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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELEM INDIAN COLONY OF POMO INDIANS,

Plaintiff,

v.

PACIFIC DEVELOPMENT PARTNERS X, LLC, et al.,

Defendants.

Case No. C-09-01044 CRB

DEFENDANTS' REPLY TO OPPOSITION TO MOTION T0 VACATE OR MODIFY ARBITRAL AWARD

Hearing Date: April 30, 2010
Time: 10:00 a.m.

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STATUTES:

RULES:

Defendants ("PDPX/PTP") hereby reply to the Opposition ("Opp.") of Plaintiff ("the Tribe") to their Motion to Vacate or Modify Arbitral Award ("Motion").

I. THE COURT SHOULD VACATE THE ARBITRAL AWARD (AND DENY ANY COURT AWARD) OF ATTORNEYS' FEES TO THE TRIBE.

The Tribe cannot escape the undisputed fact -- expressly recognized by the Arbitrator -- that it chose (apparently for tactical reasons) not to request any award of attorneys' fees for the arbitration prior to the December 7, 2009 Award. *See* Motion at 12-13. The Tribe thereby waived any such award of attorneys' fees. *See, e.g., Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 30 (1992).[1] While the Award nevertheless makes provision for such fees (on the Arbitrator's theory that all unsuccessful claimants should pay their opponents' attorney fees) (*see* Motion at 12, 14-15),[2] the Arbitrator has failed to determine the amount, and has apparently resigned. *See* Bergin Decl., Attachments 18-20; part III.A, *infra*. In any event, an arbitrator's award on a matter never submitted to him presents a classic case for judicial vacatur or modification of the award. *See* Motion at 14-15. *See also Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F. 2d 1195, 1198 (9th Cir. 1982);[3] *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F. 3d 826, 830 (9th Cir. 1995) ("When arbitrators rule on a matter not submitted to them, … the award may be overturned because the arbitrators exceeded the scope of their authority").

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[1] "The issue would have been waived … had Moncharsh failed to raise it *before the arbitrator*. Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties." *Id.* (emphasis in original).

[2] "[O]utside the scope of the submission, the arbitrator has no 'inherent power' to award attorney's fees." *Selznick v. Nahas*, 2001 WL 1650096, at *10 (Cal. App. Dec. 21, 2001).

[3] "Because the inherent nature of arbitration as a method of dispute resolution involves the agreement of the parties, we vacate this arbitration award as … beyond the authority of the arbitrators under the submission. We emphasize … [that an] award will not be shielded from judicial scrutiny intended to insure that the award is grounded on the agreement of the parties and the issues they present for resolution." *Id.* (citing *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F. 2d 649, 651-52 (5th Cir. 1979)). *See also Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 692 F. 2d 536, 538-39 (8th Cir. 1982) ("A court may vacate a labor arbitration award if the arbitrator exceeds the scope of the submission by ruling on issues not presented to him by the parties") (citing authorities), *aff'd on reh'g en banc*, 706 F. 2d 228 (8th Cir. 1983).

By no means can the Tribe avoid such result by now presenting to the Court a purported state statutory basis for the attorneys' fee award that the Tribe never presented to the Arbitrator. Moreover, the Tribe's new found reliance on California Civil Code § 1717, which provides for an award attorneys' fees to the prevailing party in an action to enforce a contract that contains a fee-shifting provision (even if the contract is found to be void), flies in the teeth of the Arbitrator's declaration that "[t]here is no award for attorney fees in the arbitration proceedings based on the Memorandum of Agreement ["MOA"]" -- in other words, "the initial award of attorney fees … does not rely on the MOA/Contract, but on merit for work performed." Bergin Decl., Attachment 18, p. 3. These statements by the Arbitrator plainly foreclose the Tribe's belated effort to justify the Arbitrator's attorney fee award as based on the MOA.[4] Having failed to present its argument to the Arbitrator, the Tribe must suffer the consequence that the Arbitrator has foreclosed such argument. *See DiRussa v. Dean Witter Reynolds, Inc*., 936 F. Supp. 104, 107 (S.D.N.Y. 1996) (disregarding plaintiff's post-award argument for attorneys' fees that was never presented to the arbitrators), *aff'd*, 121 F. 3d 818, 822-24 (2d Cir. 1997).

