UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

JOSEPH CLARK, individually and on behalf of all others similarly situated;	)	
	)	Civil No. 1:17-cv-00240-MR-DLH
Plaintiff,	)	
v.	)	
	)	**PLAINTIFF'S OBJECTION TO**
HARRAH'S NC CASINO COMPANY, LLC, D/B/A HARRAHS' CHEROKEE CASINO RESORT AND D/B/A HARRAH'S CHEROKEE VALLEY RIVER CASINO AND HOTEL and BROOKS ROBINSON,	)	**THE REPORT AND RECCOMENDATION OF THE MAGISTRATE JUDGE ON DEFENDANTS' MOTIONS TO DISMISS**
Defendants.	)	

Plaintiff Joseph Clark ("Plaintiff"), individually and on behalf of all others similarly situated, by and through his undersigned counsel, submits Plaintiff's Objection to the Report and Recommendation of the Magistrate Judge on Defendants' Motion to Dismiss. For the reasons stated below, Harrah's Motion should be denied.

I. INTRODUCTION

Plaintiffs object to the Report and Recommendation of the Magistrate Judge ("R&R") finding that absent party Eastern Band of Cherokee Indians ("EBCI") is a necessary party under FRCP 19 in a case brought against Defendants Harrah's and Harrah's executive employee Brooks Robinson under the federal Fair Labor

Standards Act and the North Carolina Wage and Hour Act that have led to plaintiffs and the putative class being denied pay for time they spent on the job. The R&R errs in numerous material ways, most particularly by failing to articulate actual concrete interests of the Tribe that would be impaired by allowing this case to proceed, and by failing to weigh the prejudice to the Plaintiffs in comparison to the purported harm to the Tribe.

Harrah's below asserted that the failure to join the Tribe violates the "necessary party" requirements of FRCP 12(b)(7) and 19 because "[a]ny judgment in the absence of TGCE would impair the contractual interests between EBCI [] and Defendant Harrah's as well as the EBCI's sovereign capacity to negotiate contracts and govern the reservation." [D.E. 34.1 at 16]. Harrah's below failed to actually explain why either asserted "impairment" would arise, let alone apply the test for a necessary party to the alleged "impairments." Nonetheless, the Magistrate Judge found that the Tribe is a necessary party here, but the R&R provides no more insight that did Harrah's into what the purported impairments are that make the Tribe a necessary party.

This finding does not comply with the standards for necessary party dismissal. The interests have to be real and not hypothetical, and they have to be identified and supported by evidence. Harrah's, as "[t]he party seeking dismissal under Rule 19[,] bears the burden of proof." *Key Constructors, Inc. v. Harnett*

County, 315 F.R.D. 179, 183 (E.D.N.C. 2016). This burden is particularly heavy because courts "are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 441 (4th Cir. 1999). *See also Nat'l Union Fire Ins. Co. of Pittsburgh v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 (4th Cir. 2000) (dismissal "is a drastic remedy" that "should be employed only sparingly").

The R&R acknowledges Harrah's burden and the requirement that Rule 19 is to be used sparingly, while at the same time reaching a result that eludes these requirements. ***Plaintiffs still do not know what the purported interests of the Tribe are here that make its presence so crucial.*** All that is identified is vague and general "contractual interests", whatever that means. Are the interests related to indemnification? If so, there is a line of cases and relevant facts that have to be considered. Is the purported interest a concern that Plaintiffs might have to be paid more? We just do not know. Harrah's does not say, and the R&R does not identify the issue. Plaintiffs have never been given an opportunity to address the purported interests because they just have not been identified. Harrah's failed "failed to meet [its] burden" of showing that the Tribe is a necessary party, and the R&R should not be adopted by this Court. *United Property & Cas. Ins. v. Hunter*, 2017 WL 1135238 at *2 (D.S.C. March 27, 2017).

