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PAUMA BAND OF MISSION INDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,

Plaintiff,

vs.

UNITE HERE INTERNATIONAL UNION; **STATE OF CALIFORNIA**; **EDMUND G. BROWN, JR.**, as Governor of the State of California;

Defendants.

Case No.: 16-CV-02660 BAS AGS

PAUMA BAND OF MISSION INDIANS' OPPOSITION TO UNITE HERE INTERNATIONAL UNION'S MOTION TO DISMISS SECOND AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE ALLEGATIONS

Date: TBD
Time: TBD
Dept: 4B
Judge: The Honorable Cynthia Bashant

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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INTRODUCTION

The Pauma Band of Mission Indians ("Pauma" or "Tribe") submits this opposition in response to the motion to dismiss filed by UNITE HERE International Union ("the Union"). The motion to dismiss is unabashed in its belief that the present case is actually "very simple." On this, Pauma and the Union agree. What the Union will probably not agree with, though, is how this simplicity carries over to the six mistake-laden arguments presented in the Union's motion to dismiss. Each one of these puts forward some legal issue, but the discussion cuts off before the analysis is fully fleshed out, as if the Union was caught mid-sentence taking a hardline position that was about to turn into a major faux pas. For instance, see how each one of the arguments morphs once Pauma tacks on the missing information to the end of the initial comment:

1. This case is an improper collateral attack on NLRB proceedings *that did not involve the claim at issue and would not have dealt with any jurisdictional-related issues in any event.*
2. This Court lacks subject-matter jurisdiction *over the same sort of compact enforcement issue that was addressed in Cabazon Band of Mission Indians v. Wilson, which also concerns a fundamental issue of federal Indian law and the interplay between the Indian Gaming Regulatory Act and the National Labor Relations Act.*
3. The TLRO does not waive the Union's statutory right to file the NLRB charges *even though the Union admitted in the In re Indian Gaming litigation that the "all issues" language of the waiver was meant to cover unfair labor practice charges regardless of whether or not the National Labor Relations Board may someday have the requisite jurisdiction to hear them.*
4. Pauma's claim that the Union breached the TLRO is subject to the TLRO's dispute resolution provisions *that the Union refuses to acknowledge let alone follow and which only concern the resolution of labor – and not contractual – issues.*
5. The Court has discretion to dismiss the declaratory relief claim *that the Ninth Circuit considers inherently substantial and which concerns a provision that both the*

Union and the State of California ("State") viewed as being central to the execution of the 1999 Compact.

6. The Court should strike redundant, immaterial and impertinent allegations from the First Amended Complaint *on the basis of a Ninth Circuit opinion that approved such an extraordinary remedy in a case involving a 733-page, incomprehensible complaint.*

With these jurisdictional and related arguments advanced by the Union and the State lacking any merit, this Court should rule that Pauma has presented at least a plausible claim for relief under Federal Rule of Civil Procedure 8 ("Rule 8") so the parties can turn their attention towards the fact development portion of the proceeding.

LEGAL STANDARD

The minimal notice pleading standard of Rule 8 requires that a complaint "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (*see O'Brien v. Welty,* 818 F.3d 920, 933 (9th Cir. 2016) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009))), "such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011).

ARGUMENT

I. A COLLATERAL ATTACK DOES NOT OCCUR WHEN A FEDERAL DISTRICT COURT ENTERTAINS A NEW ISSUE THAT AN ADMINISTRATIVE AGENCY COULD NOT, WOULD NOT, AND SHOULD NOT HAVE HEARD

The first issue raised by the Union is that the district court should not hear the present matter on prudential grounds since the central issue in the case of "whether the TLRO is a contact between the Union and Pauma in which the Union waived its statutory right to file NLRB charges" (*see* Dkt. No. 34-1, 30:21-23) is one that the Tribe "could have raised in the [multitude of] NLRB proceedings" initiated by the Union as part of its corporate campaign to forcibly become the bargaining representative for unwitting casino employees. *See* Dkt. No. 34-1, 15:3-5. At the forefront of this issue is the question of

whether the collateral attack doctrine even applies when the first tribunal likely lacks the requisite subject matter jurisdiction to hear the case to begin with. In general, "[t]he collateral attack doctrine precludes litigants from collaterally attacking the judgments of other courts." *See Rein v. Providian Fin. Corp.,* 270 F.3d 895, 902 (9th Cir. 2001) (citing *Celotex Corp. v. Edwards,* 514 U.S. 300, 313 (1995)). This seemingly-straightforward doctrine contains a myriad of exceptions, one of which explicitly allows a party to file an otherwise prohibited collateral attack if, for the first tribunal, "the exercise of jurisdiction constituted a manifest abuse of authority" or "the judgment was rendered by a court lacking capability to make an adequately informed determination as to its own jurisdiction." *In re Bulldog Trucking,* 147 F.3d 347, 353 (4th Cir. 1998) (citing, *e.g.*, Restatement (Second) of Judgments § 12 (1982)).

One of the most fundamental tenets of federal Indian law arising from Congress' plenary power to define relations with Indian tribes that is grounded in the Commerce Clause of the United States Constitution is that a federal court should only interpret a federal statute to apply to an Indian tribe if there is a "clear indication of legislative intent." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 61 (1978). A quick glance at the jurisdictional provisos in Section 2 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq*., shows no such thing, however, as that section explains that the ill-defined group of "persons" who are subject to the Act does not expressly *include* Indian tribes but expressly *excludes* a slew of entities ranging from governments to the professional and managerial class of employees that make up at least 55% of the labor force. *See* Bryan M. Chugrin, *The Managerial Exclusion under the National Labor Relations Act: Are Worker Participation Programs Next?,* 38 CATH. U. L. REV. 557, 560-61 (1999). Having Indian tribes omitted from the jurisdictional section of this patchwork statute was the beginning and the end of the inquiry for the NLRB when it first addressed the issue in the 1976 case of *Fort Apache Timber Company,* 226 N.L.R.B. 503 (1976). While finding it was "possible to conclude that" a tribally-run enterprise falls within the jurisdictional exemption for governments in Section 2, the NLRB concluded that a "self-

directed enterprise on the reservation… [is] implicitly exempt… [from] the Act" after discussing how tribal sovereignty cannot be encroached upon "unless Congress has specifically provided [as much]." *See Fort Apache,* 226 N.L.R.B at 505-06.