Further, by failing to present its argument to the Arbitrator, the Tribe foreclosed PDPX/PTP from presenting its rebuttal to the Arbitrator, with the result that the Court can never know how the Arbitrator would have resolved the issue had it been presented to him. For example, courts have held on several occasions that application of Cal. Civ. Code § 1717 is preempted by federal law in circumstances where it potentially interferes with effectuation of federal statutory policy. One of those circumstances is the possibility that by making a party liable in arbitration, for attorneys' fees, to another party with whom the first party had no valid

[4] "[U]nlike statutory attorney's fees provisions that simply grant fees to prevailing parties, [Cal. Civ. Code] section 1717 does *not supply an independent basis for a fee award*. Rather, it operates by *broadening already-existing contractual fee-shifting provisions*." *Roy Allan Slurry Seal v. Laborers Int'l Union*, 241 F. 3d 1142, 1145 n.3 (9th Cir. 2001). All emphasis in quotations herein is added by the undersigned unless otherwise indicated.

agreement to arbitrate, section 1717 "'might substantially impede the parties' willingness to agree to contract terms providing for final arbitral … resolution of disputes.'" *Carpenters Health and Welfare Trust Fund v. Acme Indus., Inc.*, 224 Cal. App. 3d. 187, 189 (1990), quoting *Teamsters Local v. Union Flour Co.*, 369 U.S. 95, 104 (1962).

The Ninth Circuit echoed that theme in the *Roy Allan* case, where it similarly held that application of § 1717 to labor agreements was preempted under federal labor law, reasoning in part that negotiation of labor agreements could be disrupted if

> [a]ny union that sought arbitration against a party who, it later turned out, was not bound by the CBA [collective bargaining agreement] at issue, might be liable for attorney's fees -- depending on the state in which the litigation was filed. *See Carpenters Health and Welfare Trust Fund*[,] [*supra*]….
>
> [A]pplication of section 1717 would run counter to a second major goal of the LMRA [Labor Management Relations Act] -- "enforcing the parties' intent as expressed in their negotiated agreement." [*Waggoner v. Northwest Excavating, Inc.*, 642 F. 2d 333, 339 (9th Cir. 1981)]. … Section 1717 takes just the opposite approach. … Given these opposing goals, … the LMRA must preempt section 1717 when fees are not available under a CBA but could be available under the operation of section 1717.

241 F. 3d at 1148.

Similar concerns arise under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* The Supreme Court has expressly reserved the question whether, "as a matter of substantive federal arbitration law," an arbitration clause can survive if a contract is otherwise void because "the signer lacked authority to commit the alleged principal." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 445 (2006). The Ninth Circuit has answered that question in the negative. *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F. 2d 1136, 1140-41 (9th Cir. 1991); Motion at 14 n. 19. The Tribe, however, invokes Cal. Civ. Code § 1717 to undermine the Ninth Circuit's holding in that case, to the extent of permitting an arbitrator to

award attorneys' fees even after finding, as here, that the parties putative contract is void because a "signer lacked authority to commit the alleged principal." There is no more reason to allow § 1717 to play a disruptive role in the context of "substantive federal arbitration law" than in the closely related context of federal labor law (where arbitration is an essential fixture).[5] None of the cases relied on by the Tribe involved application of § 1717 in an arbitration.

Further, the Ninth Circuit has rejected application of Cal. Civ. Code § 1717 on grounds that *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), "'prohibits a federal court from awarding attorney's fees under state statutes allowing such fees unless the court's jurisdiction is based upon diversity of citizenship.'" *Roy Allan*, 241 F. 3d at 1146 (quoting *Waggoner*, 642 F. 2d at 338). This case is not based on diversity of citizenship, but rather on federal question jurisdiction as well as a jurisdiction provision (28 U.S.C. § 1362) for suits by Indian tribes. Moreover, the Tribe's current claims for attorneys' fees do not involve an "action on a contract," as § 1717 requires. *See Roy Allen*, 241 F. 3d at 1147 (because "the substantive contract issues have been resolved … and the only remaining issue is the availability of attorney's fees in … [a] suit under the LMRA to vacate the federal labor arbitration awards …. this motion for attorney's fees cannot fairly be characterized as an action on the []contract"). For all of the forgoing reasons, the Court should reject each of the Tribe's present claims for an award of attorneys' fees under Cal. Civ. Code. § 1717, both in connection with the arbitration and in connection with the current proceeding.