II. STANDARD OF REVIEW.

This matter comes to this Court as an objection to the Report and Recommendation of Magistrate Judge Howell, who has recommended dismissal pursuant to Rule 19 for failure to join a necessary party. Rule 72(b) of the Federal Rules of Civil Procedure permits a party to "serve and file specific, written objections" to a magistrate judge's proposed findings and recommendations within fourteen days of being served with a copy of the report. See also 28 U.S.C.§ 636(b)(1). The Fourth Circuit has held that an objecting party must do so "with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." *United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007), cert denied, 127 S. Ct. 3032 (2007). This Court must determine *de novo* any portion of the magistrate judge's report and recommendation to which a proper objection has been made, and this Court "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

III. ARGUMENT.

The inability to join another party such as EBCI does not make that party "indispensable" under Rule 19.[1] "Only necessary persons can be indispensable, but

[1] Rule 19(a) applies to the failure to join a party who should be "joined if feasible." For purposes of this motion, Plaintiffs do not contest that the Tribe and its wholly owned entities are immune from the application of the FLSA, so joinder is not in

not all necessary persons are indispensable. In determining whether a party is … indispensable, the court must consider the practical potential for prejudice in the context of the particular factual setting presented". *Schlumberger Indus., Inc. v. Nat'l Sur. Corp.,* 36 F.3d 1274, 1285–86 (4th Cir. 1994).

To determine whether a party that cannot feasibly be joined is indispensable, the Supreme Court in *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09 (1968) directed that courts should follow a four-part test to determine whether 19(b) applies:

> Rule 19(b) suggests four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled….First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists….Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another….Third, there is the interest of the outsider whom it would have been desirable to join…. Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies…. Rule 19(b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. Commentators had argued that greater attention should be paid to this potential solution to a joinder stymie, and the Rule now makes it

---

fact feasible. *Compare Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09 (1968) ("The optimum solution, an adjudication of the permission question that would be binding on all interested persons, was not 'feasible,' however, for Dutcher could not be made a defendant without destroying diversity. Hence the problem was the one to which Rule 19(b) appears to address itself").

> explicit that a court should consider modification of a judgment as an alternative to dismiss.

Id. at 109-112.

Harrah's neither mentioned these factors in its briefing below, let alone applied the factors. Harrah's failure was highly prejudicial to Plaintiffs as at each step – even now -- Plaintiffs have had to guess at how Harrah's might have applied the factors. The R&R nonetheless ruled on Harrah's skimpy record in contravention of the Supreme Court's guidance that "a court does not know whether a particular person is 'indispensable' until it had examined the situation to determine whether it can proceed without him." 390 U.S. at 119.

The Magistrate should not have granted Harrah's motion when it had not applied the factors. *Compare ACA Finc'l Guranty Corp. v. City of Buena Vista, Virginia*, 2017 WL 3431592 at *5-6 (W.D. Va. Aug. 9, 2017) (holding that the Court could not rule on 19(b) dismissal motion because "Defendants analyze only the fourth [*Provident Tradesmen*] factor, whether there is an adequate alternative remedy"). By definition the Harrah's motion was legally defective as "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to ... put flesh on its bones." *McPherson v. Kelsey,* 125 F.3d 989, 995–96 (6th Cir.1997) (quoting

Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n, 59 F.3d 284, 293–94 (1st Cir.1995)).

Any elucidation that Harrah's did make occurred on reply, and Harrah's "should have made this argument in [its] principal brief and not in a reply. By doing so, [Harrah's] has deprived [Plaintiffs] of any meaningful opportunity to respond and thus the argument is deemed waived." *Dubey v. Colvin*, 2015 WL 9948260 at *10 n.3 (D.R.I. Dec. 11, 2015).

A. THE TRIBE'S INTERESTS WHICH ARE PURPORTED TO BE IMPAIRED FAIL TO MEET THE STANDARDS OF RULE 19(b).

1. The Ray Affidavit Does Not Provide the Evidence Which Supports the Conclusions of the R&R.

The "situation" this court must examine is limited to the two interests of the Tribe that Harrah's (and not the Tribe) has asserted. There is not a shred of evidence in the record which supports the Tribe's purported interests here. The only "evidence" is a one and one-half page affidavit from the Regional VP of TCGE. That affidavit merely states the existence of contractual relationships between Plaintiffs, Harrah's and the Tribe. The Ray affidavit does not claim that the Tribe's interests would be impaired by allowing this case to proceed, let alone specify what those interests are or how they could be impaired.

