No. 21-55017
D.C. No. 3:20-cv-01006-W-DEB
U.S. District Court for Southern California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITE HERE LOCAL 30,

Plaintiff – Appellee,

v.

SYCUAN BAND OF THE KUMEYAAY NATION,

Defendant – Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellee Unite Here Local 30 ("the Union") seeks to convince the Court to affirm the District Court's Order based on the very same misapplication of the legal standard that caused the lower court to reach an improper conclusion in the first place. The Union acknowledges that the National Labor Relations Act ("NLRA") applies to tribal casinos (Opposition, 26), but argues to prevent the Court from accepting this Court's holding *Casino Pauma v. N.L.R.B.,* 888 F.3d 1066 (9th Cir. 2018), *cert. denied, Casino Pauma v. N.L.R.B.*, 139 S. Ct. 2614, 204 L. Ed. 2d 264 (2019) ("*Casino Pauma*"). However, if as *Casino Pauma* held, the NLRA preempts some or all of the Tribal Labor Relations Ordinance ("TLRO"), the TLRO must be interpreted and reformed to be consistent with the Court's *Casino Pauma* holding.

The Union further acknowledges that Sycuan disputes the formation of a contract, yet nevertheless argues the contract terms compel Sycuan to arbitrate its refusal to comply with the disputed terms. To activate this purported "contract" the Union imputes the Tribe's acceptance from the Compact entered between Sycuan and the State of California. However, the principles of basic contract law formation does not support the Union's contention because Sycuan never accepted the Union's intent to organize Sycuan's employees and the Union is not a party to the Compact between Sycuan and the State of California, the only contract that exists.

Further, the Union's assertion that the District Court lacked subject matter

jurisdiction over Sycuan's Counterclaim is inconsistent with supplemental jurisdiction under the applicable federal statute (28 U.S.C. § 1367). If the District Court had jurisdiction over the Union's claims under section 301 of the Labor Management Relations Act, it also had original jurisdiction over Sycuan's Counterclaim satisfying the well-pleaded complaint rule and the District Court abused its discretion in declining to retain supplemental jurisdiction over Sycuan's Counterclaim.

Finally, California is neither a necessary nor an indispensable party for the Counterclaim, that simply asked the District Court to reconcile the law applicable to a tribal ordinance interpreted under federal law. The Union's assertion that the Tribe seeks to invalidate its Gaming Compact with California is simply not true. Sycuan's challenge to the portions of the Compact is distinct from a challenge to the validity of the Compact itself. Accordingly, the State need not be joined to resolve the dispute before the Court as: (1) the Union and the State share the same alleged interest in protecting California citizens; and (2) the Union is more than capable of defending that interest on its own.

II. ARGUMENT

A. A Valid Bilateral Contract Was Never Formed Between Sycuan and the Union.

The Union attempts to circumvent the lack of any contract formation between Sycuan and the Union by asserting a bilateral contract was formed as soon as the

Union sent Sycuan a letter indicating its intent to organize Sycuan's employees. (Opposition, 19-20.) However, this argument is flawed and without merit. In reality, Sycuan never accepted the Union's offer, and its demands were based solely on the TLRO, not on the Compact itself. Furthermore, the Union is neither a party to the Compact nor a specifically named beneficiary of that "contract" and, as such, "has no standing to enforce the contract…." *Hatchwell v. Blue Shield of Cal.,* 198 Cal. App. 3d 1027, 1034 (1988). The Union's position is based on the faulty premise that it is a party to the Compact and, by proving a unilateral offer to Sycuan under the TLRO, which Sycuan rejected, a binding contract was somehow magically created contrary to well-established principles of contract law.

1. The Union's letter indicating its intent to organize did not create a contract between Sycuan and the Union.

The Union's contention that a contract was formed when "the tribe made an open-ended offer in the TLRO, which the Union accepted by delivering the November 2019 letter" (Opposition, 19) likewise fails. Restatement Second of Contracts § 27 provides that "preliminary negotiations and agreement do not constitute a contract" if "either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to…. *See* Restatement Second of Contracts § 27, cmt. b. In *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 314-16 (9th Cir. 1996), this Court held that a letter of intent does not create a binding contract. *Id.* at 314-15. The

Court ultimately held that "[t]here is not dishonor in refusing to be bound by a contract to which a party expressly said it was not yet prepared to agree." *Id.* at 314.

