IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
Case No. 1:17-cv-00240-MR-DLH

JOSEPH CLARK, On Behalf of Himself and All Others Similarly Situated, **Plaintiff,** **vs.** **HARRAH'S NC CASINO COMPANY, LLC, d/b/a HARRAH'S CHEROKEE CASINO RESORT and d/b/a HARRAH'S CHEROKEE VALLEY RIVER CASINO AND HOTEL, and BROOKS ROBINSON,** **Defendants.**	**DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COLLECTIVE/CLASS ACTION COMPLAINT**

Defendant Harrah's NC Casino Company, LLC, d/b/a Harrah's Cherokee Casino Resort and d/b/a Harrah's Cherokee Valley River Casino and Hotel (collectively "Defendant" or "Harrah's"), hereby submits this Reply in Support of Its Motion to Dismiss Plaintiff's First Amended Collective and Class Action Complaint (the "Amended Complaint").

It is undisputed that Plaintiff's claims arise out of his employment at Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino and Hotel (the "Cherokee Casinos") and that the Cherokee Casinos are tribal gaming enterprises, wholly owned by the Eastern Band of Cherokee Indians (the "Tribe") and operated

through the Tribal Casino Gaming Enterprise ("TCGE"). Plaintiff concedes that both the Tribe and the TCGE enjoy sovereign immunity in federal courts. Still, in an effort to get around the immunity issue, Plaintiff contends that he can bring the instant matter against Harrah's in this Court, regardless of the Tribe's and TCGE's tribal status. Plaintiff's contentions are meritless, mischaracterize both the law and Defendant's positions, and should be rejected.

A. Plaintiff Mischaracterizes Defendant's Arguments Regarding Subject-Matter Jurisdiction

Plaintiff misconstrues both the law and Defendant's positions regarding subject-matter jurisdiction, arguing that Defendant's 12(b)(1) dismissal argument "is legally and factually irrelevant" because coverage under the Fair Labor Standards Act ("FLSA") is "not a fact which in any way implicates this Court's subject matter jurisdiction." Doc. 39 p. 8. Contrary to Plaintiff's contention, this Circuit has held that FLSA cover *is* a jurisdictional requirement of an FLSA claim. *Ergashov v. Glob. Dynamic Transp., LLC*, 680 Fed.Appx. 161, 162-63 (4th Cir. 2017) (per curiam); *Velasquez v. Salsas & Beer Rest., Inc*., 2017 WL 4322814, *3 (E.D.N.C. Sept. 28, 2017) ("The United States Court of Appeals for the Fourth Circuit has held that FLSA coverage is a jurisdictional requirement of an FLSA claim").

Moreover, Plaintiff's jurisdictional contentions misconstrue the nature of Defendant's arguments. In arguing that this Court lacks subject-matter jurisdiction,

Defendant contends that Plaintiff improperly named Harrah's instead of TCGE in a clear effort to circumvent tribal sovereign immunity. Thus, Defendant's subject-matter jurisdiction argument is based on tribal sovereign immunity. It is well-established that, in the context of an FLSA claim, the doctrine of tribal sovereign immunity is applicable, and it works to divest a court of subject-matter jurisdiction. *Lobo v. Miccosukee Tribe of Indians of Florida*, 279 Fed. Appx. 926 (11th Cir. 2008) (affirming dismissal of plaintiff's FLSA claim under Rule 12(b)(1) for lack of subject matter jurisdiction); *Larimer v. Konocti Vista Casino Resort Marina & RV Park*, 814 F.Supp.2d 952, 956-57 (N.D. Cal. 2011) (granting defendants' 12(b)(1) motion to dismiss plaintiff's FLSA claims because the doctrine of tribal sovereign immunity divested the court of subject-matter jurisdiction). Notably, none of the cases Plaintiff cites in support of his argument regarding subject-matter jurisdiction deal with sovereign immunity. Plaintiff's contention that Defendant's subject-matter jurisdiction argument is "misplaced" is without merit and should be rejected.

B. TCGE is a Necessary and Indispensable Party Under Rule 19

TCGE, as an instrumentality of the Tribe, is a necessary and indispensable party to this litigation under Rule 19 rendering dismissal appropriate. Plaintiff, in his own brief, concedes that the TCGE is a necessary party to this action under Rule 19(a) and that it is immune from suit as a sovereign entity. Doc. 39 p. 19. Although Plaintiff attempts to argue that the TCGE is not an indispensable party under Rule

19(b), he entirely misreads the very cases he cites in an attempt to support his argument. *See* Doc. 39 pp. 21-22 (citing *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) and *Enter. Mgmt. Consultants, Inc. v. United States ex. Rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)). Those cases demonstrate that the TCGE, as a sovereign entity, is an indispensable party under Rule 19(b).