There is no record here that could possibly support a Rule 19 dismissal under binding fourth Circuit law. There is no dispute that "the burden is on the

party moving under Rule 12(b)(7) to show the nature of the unprotected interests of the absent individuals or organizations and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence." 5C Charles Alan Wright et al., *Federal Practice and Procedure* § 1359 (3d ed. 2007). "To discharge this burden, it may be necessary to present affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." *Id.* If the moving party fails to discharge their burden, the Rule 12(b)(7) motion to dismiss should be denied. Indeed, courts regularly deny Rule 19 motions when the record fails to contain evidence supporting the movant's assertions.[2]

---

[2] *See, e.g., Harty v. Spring Valley Marketplace LLC,* No. 15-CV-8190 (NSR), 2017 WL 108062, at *13 (S.D.N.Y. Jan. 9, 2017) ("Ultimately, the Court finds that the parties have not created an adequate evidentiary record on the issue of necessary parties and is therefore unable to dismiss the action under Rule 12(b)(7) ...."); *Alexander Contracting Co. v. Nat'l Trust Ins. Co.*, No. 1:14-CV-002423-ELR, 2015 WL 11347588, at *4 (N.D. Ga. July 8, 2015) ("Because [the movant] has not satisfied its evidentiary burden, the Court cannot dismiss this case for failure to join an indispensable party."); *Nanjing Textiles IMP/EXP Corp., Ltd. v. NCC Sportswear Corp.,* 2006 WL 2337186, at *8 (S.D.N.Y. Aug. 11, 2006) ("There is insufficient evidence for the Court to resolve the factual dispute at this preliminary stage concerning whether Union is a necessary party within the meaning of Rule 19(a)."); *Knight v. County of Dane*, 1982 WL 315 at *5 (W.D. Wis. May 18, 1982) ("Rule 19 does not provide for any procedure for determining whether a party is indispensable. However, it seems clear that a defendant must provide some evidentiary matter upon which a court would make findings of fact regarding whether a party is indispensable. In the present case, defendant has presented no evidentiary matter, such as affidavits or depositions, tending to show that the union is a necessary party to this litigation; instead, defendant has only asserted in its brief that the union is indispensable. Because of this lack of evidentiary support, defendant's motion to dismiss pursuant to Rule 12(b)(7) must be denied at this

Here, Plaintiffs (and the R&R) are just guessing. Is the alleged risk to the Tribe that EBCI might later have some exposure through indemnifying Harrah's as a result of its contract? We do not know. But even if this is the argument, it does not give EBCI an interest sufficient for it to qualify as a necessary party. Numerous courts have found that "[s]imply because a party may later bring a claim for indemnification or contribution against a non-party, does not make the non-party necessary." *EEOC v. Cummins Power Gen. Inc.*, 313 F.R.D. 93, 101-02 (D. Minn. 2015). "It is not enough under [Rule 19(a)] for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under [Rule 19(a)] are only those parties whose ability to protect their interests would be impaired because of that party's absence from the litigation." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.,* 471 F.3d 377, 387 (2d Cir.2006). In *GAA Family Limited Partnership v. Southeast Restoration, Inc*., 2017 WL 2261739 (S.D. W. Va. May 23, 2017), the Court rejected a very similar assertion that that the purported necessary party "has important interests that would be affected by a declaration that the Contract…is null and void" because "it does not explain what those interests may be." *Id.* at *2. *Compare Pettus v. Servicing*

---

time. Because of the evidentiary basis for such a motion, it is very difficult to grant such a motion on the pleadings alone.").

