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Third-Party Plaintiff
TETRA TECH, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEORGE ENGASSER, an individual,

Plaintiff,

vs.

TETRA TECH, INC., a Delaware Corporation; and DOES 1 through 100, inclusive,

Defendants.

TETRA TECH, INC.,

Third-Party Plaintiff,

vs.

MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE, an unincorporated instrumentality of the Mechoopda Indian Tribe of Chico Rancheria,

Third-Party Defendant.

Case No. 2:19-cv-07973-ODW-PLA

Assigned to Hon. Otis D. Wright, II

TETRA TECH, INC.'S OPPOSITION TO MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE'S MOTION TO DISMISS AMENDED THIRD-PARTY COMPLAINT

Date: August 17, 2020
Time: 1:30 PM
Location: Courtroom 5D

Complaint filed: September 13, 2019
Trial Date: April 27, 2021

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

Rules

Other Authorities

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I. INTRODUCTION

Mechoopda Cultural Resource Preservation Enterprise's ("MCRPE") Motion to Dismiss reflects a striking disregard for its contractual commitments and for fair business practices. MCRPE negotiated a multi-million dollar Professional Services Agreement ("PSA") to provide cultural services, which included specific terms it demanded, including "sole control" over the "manner and means" of performing its services. As a necessary part of this agreement, MCRPE agreed to a standard indemnification clause that required it to indemnify Tetra Tech, Inc. ("Tetra Tech") against all losses, damages, liabilities, and claims caused by MCRPE's intentional misconduct or sole negligence. Plaintiff George Engasser ("Plaintiff")'s claims arising from his employment with MCRPE—which comprise the underlying action—fall squarely within this provision.

Instead of honoring the indemnification agreement, MCRPE hides behind its purported sovereign immunity. This tactic does not work, however, because MCRPE expressly consented to suit in its agreement with Tetra Tech. The PSA contains a dispute resolution provision ("DRP") under which MCRPE ineluctably consented to litigation of disputes under the contract. The DRP was drafted to allow for litigation as an alternative, a fact underscored by the admission of MCRPE's Rule 30(b)(6) witness that the clause was included specifically to mitigate litigation risk. By its own terms, the DRP is triggered "***[p]rior to commencing litigation***," requiring an aggrieved party to initiate a conference of the parties to resolve the dispute before filing a lawsuit. Both parties agreed that any dispute related to the PSA not resolved by conference could then be submitted to "[a]ny court with competent jurisdiction." There is no reading of this provision other than an express consent to be sued.

MCRPE's contention that this Court is not a "court with competent jurisdiction" would eviscerate the DRP because there are no judicial forums whatsoever, "where a [litigant] can assert a civil claim against [] MCRPE or the Mechoopda Indian Tribe of

[] Chico Rancheria." If this Court is not a "court with competent jurisdiction," there are no courts *at all* that can hear this dispute.

Further, MCRPE's reliance on a boilerplate assertion of sovereign immunity in the PSA does not reverse its consent. At best, the statement in Section IV.D. of the PSA—which provides that, "[n]othing herein shall be construed as a waiver of sovereign immunity"—is a general assertion devoid of any meaning. The reading MCRPE espouses directly contradicts the more specific language contained in the DRP contemplating litigation. Moreover, it does not even identify the entity on whose behalf immunity is asserted. In any event, as the Tribe has admitted, the DRP was necessary to avoid the need to resolve disputes regarding the contract by litigation. The Court can resolve any ambiguity here by recognizing that the DRP is a consent to be sued in an action to enforce the contract, while section IV.D is a general assertion of sovereign immunity in other contexts.

MCRPE's knowing and intentional waiver of its sovereign immunity for purposes of the matters covered by the PSA is supported by its extensive background and experience drafting and negotiating with tribal monitoring contracts similar to the PSA. MCRPE was not strong-armed into the PSA; it was represented by a cultural consultant with 20 years' experience negotiating similar agreements and by knowledgeable and experienced legal counsel. Further, MCRPE took the laboring oar drafting the PSA from prior similar agreements and negotiating numerous changes to the terms and conditions directly with the California Department of Resources Recycling and Recovery ("CalRecycle") over a three-month period. By the time the PSA was executed, key representatives from virtually every level of MCRPE had thoroughly reviewed, discussed, deliberated upon, and approved the PSA. There is no honest argument that MCRPE did not understand the agreement with respect to the DRP and indemnification provision.

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In short, MCRPE should be accountable to the deal it negotiated rather than hiding behind its sovereign immunity. This Court should deny the Motion to Dismiss.