Plaintiff appears to argue that *Kescoli* and *Enterprise Management Consultants* stand for the proposition that, where a necessary party is immune from suit, immunity is a compelling factor to allow the suit to proceed without joining the immune party. Doc. 39 pp. 21-22. Both cases (and, in fact, the very passages that Plaintiff cites from both cases) stand for the exact opposite proposition, however. Both cases hold that, where a necessary party under Rule 19(a) is immune from suit, immunity is a compelling factor, by itself, for the court to find that the party is an indispensable party pursuant to Rule 19(b) and dismiss the suit for non-joinder. *Kescoli*, 101 F.3d at 1311 (affirming dismissal pursuant to Rule 19(b) where a tribal entity was not named in an action because "the concern for the protection of tribal sovereignty warranted dismissal"); *Enter. Magmt. Consultants, Inc.*, 883 F.2d at 894 (same). Thus, by Plaintiff's own admission, dismissal pursuant to Rule 19 is appropriate. As Plaintiff concedes, TCGE is a necessary party under Rule 19(a) and is immune from suit; under Rule 19(b), immunity itself is considered a compelling factor to demonstrate that the party is indispensable.

Moreover, even if TCGE's sovereign immunity were not sufficient under Rule 19(b), it is still clear that it is an indispensable party under the *Provident Tradesmen* analysis. First, there is a tribal forum which should have the first opportunity to determine whether it has jurisdiction over Plaintiff's claims.

Second, both TCGE and the Tribe have a clear interest in this matter. An adverse judgment in this case, for example, would prejudice the Tribe's economic interests in the Cherokee Casinos and in the Management Agreement with Harrah's. The employment policies and practices concerning wage and hour issues at the Cherokee Casinos impact the economic performance of the Casinos, which in turn impacts TCGE and the Tribe. The Management Agreement provides that the purpose of the Cherokee Casinos is to enhance the economic viability of the Tribe. Doc. 39-1, § 1.2. Courts recognize casinos that are owned and operated by an Indian tribe are arms of the tribe, and "there is no question that [the] economic and other advantages [provided by the casino] inure to the benefit of the Tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006).

Third, TCGE's absence would impair its contractual interest because the Tribe's contractual interests are directly implicated; the Management Agreement specifically provides that the Board of Advisors of TCGE must approve all personnel policies and procedures and that the policies must comply with applicable Tribal law. Doc. 39-1, § 4.18. Any judgment related to such polices, which must be

reviewed and approved by the Board of Advisors, would, in the absence of TCGE as a party, "threaten to impair the Tribe's contractual interests, and thus, its fundamental economic relationship with" Harrah's. *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 553 (4th Cir. 2006).

Fourth, any judgment rendered in the absence of TCGE would prejudice Harrah's because it would hinder its ability to resolve its contractual obligations with TCGE and the Tribe and would also subject Harrah's to inconsistent obligations. Because it is not a party to this litigation, the Tribe will not be bound by whatever judgment might be rendered. Accordingly, a judgment in this case finding the employment policies and practices at issue unlawful would not prevent the Tribe from requiring Harrah's to adhere to those employment policies, since the Tribe would not be bound by the decision of this Court. As explained, the Management Agreement requires that the TCGE Board of Advisors approve all personnel policies and procedures, such that the Board of Advisors may require Harrah's adhere to certain policies that contradict any judgment rendered here. *Yashenko*, 446 F.3d at 553 (noting that the Tribe's absence "threatens to leave [Harrah's NC Casino Co., LLC] subject to substantial risk of incurring multiple or inconsistent obligations").

Obviously, if TCGE were a party to this litigation, it would be required to present any theories and arguments as to why its employment policies and procedures are lawful. Its failure to do so would result in waiver, and TCGE would

be just as bound as Harrah's by the judgment in this case. Harrah's would then not face a risk of inconsistent obligations. However, because TCGE is not joined as a party and will therefore not be bound by any resulting judgment, the risk that Harrah's will face inconsistent obligations is both real and substantial.

Finally, this Court cannot fashion a remedy so as to accommodate these varying and competing interests due to the Tribe's inherent interest in the matter and Harrah's risk of being subject to inconsistent obligations. Thus, Rule 19 mandates that TCGE is both a necessary and indispensable party. Tribal sovereign immunity prohibits its joinder, requiring dismissal.

