No. 21-55017

D.C. No. 3:20-cv-01006-W-DEB

U.S. District Court for Southern California, San Diego

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITE HERE LOCAL 30,

Plaintiff - Appellee,

v.

SYCUAN BAND OF THE KUMEYAAY NATION,

Defendant - Appellant.

DEFENDANT-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Appellant Sycuan Band of the Kumeyaay Nation ("Sycuan") respectfully requests that the Court reverse the District Court's Order granting Appellee Unite Here Local 30's ("the Union") Motion for Judgment on the Pleadings and the Union's Motion to Dismiss Sycuan's Counterclaim for Declaratory Relief. In granting the Union's Motion for Judgment on the Pleadings and compelling Sycuan to arbitration, the District Court ignored Sycuan's foundational challenges via its legal and factual attacks on the pleadings, including its assertion that the Union's claims are preempted by the National Labor Relations Act ("NLRA"). The District Court also misapplied the law with respect to contract formation, the presumption of arbitrability, and the requirements for waiving sovereign immunity.

Likewise, in granting the Union's Motion to Dismiss Sycuan's Counterclaim for Declaratory Relief, the District Court impermissibly empowered an arbitrator to usurp Sycuan's sovereign immunity and decide a novel legal issue of federal preemption that was entirely beyond the scope of any arbitration provision at issue. In so doing, the District Court infringed on Sycuan's sovereign immunity and compelled Sycuan to arbitrate a complex issue of federal law that must be decided in federal court **before** any dispute between the parties can be compelled to arbitration. By allowing arbitration the District Court improperly and, by implication, validated a delegation clause on the threshold arbitrability question

whether a contract exists. Sycuan specifically challenges such delegation and the arbitrability of the contract and its component arbitration clause. Moreover, the District Court abused its discretion in failing to consider any of the factors identified by this Court for determining whether to exercise jurisdiction over a declaratory relief action.

For these reasons, and as further detailed herein, the District Court's Order granting the Union's Motion for Judgment on the Pleadings and dismissing Sycuan's Counterclaim for Declaratory Relief must be reversed.

II. STATEMENT OF JURISDICTION

This is an appeal from the District Court's Order granting the Union's Motion to Dismiss Sycuan's Counterclaim and the Union's Motion for Judgment on the Pleadings. The District Court had original jurisdiction over Sycuan's Counterclaim for Declaratory Relief ("Counterclaim") pursuant to 28 U.S.C. § 1331, because Sycuan's claims seek declaratory relief under 28 U.S.C. § 2201. In its Complaint to Compel Arbitration ("Complaint") that began this litigation, the Union acknowledged that the District Court had jurisdiction under Section 301 of the Labor Management Relations Act, ("LMRA"), 29 U.S.C. § 185.

The Clerk of the District Court entered Judgment on December 10, 2020, in conjunction with its Order granting the Union's Motion to Dismiss the Counterclaim

and Motion for Judgment on the Pleadings. (ER 00006.[1]) Sycuan timely filed a notice of appeal on January 8, 2021. (ER 00376.)

This Court has jurisdiction over this appeal under 9 U.S.C. § 16, as the District Court's Order granting the Union's Motion for Judgment on the Pleadings grants the Union's Complaint To Compel Arbitration. In addition, this Court has jurisdiction over the District Court's Order dismissing Sycuan's Counterclaim pursuant to 28 U.S.C. § 1192.

III. STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting the Union's Motion for Judgment on the Pleadings where Sycuan's Answer and Counterclaim raised factual issues and affirmative defenses that, if proven, would nullify the Union's Complaint.

2. Whether the District Court erred in granting the Union's Motion for Judgment on the Pleadings where Sycuan disputed a gateway issue, the formation of a contract with the Union, and requested a jury trial on this issue pursuant to Section 4 of the Federal Arbitration Act.

3. Whether the District Court erred in granting the Union's Motion for Judgment on the Pleadings where the question of NLRA preemption was outside the scope of a limited arbitration agreement and Sycuan had not waived its sovereign

[1] The Excerpts of Record will be referred to as "ER" followed by the applicable page referenced.

immunity with respect to adjudication of this issue.

4. Whether the District Court abused its discretion in declining to retain supplemental jurisdiction over Sycuan's Counterclaim, yet the issue of NLRA preemption was a threshold issue that the District Court was required to resolve before compelling Sycuan to arbitration.

5. Whether the District Court abused its discretion in dismissing Sycuan's Counterclaim because it had original jurisdiction over the Counterclaim and failed to consider any of the factors relevant to exercising jurisdiction under the Declaratory Judgment Act.

IV. STATEMENT OF THE CASE

A. The Sycuan Band of the Kumeyaay Nation

Sycuan is a federally recognized Indian tribe located in and around the foothills of the Dehesa Valley near San Diego, California. (ER 00283.) Sycuan is sovereign within the reservation's boundaries, retaining all powers of self-government not extinguished by the United States Congress, including sovereign immunity from suit and from the laws or authority of the State of California and from any other parties. (ER 00284.) The Sycuan Casino Resort (the "Casino Resort") is the cornerstone of Sycuan's economic development, providing crucial funding for government services, and programs for members of the Sycuan tribe. (ER 00284.)

The Casino Resort began in 1983 as the Bingo Palace and, since its inception, the State of California has sought to improperly regulate jurisdiction over the Casino Resort as well as other tribal gaming facilities throughout the State. (ER 00284-85.) As a result of the State of California's continued encroachment into tribal gaming affairs – and the United States Supreme Court's subsequent determination in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that the State of California had no civil-regulatory authority over gaming on Indian lands – the United States Congress passed the Indian Gaming Regulatory Act ("IGRA") in 1988, establishing the current framework for tribal gaming. (ER 00285.) Notably, the IGRA allows tribes to operate high-stakes casino games, defined as Class III games, only pursuant to a gaming compact signed between the relevant tribe and the surrounding state. (ER 00287.)

B. California Requires Sycuan to Execute a Gaming Compact Containing a Tribal Labor Relations Ordinance That Exceeds the Provisions of the National Labor Relations Act.

After the enactment of the IGRA, the State of California repeatedly raided Sycuan's and other tribes' gaming facilities while refusing to negotiate Class III gaming compacts with any tribes residing in its borders. (ER 00284.) Thereafter, several tribes in California, including Sycuan, sought to negotiate compacts with the State of California to permit the operation of Class III gaming on their respective reservations. After the passage of Proposition 1A, a coalition of California tribes

entered into similar gaming compacts with the State referred to as the "1999 Compacts." (ER 00286.)

