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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 STATE DEFENDANTS' (1) MOTION TO DISMISS THE SECOND AMENDED COMPLAINT; (2) MOTION TO STRIKE THE SECOND AMENDED COMPLAINT (WITH PARTIAL OPPOSITION TO STATE DEFENDANTS' PARTIAL JOINDER IN UNITE HERE'S MOTION TO DISMISS SAC, 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 State of California and Edmund G. Brown, Jr. ("State") have indeed placed the Pauma Band of Mission Indians ("Pauma" or "Tribe") in a peculiar situation by enlisting the aid of UNITE HERE International Union ("Union") to draft the labor terms of the 1999 Compact ("Tribal Labor Relations Ordinance" or "TLRO"), and now using its involvement in the process as a way to block federal court review of these labor terms simply because the Union has buyer's remorse – preferring the newfangled "jurisdiction" of the National Labor Relations Board ("NLRB") over the exclusive and binding arbitration process of the TLRO. To further this end, the State has gone to great lengths to prevent the Court from declaring the contractual relations of the parties in this case, indicating it would not agree to be voluntarily bound by any seemingly-weighty declaratory judgment resulting from this suit and now conversely insisting that the supposed non-dispute over the TLRO that may or may not be part of the 1999 Compact is so insignificant as to not warrant the attention of the federal courts. Focus on actions instead of words, however, and the heart of the matter involves the State abandoning the TLRO (at least when Pauma tries to enforce it) and acquiescing in its agent the Union's repeated breaches, a course of conduct that constitutes a breach of the implied covenant of good faith and fair dealing that is an inherent term in every contract, including a compact arising under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* For this reason alone, the State has waived its immunity under Section 98005 of the Government Code, an expansive waiver that covers the violation of any "term" of a compact and consequently applies to *all* claims related to the "performance" of a compact according to the California Supreme Court. Not to mention, this Government Code waiver as well as two others created by the 1999 Compact and *Ex parte Young*, respectively, would also empower the Court to hear and resolve the first-line declaratory relief claim in any event.

As indicated above, in an ironic twist, the immunity argument turns not only on the nature of the claims but the identity of the participants in the suit, with the State claiming the presence of the "third party" Union invalidates the subordinate waiver of sovereign

immunity found within the 1999 Compact. However, the State neglects to mention that the compact's waiver permits joinder of a third party if its presence is necessary for the court to afford complete relief, which is exactly the present situation involving the Union. The irony of this argument coming from the State is that it made the *opposite* argument in a suit brought by another tribe seeking declaratory relief regarding the terms of the 1999 Compacts, claiming that all 60 tribal signatories to the compacts were necessary parties, which successfully stymied the case for years because the plaintiff tribe was predictably unable to add them. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* No. 04-2265, Dkt. No. 11-1 (E.D. Cal. Mar. 28, 2006) ("*Colusa*") (attempt to block a federal district court from interpreting the license pool provision unless the plaintiff tribe joined sixty other sovereign tribes). Thus, this motion is just the latest attempt by the State to erect a procedural barrier in the hopes of preventing a court from considering an important issue related to the terms of the 1999 Compact. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 16-01713, Dkt. No. 19 (S.D. Cal. Sept. 19, 2016) (attempt to prevent review of the actual use of SDF funds).

Ultimately, the main focus of the motion to dismiss by the State is on the importance of the issue presented and whether it puts forward a justiciable controversy for the Court. Taking the argument in the motion to dismiss at face value would lead one to conclude that the State is simply an innocent bystander caught in the middle of a seemingly insignificant and tangential dispute between Pauma and the Union. Such are the risks, though, when one compacting party enlists the aid of an ally to draft some portion of an agreement that confers federally-protected rights thereunder. The claimed insignificance of the dispute rings rather hollow after considering how strenuously the Union is fighting to preserve the TLRO in the pending Ninth Circuit matter between the parties irrespective of whether the NLRB can lawfully assert jurisdiction over Indian tribes:

> But a decision from this Court about the TLRO's relation to the [National Labor Relations Act] could adversely impact the tribal-state gaming compacts in a different way [and there are several reasons not to address the subject]. … [As for the third of these], there are compelling arguments why

> federal labor law does not preempt the TLRO. 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.

Casino Pauma v. NLRB, No. 16-70397, Dkt. No. 82, pp. 49-52 (9th Cir. Mar. 29, 2017). Thus, the true lens for gauging the justiciability of a compact-based issue like the present one is to simply reverse the scenario so that Pauma – rather than the State – is refusing to take an "official position" on the enforceability of some aspect of the TLRO when pressed, and then claiming that the State should stay on the sidelines since the dispute is solely one between the Tribe and a union that may well lack the ability to pursue a suit on its own. If neither this hypothetical scenario nor its actual complement warrant federal court involvement, then Pauma respectfully requests that the State indicate as much in its reply brief since the ever-changing landscape of federal labor law may mean that certain compact terms are merely permissive guidelines rather than binding obligations. With that said, the justiciability defense and three other arguments raised by the State all fail for the reasons that are set forth more fully below.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) simply requires a complaint to contain a short and plain statement showing an entitlement to relief in order to survive a motion to dismiss. *See ESG Capital Partners, LP v. Stratos,* 828 F.3d 1023, 1032 (9th Cir. 2016) ("*ESG Capital*"). "Specific facts are not necessary; the statement need only 'give the defendants fair notice of what the… claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). As for the general allegations comprising those grounds, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible* on its face" (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 570)), "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).

When analyzing the merits of a motion to dismiss, "the court must accept as true the facts alleged in a well-pleaded complaint[.]" *ESG Capital,* 828 F.3d at 1031; *see*, *e.g.*, *Societe d'Equipments Internationaux Nig., Ltd. v. Dolorian Capital, Inc.,* 2016 U.S. Dist. LEXIS 3783, *12 (E.D. Cal. 2016) ("When ruling on a motion to dismiss… the court 'must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'" (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975))). If a claim does not meet the plausibility standard set forth in *Iqbal*, a district court should freely give leave to amend the complaint when justice so requires. *See Ariz. Students' Ass'n v. Ariz. Bd. of Regents,* 824 F.3d 858, 871 (9th Cir. 2016) (citing Fed. R. Civ. P. 15(a)(2)). In fact, dismissal of a complaint without leave to amend is only proper "when… it is clear that the complaint could not be saved by *any* amendment." *Id.* (citing *Thinkjet Ink Info. Res., Inc. v. Sun Microsys., Inc.,* 368 F.3d 1053, 1061 (9th Cir. 2004)).