C. The Tribal Exhaustion Doctrine is Applicable.

Plaintiff's arguments regarding tribal exhaustion are similarly flawed. It is well-settled that the bar to invoke the tribal exhaustion doctrine is low – it only requires that there be a "colorable question" as to whether a tribal court has subject matter jurisdiction over a civil action. *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, 730 F.Supp.2d 485, 488 (W.D.N.C. 2010) (granting defendant's motion to dismiss because "Plaintiffs' claims against Harrah's NC Casino [Company, LLC] at least raised a 'colorable question' of tribal jurisdiction") (quoting *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992)); *Jaramillo v. Harrah's Entertainment, Inc.*, 2010 WL 653733, at *1 (S.D. Cal. Feb. 16, 2010) ("Therefore, when there is a 'colorable question' of whether a tribal court has subject

matter jurisdiction over a civil action, federal courts will stay or dismiss the action and permit a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction over the dispute.").

Plaintiff misconstrues the nature of the tribal exhaustion doctrine and attempts to make this low bar more difficult, arguing that for the tribal exhaustion doctrine to apply there should be a pending tribal court action and there must be evidence that there exists a tribal forum for the plaintiff's claims. Doc. 39 pp. 11-12, 17. Plaintiff's contentions are flawed. "The fact that there is no tribal action pending does not defeat the tribal exhaustion requirement." *Jaramillo*, 2010 WL 653733, at *1; *Madewell*, 730 F.Supp.2d at 489 ("The exhaustion rule is applicable regardless of whether an action is currently pending in tribal court."); *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir.1996) ("[T]he exhaustion rule does not require an action to be pending in tribal court."). Moreover, there does not need to be evidence that the tribal court "recognizes Plaintiffs' causes of action" for the tribal exhaustion doctrine to apply. Doc. 39 p. 17). Rather, the very purpose of the exhaustion doctrine is "to permit a tribal court to *determine* in the first instance whether it has the power to exercise subject matter jurisdiction." *Madewell*, 730 F.Supp.2d at 488 (quoting *Stock West Corp.*, 964 F.2d at 919) (emphasis added).

In a further attempt to heighten the threshold for the tribal exhaustion doctrine, Plaintiff also argues that non-members are not subject to the tribal exhaustion

doctrine except in limited circumstances, and that those circumstances only apply where the Tribe has affirmatively intervened as a party and carried the burden of providing the "need for exhaustion." Doc. 39 pp. 11-16. In support of this flawed argument, Plaintiff points to authority that deals with the tribal exhaustion doctrine in the context of "nonmembers on non-Indian fee land" or in the context of non-members in a business owned by nonmember. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008) (discussing the applicability of the tribal exhaustion doctrine where the tribe was attempting to regulate activity of nonmembers on non-Indian fee land); *Tidwell v. Harrah's Kansas Casino*, 322 F.Supp.2d 1200, 1206 (D. Kan. 2004) (noting that the matter was not a traditional "reservation affair" because the dispute was between "two non-tribal members arising under federal law, which took place in a casino owned by a nonmember"); *Solis v. Matheson*, 563 F.3d 425, 428 (9th Cir.2009) (holding that the FLSA could be enforced where the defendant business was not owned by the tribe).

That authority is entirely inapplicable here. It is undisputed that the Cherokee Casinos are on tribal land and are owned by the Tribe. In such circumstances, it is well-settled that the tribal exhaustion doctrine remains applicable, even when nonmembers are involved. "Civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts, unless affirmatively limited by

a specific treaty provision or federal statute." *Fid. & Guar. Ins. Co. v. Bradley*, 212 F. Supp. 2d 163, 165 (W.D.N.C. 2002).

Here, there is no question that a "colorable question" of tribal jurisdiction has been raised. Both TCGE and the Tribe have inherent interests in the subject matter of this case because it directly impacts both the economic viability of the Cherokee Casinos and the Tribe's rights (which have been expressly delegated to TCGE) under the Management Agreement. This Court has held "[t]he operation and management of the Casino clearly implicates the economic interests and welfare of the Tribe . . . As such, the Plaintiffs' claims against Harrah's' NC Casino raise at least a 'colorable question' of tribal jurisdiction." *Madewell*, 730 F.Supp.2d at 489; *Jaramillo,* 2010 WL 653733, at *2 (finding a 'colorable question' of tribal jurisdiction even though a non-Indian plaintiff brought suit against Harrah's Entertainment, Inc. because the Tribe owned the casino and "the Casino and its operations are intertwined with Tribal welfare"). Thus, even if this Court finds joinder under Rule 19 inapplicable, a tribal forum should have the opportunity to exercise jurisdiction. There is, at minimum, a "colorable question" of tribal jurisdiction.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiff's Amended Complaint in its entirety.

Respectfully submitted this 21st day of December, 2017.

COZEN O'CONNOR

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he electronically filed the foregoing document with the Clerk of Court using the CM/ECF system and he served the foregoing document upon the attorneys shown below by transmittal of a Notice of Electronic Filing:

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This the 21st day of December, 2017.

BY: /s/*Patrick M. Aul*
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