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Hon. Lonny R. Suko

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF LICENSING, CHRISTINE GREGOIRE, Governor, and ALAN HAIGHT, Director of Washington State Department of Licensing;

Plaintiffs,

v.

THE TRIBAL COURT FOR THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, and its CHIEF TRIBAL COURT JUDGE TED STRONG, and the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a Federally Recognized Indian Tribe,

Defendants.

NO. CV-12-3152-LRS

MOTION TO COMPEL ARBITRATION

April 18, 2013
Without Oral Argument

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Defendant Confederated Tribes and Bands of the Yakama Nation (the "Nation") respectfully requests that the Court order the Parties to arbitrate pursuant to the mandatory arbitration clause in the Consent Decree, and to otherwise dismiss this lawsuit in favor of binding arbitration.[1]

I. STATEMENT OF FACTS

The mandatory binding arbitration clause found in Paragraph 4.7(d) was added in 2006, simultaneously with the clause that removed this Court's continuing jurisdiction. ECF No. 6 at 76. These paragraphs read:

> H. The Parties agree that the provisions of ¶ 4.1 and ¶ 4.2 for maintaining the continuing jurisdiction of the court should be deleted. The Parties agree to resolve further disputes exercising mutual good faith on a government to government basis and, to the extent they are unable to resolve such disputes, the dispute resolution process in ¶ 4.7 shall apply
>
> I. Paragraph 4.7d is amended by adding a new sentence at the end to read: 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. The term "*infra*" refers to ¶ 4.27, which was also added in 2006:

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[1] This Motion is made without waiver of any objections to the jurisdiction of the Court. The Yakama Nation does not waive, alter or otherwise diminish any rights, privileges, remedies or services guaranteed by the Treaty With The Yakama of 1855, 12 Stat. 951 (1859). Nor does the Yakama Nation waive its sovereign immunity, in any form, or otherwise consent any Yakama agent or instrumentality to the jurisdiction of this Court or any tribunal.

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> 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.

The Consent Decree expressly deleted the provision allowing that a "party may petition the Court for enforcement of the Consent Decree," as the Nation had done in 2004. ECF No. 6, at 58, 74. That provision was replaced with the arbitration clause. Thus, the Parties agreed in 2006, as did the Court, that before "termination" the Parties must: (1) mediate until the mediator determines that the Parties are not able to resolve the dispute, and (2) wait 180 days, during which time either party might invoke the arbitration provision.

On February 7, 2013, the Court determined that mediation had come to an end when it ruled that "a formal declaration of an impasse by a mediator" is not required to officially end the dispute resolution. ECF No. 85, at 7. On February 21, 2013 – well within 180 days of that ruling – the Nation notified Plaintiffs that it has "elect[ed] to resolve all existing disputes related to the Consent Decree through final binding arbitration," pursuant to Paragraph 4.7d of the Consent Decree. On

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February 25, 2013, Plaintiffs notified the Nation that they refused to arbitrate.

II. LAW AND ARGUMENT

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In determining the merits of a motion to compel arbitration under the FAA, "the court's only role is to determine whether a valid arbitration agreement exists and whether the scope of the dispute falls within that agreement." *Ramirez v. Cintas Corp.*, No. 04-0281, 2005 WL 2894628, at *3 (N.D. Cal. Nov. 2, 2005). If the court is satisfied that an arbitration clause exists and could *plausibly* apply to the dispute at hand, "the court **shall** make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added); *see also* 9 U.S.C. § 3 (a court is required to dismiss or stay "any suit or proceeding" pending the arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration.") (emphasis added).

Courts have been instructed to "rigorously enforce agreements to arbitrate," *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985), and "must grant [a movant's] request to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Hackman v. Dickerson Realtors*, 520 F.Supp.2d 954, 959 (N.D. Ill. 2007) (quotation omitted).