As stated in Sycuan's Opening Brief, the Union sent letters indicating its intent to organize the Casino Resort employees and demanding concessions in accordance with the TLRO that were inconsistent with the rights and obligations provided under the NLRA. Sycuan outright refused the Union's demands and indicated it had no intent to be bound by a contract. However, similar to the plaintiffs in *Rennick,* the Union argues a contract was nevertheless formed unilaterally and petitioned the District Court to compel arbitration under the TLRO. Because the Union's open-ended offer was not accepted by Sycuan, there is no contract to enforce between them.

B. The District Court Erred in Granting the Union's Motion for Judgment on the Pleadings Because Sycuan Disputed The Gateway Issue of Contract Formation.

1. The Supreme Court's holding in *Buckeye Check Cashing* is inapplicable to the parties' dispute because Sycuan challenges the existence of a contract.

The Union contends the "severability doctrine" articulated in *Buckeye Checking Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) ("*Buckeye*"), required the District Court to compel the matter to arbitration so an arbitrator can determine the validity of the purported contract between the Union and Sycuan. (Opposition, 22-23.) (quoting *Buckeye* at 445-46). The Union also characterizes Sycuan's challenge

to arbitration as an "attack[] [on] the contract as a whole and not the arbitration clause standing alone," and asserts that under *Buckeye,* such a challenge must be resolved in arbitration. *Id.* However, the Union's mischaracterization of Sycuan's challenge to arbitration ignores the fact that Sycuan disputes the existence of a contract with the Union in the first place. In *Buckeye,* the Supreme Court made an important distinction in footnote 1, and specifically clarified that:

> **The issue of the contract's validity is *different* from the issue whether any agreement between the alleged obligor and oblige was ever concluded**. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents, . . . which hold that **it is for courts to decide whether the alleged obligor ever signed the contract.**

Id. at 444 n.1 (emphasis added and citations omitted). The Court distinguished void or voidable contracts from circumstances where no contract occurred. Thus, *Buckeye* is inapplicable to situations, such as here, where one party claims a contract was never formed.

2. The Supreme Court and Ninth Circuit distinguish between questions regarding contract validity and questions regarding contract existence.

In *Three Valley Mun. Water Dist. v. E.F. Hutton & Co.,* 925 F.2d 1136 (9th Cir. 1991), the district court sent to the arbitrator the issue of whether the signatory to the underlying agreement had the authority to contractually bind the plaintiffs. *Id.* at 1138. This Court reversed, holding that the severability doctrine is "limited to challenges seeking to avoid or rescind a contract – **not to challenges going to the**

very existence of a contract that a party claims never to have agreed to." *Id.* at 1140 (emphasis added). The Court also emphasized that:

> [B]ecause an arbitrator's jurisdiction is rooted in the agreement of the parties, a party who contends the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision.

Id. at 1140-41 (emphasis and footnote omitted).

Likewise, in *Sanford v. MemberWorks, Inc.,* 483 F.3d 956, 962 (9th Cir. 2007), this Court held that "challenges to the existence of a contract as a whole must be determined by the court prior to ordering arbitration." Thus, the Court vacated the order compelling arbitration and remanded the case to the district court "to determine whether a contract was formed" between the parties. *Sanford* at 964; *see also Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 296-97 (2010) ("where the dispute at issue concerns contract formation, the dispute is generally for courts to decide," and before compelling arbitration, a court must first "resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce").

Sycuan disputes whether a contract ever existed between the Union and Sycuan. Thus, as both the Supreme Court and the Ninth Circuit have highlighted, the challenge to the existence of the contract must be resolved by the court prior to compelling the parties to arbitration. *Granite Rock Co*., at 297; *Sanford* at 962. The

District Court should have first determined whether a valid bilateral contract was ever formed between Sycuan and the Union, rather than sending the matter to an arbitrator.

C. Whether the NLRA Preempts Portions of the TLRO Must Be Resolved as a Threshold Issue.

The Union states it was unnecessary for the District Court to determine whether the TLRO is preempted by the NLRA to force arbitration. (Opposition, 24.) This completely overlooks that Sycuan raised serious legal issues regarding whether conflicting portions of the TLRO, and thus the Union's claims in this action, are preempted by the NLRA. More specifically, the NLRA establishes a comprehensive procedure regarding the rights of private sector employees to organize and form unions, engage in collective bargaining and take other collective action, and engage in concerted protected activities, as well as the rights of employers to respond thereto, and portions of the TLRO limit these federally-protected rights.

