UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant, v. FOREST COUNTY POTAWATOMI COMMUNITY, d/b/a Potawatomi Bingo Casino, Respondent.	)	Case No. 2:13-mc-00061

REPLY MEMORANDUM IN SUPPORT OF EEOC'S APPLICATION FOR ORDER TO SHOW CAUSE WHY SUBPOENA SHOULD NOT BE ENFORCED

On various grounds, the respondent is challenging an investigative subpoena served by the U.S. Equal Employment Opportunity Commission. But many of these are just distractions. Justice is best served by focusing on the real dispute: whether the EEOC has authority to investigate an age discrimination charge filed against the Forest County Potawatomi Community, which here does business as Potawatomi Bingo Casino and not, as it claims, as "an aboriginal sovereign exercising inherent rights of self-government." The EEOC does have such authority, and the Casino should comply with the EEOC's subpoena.

The Seventh Circuit's rule is that federal statutes generally apply to all persons, including Indian tribes, but should not be applied when doing so would affect rights essential to Indian self-governance of purely "intramural" matters. In other words, when a tribe acts as a government, it is largely free from federal regulation, but when it acts as a business in interstate commerce, the federal government may regulate it as it does any other business.[1]

[1] The respondent calls itself the "Tribe," while the EEOC calls it the "Casino." The difference in shorthand is not trivial. It speaks of the crucial distinction in the larger dispute, which is whether the Casino's activities are governmental or commercial in character. This distinction will be explored in greater detail below.

ARGUMENT

I. The EEOC Has Jurisdiction to Continue Its Investigation.

The Casino begins with a key admission: "The Tribe acknowledges that some courts have held that tribal sovereign immunity is ineffective against the United States." ("Forest County Potawatomi Community's Memorandum in Opposition to the [EEOC]'s Application for Subpoena Enforcement" ("*Casino Brief*"), Dec. 9, 2013, at 2). In other words, an Indian tribe is not immune from U.S. government investigations and lawsuits just because it is an Indian tribe. *Smart v. State Farm Ins. Co*., 868 F.2d 929, 932 (7th Cir. 1989) (the sovereignty of Indian tribes "is not absolute, for Congress has plenary power to limit, modify or even eliminate the powers of self-governance which Tribes may have traditionally possessed"), *citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). *Accord*, *Solis v. Matheson*, 563 F.3d 425, 429-434 (9th Cir. 2009) (Indian tribes do not have sovereign immunity from federal statutes or federal government lawsuits); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2nd Cir. 1996) (same).

This being so, it is hardly a given that the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, does not apply to Indian tribes or agencies, despite the Casino's hyperbolic argument that "the ADEA unambiguously excludes tribes." (*Casino Brief* at 11).[2] The general rule is that "when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes." *Smart*, 868 F.2d at 932, *citing Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). The ADEA is a statute of general applicability. *E.g.*, *Cano v. Cocopah Casino*, 2007 WL 2164555, *2 (D. Ariz. 2007) (citations omitted).

[2] The Casino tries to recruit the Native American Housing and Self-Determination Act of 1996 (*Casino Brief* at 9), Civil Rights Act of 1870 (*id.*), False Claims Act (*id.*), Indian Gaming Regulatory Act (*id.* at 12), and "[n]umerous non-Indian-specific acts of Congress" (*id.* at 10) as allies in its battle to deny jurisdiction under the ADEA. None of these statutes are relevant here, and the EEOC will confine its arguments to the cases interpreting the obligations of Indian tribes with respect to the ADEA and related statutes.

A good starting place is to note that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)(1), explicitly exempts Indian tribes, but the ADEA does not. *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 496 (7th Cir. 1993). In that subpoena enforcement action, the Court refused to enforce a U.S. Department of Labor subpoena brought under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq*., where the employees affected were "law enforcement employees" of an Indian governmental commission rather than employees "engaged in routine activities of a commercial service character." 4 F.3d at 495-496.