II. THE ARBITRAL AWARD SHOULD BE VACATED AS EXCEEDING THE ARBITRATOR'S AUTHORITY, AND IN MANIFEST DISREGARD OF LAW.

As already demonstrated fully (Motion at 5-9), by ignoring a formal factual stipulation

[5] In this regard, the "FAA and LMRA establish the same governing principles and '[c]ourts routinely cite decisions under one statute as authority for decisions under the other.'" *Int'l Union of Op. Engineers, Local No. 841 v. Murphy Co.*, 82 F. 3d 185, 189 (7th Cir. 1996).

between the parties that the Arbitrator expressly found to be dispositive of the case, the Arbitrator plainly exceeded his power (through oversight or otherwise) in a classic way -- by undertaking to resolve a factual issue that had not been submitted to him by the parties (because that issue was not in dispute between them), but rather had been expressly withdrawn from the issues submitted to him (which occurred when the parties jointly submitted their formal stipulations to the Arbitrator). This is not an issue of "manifest disregard of facts," as the Tribe suggests on occasion (*see* Opposition at 5:5, 11:21), but rather an instance of the most fundamental basis for vacating an arbitral award -- the Arbitrator' assertion of unconferred power to resolve an issue that the parties had expressly excluded from the issues submitted to the Arbitrator, and to resolve it contrary to the parties' stipulation, notwithstanding that the arbitrator expressly found the issue to be dispositive.[6]

The Tribe notes (Opp. at 4) the general principle that arbitration awards are not subject to judicial review merely for erroneous findings of fact or conclusions of law. However, the Tribe proceeds to ignore the Arbitrator's conclusion that if Exhibit C-15 was before the Tribe's Executive Committee on September 3, 2007 -- as the parties had *stipulated* -- then "Respondent Tribe's argument would/should be dismissed." Award, p. 8 (Bergin Decl., Attachment 1). *See*

[6] *See Bruce Hardwood Floors v.UBC, Southern Council of Industrial Workers*, 103 F. 3d 449, 452 (5th Cir. 1997) ("Where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference ends and vacatur or modification of the award is an appropriate remedy"); *Coast Trading Co. v. Pacific Molasses Co*., 681 F. 2d 1195, 1198 (9th Cir. 1982) (vacating award as "beyond the authority of the arbitrators under the submission" where a "submission statement recited facts indicating the seller's breach"); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1356 (2008) (well recognized "'exception to the general rule assigning broad powers to the arbitrators arises when the parties have, in either the contract or an agreed submission to arbitration, explicitly and unambiguously limited those powers"); *Advanced Micro Devices, Inc. v. Intel Corp*., 9 Cal. 4th 362, 381 (1994) ("[T]he cases establish one 'bright-line' rule: …. arbitrators may not award remedies expressly forbidden by the arbitration agreement or submission…. Even where the parties' original contract included a broad arbitration clause, the arbitrator's powers may be restricted by the limitation of issues submitted") (citing *Totem Marine Tug & Barge*, 607 F. 2d at 651-52); *California Faculty Ass'n v. Superior Court*, 63 Cal. App. 4th 935, 952 (1998) ("arbitrator failed to adhere to the specific restrictions and limitations imposed on him by the parties and engaged in a decision making process which exceeded his authority"); *Doyle v. Hunt Const. Co*., 123 Cal. App. 2d 51, 53-54 (1954) (affirming modification of award where "arbitrators awarded on matters that were not submitted to them" in that "matters which had been in dispute had been adjusted by agreement of the parties").

Motion at 5-9. Instead, the Tribe mistakenly invites the Court to step into the Arbitrator's shoes and revisit his conclusion based on the Tribe's legal and evidentiary arguments that the Arbitrator already considered in arriving at his conclusion. *See* Opp. at 12. It is plainly not the role of the Court to supplant the Arbitrator in this regard.

Further, the Tribe virtually ignores the Arbitrator's truly manifest disregard of a wealth of controlling law on the dispositive issues of equitable estoppel and retroactive ratification (among other issues), which mandates that the Tribe should be precluded from now disavowing the representations that it is deemed to have made to PDPX/PTP, in accepting the benefits of the MOA from PDPX/PTP, that the MOA was indeed duly authorized and enforceable in the Tribe's view. *See* Motion at 9-11. For each of the foregoing reasons, the Award should be vacated, PDPX/PTP should have the option of pursuing further arbitral proceedings before a new arbitrator (Arbitrator Brown has apparently resigned, as discussed below), and the Court should retain jurisdiction by continuing to stay this case.

III. THE PDPX/PTP NOTICE OF MOTION FOR JUDICIAL VACATUR OR MODIFICATION OF THE ARBITRAL AWARD WAS TIMELY SERVED.

The Tribe mistakenly asserts that the PDPX/PTP Motion, filed and served electronically on March 9, 2010, should be barred as untimely. The Tribe is wrong for several reasons. First, the "three month" limitations period (9 U.S.C. § 12) for serving a notice of motion to vacate or modify an arbitral award under the FAA was tolled pending resolution of the Tribe's Request for Modification of Arbitration Award submitted to the Arbitrator on December 24, 2009, as demonstrated in subpart A below. Second, the limitations period should be equitably tolled in any event, as demonstrated in subpart B below. Third, PDPX/PTP did not receive requisite mail service of the Award until after December 23, 2009 (also addressed in subpart B below).