Co., LLC, 2015 WL 9255331 at *3 (E.D. Va. Dec. 17, 2015) ("Complicating or tangentially affecting one's business does not rise to the level of impairing one's ability to protect one's interest, or subjecting one to multiple or inconsistent judgments."); *Salt River Project Agr. Imp. And Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (reversing Rule 19 dismissal where district court had "concluded under Rule 19(a)(1)(B)(i) that the Navajo Nation had three distinct interests in this action: (1) the scope of the tribe's rights under the 1969 lease, (2) the job security of Navajo Nation members, and (3) the tribe's general interest in governing the Navajo reservation" because "that is not the end of the matter. The district court failed to analyze whether proceeding without the Navajo Nation would 'impair or impede' the tribe's ability to protect those interests.").

Further, the alleged "impairment of contractual interests" is so vague as to not be actionable under Rule 19. *See Trans Energy, Inc. v. EQT Prod. Co.,* 743 F.3d 895, 902 (4th Cir.2014) (requiring a party to show that its interests will be harmed in a "tangible way"); *Dore Energy Corp. v. Prospective Inv. & Trading Co.,* 570 F.3d 219, 232 (5th Cir.2009) ("The factors under Rule 19(b) are concerned with whether *actual harm* to anyone's interests will occur if the case proceeds absent certain parties." (emphasis added)).[3]

[3] The court in *Dillon v. BMO Harris Bank N.A.,* 16 F. Supp.3d 605, 614 n.45 (M.D.N.C. 2014) cited these cases as support for its rejection of a claim of impairment of tribal interests in its "contractual relationships with the lenders"

The R&R also ignores that the purported impairment of the non-party Tribe's interests is neutered as a factor where the moving party and the alleged necessary party have similar litigation interests because "[a]n absent party with an interest in the action is not a necessary party under Rule 19(a) 'if the absent party is adequately represented in the suit.'" *Salt River*, 672 F.3d at 1180 (quoting *Shermoen v. United States,* 982 F.2d 1312, 1318 (9th Cir.1992). This is definitely the case here as Harrah's and the Tribe both wish for Harrah's to defeat the claim.[4]

Indeed, the Tribe's interests are at their weakest when the Tribe has vested complete discretion to its agent, which in this case is Harrah's. The Compact, which was extensively discussed in the briefing, gave Harrah's complete authority to make decisions about the management of the casinos, including employment

---

which the court found to not have been adequately explained. *Id.* at 614. In citing the above cases, the Court noted that "While the discussion in these cases relates to the analysis under Rule 19(b), it applies equally to the Rule 19(a) analysis." *Id.* at 614 n.45.

[4] *Compare Key Constructors*, 315 F.R.D. at 184 ("Key Constructors's interests in recovering for breach of contract align with Temple Grading's interests. Each wants to get paid for its work on the project and to be compensated for the alleged damages incurred while working on the project…. Thus, the second Rule 19(a) factor does not support finding that Temple Grading is a necessary party."): *EEOC v. Cummins Power Gen. Inc.*, 313 F.R.D. 93, 101-02 (D. Minn. 2015) (finding that the purported necessary party's did not have to be present because "Cummins has considerable incentive to defend against the EEOC's claims in a way which protects any interest Cigna or Pearson might have (i.e., that the Cigna Authorization and Pearson Form do not violate the ADA or GINA) making them unnecessary under Rule 19(a)(1).").

and payroll policies. [See D.E. 53 at 9]. Compare *Alto v. Black*, 738 F.3d 1111, 1127 and 1129 (9th Cir. 2013) (Tribe cannot claim a compelling interest where injury complained of by plaintiff was "the BIA's violation of the APA in carrying out a responsibility delegated to it by the Band, under the Band's own Constitution" and rejecting "the Band's legal interest in maintaining sovereign control over membership issues" as a compelling Rule 19 interest because "The Tribe itself has delegated its authority over enrollment to the BIA").

2. The Magistrate Judge Relied Almost Exclusively on *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541 (4th Cir. 2006) Which is Plainly Distinguishable.

