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,** **Defendant.**	**DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S 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 ("Defendant"), through counsel and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(7) and Local Rules 7.1(C) and 7.1(D), hereby submits this Brief in Support of Its Motion to Dismiss the Class Action Complaint of Plaintiff Joseph Clark ("Plaintiff").

FACTUAL BACKGROUND AND SUMMARY OF ARGUMENT

The Eastern Band of Cherokee Indians ("EBCI") is a federally recognized Indian tribe located in Cherokee, North Carolina. [*See* Exh. "A", Ray Decl. ¶ 4];

see also 25 U.S.C. § 479a-1 *transferred to* 25 U.S.C. § 5131; 81 Fed. Reg. 5019, 521 (Jan. 29, 2016). EBCI contracts with Defendant to oversee the management of two tribal casinos on tribal land pursuant to the terms of a management agreement. [Ray Decl. ¶ 6]. Also pursuant to the management agreement, EBCI expressly delegates its obligations and rights to its wholly-owned and operated enterprise -- the Tribal Casino Gaming Enterprise ("TCGE"). [Ray Decl. ¶ 7].

In an attempt to avoid clear tribal sovereign immunity, Plaintiff has failed to name his correct employer in this suit. The attached declaration of TCGE's Regional Vice President, Human Resources and Community Relations makes clear that TCGE was Plaintiff's employer; not Defendant. [Ray ¶ 8]. All TCGE employees, including Plaintiff, are employees of a tribal enterprise. [Ray Decl. ¶ 5]. Plaintiff was employed by TCGE as a table games dealer, dual rate dealer, and floor supervisor,[1] at two casinos located on EBCI Indian Reservation Lands. [ECF No. 1, ¶ 23]. In contrast to TCGE that employs the entire workforce at the two casinos, Defendant has a *single employee* on the casino property to facilitate the management services it provides to EBCI. [Ray ¶ 6]. Plaintiff was subject to the rules and regulations of the Cherokee Tribal Gaming Commission while he was employed at the property, and his employment with TCGE was conditioned on

[1] The putative class members that Plaintiff purports to represent are also "current and former table games dealers, dual rate dealers, and floor supervisors" at TCGE casinos. [ECF No. 1, ¶ 38].

passing a background check conducted by the Cherokee Tribal Gaming Commission. [Ray Decl. ¶¶ 9-10].

Plaintiff's Class Action Complaint contains two claims: (1) that Defendant violated the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* (the "FLSA") by failing to properly compensate Plaintiff and the putative class for all hours worked; and (2) that Defendant violated the North Carolina Wage and Hour Act, N.C. Gen. Stat. §§95-25.6 *et seq.* (the "NCWHA") by failing to properly compensate Plaintiff and the putative class for these same hours worked. [ECF No. 1]. Specifically, Plaintiff contends that Defendant violated the FLSA and NCWHA by: (1) automatically deducting a daily, 30-minute meal period from Plaintiff's wages; and (2) requiring Plaintiff to report to work 30 minutes prior to each shift without compensation. [ECF No. 1, ¶¶ 27, 35, & 49].

As fully set forth below, Plaintiff's Class Action Complaint should be dismissed in its entirety for multiple reasons. First, dismissal is warranted under Federal Rule 12(b)(1) because this Court lacks subject matter jurisdiction over Plaintiff's claims as well as any putative class member claims. Plaintiff's employer TCGE has sovereign immunity from suit under the FLSA. Congress has not chosen to abrogate sovereign immunity with regard to the FLSA, nor has TCGE waived sovereign immunity for any FLSA claims. Second, Plaintiff cannot avoid sovereign immunity by suing Defendant rather than TCGE because the tribal

exhaustion doctrine also warrants dismissal of the Class Action Complaint. Specifically, Plaintiff's claims here directly implicate EBCI's economic interests and welfare and, therefore, must proceed before the tribal court. Third, Plaintiff's Class Action Complaint should be dismissed for failing to join his employer, TCGE, a necessary and indispensable party to this litigation. Accordingly, dismissal of Plaintiff's Class Action Complaint with prejudice is warranted and proper.

