CASE NO. 17-16599

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITE HERE INTERNATIONAL UNION,

Petitioner-Appellee,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS

Respondent-Appellant.

OPENING BRIEF OF APPELLANT SHINGLE SPRINGS BAND OF MIWOK INDIANS

Christopher F. Wohl, SBN: 170280
PALMER KAZANJIAN WOHL HODSON LLP
2277 Fair Oaks Boulevard, Suite 455
Sacramento, CA 95825
Tel: (916) 442-3552
Fax: (916) 640-1521

CORPORATE DISCLOSURE STATEMENT

Petitioner Shingle Springs Band of Miwok Indians does not have any parent corporation and is not a publicly held corporation that owns 10% more of its stock.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

I.
PRELIMINARY STATEMENT

Appellant/Respondent SHINGLE SPRINGS BAND OF MIWOK INDIANS (hereinafter "Appellant" or "Tribe") hereby appeals the judgment of the Eastern District Court granting Petitioner/Respondent UNITE HERE INTERNATIONAL UNION's (hereinafter "Respondent" or "Union") Motion for Judgment on the Pleadings as pertains to the Union's Petition to Compel Arbitration.

II.
JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362 and the Labor Management Relations Act, 29 U.S.C. § 185(a).

This Court has appellate jurisdiction to review the District Court's order granting the Union's Motion for Judgment on the Pleadings and to Strike Affirmative Defenses, as related to the Union's Petition to Compel Arbitration, pursuant to 28 U.S.C. §1291.

The Union's Motion for Judgment on the Pleadings was granted on July 12, 2017. (ER 005-007.) Judgment was entered in accordance with the Court's Order on July 14, 2017. (ER 004.) On August 14, 2017, the Tribe timely filed its Notice of Appeal under Federal Rules of Appellate Procedure 4(a)(1)(A). (ER 001-003.)

III.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the issue of arbitrability, under the parties' Memorandum of Agreement (hereinafter "MOA"), is to be decided by the Court or by the arbitrator?

IV.
STATEMENT OF CASE

The Tribe and the Union entered into a card check and neutrality agreement, i.e. the MOA, on or about June 26, 2012. (ER 155-164.) The MOA is expressly

limited to the following purposes: (1) to ensure an orderly environment for the exercise by the Bargaining Unit of their rights under the Tribal Labor Relations Ordinance ("hereinafter "TLRO"); (2) 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 (3) to implement a card check recognition procedure. (ER 155-164.)

The MOA contains a limited dispute resolution provision providing that disputes over the application of the MOA are to be submitted to expedited and binding arbitration. Specifically, this section provides:

> The Parties agree that any disputes over the interpretation or application of this Agreement shall be submitted first to mediation arranged through a mutually agreeable mediator such as, by way of illustration only, the American Arbitration Association. If after a minimum of 30 business days after submission of the dispute to a mediator, a mutually satisfactory agreeable mediator is not chosen after impasse over any dispute, then either the Tribe or the Union may submit the dispute(s) to expedited and binding arbitration before an arbitrator selected from the TLP. The arbitrator shall not modify, add to or subtract from this Agreement. The arbitrator shall follow the arbitration procedures prescribed in the TLRO. The arbitrator shall have the authority to order the non-compliant party to comply with the Agreement. The Parties hereto agree to comply with any order of the arbitrator, which shall be final and binding, and shall be enforceable as provided in the TLRO. (ER 155-164, Section 10 of MOA.)

On or about November 18, 2015, the Union alleged the Tribe violated Section 5 of the MOA. (ER 176-177.) Section 5 of the MOA requires the Tribe to remain neutral with respect to the employees' decision on Union representation. (ER 155-164.) The Union specifically alleged this violation occurred when the

Tribe terminated employees Christopher Garrigues and Kerry Bond.[1] (ER 148-193.)

On January 7, 2016, the Tribe and the Union mediated multiple issues, but did not resolve the dispute regarding the discipline and/or termination of any Tribe employees.[2] (ER 148-193.)

