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SHINGLE SPRINGS BAND OF MIWOK INDIANS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITE HERE INTERNATIONAL UNION, Petitioner, v. SHINGLE SPRINGS BAND OF MIWOK INDIANS; DOES 1-100, Respondent.	Case No. 2:16-CV-00384-TLN-EFB REPLY IN SUPPORT OF MOTION TO DISMISS Date: May 19, 2016 Time: 2:00 p.m. Courtroom: 2, 15th Floor

I. INTRODUCTION

The Petition to Compel arbitration filed by UNITE HERE International Union ("Union") must be denied because the neutrality agreement at issue (i.e., the Memorandum of Agreement or "MOA") does not permit arbitration of purely intramural personnel decisions (i.e. the termination of two employees.). Further, at no time has the Tribe agreed that the MOA would permit arbitration of personnel matters – employment matters such as the purported wrongful termination of two former Tribe employees are subject to Tribal law.

The Union's Petition must also be denied because the MOA is a "neutrality agreement" which cannot be used to regulate the terms and conditions of employees in the workplace. 29 U.S.C. § 158(a)(2). Neutrality agreements like the MOA are not collective bargaining agreements and confer no rights on the two former employees. Arbitrating these two Tribal employment matters also gives the illusion that union representation is either inevitable or already in effect. Further, the

two terminated employees are not even parties to the MOA and hence have no standing to seek arbitration or any other legal redress outside of tribal laws.

For all of these reasons, and for the arguments set forth below and in the Tribe's initial filing, the Tribe respectfully requests the Court to issue an Order granting the Tribe's Motion to Dismiss and denying the Union's Petition.

II. LEGAL ARGUMENT

A. The Court Should Deny the Petition Because There Was No Agreement To Arbitrate Tribal Personnel Matters.

The Union argues that the alleged employment terminations of Mr. Garrigues and Mr. Bond are arbitrable under the MOA. The Union is wrong. The Tribe never agreed to arbitrate purely intramural personnel decisions, and nothing in the MOA requires arbitration of intramural personnel decisions. In fact, there is no provision within the MOA regarding employee discipline and/or termination. The MOA is further silent on any grievance procedure or accompanying remedies for employee disciplinary actions, such as back pay and/or reinstatement. *Litton Fin. Printing Division v. NLRB* (1991) 501 U.S. 190, 209 (although the court may not decide the merits of the grievance, the court "must determine whether the parties agreed to arbitrate this dispute, and [the court] cannot avoid that duty because it requires [the court] to interpret a provision of a bargaining agreement."). [1]

In spite of the limited breadth of the MOA, the Union attempts to circumvent longstanding federal labor law by arguing that employment termination decisions fall within the scope of Section 10 providing for arbitration of "disputes over the interpretation or application of [the] Agreement." MOA, Section 10. However, it is clear that intramural personnel matters do not and cannot fall within the scope of Section 10. *Granite Rock Co. v. Int'l Bhd. Of Teamsters* (2010) 561 U.S. 287, 287 (courts determine threshold issues as the scope of the arbitration clause and its enforceability, as well as whether and when the parties agreed to the clause). Such a determination would interfere with Tribe's "exclusive rights of self-governance in purely intramural matters." *Donovan v. Coeur*

[1] The U.S. Supreme Court in *Litton* "appeared to instruct that the judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance[.]" *IBEW v. GKN Aero. N. Am., Inc.* (8th Cir. 2005) 431 F.3d 624, 528.

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d'Alene Tribal Farm (9th Cir. 1985) 751 F.2d 1113, 1116 (citations omitted). The Union's position is unavailing.

(1) The Tribe Never Intended to Include Employment Termination Decisions Within the Arbitration Provision.

It is a fundamental labor principle that "arbitration is strictly 'a matter of consent' and thus 'is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration[.]" *Granite Rock Co.*, 363 U.S. at 299 (internal citations omitted). In determining the arbitrability of the dispute, courts must also consider the history of the parties' own interpretations of the agreement. *Commc'ns Workers of Am. v. Pac. Nw. Bell Tel. Co.* (9th Cir. 1964) 337 F.2d 455, 459. Indeed, the Ninth Circuit warned that:

> [The presumption regarding arbitrability] recognizes that if evidence of intent is of the 'most forceful' character, it need not be confined to the language of the contract; and it would appear clear that the decision whether such evidence dehors the agreement is of sufficient forcefulness is for the courts and not for the arbitrator. The Court, then, has not announced a rule of evidence; it has simply warned that the persuasive power of the evidence must be such that the truth emerges with forceful clarity. We apprehend, however, that it is still for the courts to search out the truth upon this issue.