When Congress created the ADEA three years after enacting Title VII, it could have exempted Indian tribes from the ADEA, too, but did not do so. In *Great Lakes*, the Seventh Circuit also could have exempted all employees of Indian agencies from the coverage of the FLSA – the statute on which the ADEA is based[3] – but declined the opportunity. *See Smart*, 868 F.2d at 932-936 (ERISA applies to Indians and tribes because it is a statute of general applicability from which Congress did not specifically exclude them). The Court ruled that the "law-enforcement employees [of Indian agencies], and any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the [FLSA], are exempt" from the FLSA, but did not reach that conclusion regarding employees of other Indian agencies. 4 F.3d at 496.[4]

[3] "The ADEA incorporates many of the enforcement and remedial mechanisms of the [FLSA]. Like the FLSA, the ADEA provides for 'such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter.' 29 U.S.C. § 626(b)." *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323, 325 (1995). *Accord*, *Lehman v. Nakshian*, 453 U.S. 156, 163 (1981) ("Congress chose to incorporate the enforcement scheme of the [FLSA] into § 7 of the ADEA . . ."). ADEA § 7 has been codified as 29 U.S.C. § 626(b). *Id*., 453 U.S. at 162.

[4] For this conclusion, said the Court, 4 F.3d at 496, "[w]e have the support of" *EEOC v. Cherokee Nation* , 871 F.2d 937 (1989). The Casino tries to stretch this to mean that the Seventh Circuit agrees with the Casino's interpretation of the ADEA (*Casino Brief* at 13), but it ignores the statement which preceded the primary ruling: "We do not hold that [all] employees of Indian agencies are exempt from the [FLSA]." *Great Lakes*, 4 F.3d at 495. Further, in *United States v. Funmaker*, 10 F.3d 1327, 1331 (7th Cir. 1993), and *Smart*, 868 F.2d at 932-933, 934-935, the Seventh Circuit adopted the reasoning of *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). There, the Ninth Circuit held that the federal Occupational Safety and Health Act applied to an Indian tribal

This is consistent with the Seventh Circuit's ruling only three months later that "[a]s a general rule, [federal] statutes written in terms applying to all persons include members of Indian tribes as well," but not "when the application of a statute would affect Indian or tribal rights recognized by treaty or statute, or would affect rights essential to self-governance of intramural matters. . . ." *United States v. Funmaker*, 10 F.3d 1327, 1330-1331 (7th Cir. 1993). *Accord*, *Solis*, 563 F.3d at 430 ("Indians and their tribes are equally subject to statutes of general applicability, just as any other United States citizen"). The Seventh Circuit applied the same standard in *Smart*, 868 F.2d at 934-936, where it held that the Employee Retirement Income Security Act ("ERISA") also is a statute of general applicability and does not affect Indian rights to self-governance of intramural matters.

In the present case, the charging party, Federico Colón, worked at the Casino. (*See* "Declaration of Rufino Gaytán III in Support of Forest County Potawatomi Community's Memorandum in Opposition to the [EEOC]'s Application for Subpoena Enforcement" ("*Gaytán Dec*."), Dec. 9, 2013, ¶ 3 (Ex. B – Colón charge)). Casino employees, even at Indian casinos, do not exercise governmental functions. *Cocopah Casino*, 2007 WL 2164555, *2 (*Cocopah Casino*, 2007 WL 2164555, *2 ("Although the profits resulting from casino operations . . . provide funding for purely intramural matters [of the Cocopah Tribe], the . . . Cocopah Casino appears to function 'simply [as] a business entity that happens to be run by a tribe or its members'"). *Accord*, *Mashantucket Sand & Gravel*, 95 F.3d at 181 ("a bingo hall and casino [even one on tribal grounds] designed to attract tourists from surrounding states undeniably affects interstate commerce."), *citing Funmaker*, 10 F.3d at 1331.[5]

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farm's commercial activities, because that farm employed some non-Indian workers and was similar in its operations to other farms in the area.