This Court's decision in *Casino Pauma* made clear that the NLRA does in fact apply to tribal employers, irrespective of what a tribal law or a gaming compact provides. The Union does not dispute this fundamental legal principle. (Opposition, 26, "The National Labor Relations Act applies to tribal casinos.") That being said, because the issue of preemption bears directly on the validity of the TLRO provisions the Union is seeking to enforce, including the arbitration provision, the

District Court was **required** to resolve this issue **prior** to compelling the Union's claims to arbitration. (Opening Brief, 28).

This Court is in the best position to determine the resolution of the NLRA preemption issue as it will enable the Court to clarify the scope and impact of its holding in *Casino Pauma*. Regardless of the Union's contentions, if portions of the TLRO are preempted by the NLRA, then the Union lacks any basis to compel arbitration and/or require Sycuan to adhere to those provisions of the TLRO that conflict with the NLRA.

1. Sycuan never agreed to arbitrate whether the NLRA preempts certain provisions of the TLRO.

The Union argues "[a]rbitration is the forum available to the Tribe to present its argument that federal law preempts the TLRO and invalidates its contract with the Union." (Opposition, 51.) However, the strong presumption in favor of arbitration "does not confer a right to compel arbitration of any dispute at any time." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Union Univ.,* 489 U.S. 468, 474, 479 (1989) (noting that arbitration "is a matter of consent, not coercion"). It is well established that an agreement to arbitrate covers only those disputes that the parties have contractually consented to submit to arbitration. *See United Steelworkers of Am. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960) ("A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.")

Sycuan's dispute as to whether portions of the TLRO are preempted by the NLRA cannot be compelled to arbitration as it is a legal question that is outside the scope of the arbitration provision in the TLRO. An arbitrator does not have the authority to resolve disputes outside of the agreed upon arbitration provision. *See Simon v. Pfizer, Inc.,* 398 F.3d 765, 775 (6th Cir. 2005) ("[N]o matter how strong the federal policy favors arbitration, arbitration is a matter of contract it has not agreed to submit to arbitration."). "Where a party contests either or both matters, 'the court must resolve the agreement.'" *Granite Rock* at 299-300. Thus, the Court must resolve these substantive legal issues before requiring Sycuan to submit any alleged dispute arising under or involving the interpretation of the provisions of the TRLO.[1]

2. Sycuan never agreed to waive sovereign immunity to a claim to compel arbitration.

As a federally recognized Indian tribe, Sycuan is subject to suit only where it or Congress has unequivocally expressed consent to suit. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 58-59 (1978). The Tribe only waived its immunity with respect to disputes "arising under" the TLRO. (2-ER-00158 ¶ 13(a)). The Tribe

[1] The State also misinterprets the scope of the 2015 Compact by alleging Sycuan should "exhaust its dispute resolution processes…." *See* State's Amicus Brief "AOB" (AOB, 18.) Sycuan **never** agreed to arbitrate the issue of federal preemption, therefore, it cannot be compelled to arbitrate that issue, which is the basis for its Counterclaim. *Granite Rock* at 299-300.

never "clearly" and "unequivocally" waived its sovereign immunity with respect to the issue of NLRA preemption, and thus the Union is unable to force the Tribe to resolve this issue through arbitration.[2]

The Union alleges that sovereign immunity refers only to suit and not arbitration. (Opposition, 44). However, "a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract." *Cione v. Foresters Equity Servs., Inc.,* 58 Cal. App. 4th 625, 634 (1997).

The enumerated legal requirements to affect a waiver of the Tribe's sovereign immunity are not present here. Neither the Compact nor the TLRO mentions or even implies in any way a waiver of the Tribe's sovereign immunity for such a claim. Nonetheless, even assuming it were determined that the Tribe impliedly intended to waive its immunity, such a waiver could not be upheld on that basis because "waivers of tribal sovereign immunity may not be implied." *Allen v. Gold Country Casino,* 464 F3d 1044, 4047 (9th Cir. 2006). As the Eleventh Circuit succinctly stated, "[t]ribal sovereign immunity would be rendered meaningless if a suit against

[2] The fact that the Tribe has asked the Court to resolve the issue of NLRA preemption does not waive the Tribe's sovereign immunity "as to claims that could be asserted against it, even as to related matters . . . arising from the same set of underlying facts."*Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (internal quotation and citation omitted); *see also Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribes "did not waive their immunity by intervening in ... administrative proceedings" because "[a]ny waiver must be unequivocal and may not be implied.").

a tribe asserting its immunity were allowed to proceed to trial." *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995).