ARGUMENT

I. THE SECOND AMENDED COMPLAINT ALLEGES AN ACTUAL CASE AND CONTROVERSY

Despite the State's conclusory averment that "no dispute" exists between the parties, its impassioned defense of this suit shows quite the opposite – that it is heavily invested in the outcome of this case and acting in concert with the Union, just as it was during the negotiations for the TLRO in the 1999 Compacts. *See* Dkt. No. 33, ¶¶ 2, 69-89, 170-172, 191-193. As to that, Pauma alleges that while the State "feigned indifference" during the initial meeting on the topic, it later abandoned the terms of the TLRO through both words and actions indicating that it sides with the Union against Pauma's efforts to enforce the agreement. *See* Dkt. No. 33, ¶¶ 165-173, 191-193, 283-285. The State's abandonment of the TLRO only applies with respect to the Union's part of the bargain, however, as Pauma risks the State holding the Tribe in material breach of the 1999 Compact should it fail to follow the TLRO to a tee. *See* Dkt. Nos. 33, ¶ 283; 33-1 at 1-49. Further compounding this dilemma and thus highlighting the reality of the present controversy is the fact that the State indicated that it would not be bound by any declaratory judgment

regarding the important issue at the heart of this case if it were not a party.[1] *See* Dkt. No. 33, ¶¶ 172, 284. The State's refusal to be bound – when all Pauma hopes to do is enforce the very terms the State demanded – is proof positive that the State's interests are adverse to the Tribe's with respect to its rights under the TLRO.[2]

While federal courts "may adjudicate only actual cases or controversies" in order to keep with Article III of the United States Constitution (*see Rhoades v. Avon Prods., Inc*., 504 F.3d 1151, 1157 (9th Cir. 2007) (citation omitted)), this standard (which Pauma meets) only requires a showing that "[t]he disagreement underlying the declaratory relief action [is] not [] nebulous or contingent but [has] taken on a fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *North County Commc'ns Corp. v. Cal. Catalog & Tech*., 594 F.3d 1149, 1154 (9th Cir. 2016) (*quoting PSC v. Wycoff Co.*, 344 U.S. 237, 244 (1952) (alterations omitted)). In other words, the ultimate question at the heart of the case or controversy analysis is "whether the facts alleged, under all the circumstances show that there is a *substantial controversy*, between parties having *adverse legal interests*, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007) (citing *Maryland Cas. Co. v. Pac. Coal & Oil Co*., 312 U.S. 270, 273 (1941)).

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[1] The State's motion to strike the allegations in the Second Amended Complaint setting forth its position on this point should be denied for the reasons set forth herein. *See* Section II, *infra*. In addition, even assuming Pauma made a confidential settlement offer, the State's response would still be admissible to establish the case or controversy requirement and the existence of a dispute. *See Nat'l Presort v. Bowe Bell + Howell Co*., 663 F. Supp. 2d 505, 508 (N.D. Tex. 2009) (holding a settlement communication was admissible to establish the case or controversy requirement and threat of litigation).

[2] Before getting into the standard justiciability discussion, the Ninth Circuit already addressed this issue in an identical fact pattern where a tribe tried to enforce a disputed term in a compact that the State claimed was just an amorphous, separate contractual agreement. *See Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1056 (9th Cir. 1997) (discussing the "importance" of hearing tribal enforcement actions, as doing otherwise "would reduce the structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into").

A substantial controversy under the foregoing *MedImmune* inquiry exists if a case will be useful in clarifying or settling legal relations of contracting parties. *Newcal Indus. v. Ikon Office Solutions*, 513 F.3d 1038, 1057 (9th Cir. 2008) (holding the declaration at issue would help "clarify or settle" legal relations between the parties). The allegations in the Second Amended Complaint present just such a "substantial controversy" that declaratory relief was designed to address – namely whether the Union should resolve unfair labor practice charges with sixty-plus California gaming tribes pursuant to the "exclusive" and "binding" arbitration process in their gaming compacts in lieu of the administrative fora of the NLRB, whose belated exercise of jurisdiction has split the federal circuits. *See Soaring Eagle Casino & Resort v. NLRB,* 791 F.3d 648, 672-73 (6th Cir. 2015).

Pauma's allegations also show "sufficient immediacy" because the Tribe is in the same position as the petitioner in *MedImmune,* as both are "coerced" contracting parties who file suit to determine their rights after being faced with the pre-suit predicament of abandoning said rights or risking prosecution. To explain, in *MedImmune*, the petitioner MedImmune received a demand for royalty payments from the respondent who claimed that one of MedImmune's products was subject to both a patent owned by the respondent and a related license agreement. *See MedImmune*, 549 U.S. at 121-22. Despite believing the patent to be invalid, MedImmune paid the royalties under protest and then brought suit for declaratory relief to avoid the potentially substantial liability that it might incur in connection with a product that accounted for more than 80 percent of MedImmune's sales. *Id.* "The dilemma posed by that coercion – putting the challenger to the choice between abandoning his rights or risking prosecution – is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'" *MedImmune*, 549 U.S. at 129 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)).

Pauma faced a similar predicament in choosing between abandoning its rights to have all unfair labor practice disputes resolved by the economical arbitration process of the TLRO or risking prosecution by refusing to comply with the NLRB's procedures and orders. On the one hand, the TLRO makes clear that "[a]ll issues shall be resolved exclu-

sively though the binding dispute resolution mechanism herein, with the exception of a collective bargaining impasse, which shall only go through the first level of binding dispute resolution." *See* Dkt. No. 33-1 at 1-59. Nevertheless, the Union filed *ten* unfair labor practice charges with the NLRB against Casino Pauma and the Tribe, all of which are at various stages of adjudication. *See* Dkt. No. 33, ¶¶ 157, 181-182. Given the contempt powers of the NLRB, Pauma – like MedImmune – had to file this suit to ameliorate a big and quickly-devolving quandary created by the Union's coercive actions. *See* NLRB, *Statements of Procedure* § 101.15, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/FinalRules101%26TOC.pdf (last visited Mar. 4, 2017) (explaining the NLRB may "order immediate remedial action and impose sanctions and penalties" if a party fails to abide by the terms of a judgment).