[5] In *Funmaker*, 10 F.3d at 1331, the Seventh Circuit stated:

In *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1079-1081 (9th Cir. 2001), and *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993), the Eighth and Ninth Circuits made similar distinctions: in each case, the court ruled that sovereign immunity did not protect the tribe from EEOC investigations, but that the ADEA did not apply to the relationship between a tribal agency and one of the tribe's enrolled members.[6] This principle does not apply here; as the Casino admits, Mr. Colón is not an Indian. (*Casino Brief* at 12 n.5). "In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government." *Solis*, 563 F.2d at 434, *quoting Mashantucket Sand & Gravel*, 95 F.3d at 181.

In *Karuk Tribe Housing Auth.*, 260 F.3d at 1080-1081, the Ninth Circuit drew the distinction even more sharply:

> The [Karuk Tribe] Housing Authority . . . functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance. **Courts conducting "self-governance" analysis have distinguished such essentially governmental functions from commercial activities undertaken by tribes and have classified actual tribal governmental entities as aspects of "self-government,"** *see, e.g., Fond du Lac*, 986 F.2d at 246; *[EEOC v.] Cherokee Nation*, 871 F.2d at 937 [10th Cir. 1989)], **while rejecting such a categorization for businesses that happen to be owned and operated by tribes**, *see, e.g., Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999) ("tribe-run business enterprises acting in interstate

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> Funmaker never contested that the [Ho Chunk Bingo Hall and Casino in Wisconsin Dells, Wisconsin] was used in or affected interstate commerce. Instead, Funmaker relies on the fact that the bingo hall was on tribal property and was involved in a tribal dispute. Given the long reach of the Commerce Clause, however, that reliance is misplaced. If Ollie's Barbecue, a Birmingham restaurant that served no interstate travellers but purchased food that had moved through interstate commerce, was sufficiently involved in interstate commerce to fall within federal jurisdiction, a bingo hall and casino designed to attract tourists from surrounding states undeniably affects interstate commerce for Commerce Clause purposes. *See Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).

[6] In *Karuk Tribe Housing Auth.*, 260 F.3d at 1078, the Ninth Circuit stated it "generally agree[d] with the logic of the approach to administrative subpoena enforcement adopted by the Seventh Circuit in *Great Lakes*. . . ." It held that the ADEA does apply to Indian tribes (*id.* at 1078-1079), but denied enforcement of the EEOC's subpoena because the individuals affected were employees of the tribal housing authority and, thus, were engaged in purely "intramural" functions touching on matters of tribal self-governance. *Id*. at 1078-1081.

> commerce do not fall under the 'self-governance' exception" to *[Donovan v.] Coeur d'Alene [Tribal Farm]* [751 F.2d 1113, 1116 (9th Cir. 1985)]; the enterprise at issue "does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members"); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (**OSHA has jurisdiction over a tribe-owned business because the "nature of MSG's work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce – when viewed as a whole, result in a mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters"**); *[United States Dep't of Labor v.] Occupational Safety & Health Review Comm'n*, 935 F.2d [182,] 184 [(9th Cir. 1991)] (tribal employer is subject to OSHA because it "employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce"); *Coeur d'Alene*, 751 F.2d at 1116 ("The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm . . . is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural. . . nor essential to self-government.'" (quoting [*United States v.*] *Farris*, 624 F.2d [890,] 893 (9th Cir. 1980)]).

(Bold emphasis added). In the present case, as in *Coeur d'Alene Tribal Farm*, "the enterprise at issue 'does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members'"; here, as in *Mashantucket Sand & Gravel*, the federal agency "has jurisdiction over a tribe-owned business because the 'nature of [the Casino]'s work, its employment of non-Indians, and the . . . work on a hotel and casino that operates in interstate commerce . . . is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters."

Because the ADEA is a statute of general applicability from which Congress did not specifically exclude Indians and tribes, because Mr. Colón is a non-Indian who did not work for an Indian agency exercising a governmental function, because the Casino does not operate exclusively within the domain of the Forest County Potawatomi Community and its members, and because the Casino employs non-Indians and serves a largely non-Indian clientele in

interstate commerce, the EEOC has jurisdiction over Mr. Colón's ADEA charge. *E.g.*, *Solis*, 563 F.3d at 434 (intramural exception did not exempt from FLSA a retail store owned and operated by tribal members and located on tribe's reservation; the store was purely commercial enterprise in interstate commerce employing non-Indians and selling out-of-state goods to non-Indians).