ARGUMENT

I. MOTION TO DISMISS STANDARDS.

Federal Rule of Civil Procedure 12(b)(1) provides that dismissal of a complaint is appropriate in circumstances where a court lacks subject matter jurisdiction over the dispute. *See Arbaugh v. Y&H Corp.,* 546 U.S. 500, 514 (2006) (holding that a court "must dismiss the complaint in its entirety" when it lacks subject matter jurisdiction over a matter); *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir. 1982); *see also Madewell v. Harrah's Cherokee Smokey Mountains Casino, et al.,* No. 2:10cv8, 2010 WL 2574079 at *2-3 (W.D.N.C. May 3, 2010), *report and recommendation adopted*, 730 F.Supp.2d 485, 488-489 (W.D.N.C. 2010) (dismissing claims against TCGE under Rule 12(b)(1) for lack of subject matter jurisdiction and against Defendant under the tribal exhaustion doctrine). Plaintiff bears the burden of establishing that subject matter jurisdiction exists.

See, e.g., Tremblay v. Mohegan Sun Casino, 599 Fed. Appx. 25, 26 (2d Cir. 2015) (unpublished); *Madewell*, 2010 WL 2574079 at *2.

Federal Rule of Civil Procedure 12(b)(7) provides that a complaint should be dismissed for failure to join a party under Rule 19 where an absent party is necessary and indispensable. *See, e.g., Landress v. Tier One Solar, LLC,* 243 F.Supp.3d 633, 639 (M.D.N.C. 2017). "'The inquiry contemplated by Rule 19 is a practical one which is left to the sound discretion of the trial court.'" *Id.* (internal quotations and citations omitted).

II. PLAINTIFF'S CLASS ACTION COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(1) BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION ON THE BASIS OF TRIBAL SOVEREIGN IMMUNITY.

This jurisdiction has already established that EBCI and TCGE have sovereign immunity. *See, e.g, Madewell,* 2010 WL 2574079 at *2-3. Plaintiff seeks to avoid the well-established law regarding tribal sovereign immunity by improperly bringing suit against Defendant. The attached declaration makes clear, however, that Plaintiff was actually employed by TCGE – which is an EBCI tribal enterprise. [*See* Exh. "A"]. Accordingly, this Court lacks subject matter jurisdiction over the claims in Plaintiff's Class Action Complaint because of tribal sovereign immunity. "[W]hen a federal court concludes that it lacks subject matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

The Supreme Court has expressly held that "Indian tribes are 'domestic dependent nations that exercise inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal citations omitted). Therefore, "'as a matter of federal common law, an Indian tribe enjoys sovereign immunity from suit except where Congress has authorized the suit or the tribe has waived its immunity.'" *Tremblay,* 599 Fed. Appx. at 26 (internal quotations and citations omitted); *see also Kiowa Tribe of Oklahoma v. Manuf. Techs., Inc.,* 523 U.S. 751, 754 (1998) ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); *State of FL. v. Seminole Tribe,* 181 F.3d 1237, 1241 (11th Cir. 1999) ("a suit against an Indian tribe is . . . barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit"). The law is clear that waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. "Although effective waiver of sovereign immunity requires no 'magic words', a tribe's waiver must be 'clear' and 'unambiguous.'" *Costello v. Seminole Tribe of Fla.*, 763 F. Supp.2d 1295, 1298 (M.D. Fla. 2010) (citing *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Oklahoma,* 532 U.S. 411 (2001)).

Here, the Court lacks subject matter jurisdiction over Plaintiff's claims under the long-established doctrine of tribal immunity because his employer, TCGE, is a wholly-owned enterprise of EBCI formed under Cherokee tribal law. [Ray Decl.