In 2015, Sycuan and the State negotiated a new Compact (the "2015 Compact") in which the State compelled Sycuan (as it did with other gaming tribes) to enact a prefabricated Tribal Labor Relations Ordinance ("TLRO") that provides specific labor rights to employees at tribal gaming establishments and unions seeking to organize those employees. (ER 00288-89.) However, the question of whether the National Labor Relations Board ("NLRB" or "Board") had full authority to regulate the employment relationship between tribes and the employees working in gaming establishments on tribal lands and, more importantly, whether the NLRA preempted some or all of the TLRO created under state law, remained unsettled in the Ninth Circuit. (ER 00286-287.) Finally, in 2018, three years after Sycuan and the State negotiated their new Compact, this Court definitively resolved this issue, holding in *Casino Pauma v. N.L.R.B.* that the NLRA does, in fact, govern the relationship between a tribal casino and its employees. *See Casino Pauma v. N.L.R.B.,* 888 F.3d 1066 (9th Cir. 2018), *cert. denied, Casino Pauma v. N.L.R.B.*, 139 S. Ct. 2614, 204 L. Ed. 2d 264 (2019) ("*Casino Pauma*"). (ER 00287.) Specifically, this Court held **for the first time** that the NLRB has jurisdiction to adjudicate unfair labor charges brought before the Board against a tribal-owned business operating on tribal land. *Id.*

Moreover, Sycuan's tribal-state compact governing its Class III gaming was approved by the Department of Interior with no action by the Secretary, a deemed approval, but only to the extent that the compact complies with IGRA. *See* 25 U.S.C. §2710(d)(8)(C). If, as *Casino Pauma* held, the NLRA preempts some or all of the TLRO, then that TLRO must be interpreted, or reformed, to be consistent with IGRA.

C. The Union Informs Sycuan of Its Intent to Organize.

Notwithstanding this Court's holding in *Casino Pauma*, in November 2019, the Union sent Sycuan several letters indicating its intent to organize the Casino Resort employees and demanding certain concessions in accordance with the TLRO that were inconsistent with, and many of which exceeded, the rights and obligations provided under the NLRA. (ER 00290.) When Sycuan refused the Union's demands, and required compliance with its approved gaming ordinance, the Union alleged Sycuan was in violation of the TLRO and attempted to unilaterally commence arbitration proceedings with the American Arbitration Association ("AAA") in order to pursue its grievances against Sycuan. (ER 00290.) On December 3, 2019, Sycuan informed the AAA that it would not be participating in arbitration based on its position that portions of the TLRO, including its component arbitration provision (and by implication the delegation clause) contained therein, is preempted by the NLRA. (ER 00290-291.)

D. The Union Files a Complaint to Compel Arbitration and Sycuan Files a Counterclaim for Declaratory Relief on the Issue of NLRA Preemption.

Despite Sycuan's efforts to resolve the legal dispute with the Union, on June 1, 2020, the Union filed its Complaint in the United States District Court for the Southern District of California alleging Sycuan was in violation of the TLRO and that the parties' dispute must be submitted to arbitration in accordance with the TLRO's dispute resolution procedures. (ER 00291; 00311.)

In response, on July 30, 2020, Sycuan filed an Answer to the Union's Complaint ("Answer") asserting, *inter alia*, that: (1) portions of the TLRO, including any arbitration provisions contained therein, are preempted by the NLRA; (2) the Union and Sycuan never entered into a binding bilateral agreement; (3) key provisions of the TLRO lack sufficiently definite terms rending portions of the TLRO unenforceable; and (4) Sycuan never waived its sovereign immunity to suit with respect to the Union or the issue of NLRA preemption. (ER 00295.) Concurrently, on June 30, 2020, Sycuan filed a Rule 13 Counterclaim for Declaratory Relief alleging that there is an actual, present, and justiciable controversy between Sycuan and the Union concerning the validity and enforceability of the TLRO as applied to the Casino Resort and its employees. (ER 00281.) Sycuan sought an order declaring that the NLRA preempts and invalidates enforcement of portions of the TLRO, thus making the purported dispute between

the parties non-arbitrable, and preserving Sycuan's sovereign immunity. (*Id.*)

E. The District Court Grants the Union's Motion for Judgment on the Pleadings and Dismisses Sycuan's Counterclaim.

On September 2, 2020, before any discovery had been conducted, the Union filed a Motion to Dismiss Sycuan's Counterclaim. (ER 00208.) Subsequently, on September 15, 2020, the Union filed a Motion for Judgment on the Pleadings to compel Sycuan to arbitration. (ER 00124.) Sycuan timely opposed both motions. (ER 00066;00094.)

On December 10, 2020, the District Court issued an Order granting the Union's Motion for Judgment on the Pleadings and dismissing Sycuan's Counterclaim. (ER 00006.) The District Court declined to consider any substantive issues raised in the pleadings, including the threshold issue of NLRA preemption. (ER 00010.) Instead, the District Court summarily concluded that a bilateral contract was formed between Sycuan and the Union in which both parties agreed to comply with the TLRO's terms, including the arbitration provisions. (ER 00009-10.) The District Court further held that any remaining disputes between the parties must be resolved by an arbitrator. (ER 00010.)

On January 8, 2020, Sycuan filed a timely notice of appeal of the District Court's December 20, 2020 Order. (ER 00376.) Subsequently, on January 11, 2021, Sycuan filed a Motion for Stay in the District Court pending this Court's decision on Sycuan's appeal. (ER 00045.) On February 16, 2021, the District Court issued

an Order denying Sycuan's Motion for Stay. (ER 00001.) Sycuan thereafter filed a Motion to Stay in this Court on March 18, 2021, which has been fully briefed and is pending. (ER 00011.)

V. STANDARD OF REVIEW

A district court's decision to grant or deny a motion for judgment on the pleading is reviewed *de novo. See Ventress v. Japan Airlines,* 486 F.3d 1111, 1114 (9th Cir. 2007); *Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1167 (9th Cir. 2002). A dismissal may be affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

A district court's decision to dismiss a counterclaim is subject to review on appeal for abuse of discretion. *See Gov't Employees Inc. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (*en banc*). Discretion is considered to have been abused if the district court's decision was "[1] illogical, [2] implausible, or [3] without support in inferences that may be drawn from the facts in the record." *Forest Grove School Dist. v. T.A.*, 638 F.3d 1234, 1238 (9th Cir. 2011) (citing *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) *(en banc)*).