A. The Time for Serving Notice of the Motion for Judicial Relief Was Tolled Pending the Tribe's Request for Arbitral Modification of the Award.

The Ninth Circuit has recognized that "a court should refrain from reviewing an arbitrator's work until a final and binding award is issued; premature judicial intervention would contravene the fundamental … policy of deferring to contractual dispute resolution procedures." *Kemner v. District Council of Painting and Allied Trades No. 36*, 768 F. 2d 1115, 1118 (1985) (citing *United Steelworkers of America v. American Mfg*. Co., 363 U.S. 564, 566-68 (1960)). In this regard, the Ninth Circuit has embraced the principle that "an arbitration award under the Federal Arbitration Act … is a reviewable final order only if intended by the arbitrator to be a complete determination of the claims, including the issue of damages." *Millmen Local 550 v. Wells Exterior Trim*, 828 F. 2d 1373, 1376 (1987) (citing *Michaels v. Mariforum Shipping*, 624 F.2d 411, 413-14 (2d Cir. 1980) (citing other FAA cases)). *See also Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F. 2d 248, 251 (9th Cir. 1973) (with reference to the FAA, "judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases") (paraphrased in *Millmen* at 1375); *In re Pacific Gas & Elec. Co*., 2008 WL 2004275, at *3 (N.D. Cal., May 5, 2008) (following *Millmen* and *Aerojet* under FAA).[7]

The Ninth Circuit held in *Millmen* that judicial review of an arbitral award was precluded

[7] While *Millmen*, involving arbitration under a collective bargaining agreement, arose under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, subsequent Supreme Court decisions indicate that the FAA may also be applicable to such labor cases. *See New United Mfg., Inc. v. United Auto Workers Local 2244*, 617 F. Supp. 2d 948, 954 & n.6 (N.D. Cal. 2008) (citing, *inter alia*, *EEOC v. Waffle House, Inc*., 534 U.S. 279, 289 (2002); *Smart v. Int'l Broth. of Elec. Workers., Local 702*, 315 F. 3d 721, 724-25 (7th Cir. 2002) (Posner, J.)). In any event, "federal courts have often looked to the [FAA] for guidance in labor arbitration cases." *United Paperworkers Int'l Union v. Misco, Inc*., 484 U.S. 29, 40 n.9 (1987). *See also American Postal Workers Union of Los Angeles v. United States Postal Service*, 861 F. 2d 211, 215 & n.2 (9th Cir, 1987) ("[i]n an LMRA suit challenging an arbitration award we assumed that the … [FAA] is part of the [applicable] federal substantive law"); *Int'l Union of Op. Engineers*, 82 F. 3d at 189 ("FAA and LMRA establish the same governing principles and '[c]ourts routinely cite decisions under one statute as authority for decisions under the other'"); *McKinney Restoration Co. v. Illinois District Council No. 1, etc*., 392 F. 3d 867, 871-72 (7th Cir. 2004) (same re whether "award was a final decision that commenced the running of the limitations period").

so long as the arbitrator "specifically retained jurisdiction to decide the remedy if the parties could not agree" because retention of such jurisdiction "indicates that the arbitrator did not intend the award to be final." *Id*. at 1376-77 (citing FAA cases). It follows *a fortiori* that judicial review of the Award here was premature until recently. In response to the Tribe's Request for Modification of Arbitration Award, submitted to the Arbitrator on December 24, 2009 pursuant to American Arbitration Association ("AAA") Commercial Rule R-46,[8] the Arbitrator actively undertook to determine issues relating to the award of attorneys' fees then being pursued (for the first time) by the Tribe. In the Arbitrator's Post-Award Ruling (served on January 26, 2010), the Arbitrator clarified his basis (or lack thereof) for making any such award,[9] established parameters and conditions for recovery of any such fees (rejecting some of the Tribe's claims),[10] and concluded:

> There would be a ruling for attorney fees during the arbitration proceedings if [the Tribe] would resubmit their claims based on work done … in pursuit of issues they were successful with.
>
> The [Tribe shall] have 15 days from their receipt of this ruling to provide the necessary information/proof for their claims. The Claimants [PDPX/PTP] are given an equal amount of time from the receipt of [the Tribe's] response to present any challenges they may have.