The R&R states that "[t]he Court finds *Yashenko* [] to be instructive" and it characterized the case as very similar because *Yashenko* involved claims that Harrah's violated the Family Medical Leave Act (FMLA). [D.E.53 at 6-7] But the claims here and those in *Yashenko* are not remotely similar because the Rule 19 decision in *Yashenko* was predicated ***solely*** on the Section 1981 claim brought by the Plaintiff there, which the R&R in this case does not even acknowledge let alone mention. A plain reading of *Yashenko* makes clear that the Rule 19 determination was instead solely predicated on alleged claims of discrimination under Section 1981. This is explicit in the opinion which states that "under Rule 19(a), the Tribe is a necessary party to Yashenko's § 1981 claim." *Id.* at 553. The FMLA claim

was addressed on its merits in the opinion and the Rule 19 analysis was not applied to the FMLA claim.

The reason why the *Yashenko* court found the Tribe was a necessary party for the Section 1981 claim has nothing to do with the asserted interests of the Tribe in this case. In *Yashenko*, the Section 1981 claim challenged Harrah's contractual obligation to give employment preference to members of the Tribe. *Id.* at 545. The Tribe was found to a necessary party for the discrimination claim because "the plaintiff could not obtain complete relief without suing the tribe; a judgment in the plaintiff's favor would only bind him and the private employer and would not prevent the tribe from continuing to enforce its tribal preference policy on its own property." *Id.* at 552-53. These concerns are not remotely applicable here, and it is noteworthy that the issue of hiring preferences was not delegated to Harrah's under the contract in Yashenko: Harrah's was required to give hiring preference. Here, by contrast, the issue of employment policies related to pay was entirely delegated to Harrah's.

B. THE R&R FAILED TO CONSIDER OR WEIGH WHETHER PLAINTIFFS WOULD HAVE AN ALTERNATIVE FORUM.

The very first indispensability factor is whether the plaintiffs have an alternative forum if the case is dismissed for inability to join an indispensable party. In *Provident Tradesmen*, the Supreme Court noted that "The Advisory Committee on the Federal Rules of Civil Procedure, in its Note on the 1966

Revision of Rule 19, quoted at 3 Moore, Federal Practice 19.01… [that] '"(T)he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible."'"). *Id.* at 109 n.3. Harrah's has failed to put in any evidence indicating it could be sued in a Tribal Court, or that the Tribal Court would or even jurisdictionally could apply the FLSA. The R&R fails to mention this factor in its opinion at all, and it is error as "[a] critical consideration under Rule 19(b) is the availability or unavailability of an alternative forum. If the plaintiff's complaint is dismissed and there is no other court having jurisdiction over the parties as well as over the absent person, the plaintiff's interest in having the federal forum would strongly influence a court to find that the absent person was not indispensable." *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir. 1980). Whether or not this factor is dispositive cannot be weighed unless it is considered.

C. HARRAH'S HAS NOT SHOWN A RISK OF INCONSISTENT RELIEF OR MULTIPLE LITIGATION.

Another *Provident Tradesmen* factor is whether Harrah's "may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another." Below, Harrah's nowhere asserted this factor as one of its concerns. Nor could Harrah's make such an argument, as the focus is on whether ***the plaintiff*** can obtain complete relief in the single proceeding.

Without any explanation, the R&R concludes that the Tribe's absence "may subject the existing parties to a substantial risk of incurring multiple or inconsistent obligations." [D.E. 53 at 9] How this could possibly be the case is nowhere identified. Indeed, it has never been identified by Harrah's or the R&R, so Plaintiffs have never had a chance to address the purported risk. The R&R's conclusion thus runs afoul of the requirement that "[i]n order to qualify as a necessary party under Rule 19(a), the possibility of being subject to multiple or inconsistent obligations must be real, and not a mere possibility." *FDIC v. Bank of N.Y.*, 479 F.Supp.2d 1, 12 (D.D.C. 2007).