Nearly thirty years of adherence to this rule in *Fort Apache* came to an end when the NLRB had the chance to address a case dealing with an unfair labor practice charge against the uniquely-situated and uniquely-profitable casino operated by the San Manuel Band of Mission Indians on the outskirts of Los Angeles. After setting the table for its forthcoming reversal of longstanding precedent by explaining that "tribal businesses have grown and prospered… [and] become significant employers of non-Indians and serious competitors with non-Indian owned businesses," the NLRB "adopt[ed] a new approach" that turned the traditional presumption of exclusion set forth within *Santa Clara Pueblo* into a presumption of inclusion unless a tribe can show that it has protective treaty rights or that the activity in question "is consistent with [a tribe's] mantle of uniqueness" by "fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes." *San Manuel Indian Bingo & Casino,* 341 N.L.R.B. 1055, 1061 (2004).

By releasing a self-serving opinion that favors policy over the law and the forced assimilation of Indian tribes over due respect for sovereignty, the NLRB created a mess of a once simple principle and compelled the federal appellate courts to spend an inordinate amount of time trying to rectify the situation – producing the most horrific circuit split imaginable in the process. On one side of the split is the United States Court of Appeals for the Tenth Circuit that still follows the fundamental principle in *Santa Clara Pueblo* and believes the NLRB lacks the jurisdiction to regulate labor relations at a tribal commercial enterprise located on a reservation. *See Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*). Not surprisingly, on the other side of the split is the District of Columbia Circuit who adopted an "analysis… that [differed] slightly from the Board," allowing the NLRB to exercise jurisdiction since the perceived intrusion into tribal sovereignty was not so horribly egregious as to require "constru[ing] the statute narrowly against application to employment at the Casino." *San Manuel Indian Bingo & Casino v.*

NLRB, 475 F.3d 1306, 1315 (D.C. Cir. 2007). Straddling the circuit split is the Sixth Circuit who enforced an NLRB order against a tribal casino even though a majority of the six judges to opine on the issue in two near-simultaneous opinions believed that the NLRB's new approach was a "house of cards… [that] collapse[d]" after accounting for the fact that it "fail[s] to respect the historic deference that the Supreme Court has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary." *Compare Soaring Eagle Casino & Resort v. NLRB,* 791 F.3d 648, 662, 674 (6th Cir. 2015) ("*Soaring Eagle*") *with NLRB v. Little River Band of Ottawa Indians Tribal Gov't,* 788 F.3d 537 (6th Cir. 2015). If this were not enough, the Ninth Circuit has also dipped its toe into the circuit split, explaining that the NLRB's jurisdiction over a tribal enterprise was not so "plainly lacking" that it could not enforce a subpoena during the course of an administrative proceeding, but that it was "in no way resolving the issue of the Board's jurisdiction." *NLRB v. Chapa De Indian Health Program, Inc.,* 316 F.3d 995, 1001-02 (9th Cir. 2003). *That* question is now awaiting resolution under a petition for review that Casino Pauma filed with the Ninth Circuit last year. *See Casino Pauma v. NLRB,* No. 16-70397, Dkt. No. 1-5 (9th Cir. filed on Feb. 9, 2016) ("*Casino Pauma*").

Nevertheless, the point still remains that the various circuits are trying their best to clean up a mess created by the NLRB, who decided to force a judicial fix to a legislative question instead of simply releasing a coherent and cogent interpretation of the existing law. Groundbreaking opinions like the bombshell that is *San Manuel* are not few and far between for the NLRB, a Board that has dispensed with any pretense of neutrality over the past decade to overturn something like 4,500 years of precedent that touches upon everything from its jurisdiction over religious institutions/charter schools/claims by graduate students/claims by college athletes to whether a union can continue to obtain dues payments following the expiration of a collective bargaining agreement. *See, e.g., Pacific Lutheran Univ.,* 261 NLRB No. 157 (2014); *WKYC-TV, Inc.,* 359 NLRB No. 30 (2012). Administrative proceedings have now become dog and pony shows, the NLRB is in the midst of an unprecedented power grab, and the upheaval of its judicial under-

pinnings shows that the Board is wholly ill-equipped to make an adequate and informed determination about something as sacred as its own jurisdiction. If the issue of the NLRB asserting jurisdiction over an Indian tribe is serious enough to warrant another federal district court granting a tribe's motion to enjoin those proceedings (*see Chickasaw Nation v. NLRB,* 2011 U.S. Dist. LEXIS 105675 (W.D. Okla. 2011)), then this Court should not perceive a Board action of dubious legality as sufficient to satisfy the "other court" requirement of the collateral attack doctrine – certainly not before the Ninth Circuit and/or the Supreme Court rule on the jurisdictional issue in the pending *Casino Pauma* case.

Putting aside the question of whether the NLRB even constitutes a valid tribunal, the Union's collateral attack argument also fails because the issue of the "TLRO as waiver theory" was never raised in the administrative proceeding. The collateral attack doctrine only applies if the "claims [at issue] were… addressed by a prior order or judgment." *Rein,* 270 F.3d at 902; *see Americopters, LLC v. FAA,* 441 F.3d 726, 738 (9th Cir. 2006) ("The second reason the collateral attack rule does not apply to this case is that there is no danger that Jan's and Americopters would be able to re-litigate, in district court, previous agency determinations because there were no such determinations."). The Union has been rather candid in both this proceeding and the Ninth Circuit one that Pauma never raised the TLRO issue before the NLRB. In fact, the introduction of one of its oppositions before the Ninth Circuit starts out by stating "Pauma cannot argue this new theory" of whether "the Union agreed to arbitrate its disputes with Pauma" because "it did not make that argument to the Board and this Court's review is confined to the administrative record." *Casino Pauma,* Dkt. No. 37-1 at p. 1 (9th Cir. Nov. 10, 2016). The motion to dismiss by the Union in this matter is just as forthright, stating the collateral attack doctrine should apply because Pauma "seeks to litigate an issue *it could have raised* in the NLRB proceeding." Dkt. No. 34-1, 15:3-5. The Second Amended Complaint is rather clear on this point, though, stating that Pauma did not take part in the negotiations for the 1999 Compact and only found out that the Union played a role in negotiating the TLRO while its legal counsel was doing judicial and legislative research

at the California State Archives in September 2016, long after the conclusion of the administrative proceeding. *See* Dkt. No. 33, ¶¶ 111, 166. Before then, Pauma was simply not cognizant of the waiver issue, and the Union was in no way voluntarily forthcoming with evidence pertaining to its role in negotiating the TLRO in this or any other administrative proceeding to date.