On or about February 4, 2016, notwithstanding the mediation and in recognition of the inherent issues with negotiating over the terms and conditions of employment, the Tribe advised the Union that it refused to arbitrate on the grounds that any arbitration over an intramural personnel decision, prior to the Union establishing majority status, would be unlawful and violate Section 8(a)(2) of the National Labor Relations Act, as well as similar provisions under the MOA and Tribal law. (ER 185-190.) Section 10 of the MOA is limited to disputes over the interpretation or application of the MOA and, as such, the Tribe's intramural personnel decisions do not fall within the gambit of Section 10. To be sure, the MOA contains no provisions regarding employee discipline and/or termination and is silent on any grievance procedure or accompanying remedies for employee disciplinary actions, such as back pay and/or reinstatement. (ER 155-164.) Moreover, employees of the Tribe are not parties to the MOA and do not have standing to seek any relief under the MOA. Arbitration of any employee termination and/or disciplinary action under the MOA is tantamount to treating the MOA like a collective bargaining agreement ("CBA"), which it is certainly not nor can it ever legally be so.

---

[1] These employees were employed with Red Hawk Casino, which is owned and operated by the Tribe.

[2] The mediation between the Tribe and the Union encompassed many broad issues, such as Union access to employees. The matters pertaining to access were resolved at the mediation as they were matters covered by the MOA. However, the issues pertaining to employee terminations remained unresolved as the Tribe did not believe such issues were properly within the scope of the arbitration provision of the MOA.

Finally, the Tribe reminded the Union of its sovereign immunity and that such immunity had not been waived with respect to issues pertaining to employee disputes. (ER 185-190.)

Ultimately, Respondent filed its Petition to Compel Arbitration on February 22, 2016. (ER 148-193.) In filing the Petition, the Union attempted to mischaracterize the employment termination decisions of two employees as falling within the scope of the MOA, which is a blatant attempt to circumvent both the employment procedures set forth in Tribal law and longstanding Federal labor law. Respondent filed a Motion to Dismiss the Petition, pursuant to FRCP 12(b)(6). (ER 142-147.) After briefing, the District Court denied Respondent's Motion to Dismiss on July 27, 2016. (ER 064-071.) The Tribe thereafter filed an Answer denying that the MOA supported the claims alleged in the Union's petition, that the MOA applied to termination decisions, and that the termination decisions are not subject to arbitration. (ER 057-063.)

The Union then filed a Motion for Judgment on the Pleadings. (ER 042-056.) After briefing, on July 12, 2017, the Court granted the Motion for Judgment on the Pleadings. (ER 005-009.) In doing so, the Court found there were three issues presented in the Motion for Judgment on the Pleadings: (1) whether the Tribe breached Section 5(a) of the MOA; (2) whether the Tribe and the Union agreed to arbitrate the given dispute; and (3) who should have the primary power to determine the arbitrability of the dispute. (ER) In making its ruling, the Court only addressed the third issue, i.e. who was responsible to determine the arbitrability of the dispute. (ER 005-009.) In making its decision, the Court specifically noted that, in general, whether a dispute is arbitrable is decided by the Court. (ER 005-009.) The Court went on to cite to a panoply of law involving CBAs in which the parties to the CBA specifically agreed that the arbitrator would determine the arbitrability of disputes arising out of the interpretation or

application of the CBA. (ER 005-009.) Relying on these authorities, the Court found that the parties had reserved the issue of arbitrability for the arbitrator. (ER 005-009.) Judgment was entered pursuant to the Court's order on July 17, 2017. (ER 004) This appeal followed.[3] (ER 001-003.)

V.
STANDARD OF REVIEW

A dismissal resulting from the grant of a Motion for Judgment on the Pleadings is reviewed de novo. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011); *Peterson v. California,* 604 F.3d 1166, 1169 (9th Cir. 2010); *Dunlop v. Credit Protection Ass'n LP*, 419 F.3d 1011, 1012, n. 1 (9th Cir. 2005).

Similarly, a District Court's order to grant or deny a petition to compel arbitration is reviewed de novo. *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1152 (9th Cir. 2004); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). *Cape Flattery Ltd. v. Titan Maritime, LLC,* 647 F.3d 914, 917 (9th Cir. 2011) (validity and scope of arbitration clause is reviewed de novo); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1211 (9th Cir. 1998) (meaning of an agreement to arbitrate is a question of law reviewed de novo).