Likewise, if the TLRO is preempted by the NLRA, the Tribe's waiver of sovereign immunity—even with respect to labor issues "arising under" the TLRO—is also arguably preempted, and the Tribe cannot be required to arbitrate whether it is immune from suit as doing so would eviscerate the very principles of sovereign immunity, as explained above.

D. The Declaratory Judgment Act Gave the District Court Jurisdiction Over Sycuan's Counterclaim.

1. The District Court had original jurisdiction over Sycuan's Counterclaim.

The Union alleges the District Court did not have original jurisdiction over Sycuan's Counterclaim because "the well-pleaded complaint rule prevents the court from exercising federal-questions jurisdiction." (Opposition, 46). The authority of the federal courts to issue a declaratory judgment, such as the one requested in Sycuan's Counterclaim, derives from the Declaratory Judgment Act, which embraces both constitutional and prudential concerns. Sycuan's Counterclaim satisfies the well-pleaded complaint rule as the claim raises novel issues of federal law and federal preemption that are uniquely suited to be determined by a federal court. As such, Sycuan's Counterclaim "arises under" federal jurisdiction question and satisfies the well-pleaded complaint rule.

2. The District Court abused its discretion in declining to implement this Court's stated factors for exercising supplemental jurisdiction.

In assessing whether to exercise jurisdiction under the Declaratory Judgment Act, a district court "must balance concerns of judicial administration, comity, and fairness to the litigants." *American States Ins. Co. v. Kearns*, 15 F.3d 142, 144 (1994) (quoting *Chamberlain v. Allstate Ins. Co.,* 931 F.2d 1361, 1367 (9th Cir. 1991) (internal quotation omitted). The Supreme Court in *Brillhart v. Excess Insurance Co. of Am.,* 316 U.S. 491 (1942), identified certain factors for courts to consider in deciding whether to exercise jurisdiction over a claim for declaratory relief. In this Court, when a declaratory action presents the same legal issues as does a related action pending before another court, three factors first identified by the Supreme Court in *Brillhart* are evaluated. In *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998), this Court recognized that "[t]he *Brillhart* factors remain the philosophical touchstone for the district court," and summarized them as follows:

> (1) the district court should "avoid needless determination of state law issues;" (2) it should "discourage litigants from filing declaratory actions as a means of forum shopping;" and (3) it should "avoid duplicative litigation.

The District Court declined to evaluate any of the *Brillhart* factors in determining whether it should exercise jurisdiction over Sycuan's Counterclaim. The first *Brillhart* factor—avoiding needless determination of state law issues—is satisfied because Sycuan's declaratory action does not raise any state law issues.

Specifically, Sycuan's claim arose from latent NLRA rulings creating a novel federal preemption issue for which the federal court is best suited to resolve. Additionally, the second factor—discouraging forum shopping—also weights in favor of the District Court exercising jurisdiction because Sycuan sought declaratory relief in the very forum the Union filed its Complaint. Finally, Sycuan's Counterclaim under the third factor—avoidance of duplicative litigation—would not result in any duplicative litigation. The District Court's holding as to whether portions of the TLRO are preempted by the NLRA would have provided clarity as the implications and scope of the Ninth Circuit's recent holding in *Casino Pauma* that the NLRA applies to tribal enterprises.

Because Sycuan's Counterclaim does not raise any state law issues, seek forum shopping, and would not result in duplicative litigation, the District Court improperly refused to assess the *Brillhart* factors, thereby abusing its discretion by declining to exercise jurisdiction over Sycuan's Counterclaim under the Declaratory Judgment Act.[3]

[3] The State alleges Sycuan "did not raise its NLRA preemption concerns until it filed the Counterclaim, and even then, did not give notice to the State or initiate the 2015 Compact's dispute resolution process." (AOB, 15 fn. 9). However, the State fails to recognize that: (1) the *Casino Pauma* decision came after the implementation of the 2015 Compact and Sycuan could not have known of the upcoming ruling at that time; (2) the Compact does not require Sycuan to give notice to the State of its Counterclaim as the Compact will not be impacted, rather the TLRO; and (3) Sycuan did not initiate the claim, but instead simply responded to the Union's demand for arbitration by filing the Counterclaim.