However, knowing earlier on about the Union's primary role in negotiating the TLRO would not have led to the conclusion that Pauma could have raised the argument before the NLRB. As to that, the hearing on the unfair labor practice charges that are currently pending before the Ninth Circuit took place in late 2014, when a number of earlier-decided tribal cases were working their way out of the administrative process and into the federal circuit courts where tribes *could* and *would* challenge the NLRB's newfound exercise of jurisdiction. *See Casino Pauma,* 363 NLRB No. 60, 2015 NLRB LEXIS 889, *5 (2015). With the *Pueblo of San Juan* opinion from the Tenth Circuit already on the books, the NLRB crafted a strategy to help bolster the legitimacy of its tribal jurisdiction by allowing competing petitions to go forward before the Sixth Circuit while doing its best to block Pauma and the Chickasaw Nation from raising jurisdictional arguments in their own circuits. As for the Chickasaw Nation, the NLRB declined to exercise jurisdiction over an unfair labor practice charge against it on account of unique treaty rights (even though it came to the opposite conclusion the first time it heard the case a short time earlier) so the tribe could not file a petition for review with the Tenth Circuit – the same one that had issued the opinion in *Pueblo of San Juan*. *See Chickasaw Nation,* 362 NLRB No. 109 (2015). While *Chickasaw Nation* was set for decision, the proceeding in Pauma was only heading into the hearing so the administrative law judge simply released an order on the afternoon of the preceding business day explaining that the issue of jurisdiction was likely *res judicata*, and then followed this up by stating at the outset of the hearing that he did not want to "spend any unnecessary time litigating" any jurisdictional issues since "older cases [were] going before the circuit." *See Casino Pauma,* 2015 NLRB LEXIS 889 at *1 n.1; *Casino Pauma,* Dkt. No. 62-2 at ER64. Thus,

regardless of whether or not Pauma *wanted* to argue any issues that could conceivably fall under the umbrella of "jurisdiction" like the waiver argument at issue in the present case, the NLRB made a conscious decision to prevent the Tribe from raising those arguments in the administrative channel.

Structurally speaking, the NLRB was nevertheless not the appropriate forum for resolving issues concerning the interpretation of a tribal/state gaming compact entered into under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*. Some twenty-years ago the Ninth Circuit released its opinion in *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050 (9th Cir. 1997) ("*Cabazon*"), wherein it explained both the significant federal interest in ensuring that states adhere to their compact obligations and the "importance" of resolving any issues arising under those agreements in "the federal courts." *Id.* at 1056. During the ensuing twenty years since *Cabazon*, the courts of the Ninth Circuit have become uniquely familiar with the elaborate structure of the 1999 Compact and the actions by the State that have sought to manipulate the terms therein to provide it or one of its bedfellows with extra rights. *See, e.g., Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* 813 F.3d 1155 (9th Cir. 2015) ("*Pauma*") (holding the State misrepresented the central license pool provision of the 1999 Compact and obtained tens of millions more in revenue sharing as a result). The issues in this case are not ones that are "outside the conventional expertise of judges or… requir[e] the exercise of administrative discretion" and consequently fall within the "primary" jurisdiction of the NLRB. *Smith v. Nat'l Steel & Shipbuilding Co.,* 125 F.3d 751, 756 (9th Cir. 1997). Rather, they simply relate to basic federal Indian law concerns about the regulatory interplay between tribes and states that the federal courts have been dealing with since their inception. *See Soaring Eagle,* 791 F.3d at 655 (explaining "the Board's expertise and delegated authority does not relate to federal Indian law"). Thus, the NLRB has even less authority to hear this case that is focused upon the interpretation of a compact that arose pursuant to IGRA than it did a prior case that concerned a Summary Plan Description under another federal statute – the Employee Retirement Income

Security Act of 1974, 29 U.S.C. § 1001 *et seq*. *See Lupiani v. Wal-Mart Stores, Inc.,* 435 F.3d 842, 846 (8th Cir. 2006) (explaining the federal courts have jurisdiction to address whether the terms of a SPD for a pension plan that allegedly restrains unionization rights are misleading). And, this says nothing about Pauma's inability to join the other signatory to the compact – whose existing contract rights and future negotiation ability may be seriously hampered by the outcome of the case – in the administrative proceeding since the NLRB does not have jurisdiction over states or "any political subdivision thereof." *See* 29 U.S.C. § 152(2).

Before ending, Pauma must correct some inaccuracies related to the Union's final statement that this case is tantamount to an impermissible injunction action that seeks to "enjoin[] a pending NLRB proceeding or review[] a decision already issued by the NLRB." Dkt. No. 34-1, 15:27-16:6. First, existing precedent allows an Indian tribe to obtain such relief given the NLRB's tenuous assertion of jurisdiction over Indian tribes. *See Chickasaw Nation,* 2011 U.S. Dist. LEXIS 105675 at *16-*17 (enjoining "the NLRB from proceeding with hearing on its complaint against the Chickasaw Nation"). But, putting this fact aside for a moment, the present suit does not seek to enjoin anything right now; the Union is fully capable of filing new unfair labor practice charges with the NLRB (as it recently proved), just as Pauma is capable of amending the complaint to require the Union to pay the extra expenses associated with those processes. *See DHSC, LLC v. Cal. Nurses Ass'n,* 2015 U.S. Dist. LEXIS 115510 (N.D. Ohio 2015) (allowing a normal private plaintiff to pursue a claim for breach of an implied in fact agreement on account of the union allegedly failing "to follow the contract's terms of dispute resolution" as to unfair labor practice charges). Thus, the abusive practice of filing one unfair labor practice charge after the next can continue unabated – there may simply be a future cost associated with doing so. Yet, the ultimate flaw with the Union's argument that seeks to insulate any present or future NLRB actions from interference is that it assumes a district court has no authority to hold a party to the terms of its arbitration agreement in contravention of circuit precedent and against the novel factual background of this matter. *See*

Morris v. Ernst & Young, LLP, 834 F.3d 975, 984 (9th Cir. 2016) (explaining employees may agree to arbitrate alleged violations of concerted activity rights under Section 7 of the NLRA); *Fallbrook Hosp. Corp. v. Cal. Nurses Ass'n,* 652 F. App'x 545, 546 n.1 (9th Cir. 2016) ("*Fallbrook Hospital*") ("We assume for purposes of this disposition that the right to pursue a[n unfair labor practice] claim before the NLRB is waivable.").