De novo review means that this Court views the case from the same position as the District Court. *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008); *Lewis v. United States*, 641 F.3d 1174, 1176 (9th Cir. 2011). The appellate

[3] Following the filing of the Petition to Compel Arbitration, the Tribe filed a separate action seeking declaratory relief with the District Court (Case no. 2:16-CV-0157-TLN-EFB). Specifically, the Tribe sought declaratory relief regarding whether the Tribe's intramural personnel decisions are arbitrable under the MOA; regarding the illegality of the MOA; and regarding the illegal joint activities between the Tribe and the Union. The Union filed a Motion to Dismiss the Petition for Declaratory Relief, which was granted by the Court on July 12, 2017. The Court's ruling indicated that declaratory relief was not proper as to the first issue because, in the instant action, the Court ordered the parties to arbitrate the issue of arbitrability of the dispute. The Court noted that because the arbitrator had not yet determined whether the issue was arbitrable, the Court would not make a ruling on the second and third issues because the issues were not yet ripe. On the same date, the Court entered Judgment in accordance with its Order granting the Motion to Dismiss in the related declaratory relief action.

Court must consider the matter anew, as if no decision was previously rendered. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). Review is "independent" and no deference is given to the District Court. *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002); *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) ("When de novo review is compelled, no form of appellate deference is acceptable.").

VI.
SUMMARY OF ARGUMENT

The decision as to arbitrability is one for the Court unless the parties have unambiguously assigned that duty to the arbitrator. In this instance, the parties never agreed that the arbitrator would hear disputes over the issue of arbitrability. In fact, they were precluded from making such an agreement because the parties could not legally agree to arbitrate the dispute in the first instance.

The Union and the Tribe entered into a MOA, which provided for Tribe neutrality towards the Union. (ER 155-164.) The MOA also established a card check procedure. (ER 155-164.) To date, the Union has not obtained a majority status and, therefore, there is no CBA between the Union and the Tribe. Despite the fact that the Union does not have majority status and there is no CBA, the Union has asserted that issues pertaining to the terms and conditions of employment, including terminations, must be arbitrated under the MOA. (ER 155-164.) However, because it does not yet have majority status, the Union does not represent Tribal employees. Additionally, Tribal employees are not parties to the MOA and therefore have no right to seek relief under any of the provisions contained therein. As such, neither the Union nor the Tribal employees have standing to pursue arbitration.

Because the MOA is not a CBA, it cannot govern the terms and conditions of employment. In fact, the Tribe has an internal procedure, utilizing the Tribal Court, for making such employment related complaints. (ER 166-174.) As issues pertaining to employee terminations are not within the scope of the MOA, the arbitration provision cannot apply to this dispute. The arbitration provision is strictly limited to issues pertaining to the interpretation and application of the MOA. (ER 155-164.) The dispute raised by the Union is undisputedly outside of the scope of the MOA. As such, the matter cannot be arbitrated as to do so would be akin to treating the MOA as a CBA, which would be unlawful and in violation of both Federal labor law and Tribal law.

Furthermore, the Tribe has only waived its sovereign immunity for the very limited issues set forth in the MOA. (ER 155-164.) The Tribe has not waived its immunity as pertains to personnel decisions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58-59 (holding that a Tribe is only subject to suit when there has been a clear and unequivocal waiver of sovereign immunity). As such, disputes over employee terminations must be pursued via the Tribe's internal procedures before the Tribal Court.

As such, the decision of the District Court should be reversed and the matter remanded to allow the Court to determine whether this dispute is arbitrable.

VII.
ARGUMENT

A. The Issue Of Arbitrability Is Within The Province Of The Court

The Union's sole claim for relief is an order compelling arbitration of the two employee terminations, pursuant to the MOA.

It is well settled in both commercial and labor cases that the issue of whether parties have agreed to "submi[t] a particular dispute to arbitration" is typically an "'issue for judicial determination.'" *Howsam v. Dean Witter Reynolds*, Inc., 537

U.S. 79, 83 (2002) (*quoting AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546–547 (1964). It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for Courts to decide. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that "[w]hen deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary ... principles that govern the formation of contracts"); *AT & T Technologies*, *supra*, at 648–649 (explaining the settled rule in labor cases that "'arbitration is a matter of contract'" and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"). In fact, when determining the scope of an arbitration clause, a Court should attempt to give effect to the parties' intentions in light of the usual and ordinary meaning of the contract language and circumstances under which the agreement was made. *Rice v. Downs*, 248 Cal.App.4th 175, 185 (2016). The terms of the arbitration clause must reasonably cover the dispute as to which the arbitration was requested. *Id*.

