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HON. LONNY R. SUKO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF LICENSING, et al.,

Plaintiffs,

v.

THE TRIBAL COURT FOR THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION and its CHIEF TRIBAL COURT JUDGE TED STRONG, et al.,

Defendants.

NO. CV-12-3152-LRS

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT AND TO COMPEL ARBITRATION

I. INTRODUCTION

In the Order Denying Motion for Stay Pending Appeal, this Court observed that, under Paragraph 4.7.d of the Consent Decree, "If a dispute is not resolved by mediation, as here, the parties can **mutually** agree to binding arbitration to resolve

their dispute, but it appears that did not occur here." ECF No. 97 at 3 (emphasis in original). In effect, this Court has already concluded that arbitration under the Consent Decree was permissive, not mandatory, and that Paragraph 4.7.d offered only "an option for the parties to mutually agree to binding arbitration." *Id*. at 4.

Despite this Court's observation, the Nation persists in claiming that the Consent Decree mandated arbitration of all disputes simply because one party desires to arbitrate. Contrary to the Nation's Motion to Compel Arbitration, the Consent Decree did not permit one party to compel the other to arbitrate and there was no "mutual agreement" to submit any dispute to arbitration. Alternatively, the agreement in the Consent Decree was terminated on December 5, 2012. Thus, the Consent Decree's permissive arbitration provision was no longer in effect when the Nation belatedly requested arbitration on February 21, 2013.

II. FACTS

In 1993, the Yakama Nation filed an action in this Court against officials of the Washington Department of Licensing (Department), seeking relief concerning state fuel taxes. *Teo v. Steffenson*, No. CY-93-3050-AAM. The matter was resolved with a Consent Decree in 1994. ECF No. 6 at 50–73. Paragraph 4.7 of the Consent Decree laid out a dispute resolution process that required at least one face-to-face meeting, followed by mediation if the dispute remained unresolved. ECF No. 6 at 57-58. The original Consent Decree contained no mention of arbitration or of an option to terminate the Decree.

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In 2004, the Yakama Nation filed a petition in this Court to enforce the Consent Decree. *Teo v. Steffenson*, No. CV-04-3079. That matter was resolved with a Settlement Agreement, Agreed Changes To Consent Decree, And Order entered by this Court in 2006. ECF No. 6 at 74–83.

The 2006 Settlement Agreement added the following sentence to Paragraph 4.7.d of the Consent Decree:

> If the dispute is not resolved by mediation, the parties may agree to have a neutral third party or arbitrator make a final binding decision resolving the dispute or, if a dispute is unresolved for more than 180 days, either party may give notice of intent to terminate this agreement as provided for *infra*.

ECF No. 6 at 76. As this Court has previously noted, ECF No. 85 at 3, the "*infra*" refers to Paragraph 4.27, which was also added in 2006. It provides:

> Amendments to the Consent Decree shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Consent Decree shall be subject to the dispute resolution process in paragraph 4.7 of this Consent Decree. The agreement and processes embodied in this Consent Decree shall remain in effect unless and until such time as: (a) the parties mutually agree in writing that the decree should be vacated or terminated and superseded by a new agreement between the parties; or (b) *if a party objects to continued participation in the processes and framework provided for in this decree and desires to withdraw and terminate the agreement, it may do so only upon not less than one hundred eighty (180) days written notice to the other party and a government to government meeting or consultation between them occurs to discuss their proposed reasons for doing so*.

ECF No. 6 at 81 (emphasis added). Thus, in lieu of the previous option of resorting to the court, the revised Consent Decree substituted the option to arbitrate

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if both parties agreed to do so, or the unilateral option to terminate the Decree as was exercised by the Department.

On March 16, 2011, the Department sent a written notice to the Yakama Nation invoking the dispute resolution provision of the Consent Decree. ECF No. 6 at 12, 92-95. The parties met twice face to face but were unable to resolve the dispute. ECF No. 6 at 13-14. On September 19, 2011, the Department notified the Yakama Nation in writing that it intended to terminate the agreement after 180 days, while expressing willingness to continue negotiations during that period. ECF No. 6 at 14, 102-03.

The parties convened a government-to-government meeting on February 27, 2012. ECF No. 6 at 14. Mediation began on March 23, 2012, and the parties continued discussions with the mediator for eight months, but those discussions failed to resolve the dispute. ECF No. 6 at 15; ECF No. 60 at 2-3. The Department terminated the agreement by written notice dated December 5, 2012. ECF No. 6 at 15; ECF No. 60 at 4, 7-8. On December 6, the Yakama Nation Tribal Court enjoined the Department and state officials from terminating the Consent Decree, and ordered them to resume mediation. ECF No. 60-3 at 8.

