support the union and to wages and benefits changes that would be implemented if the employees chose union representation. The election was held, but its outcome was disputed. The union then sued the employer for breaching all three parts of the agreement. *Id.* at 1251. The district court dismissed the case, and the union appealed. The Fourth Circuit declined to decide whether the union prevailed in the election because it involved a representational issue within the NLRB's primary jurisdiction. *Id.* at 1252. The Court also refrained from deciding whether the employer breached the wage and benefit provisions, because those provisions were conditioned on the union winning the election. *Id.* at 1253. But the Court reversed the dismissal of the neutrality and nondiscrimination violations, and remanded to the district court for further proceedings:

[3] Importantly, the Union does not contend that the paragraph 5 or any other provision of the MOA requires "just cause" or some other minimum standard before the Tribe may discipline or discharge employees. It simply requires that the Tribe not terminate employees because they support the Union.

> The Union's complaint alleges violations of the neutrality and nondiscrimination provisions of that agreement which may be resolved without regard to the ultimate outcome of the election.
>
> Further, the Union seeks monetary damages and reinstatement of two employees, not a new election. To the extent that appropriate relief, if any, may be determined without deciding the ultimate outcome of the election, the district court is the proper forum. For while the Board is authorized to remedy unfair labor practices with cease and desist orders and reinstatement of employees with or without backpay, it is not empowered to grant the full range of compensatory relief sought by the Union for breach of contract.

Id. at 1253. In other words, the NLRB does not have exclusive jurisdiction over actions based on an employer's discrimination against union supporters, and a union and employer may contract for additional remedies even when the union is not the bargaining representative.

More importantly, the Court should not decide whether the MOA's neutrality clause would violate the NLRA if interpreted as the Union advocates. The Tribe's theory that it would is not a defense to arbitrating. The Tribe cites *Kaiser Steel Corp. v. Mullins*, 155 U.S. 72 (1982) for the rule that a court must decide whether a labor contract violates the NLRA before enforcing it, *see* Resp. Op., at 15; but the contract in *Kaiser Steel* did not contain an arbitration provision. When the dispute is arbitrable, "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, 446 (2006). The action to compel arbitration in *Buckeye Check Cashing* was brought under the Federal Arbitration Act, but the rule applies equally to actions brought under § 301 of the Labor Management Relations Act. *See Building Materials & ConsResp. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1197 (9th Cir. 1988) (compelling arbitration and "declin[ing] to render an advisory opinion on the validity" of contract clause); *Hosp. & Institutional Workers Union Local 250 v. Marshal Hale Mem'l Hosp.*, 647 F.2d 38, 42 (9th Cir. 1981) (compelling arbitration because "[c]onflicts between the arbitrator and the NLRB can be resolved when they become manifest in an action to enforce the award. The mere possibility of conflict, however, is no barrier to arbitration"); *United Food and Commercial Workers Union, Local 400 v. Shoppers Food Warehouse Corp.*, 35 F.3d 958, 962 (4th Cir. 1994) ("[U]ntil an arbitrator has ruled, there is not a direct and immediate conflict [with the NLRA]. And in the absence of such a conflict, the arbitration clause should be enforced.").

In *United Steel, Paper, etc. v. Hibbing Joint Venture*, 2007 WL 2580546, at *6 (D. Minn. Sept. 4, 2007), the employer made the same general argument the Tribe makes here. The employer entered into a neutrality agreement with a union, and then claimed that the agreement violated § 8(a)(2) of the NLRA because it benefited the Union too much. Summarily rejecting that argument and citing *Buckeye Check Cashing*, the Court compelled arbitration: "[T]he Court is not enforcing unlawful provisions by compelling arbitration." *Id.*

3. The Tribe's sovereignty does not prevent the Court or the arbitrator from holding the Tribe to the agreement it made.

The Tribe's explanation of its various "sovereign immunity" and "self-government" defenses is rambling and only half-hearted. The Tribe first denies that it consented to being sued, *see* Resp. Op., at. 8 n.8; later concedes that it did waive immunity from a suit by the Union to compel arbitration, *see* Resp. Op., at 10; and then denies it again. *See* Resp. Op., at 10 n.10. That the Tribe waived its immunity from suit by the Union in federal court to compel arbitration is not open to question. Paragraph 14(b) of the MOA states that "[T]he Tribe expressly waives, in a limited manner, its immunity from suit . . . . with respect to matters arising out of this Agreement" and specifies that the waiver applies to an "action to compel arbitration pursuant to this Agreement."

Nor do the various doctrines of federal Indian law that the Tribe tosses about prevent the Court from compelling the Tribe to arbitrate its dispute with the Union. Citing *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004), the Tribe says that its right of self-government is not limited to tribal membership, inheritance rules and domestic relations. But *Snyder* explains just how limited the right of self-government is: "While we have not cabined the intramural exception to those listed in *Coeur d'Alene Tribal Farm*, we have been careful to allow such exemptions only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated." *Id.* at 895. This is not one of those "rare circumstances." The vast majority of people employed at the Tribe's casino are not members of the Tribe or any other federally recognized Native American tribe, Complaint, ¶ 14; Response, ¶ 14; and operating a casino does not implicate tribal self-government. *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); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180-81 (2d Cir. 1996). Whatever rights inherent tribal sovereignty gives the Tribe to govern itself, that sovereignty does not impair contracts the Tribe makes with outsiders to the Tribe.

The Tribe's final attempt to avoid its contractual promise to the Union consists of vague references to "tribal law." The Union's opening brief explained that as a labor contract, the MOA is governed exclusively by federal law. The Tribe offers no response. In any event, the Tribe can present its "violation of tribal law" defense to the arbitrator just as it must present its "violation of the NLRA" defense to the arbitrator.

Conclusion

For all of the foregoing reasons, judgment on the pleadings should be granted in favor of the Union and arbitration should be compelled. In the alternative, the Tribe's affirmative defenses should be stricken.

DATED: September 29, 2016

DAVIS, COWELL & BOWE, LLP

By: */s/ Kristin L. Martin*
Kristin L. Martin
595 Market Street, Suite 800
San Francisco, California 94105
Tel: (415) 597-7200; Fax: (415) 597-7201

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 29th day of September, 2016, I caused to be served a true and correct copy of the above and foregoing:

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND TO STRIKE AFFIRMATIVE DEFENSES

via ECF filing, properly addressed to the following:

Christopher Frederick Wohl
Treaver Kent Hodson
Palmer Kazanjian Wohl Hodson, LLP
Suite 455
(916) 442-3552
Fax: (916) 640-1521
Email: cwohl@pkwhlaw.com
Email: thodson@pkwhlaw.com

Attorneys for Shingle Springs Band of Miwok Indians

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

Executed on this 29th day of September, 2016 at San Francisco, California.

/s/ Suzanne Scanlon
Suzanne Scanlon