[8] See the accompanying Supplemental Declaration of Timothy W. Bergin in Support of Defendants' Motion to Vacate or Modify Arbitral Award ("Supp. Bergin Decl."), ¶¶ 1-2.

[9] In this regard, the Arbitrator confirmed that the Tribe had "failed to ask for … attorneys fees during the arbitration proceedings" (Bergin Decl., Attachment 18, p. 2), and that "[t]here is no award for attorney fees in the arbitration proceedings based on the Memorandum of Agreement [MOA]" (*id.*, p. 3). PDPX/PTP had urged in response to the Tribe's Request for Modification of Arbitration Award that there was no legitimate basis for any award of attorneys' fees to the Tribe in this case, and that because this issue had never been submitted to the Arbitrator, it was not in any relevant sense part of "'the merits of the decision'" rendered by the Arbitrator. Bergin Decl., Attachment 19, pp. 2 & n.2, 4 (quoting *Moshonov v. Walsh*, 22 Cal. 4th 771, 776 (2000)). *See also Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union, Local 261*, 912 F. 2d 608, 613 (2d Cir. 1990) (state statutory provision for requests to modify arbitral award as to matters "'not affecting the merits of the controversy'" permitted request for modification on grounds of "arbitrators' passing on a matter not submitted to them").

[10] The Arbitrator rejected the Tribe's claim for attorneys' fees incurred in connection with the earlier proceedings before this Court, or any other issues on which the Tribe did not prevail. *See* Bergin Decl., Attachment 18, pp. 2-3.

Bergin Decl., Attachment 18, p. 3. On March 4, 2010, PDPX/PTP did timely present to the Arbitrator a number of challenges to the Tribe's subsequent request for an award of attorneys' fees, including (among others) challenges based on the failure of the Tribe to comply with the time and other requirements of the Post-Award Ruling, and to meet its financial obligations to the Arbitrator. *See* Bergin Decl., Attachment 20, pp. 4-5; Supp. Bergin Decl., Attachment 2. These challenges were not resolved by the Arbitrator prior to his apparent recent resignation from any further role in this case (*see* Supp. Bergin Decl., ¶ 4) -- and thus were not resolved within the 20-day period required by AAA Rule 46 (*id*., ¶ 2), which expired no later than March 24, 2010 -- 20 days after PDPX/PTP's March 4 Response (Bergin Decl., Attachment 20). *See* Bergin Decl., Attachment 19, p. 6.

The Ninth Circuit has held in similar circumstances that a statute of limitations for seeking to vacate an arbitral award is tolled pending an arbitral proceeding to determine the amount of attorneys' fees and other expenses to be awarded as damages. *See California Pacific Medical Center v. Service Employees Int'l Union*, 300 Fed. Appx. 471, 473 (9th Cir., Nov. 3, 2008) ("*CalPac Medical*"), *aff'g* 2007 WL 81906 (N.D. Cal., Jan. 9, 2007). In that case, an arbitrator had issued an award on November 30, 2004 providing that a union was "entitled to recover whatever expenses it incurred in the Organizing Campaign, including *attorneys' fees* related to the Union's petition to the NLRB." 2007 WL 81906 at *3. The Ninth Circuit held:

> For labor disputes that arise in California, a petition to vacate must be filed within 100 days of the issuance of a *final* arbitration award. … The November 30 arbitration award was not final because the arbitrator retained jurisdiction to resolve disputed damages issues between the parties. *See Millmen*…. Indeed, the arbitrator specifically directed [the union] to submit an accounting and stated [the employer] could submit objections before he would issue a 'final determination'. In addition, the arbitrator in the May 19 award did not merely engage in 'mathematical computations' … but methodically analyzed the substance of [the union's] damages request in light of [the employer's] objections -- ultimately rejecting

> a number of [the union's] claims in the process. Thus, the November 30 award was not final, the statute of limitations did not begin to run until [May] 19, 2006 (at the earliest), and [the employer's] petition to vacate, filed on August 1, 2006, was timely.

300 Fed. Appx. at 473 (emphasis in original).[11] By the same token, the December 7, 2009 Award in this case was not final for purposes of triggering the "three months" period (9 U.S.C. § 12) for seeking judicial vacatur or modification of the Award because at the Tribe's request, the Arbitrator retained jurisdiction to resolve disputed issues as to the Tribe's entitlement to recovery of attorneys' fees.