VI. SUMMARY OF ARGUMENT

For over twenty years, Sycuan and other Indian tribes operating gaming

facilities on tribal lands within California's borders, have been forced to abide by identical TLROs through which the State of California imposes obligations that exceed or contradict those applicable to non-tribal employers under the NLRA. Following this Court's landmark decision in *Casino Pauma*, the ongoing enforceability of these state-mandated ordinances is now in question. Specifically, in *Casino Pauma* this Court held that the NLRA governs the relationship between a tribal casino, such as Sycuan, and its employees. Although *Casino Pauma* ruled that the NLRA applies to Indian tribes, no federal court within California has yet to rule on the corollary issue of whether the NLRA preempts and invalidates inconsistent portions of the State-mandated TLRO.

Despite the impact NLRA preemption would have on the Union's claims in this action, including whether such claims can be compelled to arbitration, the District Court refused to address the threshold issue of whether the NLRA preempts portions of the TLRO, reasoning that doing so would interfere with the arbitrator's authority to consider the validity of the contract allegedly formed by the TLRO. The circular analysis performed by the District Court – in which a collective bargaining agreement is presumed to exist without any analysis as to whether inconsistent portions of the alleged contract (the TLRO), including the disputed arbitration provisions, have been preempted by federal law – constituted an error of law that requires reversal of the District Court's Order.

Moreover, in ruling on the Union's Complaint at the pleading stage, the District Court ignored and/or misapplied the law with respect to: (1) Sycuan's legal and factual challenges to the formation of the purported contract with the Union; (2) the scope of the arbitration provision in the TLRO; and (3) whether Sycuan had waived its sovereign immunity for purposes of adjudicating the issue of NLRA preemption in an arbitral forum. The District Court then compounded the foregoing errors and further abused its discretion by dismissing Sycuan's Counterclaim – despite having both original and supplemental jurisdiction – even though none of the recognized exceptions for declining to exercise jurisdiction under the Declaratory Relief Act were present or identified in the District Court's Order.

Based on the foregoing, Sycuan respectfully submits that this Court reverse the District Court's December 10, 2020 Order granting the Union's Motion for Judgment on the Pleadings and dismissing Sycuan's Counterclaim.

VII. ARGUMENT

A. The District Court Erred by Granting the Union's Motion for Judgment on the Pleadings Because Sycuan's Answer and Counterclaim Raised Valid Affirmative Defenses and Issues of Disputed Fact.

A motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure shall **not** be granted unless it appears "beyond doubt that the [non-moving party] can prove no set of facts in support of his claim which entitle him to relief." *Enron Oil Trading Transp. Co. v. Walbrooks Ins. Co., Ltd.,* 132 F.3d

526, 529 (9th Cir. 1995) (quotation omitted). In assessing a motion for judgment on the pleadings, "[a]ll allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party." *Gen. Conference Corp. of Seventh–Day Adventists v. Seventh–Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989). Accordingly, "if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." *Id.* at 230; *see also* William W. Schwarzer et al., *Federal Civil Procedure Before Trial*, § 9:328 (a motion seeking judgment on the pleadings may only be granted if all of the defenses raised in the answer are legally insufficient). Under this stringent legal standard, a district court is required to deny a motion for judgment on the pleadings if the defendant's answer "raises [a facially valid] affirmative defense" or "issues of fact that, if proved, would defeat recovery." *Gen. Conference Corp. of Seventh–Day Adventists*, 887 F.2d at 230.

In light of the extremely high standard applicable to motions for judgment on the pleadings, the District Court erred by granting the Union's Motion for Judgment on the Pleadings where Sycuan's Answer, affirmative defenses, and Counterclaim raised legal defenses, including preemption, and factual disputes, including the lack of a legally binding contract between the parties that, if proven, would bar the relief sought by the Union's Complaint. Most notably, in its Answer to the Union's Complaint, Sycuan alleged as its third affirmative defense that:

> [T]he Complaint is barred because the purported Tribal Labor Relations Ordinance, including any arbitration provisions contained therein, are preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and, therefore, is unenforceable where such provisions conflict with the NLRA.

(ER 00307.) Sycuan further alleged in its twelfth affirmative defense that:

> [T]he relief requested by Plaintiff exceeds the authority of the Tribal Labor Panel [i.e., for arbitration] where federal preemption applies and the Panel is called upon to address its own validity under the preempted TLRO.

(ER 00308.)

The foregoing affirmative defenses are facially valid and, if proven, would defeat the Union's right to an arbitral forum as well as the underlying relief sought in arbitration. Specifically, when the original TLRO between Sycuan and the State of California went into effect, the NLRA exempted State and federal governments from the definition of employers, but its application was silent as to tribal employers. For many years, the NLRB disclaimed jurisdiction over tribes as employers and held the NLRA did not reach their labor relations, even though the NLRA was applied to interpret tribal labor relations ordinances. *See Casino Pauma*, 888 F.3d at 1074. However, in 2007, the United States Court of Appeals for the District of Columbia Circuit gave the first indication that the NLRA also applied to tribal governments. *See San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007). A year later, in *Chamber of Commerce v. Brown,* 554 U.S. 60 (2008), the United States Supreme Court ruled that where a state law regulates within a zone

protected and reserved for market freedom, the state law is preempted by the NLRA. Subsequently, in 2015, the Court of Appeals for the Sixth Circuit held that the NLRA *could* or *may* be applied to the operation of a casino within a reservation on trust land. *See N.L.R.B. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015). Finally, in 2018, this Court extended the foregoing principles to hold that the NLRA does, in fact, govern the relationship between a tribal casino and its employees. *See Casino Pauma*, 888 F.3d at 1074.