II. STATEMENT OF FACTS

A. California Engages Tetra Tech To Coordinate The Clean-Up Effort in the Wake of the Destructive 2018 Camp Fire

In 2018, the Camp Fire burned 153,000 acres of Butte County in Northern California, killing 85 people and destroying 14,000 homes, making it the deadliest and most destructive wildfire in California history.[1] The fire left an environmental disaster in its wake; the destruction of homes and businesses left behind a tainted water supply and soil polluted with toxic chemicals.[2]

CalRecycle, the government agency responsible for coordinating the response to the disaster, engaged Tetra Tech, a consulting and engineering firm based in Pasadena, to coordinate the abatement and removal of debris left behind by the Camp Fire. Tetra Tech, Inc.'s Amended Third-Party Complaint, Exhibit ("Exh.") A, PSA, I. Description of Professional Services (ECF No. 31). For more than 20 years, Tetra Tech has provided expert support to communities seeking to prepare for, respond to, and recover from natural and human-caused disasters. In California, this business has primarily involved wildfire response. Prior to the Camp Fire, Tetra Tech had been engaged to provide similar services in response to 22 wildfire-related disasters.

[1] "The deadliest, most destructive wildfire in California's history has finally been contained," Washington Post (Nov. 26, 2018) (accessible at https://www.washingtonpost.com/nation/2018/11/25/camp-fire-deadliest-wildfire-californias-history-has-been-contained/); "Camp Fire – 2018 California Wildfires," United States Census Bureau (Nov. 2018) (accessible at https://www.census.gov/topics/preparedness/events/wildfires/camp.html).

[2] 'The Camp fire clean-up is almost complete. What's next for Paradise?" The Press-Democrat (Oct. 10, 2019) (accessible at https://www.pressdemocrat.com/article/news/the-camp-fire-clean-up-is-almost-complete-whats-next-for-paradise/).

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B. CalRecycle Requires Tetra Tech To Contract With MCRPE For Tribal Cultural Monitoring Services

Much of the property burned by the Camp Fire included the ancestral land of several federally recognized indigenous groups. Among these groups is the Tribe. In order to monitor and facilitate the protection of tribal resources and artifacts, CalRecycle directed Tetra Tech to execute a tribal monitoring services agreement, the PSA at issue, with MCRPE. Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, I. Description of Professional Services (ECF No. 31).

In January 2019, at the request of the Tribe, CalRecycle provided MCRPE with a standard tribal monitoring services agreement that included the basic terms and conditions of the project, the proposed scope of work, and work plan. Declaration of Betty Kamara ("Kamara Dec."), ¶ 5. Between January 2019 and March 12, 2019, when the PSA was executed, MCRPE proposed numerous changes to this initial draft, including terms related to the scope of the work, tribal protocols, work plan, and tribal monitoring rates and compensation. Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 37:6-37:24; 54:16-55:9; Exh. C (MCRPE's Responses to Tetra Tech's Interrogatory No. 1)). Each draft and new term was reviewed and negotiated on behalf of MCRPE by its legal counsel and the project manager. Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 55:6-55:9; 56:7-56:12; 62:10-62:21). The Tribal Council and Board of MCRPE held final authority over execution of the PSA and weighed in during internal discussions and deliberations over material terms of the contract, such as the tribal monitoring rates and compensation related terms. Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 88:14-88:23).

By contrast, Tetra Tech was specifically barred from negotiating any changes to the tribal monitoring rates, labor costs, or overall compensation with MCRPE since CalRecycle prohibited it from doing so. Those terms were negotiated and agreed to directly by MCRPE and CalRecycle. Kamara Dec., ¶ 7.

On March 12, 2019, Tetra Tech and MCRPE executed the Professional Services Agreement at issue. *See* ECF No. 31, Ex. A. Robyn Forristel, a Board member of MCRPE with actual and apparent authority to bind MCRPE, executed the PSA on behalf of MCRPE.

C. MCRPE's Contract With Tetra Tech Requires it to Indemnify Tetra Tech, And Provides For Enforcement in a "Court with Competent Jurisdiction"

a. MCRPE Required "Sole Control" over the Manner and Means of Performing its Services and its Employees.

At MCRPE's insistence, the PSA kept MCRPE and Tetra Tech separate and independent from one another in every respect. Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 76:12-77:22). Under the PSA, MCRPE had "sole control of the manner and means of performing services under the Agreement" and was to complete the services required "according to its own means and methods of work." Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, Tribal Monitor Scope of Work and Tribal Protocols and Cost to Implement.