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. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010). As such, a Court may order arbitration of a particular dispute only where the Court is satisfied that the parties agreed to arbitrate that dispute. *First Options*, *supra*, at 943; *AT & T Technologies*, *supra*, at 648–649. *Granite Rock Co.* , *supra*, at 299; *Atkinson v. Sinclair Ref. Co*., 370 U.S. 238, 243 (1962) (holding that whether a company is bound to arbitrate, as well as what issues are required to be arbitrated, are matters to be determined by the Court. A party cannot be required to submit a dispute to arbitration that he did not agree to submit); *AT & T*, *supra*, 475 U.S. 643, 651 (noting that a party cannot

be forced to arbitrate the arbitrability question."); *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 208–09 (1991). Courts should not assume that parties agreed to arbitrate the issue of arbitrability, unless there is "clear and unmistakable evidence" that the parties reached such an agreement. *First Options of Chicago, Inc.*, *supra*, at 944. Silence on the issue of arbitration of arbitrability is not to be construed as an agreement to arbitrate. *Id.* at 946. In this instance, there is no mention of arbitration of employee issues, such as terminations or the arbitrability of the issue of arbitration, in the MOA. Such silence cannot be construed as an agreement to arbitrate. Rather, this omission must be viewed as evidence to support finding that the parties never agreed that the MOA's arbitration clause would govern such disputes. Additionally, the fact that the dispute cannot legally be arbitrated further evidences that could be no intent to make such an agreement. Basic and fundamental principles of contract interpretation mandate finding that no such agreement was made.

In the proceedings below, the Union erroneously relied upon *United Steelworkers of Am. v. American Manufacturing Co.*, 363 U.S. 564 (1960), for the proposition that the issue of arbitrability must be decided by the arbitrator. However, the Union ignores the Supreme Court's ruling in a companion case issued the same day, *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.* 363 U.S. 574, 583, ft. 7 (1960). In that case, the U.S. Supreme Court made clear that "under both the agreement in this case and that involved in *American Manufacturing Co.*, 363 U.S. 564 (1960), the question of arbitrability is for the courts to decide." Accordingly, the Court (and not an arbitrator) must first determine whether the reluctant party breached a promise to arbitrate. *Id.* (stating that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.) Questions of arbitrability are within the exclusive province of Courts, not arbitrators, and

therefore only the Court can determine if the MOA requires arbitration of the employment terminations. *United Steelworkers*, *supra*, at 583, ft. 7; *Beer, Soft Drink, Water, Fruit Juice, Local Union 744 v. Metropolitan Distributors, Inc.*, 763 F.2d 300, 302-03 (7th Cir.1985) (noting that Courts ascertain whether the subject matter of a particular dispute is covered by the parties' arbitration agreement). Thus, this matter should be remanded for the District Court to make this determination.

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*. 337 F.2d 455, 459 (9th Cir. 1964). Indeed, this Circuit has 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.*

In ruling on the Motion for Judgment on the Pleadings, the Court acknowledged that the issue of arbitrability of a dispute is one for the Court, unless the parties unmistakably provide otherwise. (ER 005-009.) In this instance, the parties never agreed the issue of arbitrability was to be decided by the arbitrator. Furthermore, in justifying the ruling ordering the parties to arbitrate the issue of arbitrability, the District Court relied entirely on authority involving CBAs. (ER 005-009.) Such authority is not applicable to the given facts. This reliance is

most likely due to the utter absence of authority on this precise issue, which renders it even more imperative for this Court to review on appeal.

There was absolutely no intent for the MOA's arbitration provision to apply to disputes pertaining to employee terminations or other issues involving the terms and conditions of Tribal employment. In fact, as will be more fully discussed herein below, the Tribe could not lawfully enter into an agreement to arbitrate issues pertaining to employee terminations with the Union, as the Union does not have majority status. The MOA is strictly a neutrality clause and a card check agreement. It is not a CBA. The sole intent of the MOA was to assure the Tribe remained neutral in respect to the selection of a Union. At this time, no union has gained majority status with the Tribe. Thus, the Union had no right to negotiate on behalf of the Tribe's employees as they are not the recognized representatives. Moreover, as they are not the recognized union, the Union lacks standing to represent employees in any issues related to the terms and conditions of their employment or the termination thereof. The only standing the Union has under the Agreement is to enforce the neutrality agreement.

B. The Parties Were Precluded From Making Any Agreement To Arbitrate The Instant Disputes

The only instance in which the Court can defer ruling on the issues of arbitrability is when the parties have undisputedly agreed that the arbitrator will make the decision. In this instance, not only was there no express agreement, but the parties would be precluded from making such an agreement because the dispute itself is not arbitrable.