II. SUBJECT MATTER JURISDICTION EXISTS IN THREE DIFFERENT WAYS, ONLY ONE OF WHICH IS UNDER THE TERMS OF THE TLRO IN THE 1999 COMPACT THAT THE STATE AND PAUMA EXECUTED AND THE SECRETARY OF THE INTERIOR APPROVED

The entire focus of the Union's misguided subject matter jurisdiction argument is on the made-up principle that the identity of the parties determines the type of contract at issue. As to that, the Union contends that "[t]he flaw in Pauma's theory is that *Cabazon* jurisdiction does not extend to breach of contract suits by or against anyone other than the tribe or the state." Dkt. No. 34-1, 17:16-17. In the Union's perception, the TLRO within the 1999 Compact is simply a "contract between a tribe and a private party [and] is not an IGRA compact." Dkt. No. 34-1, 17:26-18:1. This position, however, is diametrically opposed to the one the Union recently took before the Ninth Circuit while seeking to uphold the admittedly-compact-based TLRO, or at least those portions it finds favorable:

> The TLRO is not merely a state or tribal law. The Indian Gaming Regulatory Act compelled California and the Tribe to enter into a compact governing the Tribe's gaming operations, 25 U.S.C. § 2710(d); and the TLRO is part of that agreement.

See Casino Pauma, No. 16-70397, Dkt. No. 82, pp. 51-52 (9th Cir. Mar. 29, 2017). Thus, this admission that the TLRO is part of the compact undercuts the Union's entire crabbed analysis of *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 105, that posits the Ninth Circuit gauges federal question jurisdiction in compact cases on whether or not a particular term in a compact *only* implicates the interests of a tribe and a state, and not non-governmental agents or other involved parties. In *Cabazon,* a number of Southern California tribes and the State entered into identical off-track betting compacts that largely mirrored the regulatory scheme the State had in place for the private sector. *Id.* at

1053. As should come as no surprise, one central issue the tribes and State could not agree upon, though, was whether the State could receive a share of the revenues the tribes generated by operating these satellite wagering facilities. *Id.* Rather than remain at loggerheads, the parties agreed to a revenue sharing structure but inserted a "Paragraph 19" into each form version of the compact that provided the signatory tribes with the ability to seek declaratory relief in federal court as to whether the requested licensing fee was permissible under IGRA, and the right to recoup any such past payments "[i]n the event a final judgment is obtained that the deduction of the state license fee is impermissible under the Act." *Id*. at 1054.

The resultant declaratory relief action by the Cabazon and Sycuan bands produced the rather straightforward answer that "IGRA preempts the State of California from taxing offtrack betting activities on tribal lands," which meant that the "State would pay the past and future fees it collected over to the Bands." *Id.* at 1053-54 (citing *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430, 433, 435 (9th Cir. 1994)). With a final judgment in place that required the State to restitute these unlawful revenue sharing fees, the "litigation entered… a new and confusing stage" where the "State refused to pay the fees to the Bands, declared the Compacts invalid, and threatened to cut off the simulcast signal unless the Bands agreed to enter into negotiations for new compacts." *Id.* at 1054. When the Cabazon and Sycuan bands returned to federal court and sought to enforce the restitution requirement in Paragraph 19 of their compacts, the State argued that the federal courts did not have subject matter jurisdiction to hear the matter because the paragraph at issue was "merely a [separate] contractual agreement incorporated into the Tribal-State Compacts." *Id.* at 1055. The Ninth Circuit had a different view of the matter, however, noting that the "claim is not based on a contract that stands independent of the Compacts" but instead

> is based on an agreement contained within the Compacts and entered into by the parties, during the IGRA negotiations, in order to resolve a disputed question and to complete the Compacts. The State's obligation to the Bands thus originates in the Compacts … [which means that] the Bands' claim to

> enforce the Compacts arises under federal law and thus we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

Id. at 1055-56.

The similarities between *Cabazon* and the instant matter could not be any more apparent. The evidence and allegations in the Second Amended Complaint show that the TLRO is one of two substantive "addenda" to the 1999 Compact, with the other one simply containing *post hoc* modifications to the terms of the agreement. *See* Dkt. Nos. 33 at ¶ 78; 33-1 at p. 1-44 to 1-61; *Deutsche Bank Sec. Inc. v. Rhodes,* 578 F. Supp. 2d 652, 660 (S.D.N.Y. 2008) (explaining that an "addendum" is considered part of a contract since it is simply "something to be added, esp. to a document; a supplement" (citing Black's Law Dictionary 38 (7th ed. 1999))). Each addendum was signed and executed by the representatives for the State and Pauma and subsequently included as part of the complete 1999 Compact the Secretary of the Interior had to review and approve before the agreement could take effect under federal law. *See* Dkt. No. 33-1 at p. 1-1; *see* 25 U.S.C. § 2710(d)(8) (explaining the Secretary of the Interior is tasked with "approv[ing] any Tribal-State compact entered into between an Indian tribe and a State"). Not only that, but it is beyond dispute that the parties hammered out the TLRO during the IGRA negotiations (*see In re Indian Gaming Related Cases,* 331 F.3d 1094, 1115 (9th Cir. 2003) (discussing the plaintiff tribe's argument that "labor relations are too far afield from tribal gaming to be an appropriate topic for Tribal-State compact negotiations")), and that any successful conclusion to the negotiations depended upon the tribes agreeing to the labor protections of the TLRO. *See* Dkt. No. 33, ¶ 75. In fact, Section 10.7 of the 1999 Compact explains that any agreement arising from the negotiations would be "null and void" if the signatory tribe did not agree to the Union-negotiated TLRO that was "acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees" within a matter of weeks of signing the central portion of the agreement on the eve of the State Legislature's recess. *See* Dkt. No. 33-1 at p. 1-36. Thus, just like Paragraph 19 in *Cabazon*, the TLRO is not only "contained within the Compacts and entered

into by the parties, during the IGRA negotiations," but also a necessary prerequisite to the successful completion of the compact at issue.

The Union tries to cast doubt on the direct applicability of *Cabazon* to the instant matter by discussing one of its prior cases in which another judge in this district held that confirming an arbitration award issued under the TLRO did not warrant federal court involvement. *See UNITE HERE v. Pala Band of Mission Indians,* 583 F. Supp. 2d 1190 (S.D. Cal. 2008) ("*Pala*"). Responding to this argument requires referencing the portions of the Second Amended Complaint that explain how the TLRO operates in the real world. Essentially, there are two versions of the TLRO. The first is the express terms of the 1999 Compact within Addendum B that embodies the deal struck between the parties as to how labor relations shall proceed on the Pauma reservation. *See* Dkt. No. 33-1 at pp. 1-52 to1-61. To transform the terms of the TLRO from contract into a law that provides the absentee employees with their NLRA-based rights, the second version of the TLRO is an identical tribal ordinance that Pauma "maintain[s]… in effect during the term of" the 1999 Compact and pursuant to which those with a stake in organizational matters can resolve their grievances. *See* Dkt. No. 33-1 at p. 1-49. Thus, an action to enforce an arbitration award issued pursuant to the tribal version of the TLRO has as its foundation the tribal law ordinance and not the terms of the 1999 Compact.