Thus, the PSA required MCRPE to:

- Provide workers' compensation coverage to its own officers, employees, and agents;
- Assume any risks related to its own equipment, labor, materials, or services;
- "[C]omply with all applicable laws, orders, citations, rules, regulations, standards, and statutes" in performing the Subcontract;
- Accept sole responsibility for the safety of its employees to perform the work in a safe and lawful manner; and
- Accept sole responsibility for any claim made by its own employees, agents, or subcontractors for wages, employment benefits, or insurance.

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Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, Terms and Conditions, I.A., II.A., II.B.

MCRPE's independence and exclusive control over all aspects of the project was a critical requirement for the Tribe both because of its concern over its cultural resources, and because of the Tribe's legal responsibility under Section 106 of the National Historic Preservation Act to address and mitigate any damage to cultural artifacts and resources caused by the clean-up work. Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 76:12-77:22).

Under the PSA, and as a matter of practice, Tetra Tech had no ability to control, and in fact did not, exercise any control whatsoever over MCRPE's employees. Kamara Dec., ¶ 8. MCRPE had exclusive authority to hire, discipline, pay, or terminate any MCRPE employee in connection with services provided under the PSA. Kamara Dec., ¶ 8. MCRPE's fee for these terms was not to exceed $33,821,771.36.

b. In Exchange for its Control and Independence, MCRPE Agreed to Indemnify Tetra Tech for Claims Arising from Misconduct or Negligence, and to Submit all Disputes Related to the PSA to a Court of Competent Jurisdiction.

Consistent with these terms, MCRPE agreed to bear all risks associated with its own services, labor, and materials through an indemnification clause that required MCRPE to indemnify Tetra Tech against all losses, damages, liabilities, and claims caused by MCRPE's intentional misconduct or sole negligence. Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, Terms and Conditions, II. B.

The PSA sets forth an extensive procedure that the Parties are required to follow to resolve any claims arising from the PSA, as follows:

> Dispute Resolution. Except for actions for nonpayment or breach of confidentiality, all claims, disputes, and other matters in controversy between the Parties arising out of or in any way related to this Agreement shall be submitted

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> as a condition precedent to other remedies provided by law. **Prior to commencing litigation**, the Party seeking relief shall provide the other Party with a written statement settling forth the matters in dispute and request that the Parties meet and confer at a location where the Project is located, unless another location is mutually agreed upon . . . in order to make a good faith attempt to resolve the dispute between the Parties. . . . [T]he Parties agree that statements (including but not limited to any admissions) made during the meet and confer process are confidential and may not be relied upon or introduced as evidence for any purpose, including impeachment, in **any legal, equitable or other proceeding** . . . Any agreement that is reached during the meet and confer process, however, is not confidential and **may be enforced** as a modification of the Agreement without further obligation to meet and confer. Notwithstanding the foregoing, any evidence otherwise subject to discovery or otherwise admissible **shall not be protected from discovery or from being admitted into evidence** simply as a result of it having been used in connection with the meet and confer process. **Any court with competent jurisdiction** shall have the authority to enforce this provision and to determine if the meet and confer process has been satisfied.

Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, Terms and Conditions, IV. F (emphasis added)). Under the PSA, the first step to resolve any disputes arising from the PSA is through a confidential meet and confer process at the site of the project. *Id.* This discussion must take place "[p]rior to commencing litigation" and must be kept confidential. *Id.* During her deposition, Ms. Reyes, MCRPE's Rule 30(b)(6) witness testified that the DRP was included in the PSA "[t]o have a different method of trying to resolve things instead of having to go to court." Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 64:16-65:4).

Barring settlement, the Parties agree to submit their claims before a "court with competent jurisdiction." Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, Terms and Conditions, IV. F.

D. The Underlying Action Emerges From MCRPE's Failure To Pay Overtime Wages To Its Tribal Monitors

Plaintiff worked for MCRPE as a tribal monitor on the Camp Fire project at the rate of $50 per hour. MCRPE charged Tetra Tech an hourly rate for each tribal monitor

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which ranged from $104.85 per hour to $116.19, depending on the personnel used. It is undisputed that MCRPE paid Engasser straight time wages for all hours worked, and he typically worked a 12-hour day. Engasser filed this lawsuit solely against Tetra Tech on behalf of himself and all tribal monitors employed by MCRPE seeking unpaid overtime wages under the FLSA and California law, as well as penalties for alleged missed meal periods and rest breaks, alleged improper wage statements, and alleged waiting time penalties under California law (ECF No. 1).