With respect to the "adverse interest" prong of the "case or controversy" inquiry, the term means that a party, even a non-signatory, has a "stake" in the matter. *Newcal Indus.,* 513 F.3d at 1056 (explaining "Newcal had a stake in the controversy even though it was not a party to the relevant contracts"). Without even looking at the Union, the State certainly has a demonstrated stake in this case. First, IGRA allows states to negotiate with tribes regarding the seven subjects enumerated within Section 2710(d)(3)(C). Along with the Union, the State litigated the issue of whether the TLRO was a legitimate subject of compact negotiation under those seven subjects in *In re Indian Gaming*, 147 F. Supp. 2d 1011, 1013, 1021-22 (N.D. Cal. 2001), which resulted in a district court ruling that "labor relations at gaming facilities and closely related facilities, which is the subject governed by the Tribal Labor Relations Ordinance, is a subject that is 'directly related to the operation of gaming activities.'" *Id*. at 1019 (citing 25 U.S.C. § 2710(d)(3)(C)(vii)).

Indeed, these labor regulations are still found in the TLROs of the most recently negotiated compacts. *See* California Gambling Control Commission ("CGCC"), *Tribal-State Compact Between the State of California and the Agua Caliente Band of Cahuilla Indians* at App. C (Aug. 4, 2016), *available at* http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Agua_Caliente_Compact_2016.pdf (last visited Mar. 6,

2017). Not to mention, the TLRO at issue in this case is part of each of the forty or so remaining 1999 Compact in California, which will continue in effect until June 2022 and potentially much longer if the tribal signatories have their choice. *See* CGCC, *Ratified Tribal-State Gaming Compacts (New and Amended)*, *available at* http://www.cgcc.ca.gov/?pageID=compacts (last visited Nov. 25, 2017). Thus, a decision in Pauma's favor could affect the State's future behavior in compact negotiations, leading it to unilaterally revise the specifics of the arbitration process for handling claims. Conversely, a decision adverse to Pauma would effectively negate the TLRO in forty-plus compacts and mean that the State should no longer be negotiating labor issues as part of any compacts going forward. Thus, the State's case or controversy arguments are simply without any merit.

II. PAUMA ALLEGES A VALID CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, WHICH IS A TERM IN EVERY CONTRACT UNDER THE APPLICABLE FEDERAL CONTRACT LAW

The State's argument against the sufficiency of the implied covenant claim is difficult to address for two reasons. First, it completely mischaracterizes the factual bases for Pauma's claim by coyly pretending it is solely based upon a refusal to accept a supposed settlement offer. Second, the State continues a seven-year pattern of largely trying to argue California contract law rather than applicable federal contract law. This is surprising considering that a prior case in the *same* district between the *same* parties and the *same* attorneys settled the issue once and for all. The rule is that "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015) (*citing Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010)). The Restatement is the primary repository of federal contract law. *See Curtin v. United Airlines, Inc*., 275 F.3d 88, 93 n.6 (D.C. Cir. 2001) (explaining the federal courts "often look to the… Restatement when deciding questions of federal common law."); *First Interstate Bank v. Small Bus. Admin*., 868 F.2d 340, 343-44 (9th Cir. 1989) ("In applying federal contract law, we are guided

by general principles of contract law and the Restatement.") (citation omitted).

A natural corollary of the rule that federal contract law serves as the go-to resource is that State law is relegated to a secondary role where it either acts in a gap-filing capacity or provides additional support for a consonant federal law rule. *See First Interstate Bank,* 868 F.2d at 343 n.3. As explained by the Southern District when addressing this one issue for a second time more than five-and-a-half years ago:

> [I]t seems clear to this court, federal law as set forth in the Restatement and other common law issues [sic] is what would be the contract law the court would rely on. And to the extent California law is in accord with that, it can provide persuasive or otherwise supporting interpretation. If California law is contrary to the Restatement, then it would appear the Restatement would be the proper law to follow in addressing any contract issue here[.]

Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California, No. 09-01955, Dkt. No. 182, 12:5-17 (S.D. Cal. May 23, 2012). Accordingly, federal law applies if it is available, even if a party insists that state law is the same. *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JP Morgan Chase Bank, N.A.*, 671 F.3d 1027, 1032 (9th Cir. 2012) ("The outcome is likely the same under California or federal law, but in light of our precedent, federal common law applies.").

Under federal contract law, the implied covenant of good faith and fair dealing is set forth in Section 205 of Restatement Second of Contracts. *See* Restatement (Second) of Contracts § 205 (1981). The covenant inheres in every contract in order to protect the reasonable or justified expectations of the parties. *See Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). This implied term carries with it a host of unwritten, circumstantial duties that the contracting parties owe to one another, imposing obligations like not to "interfere[] with or fail[] to cooperate in the other party's performance" and "not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Id.*; Restatement (Second) of Contracts § 205 cmt. d (1981); *see Melbye v. Accelerated Payment Techs., Inc.,* 2012 U.S. Dist. LEXIS 3436, *12 (S.D. Cal. 2012) (explaining the covenant is "designed to effectuate the intentions and reasonable

expectations of parties reflected by mutual promises within the contract.")

As for everything that falls under its ambit, "[t]he scope of the implied covenant of good faith and fair dealing is [again] defined in part by the justified expectations of the contracting parties." *Richards v. Option One Mortg. Corp*., 682 F. Supp. 2d 40, 46 n.12 (D.D.C. 2010) (*quoting Minebea Co. v. Papst*, 444 F. Supp. 2d 68, 188 (D.D.C. 2006)). Not just any justified expectations are at issue, but the justified expectations that existed *at the time of contract formation*. *See True N. Composites, LLC v. Trinity Indus., Inc*., 191 F. Supp. 2d 484, 516 (D. Del. 2002) (explaining "the parties' reasonable expectations at the time of contract formation determine the reasonableness of the challenged conduct."); *see also* Restatement (Second) of Contracts § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasized faithfulness to an agreed *common purpose* and consistency with the justified expectations of the other party.").