Notably, the TLRO at issue in this action—that Sycuan was **required** to sign in order to maintain its Class III gaming license—contains provisions that far exceed those required for other business under the NLRA. For instance, Section 7(c)(1) of the TLRO, at issue in the Union's Complaint, purportedly requires Sycuan to provide a union attempting to organize with an election eligibility list containing employees' names, addresses, telephone numbers and email addresses. (ER 00268.) Section 8(a) of the TLRO, also at issue in the Complaint, ostensibly requires Sycuan to grant such union access to certain non-work areas of the Casino Resort in order to organize "Eligible Employees." (ER 00269.) These provisions exceed the obligations imposed on employers under the NLRA and allow access to secure, back-of-house areas that require Sycuan Gaming Commission credentials. *See generally* 29 U.S.C. §§ 151-169. The TLRO also exceeds the NLRA's protections in other respects, including permitting unions or employees to organize secondary boycotts after

impasse, which the NLRA prohibits as an unfair labor practice. *See* 29 U.S.C. § 158(b)(4). In addition, Section 7(c)(2) of the TLRO purports to require Sycuan to "not act in any way which is or could reasonably be perceived to be anti-union." (ER 00268.) Conversely, the NLRA allows employers to engage in "free speech" that includes the right to oppose unions if they wish. *See* 29 U.S.C. § 158(c).

Based on the foregoing, Sycuan stated a valid affirmative defense that the State-mandated TLRO is inconsistent with the NLRA and, in accordance with *Casino Pauma*, that these inconsistent provisions are preempted by the NLRA under the doctrines of preemption established by the United States Supreme Court. *See, e.g., Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959); *see also Casino Pauma*, 888 F.3d at 1074 (holding that Indian tribes are "employers" within the meaning of and subject to the restrictions of the NLRA). Sycuan also raised these arguments in its Counterclaim. (ER 00291-292.)

If Sycuan's position is correct, and the TLRO is preempted by the NLRA in whole or in part, then the claims outlined in the Complaint are not arbitrable because they rely for arbitrability on an unenforceable state requirement and tribal ordinance that must be interpreted by incorporating and applying the NLRA. Accordingly, the District Court erred in granting the Union's Motion for Judgment on the Pleadings

given that Sycuan raised a facially valid affirmative defense that, if proven, would defeat the Union's Complaint.

Moreover, preemption was not the only applicable affirmative defense raised by Sycuan in its Answer. Sycuan also challenged the Complaint on the grounds that, among other reasons: (1) Sycuan did not mutually and voluntarily enter in an agreement with the Union to arbitrate the dispute at issue; (2) the alleged contract between Sycuan and the Union is unenforceable because it lacks sufficiently definite terms and constitutes an "agreement to agree;" and (3) Sycuan did not waive its sovereign immunity to suit with respect to the Union or the claims alleged. (ER 00307-308.) These defenses, all of which are discussed in greater detail below, are facially valid and raise legal and factual issues that should have precluded the District Court from granting the Union's requested relief based solely on the pleadings. For these reasons alone, the District Court's Order granting the Union's Motion for Judgment on the Pleadings must be reversed. *See Gen. Conference Corp. of Seventh–Day Adventists*, 887 F.2d at 230 (reversing a district court's grant of an *unopposed* Rule 12(c) motion because the defendant had asserted affirmative defenses and issues of fact remained); *Schwarzer*, *supra*, § 9:328.

B. The District Court Erred by Granting the Union's Motion for Judgment on the Pleadings Because Sycuan Never Entered Into a Bilateral Contract With the Union.

1. The Presumption in Favor of Arbitration Does Not Apply Because Sycuan Disputes the Existence of an Enforceable Contract.

The United States Supreme Court has repeatedly affirmed that arbitration "is a matter of consent, not coercion." *Volt Info. Scis. Inc. v. Bd. Of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Consistent with this bedrock principle, "courts may order arbitration of a particular dispute only when satisfied that the parties agreed to arbitrate *that dispute*." *Granite Rock Co. v. Int'l Bhd. Of Teamsters,* 561 U.S. 287, 299 (2010) (emphasis in original); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). Moreover, where "the parties contest the *existence* of an arbitration agreement, the presumption in favor of arbitrability does not apply." *Goldman Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) (emphasis in original). Likewise, a court should not compel arbitration where the parties dispute the "enforceability or applicability of the [arbitration agreement] to the dispute in issue." *Granite Rock*, 561 U.S. at 299-300.

In both its Answer and opposition to the Union's Motion for Judgment on the Pleadings, Sycuan specifically disputed that a contract exists between it and the

Union and demanded a jury trial on the issue. (ER 00094; 00307.) Notwithstanding the foregoing, the District Court summarily concluded, based on nothing more than the pleadings, that the presumption in favor of arbitrability still applies, and that a "contract was formed in which the Tribe and the Union agreed to comply with the TLRO's terms." (ER 00009-10.) The District Court's ruling constitutes an error of law.[2]

Specifically, under basic contract law, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1212 (9th Cir. 2016) (quoting Restatement (Second) of Contracts § 17 (1981)). "The mutual intention to be bound by an agreement is the *sine qua non* of legally enforceable contracts and the recognition of this requirement is nearly universal." *Id.* Thus, "where the parties to a 'contract' have not mutually consented to be bound by their agreement, they have not formed a true contract." *Id.*

Here, there is no enforceable contract between Sycuan and the Union because: (1) the TLRO constitutes an **unenforceable** "agreement to agree;" and (2) the TLRO's terms are not sufficiently definite. First, it is well established that indefinite

[2] To the extent the TLRO includes any sort of delegation clause, there is no "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide arbitrability, as required. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

"agreements to agree" cannot impose legally binding obligations on either party. *See, e.g., Cable & Comput. Tech. v. Lockheed Sanders, Inc.*, 214 F.3d 1030, 1035 (9th Cir. 2000); *Kruse v. Bank of Am.*, 202 Cal.App.3d 38, 59 (1988) ("an agreement for future negotiations [is] not the equivalent of a valid, subsisting agreement"); *see also* Restatement (Second) Contracts, § 26, p. 75 ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). This is because "[n]either law nor equity provides a remedy for breach of an agreement to agree in the future." *Autry v. Republic Prods., Inc.*, 30 Cal.2d 133, 151 (1947). Thus, where essential terms are "only sketched out," with the "final form" to be determined in the future, there can be no enforceable contract. *Bustamante v. Intuit*, 141 Cal.App.4th 199, 213-214 (2006).

