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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,

v.

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

Defendants.

3:16-cv-02660-BAS/AGS

STATE OF CALIFORNIA AND GOVERNOR EDMUND G. BROWN JR.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS/MOTION TO STRIKE

Date: December 11, 2017
Dept: 4B
Judge: The Honorable Cynthia Bashant
Trial Date: N/A
Action Filed: 10/27/2016

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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INTRODUCTION

The Pauma Band of Luiseno Mission Indians (Pauma), asserts two claims against the State of California and Governor Edmund G. Brown Jr. (collectively, the State). The first seeks a declaration that Pauma's Tribal Labor Relations Ordinance (TLRO),[1] rather than the National Labor Relations Act (NLRA), governs the resolution of labor disputes between Pauma and defendant UNITE HERE International (Union). (Second Amended Complaint (SAC) ¶¶ 13, 194). The other alleges breach of the implied covenant of good faith and fair dealing (hereinafter, implied covenant) based on: 1) the State's "inaction" upon learning that the Union is filing unfair labor practice charges with the National Labor Relations Board (NLRB) instead of pursuing the TLRO procedures, and 2) the State's filing of a motion to dismiss rather than consenting to a conditional dismissal. (SAC ¶ 285.)

At its core, however, this suit seeks to adjudicate the question whether "the Union had promised to arbitrate any unfair labor practice charges" pursuant to the TLRO in the 1999 Compact (SAC ¶ 174) and, as a result, "waived its right to litigate [labor] issues before the NLRB" (*see* SAC Prayer). The State has taken no official position on these questions. (SAC ¶ 168.) Nor is the State's position of any consequence, as it possesses no lawful authority to force the Union to pursue one course of action over another, or to compel the NLRB to rescind its post-1999 Compact assertion of jurisdiction over tribal casino enterprises. The dispute is between Pauma and the Union and the NLRB, and neither the State taking a position, or this Court issuing the remedy Pauma seeks against the State, will resolve that dispute. Nonetheless, Pauma attempts to invoke the jurisdiction of this Court in a futile attempt to resolve that dispute.

[1] To comply with section 10.7 of the 1999 Tribal-State Compact (1999 Compact) (SAC, ex. 1), Pauma agreed to adopt the TLRO which is attached thereto as Addendum B and to maintain the TLRO during the term of the 1999 Compact.

ARGUMENT

I. FEDERAL SUBJECT MATTER JURISDICTION IS LACKING

A. Pauma's Claims Against the State Do Not Arise Under Federal Law

Subject matter jurisdiction is a threshold matter. *See Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380-81 (9th Cir. 1988). Pauma bears the burden of establishing this Court's jurisdiction. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). Responding to the State's motion to dismiss on jurisdictional grounds, Pauma centers its discussion on two asserted bases for jurisdiction, both allegedly grounded on the existence of a federal question. Pauma first mischaracterizes the State's jurisdictional arguments as being premised on the view that the TLRO is not part of the 1999 Compact, and then proceeds to knock down that view. The State does not argue that "the TLRO is not actually part of the 1999 Compact," as Pauma claims. (ECF No. 38, p. 32.) The State merely described the TLRO as being attached to the 1999 Compact as "Appendix B." But the TLRO being part of the 1999 Compact does not end the jurisdictional inquiry, for although the compact requires a process for addressing the rights of tribal casino employees, that alone does not establish that this action involves a dispute between Pauma and the State under the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721 (IGRA) so as to confer federal question jurisdiction.

In challenging Pauma's assertion of federal question jurisdiction, the State lays emphasis on the true nature of the dispute, which is a non-IGRA-based dispute arising from *the Union's decision* to resolve labor disputes between it and Pauma through the NLRB and *the NLRB's decision* to assert jurisdiction over those disputes. The dispute is not one between Pauma and the State arising from the 1999 Compact or involving a violation of IGRA. As there is no IGRA-based dispute between the State and Pauma alleged in the SAC, there is no substantial

federal question underlying the declaratory relief claim, and the Court therefore lacks federal subject matter jurisdiction over that claim.[2]

Pauma raises a new basis for federal question jurisdiction in its opposition. Pauma contends that the Court has jurisdiction to resolve a conflict between the procedures in the TLRO and those in the NLRA. Pauma relies on cases finding federal question jurisdiction to resolve conflicts between federal statutes. Those cases are inapposite because the TLRO is not a federal statute.