The Department and state officials filed a Complaint in this Court on December 17, 2012. ECF No. 1. On January 10, 2013, this Court entered an order preliminarily enjoining the Tribal Court proceedings and orders. ECF No. 75. On February 11, this Court denied the Yakama Nation's Cross-Motion for Preliminary

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Injunction, ruling that the Yakama Nation is not likely to succeed on the merits of its argument that the Consent Decree required the Department to continue in mediation until the mediator formally declared impasse. ECF No. 85. The Yakama Nation's appeal from that order is currently pending in the Ninth Circuit. ECF Nos. 100, 103.

On February 21, 2013, the Yakama Nation raised mandatory arbitration as an issue for the first time, and sent to the Department and its counsel a Notice of Arbitration Demand. ECF No. 96 at 3. On February 25, the Department declined the invitation to arbitrate. ECF No. 96 at 3-4. On February 27, despite the undisputed absence of a mutual agreement to arbitrate, the Yakama Nation filed the current Motion to Compel Arbitration, asking the Court to dismiss this lawsuit without prejudice. ECF No. 96.

III. ARGUMENT

A. Standards Under The Federal Arbitration Act.

In asking the Court to dismiss this case and compel arbitration, the Yakama Nation relies on Sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 3, 4. Section 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the

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> agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 provides that a "party aggrieved by the alleged . . . refusal of another to arbitrate under a written agreement for arbitration" may seek an order compelling arbitration.

As a preliminary matter, the Nation cannot obtain dismissal of this lawsuit, but only a stay pending arbitration. Dismissal is appropriate only where all issues are subject to arbitration. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 143 (C.D. Cal. 2011). In this case, Count I of the Complaint, which seeks equitable relief concerning the conduct of litigation outside the jurisdiction of the Yakama Nation Tribal Court, does not arise from the Consent Decree and is not subject to arbitration.

To determine whether an issue is referable to arbitration, the Court must examine the parties' agreement to determine whether they intended to submit to arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1773-74 (2010). Arbitration is a matter of consent, not coercion. *Id.* at 1773; *see Am. Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990) ("Arbitration Act does not require parties to arbitrate when they have not agreed to do so"). A simple reading of the language of Paragraph 4.7.d confirms that the option to arbitrate required both parties to agree to arbitrate, which never happened in this case, as this Court has noted. ECF No. 97 at 3-4.

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B. The Text Of The Consent Decree Makes Arbitration Voluntary And Requires Mutual Agreement To Arbitrate.

The Yakama Nation says the final sentence of Paragraph 4.7.d of the Consent Decree mandates arbitration. That sentence provides:

> If the dispute is not resolved by mediation, the parties *may agree* to have a neutral third party or arbitrator make a final binding decision resolving the dispute *or*, if a dispute is unresolved for more than 180 days, *either party may give notice of intent to terminate* this agreement as provided for *infra*.

ECF No. 6 at 76 (emphasis added). According to the Yakama Nation, the Court's Order Denying Cross-Motion for Preliminary Injunction (ECF No. 85) was a determination under Paragraph 4.7.d of the Consent Decree that "the dispute is not resolved by mediation." The Nation says that, if either party demands arbitration following such a determination, as the Nation did on February 21, Paragraph 4.7.d requires the other party to submit to arbitration. ECF No. 96 at 3. The language of Paragraph 4.7.d is not reasonably susceptible to such an interpretation.

Paragraph 4.7.d plainly does not mandate arbitration. It gives the parties two independent options. First, the parties "may agree" to submit a dispute to arbitration. That language requires the voluntary, mutual consent of both parties before any dispute can be submitted to arbitration. *See* ECF No. 97 at 3. Second, in contrast to the language requiring both parties' agreement to arbitrate, "either party" may terminate the agreement, without the consent of the other, by following the procedures in Paragraph 4.27. *See* ECF No. 85 at 8 ("[t]hrough Paragraph 4.27, the parties provided themselves an 'out'"). In this case, the Department did

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the latter, and properly terminated the agreement in the Consent Decree on December 5, 2012.

The language in the Consent Decree is similar to the following language construed by the court in *Gangemi v. General Electric Co.*, 532 F.2d 861, 863 (2d Cir. 1976) (emphasis added):

> Any individual grievance involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written *mutual agreement* of the Association and the Company as executed by their authorized representatives.

The court said that language "clearly and unambiguously provided for only voluntary or permissive arbitration of the dispute between the parties." *Id*. at 868. The court ruled that it was error to compel arbitration under that language. *Id*. The same rulings are required by the language at issue here.

The Yakama Nation maintains, however, that courts have construed other language purportedly "extremely similar" to the language in the Consent Decree as mandating arbitration. ECF No. 96 at 5. The Nation is incorrect. The language in the Consent Decree is not like the language in the cases it cites.