In light of the foregoing principles, the provisions of the TLRO the Union relies on to allege a purported "contract" constitute nothing more than an unenforceable "agreement to agree" (and not even an "agreement to agree" with a particular party). Specifically, Section 7 of the TLRO provides that if an unspecified union **later offers to agree** to comply with Sections 7(b)(1) and (b)(2) of the TLRO, Sycuan will agree to comply with Sections 7(c) and 7(d). (ER 00267-268.) Thus, the very terms of Section 7 of the TLRO require **future assent** from an **unknown**

party, without consideration, before any contract is formed.

Such an uncertain agreement also cannot be enforced because it fails to include sufficiently certain material terms (such as the identity of the union and whether the unidentified union will assent in the future) to constitute a "meeting of the minds." *See Bustamante*, 141 Cal.App.4th at 213-214 ("[T]he failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have … agreed on some of the terms, or have taken some action related to the contract."); *see also Banner Entm't, Inc. v. Superior Court (Alchemy Filmworks, Inc.)*, 62 Cal. App. 4th 348, 358–59 (1998), *as modified* (March 30, 1998) ("Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense.").

The TLRO's failure to identify one of the indispensable parties to the agreement is also detrimental to the formation of a contract. There can be no dispute that the identity of one of the two parties, in this case the specific union, is one of the most important and "material terms" of the agreement. After all, the unidentified union is not required to meet any criteria with respect to experience or legitimacy, and Sycuan must be allowed to protect the privacy of its employees and/or refuse to contract with an inappropriate party.

The history of the union, its competency, and its integrity are crucial factors

that must be known to Sycuan before it can assent to any provisions of the TLRO, including those requiring it to disclose employees' private contact information (including home and email addresses), to refrain from criticizing the union, and to forgo alternative mechanisms for handling any grievances or actions. Given the importance of the matter left to the future, the very identity of one of the parties (a material term), there can be no "meeting of the minds" and no enforceable contract. *See Coleman Eng'g Co. v. N. Am. Aviation, Inc.,* 65 Cal.2d 396, 406 (1966) ("[T]he enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future...").

The terms of the "agreement to agree" are rendered even more indefinite by the fact that the TLRO does not specify whether the unidentified union is required to be bound by the entire TLRO or just sections 7(b)(1) and (b)(2). (ER 00267-268.) Thus, for instance, it is unclear if the unspecified union would be bound by Section 6 of the TLRO, which delineates unfair labor practices. (ER 00266-267.) A union could argue that sections 7(b)(1) and (b)(2) do not require it to refrain from engaging in the unfair labor practices listed in Section 6 of the TLRO, even though this is a material term to Sycuan. These ambiguities, therefore, preclude a "meeting of the minds" sufficient to form an enforceable agreement. *See Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal.2d 474, 481 (1955) ("Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be

ascertained, the contract is void and unenforceable.").

Likewise, because of the indefiniteness in the TLRO's terms, a court would be unable to determine the scope of the unidentified union's duties or form a rational basis for the assessment of damages to Sycuan in case of an alleged breach. *See Ladas v. California State Auto. Assn.*, 19 Cal.App.4th 761, 770 (1993) ("To be enforceable, a promise must be definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."). For all of these reasons, a valid contract between the Union and Sycuan was **never** formed, and the District Court erred by holding otherwise.

2. Sycuan Is Entitled to a Jury Trial on the Issue of Whether a Contract With the Union Was Formed.

The District Court also erred by refusing to allow Sycuan to proceed with a jury trial pursuant to Section 4 of the FAA, 9 U.S.C. § 4, to resolve the disputed issues of facts regarding the enforceability of the TLRO and the arbitration provision contained therein. Where there is a genuine dispute of material fact regarding contract formation and the party opposing arbitration timely demands a jury trial of the issue, as Sycuan did here, the FAA specifically provides that "the court shall proceed summarily to the trial thereof." *See* 9 U.S.C. § 4. Courts have interpreted this provision to require a jury trial where, as here, "there is a triable issue concerning the existence or scope of the [arbitration] agreement." *Saturday Evening Post Co.*

v. Rumbleseat Press, 816 F.2d 1191, 1196 (7th Cir. 1987); *see also Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 129-30 (2d Cir. 1997).

For the reasons stated above, there is a material issue regarding the existence of a contract, which is a prerequisite to the enforceability of an arbitration agreement between Sycuan and the Union. The District Court should not have determined whether the Union's claim is arbitrable until it resolved **all factual disputes** regarding whether an enforceable agreement to arbitrate existed in the first place. *See Chastain v. Union Sec. Life Ins. Co.*, 502 F. Supp. 2d 1072, 1075 (C.D. Cal. 2007). To reach the derivative question of what specific issues the parties intended to arbitrate before resolving all factual disputes regarding whether the parties effectively entered into an agreement to arbitrate **in the first instance** would not only be futile, but contrary to basic principles of contract interpretation. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). At a minimum, Sycuan is entitled to an evidentiary hearing to show "that there is a dispute of fact to be tried" as if it were opposing a motion for summary judgment. 9 U.S.C. § 4. Because the District Court denied Sycuan its rights under Section 4 of the FAA, its Order granting the Union's Motion for Judgment on the Pleadings must be reversed.

C. The District Court Erred in Granting the Union's Motion for Judgment on the Pleadings Because the Threshold Issue of NLRA Preemption Is Outside the Scope of the TLRO and Sycuan Did Not Waive Its Sovereign Immunity to Suit With Respect to NLRA Preemption.

Even assuming, *arguendo*, a valid contract exists between Sycuan and the Union, the District Court erred in granting the Union's Motion for Judgment on the Pleadings because the issue of NLRA preemption is outside the scope of the arbitration provisions in the TLRO. It is well-established that an agreement to arbitrate covers only those disputes that the parties have contractually consented to submit to arbitration. *See United Steelworkers*, 363 U.S. at 582 ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). It is equally well-established that a waiver of a tribe's sovereign immunity must be explicit and cannot be implied. Here, Sycuan **did not consent** to allow an arbitrator to decide whether the NLRA preempts portions of the TLRO.