In this case, the original allegations in the Second Amended Complaint detail how the State and the Union required tribes to include the TLRO as part of their compacts, exhibiting a clear intent amongst the involved parties that *all* labor issues would be resolved thereunder. *See* Dkt. No. 33, ¶¶ 70-89. Specifically, the State required Pauma to execute the TLRO within its compact by a date certain or the *entire* agreement would be null and void, and then further demanded that the Tribe abide by these terms for the duration of the compact. *See* Dkt. Nos. 33, ¶ 283; 33-1 at 1-49. Moreover, the newly-included allegations in the Second Amended Complaint explain how the Union admitted in connection with the *In re Indian Gaming* suit shortly after the conclusion of negotiations that, indeed, all labor issues were meant to go through the arbitration process of the TLRO, and that they were also meant to regardless of the future state of the law. *See* Dkt. No. 33, ¶¶ 90-102. Thus, Pauma had a reasonable expectation that every involved party would resolve labor issues under the TLRO and that the State would stand by those terms as a binding agreement, at a minimum, and use its regulatory powers to enforce them, if necessary.

Instead, the State abandoned the TLRO, or at least Pauma's rights thereunder, by standing idly by in the face of the Union's nine breaches of the agreement and then stri-

dently supporting the Union's efforts to block Pauma from enforcing its terms. *See* Dkt. No. 33, ¶¶ 165-173, 191-193, 283-285. Now, the State has brazenly refused to even acknowledge that the TLRO is part of the Compact (which is something even the Union has admitted), when it could have at least expressed a middle-ground position that the TLRO is an enforceable arbitration agreement that the parties must follow *before* resorting to the expensive and lengthy NLRB process. *See* Dkt. No. 33, ¶ 285. What makes the State's inaction all the worse is its involvement in the *In re Indian Gaming* suit because it shows that the State *knew* that the Union believed it was bound by the TLRO no matter what.

In an attempt to wholly avoid a discussion about what it did or did not do, the State suggests that Pauma's claim fails under state law because the covenant cannot impose duties beyond those in the agreement. It also facetiously argues that Pauma's claim under the covenant is based solely on the rejection of a "compromise offer" and its refusal to force Union compliance with the TLRO. *See* Dkt. No. 36-1, 22:3-16. Both of these contentions are wrong, though. If the State's first argument were true, then the covenant would be no different than a garden variety breach of contract claim. While it is true that the covenant cannot alter the express terms of the agreement or add duties *outside* of the contract, what it does do is impose duties *inside* the contract that are fairly inferable from the express terms of the agreement. *See Interallianz Bank AG v. Nycal Corp.,* 1994 U.S. Dist. LEXIS 5954, *24 (S.D.N.Y. 1994) (stating the covenant "arise[s] out of the agreement entered into… [and] does not create duties which are not fairly inferable from the express terms of the contract" (citing *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1056 (2d Cir. 1992))). One express obligation can therefore produce numerous and varied implied duties; after all, flexibility is the rule of the day when it comes to rooting out bad-faith performance. Restatement (Second) of Contracts § 205 cmt. a (1981). As the Restatement explains:

> [B]ad faith may be overt or *may consist of inaction*, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decision: evasions of the spirit of the bargain, lack of

> diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

Restatement (Second) of Contracts § 205 cmt. d (1981) (emphasis added).

As for how this relates to the State's two arguments, the breach of the covenant claim alleges that the State failed to take *any* action in support of the parties' obligations under the TLRO (*see* Dkt. No. 33, ¶ 285), and that inaction is enough to violate the covenant and the parties' shared expectations that the TLRO would govern all future labor disputes between them. *See Patton v. United States*, 74 Fed. Cl. 110, 118-19 (2006). To further bolster Pauma's claim, the Second Amended Complaint also alleges that the State abandoned the TLRO, not only *acquiescing* in the Union's repudiation of the ordinance but now actively *aiding* that misconduct by seeking to block the Court from addressing the issue. *See* Dkt. No. 33, ¶¶ 283-285. "When a party engages in acts inconsistent with the existence of a contract, including acquiescing in a repudiation of the contract by the other party, courts have found an objective intent to abandon despite the party's assertion of subjective intent to the contrary." *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 745 (2004) (citation omitted); *see NLRB v. L.A. Yuma Freight Line,* 446 F.2d 210, 215 n.4 (9th Cir. 1971) (explaining "passive inaction" can constitute a contractual breach).

Finally, the Court should deny the State's motion to strike Pauma's allegations regarding the State's meet-and-confer statement that it refuses to be bound by a declaratory judgment resulting from this case if it is not a party. The statement is outside the purview of Federal Rule of Evidence 408 ("Rule 408") because it is not offered to impose liability against the State for Pauma's declaratory relief claim, which was the only claim alleged against the State and discussed at the meet-and-confer conference of December 5, 2016. *See* Dkt. No. 33, ¶¶ 170-172. Indeed, declaratory relief would not have imposed any liability on the State in interpreting the TLRO. Rather, the statement is offered to show the State's abandonment of the TLRO for Pauma's claim based on the breach of the covenant, which did not exist at the time of the meet and confer. *See* Dkt. No. 33, ¶¶ 276-278.

As the Sixth Circuit explained, "'Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim' … [and is thus] 'inapplicable when the claim is based on some wrong that was committed in the course of the settlement discussions.'" *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293-94 (6th Cir. 1997) (*quoting* 23 Charles Alan Wright & Kenneth W. Graham Jr., *Federal Practice and Procedure: Evidence* § 5314 n.25 (1st ed. 1980)). At that time, the State was feigning indifference on the meaning and enforceability of the TLRO. Only after the State told Pauma it would not be bound by any declaratory judgment did the Tribe realize that a big dispute had arisen directly with the State and that the parties' interests were not just adverse, but diametrically opposed. *See* Dkt. No. 33, ¶¶ 170-172, 283-285. Simply put, this evidence of a refusal to be bound when coupled with the refusal to take part is highly relevant not only to justiciability, but also the implied covenant claim. *See Johnson v. Land O' Lakes*, 181 F.R.D. 388, 392 (N.D. Iowa 1998) (stating evidence is admissible "where a party has made a statement in a pleading about his own conduct which is at variance with his position in the matter being litigated (*citing Garman v. Griffin*, 666 F.2d 1156, 1158-59 (8th Cir. 1981))).