Judge Whelan appreciated this distinction in *Pala,* when he noted that the Union was seeking relief under a "straightforward ordinance modeled after labor ordinances enacted by many other gaming tribes" and not under "any provision of the IGRA of the Gaming Compact." *Pala,* 583 F. Supp. 2d at 1193 n.1, 1197. Another judge in this district then followed suit and held that a completely freestanding tribal ordinance that has no textual doppelganger in the compact is similarly inadequate for establishing subject matter jurisdiction in federal court. *See Harris v. Sycuan Band of Diegueno Mission Indians,* 2009 U.S. Dist. LEXIS 119226, *12-*13 (S.D. Cal. 2009). What these cases stand for is the proposition that a private action raising issues pertaining to the interpretation or enforceability of tribal law does not belong in federal court. With that said, if Judge Whelan

had any misapprehension about the connection between the TLRO and the 1999 Compact (he does incorrectly state that the TLRO did not "require[] federal approval"), that almost certainly resulted from the Union filing a four-page petition to confirm its arbitration award and expecting a district judge to make sense of a very complicated compact between two sovereigns as a result. *See Pala,* No. 07-02312, Dkt. No. 1 (S.D. Cal. Dec. 11, 2007). Putting any errors like this aside, the pivotal fact that Judge Whelan does, once again, latch on to is the crucial distinction between the "private enforcement of a TLRO arbitration award" under tribal law that does not belong in federal court and a "State-Tribal gaming compact dispute[], where a federal court is necessary to provide a neutral forum that otherwise might not exist." *Pala,* 583 F. Supp. 2d at 1197-98 (citing *Cabazon,* 124 F.3d at 1056).

The only wrinkle between the present case and *Cabazon* is the involvement of the Union in the compact dispute, but that simply arises from the fact that the State chose to enlist the Union – and all of its special expertise – as its agent in negotiating the labor provisions of the 1999 Compact. *See*, *e.g.*, Restatement (Third) of Agency § 1.01 (2006) (explaining an "agency" arises when one "manifests assent to another person… that the agent shall act on the principal's behalf and subject to the principal's control"). This sort of arrangement is not unheard of under the 1999 Compacts. For example, all of the gaming compacts that have come about in California since the execution of the original agreements in 1999 require the signatory tribe to execute an "MOU" with the local county to cover costs associated with the provision of public services and road improvements. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 09-01955, Dkt. No. 130-2 at § 10.8.8 (S.D. Cal. Sept. 9, 2011). At present, these MOUs truly are separate from the underlying compact and oftentimes arise years after the principal agreement. As raised in the other case presently pending before the Court, this arrangement is a huge problem and likely illegal under federal law because IGRA very intelligently requires the Secretary of the Interior to review the whole bundle of concessions a tribe is giving up in order to obtain its compact. *See* 25 U.S.C. §

2710(d)(8). Thus, the day will soon come when the terms of these MOUs are integrated into the base compact as well, and any future suit pertaining to the interpretation of performance of these sub-agreements will necessarily involve both the State and the pertinent county as co-defendants. Therefore, the inclusion of a defendant in addition to the State should not be fatal (or even relevant) to the Court's jurisdiction.

It is also worth remembering that the remedy the Union requests of dismissing the complaint with prejudice and without leave for amend "is not appropriate unless it is clear… that the complaint could not be saved by amendment." *Puri v. Khalsa,* 674 F. App'x 679, 689 (9th Cir. 2017) (citing *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003)). This forgiving rule exists specifically to "facilitate [a] decision on the merits, rather than on the pleadings or technicalities." *Chudacoff v. Univ. Med. Ctr.,* 649 F.3d 1143, 1152 (9th Cir. 2011). Yet, even if the Union continues to adhere to its staunch "the TLRO is not the 1999 Compact" stance, Pauma can undeniably create federal jurisdiction by adding a fallback claim that seeks to enjoin Section 10.7 of the 1999 Compact and rescind the TLRO in the event the district court comes to the conclusion that the TLRO does not have any sort of preclusive effect on the NLRA. *See Pauma,* 813 F.3d 1155 (allowing rescission of a compact following a prior decision construing the terms of the 1999 Compact).

The question of whether leave to amend beyond the Second Amended Complaint should be granted does not need to be answered, though, because at least two other bases for subject matter jurisdiction exist. Again, one of the critical differences between the present case and *Pala* is that this one involves two domestic dependent sovereigns that often clash on regulatory issues. In fact, since time immemorial, the federal courts have been addressing questions pertaining to the scope of one jurisdiction's right to regulate the second jurisdiction or some of its members. *See Cabazon Band of Mission Indians v. County of Riverside,* 783 F.2d 900 (9th Cir. 1986), *aff'd sub nom. California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) (hearing a case regarding a state's civil regulatory authority over reservation-based gaming activities); *Salt River Project Agric.*

Improvement & Power Dist. v. Lee, 672 F.3d 1176 (9th Cir. 2012) (dealing with a tribe's regulatory authority over non-members). Given this, untethering the TLRO from the 1999 Compact does not suddenly kill jurisdiction; after all, jurisdiction under 28 U.S.C. §§ 1331 and 1362 attaches to the State regulation in whatever guise it comes. Thus, the provisions within the TLRO – whether attached to the 1999 Compact or not – create federal jurisdiction so this Court can address the extent to which the State may enforce labor laws at the tribal casino when those regulations arose only after the NLRB originally ceded jurisdiction on the subject. This final point brings into focus the third and final ground for jurisdiction, which is that the waiver question may involve the interplay between two federal statutes, and the State picking up as part of its compact negotiations what the NLRB had disclaimed for sixty years prior. *See, e.g., Lupiani,* 435 F.3d at 846 (compiling federal-statutory-conflict cases the federal courts had jurisdiction to hear).[1]

III. A WAIVER HAPPENS WHEN A PARTY "CONSCIOUSLY YIELDS" A STATUTORY RIGHT OR EXPECTANCY, JUST AS THE UNION ADMITTED IT DID THROUGH THE TLRO IN THE *IN RE INDIAN GAMING* LITIGATION

The shift in the Union's motion to dismiss from jurisdictional to merits-based arguments begins by zeroing in on the arbitration section of the TLRO and claiming that the "[a]ll issues shall be resolved exclusively through the binding dispute resolution mechanism herein" language is legally insufficient to waive the Union's right to file unfair labor practice charges with the NLRB. *See* Dkt. No. 34-1, 22:18-19. The first part of this argument is actually buried within footnote ten at the bottom of the introductory page, with the Union trying to dissuade the Court from addressing the issue of whether the right to file charges with the NLRB is waivable since "there are other grounds for dismissing the [Second Amended Complaint]." Dkt. No. 34-1, 23:22-24. The footnote suggests that the Ninth Circuit has not addressed the question at hand, with the opinion in *Fallbrook Hospital,* 652 F. App'x 545, representing the circuit's attempt to punt the is-

