UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

JOSEPH CLARK, individually and on behalf of all others similarly situated; Plaintiff, v. 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, Defendants.	)	Civil No. 1:17-cv-00240-MR-DLH **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COLLECTIVE/CLASS ACTION COMPLAINT**

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Plaintiff Joseph Clark ("Plaintiff"), individually and on behalf of all others similarly situated, by and through his undersigned counsel, submits Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Collective/Class Action Complaint ("Harrah's Motion"). For the reasons stated below, Harrah's Motion should be denied.

I. INTRODUCTION

In this lawsuit, Plaintiffs have sued Harrah's NC Casino Company, LLC ("Harrah's") for violating the FLSA in its role of managing and operating Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino and Hotel. Harrah's had the full power to hire and fire Plaintiffs and to set their compensation and employment policies pursuant to a management agreement with the Eastern Band of Cherokee Indians ("EBCI").[1] In connection with Harrah's motion to dismiss the initial complaint, Harrah's argued it was not the employer of Plaintiffs. After the amended complaint cited to the management agreement which gave Harrah's unfettered authority to hire and fire and set employment policies, Harrah's motion to dismiss the Amended complaint abandons the argument that it is not Plaintiffs' employer.

Harrah's, which is Plaintiffs' employer for purposes of the FLSA, does not

[1] Harrah's cites to the management agreement throughout its brief, but did not include a copy. Attached hereto is a copy of the management agreement between Harrah's and the EBCI.

assert that it is an instrumentality of an Indian Tribe or that it is owned by an Indian Tribe. Nonetheless, Harrah's has filed a Rule 12 motion seeking to dismiss this lawsuit by attempting to cloak itself within potential sovereign rights of the EBCI which is not a party to this lawsuit and has asserted no rights or interests in this lawsuit.

As is discussed in more detail herein, Harrah's cannot claim the Tribe's sovereign immunity for itself because the Harrah's entity sued herein is a North Carolina limited liability company subject to federal and state employment laws. No legal or factual basis exists to extend sovereign immunity to Harrah's. Similarly, Harrah's cannot invoke the tribal exhaustion doctrine under the circumstances of this case, nor can Harrah's establish that EBCI is a necessary party in this proceeding when Harrah's concedes it is an employer under the FLSA and in light of the fact that the FLSA makes Harrah's jointly and severally liable for any damages. Harrah's has not and cannot carry its burden of establishing that this Court lacks subject-matter jurisdiction or that it should decline to exercise subject matter jurisdiction under the applicable rules and governing law, and its motion to dismiss should be denied.

II. FACTS RELEVANT TO THE MOTION.

This is a case brought against Defendant under the federal Fair Labor Standards Act and North Carolina's state law equivalent for employment policies

and practices which have led to plaintiffs and the putative class being denied pay for time they spent on the job. Defendant is a North Carolina Limited Liability Company and is not asserted to be an instrumentality of an Indian Tribe. Defendant signed a contract to manage casinos owned by the Eastern Band of Cherokee Indians ("EBCI"). Pursuant to that management agreement, Harrah's was given "exclusive responsibility and authority to direct the election, hiring, training, control and discharge of all employees" at Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino. [Amended Complaint, ¶24]. Indeed, the management agreement explicitly states that all employee at Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino are under Harrah's supervision. [Amended Complaint] and that Harrah's maintains responsibility for drafting "personnel policies and procedures" for all Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino employees. [Amended Complaint, ¶26].

Co-defendant Robinson is the General Manager of Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino, and was responsible for the day-to-day operation of Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino pursuant to the terms of the management agreement. [Amended Complaint, ¶27]

III. ARGUMENT

A. The Court Has Subject Matter Jurisdiction Over Plaintiff's Claims Against Harrah's

Harrah's initial argument is a curious one, in that Harrah's spends pages arguing that EBCI, which is not a party to this case, is immune to suit due its status as a Tribe. But EBCI is not a party, so this argument is *apropos* of nothing as Harrah's cannot obtain EBCI's immunity (which Plaintiffs accept for purposes of this motion only) through the transitive property, and the claims against Harrah's and its employee – the only defendants in this case – cannot be dismissed pursuant to Rule 12(b)(1) because this Court has subject matter jurisdiction over Harrah's, a privately owned LLC registered with the North Carolina Secretary of State that is not asserted to be owned by an Indian Tribe let alone owned by the EBCI.

1. This Court Has Federal Question Subject Matter Jurisdiction Under 28 U.S.C. § 1331 and 29 U.S.C. § 216(b)

This Court's subject-matter jurisdiction is provided by 28 U.S.C. § 1337 (as the Plaintiffs' claims involve interstate commerce), 28 U.S.C. § 1331 (subject jurisdiction when Plaintiffs' claim raises a federal question), and 29 U.S.C. § 216(b) (Plaintiffs' claim arises under the FLSA, a federal statute expressly providing for jurisdiction of the federal courts).[2]

[2] In addition to the federal question jurisdiction, Plaintiff's NCWHA claims provide the Court with supplemental jurisdiction pursuant to 28 U.S.C. § 1367 because they arise from the same nucleus of facts of the FLSA federal claims.

2. The Elements of a FLSA Claim are Not Jurisdictional and are Not Subject to Challenge Under FRCP 12(b)(1).

Harrah's argues that 12(b)(1) dismissal is required because the Tribe is the "real" employer here. But this argument is misplaced and is both legally and factually irrelevant to the question of subject matter jurisdiction.