¶¶ 4, 5, 8]; *see also Tremblay v. Mohegan Sun Casino,* 599 Fed. Appx. 25, 26 (2d Cir. 2015) (unpublished); *Furry v. Miccosukee Tribe of Indians of Fla.,* 685 F.3d 1224, 1228 (11th Cir. 2012); *Madewell,* 2010 WL 2574079 at *2, n. 5 ("The court takes judicial notice . . . as to the creation and tribal status of the TCGE"); *Cook v. AVI Casino Enters, Inc.,* 548 F.3d 718, 724-726 (9th Cir. 2008) (the "same presumption of immunity" likewise applies to all tribal agents). Therefore, absent express authorization from Congress or clear waiver from EBCI and TCGE, Plaintiff's FLSA claim cannot stand.

1. Congress Has Not Abrogated Sovereign Immunity Under The FLSA.

As an initial matter, TCGE cannot be sued under the FLSA unless Congress has abrogated TCGE's tribal sovereign immunity. In order for Congress to abrogate tribal sovereign immunity, it must "unequivocally express that purpose." *See Bay Mills,* 134 S. Ct. at 2031. There is no question that Congress did not expressly abrogate tribal sovereign immunity in the text of the FLSA. In fact, the FLSA is completely silent with respect to any Congressional authorization of private lawsuits under the FLSA against Indian tribes or tribal agents. Nowhere in the text of the FLSA is there any mention of tribal immunity from suit, much less an express and unequivocal abrogation of tribal immunity for private lawsuits. *See* 29 U.S.C. §§ 201-216. Without statutory language to the contrary, the FLSA does

not abrogate long-standing tribal sovereign immunity barring Plaintiff's FLSA claims.

Neither this Court nor the Fourth Circuit have directly addressed the issue of tribal sovereign immunity in the context of an FLSA claim. However, the Eleventh Circuit directly addressed this issue in *Lobo v. Miccosukee Tribe of Indians of Florida,* 279 Fed. Appx. 926 (11th Cir. 2008). In *Lobo,* the plaintiff brought similar unpaid wage claims under the FLSA against a tribal-owned casino. In affirming dismissal of plaintiff's complaint, the appellate court noted that an Indian tribe is not subject to suit unless the tribe waives immunity or Congress expressly abrogates it. *Id.* at 927. The Eleventh Circuit then held: "Turning to the text of the FLSA, it is clear that there is no such indication that Congress intended to abrogate the tribe's immunity to suit. Indeed, there is no mention of tribes in the text of the statute." *Id.* The appellate court, therefore, affirmed dismissal of the plaintiff's FLSA claim under Rule 12(b)(1) for lack of subject matter jurisdiction. *Id.* Other courts have, likewise, dismissed FLSA claims on sovereign immunity grounds. *See, e.g., 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 against tribal casino); *Costello v. Seminole Tribe of FL.,* 763 F.Supp.2d 1295, 1298 (M.D. Fla. 2010) (finding no Congressional abrogation of sovereign immunity for FLSA claims); *Brown v.*

Cheyenne Arapaho Tribes, Oklahoma, 2010 WL 9473334, *2 (W.D. Ok. Nov. 3, 2010) (dismissing plaintiff's FLSA claim against an Indian tribe).

2. TCGE Has Not Waived Its Sovereign Immunity.

TCGE did not and has not waived its sovereign immunity with respect to Plaintiff's FLSA and NCWHA claims. Here, any waiver "'cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed.'" *Sanderlin v. Seminole Tribe of Florida,* 243 F.3d 1282, 1286 (11th Cir. 2001) (internal citation omitted). Plaintiff's Class Action Complaint contains no allegation that TCGE waived its sovereign immunity from his claims, and rightfully so – as there is no evidence whatsoever that TCGE has waived its sovereign immunity with regard to the FLSA.

Without express Congressional abrogation nor clear tribal waiver, Plaintiff's claims are barred for lack of subject-matter jurisdiction. Plaintiff's Class Action Complaint states that jurisdiction in this matter is based on both federal question (28 U.S.C. §1331) and the coverage provisions of the FLSA (29 U.S.C. §216(b)). [ECF No. 1, ¶25]. Because the FLSA does not abrogate the doctrine of tribal sovereign immunity, and EBCI has not waived its right to tribal sovereign immunity for itself or for its enterprises and agents such as TCGE, the Court must dismiss Plaintiff's Class Action Complaint as a matter of law for lack of subject matter jurisdiction.