[1] The substantial question argument in this section is much the same as the one the Union raised in Section E of its motion to dismiss, so Pauma will address them together in Section V, *infra*.

sue. What the opinion in *Fallbrook Hospital* actually says though is that the Ninth Circuit "assume[d] for purposes of this disposition that the right to pursue a claim before the NLRB is waivable" and then proceeded to gauge whether the defendant in that case made a clear and unmistakable waiver of its statutory right. *Id.* at 546 & n.1. Though the Union's motion ends its analysis with *Fallbrook Hospital,* the Ninth Circuit followed up this June 2016 opinion with a published one in *Morris* a couple months later wherein it explained that alleged violations of employee concerted-activity rights under Section 7 of the NLRA that are typically resolved through unfair labor practice charges can be subject to arbitration instead since such an "arbitration requirement is not [a] problem" and "federal labor policy favors and promotes arbitration." *Morris,* 834 F.3d at 984-85. Given that, the notion that a party can in fact waive NLRA rights is not only plausible but seemingly guaranteed by circuit precedent – and that is just in the normal case and not one involving the NLRB ceding jurisdiction to the State via the IGRA compacting process.

The main battleground for the Union concerns the sufficiency of the waiver in the TLRO, however, since the "[b]road, general language [of the arbitration clause in the TLRO] is [allegedly] not sufficient to meet the level of clarity required to effect a [clear and unmistakable] waiver." *See* Dkt. No. 34-1, 24:1-2. Whether a "clear and unmistakable" waiver is even required in this particular situation is open to question, though. Typically, a standard of this nature only applies out of concern "about allowing a union to waive an individual employee's statutory rights." *Interstate Brands Corp. v. Bakery Drivers, Local Union No. 550,* 167 F.3d 764, 767 (2d Cir. 1999) ("*Interstate Brands*"). In other words, a court wants to make absolutely certain that one party was aware that another waived its statutory rights. While certain collective actions under the NLRB like engaging in strike-related activities may implicate conjoined union and employee rights, the filing of an unfair labor practice charge is not one of those things. All it takes to initiate one of these cases is the submission of a one-page charging document with the NLRB and then the investigative branch of the agency takes care of the rest. *See* National Labor Relations Board, *Statement of Procedures* §§ 101.2, 101.4, *available at* https://

www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/FinalRules101%26TOC.pdf (last visited Mar. 4, 2017). As the Union has shown in connection with its prior NLRB charges, the charging party does not even have to make an appearance for the NLRB to litigate the merits of the charge, making this sort of one-sided, Executively-guided administrative litigation that is the antithesis of its federal civil counterpart something any employee can do without Union assistance. *See*, *e.g.*, *Casino Pauma,* No. 21-CA-125450 (N.L.R.B. filed Mar. 28, 2014). Thus, the present issue under consideration that simply asks whether *the Union* waived its own right or expectancy to file charges with the NLRB should involve nothing other than an "ordinary textual analysis" and not any sort of heightened inquiry. *See Interstate Brands,* 167 F.3d at 767.

With that said, the "clear and unmistakable" standard does not differ much from an ordinary textual analysis given that it still takes into account "relevant extrinsic evidence to determine if the parties intended [allegedly] general language to include" the waiver of some statutory right. *Children's Hosp. Med. Ctr. v. Cal. Nurses Ass'n,* 283 F.3d 1188, 1194 (9th Cir. 2002). In that sense, the search for intent under the "clear and unmistakable" standard looks a lot like an ordinary textual analysis that considers extrinsic evidence to interpret language that may on first blush appear to be unambiguous on its face. *See* Restatement (Second) of Contracts § 202(1) (1981); *United States v. King Features Entm't, Inc.,* 843 F.2d 394, 398 (9th Cir. 1988). The sort of evidence a court will take into account when interpreting a waiver of statutory rights involves "the bargaining history, the context in which the contract was negotiated, the interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning." *Standard Concrete Prods. v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952,* 353 F.3d 668, 676 (9th Cir. 2003); *accord Local Joint Exec. Bd. of Las Vegas v. NLRB,* 540 F.3d 1072, 1079 (9th Cir. 2008); *NLRB v. N.Y. Tel. Co.,* 930 F.2d 1009, 1011 (2d Cir. 1991). The ultimate question at the heart of the analysis is whether a party "consciously yielded… its interest in the matter." *Local Joint Exec. Bd.,* 540 F.3d at 1079.

The first thing to note about the waiver is just how broad it is, with the language

explaining that "all issues," including the unfair labor practice charges detailed in the preceding sections, are to "be resolved exclusively through the binding dispute resolution mechanisms herein, with the exception of a collective bargaining negotiation impasse[.]" Dkt. No. 33 at ¶ 82; *see Interstate Brands,* 167 F.3d at 767-68 (explaining that a waiver requiring arbitration of "any act or conduct or relation between the parties hereto" was "unusually broad" and "could hardly be broader"). The Union admitted in the lead-up to the negotiations for the 1999 Compact that similar NLRA-modeled language in the Pala Compact was meant to guarantee the "same type of worker rights at Indian casinos as you would find off-reservation." Dkt. No. 33 at ¶¶ 45-47, 87. When identical language was omitted from a form statutory compact crafted by the tribes, the Union took court action to invalidate the approved agreement simply because the NLRA did not apply to tribes and thus "tribal gaming employees [were] unlikely to organize without a compact like the Pala [C]ompact" that contained the same NLRA-based protections that are now included within the TLRO. Dkt. No. 33 at ¶¶ 63-64. Thus, events spanning the entire course of the 1999 Compact negotiations (and then some) show rather clearly that the Union believed it was obtaining the statutory protections of the NLRA that did not apply to tribes, and the concomitant right to resolve any claims arising therefrom through arbitration. Lest there is any doubt about this, all one needs to do is review the Union's filings in the *In re Indian Gaming* litigation that arose shortly after the conclusion of the 1999 Compacts, in which it admitted that the NLRB and the Supreme Court routinely enforce "organizing agreements just like the agreement the Union sought here" that requires the "arbitration of disputes," that the TLRO was meant to "substitute for the NLRA," and that the TLRO would remain in effect and paramount even if the NLRB somehow assumed jurisdiction over Indian tribes "because the [TLRO] provisions are entirely proper and enforceable under the NLRA." Dkt. Nos. 20-8 at pp. 4-5; 23-1 at p. 8.