1. Any Agreement To Have An Arbitrator Determine Arbitrability Would Be Void *Ab Initio*.

A party cannot be compelled to arbitrate an issue that is not arbitrable. *Guadango v. E*Trade Bank*, 592 F.Supp.2d 1263, 1272-73 (C.D. CA 2008). The

issue of arbitrability of employee terminations is not arbitrable. In these circumstances, allowing even the issue of arbitrability to be arbitrated would amount to recognition of a minority union and treat the MOA as a CBA, which it is not.

Nothing in the MOA requires arbitration of the Tribe's personnel decisions and there is no provision within the MOA concerning employee discipline and/or termination. (ER 155-164.) The MOA does not contain a grievance procedure or accompanying remedies for employee disciplinary actions, such as back pay and/or reinstatement. (ER 155-164); *Litton Fin. Printing Division*, *supra*, at 209 (although the Court may not decide the merits of the grievance, the Court "must determine whether the parties agreed to arbitrate this dispute").

In spite of the MOA's clear limitations, the Union attempts to circumvent longstanding Federal labor law by claiming that the Tribe's employment decisions are subject to the MOA's arbitration provision. However, the Union's claim is not supported by the MOA or Federal labor law. There is simply no precedent for finding that the Tribe's employment decisions fall within the scope of the MOA's arbitration provision. *Granite Rock Co.*, *supra*, at 287 (noting that 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).

Federal Courts must also place practical and realistic construction on labor agreements, giving due consideration to the purpose, which they are intended to serve. *California Trucking Asso. v. Corcoran*, 74 F.R.D. 534, 545 (N.D. Cal. 1977) (noting that Courts engage in contract interpretation principles in determining arbitrability); *El Vocero De Puerto Rico v. Union De Periodistas* 532 F. Supp. 13, 15 (D.P.R. 1981) (stating that 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 that its personnel decisions, including employment terminations, would be governed by the MOA because to do so would violate Federal law by giving the Union the right to negotiate over the terms and conditions of employees whom it does not represent. This is exactly why the Tribe and the Union expressly agreed to limit the MOA to the following express purposes: (1) To ensure an orderly environment for the exercise by Bargaining Unit Employees of their rights under the TLRO; (2) 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 (3) Implementation of a Card Check Recognition Process pursuant to the terms of this Agreement. (ER 155-164.)

The Tribe and the Union never agreed to bargain and/or negotiate over the terms and conditions of *employment* and the MOA certainly contains no provision suggesting otherwise. (ER 155-164.) The Union knows full well that under a CBA a discharged union employee must first exhaust the grievance procedures before seeking direct legal redress. *Edwards v. Teamsters Local Union No. 36, Bldg. Material & Dump Truck Drivers*, 719 F.2d 1036, 1038 (9th Cir. 1983) (citing *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 666 (1965)). The MOA is clearly not a CBA and it certainly does not contain any grievance procedure and/or applicable remedies for any of the Tribe's employees. (ER 155-164.)

If Tribal employees, whether current or former, wanted to challenge an employment decision made by the Tribe, said employee would be required to comply with the Tribe's Employment Code, which mandates that disputes pertaining to termination of employment must be adjudicated in Tribal Court. The Union is clearly attempting to bypass Tribal law and procedure by forcing an arbitration on issues involving the terms and conditions of employment. The Union's overbroad interpretation of the MOA would conceivably allow the Union

to arbitrate *any and all* disciplinary actions or termination decisions by the Tribe, which the Tribe would never allow and the MOA clearly does not permit. *California Trucking Asso. v. Corcoran, supra,* at 544 (holding that Courts engage in contract interpretation principles in determining arbitrability).

Furthermore, longstanding principles of labor law dictate that whether the parties have agreed to arbitrate employment termination decisions is question of substantive arbitrability for Courts to decide. *Granite Rock Co. v. supra,* at 297 (noting that Courts determine threshold issues, such as the scope of the arbitration clause and its enforceability, as well as whether and when the parties agreed to the clause). Labor arbitrators have authority to resolve labor disputes only because the parties previously agreed to submit their grievances to arbitration. *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 374 (1974). 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 party contests either or both matters, 'the court' must resolve the disagreement." *Granite Rock, supra,* at 299.

