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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAURICE LARIMER, Plaintiff, vs. KONOCTI VISTA CASINO RESORT, MARINA & RV PARK; and ANTHONY JACK, an individual, Defendants.	NO. 3:11-cv-01061-JW PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SUMMONS AND COMPLAINT Date: September 12, 2011 Time: 9:00 a.m. Courtroom: 5 Honorable Chief Judge James Ware

I. SUMMARY OF FACTS

Plaintiff Maurice Larimer was employed at defendant Konocti Vista Casino Resort, Marina & RV Park (herinafter "Konocti") from August 12, 2009, until his termination on December 13, 2010. Konocti is a casino located in Lake County, California, and plaintiff

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worked as a chef in the food and beverage department. Konocti is apparently owned and operated by the Big Valley Band of Pomo Indians of the Big Valley Rancheria (herinafter "the Tribe"). However, Konocti mostly caters to tourists who are arriving in or traveling through Lake County, California, which includes individuals who are not members of the Tribe and are not Native Americans. Plaintiff is neither a Tribal member nor Native American.

Plaintiff was paid a weekly salary during his employment. However, his primary duties and the vast majority of his work time involved routine, manual tasks which render him non-exempt from overtime pay under the federal Fair Labor Standards Act, Title 29 United States Code, §§ 201, *et seq*. ("FLSA" or the "Act"). Plaintiff spent most of his working time on food preparation, cooking, cleaning and other non-exempt work duties. The FLSA provides that overtime pay is due non-exempt employees at the rate of one and one-half times the regular rate of pay for all hours worked over 40 in a workweek. Plaintiff worked many hours over 40 per week during his employment. Plaintiff brings this action under the FLSA to recover overtime wages and liquidated damages.

Defendants filed their motion to dismiss on the basis that they are immune from suit under the federal FLSA because defendant Konocti is owned by the Tribe. However, a commercial business operated by tribal members on tribal land that employs, and does business with, both Indians and non-Indians is subject to the requirements of the FLSA, because the FLSA (which is silent as to Indians) is a statute of general applicability that neither interferes with any aspect of tribal self-government nor abrogates any rights provided by a specific provision of an existing treaty.

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II. ARGUMENT

A. The FLSA, As A Statute Of General Applicability, Applies to Konocti Vista Casino, Which Operates A Commercial Enterprise On Tribal Land That Employs Non-Tribal Members, And Sells To Non-Indian As Well As Indian Customers.

When a statute of general applicability such as the FLSA is silent in terms of its specific applicability to Indian tribes, the Ninth Circuit Court of Appeals has held that the general rule is to include Indians within the scope of that statute. See *Donovan v. Coeur d'Alene Tribal Farm* 751 F.2d 1113, 1115-1116 (9th Cir. 1985). The Court further held in *Coeur d'Alene*, 751 F.2d at 1116, that this general rule is subject to three exceptions. None of these exceptions apply to preclude the application of the FLSA to Konocti here, which is a Tribe operating a casino and retail business on tribal land, employing both tribal members and non-tribal employees, and selling goods and services to non-tribal customers as well as to tribal customers.

1. The FLSA is a Statute of General Applicability that is Presumed to Apply to Indians on Reservations and their Property Rights.

The Supreme Court repeatedly has affirmed that tribes possess only "quasi-sovereign" status at the sufferance of Congress. See, *e.g.*, *Montana v. United States*, 450 U.S. 544, 563-564 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "Unlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance." *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).

The FLSA is a statute of general applicability and has a broad remedial purpose.

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Snyder v. Navaho Nation, 382 F.3d 892, 894-895 (9th Cir. 2004). Congress enacted the FLSA to protect workers from "substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U.S. 728, 739 (1981). The provisions of the FLSA are broadly construed "to apply to the furthest reaches consistent with Congressional direction." *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).

Similarly, the Ninth Circuit has broadly interpreted the term "employer." Thus, the FLSA provides that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. Section 207(a)(1). Under the FLSA, an "[e]mployer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. Section 203(d). The definition of "employer" under the FLSA is to be given "an expansive interpretation" in order to effectuate the Act's broad remedial purposes. *Real v. Driscoll Strawberry Associations, Inc.* 603 F.2d 748, 754 (9th Cir. 1979).

The Supreme Court has consistently held that "a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); see *United States v. Smiskin*, 487 F.3d 1260, 1263 (Ninth Circuit 2007) ("Federal laws of general applicability are presumed to apply with equal force to Indian tribes."). Therefore, the FLSA, a comprehensive statute of general applicability, is presumed to apply to Indian tribes.

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2. Application of the FLSA to the Commercial Business Operated by Konocti does Not Interfere with the Tribes Self-Governance in Purely Intramural Matters and does Not Abrogate Rights Guaranteed by any Existing Treaty.

