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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITE HERE LOCAL 19,

Petitioner,

v.

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS; CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY; DOES 1-100,

Respondents.

No. 1:14-CV-01136-MCE-SAB

UNITE HERE LOCAL 19'S REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND TO STRIKE AFFIRMATIVE DEFENSES

UNITE HERE Local 19 ("Union") responds as follows to the arguments made by Respondents in opposition to the motion to strike affirmative defenses and for judgment on the pleadings:

A. The Union's motion to strike the third, fourth, fifth and sixth affirmative defenses should be granted because there is no opposition

The Union moved to strike all of Respondents' affirmative defenses. In their opposition memorandum, Respondents respond only to the Union's arguments about their first, second and seventh affirmative defenses. Respondents decline to provide a response to the Union's arguments in favor of striking the third, fourth, fifth and sixth affirmative defenses but do not give

any justification for not doing so. Respondents assert that they are not waiving the other defenses, but the Court's rules do not permit a piecemeal response to a motion, much less allow a respondent to make a unilateral decision to proceed in that fashion. *See* Local Rule 230(c) (setting time to oppose a motion). Allowing Respondents to respond to the pending motion incrementally and when they choose would waste the Court's resources. If the Court is otherwise inclined to grant the Union's motion, Respondents' approach would necessitate another round of briefing and another hearing. All issues raised in the motion should be addressed at this time.

We address the Respondents arguments about the first, second and seventh affirmative defenses in the following three sections.

B. Federal labor laws apply to Respondents' casino

1. The *Couer d'Alene Tribal Farm* test is based on long-established principles of federal Indian law

Respondents argue that the Ninth Circuit's test set out in *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) for when a federal law of general applicability applies to tribes is "contrary to longstanding U.S. Supreme Court precedent affirming tribal sovereignty unless expressly abrogated by Congress." Respondents' absolutist argument disregards other Supreme Court precedent that limits the application of the rule that Respondents tout.

In *Couer d'Alene Tribal Farm*, the Ninth Circuit began with the principle set out in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) that "a general statute in terms applying to all persons includes Indians and their property interests." 751 F.2d at 1115; *see also Tuscarora Indian Nation*, 362 U.S. at 120 ("[G]eneral Acts of Congress apply to Indians . . . in the absence of a clear expression to the contrary."). The pro-tribal sovereignty principle that Respondents cite and the rule of *Tuscarora Indian Nation* might outwardly appear to be in conflict but, as the D.C. Circuit explained in *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007), that conflict is "superficial." There is "no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application." *Id.* at 1312. The D.C. Circuit concluded that it did

not need to resolve the superficial conflict because "the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino." *Id.* at 1315.

It is also not necessary to resolve the superficial conflict here because the *Couer d'Alene Tribal Farm* test draws from both principles. It begins with the general rule of *Tuscarora Indian Nation*, but creates an exception for laws that "touch[] exclusive rights of self-government in purely intramural matters," 751 F.2d at 1116; which is the only area in which tribes retain sovereign authority. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 334 (2008) ("By virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, protecting tribal self-government, and controlling internal relations."); *Duro v. Reina*, 495 U.S. 676, 685-86 (1990) ("[T]he retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. . . . The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.").

2. The Supreme Court did not overrule *Couer d'Alene Tribal Farm*

Next, Respondents assert that the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. __, 134 S.Ct. 2024 (May 27, 2014) implicitly overruled *Couer d'Alene Tribal Farm* and *Tuscarora Indian Nation*, and changed the standard for determining whether federal laws of general applicability apply to tribal businesses. Respondents are wrong for the following reasons.[1]

First, *Bay Mills* did not address the question at issue here: whether a federal statute of general applicability that does not expressly apply to Indian tribes -- such as § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 -- does in fact apply to tribes. That question was not before the Court in *Bay Mills* because Michigan's suit was based on the Indian

[1] Respondent's counsel made the same exact argument to an administrative law judge of the National Labor Relations Board, who flatly rejected it. *See Casino Pauma*, 2014 WL 2886354 (June 25, 2014).