Id.

Federal courts must also place practical and realistic construction on labor agreements, giving due consideration to purpose which they are intended to serve. See *California Trucking Asso. v. Corcoran* (N.D. Cal. 1977) 74 F.R.D. 534 (courts engage in contract interpretation principles in determining arbitrability); see also *El Vocero De Puerto Rico v. Union De Periodistas* (D.P.R. 1981) 532 F. Supp. 13 (in context of labor agreement, great weight should be given to interpretation of the agreement by parties thereto, and what parties actually intended is of the utmost importance).

The Tribe never, at any point, agreed to submit intramural personnel decisions to arbitration under the MOA. Not only would the inclusion of those decisions violate federal law by giving the Union the right to negotiate over the terms and conditions of employees, but construing the provision as such would not serve the neutrality agreement's purpose. Rather, the Tribe and the Union entered into the MOA for the following express purposes:

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- To ensure an orderly environment for the exercise by Bargaining Unit Employees of their rights under the TLRO;
- To avoid strikes, picketing, and/or other adverse economic or public relations activity directed at the Tribe in the event the Union decides to conduct an organizing campaign among Eligible Employees; and
- Implementation of a Card Check Recognition Process pursuant to the terms of this Agreement.

See MOA, Recitals (D).

The Tribe and the Union entered into the MOA for three limited purposes, none of which include bargaining and/or negotiation over the terms and conditions of employment. This is unsurprising as a discharged employee must exhaust the grievance procedures provided by a collective bargaining agreement before seeking direct legal redress. *Edwards v. Teamsters Local Union No. 36, Bldg. Material & Dump Truck Drivers* (9th Cir. 1983) 719 F.2d 1036, 1038 (citing *Republic Steel Corp. v. Maddox* (1965) 379 U.S. 650).[2] Mr. Garrigues and Mr. Bond, the two employees whose employment terminations the Union seeks to challenge, have not exhausted their remedies in accordance with the procedures set forth in tribal law. Instead, the Union in an attempt to circumvent the Tribe's own internal processes, seeks direct legal redress on behalf of these two Tribal members, who are not even parties to the MOA.

The MOA further confirms that the sovereign immunity waiver by the Tribe "shall not be enforced by any other party other than the Parties to the Agreement and shall not give rise to any claim or liability to any other third party other than the Parties hereto."[3] MOA, Section 14(b). As a result, Mr. Garrigues and Mr. Bond have no standing under federal law or the MOA. If Mr. Garrigues and Mr. Bond elect to bring a claim against the Tribe, they must first exhaust the Tribe's internal dispute resolution process in accordance with Tribal law.

[2] Because the MOA is not a collective bargaining agreement, it does not contain any grievance procedure and/or applicable remedies for employees.

[3] Federal law prohibits suits against Indian Tribes, unless the Tribe (or Congress) has clearly and unequivocally expressed consent to suit (which the Tribe has not done here). See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 56, 58-59 (Indian tribes may be sued only where the tribe or Congress unequivocally expresses consent to suit).

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As set forth above, not only does the express language of the MOA evidence that the Tribe never intended to agree to arbitrate intramural personnel decisions, bedrock principles of federal law demonstrate that such an interpretation of the arbitration provision is neither practical nor realistic. *California Trucking Asso. v. Corcoran* (N.D. Cal. 1977) 74 F.R.D. 534.

B. The MOA Would Be an Illegal And Unenforceable Contract if Employee Termination Decisions Were Subject To the Arbitration Provision.[4]

The National Labor Relations Act ("NLRA") proscribes employers from favoring any union that has failed to demonstrate majority status and that does not represent an appropriate bargaining unit of the workforce. 29 U.S.C. § 158(a)(2) (it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it"). The MOA expressly prohibits the Tribe from granting the Union any support as it pursues majority status and attempts to gain the status of exclusive representative of an appropriate bargaining unit. MOA, Section 5(b) ("for the purposes of this Agreement "Neutrality" means that Manager or management shall not express any opinion for or against Union representation of any existing or proposed bargaining unit composed of Bargaining Unit Employees, or for or against the Union or any officer, member or representative thereof in their capacity as such"). Accordingly, neutrality agreements like the MOA may not be used to regulate the terms and conditions of employees in the workplace. Section 8(a)(2) of the NLRA. See *Majestic Weaving Co., Inc. of New York* (1964) 147 NLRB 859, 862 ("there 'could be no clearer abridgment' of the Section 7 rights of employees than impressing upon a nonconsenting majority an agent granted exclusive bargaining status") (internal citations omitted); see also *American. Bakeries Co.* (1986) 280 N.L.R.B. 1373, 1377 (any "bargaining prior to achievement of the union's majority status is violative.").