3. The cases relied on by the Union are inapplicable and distinguishable.

The Union's reliance on *Textron Lycoming Reciprocating Engine Div. v. UAW,* 523 U.S. 653 (1998) ("*Textron*") (Opposition, 49-50), is misplaced and inapplicable to the Parties' dispute in this case. In *Textron*, a union sought a declaratory judgment from a federal court that a collective bargaining agreement was voidable due to fraudulent inducement. 523 U.S. at 655. The union argued that the "hook" for federal subject matter jurisdiction was that assessing whether the contract had been breached would require consideration of Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), that permits suits "for violation of contracts." *Id.* at 656. However, the Supreme Court noted that the declaratory judgment action was *not* a suit regarding the *violation* of a contract (as permitted by federal statue) but, instead, a suit claiming the *invalidity* of a contract, and because neither party asserted any violation of the contract, the suit was outside the scope of jurisdiction granted by the federal statue. *Id.* at 658. The Supreme Court ultimately held that Section 301(a) only confers jurisdiction where there was an alleged contract violation, and because it was undisputed no such violation had occurred, the district court lacked federal jurisdiction. *Id.* at 661-662.

Here, there is no need to speculate. Unlike in *Textron*, the Union alleged a violation of a labor contract and asserted the District Court had jurisdiction under Section 301(a) of the LMRA based on this alleged violation. (Opposition, 48.)

Because the Union established federal question jurisdiction under Section 301(a) of the LMRA, Sycuan does not need to separately establish federal question jurisdiction for its Counterclaim; rather Sycuan simply needed to establish supplemental jurisdiction, which it clearly did. (Opening Brief, 30.) Moreover, unlike the union's claim in *Textron*, Sycuan's Counterclaim does not allege a claim for fraud and Sycuan and the Union do not have a collective bargaining agreement—let alone any agreement.

The Union's reliance on *Stillaguamish Tribe of Indians v. Washington,* 913 F.3d 1116 (9th Cir. 2019), is similarly misplaced. There, as in *Textron*, the case involved a dispute about an actual contract. However, in *Stillaguamish*, the plaintiff had filed a declaratory judgment in federal court in response to a *threatened state court action*. *Stillaguamish,* 913 F.3d at 1118. This Court held that, because the declaratory judgment action was in response to a threatened state court action, the district court lacked federal question jurisdiction. *Id.* at 1118-19. Here, however, Sycuan's Counterclaim was not filed in response to a threatened state court action; it was instead filed in response to a pending federal court action. Thus, *Stillaguamish* has no bearing on the instant case.

Likewise, the Union's reliance on *Alton Box Bd. Co. v. Esprit de Corp,* 682 F.2d 1267 (9th Cir. 1982), and *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998), is misplaced as both cases are inapplicable to the Parties' dispute, more specifically, to

Sycuan's Counterclaim. (Opposition, 47.) In *Alton*, the court held that the district court lacked federal jurisdiction to hear a declaratory judgment that involved a federal defense to a **pending state court action**. *Alton*, 682 F.2d at 1269-70. In *Rivet*, the plaintiff attempted to **defeat** federal subject matter jurisdiction by "artfully pleading" his complaint as if it arose under state law where the plaintiff's suit was, in essence, based on federal law. 522 U.S. at 475-76. The Supreme Court held that claim preclusion by reason of a prior federal judgment is a defense plea that provides no basis for removal. *Rivet*, 522 U.S. at 477. Here, as stated above, Sycuan's Counterclaim did not involve a pending state court action.

The Union has failed to present any legal or factual basis to support the dismissal of Sycuan's Counterclaim. The Union filed a federal suit invoking federal claims under Section 301 before Sycuan sought declaratory judgment, which seeks to absolve Sycuan from those very same claims. Accordingly, there can be no doubt the District Court abused its discretion in declining to exercise jurisdiction over Sycuan's Counterclaim.

E. The State of California Is Neither a Necessary Nor an Indispensable Party.

1. The State is not necessary under Rule 19(a).

The Union argues that the State of California is a required party to Sycuan's Counterclaim. (Opposition, 52.) However, California is neither a necessary nor an indispensable party to a claim that only requested the court to determine whether

Sycuan's ordinance remains valid, or partially valid, under the federal labor law since the Ninth Circuit's clarification on the issue in *Casino Pauma*. Neither the State's nor Sycuan's compliance with the Compact is at issue. Accordingly, Rule 19 of the Federal Rules of Civil Procedure does not require joinder of the State.