III. THE STATE WAIVED ITS SOVEREIGN IMMUNITY TO PAUMA'S CLAIMS THROUGH THREE SEPARATE WAIVERS

A. The State First Waived Any Immunity to Pauma's Claims Long Before the Compact was Executed Under Government Code § 98005

While the State's motion begins its sovereign immunity argument by quoting select language from the compact's waiver of sovereign immunity, it fails to include the preface for the waiver, which states that the parties agree to "waive any immunity… ***that they may have*[.]**" *See* Dkt. No. 33-1, § 9.4 (emphasis added). Those two concluding words of "may have" indicate that the compact recognizes that the parties "may have" waived some of their immunity previously and therefore the Section 9.4 waiver therein will only pertain to whatever immunity remains *after* the application of those prior waivers.

As it so happens, the State previously waived its immunity from compact actions

in 1998. During the November 1998 General Election, the voters in California passed an initiative known as Proposition 5 that amended the Government Code to include a form compact the Governor would have to execute with any interested tribe as a ministerial act within thirty (30) days of receiving a request. *See* Dkt. No. 33, ¶ 52; *In re Indian Gaming,* 331 F.3d 1094, 1100 (9th Cir. 2003) ("*Coyote Valley II"*). On November 4, 1998, Proposition 5 became effective by operation of law, nearly a full year before the execution of the 1999 Compacts. *See* Dkt. No. 33, ¶¶ 52-56.

Although the Union successfully invalidated virtually all of Proposition 5 in *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 590 (1999) ("*HERE*" or "*HERE v. Davis*"), the California Supreme Court left one portion of the statutory compact intact that contains a broad immunity waiver for tribal compact suits:

> Without limiting the foregoing, the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov't Code § 98005. To make sure the breadth of this language was understood, the California Supreme Court went on to define the precise scope of this statutory waiver:

> The consent to suit contained in the final sentence of Government Code section 98005… concerns neither the scope of gambling permitted to tribes nor the implementation of the model compact but, rather, the ***resolution of future disputes concerning the negotiation, amendment and performance of compacts*** "different" from Proposition 5's model compact.

HERE v. Davis, 21 Cal. 4th at 614 (emphasis added). Thus, this statutory waiver alone, whether read in isolation or construed according to the Supreme Court's interpretation, would permit either of the two claims against the State. First, the scope of the waiver includes any claims related to the "performance of compacts" and thus naturally includes

a claim for declaratory relief regarding the meaning of a term within a compact such as the TLRO. According to *HERE*, the "performance" component of the waiver refers to the clause pertaining to "the state's violation of the terms of any Tribal-State compact," which necessarily allows Pauma's claim for breach of the implied covenant of good faith and fair dealing since the implied covenant is a "term" of the compact.[3] *Chodos v. West Publ'g Co., Inc*., 292 F.3d 992, 996 (9th Cir. 2002) ("California law, like the law in most states, provides that a covenant of good faith and fair dealing is an implied *term* in every contract." (citation omitted)); *Dunnigan v. Metro. Life Ins. Co*., 99 F. Supp. 2d 307, 323 (S.D.N.Y. 2000) ("It is well-settled that the common law duty of good faith and fair dealing is an implied *term* in every contract." (*citing Cross & Cross Properties Ltd. v. Everett Allied Co*., 886 F.2d 497, 501-02 (2d Cir. 1989))).

On a final note, the Court should disregard the State's flatly implausible argument that the language in Section 9.4(a)(3)(c) of the Compact somehow negates the preexisting waiver of the Government Code. *See* Dkt. 33-1, § 9.4(a)(3)(c) ("Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express or implied, are granted by either party."). It matter of factly does not. Section 9.4(a)(3)(c) is contract-oriented and forward-looking, using preventative boilerplate language to ensure neither party can claim that other language in the compact or subsequent oral agreements provide additional waivers. It cannot rescind a statutory waiver by implication. Moreover, the State made this same argument previously without success. *See Pauma,* 813 F.3d at 1171 n.12 (explaining the "broad statutory waiver" in Section 98005 of the Government Code "supported" the Court's decision to award restitution despite the State raising the same objection). If the State's argument had any merit, then any tribe with a compact – whether Rincon, Pauma, or another – would never have been able to pursue a bad faith

[3] The State's motion to strike the allegations of the Prayer in the Second Amended Complaint seeking damages should be denied outright, given that Section 98005 of the Government Code waives the State's immunity to Pauma's breach of the covenant claim, regardless of whether the Tribe seeks damages or other relief.

negotiation claim against the State, and the State would never have had reason to revise the *contract* waiver in recent years to try and specifically rescind the *statutory* one in Section 98005 of the Government Code. *See*, *e.g.*, *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d. 1019, 1026 (9th Cir. 2010) (allowing the compacted Rincon tribe to pursue a bad faith claim under Section 98005).

B. The Compact Contains a Second Waiver, which is Valid Despite the Union's Involvement and Pauma's Prayer for Damages

The State next attempts to salvage its immunity by arguing the Union's presence in the suit invalidates its waiver under Section 9.4(a)(3) of the 1999 Compact, a section that generally explains "the State and the Tribe expressly consent to be sued [in federal court] and waive any immunity therefrom that ***they may have*** provided that":

> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); and
> (3) [N]o person or entity other than the Tribe and the State is party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party.

Dkt. No. 33-1, §§ 9.4(a)(2)-(3).

First, the Union can and should be considered an agent (and thus part) of the State under the 1999 Compact. Section 2.17 of the 1999 Compact defines the "State" as the "State of California or any authorized official or agency thereof." Dkt. No. 33-1, § 2.17. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). Pauma alleges that the State's negotiator met with the Union at the outset of the 1999 Compact negotiations (*see* Dkt. No. 33, ¶¶ 70-71, 75), with that alliance culminating in the September 9th compact proposal which included a Section 10.7 that required the tribes to sit down with the Union to nego-

tiate "an agreement or other procedure *acceptable to the State* for addressing organizational and representational rights of Class III gaming employees" by October 13, 1999. Dkt. No. 33, ¶ 75 (emphasis added); *see Coyote Valley II,* 331 F.3d at 1106. The text of this Section 10.7 states in relevant part that:

> This Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise[.]