The Yakama Nation relies primarily on *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001). The agreement involved in that case provided: "If any misunderstanding or dispute arises between the Company and the [Federal Insurance Administration] . . . such mis-understanding or dispute *may be submitted* to arbitration." *Id*. at 318 (emphasis added). The above quoted language in

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Bankers Insurance was not accompanied by further language providing alternatives to arbitration. Thus the question before the court in that case was whether "may," standing alone, was permissive or mandatory. The court construed that language as mandating arbitration if either party asked for it, but permissive in the sense that neither party had to seek arbitration. Moreover the *Bankers Insurance* court held that arbitration was required only when arbitration was "sought prior to litigation." *Id*. at 320-21. Here, however, the language of the Consent Decree makes clear that both parties' consent was required before a dispute could be submitted to arbitration, and the case was in litigation for months prior to the Nation's belated arbitration demand. Those critical distinctions render *Bankers Insurance* inapplicable.

The *Bankers Insurance* decision in turn relied on federal labor dispute and collective bargaining cases such as *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996). In that case, a collective bargaining agreement provided that "[a]ll disputes not settled pursuant to the [grievance] procedures . . . may be referred to arbitration." 78 F.3d at 879. The court held that "the purpose of the word 'may' . . . is to give an aggrieved party the choice between arbitration and abandonment of his claim." By contrast, the purpose of the word "may" in the final sentence of Paragraph 4.7.d of the Consent Decree is to give an aggrieved party the choice between arbitration or termination. The Department chose the

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latter. Thus, Paragraph 4.7.d did not put the Department in a Hobson's choice of either agreeing to arbitrate or abandoning its claims for damages in this case.

Other decisions cited by the Nation held that arbitration was mandatory under language similar to that in *Bankers Insurance* and *Austin*. The cases are easily distinguishable because the contract language there at issue provided for arbitration at the option of either party, not the mutual agreement to arbitrate required by the Consent Decree in this case.[1]

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[1] *See, e.g., J.C. Bonnot v. Cong. Indep. Unions Local 14*, 331 F.2d 355 (8th Cir. 1964) (if "the two parties do not agree after [grievance process], then either party may request arbitration"); *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418 (5th Cir. 1962) ("If the Union and the Company fail to agree, the dispute may be submitted to the arbitration"); *N.Y. Cross Harbor R.R. Terminal Corp. v. Consol. R. Corp.*, 72 F. Supp. 2d 70 (E.D.N.Y. 1998) ("Either party may, upon written notice to the other, refer any dispute . . . to arbitration"); *McCrea v. Copeland, Hyman & Shackman*, 945 F. Supp. 879 (D. Md. 1996) ("if any controversy or dispute relating to this Agreement arises between [the parties], either party may petition the appropriate [state] court . . . for an order compelling the submission of that controversy or dispute to arbitration"); *In re Winstar Commc'ns*, 335 B.R. 556 (Bankr. D. Del. 2005) (if "the parties are still unable to resolve the dispute, either party may elect to commence arbitration"); *TM*

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C. Alternatively, There Is No Agreement To Arbitrate Because The Consent Decree Has Been Terminated.

Under Paragraph 4.27 of the Consent Decree, the "agreement and processes embodied in this Consent Decree shall remain in effect" only until the procedure for termination is completed. The Court has already ruled that the phrase "processes embodied in this Consent Decree" includes the dispute resolution process, including permissive arbitration, in Paragraph 4.7. ECF No. 85 at 4-5. Regardless of whether action by this Court is still necessary to end the Decree itself, the "agreement and processes" were subject to termination by the unilateral actions of either party to the Consent Decree.

The Department followed the procedure required by Paragraphs 4.7 and 4.27 to terminate the agreement and processes in the Consent Decree. *Id*. at 7. That procedure was complete when the Department sent a written notice of termination dated December 5, 2012. ECF No. 6 at 15; ECF No. 60 at 4, 7-8. Even if Paragraph 4.7.d could be construed as mandating arbitration, the express terms of Paragraph 4.27 provided that the "agreement and processes embodied" in Paragraph 4.7.d ceased to have effect on December 5, 2012. The Yakama Nation

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Delmarva Power, LLC v. NCP of Va., LLC, 557 S.E.2d 199 (Va. 2002) ("If any material dispute . . . concerning this Agreement is not settled in accordance with the [informal] procedures . . . then either Party may commence arbitration hereunder by delivering to the other Party a notice of arbitration").

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demanded arbitration more than two months after that date. ECF No. 96 at 3. By that time, the alleged agreement to arbitrate disputes no longer existed.

Because no agreement for arbitration was in effect when the Yakama Nation sent its arbitration demand, there is no basis for the Court to stay or dismiss this case under 9 U.S.C. § 3 or to compel arbitration under 9 U.S.C. § 4.

IV. CONCLUSION

The submission of disputes to arbitration required mutual agreement to do so, which is undisputedly lacking here. Furthermore, the arbitration demand was not tendered until months after the permissive arbitration provision in the Consent Decree was terminated, rendering the demand untimely under the Federal Arbitration Act. The Yakama Nation's Motion to Compel Arbitration should be denied.

DATED this 25th day of April, 2013.

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PROOF OF SERVICE

I hereby certify that on the 25th day of April, 2013, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties or their counsel of record as follows:

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I hereby further certify that I have mailed by United States Postal Service a copy of the same document to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of April, 2013 at Seattle, Washington.

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