Rule 19 provides for the mandatory joinder of parties "needed for a just adjudication," commonly referred to as "necessary" parties. *See EEOC v. Peabody W. Coal Co.,* 400 F.3d 774, 779 (9th Cir. 2005). The Rule 19 analysis begins at subsection (a)(1), which asks whether a nonparty is necessary to the litigation. Fed. R. Civ. P. 19(a)(1). The following two issues guide this determination. First, whether the court can afford existing parties complete relief in that party's absence. Second, whether that party claims an interest in the action, such that disposition might impact that party's practical ability to protect its interest.

a. The Court can determine Sycuan's declaratory relief request without joining the State.

As to the first prong, the Court can easily consider Sycuan's Counterclaim as to whether the NLRA preempts portions of the TLRO without impacting the Compact. Sycuan's Counterclaim only concerns its 2015 TLRO, not the contents of, terms therein, or validity of its Compact with the State. Sycuan's Counterclaim for declaratory relief action asked the District Court to address and clarify the implications of the NLRA to the existing TLRO. For example, at paragraph 29 of the Counterclaim, the Tribe alleges that in 1999, "it was unclear whether the NLRA

. . . might preempt tribal labor ordinances." At paragraph 39, the Tribe recounts that "the Sycuan Band General Council adopted resolution No. 99-250 on October 2, 1999, adopting the TLRO." Paragraph 41 of the Counterclaim states: "On September 2, 2015, the Sycuan Band and the State of California executed an amendment to the Sycuan Compact ("the Amended Compact"). The Secretary of the Interior approved that amendment, and it remains the operative compact between the signatories."[4] The Tribe **did not allege** that the 2015 Amended Compact is invalid, or that either party is in breach. It likewise did not ask the court to excuse it from performance under the Compact.

The Union's suggestion that it would be necessary to join a party in any litigation to invalidate a statute that party drafted or required, would lead to absurd results. For example, it would mandate that whenever a party sues to invalidate a federal statute domesticating a foreign treaty, that party would have to join every foreign signatory to the treaty. But, in fact, federal courts routinely construe such statutes under federal law without inviting or requiring foreign nations' joinder. *See, e.g., Bond v. United States*, 572 U.S. 844 (2014) (restricting the enforcement of a federal statute domesticating the Chemical Weapons Convention without

[4] On December 17, 2015, the Secretary of Interior issued a "deemed approved" letter for Sycuan's Amended Compact, limiting and excepting from approval activities that exceed the lawful scope of state authority in gaming compacts under IGRA, which could include violations of federal law unrelated to gaming, such as NLRA violations or preempted terms. *See* 25 U.S.C. §2710(d)(8).

invalidating the Convention or joining its signatories); *Missouri v. Holland*, 252 U.S. 416 (1920) (similarly construing an act domesticating the Migratory Birds Treaty).

The Tribe simply asked the District Court to determine whether federal labor law preempts enforcement of the 2015 TLRO, or portions thereof, but it did not ask the District Court to construe or enter any declaration as to the Compact itself. Accordingly, California is not a necessary party under Rule 19(a)(1).

b. The State does not have an interest in this case that is vulnerable to any potential prejudice.

For similar reasons, the State has no cognizable interest in these proceedings that risks prejudice. In applying Rule 19, this Court has explained that a cognizable interest must be "specific" and tied to the litigation. *See Ward v. Apple, Inc.*, 791 F.3d 1041, 1050 (9th Cir. 2015). The interest also must be "legally protected." *Id.*

Here, although the State has a contractual interest in Sycuan's compliance with the Compact, "an interest that 'arises from terms in bargained contracts' may be protected, [the Ninth Circuit has] . . . required that such an interest be 'substantial.'" *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970–71 (9th Cir. 2008) (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002)). The State has no cognizably **substantial** interest here.

As stated within the four corners of the Compact, the State's objective that the Tribe comply with the Compact, or even adopt and maintain the TLRO, is not at

issue. The Tribe is in full compliance with the Compact and is maintaining the TLRO. The question is which law applies. The Tribe enacted the TLRO, as required, and has otherwise complied with its Compact obligations. The Tribe's Counterclaim concerns whether portions of the TLRO are now preempted by the NLRA or otherwise enforceable, based on this Court's subsequent pronouncement in *Casino Pauma* that post-dated the enactment of the TLRO. Resolving this question does not affect the State's rights but, rather, the Union's potential rights under the TLRO.