Gaming Regulatory Act, 25 U.S.C. § 2701 ("IGRA") *et seq.*, a federal law which expressly applies to tribes and only to tribes. 134 S.Ct. at 2028-29.

Second, *Bay Mills* involved only the question whether the tribe's sovereignty gave it immunity from a lawsuit: "We granted certiorari to consider whether tribal sovereign immunity bars Michigan's suit against Bay Mills." 134 S.Ct. at 2030. Tribal sovereign immunity from suit is distinct from, and broader than, the sovereignty that exempts tribes from compliance with some laws. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998). "[I]mmunity extends beyond what is needed to safeguard tribal self-governance." *Id.* at 758. Thus, the issue before the Supreme Court in *Bay Mills* (whether a tribe is immune from suit under a law that expressly applies to tribes) is distinct from the issue raised by Respondents in their first affirmative defense (whether a federal labor law that says nothing about Indian tribes applies to a tribe). Respondents' immunity from suit is not at issue in this case because they unambiguously waived that defense in § 29(6) of the Collective Bargaining Agreement:

> For the sole purpose of enabling a suit to compel arbitration or to confirm an arbitration award under this Agreement or the Employer's Tribal Labor Relations Ordinance, the Employer agrees to a limited waiver of sovereign immunity and consents to be sued in federal court, without exhausting tribal remedies.

Petition, Exh. A (pp. 17-18).

Nevertheless, Respondents assert that *Bay Mills* stands for the absolute rule that Congress must expressly state that a law applies to tribe, or else the law does not apply. As the D.C. Circuit explained in *San Manuel Indian Bingo*, that rule has not been applied to laws of general application. IGRA is not a law of general application so the *Bay Mills* Court's invocation of that rule was consistent with Supreme Court precedent. In addition, the *Bay Mills* Court invoked the rule only in connection with tribes' immunity from suit: "Congress must 'unequivocally' express its purpose to *subject a tribe to litigation*." 134 S.Ct. at 2034 (emphasis added). While the Court explained that the presumption against congressional abrogation of immunity from suit is rooted in the more general principle that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *id.* at 2032; that presumption does not conflict with the *Couer d'Alene Tribal Farm* test because, as explained in the preceding subsection, the *Couer*

d'Alene Tribal Farm test has an exception for laws that would interfere with tribal self-government. As explained in the opening brief, applying federal labor laws to a commercial business, such as a tribal casino, does not interfere with tribal self-government. *San Manuel Indian Bingo*, 475 F.3d at 1314-15; *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179-81 (2d Cir. 1996).

Respondents assert that the Court in *Bay Mills* "refused to distinguish between traditionally governmental and commercial functions for the purpose of deciding what is and is not worthy of immunity." But the Court's opinion did not reject that distinction. It did not draw that distinction at all. Respondents quote only from Justice Sotomayor's concurrence to argue that tribal casinos are not separate from tribes' governmental functions. A concurrence is not binding on this Court, and none of the other justices joined Justice Sotomayor's concurrence. Moreover, even Justice Sotomayor limited her opinion to the the question whether there should be a "'commercial activity' exception to tribal sovereign immunity." *Bay Mills*, 134 S.Ct. at 2045.

There is another reason why Respondents make too much of *Bay Mills*. Respondents implicitly argue that the Court in *Bay Mills* overruled *Tuscarora Indian Nation* without saying that it was doing so. In fact, the *Bay Mills* Court expressed the opposite intent. It emphasized its commitment to *stare decisis* and not overruling prior precedent. 134 S.Ct. at 2036 ("[T]his Court does not overturn its precedents lightly. *Stare decisis*, we have stated, is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Although not an inexorable command, *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion. For that reason, this Court has always held that any departure from the doctrine demands special justification.").