E. MCRPE Refuses To Keep Its Promise To Indemnify Tetra Tech

Prior to Tetra Tech filing its Third-Party Complaint, Tetra Tech and MCRPE met and conferred as required by the DRP in the PSA. Among other things, Tetra Tech demanded that MCRPE assume its defense in this Action and fully indemnify it against any related losses. MCRPE rejected Tetra Tech's request, arguing, in relevant part, that this Court is not a court that qualifies as a court of "competent jurisdiction" over the matters in controversy. MCRPE then filed a Motion to Dismiss wherein it disclosed statements made by the Parties during their confidential meet and confer discussions, a breach of Section IV-F of the PSA. (ECF No. 30-1).

F. MCRPE Produces a Rule 30(b)(6) Witness that Evades all Questions Regarding this Court's Jurisdictional Discovery in Violation of the Parties' Stipulation to Participate in Limited Jurisdictional Discovery

On July 16, 2020, Tetra Tech took the deposition of Stephanie Reyes ("Ms. Reyes"), MCRPE's Person Most Knowledgeable ("PMK").[3] During her deposition,

[3] This deposition was taken pursuant to a Joint Stipulation executed by the Parties whereby MCRPE agreed to respond to a limited set of written discovery requests, and to designate and produce a witness pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP") on the following topics: (1) MCRPE's relationship to the Mechoopda Indian Tribe; (2) MCRPE's role in drafting the PSA; (3) negotiations surrounding the PSA; (4) the factual and legal bases of MCRPE's arguments regarding the indemnification and DRP of the PSA; (5) MCRPE's procedures for waiving its

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Ms. Reyes refused to answer any questions related to the DRP, by deferring to "legal" with all of her responses. On this basis, Ms. Reyes refused to respond to questions regarding the indemnity clause, the applicability of the indemnity clause and DRP to this case, and MCRPE's interpretation of the terms that appear in the DRP. Noh Dec., Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 57:23-58:18; 63:23-64:11).

III. LEGAL STANDARD ON A MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1) AND 12(b)(2)

MCRPE challenges this Court's personal and subject matter jurisdiction pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure ("FRCP"). A Rule 12(b)(1) motion based on sovereign immunity is a factual attack, which is not a challenge to the sufficiency of the pleading, but rather, a challenge to the factual existence of subject matter jurisdiction. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

In responding to a 12(b)(1) motion, the nonmoving party must be afforded "ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 918 (6th Cir. 1986). The district court may consider affidavits, hear oral testimony, order an evidentiary hearing, or even postpone its determination, particularly if questions of jurisdiction are intertwined with the merits. *Land v. Dollar*, 330 U.S. 731, 735, fn. 4 (1947); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988), *overruled on other grounds by O'Bryan v. Holy See*, 556 F.3d 361, 378 (6th Cir. 2009).

To oppose MCRPE's FRCP 12(b)(2) motion, Tetra Tech need only make a *prima facie* showing of jurisdictional facts. *Lee v. City of L.A.*, 250 F.3d 668, 692 (9th Cir. 2001). To establish this Court's personal jurisdiction over MCRPE, Tetra Tech must

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sovereign immunity; and (6) any previous occasions on which MCRPE waived its sovereign immunity.

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show that: (1) MCRPE purposefully availed itself of the privilege of conducting activities in California, thereby invoking the benefits and protections of its laws; (2) its claims arise out of MCRPE's California-related activities; and (3) the exercise of jurisdiction would be reasonable. *Lee*, 250 F.3d at 692 (citing *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995)).

Here, MCRPE's Motion to Dismiss fails under both Rules 12(b)(1) and 12(b)(2).

IV. ARGUMENT

A. MCRPE Waived its Sovereign Immunity by Executing the Professional Services Agreement

1. The DRP Creates a Right to Sue MCRPE.

MCRPE can be sued in this court because it consented to be sued in the PSA. In the DRP, the PSA sets forth a detailed procedure for informally resolving disputes "[p]rior to commencing litigation." As MCRPE's Rule 30(b)(6) witness testified, this provision was included in the agreement "to have a different method of trying to resolve things instead of having to go to court." Noh Dec., ¶ 5, Exh. B (Transcript of Deposition of Stephanie Reyes, 64:16-65:4). The DRP is specifically designed as a *first step* for resolving disputes which, once completed, allows a party not achieving a satisfactory resolution to enforce the agreement in "a court with competent jurisdiction." Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, Terms and Conditions, IV. F.