In its briefing to the District Court, the Union asserted that the question of NLRA preemption must be resolved in arbitration based on language in the TLRO contending: "All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein." (ER 00314.) However, the Union's position runs counter to its own interpretation **of the same language from the TLRO** advanced in prior litigation. Specifically, in the matter of *Pauma Band of Mission Indians v. UNITE HERE Int'l Union*, Case No. 16-cv-2660-BAS-JLB (S.D. Cal.), the Union

argued that the TLRO's arbitration provision did not require it to submit unfair labor practice claims to arbitration because "[t]he TLRO provision . . . does not mention the NLRA or an intent to waive statutory claims generally, and the phrase 'all issues' is susceptible to another obvious meaning: all issues arising under the TLRO." Brief for Defendant in Support of Motion to Dismiss, *Pauma Band of Mission Indians v. UNITE HERE Int'l Union*, 2017 WL 11517454 (S.D. Cal.). (ER 00112.) The Union likewise argued that "the TLRO [arbitration] provision does not come even close" to constituting a "clear and unmistakable" waiver of the right to bring statutory claims, and in particular claims under the NLRA, in a federal forum. *Id.*

On this issue, the Union and Sycuan are in complete agreement. The TLRO **does not even mention** the NLRA or evidence an intent to arbitrate issues of preemption or conflicts of law, under the NLRA or otherwise. Rather, as the Union aptly observed in its briefing in the *Pauma Band* matter, the TLRO's dispute resolution process applies **only** to "issues arising under the TLRO." Thus, by the Union's own reasoning, the district court erred by compelling Sycuan to resolve its dispute in arbitration because, by definition, the issue of NLRA preemption does not "arise under" any language in or provision of the TLRO.

Moreover, requiring Sycuan to arbitrate the issue of NLRA preemption would infringe on Sycuan's sovereign immunity, in clear violation of longstanding federal law. As this Court has explained:

> It is well settled that a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo [v. Martinez]*, 436 U.S. [49] at 58, 98 S.Ct. 1670 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)). That expression must also manifest the tribe's intent to surrender immunity in "clear" and unmistakable terms. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (quoting *Potawatomi*, 498 U.S. at 509, 111 S.Ct. 905). Thus, absent a clear and unequivocally expressed waiver by a tribe or congressional abrogation, "[s]uits against Indian tribes are ... barred." *Potawatomi*, 498 U.S. at 509.

Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011, 1016 (9th Cir. 2016) (internal footnotes omitted).

Here, Sycuan only waived its immunity with respect to disputes "arising under" the TLRO. (ER 00201.) Sycuan **never** "clearly" and "unequivocally" waived its sovereign immunity with respect to the issue of NLRA preemption, and it cannot be required to resolve this issue via arbitration.[3] Just as the Union argued in *Pauma Band* that such language was neither clear nor unequivocal enough to cover NLRA charges, it is neither clear nor unequivocal enough to waive Sycuan's

[3] The fact that Sycuan asked the District Court to resolve the issue of NLRA preemption does not waive Sycuan's sovereign immunity "as to claims that could be asserted against it, even as to related matters . . . arising from the same set of underlying facts." *Bodi*, 832 F.3d at 1016 (internal quotation and citation omitted); *see also Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribes "did not waive their immunity by intervening in . . . administrative proceedings" because "[a]ny waiver must be unequivocal and may not be implied.").

sovereign immunity. As such, the District Court erred in holding that Sycuan had waived its sovereign immunity to suit with respect to the issue of NLRA preemption.

Finally, and as further discussed in Section D(2) below, because the issue of NLRA preemption is a threshold issue, the District Court was **required** to resolve this issue **before** compelling the Union's underlying claims to arbitration. After all, if the NLRB preempts applicable portions of the TLRO, then Sycuan's waiver of sovereign immunity, even with respect to labor issues "arising under" the TLRO, is also arguably preempted, and Sycuan cannot be required to arbitrate whether it is immune from suit as doing so would eviscerate the principles of sovereign immunity. *See, e.g., Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995) ("Tribal sovereign immunity would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial."); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (recognizing that an immunity defense is effectively lost if an immune party is forced to stand trial or face other burdens of litigation).

For these additional reasons, the District Court erred in granting the Union's Motion for Judgment on the Pleadings.

D. The District Court Abused Its Discretion by Failing to Exercise Supplemental Jurisdiction Over Sycuan's Counterclaim.

Under 28 U.S.C. § 1367(a), "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within

such original jurisdiction that they form a part of the same case or controversy under Article III of the United States Constitution." Thus, section 1367(a) "grants supplemental jurisdiction to the constitutional limit" and "requires only that the jurisdiction-invoking claim and the supplemental claim have some loose factual connection." 13D CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.1 (3d ed. & Oct. 2020 Update).

To this end, federal courts have routinely held that supplemental jurisdiction under section 1367 should be applied broadly. *See, e.g., Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 214 (2d Cir. 2004) ("The Counterclaims and the underlying claim bear a sufficient factual relationship (if one is necessary) to constitute the same 'case' within the meaning of Article III and hence of section 1367."); *Ammerman v. Sween,* 54 F.3d 423, 424 (7th Cir. 1995) ("[a] loose factual connection [between the supplemental state law claim and the federal claim] is generally sufficient" to establish jurisdiction under section 1367(a)); *Polaris Pool Sys. v. Letro Prods., Inc.*, 161 F.R.D. 422, 425 (C.D. Cal. 1995) (the court had jurisdiction under section 1367(a) to hear defendant's state law Counterclaims because they were "based on the same facts" and thus formed part of the same case or controversy as plaintiff's federal claims). Where "Defendant's Counterclaims bear a logical and factual relationship to Plaintiff's claims . . . supplemental jurisdiction exists over Defendant's Counterclaims under § 1367(a)." *Sparrow v. Mazda Am. Credit*, 385

F.Supp.2d 1063, 1070 (E.D. Cal. 2005).

Here, there can be no dispute that Sycuan's Counterclaim bears both a "logical" and "factual" relationship to the original Complaint filed by the Union. The related facts and the logical relationship between the Union's original claim and Sycuan's Counterclaim are self-evident. Both concern the enforceability and validity of the TLRO, which forms the basis of the alleged "contract" the Union seeks to enforce by compelling Sycuan to arbitration.

More specifically, the Union alleged in its Complaint that the TLRO created a contract between the Union and Sycuan that requires Sycuan to permit the Union to undertake certain union organizing activities on Tribal property. The Union further claimed Sycuan's alleged breach of this purported contract must be compelled to arbitration in accordance with the terms of the TLRO. Sycuan, in turn, alleged that no such contract had been created and sought a declaratory judgment that inconsistent portions of the TLRO are preempted by federal labor law. These two claims are inextricably intertwined, and the legal and factual issues a court would consider in resolving the Union's Complaint and Sycuan's Counterclaim are virtually identical. For these reasons, Sycuan's Counterclaim is indisputably part of the same "case or controversy" as the Union's Complaint, such that the District Court had supplemental jurisdiction under section 1367(a).