The District Court in *CalPac Medical* drew an important distinction between finality of an arbitral award for purposes of judicial reviewability and finality of the award for purposes of triggering the statute of limitations on seeking such review. The Court recognized that "any exception or qualification to the rule of finality" that would permit the Court to review a non-final award should *not* apply to "triggering of the statute of limitations for a petition to vacate an award" because otherwise parties contemplating such petitions would be placed in "an impossibly uncertain position." 2007 WL 81906 at *5. If they were "forced to constantly evaluate whether any award could be deemed final and trigger the limitations period," such parties would likely feel compelled by caution in many cases (like PDPX/PTP here) to seek judicial review of an "interim award that was not in their favor" -- which could "'interfere with the purpose of arbitration: the speedy resolution of grievances without the time and expense of court

[11] "Although the analogous state statute of limitations establishes the time period within which suit must be brought [under § 301 of the LMRA], *federal law* determines the time at which the cause of action *accrues*." *Martin v. Construction Laborer's Pension Trust for Southern California*, 947 F. 2d 1381, 1384 (9th Cir. 1991). An accrual rule similar to that applied by the Ninth Circuit in *CalPac Medical* has been applied under the FAA as well as state arbitration law. *See Harry Hoffman Printing*, 912 F. 2d at 613-15 (state law) (statute of limitations for seeking to vacate arbitral award tolled pending request that arbitrators modify award; *Masters Choice, Inc. v. Cowie*, 1997 WL 211368, at *1 & n.2 (W.D.N.Y. April 23, 1997) (following *Harry Hoffman* rationale under FAA).

proceedings.'" *Id*. (quoting *Millmen*, 828 F. 2d at 1375).[12]

Irrespective of whether the Award in this case can now be deemed final, or whether the statute of limitations for seeking to vacate or modify the Award has even begun to run, the Award is now subject to judicial review because the Arbitrator has apparently resigned from any further involvement in the case and the AAA has accordingly determined to close the case. *See* Supp. Bergin Decl., ¶ 4**.** In *New United Motor*, this Court held that under such circumstances, it has jurisdiction to entertain a petition to vacate an arbitral award that left open remedial issues. 617 F. Supp. 2d at 955, 959-60.[13] However, even in the event that the Court were otherwise to confirm the Award, the Court should not itself undertake to complete the Arbitrator's unfinished determinations respecting an award of attorneys' fees to the Tribe. *See, e.g., Capital District Chapter of New York State, P.D.C.A. v. Int'l Broth. of Painters and Allied Trades*, 743 F. 2d 142, 148 (2d Cir. 1984) ("[r]esolution of this attorneys' fee question is for an arbitrator, not a court in the first instance"); *Harris v. Sandro*, 96 Cal. App. 4th 1310, 1315 (2002) ("no 'court' may decide a dispute under the contract [subject to arbitration]; all such disputes [*i.e.*, the "amount of the fee

[12] "Thus, for purposes of triggering the statute of limitations period for filing a petition to vacate an arbitration award under [federal labor law], 'final' means final, without qualification or exception: the period will not be triggered until the arbitrator has issued his or her last, and thus final, award." *Id*. *See also Harry Hoffman Printing*, 912 F. 2d at 614-15 (similar reasoning).

[13] "[T]he finality requirement of § 301 [of the LMRA] is not an absolute bar to subject matter jurisdiction. *See Union Switch & Signal Division American Standard, Inc. v. United Electrical, Radio and Machine Workers of America, Local 610*, 900 F. 2d 608, 612-14 (3d Cir. 1990) ('complete arbitration' rule is prudential, not jurisdictional); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp*., 935 F. 2d 1019, 1022 (9th Cir. 1991) (discussing rare exceptions to finality rule). Both parties agree the award is properly before the Court because and the award is 'final' for jurisdictional purposes because Arbitrator Askin believed he was done with the case. *See Smart* …, 315 F. 3d [at] … 725-26 … ("if the arbitrator himself thinks he's through with the case, then his award is final and appealable"). The wisdom of this approach is clear here: because Arbitrator Askin personally relinquished jurisdiction of the dispute, the arbitration process would be left at a dead standstill if this Court had no jurisdiction to confirm or vacate the award." *Id*. at 955 (footnote omitted). "'[W]hat makes this case 'appealable' is the fact that the arbitrator quit,' and if he had not, 'this case would not be ripe for the instant petition [to vacate the award]'…. But he did 'quit' … and that fact makes this one of the rare occasions when the Court can properly exercise jurisdiction over a liability award alone." *Id*. at 960 (quoting brief).