MCRPE's argument would render the DRP a nullity merely because MCRPE has not expressly waived sovereign immunity. But controlling case law does not require such rigidity. Indeed, the Supreme Court has held that a valid and enforceable waiver of sovereign immunity need not even include the words "sovereign immunity." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 421 (2001). "When states or the federal government waive sovereign immunity . . . they do not say they are waiving 'sovereign immunity'; **they create a right to sue**." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660

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(7th Cir. 1996) (emphasis added); *see also Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir. 1995) (The Supreme Court has "never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity."). These waivers are effective even though the sovereign immunity of states and the federal government, *like that of Indian tribes*, cannot be waived by implication. *Id.*

Because it specifically contemplates litigation as a second step to enforcing the PSA beyond the DRP, the PSA plainly creates a right to sue. By its plain terms, the DRP itself is defined as a necessary condition precedent to initiating litigation. Tetra Tech, Inc.'s Amended Third-Party Complaint, Exh. A, PSA, Terms and Conditions, IV. F). The DRP further provides that statements made during the meet-and-confer discussions would be inadmissible in any "legal, equitable, or other proceeding." *Id.* Then, it allows for a "court with competent jurisdiction" to enforce it, including to determine whether the parties had satisfied the meet and confer requirements.

Thus, this case is on all fours with *C & L Enterprises*. In that case, a native tribe executed a construction contract for the installation of a foam roof on a tribe-owned commercial building. *C & L Enterprises*, 532 U.S. at 411. The contract included a clause that required arbitration of all contract-related disputes and enforcement of arbitration awards **"in any court having jurisdiction thereof."** *Id.* (emphasis added). The tribe proposed and prepared the contract. *Id.* at 413. After execution of the contract but before C & L commenced performance, the tribe solicited new bids for the installation of the roof. *Id.* C & L claimed that the tribe dishonored the contract and submitted an arbitration demand. *Id.* The tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. *Id.* The arbitrator ultimately rendered an award in favor of C & L. *Id.* The contractor filed suit to enforce the award in state court, and the tribe moved to dismiss on grounds of its sovereign immunity. *Id.* The district court denied the motion, and the tribe eventually appealed to the U.S.

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Supreme Court. *Id.* at 412. Among other things, the tribe argued that it was immune from suit on its contract with C & L and (much like MCRPE here) claimed that "'no court' on earth or even on the moon" had the jurisdiction contemplated by the arbitration provision. *Id.* at 421.

The Supreme Court disagreed. *Id.* The Court reasoned that the tribe had consented to dispute resolution and to the enforcement of the award in any court having jurisdiction. *Id*. at 419, 423. The tribe agreed to a specific dispute resolution regime that had a "real world objective" with "practical consequences." *Id.* at 413. Within that context, the Oklahoma state court where the suit was filed was a "court having [appropriate] jurisdiction" over the matter in controversy. *Id.* at 412. By way of the dispute resolution clause, the tribe in *C & L Enterprises* thus created a right to sue that effectively waived its sovereign immunity. *Id*. at 420-21.

Similarly, in *Sokaogon Gaming*, the Seventh Circuit held that a dispute resolution provision constituted consent to suit. 86 F.3d at 657-58. In *Sokaogon*, Tushie-Montgomery Associates, Inc. ("TMI") and the Sokaogon Gaming Enterprise Corporation executed a contract for architectural services in connection with the construction of a tribal casino. *Id.* at 657-58. After TMI had rendered substantial services and received a partial payment of $150,000, the leadership of the tribe changed and the new leadership repudiated the contract. *Id.* at 658. The contract contained an arbitration clause, which TMI invoked. *Id.* That clause required all "claims, disputes or other matters" arising out of or related to the contract to be decided by arbitration in accordance with the rules of the American Arbitration Association. *Id.* at 659. The agreement also stated that "judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof." *Id.* The tribe refused to participate in arbitration and instead brought suit, claiming not only that the contract was void but also that the tribe had not waived its sovereign immunity from suit and therefore could not be forced to arbitrate the dispute. *Id.* at 658. The arbitration

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went forward without the tribe's participation and resulted in an award of more than $500,000 to TMI, which brought an action in state court to confirm the award. *Id.*

Although the district court granted partial summary judgment for the tribe in part on sovereign immunity grounds, the Seventh Circuit reversed, holding that the tribe had agreed to arbitration of disputes under the contract and to have the award enforced in a court of law." *Id.* at 659. "***To agree to be sued is to waive any immunity one might have from being sued***." *Id.* (emphasis added).