Fifteen years have elapsed and nevertheless the Union is still advocating the same principles as it tries to uphold the TLRO irrespective of the applicability of the NLRA:

> The NLRA does not preempt private agreements relating to labor organiz-

> ing. Such agreements are enforceable under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. … This principle would unquestionably apply if the TLRO is a contract with the Union, as the Tribe says it is.

Casino Pauma, No. 16-70397, Dkt. No. 82, p. 52 (9th Cir. Mar. 29, 2017). This long-held stance is rather damning for the Union since the NLRB will even allow for arbitration of unfair labor practice claims in situations that actually fall under its jurisdiction. *See, e.g., Spielberg Mfg. Co.,* 112 N.L.R.B. 1080, 1082 (1955) (deferring to an arbitral decision unless there is some fundamental abuse of process). Thus, the above admissions show the Union recognizes the validity of the TLRO and that it should have, at a minimum, first submitted any unfair labor practice charge to arbitration before trying to seek recourse from the NLRB. *See, e.g., DHSC, LLC,* 2016 U.S. Dist. LEXIS 115510 at *13. All of the argument in the motion to dismiss explaining that the Union meant something other than what it said is simply irrelevant at this point in time and should be reserved for summary judgment *after* Pauma has obtained the Union's relevant evidence through discovery.

Once again, these past and present admissions show the intent of the Union rather clearly. Nevertheless, the Union argues the arbitration requirement of the TLRO is invalid because it does not make "explicit reference to the statute or… refer[] to statutory claims." Dkt. No. 34-1, 24:13-15. This idea that an arbitration provision needs to mention a specific statute arose because corporate entities had a penchant for abusing their superior negotiation positions by requiring potential employees to accept arbitration provisions that would waive all federal or state claims under the sun by using open-ended language along the lines of "this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." *Smith v. SEIU, Local 521,* 2016 U.S. Dist. LEXIS 107926, *25 (N.D. Cal. 2016) (citing *Wright v. Univ. Maritime Serv. Corp.,* 525 U.S. 70, 81 (1998)). Thus, requiring a statutory reference was a way for some federal courts to ensure that a party would not unknowingly waive a host of statutory rights when presented with a broad and intentionally vague waiver *that they had no part in drafting.* What the Union seems to overlook in the present situation is that the TLRO is naturally

circumscribed because it actually does recite the "statutory [unfair labor practice] requirements." *Powell v. Anheuser-Busch Inc.,* 457 F. App'x 679, 680 (9th Cir. 2011). More than simply reciting the requirements, the text of the TLRO *that the Union authored* goes above and beyond this by doing everything from identifying the subject matter in the title of the agreement to listing the specific sub-matters that are subject to arbitration within the waiver. *See* Dkt. No. 33-1 at pp. 1-53 & 1-59. With a clear and unmistakable waiver needing to do nothing more than identify the general subject matter and the specific topics to be arbitrated (*see Miss. Power Co. v. NLRB,* 284 F.3d 605, 621 (5th Cir. 2002)), Pauma has, if nothing else, at least made a plausible argument that the Union knowingly waived any right or expectancy to resolve labor disputes with the NLRB in lieu of arbitration *when it drafted the terms of the TLRO*. *See Perez v. Qwest Corp.,* 883 F. Supp. 2d 1095, 1118 (D.N.M. 2012) (considering the *contra proferentum* doctrine when analyzing whether a waiver is clear and unmistakable).

IV. ONE WHO ADAMANTLY REFUSES TO USE THE TLRO TO RESOLVE ACTUAL LABOR DISPUTES HAS NO RIGHT TO DEMAND THAT ANOTHER FOLLOW IT TO OBTAIN DECLARATORY RELIEF ABOUT BASIC COMPACT ISSUES

The remainder of the Union's motion to dismiss raises three smaller and equally confounding issues, with the first being that Pauma has a duty to submit any breach of compact claim to arbitration despite the fact that the Union has now circumvented the TLRO process ten times over the prior four years. *See* Dkt. 34-1, 29:11-30:2. Once again, responding to this argument requires keeping in mind exactly how the TLRO operates. First, there is the *contract* version of the TLRO in Addendum B to the 1999 Compact, the negotiation for which the State delegated to its agent the Union so long as the resultant terms were to its satisfaction. *See*, *e.g.*, Dkt. No. 33 at ¶¶ 71-77. A contract, even one subsumed within a gaming compact, only applies to the parties and privies to the agreement (*see Bosse v. Crowell Collier & MacMillan,* 565 F.2d 602, 613 (9th Cir. 1977) ("[A]s a general rule only the parties and privies to a contract may enforce it." (citation omitted))), which meant the contract version of the TLRO was not enough since its core protections

that were ripped right out of the NLRA were designed to protect casino employees who, for Pauma, did not even exist at the time of the negotiations. *See* Dkt. No. 33 at ¶¶ 79-81. Thus, a *legal* version of the TLRO also exists, which is a carbon copy set of rules that Pauma has enacted under tribal law and has a compact-imposed duty to "maintain… in effect during the term of th[e] Compact" so each of the groups with a stake in organizational activities at the casino (*i.e.*, Pauma, the Union, and the employees) can have "[a]ll [such] issues" related thereto resolved "exclusively" through the "binding" arbitration process of the TLRO. *See* Dkt. No. 33-1 at p. 1-59.

As for how this works in practice, if an employee believes the casino suppressed his or her concerted activity rights (like the right to solicit coworkers about unionization issues), then he or she can file a claim with the arbitration panel asking whether the action by the casino constitutes an unfair labor practice. *See* Dkt. No. 33-1 at p. 1-54. Similarly, if a union believes that the casino is trying to chill its free speech rights guaranteed by Section 7 of the TLRO, then it too can file a similar claim to have an arbitrator adjudge whether the speech in question is deserving of protection. *See* Dkt. No. 33-1 at p. 1-55. These questions, whether the requisite number of authorization cards has been submitted to hold a secret ballot election, whether the election was conducted in conformity with the rules, and every other labor-related issue save one is intended to go through the "exclusive" and "binding" arbitration process of the TRLO. *See* Dkt. No. 33-1 at p. 1-59. What is not meant to go through this labor-oriented process is a general question of whether the Union has breached the compact by abjectly refusing to abide by the terms of the TLRO that it negotiated and admitted in the *In re Indian Gaming* litigation was meant to control irrespective of the applicability of the NLRA. *See* Dkt. No. 33 at ¶¶ 90-100. Submitting the question of whether a party has waived federal statutory rights to a private arbitrator is not only inappropriate and an utterly futile exercise, but the Union – who has circumvented arbitrating *actual* labor issues under the TLRO on ten prior occasions spanning the last four years – simply does not have clean enough hands to be raising this argument. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.,* 304 F.3d 829, 841 (9th Cir.