C. The Union did not waive federal jurisdiction

Respondents argue that a statement in the Collective Bargaining Agreement's preamble – that the Tribal Labor Relations Ordinance ("TLRO") is the appropriate law with regard to labor relations -- deprives this Court of subject-matter jurisdiction. There are three errors in

Respondents' reasoning.

First, it is not logical to interpret the Collective Bargaining Agreement's preamble as an agreement that the TLRO would displace jurisdiction under § 301 of the LMRA because § 301 does not address the same subject-matter as the TLRO. This suit was brought under § 301 because that statute establishes federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." In contrast, the TLRO does not provide a method to resolve contract disputes. It regulates only the organizing and collective bargaining process. For example, it prohibits unions and employers from committing unfair labor practices (§§ 5-6), gives unions methods of communicating with employees for the purpose of organizing (§ 8), establishes a procedure for elections to determine employee support for a union (§§10, 12), and sets out the rules that apply if bargaining reaches impasse (§ 11). Wilson Dec., Exh. B. In this regard, the TLRO's provisions largely replicate the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

The TLRO also provides a process to resolve disputes arising under the TLRO's substantive provisions, and that process culminates in arbitration. Unlike § 301 of the LMRA, the TLRO's dispute resolution provision does not extend to enforcement of collective bargaining agreements or arbitration awards issued under collective bargaining agreements. It applies only to "matters related to organizing, election procedures and alleged unfair labor practices prior to the union becoming certified as the collective bargaining representative of bargaining unit employees" and "matters after the union has become certified as the collective bargaining representative and relate specifically to impasse during negotiations." Wilson Dec., Exh. B (§ 13(b)).

Second, Respondents do not claim that the TLRO provides a substantive rule of decision for the Court to apply (as a choice of law provision would), but rather that it simply deprives this Court of jurisdiction to confirm arbitration awards. They assert, "[T]he federal court should decline jurisdiction as the governing statute is a state law, not a federal law." Resp. Br., at 8. Respondents are effectively arguing that the statement in the Collective Bargaining Agreement's preamble operates as a forum selection clause. The problem with that argument is that a waiver

of the right to proceed in a court having jurisdiction must be clearly and unequivocally expressed. *Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel*, 69 F.3d 1034, 1036-37 (9th Cir. 1995); *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989); *see also John Boutari and Son v. Attiki Importers*, 22 F. 3d 51, 53 (2d Cir. 1994). This principle, and the supporting cases, were explained in the Union's opening brief, but Respondents simply ignore them.

The statement about the TLRO in the Collective Bargaining Agreement's preamble is not a clear and unequivocal waiver of the right to proceed in federal court. To the contrary, the parties clearly agreed that suit to confirm arbitration awards under the Collective Bargaining Agreement could be brought in federal court:

> For the sole purpose of enabling a suit to compel arbitration or to confirm an arbitration award under this Agreement or the Employer's Tribal Labor Relations Ordinance, the Employer agrees to a limited waiver of sovereign immunity and consents to be sued in federal court, without exhausting tribal remedies.

Petition, Exh. A (pp. 17-18) (emphasis added).[2]

A contract interpretation rule bolsters this conclusion. "Specific terms of a contract govern inconsistent, more general terms." *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1099 (9th Cir. 2006) (citing *Restatement (Second) of Contracts* § 203 (1981)). This is because "in the case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language." *Restatement (Second) of Contracts* § 203, comment e. Appling that rule here, the parties' specific agreement to proceed in federal court trumps the general statement that the TLRO is the applicable law.