With regard to Pauma's claim for breach of the implied covenant, while breach of an IGRA-based compact may support the exercise of federal jurisdiction, the basis for Pauma's claim is so insubstantial as to not involve a federal question, and considering that it was added solely in an attempt to create federal jurisdiction after the State informed Pauma that its original complaint failed to allege the existence of a dispute between them (*see* SAC ¶ 171), the claim warrants dismissal for lack of jurisdiction under the authority stated in *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 666 (1974), and 28 U.S.C. § 1359 (court lacks jurisdiction where a party is collusively joined to invoke federal jurisdiction).

B. The Declaratory Relief Claim Involves No Live Case or Controversy

Pauma suggests that the State's post-suit filing of a motion to dismiss and rejection of a conditional dismissal offer may serve to establish the existence of a dispute that is ripe for judicial review.[3] The suggestion is unreasonable on its face.

[2] Any suggestion that federal question jurisdiction exists because the declaratory relief claim involves interpretation of the 1999 Compact also ignores the absence of any dispute between Pauma and the State over the meaning of any compact provision. Rather, as stressed by the State, the actual dispute is between Pauma and the Union and the NLRB over the NLRB's assertion of jurisdiction over labor disputes at tribal casinos.

[3] Pauma ascribes various motives to the State's decision to reject the conditional dismissal offer and to proceed with this motion. To be clear, the State has communicated nothing to Pauma about how it would view any judgment issued

First, such a rule would encourage parties to evade the constitutional ripeness bar through artful drafting of complaints and making trivial settlement offers assuming they will be rejected. Moreover, post-suit conduct, even the filing of new litigation, does not serve to create a "case or controversy" with respect to pending litigation because "the relevant inquiry is whether a case or controversy existed" when the complaint was filed. *See Juniper Networks, Inc. v. Altitude Capital, L.P.*, No. C 09-03449, 2010 U.S. Dist. LEXIS 131668, at *25-32 & nn.4, 5 (N.D. Cal. Dec. 13, 2010) (*Juniper Networks*). *Juniper Networks* concerned patent litigation under the Declaratory Judgment Act. *Id*. at *24. Although a distinct test for ripeness applies to cases under the Act,[4] the "actual case or controversy" element carries the same meaning as the "cases" and "controversies" that are justiciable under Article III, section 2 of the United States Constitution. *Id*. at *25. *Juniper Networks* held that post-complaint conduct involving the filing of litigation did not retroactively create a case or controversy in a previously-filed action, because there was no case or controversy at the time the earlier litigation was filed. *Id*. at *32 n.4. For the same reason, the court found the presentation of a covenant not to sue offered by one party to another following the initiation of litigation to be irrelevant to the existence of a case or controversy. *Id*. at *35 n.5.

Pauma makes reference to "risks" it takes of being deemed in breach if it fails to abide by the TLRO. This does not establish that Pauma faces immediate and certain injury from the State giving rise to a case or controversy. Only issues that are "definite and concrete, not hypothetical or abstract" will satisfy the Article III, section 2 requirement. *See Thomas v. Anchorage Equal Rights Comm'*, 220 F.3d 1134, 1139 (9th Cir. 2000) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). For the same reason, Pauma's concern that the NLRB may hold it in

by this Court if the State were not a party, or about why the State declined the offer.

[4] In its opposition, Pauma applies the test relevant to the Declaratory Judgment Act. (ECF No. 38, p. 15.)

contempt if it refuses to comply with the Board's rules and orders lacks definiteness and concreteness, and, furthermore, is not relevant to the question whether Pauma has presented a justiciable dispute between itself and the State. Likewise, even if other recent gaming compacts have included labor relations provisions, that has no relevance as to whether there is a justiciable dispute between Pauma and the State.

II. STATE DEFENDANTS' SOVEREIGN IMMUNITY TO PAUMA'S CLAIMS IS PRESERVED

A. California Government Code Section 98005's Limited Waiver is Inapplicable to Actions Seeking Declaratory Relief and to Actions For Damages

California Government Code section 98005's limited waiver of sovereign immunity is limited to three types of claims against the State of California: 1) those arising from the State's refusal to enter into negotiations for the purpose of entering into a tribal-state compact; 2) those arising from the State's refusal to conduct those negotiations in good faith; and, 3) those alleging violation of the terms of any tribal-state compact. Cal. Gov't Code § 98005.