Dkt. No. 33, ¶ 75; 33-1, § 10.7; *see Coyote Valley II,* 331 F.3d at 1104. Thus, the resultant TLRO was negotiated with the tribes by the Union *at the direction of* the State and only after the Union specifically *sought out* and *accepted* the role of negotiator for these labor provisions. The "acceptable to the State" proviso in Section 10.7 of the 1999 Compact also ensured that the State retained ultimate *control* over the outcome of the process – a power it also wielded by having to sign and execute the TLRO in Addendum B before it and the rest of the compact went to the Secretary of Interior for ratification pursuant to the statutory approval process in Section 2710(d)(8)(A) of IGRA. *See* Dkt. No. 33, ¶ 78.

Second, the State only cites part of Section 9.4(a)(3) and omits the language that allows joinder of a third party if the failure to join would deprive the court of jurisdiction:

> (3) [N]o person or entity other than the Tribe and the State is party to the action, *unless failure to join a third party would deprive the court of jurisdiction*; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party.

Dkt. No. 33-1, § 9.4(a)(3) (emphasis added). This language does not refer to subject matter jurisdiction because an action arising from the compact naturally pertains to IGRA. *See Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 90 (1998) ("'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'"). Thus, subject matter jurisdiction inherently exists. What this reference to jurisdiction means is that a suit may include all necessary parties without invalidating the immunity waiver so that a court can hear the

case and issue complete relief. This is exactly the argument that the State made in the *Colusa* suit where the Cachil Dehe tribe sought a declaration on the size of the license pool but the State argued that the suit could not proceed without joining the sixty-plus other gaming tribes as necessary parties. *See Colusa,* No. 04-2265, Dkt. No. 11-1 (E.D. Cal. Mar. 28, 2006) (attempt to block a declaratory relief action regarding the size of the license pool of the 1999 Compact unless the plaintiff joined sixty other sovereign tribes).

Throughout the history of compacting in California, situations have arisen requiring the involvement of third parties in compact-based suits in order to issue complete relief. For example, the State brought suit against the Sides Accountancy Corporation in order to divest it of its duties in overseeing the license draw process under the 1999 Compacts. *See Pauma,* No. 09-01955, Dkt. No. 250-2 at Ex. 41 (S.D. Cal. Dec. 20, 2013). Under the State's interpretation, the State would have been able to file suit against Sides as administrator of the license pool but then claim sovereign immunity from any counter claims by intervening tribal defendants, which would be patently unfair and deprive the court of the ability (*i.e.*, "jurisdiction") to issue relief to all affected parties. The converse situation arose in *California v. Iipay Nation of Santa Ysabel*, 2015 U.S. Dist. LEXIS 67415 (S.D. Cal. 2015). Therein, a tribe partnered with a private entity to conduct what the State alleged to be illegal gaming activities. It would be similarly inequitable for the State to bring suit against the tribe and its partner for breach of the compact, only to have the suit dismissed when the tribe claimed it was immune from suit due to the presence of its non-tribal gaming partner. As in both of these cases, the State *and* another entity are necessary parties to the present suit so the Court can provide complete relief, and the joinder of the Union should not invalidate the State's waiver of immunity provided under Section 9.4.

C. The *Ex parte Young* Doctrine Provides a Third, Fallback Waiver

Even assuming the compact and Government Code waivers are both inapt, the Court could still hear Pauma's declaratory relief claim against the State under the doctrine of *Ex parte Young*. "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air*

Lines, 463 U.S. 85, 96 n.14 (1983) (*citing Ex parte Young*, 209 U.S. 123, 160-62 (1908)). This jurisdictional basis extends to declaratory actions that seek to stop interference with rights created by federal statutes. *See Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 389 (6th Cir. 1997). In *Associated Builders,* the Sixth Circuit reached this conclusion by relying upon the recent Supreme Court decision

> [i]n… *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc*., 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997), [where] a contractor and subcontractor sought a declaratory judgment that California's prevailing wage law relating to apprentices… was *interfering with federal rights established by ERISA*. The district court, citing… the seminal case of *Ex parte Young*, said: 'This Court has jurisdiction under 28 U.S.C. § 1331. Federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.' 778 F. Supp. 1522, 1526 (N.D. Cal. 1991). Although the Court of Appeals… and the Supreme Court differed on the issue of ERISA relationship, neither court questioned the district court's exercise of jurisdiction over the contractor-employers' case.

Id. (emphasis added).

In addition to statutorily-created rights, *Ex parte Young* also extends to suits about whether contracts entered into by Indian tribes violate federal law, even federal common law. *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) ("*Ex parte Young* is not limited to claims that officials are violating the federal Constitution or federal statute; it applies to federal common law as well." (*citing South Dakota v. Bourland*, 949 F.2d 984, 989 (8th Cir. 1991), *rev'd on other grounds*, 508 U.S. 679 (1993))). For instance, in *Salt River*, the Ninth Circuit heard a suit brought by the non-tribal operator of the Navajo Generating Station, who claimed that Navajo officials were exceeding their authority by imposing operational regulations beyond the express terms of the lease agreement between the parties. *See id*. at 1181-82. In resolving the matter, the Ninth Circuit found that the *Ex parte Young* doctrine applies to basic federal Indian law questions like whether a state or a tribe is imposing civil regulations on the other (or some of its members or citizens) without authorization. This case is no different because it concerns the proper application of state-imposed labor laws that a tribe

assumed when circumstances were different.[4]

On a final note, the Court should not look at the State-cited opinion in *San Pasqual Band of Mission Indians v. California*, 241 Cal. App. 4th 746 (2015), as authority to override the waiver established within Government Code Section 98005. While the California Appellate Court dismissed the tribe's suit for a damages windfall on the basis of the State's sovereign immunity and the "monetary damages" exclusion in the waiver of Section 9.4 of the 1999 Compact, that opinion is inapposite for a number of key reasons, the most obvious of which being that the *state* court did not address the *federally*-oriented waiver in Section 98005 of the Government Code. *See* Cal. Gov't Code § 98005 ("[T]he State of California also submits to the jurisdiction of the *courts of the United States* in any action brought… by any federally recognized California Indian tribe… ." (emphasis added)). Further, the court also did not account for the preface to the compact waiver that explains that the parties were only "waiv[ing] any immunity [ ] ***that they may have***" so long as certain conditions were met. Dkt. No. 33-1, § 9.4 (emphasis added).