II. The Casino is an "Employer" and The EEOC Has Jurisdiction in This Case.

A. The Casino is an "Employer" Subject to the ADEA.

By its terms, the ADEA regulates the conduct of "employers," and "employers" are "persons" who meet certain jurisdictional requirements. (29 U.S.C. § 630(a)). "Persons" are "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." (29 U.S.C. § 630(b)).[7]

The Casino says that it is an "an aboriginal sovereign exercising inherent rights of self-government," and so is not a "person" or "employer" under the ADEA. (*Casino Brief* at 7-8). It is wrong, for two reasons. First, as noted above, the ADEA does not exempt Indian tribes.[8] Second, the Casino is a business or, if you wish, an "association" or "organized group of persons" engaged in the casino business. Though owned by a tribe, it is a business enterprise "engaged in an industry affecting commerce [which] has [had] twenty or more employees . . . in

[7] This definition of "person" is virtually identical to the FLSA definition. Under the FLSA, 29 U.S.C. § 203(a), a "person" is "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." As noted above, in *Solis*, 563 F.3d 425, the Ninth Circuit held that the intramural exception did not exempt from the FLSA a store owned and operated by Indians and located on a reservation.

[8] The Casino tries to turn this upside down by arguing that "the ADEA does not include the Tribe in its definition of employer" (*Casino Brief* at 13) and that "[w]hen Congress wishes to include tribes with other governmental entities, it knows how to do so." (*Id*. at 10). But it ignores that when Congress wants to exempt tribes from a statute's reach, it can do so unambiguously. The Casino cannot overcome the fact that Title VII explicitly exempts Indian tribes from coverage, and the ADEA does not. *Great Lakes*, 4 F.3d at 496.

Further, the Casino ignores that in *Smart*, the Seventh Circuit held that, although ERISA does not explicitly state that it applied to tribal employers operating a business employing Indians on a reservation (868 F.2d at 933-934), there was no clear evidence of Congressional intent to exempt them (*id*. at 936) and ERISA, as a statute of general application, applied to the Chippewa Tribe because it did not modify an existing right of the Tribe under treaty or other statute or a right essential to self-governance of intramural matters (*id*. at 935).

each of twenty or more calendar weeks in the current or preceding calendar year" (29 U.S.C. § 630(b)), and not an Indian agency exercising law enforcement or other governmental functions. Therefore, it is covered by the ADEA. *See Smart*, 868 F.2d at 933 ("ERISA is clearly a statute of general application, one that envisions inclusion within its ambit as the norm. The exemptions from coverage are explicitly and specifically defined, as well as few in number. Accordingly, there is no doubt that the Chippewa Health Center is an 'employer' within the broad meaning of ERISA."). *Accord, Mashantucket Sand & Gravel*, 95 F.3d at 181 (tribe-owned business which employed non-Indians and did construction work on a hotel and casino that operates in interstate commerce is an "employer" under OSHA); *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 (farm that employed some non-Indian workers and sells produce in interstate commerce is an "employer" under OSHA). *See also Funmaker*, 10 F.3d at 1332.

B. The EEOC is Not Subject to Equitable Estoppel.

The Casino says that "the EEOC agrees" that "the ADEA does not apply to the Tribe, and accordingly, the EEOC does not have jurisdiction to consider Mr. Colón's Charge or initiate its own investigation against the Tribe. As a result, the Subpoena is unenforceable against the Tribe." (*Casino Brief* at 7). Of course, this is incorrect. If it were true, the Court would not have this hotly-contested subpoena enforcement action before it.

The Casino argues that the EEOC cannot assert jurisdiction here because of a statement in a form notice of dismissal issued by the director of the EEOC's Chicago District Office with regard to an earlier discrimination charge.[9] (*Casino Brief* at 7). Again, it is wrong. The short statement in that dismissal was not, as the Casino claims, a "definitive interpretation" from the

[9] The statement, made on November 8, 2012, on a form dismissing *Willie Smith v. Potawatomi Casino*, EEOC Charge No. 443-2012-895, stated: "Respondent is exempt from Title VII and ADEA coverage." (*Gaytán Dec*., ¶ 5 (Ex. D – "Dismissal and Notice of Rights")).