A state retains its Eleventh Amendment immunity, and is subject to suit in federal court only to the extent it has expressly and unequivocally consented to be sued. *See Green v. Mansour*, 474 U.S. 64, 68 (1985). Pauma's declaratory relief claim, which seeks a determination that the Union may not pursue remedies before the NLRB, and is based on the State "feigning indifference" to and its "inaction" in response to the Union's decision to forego the TLRO procedures, does not fit within any of the three classes of claims to which the statutory waiver applies. Pauma's contention that California Government Code section 98005's waiver for claims based on violation of the terms of the 1999 Compact "naturally includes" any claim for declaratory relief is not supported by the express language of Government Code section 98005 or by *Hotel Employees & Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585 (1999) (*Hotel Employees*). *Hotel Employees* did not strike down section 98005, but neither did it analyze the scope

of the statutory waiver.

Pauma's breach of the implied covenant claim might fit within the third class of claims described in California Government Code section 98005, except that section 9.4(a)(3)(c) of the 1999 Compact places a limit on the operation of Government Code section 98005 for claims based on breach.[5] Even assuming section 98005 waives the State's sovereign immunity to Pauma's claim for breach of the implied covenant notwithstanding section 9.4(a)(3)(c), section 98005 does not expressly waive the State's sovereign immunity from the money damages Pauma seeks as a remedy for that claim. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) ("Waivers of immunity must be 'construed strictly in favor of the sovereign,' . . . and not '[enlarged] . . . beyond what the language requires.'" (Citation omitted.)) Here, the 1999 Compact will determine the scope of the State's waiver of sovereign immunity.

B. The Limited Sovereign Immunity Waiver in the 1999 Compact Does Not Extend to Suits Involving Third Parties Who Are Not Indispensable Parties or to Money Damage Claims

To avoid the consequences of compact section 9.4(a)(3) in this litigation involving a third party, Pauma argues that the Union should be considered an "agent" of the State under compact section 2.17. Section 2.17 defines "State" as the

[5] The State's argument would not preclude compact tribes from suing for failure to negotiate in good faith, as Pauma contends. The 1999 Compact provides that disputes subject to court resolution include enforcing IGRA's obligation to negotiate in good faith. (1999 Compact §§9.1(d) & 12.3.) Pauma's reliance on *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 813 F.3d 1155 (9th Cir. 2015), is also inapt. There, the court relied on the 1999 Compact as the source of the waiver and did "not reach whether [section 98005] would also apply." *Id*. at p. 1171 n.12. The Court should also reject Pauma's argument that compact section 9.4(a) is an invalid "implicit" disclaimer of the Government Code section 98005 waiver. Compact section 9.4(c) explicitly provides that no other "express or implied" waivers are granted. Finally, the 1999 Compact provides that the presence of language in another compact shall not be a factor in its construction (1999 Compact §15.3) and thus the Court should disregard Pauma's references to terms in other compacts.

State of California or an authorized official "or agency thereof." The definition does not purport to cover "agents" in the principal-agent sense of the term. Under that definition, the Union is not an "agency" of the State of California. It is neither a "Tribe" nor the "State" under compact section 9.4(a)(3). It is a third party, and, under section 9.4, its presence vitiates the limited sovereign immunity waiver.

Pauma next claims that under 1999 Compact section 9.4(a)(3), a party other than the tribe's or the State's presence in litigation does not abrogate the waiver if "failure to join the party would deprive the court of jurisdiction." This provision applies to parties whose interests are such that in their absence, complete relief cannot be accorded and applies to the compulsory joinder of parties as envisioned by Federal Rule of Civil Procedure 19. In litigation over the size of the 1999 Compact license pool, the State moved to dismiss for failure to join the other 1999 Compact tribes as required parties under Rule 19 because a potential change in the size of the pool would affect the number of gambling devices available to all 1999 Compact tribes. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty v. California*, 547 F.3d 962, 970 (9th Cir. 2008) (*Colusa I*). The Ninth Circuit held that the fact that the litigation's outcome may have a financial impact on "the non-party tribes [was] not sufficient to make those tribes required parties." *Id*. at 971. Pauma's cited cases in support of its contention that the Court would lack jurisdiction if the Union were not joined are not analogous. *California Gambling Control Comm'n v. Sides Accountancy Corp. et al.*, No. 01AS07872 (Sacramento Sup. Ct. filed Dec. 27, 2001), did not involve litigation between the State and any tribe under the 1999 Compact. That case was filed after the commission began administering the license draws pursuant to an executive order. *See*, *Colusa*, at 967. In *California v. Iipay Nation of Santa Ysabel*, the State initiated an action "against the Tribe and other defendants who are agencies or officials of the Tribe" and no third parties were involved. 2015 WL 2449527, at *1 (S.D. Cal. May 22, 2015).