The cases the Union cites in support of its arguments are of limited import here where there is no collective bargaining agreement at issue. Indeed, neutrality agreements such as the MOA

[4] The Tribe intends to file a Complaint for Declaratory Relief to request declarations regarding the respective rights and obligations of the parties, including a declaration that arbitrating intramural personnel decisions violates federal law and renders the MOA illegal. See *United Food & Commercial Workers Local Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Employers Council, Inc.* (9th Cir. 1987) 827 F.2d 519, 523 (party may file declaratory action under Declaratory Judgment Act alleging provision of labor contract is illegal).

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generally provide the framework for the representation process and may set forth provisions only to take effect if the union obtains majority status and becomes the exclusive representative of employees. See *Snow & Sons* (9th Cir. 1962) 134 N.L.R.B. 709, enforced, 308 F.2d 687 (the NLRB will enforce voluntary recognition agreements where the employer agrees to a private alternative to a Board election and, as a result of that alternative procedure, has knowledge of the union's majority status); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel* (2d. Cir. 1993) 996 F.2d 561 (employer and union entered into contract to govern conduct during union organizational campaign). Unlike collective bargaining agreements, neutrality agreements do not evidence a contract reached after the union has obtained majority status and after extensive bargaining negotiations between the parties. Simply put, neutrality agreements like the MOA are not collective bargaining agreements and cannot be treated as such. *Ibid.*

Dana Corp. and International Union (Dec. 6, 2010) 356 N.L.R.B. No. 49, 2010 WL 4963202, is particularly instructive here. In *Dana Corp.*, the National Labor Relations Board considered the terms of a neutrality agreement and provided certain factors that, if found, would demonstrate a violation of Section 8(a)(2). Specifically, the Board opined that if a union purported to speak for the employees or was treated as if it did, Section 8(a)(2) was violated; if the neutrality agreement affected existing terms and conditions of employment or obligated the employer to violate such terms and conditions, it violated Section 8(a)(2); or if the neutrality agreement, its context, or the parties' conduct would reasonably lead employees to believe recognition of the union was a foregone conclusion, Section 8(a)(2) was violated. *Id.*

Here, Section 10 of the MOA contains a provision regarding arbitration of "disputes over the interpretation or application of [the] Agreement." *See* MOA, Section 10. The Union attempts to mischaracterize purely Tribal personnel matters as an alleged violation of paragraph 5 of the MOA. In so doing, the Union is attempting to not only circumvent the employment procedures set forth in tribal law, but violate longstanding federal law at the same time. Indeed, any arbitration of an employment termination decision would most certainly violate the factors identified in *Dana Corp.* Arbitrating the propriety of the two employee terminations indicates to Tribal employees that the

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Union *already* represents them and is able to petition on their behalf, without complying with the card check process set forth in the MOA and in compliance with the NLRA.

Arbitrating these two Tribal employment matters also gives the (false) impression that union representation is either inevitable or already in effect. The requested grievance arbitration forces the Tribe to treat the Union as if it speaks on behalf of its employees and will undoubtedly affect the existing terms and conditions of the employment relationship. Any such bargaining should only follow actual recognition pursuant to the terms of the MOA. See *Dana Corp.*, 356 N.L.R.B No. 49, 2010 WL 4963202 at *9. Importantly, there is little doubt that proceeding with arbitration would "reasonably [lead] employees to believe that recognition of [the Union] is a foregone conclusion." *See id.*

Certainly, there can be no more forceful evidence of a purpose to exclude employment termination decisions from arbitration than the violation of federal law. See *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83 ("...a federal court has a duty to determine whether a contract violates federal law before enforcing it"). Adopting the Union's posture on the arbitrability of Tribal intramural personnel decisions, like the terminations of Mr. Garrigues and Mr. Bond, violates Section 8(a)(2) of the NLRA. This position is untenable. Accordingly, the Tribe respectfully requests that the Court determine that the employment terminations of Mr. Garrigues and Mr. Bond are not substantively arbitrable.

To be sure, the question of whether the parties have agreed to arbitrate the dispute for which one party seeks arbitration, is reserved for the courts. *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582-83. Substantive arbitrability includes such issues as the scope of the arbitration clause and its enforceability, as well as whether and when the parties agreed to the clause. *Granite Rock Co.*, 561 U.S. at 287. Labor arbitrators have authority to resolve labor disputes only because the parties agreed to submit their grievances to arbitration. *Gateway Coal Co. v. United Mine Workers* (1974) 414 U.S. 368, 374. Accordingly, "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor [...] its enforceability or applicability to the dispute is in issue. Where a

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party contests either or both matters, 'the court' must resolve the disagreement." *Id.* (Internal citations omitted.)