1. None of the Statutory Exceptions to the Exercise of Supplemental Jurisdiction Apply.

This Court has made clear that a district court that has supplemental jurisdiction pursuant to section 1367(a), as the District Court did here, **must** assert that jurisdiction unless a specific exception under section 1367(c) applies. *See Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1556 (9th Cir. 1994)* ("[I]t is clear that Congress intended section 1367(c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court."); *see also Exxon Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546, 559 (2005)* ("Section 1367(a) commences with the direction that §§ 1367(b) and (c), or other relevant statutes, may provide specific exceptions, but otherwise § 1367(a) is a broad jurisdictional grant."). Under section 1367(c), a district court may decline to exercise supplemental jurisdiction over a claim under 1367(a) **only if**: (1) the claim raises a novel or complex issue of state law; (2) the claim substantially predominates over the claim over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Here, the District Court concluded, with almost no analysis, that exceptional circumstances exist for declining to exercise supplemental jurisdictional over Sycuan's Counterclaim because ruling on the Counterclaim "would interfere with

the arbitrator's authority under *Buckeye Check Cashing*." (ER 00010.) Specifically, the District Court observed that "[i]n a challenge involving a contract with an arbitration clause, the issue of a contract's validity as a whole is to be considered by the arbitrator, not the court." (ER 00010) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006)).

The District Court's ruling constitutes an abuse of discretion. As more fully set forth in Section D(2) below, Sycuan **never** consented to arbitrate the issue of NLRA preemption, thus, the question raised in Sycuan's Counterclaim **cannot** be resolved in arbitration as a matter of law. *See United Steelworkers of Am.*, 360 U.S. at 582 ("[A] party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.")

Moreover, the District Court's reliance on *Buckeye Check Cashing* is misplaced. Where, as here, a party disputes the making of a contract in the first instance, the severability doctrine articulated in *Buckeye Check Cashing* does not apply. Indeed, in *Buckeye*, the Supreme Court specifically clarified:

> **The issue of the contract's validity is different from the issue whether of any agreement between the alleged obligor and obligee was ever concluded**. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents, . . . which hold that **it is for courts to decide whether the alleged obligor ever signed the contract**.

Buckeye at 444 n.1 (emphasis added and citations omitted).

Here, as noted, a contract with the Union was **never formed**. Because the

District Court erred in holding otherwise, it likewise abused its discretion in deciding the severability doctrine articulated in *Buckeye* constituted "exceptional circumstances" for declining to exercise supplemental jurisdiction over Sycuan's Counterclaim. *Id.*; *see also Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (the severability doctrine is "limited to challenges seeking to avoid or rescind a contract – not to challenges going to the very existence of a contract that a party claims never to have agreed to.").

2. NLRA Preemption Is a Threshold Issue That Must be Addressed Prior to Compelling Arbitration.

The District Court further abused its discretion in declining to exercise supplemental jurisdiction over Sycuan's Counterclaim because the issue of NLRA preemption is a **threshold** issue that must be decided by the federal court **before** the Union's labor dispute claims can be compelled to arbitration. Indeed, the issue of preemption bears directly on the validity of the TLRO provisions the Union is seeking to enforce, **including the arbitration provision**. After all, the Union's demand for arbitration is based on Sycuan's refusal to comply with certain provisions of the TLRO that it maintains are preempted by the NLRA. If, as Sycuan contends, this Court's decision in *Casino Pauma* makes it clear that portions of the TLRO, that existed at the time of that decision and continue to exist, are preempted by the NLRA, then the Union lacks any basis to compel arbitration and/or require Sycuan to adhere to those provisions of the TLRO that conflict with the NLRA, such

as the provision requiring Sycuan to provide the Union with employees' private contact information, residential address, and other items that contravene the employees' California constitutional right of privacy, as well as to recognize the Union without an employee secret ballot election.

Moreover, the NLRA sets forth specific prerequisites that must be met before a union can be recognized as the exclusive bargaining representative of the employees and bargain with the employer to establish a collective bargaining agreement. *See* 29 U.S.C. §§ 158-159. Indeed, Sycuan might face an unfair labor practice charge under the NLRA if it were to recognize the Union and enter into a collective bargaining agreement with it without those prerequisites, including having the employees to participate in a secret ballot election. Accordingly, as Sycuan requested in its Counterclaim seeking a declaratory judgment, it is necessary for a court to provide clarity as to whether the TLRO remains enforceable or is preempted by the NLRA. In other words, the relief sought by Sycuan in its Counterclaim is **necessary** to determine Sycuan's rights and obligations with respect to the Complaint filed by the Union.

This threshold issue of NLRA preemption is one that must be decided by a court, not an arbitrator. As repeatedly explained herein, Sycuan never consented to submit the issue of NLRA preemption to an arbitrator, and thus the arbitrator is foreclosed from making a ruling on this issue. It is also imperative that a court and

not an arbitrator decide this novel issue of federal law to avoid conflicting legal rulings and ensure that a federal court, with appropriate judicial review, is permitted to interpret and clarify the scope of this Court's holding in *Casino Pauma*. *See, e.g., Stead Motors v. Automotive Mach. Lodge, 1173*, 886 F.2d 1200, 1206 (9th Cir. 1989) ("Arbitrators' awards are not judicial opinions. . . . [L]abor arbitrators are not bound by the strictures of precedent or by the record actually before them; nor are they generally subject to reversal by 'superior tribunals' for errors of law or fact."); *Lancaster v. Norfolk W. Ry.,* 773 F.2d 807, 816 (7th Cir. 1985) (arbitrators have no particular expertise in cases that do not require collective bargaining agreement interpretation; thus "arbitration would have no advantage over adjudication in [such a] case."); *see also Univ. Life Ins. Co. of Am. v. Unimarc Ltd.,* 699 F.2d 846, 851 (7th Cir. 1983), *superseded on other grounds by* 9 U.S.C. § 16(b) (federal antitrust issues "are considered to be at once too difficult to be decided competently by arbitrators—who are not judges, and often not even lawyers—and too important to be decided otherwise than by competent tribunals.") (citation omitted).