"Commission" (*id*.); only the five Commissioners appointed by the President with the advice and consent of the U.S. Senate constitute the "Commission." *See* 42 U.S.C. § 2000e-4(a).

Further, a dismissal determination is not a final agency action and thus has no legal effect. *E.g.*, *Borg-Warner Protective Services Corp. v. EEOC*, 245 F.3d. 831, 836 (D.C. Cir. 2001) (the EEOC did not engage in "final agency action," reviewable by court under Administrative Procedure Act, by issuing a determination that there was "reasonable cause to believe" that the employer was violating Title VII); *Georator Corp. v. EEOC*, 592 F.2d 765, 767-768 (4th Cir. 1979) (an EEOC reasonable cause determination is not a "final agency action" because "standing alone it is lifeless and can fix no obligation nor impose any liability on the plaintiff"), *cited in EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005) ("The existence of probable cause to sue is generally and in this instance not judicially reviewable").

To the extent that the Casino is arguing that the EEOC is equitably estopped by the earlier dismissal (*Casino Brief* at 7 n.2), this argument is incorrect, too. As the Seventh Circuit made clear in *Matamoros v. Grams*, 706 F.3d 783 (7th Cir. 2013), "The Supreme Court has *never* affirmed a finding of estoppel against the government. And that is not for lack of review. The Court, in fact, has 'reversed every finding of estoppel that [it has] reviewed.'" *Id.* at 793-794, *quoting Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (italics in original). Further, to apply equitable estoppel, the Casino must prove that the EEOC misled the Casino and that the Casino reasonably relied on that conduct to its substantial injury. *Matamoros*, 706 F.3d at 793; *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 81 (7th Cir. 1992).

Equitable estoppel against the government requires "an affirmative act to misrepresent or mislead; mere negligence is not enough." *Matamoros*, 706 F.3d at 794. Here, there is no evidence that the EEOC misled the Casino or that its earlier dismissal was more than error. Even

more to the point, the Casino has not shown that it has reasonably relied on that dismissal to its substantial injury. As a matter of fact and law, equitable estoppel cannot apply here.

III. The Information Requested In The EEOC's Investigation Is Relevant.

The EEOC has broad powers to investigate ADEA violations, and its subpoena should be enforced where, among other things, the information requested is reasonably relevant. *E.g.*, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 71-72 (1984) (Title VII investigation); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700-701 (7th Cir. 2002) (ADEA investigation).

The Casino does not argue that all of the information requested by the EEOC is irrelevant. In fact, it earlier produced a few documents in an effort to convince the EEOC that Mr. Colón's charge is without merit. (*See Gaytán Dec*., ¶ 4 (Ex. C (Position Statement submitted to EEOC, May 28, 2013, attaching Documents C-F)). Rather, the Casino now argues that some of the information requested by the EEOC is irrelevant; specifically, it argues that:

> The Subpoena requests information far beyond that which is relevant to the Charge. The subpoena requests, among other overly broad requests, "all documents" related to "all" age-based complaints for more than a one-year time period, including all related personnel files, internal investigation documents, and the compilation of related summaries. (*See* Gaytán Decl. ¶ 2, Exhibit A.) These requests simply bear no relation to the Charge under investigation and the time period sought far exceeds the applicable limitations period. The Charge relates to a single employee complaining of a limited series of alleged events occurring in December 2012. The Charge does not in any way allege a pattern or practice of discrimination.

(*Casino Brief* at 15). The Casino makes no further relevance argument.

In job discrimination cases, it is necessary to obtain facts about similarly-situated individuals to determine if there is merit to the charging party's allegations. It is standard EEOC practice, when an individual charge is filed against a large employer, to seek some information about whether the alleged discriminatory practice might have affected other employees. By asking for all age-based complaints made to the Casino from April 1, 2012, forward, the EEOC

is trying to determine whether the Casino has treated similarly-situated individuals in a consistent and non-discriminatory manner. This is not unreasonable; April 1, 2012, was less than one year before Mr. Colón filed his charge on February 19, 2013. (See *Gaytán Dec.*, ¶ 3).