III. PLAINTIFF'S NORTH CAROLINA WAGE & HOUR ACT CLAIM SHOULD LIKEWISE BE DISMISSED UNDER RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF CANNOT STATE A CAUSE OF ACTION UNDER THE FLSA.

Plaintiff's Class Action Complaint also contains a claim for purported violation of the NCWHA. The Court can easily dispense with this cause of action because the factual basis for Plaintiff's NCWHA claim is similar to the factual basis for Plaintiff's FLSA claim. For example, Count I contends that Plaintiff was not paid "for all overtime hours worked" under the FLSA. (ECF No. 1, ¶¶ 59-61). Count II similarly contends that Plaintiff was not paid "all promised wage and overtime payments" for all hours worked under the NCWHA. (ECF No. 1, ¶¶ 66-67).

Tribal sovereign immunity encompasses both Plaintiff's federal law FLSA claims and Plaintiff's state law NCWHA claims. *See, e.g., Kiowa,* 523 U.S. at 755-56 (recognizing the tribal sovereign immunity "is not subject to diminution by the States"); *Welch Contracting, Inc. v. NC Dep't of Transp., Inc.,* 622 S.E.2d 691, 698 (N.C. App. 2005) (holding that "EBCI enjoys tribal sovereign immunity from jurisdiction of the courts of North Carolina"). Moreover, "[t]he North Carolina Wage and Hour Act is modeled after the Fair Labor Standards Act." *Laborers' Intern. Union of North America, AFL-CIO v. Case Farms, Inc.,* 488 S.E.2d 632, 634 (N.C. App. Ct. 1997). Therefore, "[i]n interpreting the NCWHA, North

Carolina courts look to the FLSA for guidance." *Garcia v. Frog Island Seafood, Inc.*, 644 F.Supp.2d 696, 707 (E.D.N.C. 2009). For all of the reasons set forth in Section II above, Plaintiff's NCWHA claim is, therefore, likewise barred for lack of subject matter jurisdiction.

IV. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER THE TRIBAL EXHAUSTION DOCTRINE.

Despite clear evidence that Plaintiff and the putative class were TCGE employees, Plaintiff seemingly attempts to avoid tribal sovereign immunity by suing Defendant instead. This strategy is unavailing, however, because principles of comity also compel this Court to dismiss the instant action. Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on their reservations and non-Indian fee lands. *Montana v. United States*, 450 U.S. 544, 565 (1981). For example, a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members and may retain inherent power to exercise civil authority over the conduct of non-Indians that threatens the economic security or the health or welfare of the tribe. *Id.* This Court has expressly upheld the tribal exhaustion doctrine and ruled that "[w]hen there is a 'colorable question' as to whether a tribal court has subject matter jurisdiction over a civil action, a federal court should stay or dismiss the action so as to 'permit a tribal court to determine in the first instance whether it has the power to exercise subject matter jurisdiction.'" *Madewell v. Harrah's Cherokee Smokey Mountains*

Casino, 730 F. Supp. 2d 485, 488 (W.D.N.C. 2010) (quoting *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992)). The tribal exhaustion doctrine "is applicable regardless of whether an action is currently pending in tribal court. *Id.* at 489. Further, "'civil jurisdiction over the activities of non-Indians on reservations 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) (internal citation omitted).

It is beyond dispute that the tribal court has subject matter jurisdiction over the instant action. Plaintiff's claims stem from alleged payroll policies at two TCGE casinos located on EBCI Indian Reservation Lands. The EBCI and Defendant entered into a contractual agreement for Defendant to oversee the management and operations of those casinos. [Ray Decl. ¶6]. The operation of those casinos clearly has an impact on the economic interests and welfare of EBCI and the EBCI has the power to regulate the activities of Plaintiff and Defendant operating on EBCI's lands.