Not to mention, the factual backgrounds of the two cases could not be any more dissimilar; here Pauma merely seeks damages for the increased costs of litigating before the NLRB, while the plaintiff tribe in *San Pasqual* sought $315 million from the State for lost profits *in State court* where tribes have historically *never* gotten a fair shake. *San Pasqual,* 241 Cal. App. 4th at 232-33; *see*, *e.g.*, *UNITE HERE v. Pala Band of Mission Indians*, 583 F. Supp. 2d 1190, 1198 (S.D. Cal. 2008) ("Additionally, Unite Here's reliance on *Cabazon* makes more sense in the context of State-Tribal gaming compact disputes, where a federal court is necessary to provide a neutral forum that otherwise might not exist."). The long-recognized and well-documented unfair treatment of tribes in State court is yet another reason why Pauma's claims should proceed in the present forum. *See*

[4] A waiver based on *Ex parte Young* is available under IGRA so long as it does not compel State officials to comply with the statutory scheme's detailed remedial process for obtaining a new compact. *See Tohono O'odham Nation v. Ducy*, 130 F. Supp. 3d 1301, 1312-13 (D. Ariz. 2015) (*citing, e.g., Friends of Amador County v. Salazar*, 2010 U.S. Dist. LEXIS 110448 (E.D. Cal. 2010)).

Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 156 (2006) ("And while tribes might theoretically challenge the legality of an RSA in state court… state courts are unlikely to provide a fair and impartial forum for claims against the state itself."); B. J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 440 (1997) ("This case seems to endorse the notion that… Congress also recognized the limitations of a fair state court application of the law based on past history, thus federal courts should be available to litigants for enforcement of ICWA."); Scott B. McElroy *et al*., *Revisiting Colorado River Water Conservation District v. United States – There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597, 643 (1995) ("This decision has been cited to 'illustrate for many tribes what they maintained all along – that Indian tribes simply cannot get a fair shake in state courts… .'").

IV. THE 1999 COMPACT AND THE APPARENT CONFLICT BETWEEN TWO FEDERAL STATUTES READILY PROVIDE FEDERAL QUESTION JURISDICTION

Contrary to the State's claims, at least two different bases of jurisdiction exist (and likely three (*see* Section II in concurrently-filed opposition to the Union's motion to dismiss)), one based on the statutorily-created 1999 Compact and the other on the interplay between IGRA and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*.

A. Jurisdiction is Sufficiently Based on the 1999 Compact

In *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d at 1055-56, the Ninth Circuit answered in the affirmative the question of whether disputes arising from an IGRA-based compact can form the basis of federal question jurisdiction. In that case, the State argued that the court did not have jurisdiction to hear a breach of contract claim brought by the tribe because the provision in question that governed simulcast wagering licensing fees was merely a separate contractual agreement incorporated into the compact between the parties. In rejecting this argument, the Court stated as follows:

> Although it is true that the federal courts do not have jurisdiction over run-of-the-mill contract claims brought by Indian tribes,... this claim is not based on a contract that stands independent of the Compacts. Rather, it is based on

> an agreement contained within the Compacts and entered into by the parties, during their 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] quite clearly are a creation of federal law… .

Id. The State attempts the same tired trick here, arguing that the TLRO, as an addendum to the compact, is not actually part of the agreement. This is a bold argument considering *the Union* even acknowledges the TLRO is part of the 1999 Compact. *See* Introduction, *supra.* Yet, this is simply not the case. The foregoing argument in Section III(B), *supra*, explains how Section 10.7 of the 1999 Compact required each signatory tribe to execute the Union-negotiated TLRO that was "acceptable to the State" under threat of nullification of the entire compact. *See* Dkt. No. 33-1, § 10.7; *Coyote Valley II,* 331 F.3d at 1104. The resulting TLRO was then attached to the 1999 Compact as "Addendum B," with the title page containing both signature blocks so the parties could execute the provisions and prefatory language that refers and links back to the main body of the compact:

> In compliance with Section 10.7 of the Compact, the Tribe agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto, and to notify the State of that adoption no later than May 5, 2000. If such notice has not been received by the State by May 5, 2000, this Compact shall be null and void. Failure of the Tribe to maintain the Ordinance in effect during the term of this Compact shall constitute a material breach entitling the State to terminate this Compact… .

Dkt. No. 33-1 at 1-49. Further proof of this interconnectedness comes from the Table of Contents at the outset of the 1999 Compact listing the "Addendum B" TLRO as part of the agreement's terms. *See* Dkt. No. 33-1 at 1-4. Thus, Addendum B should receive the same treatment as other addenda that courts view as being, much like Addendum A to the compact, a mere "modification" or "supplement" to the contract. *Deutsche Bank Sec. Inc. v. Rhoads*, 578 F. Supp. 2d 652 (S.D.N.Y. 2008) (rejecting argument that addendum was a separate contract and noting that "the document refers to itself as an 'addendum,' and it clearly is a modification of or supplement to the Engagement Letter." (*citing* Black's Law Dictionary 38 (7th ed. 1999) (defining "addendum" as "something to be added, esp. to a

document; a supplement")))). The prevailing legal definition of "addendum" is consistent with this judicial understanding, providing that an addendum is "[s]omething to be added, usu. to a document… to alter its contents or give more information." Black's Law Dictionary 45 (10th ed. 2009).