The 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) (stating 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 TLRO mirrors the NLRA in that it also proscribes the Tribe from dominating or interfering with the formation or administration of any labor organization or contributing any support to it. (ER 166-174, §5(2). 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. (ER 155-164.) Accordingly, neutrality agreements,

like the MOA, may not be used to regulate the terms and conditions of employees in the workplace because the Union has no majority status and represents no employees. *Majestic Weaving Co., Inc. of New York* (1964) 147 NLRB 859, 862 (1964) "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*., 280 N.L.R.B. 1373, 1377 (1986) (any "bargaining prior to achievement of the union's majority status is violative."). The irony of the Union's position is that, if the Tribe agreed to submit these termination issues to arbitration, said act would constitute a violation of the neutrality agreement, as it would be demonstrating a preference for the Union.

Neutrality agreements, such as the MOA, generally provide the framework for the representation process and may set forth provisions to take effect only if the Union obtains majority status and becomes the exclusive representative of employees. *Snow & Sons*, 134 N.L.R.B. 709, 720 (1961) enforced, 308 F.2d 687, 690 (9th Cir. 1962) (stating 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*, 996 F.2d 561, 564 (2d. Cir. 1993). Unlike CBAs, 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 CBAs and cannot be treated as such. *Ibid.*

Dana Corp. and International Union, 356 N.L.R.B. 256, 260-61 (2010), is particularly instructive here. In *Dana Corp.*, the NLRB 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, then 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." (ER 155-164.) The Union attempts to mischaracterize the employment termination decisions of two employees 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 labor 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 dictates to Tribal employees that the Union *already* represents them and is able to petition on their behalf, regardless of the employee's desire for such representation and without complying with the card check procedures delineated in the MOA.

Arbitrating these two Tribal employment matters gives the fallacious 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. *Id.* Importantly, there is little doubt that proceeding with arbitration would "reasonably [lead] employees to believe that recognition of [the Union] is a foregone conclusion." *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. *Kaiser Steel Corp. v. Mullins* 455 U.S. 72, 83 (1982) (stating that "…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 employment termination decisions violates Section 8(a)(2) of the NLRA.

Here, the Union argues that Tribal law is irrelevant and that in any event, the TLRO requires arbitration of disputes. As an initial matter, the MOA expressly refers to the TLRO and compliance with the TLRO throughout the agreement, including the arbitration provision. (ER 155-174.) Moreover, the TLRO requires arbitration of certain matters, including matters relating to organizing and election procedures, as well as matters after a union has obtained majority status, such as alleged unfair labor practices and discharge of employees. (ER 166-174.) To reiterate, the Union does not represent the Tribe's employees at present time. Contrary to the Union's contention, the TLRO does not require arbitration of employment termination decisions under the MOA because the Union has not obtained majority status. (ER 166-174.)

Moreover, a discharged employee must exhaust the grievance procedures provided by a CBA before seeking direct legal redress. *Edwards, supra,* at 1038 (citing *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 666 (1965). Mr. Garrigues and Mr. Bond, the two employees whose employment terminations the Union seeks to challenge, are not parties to the MOA and have not exhausted their remedies in accordance with the procedures set forth in Tribal law. The Union does not and cannot refute this.

Furthermore, it is considered an illegal and unfair labor practice for a union and an employer to enter a CBA before the union represents the majority of employees in the unit. *NLRB v. Local Union No. 103, International Association of*

Bridge, Structural & Ornamental Iron Workers, AFL-CIO ("Iron Workers"), 434 U.S. 335, 344-45 (1978); *International Ladies' Garment Workers, AFL-CIO v. NLRB*, 366 U.S. 731, 735 (1961); *Majestic Weaving Co., Inc. of New York*, 147 N.L.R.B. 859, 860-861 (1964) *enforcement den. on other grounds*, 355 F.2d 854, 857 (2d Cir. 1966). The recognition of a minority union would give that union a marked advantage over any other union in securing the adherence of employees. *Garment Workers, supra*, at 735. In fact, Courts have held that there is no clearer abridgement of section 7 of the NLRA, which assures employees the right to bargain through representatives of their choosing, than to grant exclusive status to a minority union and thereby impressing that agent upon the nonconsenting majority. *Iron Workers, supra*, at 344-45. Thus, if in fact the Tribe entered into any CBA with the Union prior to their attaining majority status, it would not only violate the neutrality clause, but would also be an illegal act in direct contravention of the NLRA.