The courts have recognized the validity of these practices. "EEOC enforcement actions are not limited by the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 331 (1980). *Accord*, *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. General Electric Co.*, 532 F.2d 359, 364-365 (4th Cir. 1976). Thus, the scope of an EEOC investigation may be broader than that of the underlying charge. "The EEOC's role . . . is to investigate a claim thoroughly and reasonably and remedy any unlawful discrimination that it uncovers." *EEOC v. Tempel Steel Co.*, 723 F. Supp. 1250, 1253 (N.D. Ill. 1989). "[I]t is crucial that the [EEOC]'s ability to investigate charges of systemic discrimination not be impaired." *Shell Oil*, 466 U.S. at 69. *Accord*, *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 595-597 (7th Cir. 2009).

"The EEOC's investigation of a charge is not confined to the four corners of the charge so long as it is reasonably tethered by relevance to the charge and in good faith." *EEOC v. Schwan's Home Service*, 692 F.Supp.2d 1070, 1085 (D. Minn. 2010), *quoting EEOC v. Von Maur, Inc.*, 2007 WL 3503435, *3 (S.D. Iowa, Oct. 22, 2007). "Since the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the [EEOC] access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Technocrest Systems, Inc.*, 448 F.3d 1035, 1038 (8th Cir. 2006), *quoting Shell Oil*, 466 U.S. at 68-69. "The [EEOC] is entitled to the information that it thinks it needs in order to be able to

formulate its theory of coverage before the court is asked to choose between the [EEOC]'s theory and that of the subpoenaed firm." *Sidley Austin*, 315 F.3d at 700.

In the Seventh Circuit, if an employer objects to producing information requested in a subpoena, it has the burden of substantiating its objections. *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 648 (7th Cir. 1995) (ADEA/Title VII case), *quoting EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981); *EEOC v. City of Milwaukee*, 54 F. Supp.2d 885, 891 (E.D. Wis. 1999) (Adelman, J.). *Cf. EEOC v. Kronos, Inc.*, 620 F.3d 287, 297 (3rd Cir. 2010) (cited in *Casino Brief* at 14). Here, the Casino has not met its burden, and it must comply with the EEOC's subpoena. *See St. Paul Reinsurance Co. Ltd. v. Commercial Financial Corp.*, 198 F.R.D. 508, 511-512 (N.D. Iowa 2000) (citations omitted) ("The party resisting discovery must show specifically how each [discovery request] is not relevant or how each question is overly broad, burdensome or oppressive"; a party's mere statement that the discovery sought was "overly broad, burdensome, oppressive and irrelevant" is not a successful objection).

IV. The EEOC is Not Required to Conciliate or Mediate During an Investigation.

Conciliation. The Casino is simply wrong when it argues that EEOC has a statutory duty to "conciliate" during an investigation of an age discrimination charge. (*Casino Brief* at 13-14).

The Casino is correct that in 29 U.S.C. § 626(b), "[t]he ADEA commands that the '[EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.'" (*Casino Brief* at 13-14). But it fails to recite the preceding phrase. In full, the sentence reads: "*Before instituting any action under this section*, the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to

effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b) (italics added).

In that sentence, "action" refers only to a lawsuit brought to enforce the ADEA or one of the other anti-discrimination statutes,[10] not to a proceeding like the present one in which the EEOC merely seeks to enforce an administrative subpoena. *See, e.g., Bay Shipbuilding*, 668 F.2d at 308 ("The district court correctly exercised its discretion by dispensing with the paper formalities of complaint and answer that would be required by the Federal Rules of Civil Procedure in an ordinary civil action. As its decision noted, the Rules do not apply to proceedings for enforcement of administrative subpoenas when 'otherwise provided by statute or by rules of the district court or by order of the court in the proceedings' (Rule 81(a)(3)). The applicable statute granting jurisdiction to the district court, 29 U.S.C. § 161(2), specifically provides that enforcement is begun 'upon application' by the agency to the court."). This is made even more clear by the reference to "action" in the sentence preceding the sentence quoted above: "In any *action* brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. § 626(b) (italics added). *See, e.g., Vance v. Whirlpool Corp.*, 707 F.2d 483, 488 (4th Cir. 1983) (Section 626(b) requires the government to