The Compact does not address the question of a change in federal law, or suggest that its answer could put a party in breach of the Compact. Indeed, this Court has already confirmed that federal courts can adjudicate one party's unilateral act in complying with a Gaming Compact, absent breach, **without** prejudicing the other party's contractual interests. *See Cachil Dehe Band*, 547 F.3d at 970–71 (a tribal signatory to the California Model Gaming Compact has no cognizable interest in how the State unilaterally administers its own compliance with the Compact, absent contractual breach).

2. The State limited its waiver of sovereign immunity and thus joinder is not feasible.

The State defined the scope of its contractual interests in the Compact itself, and that scope is not implicated here. Only within that narrow scope did the State waive its sovereign immunity. Specifically, in Section 13.4(a) of the Compact, the State consented to suit in "disputes between the State and the Tribe that arise under

this Compact and the enforcement of any judgment or award resulting therefrom." The Compact further elaborates that the Tribe could only secure declaratory relief from the State to determine whether it had "materially breached the Compact or that a material part of [the] Compact has been invalidated." (3-ER-00243 ¶ 14.2(b)).[5]

Put otherwise, California has limited its exposure to appearing in specified disputes with the Tribe arising under the Compact, and **this is not such a dispute**. Similarly, the State waived immunity to claims for a declaration regarding **the parties' compliance with the Compact or the validity of the Compact**. The Union is not a party to the Compact, and Section 18.3 does not permit third-party beneficiary claims, or create any enforcement right, and the Counterclaim is not seeking such a declaration. The State thus chose to maintain its immunity in a case like this, strongly suggesting it has no interest.

Because the State is not a necessary party, it need not be joined. Nor could it feasibly be joined. The Compact includes a narrow waiver of sovereign immunity in disputes between the parties that arise **under that instrument**. Additionally, the State and the Tribe only waived immunity to declaratory claims where the remedy sought would determine whether one party had "materially breached the Compact

[5] The parties to the Compact also waived immunity "with respect to any third party that is made a party or intervenes as a party to the action" as delineated by 13.4(a), but not with respect to independent actions initiated by or with third parties. (3-ER-00243 ¶ 13.4(a)).

or that a material part of [the] Compact has been invalidated." Amended Compact, § 14.2(b).

The Tribe does not allege the State has breached the Compact, nor did it ask the District Court to determine that any part of the Compact has been invalidated. Instead, it merely asked the District Court to determine which law controls and whether portions of the TLRO are preempted by the NLRA, as the Ninth Circuit has suggested. California therefore retains its immunity and cannot feasibly be joined.

3. The State is not indispensable under Rule 19(b).

Because the State is not a necessary party, the Court's analysis must end. *See Temple v. Synthes Corp.,* 498 U.S. 5, 8 (1990) ("[N]o inquiry under Rule 19(b) is necessary because the threshold requirements of Rule 19(a) have not been satisfied."); *Global Cmty. Monitor v. Mammoth Pac., L.P.,* 2015 WL 2235815, at *8 (E.D. Cal. May 11, 2015) (parties who are not necessary "also cannot be considered indispensable). Nevertheless, a court should consider the following four factors under Rule 19(b) of the Federal Rules of Civil Procedure:

> First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Am. Greyhound Racing, 305 F.3d at 1024 (citing Fed. R. Civ. P. 19(b)).

The first factor requires consideration of the potential prejudice to both the absent party and the existing party. Fed. R. Civ. P. 19(b). Concerning the absent party, this Court has determined that this factor largely duplicates the consideration that made a party necessary under 19(a). *Am. Greyhound Racing,* 305 F.3d at 1026.

The State's conduct thus far shows it does not fear any prejudice from this dispute.[6] It waived immunity, for example, in Compact disputes alleging breach or contractual invalidity, but it did not waive immunity in disputes between a Compact party (the Tribe) and a third party (the Union) over the Compact party's extracontractual implementation of the Compact. This Court, in fact, has ruled that the latter sort of disputes do not implicate the Compact or necessitate joinder. *See Cachil Dehe Band*, 547 F.3d at 970–71. The Tribe has shown that proceeding with its declaratory judgment action in the State's absence would not impair or impede the State's ability to protect its interests as Sycuan does not seek to interfere with the Compact.