2002) (explaining unclean hands "closes the doors of a court of equity [or law] to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief").

V. COMPACT ISSUES ARE INHERENTLY SIGNIFICANT, WITH THE QUESTION ABOUT THE APPLICABILITY OF THE TLRO THEREIN BEING ESPECIALLY SO IN LIGHT OF THE STATE AND UNION'S PERCEPTIONS OF THE IMPORTANCE OF THE AGREEMENT AT AND AROUND THE TIME OF THE COMPACT NEGOTIATIONS

Both Sections B(1)(b) and E raise similar arguments challenging the weightiness of the lawsuit, with the latter section explaining that the district court has discretion to dismiss "an action under the Declaratory Judgment Act" where countervailing considerations come into play like the subjective basis for the suit. *See* Dkt. No. 34-1, 30:11-20. Jurisdiction in this case, though, does not turn upon the Declaratory Judgment Act, but on 28 U.S.C. §§ 1331 and 1362 given that the case requests clarification of a term within a contract between two sovereigns that arose under a federal statutory scheme. *See Cabazon,* 124 F.3d at 1055-56. The standard for discretionary dismissal in a federal question case like this requires that the matter be "wholly insubstantial *and* frivolous." *Shapiro v. McManus,* 577 U.S. __, 136 S. Ct. 450, 452 (2015) (citing *Bell v. Hood,* 327 U.S. 678 (1946)). Proving a lack of significance is next to impossible for the Union for both factual and legal reasons. The Ninth Circuit in *Cabazon* addressed the question from a legal perspective in response to the State's argument that the term at issue was merely a separate contract incorporated into a tribal/state compact, explaining that the State was "underestimate[ing] the federal interest at stake." *Cabazon,* 124 F.3d at 1050. In the eyes of the Ninth Circuit, enforcing the terms of a gaming compact, whatever the State may call them, was inherently "important" since IGRA would become a "virtual nullity" if a court could "force the State to negotiate a compact" but have to sit idly by if the State chose "to ignore the compact once entered into." *Id.* The opinion by the Ninth Circuit in *In re Indian Gaming* explained that the State could use compact negotiations to require signatory tribes to both adhere to then-inapplicable federal labor laws and arbitrate any disputes that arise as a result; now it is up to a federal court to hold the State and its privies to their original promise despite some self-serving maneuvering in the interim.

From a factual perspective, any argument suggesting that the present action is insignificant is tantamount to claiming that the TLRO is simply not a material provision in the 1999 Compact. Rebutting this requires little more than pointing out how the other parties perceived the labor terms at or around the time of the negotiations for the 1999 Compact. As for the State, its negotiator required the tribes to sit down with the Union to devise labor protections at the outset of the negotiations and then reinforced this commitment at the end of the process by inserting a provision in Section 10.7 of the final draft version of the 1999 Compact that said the agreement would be null and void if the tribes did not work out these protections in a manner satisfactory to the State by a date certain. *See* Dkt. Nos. 33 at ¶¶ 70-71, 75. More than simply requiring the signatory tribes to agree to such protections, the State went one step further and demanded that they enact such protections under their own laws so all the stakeholders in the labor realm could benefit from them, and then explained that the "[f]ailure of the Tribe to maintain the [tribal law] in effect during the term of this Compact shall [automatically] constitute a material breach entitling the State to terminate this Compact." *See* Dkt. Nos. 33 at ¶ 85; 33-1 at p. 1-49. Thus, the creation and perpetuation of the 1999 Compact turned upon the TLRO, which makes it arguably the single most important term in the agreement for the State. The same can be said for the Union as well, which singlehandedly invalidated a prior statutory compact that was overwhelmingly approved by the people of the State of California simply because it did not have the NLRA-based labor laws that ultimately became the centerpiece of the TLRO. *See* Dkt. No. 33 at ¶¶ 57-67. Thus, these claims of "bald procedural fencing" are simply just a cover by the Union to hide the significance of both the TLRO and what an adverse decision would mean now that it can at least temporarily wage corporate campaigns against tribal casinos by filing one unfair labor charge after the next with the ever-so-acquiescent NLRB.

VI. THE TOME-SIZED COMPLAINT THE NINTH CIRCUIT STRUCK IN *CAFASSO* WAS 733 PAGES AND QUITE LITERALLY APPROACHING *WAR AND PEACE* LENGTH

The final argument in the Union's motion to dismiss conveys the perception that

Rule 8 of the Federal Rules of Civil Procedure imposes an upper limit on the size of a complaint, with the ideal pleading being something that "can be read in seconds and answered in minutes." Dkt. No. 34-1, 31:14-16. Believing that Pauma has missed this mark, the Union then tries to insinuate that the Second Amended Complaint in this action is worthy of being branded as the sort of "tome approaching the magnitude of *War and Peace*" that the Ninth Circuit would strike without hesitation. *See* Dkt. No. 34-1, 31:17-19 (citing *Cafasso v. Gen. Dynamics C4 Sys.,* 637 F.3d 1047, 1059 (9th Cir. 2011)). But the complaint in *Cafasso* that warranted this rather extraordinary remedy was quite literally nearing the size of *War and Peace*, as it was 733 pages long. *See Cafasso,* 637 F.3d at 1059. One critically important detail from the *Cafasso* opinion that the Union happens to omit from its discussion is that the Ninth Circuit compared the 733-page complaint pending before it in that case to the sufficiently detailed, clear, and organized 81-page complaint that it had previously approved in an earlier case. *See id.* at 1059 (citing *Hearns v. San Bernardino Police Dep't,* 530 F.3d 1124, 1132 (9th Cir. 2008)). The Second Amended Complaint earns all these same descriptors and actually checks in two pages shorter despite devoting eighteen pages to simply reciting one set of claim-specific allegations ten times on account of the sheer number of times the Union has circumvented the TLRO and filed unfair labor practice charges directly with the NLRB. While the Union may believe that the complaint in this case should be "read in seconds," it is worth remembering that the Union filed such a complaint in the *Pala* case and had its suit summarily dismissed by a district judge who may not have fully understood all of the background facts of the matter. *See Pala,* No. 07-02312, Dkt. No. 1 (S.D. Cal. Dec. 11, 2007). Quite simply, counsel for Pauma wrote the Second Amended Complaint in such a fastidious and fact-intensive manner for the Court – not the Union – in the hopes that the extra evidence-based allegations would propel this case directly into the discovery stage.

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that the Court deny the Union's motion to dismiss *en toto*, or grant further leave to amend to fix any deficiencies.

RESPECTFULLY SUBMITTED this 27th day of November, 2017

PAUMA BAND OF MISSION INDIANS

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