Plaintiffs can satisfy their claim solely against Harrah's because, as discussed above, the FLSA provides for joint and several liability. Indeed, the 1966 advisory committee's note to the 1966 FRCP amendment to Rule 19 makes clear that Rule 19 "is not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability" and that the "[j]oinder of these tortfeasors continues to be regulated by Rule 20."[5]

[5]*See also Temple v. Synthes Corp., Ltd.,* 498 U.S. 5, 7 (1990) ("In his petition for certiorari to this Court, Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties. We agree….It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. Nothing in the 1966 revision of Rule 19 changed that principle.") (citations omitted); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 406

Harrah's potential risk of inconsistent or multiple obligations is both legally irrelevant and legally and factually unfounded, especially if the (as yet unidentified) risk of inconsistency concerns later disputes with the Tribe over whether Harrah's might be entitled by contract to pass on the costs of any judgment. That an existing party may pursue or be subject to further litigation against other absent parties has no effect on the Rule 19 analysis and the conclusion of the R&R

> runs contrary to precedent in this circuit. In *United States v. Arlington County, Va.,* 669 F.2d 925, 929 (4th Cir.), *cert. denied,* 459 U.S. 801, 103 S.Ct. 23, 74 L.Ed.2d 39 (1982), the Fourth Circuit held that the

---

(3d Cir. 1993) ("If the Agreement in question can be construed or interpreted as a contract imposing joint and several liability on its co-obligors, Shepard Niles and Underwood, complete relief may be granted in a suit against only one of them…. because the Agreement can be construed to impose joint and several liability, Underwood is not a necessary party under subsection (a)(1), and we must affirm the district court's holding that complete relief could be granted between Shepard Niles and Janney without Underwood's presence."); *Moreno v. EDCare Mgt., Inc.*, 243 F.R.D. 258, 259 (W.D. Tex. 2007) ("Plaintiffs contend that EDCare is *an* employer of plaintiffs [under the FLSA], it is therefore jointly and severally liable with Southwest for any FLSA violations, and Southwest is not a necessary party….Assuming for purposes of this motion that EDCare is an employer of plaintiffs, because joint and several liability exists under the FLSA, complete relief can be accorded from EDCare without the joinder of Southwest."); *DeWitt v. Daley,* 336 B.R. 552, 556-57 (S.D.Fla.2006) ("Because Plaintiffs have stated a claim against Defendant individually, BBC is not a necessary party that should be joined under 19(a). As stated *supra,* the FLSA provides for joint and several liability. Therefore, Plaintiffs can obtain complete relief from Defendant without making BBC a party to the case. The fact that Defendant may then have a claim for indemnification against BBC is of no consequence."); *Core Construction Services. LLC v. U.S. Specialty Ins. Co.*, 2017 WL 1037444 at *3 (E.D. La. March 17, 2017) ("Under federal law, a party that is merely subject to joint and several liability with an existing defendant is not a necessary party.").

> reference to complete relief in Rule 19(a) applies only to "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." *See Atlantic Aero, Inc. v. Cessna Aircraft Co.,* 93 F.R.D. 333, 335 (M.D.N.C.1981) (holding that possible indemnity rights against a party do not make an absent joint tortfeasor an indispensable party).

RPR & Assoc. V. O'Brien/Atkins Assoc., P.A., 921 F. Supp. 1457, 1463 (M.D.N.C. 1995).[6]