That the instant action should be dismissed pursuant to the tribal exhaustion doctrine is readily supported by this Court's holding in *Madewell.* There, the Western District of North Carolina dismissed a personal injury claim against the Defendant in this case finding that there was a colorable question that the tribal court had subject matter jurisdiction over the action. 730 F. Supp. 2d at 488-89.

The court found that the EBCI contracted with Defendant to manage the casino that it owned and operated and thus the operation of the casino clearly implicated the economic interests and welfare of the EBCI. *Id.* Thus, there was at least a "colorable question" of tribal jurisdiction, which warranted dismissal. *Id; see also Fid. & Guar. Ins. Co. v. Bradley*, 212 F. Supp. 2d 163, 166 (W.D.N.C. 2002) (dismissing action pursuant to tribal exhaustion doctrine). Accordingly, the instant action should be dismissed and brought in tribal court.

V. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER RULE 19 FOR FAILURE TO JOIN A NECESSARY AND INDISPENSABLE PARTY

Plaintiff's Class Action Complaint is also deficient because Plaintiff failed to join TCGE as a necessary and indispensable party to this lawsuit under Federal Rule 19. Rule 19 is a two-prong inquiry: (1) whether a party is necessary under Rule 19(a) and (2) whether a party is indispensable under Rule 19(b).

The Fourth Circuit in *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006), recognized that EBCI was both a necessary and indispensable party in the context of race discrimination claim against this same Defendant. Because EBCI could not be feasibly joined based on tribal sovereign immunity, Rule 19(b) compelled dismissal because EBCI was an indispensable party to the litigation. *See Yashenko*, 446 F.3d at 552-53. In this regard, the *Yashenko* court ruled that any judgment would impair EBCI's contractual interests

with a private party as well as its sovereign capacity to negotiate contracts and govern the reservation. *Id.* at 553. Moreover, any disposition in EBCI's absence also threatened to leave the defendant subject to substantial risk of incurring multiple or inconsistent obligations. *Id.*

Here, EBCI's tribal enterprise TCGE[2] is likewise a necessary and indispensable party to this litigation. For the same reasons as espoused in *Yashenko,* TCGE would be an indispensable party to the instant action, the absence of whom compels dismissal. EBCI contracts with Defendant to manage and operate the two casinos where Plaintiff worked. [Ray Decl. ¶6]. Pursuant to a management agreement between them, EBCI has delegated its rights under the management agreement to TCGE. [*Id.* at ¶7]. Similar to *Yashenko*, Plaintiff's Class Action Complaint contends that Defendant maintains payroll policies which violate the FLSA and the NCWHA. Any judgment in the absence of TCGE would impair the contractual interests between EBCI (together with its tribal enterprise TCGE) and Defendant as well as the EBCI's sovereign capacity to negotiate contracts and govern the reservation. Moreover, any decision in the absence of Plaintiff's employer, TCGE, would not afford Plaintiff full relief because TCGE

[2] Instructive here is Magistrate Judge Howell's Memorandum and Recommendation in *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, No. 2:10cv8, 2010 WL 2574079 (W.D.N.C. May 3, 2010) (unreported). In *Madewell,* at issue was tribal sovereign immunity in the context of personal injury and loss of consortium claims. Magistrate Judge Howell recommended dismissal of the plaintiff's claims against TCGE on sovereign immunity grounds and opined that EBCI's sovereign immunity extended to TCGE as a commercial enterprise of EBCI. *See id.* at *3.

would not be prohibited from imposing the same purported payroll policies at issue in this action. Finally, litigating Plaintiff's unpaid wage claims without TCGE would subject both Defendant and TCGE to inconsistent obligations. Accordingly, the instant action must be dismissed pursuant to Rule 19.

CONCLUSION

For each of the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiff's Class Action Complaint in its entirety, and award Defendant such other and further relief as to it seems just and proper.

This the 18th day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he electronically filed the foregoing *Defendant's Brief in Support of Its Motion to Dismiss Plaintiff's Class Action Complaint* 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 18th day of October, 2017.

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