award"] must be decided by an arbitrator"). Rather, that aspect of the Award should be vacated for lack of a "final[] and definite award," 9 U.S.C. § 10(a)(4) (among other grounds addressed in part I above). *See, e.g., Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F. 3d 1060, 1069 (8th Cir. 2003) ("[b]y expressly leaving this award open for judicial determination, the panel failed to make a final determination" and the award was to that extent properly vacated).[14]

B. The Notice of the Motion for Judicial Relief Was Timely on Alternative or Additional Grounds as Well.

In this case, "[i]t is unnecessary … to decide … when the limitations period began to run," *Capital Tracing, Inc. v. United States*, 63 F. 3d 859, 860 (9th Cir. 1995), because a "general rule that equitable tolling [i]s a defense to all federal statutes of limitations, unless Congress provided otherwise," is firmly established. *Fadem v. United States*, 52 F. 3d 202, 205 (9th Cir. 1995) (citing *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96 (1990)).[15] There is no exception to this general rule for the three-month limitations period for seeking vacatur or modification of an arbitral award under the FAA.[16] The Ninth Circuit holds that equitable tolling of a statute of limitations is appropriate where delay in filing could reasonably be attributable to

[14] The Arbitrator's unfinished determinations could not be remanded for arbitration before a new arbitrator (much less the former Arbitrator) absent an agreement between the parties to undertake renewed arbitration, whether under the MOA (which the Award deems void) or otherwise.

[15] "[F]ederal statutory time limitations on suits against the government are *not* jurisdictional in nature.'" *Id*. at 206 (emphasis by court in *Fadem*) (quoting *Washington v. Garrett*, 10 F. 3d 1421, 1437 (9th Cir. 1993)).

[16] *See American Guaranty Co. v. Caldwell*, 72 F. 2d 209, 211-212 (9th Cir. 1934) (affirming vacatur of arbitral award under FAA despite failure to comply with limitations period due to "excusable … neglect"); *Foster v. Turley*, 808 F. 2f 38, 41 (10th Cir. 1986) (FAA limitations period not jurisdictional); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 Fed. Appx. 243, 245-47 (6th Cir. 2004) (potential availability of equitable tolling of limitations period for vacatur motion under FAA); *Bauer v. Carty & Company, Inc.*, 2005 WL 948641, at *3-4 (W.D. Tenn., March 9, 2005) (finding adequate grounds pled for equitable tolling of limitations period for seeking vacatur of award under FAA); *Sargent v. Paine Webber, Jackson & Curtis, Inc.* 687 F. Supp. 7, 9-10 (D.D.C. 1988) (applying equitable tolling of FAA limitations period for vacatur motion, noting both diligent efforts and "different interpretations" of when period is triggered), *remanded on other grounds*, 882 F. 2d 529 (D.C. Cir. 1989); *Holodnak v. Avco Corp*., 381 F. Supp. 191, 197 (D. Conn. 1974) (applying equitable tolling of FAA limitations period for vacatur motion as alternative holding), *rev'd in part on other grounds*, 514 F. 2d 285 (2d Cir. 1975).

"lack of clarity in our circuit's law," and given the "absence of demonstrated prejudice" to other parties. *Capital Tracing*, 63 F. 3d at 862-63. This holding applies *a fortiori* here where, as demonstrated in part III.A above, Ninth Circuit (and other) law indicates relatively clearly that the statute of limitations for serving notice of the PDPX/PTP Motion was tolled pending the Arbitrator's consideration of the Tribe's disputed motion for modification of the Award. The Court need not determine that such reading of the law is necessarily correct (as PDPX/PTP maintain), but only that it is not objectively unreasonable.

The Tribe had ample notice, through post-Award submissions by PDPX/PTP to the Arbitrator -- well prior to the filing of the PDPX/PTP Motion -- that PDPX/PTP intended to file such a motion.[17] For example, PDPX/PTP informed the Tribe on February 17, 2010 that PDPX/PTP "contemplate seeking judicial review of the December 7, 2009 Award … within 90 days of issuance of an *appealable version*" (Supp. Bergin Decl., Attachment 3, p.1), reflecting a view that the Award was not then subject to judicial review pending resolution of the Tribe's disputed request that the Arbitrator modify the Award. PDPX/PTP thereafter undertook to prepare their Response to the Arbitrator's Post-Award Ruling, and to the Tribe's Response to that ruling, which PDPX/PTP submitted to the AAA on March 4 -- only four days before the date by which the Tribe now contends PDPX/PTP should have served their Motion for judicial relief from the Award. *See* Bergin Decl., Attachment 20. Much of the time otherwise available for preparing such Motion was consumed by the continuing proceedings before the Arbitrator (reflecting the view that such proceedings tolled the time for serving the Motion). PDPX/PTP nevertheless ultimately made a concerted effort to prepare and file their Motion on a timely