C. The Union Did Not Comply with Procedure Regarding Petitions to Compel Arbitrations Filed as Documents Instituting Suit.

The Tribe does not contest that the Petition's federal subject matter jurisdiction is supported by Section 301 of the Labor Management Relations Act ("LMRA"), which vests federal courts with jurisdiction of suits between employers and labor unions without regard to the amount in controversy or diversity of citizenship. *See* 29 U.S.C. § 185(a).

The Union also misapprehends the Tribe's procedural argument in support of its motion. Specifically, the Union attempts to dismiss the relevance of the Federal Arbitration Act ("FAA") by stating that its Petition was brought under the LMRA and not the FAA. As an initial matter, cases cannot be "brought under" the FAA because the FAA by itself does not confer "federal question" jurisdiction. *Southland Corp. v. Keating* (1984) 465 US 1, 16, fn. 9. Rather, the FAA creates a body of federal law governing arbitration provisions in any contract affecting commerce without regard to the nature of the claim, including the MOA. 9 U.S.C. § 2; *Marmet Health Care Ctr., Inc. v. Brown* (2012) ___ U.S. ___, 132 S.Ct. 1201, 1203.[5] Moreover, as the Union concedes, federal courts often look to the FAA for guidance in labor arbitration cases. *United Paperworkers Int'l Union v. Misco, Inc.* (1987) 484 U.S. 29, 41 n. 9; see also *Granite Rock Co. v. Int'l Bhd. Of Teamsters* (2010) 561 U.S. 287 (discussing precedents applying the FAA because LMRA and FAA employ the same rules of arbitrability that govern labor cases).

Of particular importance here is that the LMRA is silent on the procedure governing petitions for an order compelling arbitration (*see* 29 U.S.C. §§ 141 *et seq.*), whereas the FAA sets forth the procedural rules for such petitions in federal court. 9 U.S.C. § 4. The FAA provides that petitions compelling arbitration must be made and heard "in the manner provided by law for the making and

[5] The FAA excludes certain types of arbitration agreements, including certain employment contracts. *See* 9 U.S.C. §§ 1, 2. However, the U.S. Supreme Court has interpreted this exclusion to apply only to "transportation workers" (those actually engaged in the movement of goods in interstate commerce). All other employment contracts affecting interstate commerce are subject to the FAA, including labor contracts. *Circuit City Stores, Inc. v. Adams* (2001) 532 US 105, 109-19; *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247; *Harden v. Roadway Package Systems, Inc.* (9th Cir. 2001) 249 F3d 1137, 1140-41; *Int'l Bhd. of Elec. Workers, Local # 111 v. Pub. Serv. Co. of Colo.* (10th Cir. 2014) 773 F.3d 1100, 1105–07 (FAA applies to arbitration clause in a collective bargaining agreement).

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hearing of motions." *Id.* § 6. The propriety of following this procedure is further bolstered by the Federal Rules of Civil Procedure ("FRCP"), which make clear that a request for a court order must be made by motion. F.R.C.P. 7(b)(1). The Union has not provided any authority to rebut this showing.[6]

The Union did not notice a hearing date along with its motion as required by Eastern District Local Rule 230. Because the motion was not properly noticed, the Tribe was unable to determine the proper timeline to follow in filing an opposition pursuant to the FRCP and Local Rule 230. *See* E.D. Rule 230(c) ("Opposition, if any, to the granting of the motion shall be in writing and shall be filed and served not less than fourteen (14) days preceding the noticed (or continued) hearing date.") Accordingly, the Tribe requests that the Court grant the Tribe's motion to dismiss.

III. CONCLUSION

For the reasons set forth above, the Court should grant the Tribe's motion to dismiss and deny the Union's Petition. If the Court denies the Tribe's motion to dismiss, however, the Tribe alternatively requests a full opportunity to respond to the Tribe's Petition in accordance with F.R.C.P. 12(4).

Dated: May 12, 2016

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[6] Indeed, the cases the Union cites for the proposition that cases brought under Section 301 are routinely initiated by filing a petition to compel arbitration do not specifically discuss the proper procedures for the petitions, but simply note in the initial factual and procedural background of the matter (and prior to any legal analysis) that the petitioner filed a petition to compel arbitration. *See* Union's Opposition, at 5:1-10.

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