Finally, Respondents' argument that the parties agreed that the TLRO governs this dispute

[2] The parties did provide for the possibility that the federal court might decline to exercise jurisdiction with the phrase "[t]o the extent the federal court declines jurisdiction, for the sole purpose of compelling arbitration or confirming an arbitration award under this Agreement, the tribe agrees to a limited waiver of its sovereign immunity and consents to be sued in the appropriate state superior court . . . ." As Respondents point out, that phrase is largely copied from § 13(d) of the TLRO. The TLRO was negotiated in 1999, *see In re Indian Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2003); before the Ninth Circuit and the D.C. Circuit decided that generally-applicable federal labor laws applied to tribal businesses.

suggests another basis for federal jurisdiction. The TLRO was adopted as part of the IGRA Tribal-State Compact. Wilson Dec., ¶ 7. *Cf. In re Indian Gaming Related Cases*, 331 F.3d at 1106-07. IGRA "necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997), *cert. denied* 524 U.S. 926 (1998). The *Cabazon Band* Court reached that conclusion because IGRA expressly authorizes tribes and states to agree to the remedies for breach of contract: "By envisioning the enforcement of a compact and any contractual obligations assumed pursuant to a compact in federal court, IGRA necessarily confers jurisdiction to the federal courts."[3] *Id.*

D. Confirmation of the Arbitration Award is not premature

Respondents argue that the Arbitration Award cannot be confirmed because Arbitrator Halter gave Respondents the option of paying Jarrod Woodcock and Mae Pitman front pay indefinitely instead of reinstating them, and the amount of front pay and backpay Respondents owe under the Arbitration Award has not yet been calculated.

1. A second hearing is not needed to calculate the amount due

Here, too, Respondents ignore almost all of the case law cited by the Union in its opening brief. The only case that Respondents discuss is *Millman Local 550 v. Wells Exterior Trim*, 828 F.2d 1373 (9th Cir. 1987), but they misrepresent its application to this case. In *Millman*, the Ninth Circuit held that when an arbitration proceeding is bifurcated into two discrete hearings – the first to determine liability and the second to determine damages – the arbitrator's award is not final and reviewable until both phases are complete. *Id.* at 1376. But the Court contrasted that

[3] Respondents might answer that *Cabazon Band* involved a suit brought by a tribe, which was a party to the Compact, so its holding should be limited to suits brought by parties to a tribal-state gaming compact. Nothing in the decision suggests such a limit, and IGRA's authorization of compact provisions providing "remedies for breach of contract" does not limit those remedies to tribes and states. Here, unions are the intended third-party beneficiaries of the TLRO's arbitration procedures, *see, e.g.*, Wilson Dec., Exh. B (§ 10(d), § 12(e)); which Respondents characterize as part of their IGRA Compact with California. If federal question jurisdiction exists to enforce IGRA Compacts, then it must also exist when a third-party beneficiary of that Compact sues to enforce its express rights under the Compact.

situation with an award in which the arbitrator ordered a backpay remedy but did not calculate the amount of backpay due. In the latter scenario, confirmation is not premature: "[T]he arbitrator need not complete the mathematical calculations for the award to be final and reviewable." *Id.* at 1377.

That is what occurred here. Arbitrator Halter did not refrain from deciding the remedy. The award issued by Arbitrator Halter sets out the remedy:

> In sum, grievants Woodcock and Pitman were suspended and discharged without just cause. The remedy to cure the numerous violations of the CBA is reinstatement with a make whole remedy that includes backpay with interest, tips for Woodcock, restoration of seniority, contributions to retirement, reimbursement of health insurance premiums and expenses, and any other employment benefits unjustly denied due to their wrongful suspensions and discharges. Front pay is also awarded should the Tribe Employer not reinstate the grievants. In other words, the Union's requested remedy is granted.

Petition, ¶ 16 & Exh. B, at 17; Answer, ¶ 16. The only thing left to do is the mathematical calculations to determine the amount of back and front pay necessary to make Jarrod Woodcock and Mae Pitman whole.

Respondents cannot dispute this. Their seventh affirmative defense states, "The parties agreed during the course of arbitration that said Arbitrator Halter would retain jurisdiction over the case to determine calculation of damages should liability be determined, which calculation has never occurred to date. The case should be returned to Arbitrator Halter to determine compliance with his award" (emphasis added).