[17] *See Western Employers Ins, Co. v. Jeffries & Co., Inc*., 958 F. 2d 258, 261 (9th Cir. 1992) ("district court should have construed … a 'Petition to Vacate' as a notice of motion to vacate within the meaning of 9 U.S.C. § 12" because "it stated with particularity the grounds … and set forth the relief sought -- … it satisfied the purposes of 9 U.S.C. § 12" as "[t]here is no question that Jeffries was on notice of Western's intent").

schedule that presumed no tolling of the statute of limitations -- finding themselves in the "impossibly uncertain position" (*CalPac Medical*, 2007 WL 81906 at *5) of seeking judicial review of an "interim award" (*id.*) simply in an excess of caution. *See* Supp. Bergin Decl., ¶ 5**.** PDPX/PTP should hardly be penalized for an excess of diligence in this regard, particularly considering that falling slightly short of the Tribe's elevated standard caused the Tribe no prejudice whatsoever.[18]

Further, the December 7, 2009 Award was mailed by the AAA to counsel for PDPX/PTP with a December 23, 2009 cover letter and postmark. *See* Supp. Bergin Decl., ¶ 6. Under AAA Commercial Rule R-39, mail service is the norm, and only where "all parties and the arbitrator agree" may required notices "be transmitted by electronic mail" rather than hard-copy delivery. *See id.*, ¶ 7. The Tribe recognizes that there was no express agreement in this regard (*see* Opp. at 3 n.2). The case law requires *express* agreement if service by e-mail is to supplant mail service; implied agreement is not sufficient, regardless of consistent use of e-mail in the case. *See Webster v. A.T. Kearney, Inc.*, 507 F. 3d 568, 574 (7th Cir. 2007) ("reluctant to hold, absent evidence of an *express* agreement between the parties, that … use of electronic communication for certain matters constituted consent to accept delivery of the award by e-mail"); *Silicon Power Corp. v. General Electric Zenith Controls, Inc.*, 2009 WL 1971390, at *4 (E.D. Pa. July 7, 2009) ("requirement that a party consent to service by electronic means in writing is strictly construed … and such consent may not be implied from a party's past actions") (citing cases). It follows

[18] Indeed, because most months have 31 days, many if not most filing parties receive 92 days (which would be until March 9 if measured from the December 7 Award) under the FAA's "three month" limitations period, which appears generally (but not invariably) to be calculated on an anniversary-date basis (*i.e.*, from December 7 to March 7 (a Sunday this year)) rather than a uniform 90(or 92)-day basis. On an anniversary-date basis, three-month periods that happen to include a February (generally having only 28 days) will tend to be shorter than otherwise. *See, e.g.*, *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F. 2d 529, 531 (D.C. Cir. 1989) (92 days); *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F. 3d 1155, 1158 (10th Cir. 2007) (92 days); *Harry Hoffman Printing*, 912 F. 2d at 610 (92 days under FAA if anniversary date had been used); *Masters Choice*, 1997 WL 211368, at *1 (92 days); *compare Possehl, Inc. v. Shanghai Hia Xing Shipping*, 2001 WL 214234, at *3 (S.D.N.Y. March 1, 2001) (apparently using 90-day period rather than three-month anniversary date).

that the three-month limitations period for the pending PDPX/PTP motion was not triggered until on or after December 23, 2009 at the earliest, and that notice of the Motion was therefore timely served even putting aside any tolling of the limitations period.[19]

Conclusion

For all the foregoing reasons, the Motion of PDPX/PTP should be granted in full.

Respectfully submitted,

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Dated: April 16, 2010

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[19] Even were it otherwise, PDPX/PTP would not forfeit its right to oppose confirmation of the Award on grounds that the Tribe never submitted any attorneys' fee issue to the Arbitrator prior to the Award, with the result that no such issue was arbitrable (particularly after the Arbitrator found the MOA to be void). *See, e.g., Sheet Metal Workers Int'l Ass'n v. Arizona Mechanical & Stainless, Inc.*, 863 F. 2d 647, 651 (9th Cir. 1988) ("even if [a party were otherwise] … time barred from raising its defenses to the award," the court "must still determine the threshold issue whether the parties agreed to arbitrate the subject in dispute"); *Int'l Broth. of Elec. Workers v. City Elec. of Olympia*, 639 F. Supp. 1363, 1368 (W. D. Wash. 1986) (similar).