[6] *See also Bacardi Int'l Ltd. v. Suarez & Co.*, 719 F.3d 1, 12 (1st Cir.2013) (noting that "[t]he mere fact, however, that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a non-party, C, behaved improperly does not, by itself, make C a necessary party") (citation and internal quotation marks omitted); *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir.2006) (affirming the refusal to join Visa in a dispute between MasterCard and an international sports association even though both Visa and MasterCard were disputing the same exclusive sponsorship rights and "there [was] no question that further litigation between Visa and [the sports association], and perhaps MasterCard and Visa, is inevitable if MasterCard prevails in this lawsuit"); *J&J Sports Productions Inc. v. Cela*, 139 F. Supp.3d 495, 504-05 (D. Mass. 2015) (Rejecting Rule 19 motion because "[h]ere, the Court can accord complete relief between J & J and Defendants, the only existing parties. If Defendants are found liable, the issues between the parties will be resolved; no other party is needed to provide J & J the relief it seeks from Defendants."); *National Satellite Sports, Inc. v. Gianikos*, 2001 WL 35675430, at *2 (S.D.Ohio June 21, 2001) ("Although it appears from the record that Plaintiff could have brought similar claims against Time Warner, resulting in a larger damage award, this is not the proper inquiry…. Rule 19(a)(1) mandates that this Court turn a blind eye to possible further litigation between Plaintiff and Time Warner, and focus solely on whether complete relief can be afforded parties presently before the Court .... Plaintiff maintains the possibility of full recovery from [the defendant] in the absence of Time Warner.").

D. HARRAH'S HAS NOT SHOWN THAT RESOLUTION OF THIS MATTER WOULD BE INCOMPLETE WITHOUT EBCI AS A PARTY.

The fourth factor is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." The *Provident Tradesmen* Court characterized this factor as referring to the "public stake in settling disputes by wholes, whenever possible". *Id.* at 111. Harrah's below did not identify how there could possibly be incomplete or inconsistent resolutions of this case here that would be caused by the absence of the Tribe as a joined party. Nonetheless, the R&R concludes that "[b]ecause Plaintiff's claims are workplace claims. TCGE, his 'real' employer, must be joined for complete relief." [D.E. 53 at 9] But this is just a conclusion unsupported by fact or explanation, and it is a conclusion that is contrary to known facts and applicable law.

To satisfy this *Provident Tradesmen* factor, "[a] plaintiff need not join all the parties against whom it may have a cause of action into one suit; the plaintiff is free to exclude potential defendants if they are jointly liable" as is the case under the FLSA. *Testaiuti v. U.S.*, 2016 WL 7626212 at *3 (S.D. Fla. July 18, 2016).[7]

[7] *See also Salton, Inc. v. Philips Domestic Appliances and Personal Care B.V.,* 391 F.3d 871, 877 (7th Cir. 2004) ("the victim is not required to sue more than one of his oppressors"); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 411–13 (3d Cir. 1993) (no joinder necessary when plaintiff sued one co-obligor under a contract but did not join the other); *United States v. Rutherford Oil Corp.*, No. G-08-0231, *8–9, 2009 WL 1351794, at *3 (S.D. Tex. May 13, 2009) (in Clean Water Act suit, government failure to join other alleged polluters did not

Here, because there is joint and several liability, the Tribe's presence is not necessary to afford Plaintiffs complete relief as

> "It has long been the rule that it is not necessary for all joint tortfeasors to be named ... in a single lawsuit." *Temple v. Synthes Corp., Ltd*. 498 U.S. 5, 7 (1990) (per curiam); *Landress v. Tier One Solar LLC*, 243 F. Supp. 3d 633, 642 n.10 (M.D.N.C. Mar. 21, 2017); *Malibu Media, LLC v. Doe*, No. RWT 13-CV-0512, 2015 WL 1402286, at *3 (D. Md. Mar. 25, 2015); *see Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) ("joint tortfeasors are not indispensable parties"); Fed. R. Civ. P. 19(a), advisory committee notes ("a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability").

EFA Properties, LLC v. Lake Toxaway Community Assoc., Inc., 2018 WL 296036 at *7 (W.D.N.C. Jan. 4, 2018). *See also USA Trouser, S.A. de C.V. v. Int'l Legwear Group, Inc.,* 2015 WL 6473252 at *4 (W.D.N.C. Oct. 27, 2015) ("It is well-established, however, that joint tortfeasors are not 'necessary' or 'indispensable' parties within the meaning of Rule 19."); *PCS Nitrogen, Inc. v. Ross Dev. Corp.,* 2010 WL 3893619 at *7 (D.S.C. Sept. 30, 2010) ("joint tortfeasors are not necessary parties since their liability is both joint and several.").