[10] Courts variously call such lawsuits a "civil action," "direct action," or "enforcement action." *E.g., General Tel. Co. of the Northwest*, 446 U.S. at 325-326 ("The 1972 amendments to [Title VII] expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII"); *Sidley Austin*, 315 F.3d at 700 (an "enforcement action," follows, and is separate from, a subpoena enforcement action); *Glass v. IDS Financial Services, Inc.*, 778 F. Supp. 1029, 1048 (D. Minn. 1991) ("direct action"). *See Hipp v. Liberty Nat'l life Ins. Co.*, 252 F.3d 1208, 1220 (11th Cir. 2001) ("The purpose of the requirement that a plaintiff file an EEOC charge within . . . 300 days . . . of the allegedly illegal act . . . is (1) to give the employer prompt notice of the complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before a civil action is filed").

attempt conciliation "before [it] institutes a civil suit"); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974) (the ADEA's language makes it clear that the government must attempt conciliation "before legal action is begun").[11] This being so, the EEOC had no duty to conciliate before investigating Mr. Colón's charge. Instead, it engages in conciliation after it investigates charges and finds reasonable cause to believe that discrimination has occurred. The EEOC has made no such finding here; its investigation has barely begun.

As the Casino admits, the EEOC communicated with the Casino's lawyers on July 11, July 19, October 30, and November 7, 2013, each time trying to persuade the Casino to provide the information the EEOC needs to conduct its investigation. (*Gaytán Dec*., ¶¶ 7, 8, 14). Each time, the EEOC was met either with complete resistance or with requests for mediation, presumably based on the Casino's refusal to acknowledge the EEOC's authority to investigate the Colón charge. It is clear that, to the Casino, "conciliation" and "mediation" only mean dismissal of the charge. Of course, dismissal is unacceptable to the EEOC.

Mediation. In similar fashion, the EEOC has opposed mediation of the charge. (*Gaytán Dec*., ¶ 9). The EEOC is under no obligation to mediate any charge, and the Casino has not pointed to any such requirement. As a general rule, "once a charge is filed, . . . the EEOC is in command of the process." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002). "[T]he nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." *EEOC v. KECO Industries, Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984). The EEOC is chronically under-staffed and overworked and, considering how far apart the parties are on the jurisdiction issue, mediation here would waste the EEOC's strained resources.

[11] Prior to 1979, the ADEA was enforced by the U.S. Department of Labor. Since then, enforcement has been the EEOC's responsibility. *Schroeder v. Copley Newspaper*, 879 F.2d 266, 271 n.4 (7th Cir. 1989).

Finally, there is a sound legal and administrative reason for not mediating: the legal papers filed here and previously before Judge Clevert state that at least three individuals have recently filed EEOC charges against the Tribe and/or Casino. Given the number of people employed by the Casino, other such charges can be expected in the future. There is no point in mediating any charge against a respondent if similar issues will arise time and again, without resolution. It is time for a court ruling, so the parties will know how to interact in the future.

CONCLUSION

For the foregoing reasons, the EEOC respectfully requests that this Court order the Casino to comply with EEOC Subpoena No. CH-13-90.

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Dated: December 13, 2013

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CERTIFICATE OF SERVICE

I, Dennis R. McBride, hereby certify that on December 13, 2013, I caused a copy of the foregoing document to be served by electronic mail on the respondent's attorneys, Andrew S. Oettinger, Esq., Rufino Gaytán, III, Esq., and Brian L. Pierson, Esq., Godfrey & Kahn, S.C., 780 North Water Street, Milwaukee, WI 53202-3590, at AOettinger@gklaw.com, RGaytan@gklaw.com, and BPierson@gklaw.com, respectively.

s/ *Dennis R. McBride*
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