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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

REPLY IN SUPPORT OF PLAINTIFF PAUMA BAND OF MISSION INDIANS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT PURSUANT TO COURT'S SEPTEMBER 28, 2018 ORDER [ECF No. 43]

Date: December 17, 2018
Time: TBD
Dept: 4B
Judge: The Honorable Cynthia Bashant

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Much of the discussion in the opposition briefs filed by that State of California and Unite Here International Union focuses on *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997); and the claim that this case does not present a substantial enough federal question to warrant federal jurisdiction. With the motion for leave highlighting multiple other grounds for jurisdiction that go largely unchallenged, this brief will advance two important points to dispel any notion that federal jurisdiction does not exist under *Cabazon.*

A. THE TLRO IS A SUBSTANTIAL TERM OF THE COMPACT – FACTUALLY

The first of these has to do with the issue of "substantial," which essentially contends that the term of the compact the Pauma Band of Mission Indians ("Pauma" or 'Tribe") has presented to the Court for interpretation and enforcement is *in*substantial or not a material term of the agreement. However, nothing could be further from the truth. In fact, the TLRO may be the *most* important term of the compact from the perspective of the party who wrote the agreement – *i.e.*, the State – if one tracks the language of the compact. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California,* 629 F. Supp. 2d 1091, 1115 (E.D. Cal. 2009) (explaining that "the State's negotiation team actually drafted the language in the Compact"). As to that, only certain terms of the compact impose repercussions on the other party if there is a failure of compliance. With the State being the legally-acknowledged author of the document, one may assume that the harshest punishments for non-compliance accompany the revenue sharing provisions. Yet, that is not the case. For both the "Revenue Sharing Trust Fund" and "Special Distribution Fund" sections of the compact, the repeated failure, not just the failure, of a tribe to make its requisite revenue sharing payments simply means that the tribe is unable to conduct "any Gaming Activity authorized by this Compact" until it satisfies its past due payment obligations:

> Sec. 4.3.2.3. The Tribe shall not conduct any Gaming Activity authorized by this Compact if the Tribe is more than two quarterly contributions in arrears in its license fee payments to the Revenue Sharing Trust Fund.

(ECF No. 33-1, § 4.3.2.3) Now, compare this with that prefatory language for the Tribal Labor Relations Ordinance ("TLRO") – and the arbitration clause therein – that explains that the tribe must abide by those terms, without deviation or interruption, for the duration of the term of the compact, and the failure to do so "shall constitute a material breach entitling the State to *terminate* this Compact." (ECF No. 33-1, p. 50) In other words, the TLRO is the *only* term in the compact that explains the failure of performance automatically constitutes a material breach. Thus, according to the very language of the agreement, the TLRO provisions are not the twentieth, or tenth, or fifth most important part of the compact – they are the single most important one. If a federal court lacks the power to declare the terms of the TLRO then it quite simply lacks the ability to review any terms within the compact.

B. MATERIALITY DETERMINATION IS INAPPROPRIATE HERE – LEGALLY

What the above discussion hopefully shows is that determining whether or not a provision in a compact is a material or substantial term is a rather fact intensive analysis and one that is inappropriate for resolution on a motion to dismiss in most cases *even if* the issue has become the basis for gauging jurisdiction. In fact, cases that deal with materiality in all aspects of the law make this point that "materiality… is a mixed question of law and fact that should be determined by the trier of fact." *Rose v. State Farm Fire & Cas. Co.,* 2012 U.S. Dist. Lexis 117066, *23-*24 (S.D. Ohio 2012); *see, e.g., Insurance Underwriters Clearing House, Inc. v. Natomas Co.,* 184 Cal. App. 3d 1520, 1526-27 (1st Dist. 1986) ("Ordinarily the issue of materiality is a mixed question of law and fact, involving the application of a legal standard to a particular set of facts" and should be resolved by the trier of fact). The only situation in which materiality should be legally resolved on a motion to dismiss is when reasonable minds could not differ on concluding that the matter under review is so obviously trivial or unimportant. *See, e.g., Fecht v. Price Co.,* 70 F.3d 1078, 1081 (9th Cir. 1995); *Steroid Hormone Product Cases,* 181 Cal. App. 4th 145, 156 (2d Dist. 2010). Yet, the quantum of evidence before the Court is Pauma pointing to express language of the agreement showing non-compliance with the

TLRO will result in a material breach and the defendants simply arguing that the term is unimportant. The weight of the evidence supports federal jurisdiction unless and until the defendants can actually show at a later point in the proceeding that the TLRO is just an insignificant term of the compact.