---

prejudice either present defendants or absent polluters). This principle has been applied in the context of FLSA claims. *See, e.g., Son v. Comprehensive Pain & Rehabilitation Center Ltd.,* 2016 WL 3213404 at *2 (N.D. Ill. June 10, 2016) (rejecting Rule 19 motion in FLSA case where defendant argued that "HPR" was a necessary party "because: (a) HPR constitutes the Plaintiffs' "employer" under the "economic realities" test under prevailing FLSA standards; and (b) given the agreement between CRC and HPR, there is a substantial risk that Defendants will be subject to double liability as a result of HPR's absence" because there was no evidence of risk of double liability).

See also Key Constructors, 315 F.R.D. at 184 ("[T]he court can accord complete relief among the existing parties in Temple Grading's absence. As mentioned, Key Constructors seeks damages from the Harnett County defendants for breach of contract or for unjust enrichment. Key Constructors also seeks damages from MBD for alleged negligence. This court can provide Key Constructors such monetary relief from defendants without Temple Grading. Thus, the first Rule 19(a) factor does not support finding that Temple Grading is a necessary party.").

The Ninth Circuit has noted the importance of the ability of a plaintiff to obtain satisfaction from the Tribe's agent as a reason why a Tribe is not a necessary party. In *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013), the court noted that "[i]n several past cases involving Rule 19 motions by Indian tribes, we have held it impossible to afford complete relief because the court's judgment would not bind the absent tribe. In those cases, however, the injury complained of was a result of the absent *tribe's* action, not only or principally that of the named agency defendant." Id. at 1126. Here, the Tribe is not the party pursuing a Rule 19 motion, and the alleged bad actor here is Harrah's, against whom Plaintiffs can obtain complete relief.

Further, to the extent this factor implicates issues related to the second factor, Plaintiffs refer the Court to Plaintiffs' arguments above.

E. Harrah's Has Not Shown That The Court Would Not Have Alternative Remedies to the Absence of EBCI Other Than Dismissal.

Lastly, even if this Court finds that any of the concerns implicated by the four-part test might apply here, "a court should consider modification of a judgment as an alternative to dismiss." *Provident Tradesmen*, 390 U.S. at 111-12. In connection with this direction from the Supreme Court, the Fourth Circuit has required courts to consider, when a party has been determined to be indispensable, the "ultimate question" which is "[w]ere the case to proceed, could a decree be crafted in a way that protects the interests of the missing party and that still provides adequate relief to a successful litigant?" *Teamsters Local Union No. 171 v. Keal Driveway Co.*, 173 F.3d 915, 918 (4th Cir. 1999). On this record, there is no way to answer that question, the R&R does not attempt to analyze this question, and it is by itself a basis for denial of the motion to dismiss under Rule 19.

IV. CONCLUSION

For the reasons stated above, the Court should not adopt the Report and Recommendation of the Magistrate and it should deny Harrah's Motion to Dismiss.

/s/ Philip J. Gibbons, Jr.
Philip J. Gibbons, Jr., NCSB #50276
PHIL GIBBONS LAW, P.C.
15720 Brixham Hill Avenue Suite 331
Charlotte, NC 28277

Email: phil@philgibbonslaw.com

James B. Zouras
STEPHAN ZOURAS, LLP
205 N. Michigan Avenue, Suite 2560
Chicago, IL 60601
Email: Jzouras@stephanzouras.com

Jeffrey A. Leon
QUANTUM LEGAL, LLC
513 Central Avenue, Suite 300
Highland Park, IL 60035
Email: Jeff@QULegal.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on May 11, 2018 a copy of the foregoing has been filed with the Clerk of the Court using the CM/ECF system which will send notification to the following:

Jennifer T. Williams
jtwilliams@cozen.com

Patrick McQuillan Aul
paul@cozen.com

Susan N. Eisenberg
seisenberg@cozen.com

Tracy L. Eggleston
teggleston@cozen.com

/s/ Philip J. Gibbons, Jr.
Philip J. Gibbons, Jr., NCSB #50276