Moreover, the parties and the Ninth Circuit have also rightly treated the TLRO as part and parcel of the 1999 Compacts. In *Coyote Valley II*, 331 F.3d at 1116-17, the Ninth Circuit evaluated whether the State negotiated the TLRO portion of the 1999 Compact in good faith as required by Section 2710(d)(3)(A) of IGRA. As part of that inquiry, the Court analyzed the objective reasonableness of both Section 10.7 in the main body of the compact requiring the execution of the TLRO *and* the TLRO itself. The Court could have excluded the TLRO from the inquiry as a side agreement that is not part of the compacts, but it did not, and instead held that the TLRO was negotiated in good faith under IGRA:

> Finally, Coyote Valley argues that even if the Labor Relations provision itself does not violate IGRA or demonstrate the State's bad faith, the State's insistence that only the specific later-negotiated Tribal Labor Relations Ordinance will satisfy that provision does show bad faith. Although this is a closer question, we continue to disagree with the tribe. … [T]he UTCSC, of which Coyote Valley was a member, met with union representatives and participated in the shaping of the TLRO. Finally, all compacting tribes in California have adopted it. Under these circumstances, and in light of the concessions granted by the State to the tribes, we hold that the State did not act in bad faith by requiring that Coyote Valley do the same.

Id. Finally, it is worth remembering that the TLRO comprised part of the compact that the Secretary of the Interior had to consider whether to approve or disapprove during his statutory-mandated review under Section 2710(d)(8)(A) of IGRA. *See* Dkt. No. 33, ¶ 78.

Despite all of this, the State argues that the TLRO cannot create federal jurisdiction based on this District's factually-distinct decision in *UNITE HERE v. Pala*, 583 F. Supp. 2d at 1198.[5] One of at least two important distinctions in that case is that the court may not have been aware that the TLRO is contained in the 1999 Compacts as "Addendum B"

[5] For additional argument on this issue, Pauma refers the Court to Section II of its opposition to the Union's motion to dismiss, concurrently filed herewith.

in addition to being an identical standalone ordinance under tribal law. To explain, Section 10.7 requires that each signatory tribe execute an exact replica of the TLRO as its own tribal law and maintain it in effect for the duration of the compact. *See* Dkt. No. 33-1, § 10.7. Thus, it appears that the court in *UNITE HERE v. Pala* viewed the TLRO solely as a creation of Pala tribal law, and not also federal law. *UNITE HERE v. Pala,* 583 F. Supp. 2d at 1193 n.1 ("The TLRO adopted by the Pala Band appears to be a straightforward ordinance modeled after labor ordinances enacted by many other gaming tribes."). This much is confirmed by later orders from this District that declined to hear cases arising under tribal law ordinances with no foundation in federal law. *See Harris v. Sycuan Band of Diegueno Mission Indians*, 2009 U.S. Dist. LEXIS 119226, *12 (S.D. Cal. 2009) ("Instead, this action [over a tribal tort claims ordinance] is analogous to that faced by the court in [*UNITE HERE v. Pala*]. In *Unite Here*, the court held that federal question jurisdiction did not exist over an action by a union plaintiff against a tribal defendant seeking to confirm an arbitration award made pursuant to a tribal labor relations ordinance.").

On top of dealing with the application of the tribal ordinance rather than the interpretation of the TLRO portion of the compact, the court in *UNITE HERE v. Pala* also mistakenly assumed that the TLRO never went before the Secretary of the Interior as part of the compact he had a statutory obligation to review. *See* Dkt. No. 33, ¶ 78; *UNITE HERE v. Pala*, 583 F. Supp. 2d at 1198 ("Like *Peabody Coal*, despite the presence of overarching federal regulation, neither the TLRO nor the arbitration award requires federal approval."). Because of this, the Court required UNITE HERE to show a substantial federal question, something that it did not believe enforcement of an arbitration provision under a seemingly independent tribal law provided. *See Id*. at 1197 ("Unlike the *Cabazon* dispute, however, private enforcement of a TLRO arbitration award is farther removed from applying federal law to a State-Tribal dispute involving an explicit IGRA provision or Gaming Compact contingency."). Thus, the Court's focus was on the fact that the dispute before it was about tribal law rather than a federal contract, launched by a private party rather than dealing with two dueling sovereigns. *Id.* at 1198 ("Unite Here's reliance

on *Cabazon* makes more sense in the context of State-Tribal gaming compact disputes, where a federal court is necessary to provide a neutral forum that otherwise might not exist."). If anything, this prior case truly highlights the difference between a dispute regarding the meaning of terms within a gaming compact under IGRA, which necessitates a federal forum, and the run-of-the-mill ones between tribes and private parties that can be more readily dealt with elsewhere. *See id.* ("Where, as here, a private party brings suit, neither litigant is significantly disadvantaged by proceeding in a state or tribal forum.").

B. Jurisdiction also Arises from the Apparent IGRA/NLRA Conflict

Federal courts also have jurisdiction to resolve questions regarding the interrelationship between two clashing statutes. The Eighth Circuit explained that a conflict between two federal statutes provides federal question jurisdiction in order to resolve the conflict. *See Lupiani v. Wal-Mart Stores, Inc*., 435 F.3d 842, 846 (8th Cir. 2006) (compiling cases that addressed conflicts between the NLRA and other federal statutes, like the Labor-Management Reporting and Disclosures Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and a federal criminal statute prohibiting mail fraud (*citing*, *e.g.*, *Smith v. Nat'l Steel & Shipbuilding Co*., 125 F.3d 751, 756 (9th Cir. 1997)). Here, this suit involves a conflict between the terms of a compact negotiated under Section 2710(d)(3)(C) of IGRA and the unfair labor practice process provided for in Section 160(a) of the NLRA. While the waiver alone should suffice to bind the Union to the arbitration process of the TLRO (*see Morris v. Ernst & Young, LLP*, 834 F.3d 975, 984 (9th Cir. 2016)), the backdrop of the case could potentially involve uniquely-federal questions regarding the State assuming jurisdiction over labor issues that the NLRB had long since disclaimed. *See* Dkt. No. 33, ¶¶ 23-41, 72-89; *Fort Apache Timber Co.,* 226 N.L.R.B. 503 (1976) ("exempt[ing tribes] as employers within the meaning of the Act"). Such inherent federal questions can, naturally, only be resolved by the federal courts.[6]

[6] On partial joinder, Pauma opposes the State joining the Union's collateral attack argument due to "the fact situations" of the two being not "sufficiently similar." *Levin Metals Corp. v. Parr-Richmond Terminal Co.,* 781 F. Supp. 1448, 1449 (N.D. Cal. 1991).

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that this Court deny the State'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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