Joinder of third parties, under compact section 9.4(a)(3) or otherwise, was not at issue in either case.

Pauma declares that the Union's absence would deprive the Court of jurisdiction but fails to provide any analysis under Rule 19 to justify its assertion that the Union is a necessary party without whom the Court could not proceed to determine the action and afford complete relief. This is Pauma's burden to demonstrate. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).[6]

Finally, Pauma may not proceed on its declaratory relief claim under the doctrine of *Ex parte Young*. *Ex parte Young*, 209 U.S. 123 (1908). Suits under *Ex parte Young* involve challenges to the legality of a state official's ongoing and direct actions taken in violation of federal law, or in enforcing an unconstitutional state law, and are limited to suits seeking prospective injunctive relief. *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1051 (9th Cir. 2001). Pauma does not allege that Governor Brown is taking ongoing, direct actions in violation of IGRA, nor does Pauma seek prospective injunctive relief. The *Ex Parte Young* exception does not apply.

III. PAUMA FAILS TO STATE A CLAIM FOR BREACH OF THE IMPLIED COVENANT

In its motion, the State observed that Pauma is asserting two factual bases to support its claim for breach of the implied covenant, and provided citations to the relevant allegations in the SAC[7] – the first being the State's alleged inaction to oblige the Union to comply with the TLRO, and the second being the State's rejection of a conditional dismissal offer, which Pauma characterizes as an "attempt by the State to prevent [Pauma] from obtaining clarity about the terms of the 1999

[6] The State may raise lack of subject matter jurisdiction at any time. *United States v. Cotton*, 535 U.S. 625, 630 (2002).

[7] See ECF No. 36-1, at pp. 8-9.

Compact." (SAC ¶ 173.) Thus, it is not clear why Pauma's opposition accuses the State of "coyly pretending [the claim] is solely based on a refusal to accept a supposed settlement offer." (*See* ECF No. 38, p. 18.) Pauma's own description of the factual bases supporting its breach claim largely mirrors the State's assessment of the claim. (*See*, *e.g.*, *id*. at 20: l. 24 through 21: l. 1, 22, ll. 4-12 & 18-27, 23, ll. 11-13.) In any case, the SAC speaks for itself.

The parties do not disagree about the general legal contours of claims for breach of the implied covenant. In short, the implied covenant imposes a burden that requires each party to a contract to "'refrain from doing anything to injure the right of the other to receive the benefits of the agreement.'" *San Jose Prod. Credit Ass'n v. Old Republic Life Ins. Co.*, 723 F.2d 700, 703 (9th Cir. 1984) (quoting *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 818 (1979)). But the scope of conduct required or prohibited is "circumscribed by the purposes and express terms of the contract." *G.P.P., Inc. v. Guardian Prot. Prods.*, 1:15-cv-00321-SKO, 2017 U.S. Dist. LEXIS 7056, at *45 (E.D. Cal. Jan. 18, 2017) (citing *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 343 (1992)).

Next, the parties largely agree that general principles of federal contract law govern interpretation of the 1999 Compact. *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066 (9th Cir. 2010) (*Colusa II*). In quoting from *Colusa*, however, Pauma omits the court's further observation that, from a practical standpoint, a court may also "rely on California contract law and Ninth Circuit decisions interpreting California law" unless there is a discernable difference between California and federal contract law. *Id.* (citing *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006)); accord *San Pasqual Band of Mission Indians v. State of California*, 241 Cal. App. 4th 746, 757 (2015). The *Colusa* court's decision relied upon both federal and California statutory and case law throughout. Finally, the State agrees that the Restatement provides guidance for the courts, but notes that it is not itself black-letter law.

The SAC alleges no action by the State that deprived Pauma of the benefits of the 1999 Compact, or inaction by the State that the 1999 Compact presupposes it will take to accomplish its purposes. The 1999 Compact contains no contractual provision that would impose on the State an implied duty to seek to direct or compel a union's activities in connection with a TLRO, or to not defend against or waive defenses available in litigation filed against it. The State's efforts to be dismissed from this litigation cannot reasonably be said to equate to an effort to "block" the TLRO, or to represent a "repudiation" of the TLRO.[8] Pauma's claim for breach of the implied covenant fails to state a claim because it fails to relate the alleged breach to any express promise or duty underlying the 1999 Compact.

CONCLUSION

The State respectfully requests that its motion to dismiss the SAC be granted, without leave to amend.

Dated: December 4, 2017

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[8] Indeed, as Pauma itself acknowledges, the State continues to negotiate with other tribes for labor provisions in the form of TLROs.