In *Majestic Weaving Co.*, the employer recognized the Teamsters as the exclusive bargaining representative for its employees and concluded a CBA with the union prior to the union obtaining majority status. *Ibid*. At the same time, a competing union had obtained a majority of authorization cards of the unit employees. *Id*. at 861. The Court found that the employer unlawfully assisted the Teamsters in violation of section 8(a)(2) by recognizing the Teamsters as the exclusive bargaining representative and executing a CBA, prior to the Local demonstrating majority status, even though the contract was not implemented until after the Teamster Local had obtained majority status. *Id*. at 860-61; *American Bakeries Co.*, 280 N.L.R.B. 1373, 1377 (1986) (providing that any "bargaining prior to achievement of the union's majority status is violative despite the fact that the contract is not enforced or is conditioned upon the union's ability to demonstrate majority standing at some later time"). For a union and an employer

to engage in conduct otherwise prohibited would threaten the NLRB's longstanding policy of promoting "voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations." *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 471-72 (1999).

A provision requiring the arbitration of disputes pertaining to the termination of employees is a substantive provision that would typically be included in a CBA. See Cal. Civ. Prac. Employment Litigation § 8:24 (stating that CBAs cover all of the terms and conditions of employment contemplated during the collective bargaining process, such as pay, seniority, holidays, vacation, discharge, severance pay, nondiscrimination, and grievance-arbitration procedures). As such, to the extent that the Agreement reached the issue of employee discharge, it would be deemed void *ab initio* and thereby unenforceable, as it would amount to an illegal and unfair labor practice involving the recognition of a minority union. *Kaiser Steel Corp.*, *supra*, at 83 (holding that contractual provisions in violation of section 8 are void at their inception).

There is a limited exception to the rule prohibiting bargaining with a union who has not yet obtained a majority. This exception allows the execution of "pre-hire agreement," i.e. a CBA that is executed prior to any employees being hired and, therefore, prior to a union gaining majority support. However, section 8(f) of the NLRA specifically limits the validity of pre-hire agreements to the construction industry. As such, section 8(f) would not apply to the agreement between the Tribe and the Union, as they are not engaged in the construction industry.

Moreover, Courts have specifically addressed the issue of whether a neutrality agreement can be analogized to a pre-hire agreement. In *New Ontani Hotel & Garden and Hotel Employees and Restaurant Employees*, 331 NLRB 1078, 1080-81 (2000), the Board held that a neutrality agreement is not analogous

to a prehire agreement. A prehire agreement is a convention permitted in the construction industry, which enables a union and an employer to execute a contract—establishing wages and other terms of employment—without the union first having to establish majority status. A prehire agreement is a collective-bargaining agreement upon its execution. *Id.; John Deklewa & Sons*, 282 NLRB 1375, 1392 (1987), *enfd. Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 774 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Conversely, "a neutrality agreement merely establishes that an employer will remain neutral in the face of union organizational campaign. Its execution – even if coupled with a card check agreement – does not create a collective-bargaining agreement, not even one conditioned on obtaining majority status." *Id.*

Finally, *Abernathy v. Southern Cal. Edison*, 885 F.2d 525, 529 (9th Cir. 1989), specifically opines that the arbitration process is merely a continuation of the collective bargaining process. *Id.* at 1349. As such, any award resulting from such an arbitration is treated as a part of the CBA contract. *Ibid. Abernathy* further illustrates that arbitrating this matter is inappropriate as the parties have not and cannot be parties to a CBA because the Union has not yet gained majority status.

C. The Tribe Did Not Waive Sovereign Immunity As To Employment Termination Issues

The Union's proposed arbitration of these employment claims, including the issue of arbitrability, would also violate the Tribe's right to sovereign immunity that is reserved in the MOA. (ER 155-164.) The MOA 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." (ER 155-164.) Thus, former Tribe employees have no standing under either federal law or the MOA to pursue any employment-related claims against the Tribe. *Santa Clara Pueblo*, 436 U.S. at 56,

58-59; *Demontiney v. U.S.*, 255 F.3d 801, 811 (9th Cir. 2001)(*citing Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989)(holding that there is a strong presumption against a waiver of sovereign immunity). If any former employee desires to bring claims against the Tribe arising out of their employment they must first exhaust the Tribe's internal dispute resolution process in accordance with Tribal law.