There can be no dispute that the question of NLRA preemption has far-reaching consequences that extend well beyond the instant action between Sycuan and the Union. Whether TLROs are preempted by the NLRA will impact the enforceability of all TLROs forced upon Indian tribes throughout California. As such, it is of the utmost importance that any ruling regarding the NLRA's application

to Indian tribes be applied consistently and fairly throughout the State – a result that cannot be accomplished in arbitration where rulings have limited, if any, precedential value in either federal or state court. *See, e.g., Stead Motors*, 886 F.2d at 1206; *Coopers & Lybrand v. Superior Court,* 212 Cal.App.3d 524, 534 n.6 (1989) ("Arbitrators' decisions carry little, if any, precedential value.").

For these reasons, the District Court abused its discretion in declining to exercise supplemental jurisdiction over Sycuan's Counterclaim on the sole and erroneous basis that the issue of NLRA preemption should be resolved in arbitration.

E. The District Court Had Original Jurisdiction Over Sycuan's Counterclaim and Abused Its Discretion by Failing to Consider the Factors Articulated By This Court for Determining Whether to Exercise Jurisdiction Over a Declaratory Judgment Action.

While the law is clear that the District Court had supplemental jurisdiction over Sycuan's Counterclaim, it is equally clear that the District Court had **original** jurisdiction over the Counterclaim. A federal court's original jurisdiction is limited to federal question and diversity actions. *See Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 125 S. Ct. 2611, 2616 (2005). Federal question jurisdiction includes cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "A case 'arises under' federal law either where federal law creates the cause of action or 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law.'" *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (*citing Franchise Tax Bd. v. Constr. Laborers*

Vacation Trust, 463 U.S. 1, 8-9 (1983). Here, Sycuan's Counterclaim "arises under" federal law because it asks the District Court to make a declaratory judgment as to the preemptive effect of a **federal** statute, that is, the NLRA.

More specifically, the Declaratory Judgment Act, under which Sycuan's Counterclaim was brought, gives the District Court discretion to exercise its jurisdiction over a claim for declaratory relief. *See* 28 U.S.C. § 2201; *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) ("Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants."). The Declaratory Judgment Act itself provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). While a district court has discretion to determine whether to hear an action under the Declaratory Judgment Act based on "considerations of practicality and wise judicial administration," *Wilton*, 515 U.S. at 288, the court's discretion is not unfettered. *See Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998). Thus, for example, federal courts cannot refuse to hear declaratory actions "as a matter of whim or personal disinclination." *Id.* Likewise, "if a party properly raises the issue in the district court, the district court must make a sufficient record of its reasoning to enable appropriate appellate review." *Id.* at 1225.

This Court has identified "three factors that courts should consider when examining the propriety of entertaining a declaratory judgment action: avoiding needless determination of state law issues; discouraging forum shopping; and avoiding duplicative litigation." *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 975 (9th Cir. 2011) (internal quotations omitted). Here, the District Court failed to consider **any** of these factors, or to make a sufficient record of its reasoning in declining to exercise jurisdiction over Sycuan's declaratory relief action, as required. This constitutes an abuse of discretion, particularly given that each of the factors identified in *R.R. St. & Co. Inc.* weigh heavily in favor of exercising jurisdiction over Sycuan's Counterclaim for the reasons that follow.

First, Sycuan's Counterclaim does not raise **any** state law issues. Instead, the Counterclaim asked the District Court to determine whether, *under Ninth Circuit precedent*, applying the NLRA to tribal employers preempts portions of the TLRO. In other words, Sycuan's Counterclaim raises novel issues of **federal** law and **federal** preemption that are uniquely suited to resolution by a **federal** court.

Second, there was **no** forum shopping. Rather, Sycuan filed a counterclaim seeking declaratory relief based on federal law in the very same forum the Union selected to file its Complaint, as required by Federal Rule of Civil Procedure 13(a).

And third, hearing Sycuan's Counterclaim would **not** result in duplicative litigation. To the contrary if, as Sycuan contends, the portions of the TLRO the

Union is claiming under are preempted by the NLRA, then this necessarily eliminates any claim the Union has against Sycuan, including for binding arbitration, further underscoring the fact that the District Court abused its discretion by compelling Sycuan to arbitration without first considering the threshold issue of NLRA preemption. Moreover, a federal court ruling on the issue of NLRA preemption will provide clarity with respect to the impact of the NLRA on California gaming compacts, thereby providing guidance to other tribes in the State and avoiding the very real possibility that arbitrators will decide the issue of NLRA preemption differently with respect to different tribes, even though the tribes are operating under *identical* TLROs. Stated differently, if Sycuan is forced to argue the issue of NLRA preemption in arbitration (which as set forth above would violate Sycuan's sovereign immunity and the terms of the TLRO), then the NLRA's application to gaming tribes in California will remain unresolved, resulting in further litigation and uncertainty, and creating the potential for inconsistent rulings in arbitration, with essentially no judicial review.

For all of these reasons, the District Court abused its discretion by declining to exercise jurisdiction over Sycuan's Counterclaim under the Declaratory Judgment Act or to consider any of the factors identified by this Court in assessing whether to entertain Sycuan's action for declaratory relief.

VIII. CONCLUSION

For the reasons set forth herein, this Court should reverse the District Court's Order granting both the Union's Motion for Judgment on the Pleadings and the Union's Motion to Dismiss Sycuan's Counterclaim for Declaratory Relief.

Respectfully submitted this 9th day of April 2021.

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STATEMENT OF RELATED CASES

Appellant is not aware of any related cases before this Court.

Dated: April 9, 2021

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CERTIFICATE OF COMPLIANCE

I, STEVEN G. BIDDLE, do hereby certify that this Brief complies with Rule 32(a)(5), (6), and (7)(B)(i) of the Federal Rules of Appellate Procedure as supplemented by Circuit Rule 32-2. The Brief has been prepared in a 14-point proportionally spaced typeface using "Times New Roman." The Brief contains 9547 words according to the Microsoft Office Word, the word processing system used to prepare the Brief.

Dated: April 9, 2021

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CERTIFICATE OF SERVICE

(All Case Participants are CM/ECF Participants)

I hereby certify that on April 9, 2021, I electronically filed the foregoing Appellant's Opening Brief and Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Steven G. Biddle

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