In so holding, the Seventh Circuit noted that "the only purpose that a requirement of a[n] [express waiver] could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration." *Id.* The court opined that the mere suggestion of a clear arbitration agreement confusing or tricking "an unsophisticated Indian negotiator" into giving up the tribe's sovereign immunity without realizing it was both "extremely implausible, as well as condescending." *Id.* at 660. The Supreme Court later relied on this holding to reach its decision in *C & L Enterprise*. *See C & L Enterprises*, 532 U.S. at 417.

Here, the DRP is even clearer than the one in *C & L Enterprise* or *Sokaogon Gaming Enterprise* because it *expressly* creates a right of action against MCRPE in "any court with competent jurisdiction." Unlike the tribes in *C & L Enterprise* and *Sokaogon*, MCRPE does not have to refer to a separate set of arbitration rules to understand its legal obligation to participate in litigation before a court of competent jurisdiction. Accordingly, by consenting to suit, MCRPE voluntarily waived its sovereign immunity.

This plain reading is consistent with MCRPE's sophistication and experience with this, and many similar, tribal monitoring agreements. MCRPE had a full team of knowledgeable and experienced personnel to review, negotiate, and execute the PSA—experienced legal counsel to review the contract, a Board who would negotiate and advise the Tribal Council on the terms of the PSA, a project manager to coordinate all

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of the different agencies involved in the process, and a Tribal Council with final approval over the PSA. Indeed, MCRPE's legal counsel was involved before the PSA was executed and was even present during the deposition of MCRPE's PMK. Every level of both MCRPE's and the Tribe's leadership reviewed, discussed, deliberated upon, and approved the final form of the PSA, including the DRP.

MCRPE should not be allowed to reap the benefits of the PSA without also paying the price. MCRPE's Motion to Dismiss should be denied.

2. Ninth Circuit Precedent Prohibits MCRPE's Interpretation of the DRP.

Based on the Parties' meet and confer discussions, Tetra Tech anticipates that MCRPE will make two arguments on reply for why the DRP does not constitute a consent to suit in the district court. Both arguments are quickly dispatched.

First, MCRPE will likely argue that, even assuming it had waived its sovereign immunity, this Court is not a "court with competent jurisdiction" within the meaning of the contract. This argument, however, begs the question. For this term (and the DRP itself) to have any meaning, there must be some court that is a "court with competent jurisdiction." But MCRPE has provided no evidence that the Tribe has established any tribal court or that there is any other court where the Tribe has consented to jurisdiction. Thus, taken at face value, MCRPE's argument renders the term "court with competent jurisdiction"—and effectively the entire DRP—illusory.

"[I]t is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effective rather than void." *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 954 (2008). "Whenever possible, courts interpret contractual language to uphold the validity of a contract." *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1149 (9th Cir. 1986). The Ninth Circuit is "particularly loathe to upset agreements intended to resolve disputes in litigation." *Id. See also Lexington Ins. Co. v. Travelers Indem. Co. of Illinois*, 21 F. App'x 585, 589 (9th Cir. 2001) ("Preference

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must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory.").

Here, MCRPE seeks to advance an interpretation of the PSA that requires reading the DRP out of existence. The DRP hinges on the Parties' ability ultimately to litigate issues that are not resolved informally. But without any judicial forum able to assert jurisdiction over MCRPE, the DRP clause is meaningless. Indeed, the arc of this case bears that out. Tetra Tech sought initially to meet and confer with MCRPE regarding its claims for indemnification and contribution in this case. In the meet-and-confer process, MCRPE simply claimed that it was immune from the claim for indemnification and that the only court that had jurisdiction over it was the Tribal Court. Now, rather than litigate the merits of the claim, MCRPE asserts here that it cannot be sued. Thus, if MCRPE's interpretation wins the day, the DRP cannot be enforced against it at all. MCRPE cannot have it both ways.

Second, MCRPE argues that its sovereign immunity was preserved through Section IV.D. of the PSA, which provides that, "[n]othing herein shall be construed as a waiver of sovereign immunity." (MCRPE's Motion to Dismiss, at p. 13). MCRPE will likely argue in reply that this section precludes finding a right to sue in the dispute resolution provision of the PSA. Instead of harmonizing these two provisions, MCRPE's interpretation would require the Court to strike the entire DRP in favor of Section IV.D. and, in the process, ignore the sworn testimony of Ms. Reyes that validated the DRP of the PSA.