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A. **The Text Of The Consent Decree Requires Plaintiffs To Arbitrate.**

Paragraph 4.7d of the Consent Decree states that if a 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. . . ." ECF No. 6 at 76. Here, a dispute has arisen under the Consent Decree. That dispute has not been resolved by mediation. The Nation has thus triggered the arbitration clause of the Consent Decree by requesting that "a final binding decision resolving the dispute" be issued by an arbitrator. *Id.*

The Consent Decree's use of permissive terminology is not unique. The arbitration clause in *U.S. v. Bankers Ins. Co.*, 245 F.3d 315, 318 (4th Cir. 2001), is extremely similar: "If any misunderstanding or dispute arises . . . such misunderstanding or dispute **may be submitted to arbitration** for a determination [that] shall be binding . . . ." *Id.* at 318 (emphasis added); *cf.* ECF No. 6 at 76 ("the parties **may** agree" to have the dispute arbitrated). Although the Court in *Bankers* held that the arbitration clause utilized permissive terminology, it was nonetheless mandatory once invoked by either party:

> [T]he arbitration agreement in question does not specify that arbitration must occur, but instead uses permissive language ("[any] such misunderstanding or dispute *may* be submitted to arbitration"). The use of the term "may" . . . requires us to determine whether arbitration is mandatory when it is sought prior to litigation. . . . Although the arbitration provision of the Arrangement is framed in permissive terms, its use of permissive phraseology is not dispositive. . . . [A] clause providing that "disputes . . . may be referred to arbitration" has the effect of giving an aggrieved party the choice

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> between arbitration and abandonment of his claim, i.e., he "may" either arbitrate or abandon the claim. . . . [T]he contrary interpretation would render the arbitration provision meaningless for all practical purposes, since parties could always voluntarily submit to arbitration."

Id. at 320-21 (citation and quotation omitted); *see also id.* at 321 (citing cases); *Austin v. Owens-Brockway Glass*, 78 F.3d 875, 879 (4th Cir. 1996); *Bonnot v. Cong. of Indep. Unions*, 331 F.2d 355, 359 (8th Cir. 1964); *Deaton Truck Line. v. Local Union 612*, 314 F.2d 418, 421 (5th Cir. 1962); *N.Y. Cross Harbor R.R. Terminal v. Consol. Rail*, 72 F.Supp.2d 70, 77 (E.D.N.Y. 1998); *McCrea v. Copeland, Hyman & Shackman*, 945 F.Supp. 879, 881-82 (D.Md.1996); *In re Winstar Commc'ns*, 335 B.R. 556, 562-64 (D. Del. Bankr. 2005); *TM Delmarva Power v. NCP of Va.*, 263 Va. 116, 557 S.E.2d 199, 201 (Va. 2002).

Here, again, the Consent Decree requires that "the parties may agree to have [an] . . . arbitrator make a final binding decision resolving the dispute . . . ." ECF No. 6 at 76. The Nation has triggered this provision by requesting arbitration. Construing the arbitration clause "as broadly as possible," as required by federal law, it cannot be said that arbitration is discretionary or otherwise not required. *U.S. Fire Ins. v. National Gypsum*, 101 F.3d 813, 816 (2nd Cir. 1996).

B. The Federal Arbitration Act Requires That Plaintiffs Submit To Binding Arbitration.

The FAA was "enacted in 1925 as a response to judicial hostility to arbitration." *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668 (2012). The

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statute reflects a "liberal federal policy favoring arbitration agreements," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991), and requires courts to stay or dismiss proceedings "when an issue before the court can be referred to arbitration." *Permison v. Comcast Holdings*, No. 12-5714, 2013 WL 594304, at *4 (W.D. Wash. Feb. 15, 2013) (citing 9 U.S.C. § 3). "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." *Id.* (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

Here, as discussed above, the "issue before the court can be referred to arbitration," and the Consent Decree requires that it be so referred when requested by one of the Parties within 180 days of mediation coming to a close. *Id.* at *4. Arbitration has been requested and refused by Plaintiffs, thus triggering the FAA and the need for this Court to compel Plaintiffs to arbitrate. Plaintiffs cannot meet their burden to show that the arbitration agreement is not enforceable.

III. CONCLUSION

"Arbitration offers flexibility, an expeditious result, and is relatively inexpensive when compared to litigation." *Schoenduve v. Lucent Technologies*, 442 F.3d 727, 731 (9th Cir. 2006). Both parties will benefit by arbitration. The relationship between the Parties, too, will benefit by arbitration, especially in lieu of complex federal court litigation.

The Yakama Nation thus respectfully requests that the Court order the

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Parties to arbitrate pursuant to the arbitration clause contained within the Consent Decree, and to dismiss this lawsuit in favor of binding arbitration.

DATED this 27th day of February, 2013.

s/Gabriel S. Galanda
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CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

3. On February 27, 2013, I filed the foregoing document, which will provide service to the following via ECF:

Fronda Woods

Rob Costello

Bill Clark

The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 27th day of February, 2013.

s/Gabriel S. Galanda

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