C. Enforceability of a Compact Arbitration Clause in light of a Subsequent Change in Federal Law

If there is any doubt that a federal court has the jurisdiction to entertain a compact suit in which the materiality of a term is in dispute then the Court need not look any further than the remarkably analogous case of *Citizen Potawatomi Nation v. Oklahoma,* 813 F.3d 1226 (10th Cir. 2018) ("*CPN*"); in which the United States Court of Appeals for the Tenth Circuit held that it had jurisdiction to address the enforceability of an arbitration clause in a compact in light of a subsequent change in the law. In *CPN,* the Tenth Circuit faced a situation in which the State of Oklahoma and a tribe executed a gaming compact containing an arbitration-based dispute resolution procedure that nevertheless allowed either party to "bring an action against the other in a federal district court for the *de novo* review of any arbitration award." *Id.* at 1228. Subsequent to the execution of the compact, the Supreme Court of the United States issued an opinion in *Hall Street Associates, LLC v. Mattel, Inc.,* 522 U.S. 576, 583-84 (2008), in which it held that the Federal Arbitration Act "precludes parties to an arbitration agreement from contracting for *de novo* review of the legal determinations in an arbitration award." *Id.* The question for the Tenth Circuit then became "how to treat the Compact's *de novo* review provision given the Supreme Court's decision in *Hall*." *Id.* On the one hand, if *Hall* did not have any impact, then the Tenth Circuit could declare that the *de novo* review provision was still legally valid. On the other, if *Hall* did have an impact, then the Tenth Circuit would have to invalidate the *de novo* review provision and possibly the entire connected portion of the compact if the provision at issue was a material part of that agreement. *Id.* at 1235-39.

As part of the discussion, the Tenth Circuit made sure to check whether it had jurisdiction to look into the issue on appeal of the interpretation and enforceability of the

arbitration clause. For the Tenth Circuit, that issue was simple, almost a formality, and a discussion that was largely relegated to a footnote in the opinion. According to the Tenth Circuit, the thirty-years of built up case law under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., made it clear that interpreting tribal/State gaming compacts is the province of federal courts because the agreements "were the creation of federal law, and IGRA prescribes the permissible scope of a Tribal-State compact." *Id.* at 1239 (quoting *Gaming Corp. of Am. v. Dorsey & Whitney,* 88 F.3d 536, 546 (8th Cir. 1996); and citing, e.g., *Forest County Potawatomi Cmty. of Wisc. v. Norquist,* 45 F.3d 1079, 1082 (7th Cir. 1995) (holding federal jurisdiction was proper and noting rights flowing from a gaming compact are federal rights)). Because of that, the Tenth Circuit was empowered to interpret the compact and determine how the arbitration clause fit into existing federal law.

This case is no different. The State of California and Pauma (along with sixty-plus other tribes) executed the compacts in or around 1999, a point in time at which the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*., did not apply to tribes on their reservations. *See, e.g., Fort Apache,* 226 N.L.R.B. 503 (1976). Due to that state of affairs, the compact not only incorporates the federal labor law protections of the NLRA but also creates a "binding" and "exclusive" arbitration process through which *any* of the main stakeholders involved in the labor front at the tribal casino are supposed to resolve issues related to said protections. (ECF No. 33-1, pp. 54-62) On this point, there can be no genuine dispute, as the negotiator of such language Unite Here, in judicially-noticeable federal court filings that arose shortly after the execution of the compacts, acknowledged that the "TLRO … substitutes for the National Labor Relations Act" and would be enforceable even if there would one day be "NLRB jurisdiction over the Indian casinos." (ECF Nos. 33-31 & 33-32) Yet, as is too often the case when outsiders deal with Indian tribes, these promises turned out to be not worth the paper they were written on, as Unite Here then pushed the National Labor Relations Board ("NLRB") to overturn a sixty-year-old position and apply the Act to Indian tribes. *San Manuel Indian Bingo & Casino v.*

NLRB, 475 F.3d 1306 (D.C. Cir. 2007). *That* quest continues to this date and the Supreme Court will soon have an opportunity to once and for all address the issue of whether the NLRB can lawfully assert jurisdiction over Indian tribes – in general or possibly in a situation like this where the party invoking the jurisdiction of the administrative agency had previously covenanted to address such issues through a "binding" and "exclusive" arbitration process.

The response from Unite Here to the quickly-developing backdrop is to inaccurately portray that Pauma is trying to pin jurisdiction on some action that may or may not come out of the Supreme Court petition. This is incorrect. What Pauma is saying is that the Court plainly has jurisdiction right now under *Bay Mills, CPN, Cabazon,* and countless other authorities, but it should stay its hand until the Supreme Court can definitively explain what the law is so the rest of the proceeding can unfold in an orderly fashion. If the Supreme Court holds that the NLRB does not have jurisdiction over Indian tribes, then Unite Here will be hard pressed to explain why its conduct does not amount to multiple contractual breaches the entitle Pauma to damages. *See Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 94 (1993) (discussing "the fundamental rule of 'retrospective operation' that has governed 'judicial decisions… for nearly a thousand years" (quoting *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) (Holmes, J., dissenting))). Conversely, if the Supreme Court holds that the NLRB does in fact have jurisdiction over Indian tribes, then, depending upon the breadth of the Supreme Court's opinion, the focus of the subsequent proceedings will likely be upon whether the execution of the "binding" and "exclusive" arbitration process of the TLRO waived or otherwise precluded, at least initially, the union's right to file charges directly with the NLRB. Thus, from Pauma's perspective, the jurisdictional issue is simple; trying to proceed with the disposition of the case before the Supreme Court rules on the applicability of the NLRA is not.

RESPECTFULLY SUBMITTED this 10th day of December, 2018

PAUMA BAND OF MISSION INDIANS

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