Under Ninth Circuit precedent, contracts must be given reasonable interpretations "as opposed to those that are unreasonable, or that would make the contract illusory." *Lexington Ins. Co.*, 21 F. App'x at 589. Contrary to MCRPE's view, Section IV.D. does not exist in a vacuum and must be read in the context of the entire contract. The DRP sets forth a detailed, 25-line paragraph that spells out a pre-litigation

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meet and confer process that the Parties negotiated, deliberated upon, and bargained for before executing the PSA.

In contrast, Section IV.D. is a single boilerplate sentence that raises more questions than answers. First and foremost, Section IV.D. does not identify the specific entity that is entitled to sovereign immunity in the context of the PSA. Section IV.D simply refers to the concept of "sovereign immunity" in the abstract, without identifying the intended beneficiary. There is no reference to MCRPE or the Tribe in this sentence. Without more, it is impossible to determine whether MCRPE or the Tribe are entities contemplated by this provision.

Contrary to MCRPE's assertion, the Court can reconcile both provisions by acknowledging the DRP as a limited consent to suit for disputes arising from the contract while also section IV.D reaffirms MCRPE's or the Tribe's claims to sovereign immunity for any disputes unrelated to the contract. Such a reading would be consistent with both the plain language of the contract and the intent of the parties. The DRP is clearly intended to create an avenue for either party to enforce contractual compliance. And, while agreeing to that avenue, MCRPE also sought to preserve its sovereign immunity to the maximum extent it could by including section IV.D. But that provision cannot upend the enforcement mechanism on which the parties agreed. Instead, section IV.D can only be understood as a clear limitation on MCRPE's waiver to actions falling within the scope of the DRP.

3. MCRPE Can Waive its Sovereign Immunity Without Following MCRPE's Enabling Ordinance or the Tribe's Constitution.

In its moving papers, MCRPE contends that the DRP does not qualify as a waiver because it was not enacted by separate resolution or written approval of MCRPE and the Tribal Council, as required by its Enabling Ordinance. (MCRPE's Motion to Dismiss, at pp. 12-13). MCRPE's argument is misleading, however, because waivers

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of tribal immunity are governed by federal, not tribal, law. As stated above, under federal law, the DRP qualifies as a waiver of MCRPE's sovereign immunity.

"When a person has authority to sign an agreement on behalf of a state, it is assumed that the authority extends to a waiver of immunity contained in the agreement." Restat. 3d of the Foreign Relations Law of the United States, § 456, com. b. To resolve questions of tribal immunity, the Supreme Court follows federal, rather than tribal, law. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 759 (1998) ("Like foreign sovereign immunity, tribal immunity is a matter of federal law."); *C & L Enterprises*, 532 U.S. at 421, fn. 3 ("Instructive here is the law governing waivers of immunity by foreign sovereigns.").

The case of *Smith v. Hopland Band of Pomo Indians* is instructive. 95 Cal. App. 4th 1, 10 (2002). In *Smith*, plaintiff entered into two contracts with a native tribe for various architectural services. *Id.* at 3. Both contracts were executed by plaintiff and the tribal chairperson. *Id.* at 4. The contracts contained an agreement to arbitrate pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association enforceable "in any court having jurisdiction thereof." *Id.* at 3. After a dispute arose over performance and payment, plaintiff filed a Complaint in Mendocino County Superior Court to recover unpaid fees. *Id.* The tribe filed a motion to quash service contending, among other things, that its tribal ordinance prohibited waivers of sovereign immunity without a separate resolution or other tribal ordinance that explicitly waived the tribe's sovereign immunity from unconsented suit. *Id.* at 4.

The Court of Appeal rejected the tribe's argument, relying heavily on the Supreme Court's holding in *C & L Enterprises*. *Id.* at 10. The court found that, "where . . . the person negotiating and signing the contract is authorized to do so, and the tribal council approves the contract, the question whether that act constitutes a waiver is one of **federal law**." *Id.* at 10 (emphasis added). Under federal law, any person authorized to sign an agreement on behalf of a state is assumed to have authority to waive its

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immunity. *Id.* (citing Restat. 3d of the Foreign Relations Law of the United States, § 456, com. b; *C & L Enterprise*, 532 U.S. at 421, fn. 3). Since the tribal chairperson had actual authority to agree to the contracts, the tribal council was bound by their terms and therefore waived its sovereign immunity. *Id.* at 10-12.