Confirmation is required here because Respondents have not taken any steps to comply with the award, either by reinstating the employees or calculating the backpay that has accrued so far and paying out that amount. Respondents attempt to distract from *Millman*'s clear rule by suggesting that there is a dispute about how much backpay and front pay is owed. Respondents' claim that a second hearing is required to do those calculations is disingenuous because Respondents have not taken any steps to schedule that hearing. Moreover, as Respondents' counsel explained in his declaration, the mathematical formula is set out in § 19(3)(e) of the Collective Bargaining Agreement: "Any award of backpay by the Arbitrator shall be reduced by

the amount of employee interim earnings and/or the receipt of unemployment benefits." Petition, Exh. A (p. 17). A hearing before Arbitrator Halter is not needed to do these simple mathematical calculations.[4]

2. Respondents failed to convince Arbitrator halter that license expiration was relevant to the remedy

In a footnote, Respondents claim that no backpay or front pay is owed after Jarrod Woodcock's and Mae Pitman's gaming licenses would have expired in November 2012 and March 2013, had they not been terminated earlier. Wilson Dec., ¶ 13. Respondents' argument is a substantive attack on Arbitrator Halter's award. It not grounds to deny confirmation of an arbitration award.

The arbitration proceeding is the forum where Respondents could have made this argument. The hearing was not held until September and October 2013, after Respondents say that Woodcock's and Pitman's licenses would have expired. Petition, ¶ 14; Answer, ¶ 14. It makes no difference whether Respondents failed raise this argument, or failed to convince Arbitrator Halter of its merits. Neither is grounds for the Court to remand to Arbitrator Halter. "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator." *United Steelworkers of America v. Smoke-Craft*, 652 F.2d 1356, 1360 (9th Cir. 1981); *see also United Food & Commercial Workers Local 400 v. Marval Poultry*, 876 F.2d 346, 352 (4th Cir. 1989) (holding that employer "was obliged to raise at arbitration all matters that were relevant to the outcome of the case -- which certainly included the likely remedy of reinstatement with back pay"). Courts will also not review the merits of a remedy awarded by a labor arbitrator. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960). Labor arbitrators have broad discretion "to craft common sense remedies responsive to all the circumstances surrounding the case presented to them." *Association of Western Paper & Pulp*

[4] If an arbitration decision awarding front pay indefinitely were not ripe for confirmation until front pay was calculated, it would be impossible ever to confirm the award and thereby compel the employer to comply with it.

Workers v. Rexam Graphic, 221 F.3d 1085, 1090 (9th Cir. 2000); *see also Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960) ("[W]hen it comes to formulating remedies" labor arbitrators "need [] flexibility in meeting a wide variety of situations.").

E. There is no reason to stay this case

Respondents ask the Court to do nothing because their casino is temporarily closed. That is not a reason to delaying resolving this case.

While Jarrod Woodcock and Mae Pitman cannot resume work immediately at a closed casino, they can be paid the accrued backpay. The preliminary injunction entered by Judge O'Neill does not preclude Respondents from paying money that is owed. It says exactly the opposite: "Payments in the ordinary course of business . . . . are not violative of this injunction." *California v. Picayune Rancheria of Chukchansi Indians*, Case No. 14-cv-01593-LJO-SAB (Oct. 29-2014), at p.9 (¶ 1) (attached hereto as Exhibit A). Respondents state that it is not clear who is in charge of Respondents' operations, but the preliminary injunction also makes that clear. The injunction prohibits Respondents' various factions from "[a]ttempting to disturb, modify or otherwise change the circumstances that were in effect at the Casino as of the afternoon of October 8, 2014." *Id.* at p.9 (¶ 1). The people who were in charge on October 8 have a court order giving them authority to remain in charge. Respondents may decide to cut their losses on front pay they will owe to Woodcock and Pitman and instead reinstate them when the casino reopens. Resolving this case now will speed that process to the benefit of all parties.

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Conclusion

For all of the foregoing reason, Respondents' affirmative defenses should be stricken; judgment on the pleadings should be granted in favor of Petitioner UNITE HERE Local 19; and the Arbitration Award should be confirmed and enforced.

Dated: November 6, 2014

Respectfully submitted,

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