The express language of the MOA is clear that the Tribe never agreed to arbitrate employment termination decisions and no reasonable interpretation of the arbitration provision suggests otherwise. *California Trucking Assoc.*, *supra*, at 544-545. Indeed, neutrality agreements, such as the MOA, 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. *Snow & Sons, supra*, at 720 (holding that 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*, *supra*, at 564. However, unlike CBAs, neutrality agreements like the MOA are not CBAs and cannot be treated as such. *Ibid.*

While it is true that the Tribal self-government exception is designed to except purely intramural matters such as conditions of Tribal membership, inheritance rules, and domestic relations (*Donovan v. Coeur d'Alene Tribal Forum*, 751 F.2d 1113, 1116 (9th Cir. 1985)), these are not the only matters covered by this exception. *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004). Here, the Union attempts to interfere with the Tribe's own internal processes regarding employment claims as set forth in Tribal law. Indeed, a Tribe's self-governance is a necessary corollary to the common-law sovereign immunity possessed by a

Tribe. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 890 (1986).

The Union argued below that it merely seeks to compel the Tribe to keep the promises it made in the MOA. However, the Tribe never agreed to arbitrate employment termination decisions. Indeed, the MOA 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." (ER 155-164.) However, the Union in an attempt to circumvent the Tribe's own internal processes, seeks direct legal redress on behalf of two former employees, who are not even parties to the MOA, and have no standing under either Federal or Tribal law.

VIII.
CONCLUSION

A party cannot be compelled to arbitrate an issue that is not arbitrable. *Guadango v. E*Trade Bank*, 992 F.Supp.2d 1263 (C.D. CA 2008). As such, the Court must determine whether there are legal or equitable grounds to refrain from enforcing the arbitration clause and in determining whether the clause is applicable to any given claim. *Id*. at 1269. The record is clear that the Tribe and the Union did not definitively agree that an arbitrator would determine the issue of arbitrability. Moreover, the parties could not have made an agreement to arbitrate disputes over the termination of the Tribe's employees, as the Union is not a majority representative. And, assuming arguendo such an agreement were made, it would be void *ab initio* because it would amount to an unfair labor practice. Because any agreement to arbitrate issues pertaining to the terms and conditions of employment would be illegal, the Court must refrain from enforcing the arbitration clause under these circumstances. Appellant respectfully requests this Court to reverse the

District Court's granting of Respondent's Motion for Judgment on the Pleadings and Order the District Court to determine the issue of arbitrability.

Dated: November 17, 2017

PALMER KAZANJIAN WOHL HODSON, LLP

By:/s/ Christopher F. Wohl

Christopher F. Wohl
Alexandra M. Asterlin
PALMER KAZANJIAN WOHL HODSON, LLP
2277 Fair Oaks Boulevard, Suite 455
Sacramento, CA 95825
Tel: (916) 442-3552
Fax: (916) 640-1521

Attorneys for Petitioner
SHINGLE SPRINGS BAND OF MIWOK INDIANS

IX.
STATEMENT OF RELATED CASES

*Unite HERE International Union v. Shingle Springs Band of Miwok Indian*s, Appellate Case No. 17-16660 now pending before this Court, is related to the instant action as it involves the same parties and issues.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of FRAP 28, 29, 31, and 32. This brief is proportionately spaced using Times New Roman 14-Point type. The brief contains 6,913 words (no more than 14,000 words) and does not exceed 30 pages.

Dated: November 17, 2017

PALMER KAZANJIAN WOHL HODSON, LLP

By: /s/ Christopher F. Wohl

Christopher F. Wohl
PALMER KAZANJIAN WOHL HODSON, LLP
2277 Fair Oaks Boulevard, Suite 455
Sacramento, CA 95825
Tel: (916) 442-3552
Fax: (916) 640-1521

Attorneys for Petitioner
SHINGLE SPRINGS BAND OF MIWOK INDIANS

CERTIFICATE OF SERVICE

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2277 Fair Oaks Boulevard, Suite 455, Sacramento, CA 95825.

I hereby certify that on November 17, 2017, I electronically filed the forgoing **OPENING BRIEF OF APPELLANT SHINGLE SPRINGS BAND OF MIWOK INDIANS** with the United States Court of Appeals for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case that are registered CM/ECF users will receive service by the Notice of Electronic Filing by CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Sacramento, California, on November 17, 2017.

/s/ Gloria Carnahan
Gloria Carnahan, Legal Assistant