Here, MCRPE executed the PSA through its authorized representative, Ms. Forristel. Ms. Forristel is a Board Member of MCRPE and was authorized by MCRPE to negotiate and execute the PSA. *See* Declaration of Robyn Forristel (ECF No. 34-4). Because Ms. Forristel had authority to bind MCRPE, she also had authority to waive MCRPE's sovereign immunity. Restat. 3d of the Foreign Relations Law of the United States, § 456, com. b. Further, as stated above, the language in the agreement clearly waived MCRPE's sovereign immunity. Accordingly, by consenting to suit and executing the PSA, MCRPE properly waived its sovereign immunity under federal law.

B. This Court has Supplemental Jurisdiction over Tetra Tech's Claims Against MCRPE

In its Motion to Dismiss, MCRPE contends that the Court lacks diversity jurisdiction over Tetra Tech's claims. (MCRPE's Motion to Dismiss, at pp. 15-16). MCRPE is mistaken. Tetra Tech's claims fall under the Court's supplemental jurisdiction, 28 U.S.C. § 1367 (Tetra Tech's Amended Third-Party Complaint, ¶ 4). Under controlling law, the court may exercise supplemental jurisdiction over any state claims arising out of "a common nucleus of operative facts" related to other federal claims, such that a plaintiff would ordinarily be expected to try them all in a single judicial proceeding. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1173 (9th Cir. 2002). Here, Tetra Tech's claims against MCRPE are based on the PSA. Plaintiff's claims, arising from his employment with the Tribe, fall squarely within the scope of the PSA.

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C. If the Court is Not Satisfied it Has Jurisdiction Over Tetra Tech's Claims, the Court Should Grant Tetra Tech Leave to Conduct Further Jurisdictional Discovery

In the event this Court is not fully satisfied that it has subject matter jurisdiction, Tetra Tech requests leave to conduct additional jurisdictional discovery. *See United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 945 (9th Cir. 2017) (the district court shall allow "appropriate discovery" if jurisdictional questions exist). The Court has the authority to grant leave to conduct further discovery under Rules 12(b)(1) and 12(b)(2).

Under Rule 12(b)(1), a request for jurisdictional discovery may appropriately be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary. *Hall v. United States*, 2017 WL 3252240, at *4 (S.D. Cal. July 31, 2017); *Laub v. United States DOI*, 342 F.3d 1080, 1093 (9th Cir. 2003) (same);

> Should facts critical to jurisdiction be in dispute, as ofttimes they are, the court must make appropriate inquiry, and must satisfy itself on authority to entertain the case. The court has considerable leeway in devising procedures in that direction, and may resort to written or live evidence submitted in connection with the motion. The nonmoving party must, however, be afforded an ample opportunity to secure and present evidence relevant to the existence of jurisdiction.

Rogers, 798 F.2d at 917–18 (emphasis added). *See also Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990)* ("Where, as with foreign sovereigns, immunity involves protection from suit, not merely a defense to liability, more than the usual is required of trial courts in making pretrial factual and legal determinations.")

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This Court may also grant Tetra Tech leave to conduct discovery under Rule 12(b)(2). To prevail on a request for jurisdictional discovery on a Rule 12(b)(2) motion, the moving party need only make a "colorable" showing that the Court can exercise personal jurisdiction over the defendant. *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1119 (C.D. Cal. 2007); *Weaver v. Johnson & Johnson, Ethicon, Inc.*, 2016 WL 1668749, at *6 (S.D. Cal. 2016) (in granting jurisdictional discovery, the court held that the plaintiff provided "some evidence" to possibly establish jurisdiction and the additional discovery "could" reveal facts to whether on jurisdiction over defendant).

Both thresholds are low and satisfied here. As stated above, the DRP constitutes an effective waiver of MCRPE's sovereign immunity. The provision creates a right to sue through an extensive resolution process that requires any issues that are not resolved to be litigated in a court with competent jurisdiction.

Personal jurisdiction is even easier to find under this set of facts. It is undisputed here that MCRPE is an organization headquartered in Chico, within California's territorial jurisdiction, and not on tribal land. As such, Tetra Tech will easily overcome its threshold showing to conduct jurisdictional discovery for Rules 12(b)(1) and 12(b)(2) purposes.

V. CONCLUSION

MCRPE consented to suit in this Court by agreeing to be sued via the DRP. MCRPE waived its immunity with full knowledge and understanding of its decision and after careful review and deliberation over all material terms of the PSA. This Court should therefore deny MCRPE's Motion to Dismiss the Amended Third-Party Complaint.

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If the Court is not satisfied on its subject matter jurisdiction over Tetra Tech's claims against MCRPE, this Court should grant Tetra Tech leave to conduct further jurisdictional discovery, including further depositions of MCRPE-affiliated witnesses.

Dated: July 27, 2020

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