Where, as here, a statute of general applicability is silent regarding its applicability to Indian tribes, the Ninth Circuit Court of Appeals has enumerated three exceptions to the presumption of applicability:

> (1) The law touches "exclusive rights of self-governance in purely intramural matters;" (2) The application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or (3) There is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

Coeur d'Alene, 751 F.2d at 116, quoting *United States v. Farris*, 624 F.2d 890, 893-894 (9th Cir. 1980).

If any of the exceptions applies, "Congress must expressly apply a statute to Indians before we will hold that it reaches them." 751 F.2d at 116 (emphasis in original). Here, Konocti does not argue, and there is no evidence, that application of the FLSA would abrogate any rights of the Tribe guaranteed by Indian treaties, or that the Legislative history of the FLSA evinces any Congressional intent to exclude tribal enterprises from the scope of its coverage. Therefore, the second and third exceptions are not at issue in this case.

In addition, there is no evidence that a commercial business owned by the Tribe, which is located on land within the reservation and sells goods and services to the general public, involves tribal self-governance in purely intramural matters. In *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009), the Ninth Circuit addressed whether FLSA provisions applied to a retail store known as Baby Zack's Smoke Shop. The Smoke Shop was located on trust land within

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the Puyallup Indian Reservation and was owned by enrolled members of the Puyallup Indian Tribe. The FLSA provisions at issue were those requiring employers to pay overtime to employees.

As to the self-governance exception, the court in *Matheson* cited another Ninth Circuit decision, *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004), and stated that exemptions have been allowed "only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly indicated." *Matheson*, 563 F.3d at 430, quoting *Snyder* at 895. The Court in *Matheson* also rejected the Tribe's treaty exemption argument.

In reaching its conclusions, the court stated that the Smoke Shop "is a purely commercial enterprise engaged in interstate commerce selling out-of-state goods to non-Indians and employing non-Indians." *Matheson*, 563 F.3d at 434. This holding is consistent with a trend in similar cases to draw a distinction between tribal governmental activities and the "purely commercial" activities of an Indian tribe, especially where non-Indians may be significantly involved as customers or employees. See, *e.g. San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1313 (D.C. Cir. 2007) (Applying the Natural Labor Relations Act to tribally-owned casino). Here, Konocti is a casino and gaming facility, that also serves food and beverages, and caters to members of the general public. It employs and caters to non-Indians as well as Indians. Indeed, plaintiff is a non-Indian. Therefore, the Tribe's operation of a purely commercial business in this case does not implicate tribal self-government. See also, *Lumber Industry Pension Funds v. Warm Springs Forest Products*

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Industries, 939 F.2d 683, 685 (9th Cir. 1991) (Self-government exception to presumption that general statute includes Indians did not preclude application of ERISA to tribally owned and operated sawmill).

3. Personal Liability Extends to Anthony Jack under the FLSA.

The definition of "employer" under the FLSA includes any person acting as an agent of the company. *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009). Anthony Jack is the Chief Executive Officer of Konocti. Thus he is personally liable to the same extent as Konocti for any FLSA violations.

4. Plaintiff Agrees to Dismiss his Second Cause of Action for Breach of Contract.

Plaintiff's second cause of action is for breach of contract to pay wages. Plaintiff will agree to dismiss this cause of action.

III. CONCLUSION

For the foregoing reasons, plaintiff respectfully submits that this Court should deny defendants' motion to dismiss the summons and complaint.

DATED: August 19, 2011

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By _____
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PROOF OF SERVICE

CASE NAME: *Larimer v. Konocti Vista Casino Resort, Marina & RV Park, et al.*

COURT : U.S. District Court, Northern District of California

CASE NO. : 3:11-cv-01061-JW

I, the undersigned, declare:

I am over the age of eighteen years and not a party to the cause. I am employed by the law firm of Wells, Small, Fleharty & Weil,292 Hemsted Drive, P.O. Box 991828, Redding, California 96099-1828.

On this date, I served the document described as: PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SUMMONS AND COMPLAINT on the interested parties in this matter by placing a true copy thereof in a sealed envelope addressed as follows:

Robert A. Rosette
Richard J. Armstrong
Rosette & Associates, PC
193 Blue Ravine Road, Suite 255
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Service of the above document was effectuated by the following means of service:

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State Court -- I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that service was made under the direction of an active member of the State Bar of California and who is not a party to the cause.

X **Federal Court** -- I declare under penalty of perjury that the foregoing is true and correct and that service was made under the direction of a member of the bar of this Court who is admitted to practice and is not a party to the cause.

Executed on August 22, 2011 at Redding, California.

Andrea M Hoffmann

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