However, although the Union claims the State has a legal interest in Sycuan's Counterclaim, the State's legal interest can be adequately represented by the Union. In assessing whether an existing party can adequately represent an absent person,

[6] The State does not allege any prejudice from the Tribe's Counterclaim but, rather, states a "material term" may be invalided. (AOB, 19.) Sycuan does not seek to invalidate terms of the Compact and only requested that the court reconcile the fundamental principles of federal labor law under the NLRA as they apply to the tribal labor ordinance.

the Ninth Circuit has asked whether the party can "make all of the arguments that would have been made by the [absent person], or that the [absent person] "would offer any necessary element to the proceedings that the present parties would neglect." *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1071 (9th Cir. 2010). Moreover, for a conflict of interest to preclude the State's representation by the Union, there must be a "clear potential of inconsistency" between the Union and the Sate that arises "in the context of th[e pending] case." *Washington v. Daley,* 173 F.3d 1158, 1168 (9th Cir. 1999).

As can be seen from the Union's Response Brief and the State's Amicus Brief, their interests are the same. Indeed, the Union identifies itself as "a labor union that represents casino employees in San Diego County and seeks to represent the Sycuan Casino Resort employees." (Opposition, 3.) The Union seeks to protect the State's interest by allegedly representing citizens from being prejudiced by Sycuan's challenge to the TLRO.[7] (*Id.* at 18.) As a labor organization admittedly organizing

[7] In *Cedar Point Nursery v. Hassid*, 594 U.S. 1 (2021), the Supreme Court was asked to determine whether a California regulation allowing unions access to agricultural employees constituted a physical taking under the Constitution. On June 23, 2021, Chief Justice Roberts issued the Court's opinion holding that the regulation granting labor organizations a "right to take access" to an agricultural employer's property to solicit support for unionization constitutes a per se physical taking requiring just compensation. *Id.* at 20. Here, the TLRO included in the California Gaming Compact that is forced upon gaming tribes constitutes a per se physical taking as the TLRO allows unions access tribal casinos' private property without providing just compensation.

casino employees, the Union is fully capable of opposing the Tribe's preemption claim. Indeed, the arguments that could be made by the State can (and certainly will) be made by the Union.[8] Likewise, the Union has not demonstrated that any conflicts are likely to arise in the context of representing the State's interest in protecting its citizens.

Finally, the third and fourth factors under Rule 19(b) ask, respectively, whether a declaratory judgment rendered in the State's absence would be adequate and whether the Tribe would have an adequate remedy if the Counterclaim is dismissed. *See* Fed. R. Civ. P. 19(b)(3), (4). The relief the Tribe seeks in its Counterclaim would be adequate, and the Tribe asks nothing from the State. The Tribe also is not seeking any relief that would compel the State to act or refrain from acting. The Tribe is simply seeking a declaration as to whether federal law allows it to deny the Union's requests for organizing concessions that go beyond what applicable federal law (the NLRA) requires. Thus, the District Court can grant the Tribe the declaratory relief it seeks without binding the State in any way.

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[8] The State also has not demonstrated an actual conflict of interest in Sycuan's Counterclaim that would prevent the Union from adequately representing the State's interest. (AOB, 15). In fact, the Union and the State have virtually identical interests in this regard. The Union and the Sate agree on the central issue at hand: Sycuan is seeking not to abide by the 2015 TLRO. (AOB, 17); (Opposition, 22). Thus, the State has "failed to demonstrate how . . . a conflict might actually arise in the context of this case." *Washington,* 173 F.3d at 1168.

All four of the FRCP 19(b) factors weigh in favor of a finding that the State is not an indispensable party to Sycuan's Counterclaim. Because joinder would not prejudice the State, and because dismissal of the Counterclaim could only deprive the Tribe of its sovereign rights, the State is not an indispensable party. As it is not necessary or indispensable, Rule 19 does not require the State's joinder.

III. CONCLUSION

Based on the foregoing, Sycuan respectfully requests that this Court reverse the District Court's Order granting both the Union's Motion for Judgment on the Pleadings and the Union's Motion to Dismiss Sycuan's Counterclaim for Declaratory Relief.

Dated: July 30, 2021

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CERTIFICATE OF COMPLIANCE

I, STEVEN G. BIDDLE, do hereby certify that this Brief complies with Rules 32(a)(5), (6), and (7)(B)(i) of the Federal Rules of Appellate Procedure as supplemented by Circuit Rule 32-2. The Brief has been prepared in a 14-point proportionally spaced typeface using "Times New Roman." The Brief contains 6,544 words according to the Microsoft Office Word, the word processing system used to prepare the Brief.

Dated: July 30, 2021

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CERTIFICATE OF SERVICE

(All Case Participants are CM/ECF Participants)

I hereby certify that on July 30, 2021, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tisha A. Davis

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