The federal courts have repeatedly made clear that the issue of whether or not Harrah's is an "employer" as that term is given meaning under the FLSA is not a fact which in any way implicates this Court's subject-matter jurisdiction. Any doubt as the inappropriateness of Harrah's seeking to proceed on a 12(b)(1) was put to rest in 2006 when the Supreme Court made clear, in connection with a case involving Title VII's requirement that an employer is only subject to suit if it employs 15 or more persons, that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 516 (2006).

Courts faced with similar 12(b)(1) challenges to the FLSA have not hesitated to apply *Arbaugh* and deny the motion. *See, e.g., Maravilla v. Ngoc Anh Restaurant Ltd.*, No. 1:16-cv-427 (LMB/MSN), 2016 WL 6821090 at *3 (E.D. Va., Nov. 17, 2016) (court applied *Arbaugh* and held that "'whether a defendant is an employer as

defined in the FLSA is an element of the plaintiff's meritorious FLSA claim' and...'does not implicate subject matter jurisdiction.'" because "the FLSA provides no indication that Congress intended the coverage requirements to operate as a jurisdictional bar" and noting that the "FLSA's definition of employer is found in the definitions section of the Act, [ ] the term is not jurisdictional.") (quoting *Gilbert v. Freshbikes*, LLC, 32 F.Supp.3d 594, 600 (D. Md. 2014)); *Bellows v. Darby Landscaping*, 2016 WL 264914 at *2 n.12 (D. Md. Jan. 21, 2016) ("the subject of Darby's motion—FLSA coverage—is an element of Bellows's FLSA claim; it *'is not* a jurisdictional issue.'") (quoting *Ramirez v. Amazing Home Contractors, Inc.,* No. CIV. JKB-14-2168, 2015 WL 4282130, at *4 & n.2 (D. Md. July 14, 2015)).

Thus, any argument as to whether or not Harrah's is an "employer" for purposes of the FLSA is not a matter of subject matter jurisdiction and must be raised via a 12(b)(6) motion which Harrah's notably does not make here, instead predicating its motion for dismissal solely on Rules 12(b)(1) and 12(b)(7). *See Maravilla*, 2016 WL 6821090 at *2 n.1 ("if the argument is effectively a Rule 12(b)(6) argument, then it is improperly raised in a Rule 12(b)(1) motion and the Court need not consider it.").

3. Harrah's Has Not Raised Arguments Which Would Defeat Its Status as Plaintiffs' Employer as That Term is Defined Under the FLSA, Even if Its Motion was (Improperly) Converted to a 12(b)(6) Motion.

Harrah's does not contest the facts in Plaintiff's Amended Complaint which

establish that Harrah's is Plaintiffs' employer under the FLSA. Instead Harrah's states summarily that EBCI is "his [Plaintiff's] employer". Br. at 7. This statement in turn refers to an affidavit that purports to establish that Plaintiffs had an employment relationship with EBCI. But because whether or not Harrah's is an employer under the FLSA is not a matter of subject matter jurisdiction, Harrah's cannot look outside the complaint for support. *See, e.g., Lowenthal v. Quicklegal, Inc.,* 2016 WL 5462499 at *5 (N.D. Cal. Sept. 28, 2016) (after rejecting argument that employer status under FLSA is jurisdictional and denying 12(b)(1) motion, court stated that it "therefore construes the defendants' arguments as attacking the merits of [plaintiff's] FLSA claim, and will consider them in the 12(b)(6) context. In doing so, the court considers only the facts in the complaint and the documents attached thereto. The court does not consider the defendants many declarations or attachments, which raise factual contentions beyond the scope of a Rule 12(b)(6) motion.") (citations omitted).

Notably Harrah's does not contest or even mention the well-pled allegations of the Amended Complaint establishing that Harrah's was Plaintiffs' employer. *See supra* Roman II Factual Statement. These facts, which must be taken as true even if a 12(b)(6) motion were pending, establish that Harrah's was Plaintiffs' employer under the "economic realities' test" established by the Fourth Circuit which Harrah's neither mentions or discusses. *See Kerr v. Marshall Univ. Bd. of Governors*, 824

F.3d 62, 83 (4th Cir. 2016) (establishing test to determine who is an FLSA "employer" including whether the individual "(1) has the power to hire and fire the employees, (2) supervise[s] and control[s] employee work schedules or conditions of employment, (3) determine[s] the rate or method of payment, and (4) maintain[s] employment records.").

Finally, Plaintiff ignores that, under the FLSA, Harrah's and EBCI could be Plaintiffs' employers simultaneously. Thus even if EBCI is Plaintiffs' employer, it would not negate that Harrah's is also Plaintiffs' employer under the FLSA.

B. The Tribal Exhaustion Doctrine Is Inapplicable to Plaintiff's FLSA and NCWHA Claims

Harrah's also attempts to dismiss this case by invoking the doctrine of tribal exhaustion, citing *Montana v. U.S.*, 450 U.S. 544 (1981) as its support. Remarkably, Harrah's, and not the EBCI, is arguing that Plaintiffs must pursue their claims in a tribal court. But Harrah's cites to no contract which would require such exhaustion here, which renders *Montana* inapplicable. Nor is there a currently pending Tribal Court action in which steps to exhaust remain, nor has the tribal court attempted to insert itself into this action for purposes of asserting its jurisdiction. Harrah's failure to note the standard that governs the tribal exhaustion doctrine requires ejection of Harrah's claim.

1. There is No Pending Tribal Action and There is No Evidence Plaintiffs Would be Able to Pursue a Tribal Action as the Tribal Courts Do Not Have Jurisdiction to Enforce the FLSA.

Harrah's does not argue that there is an existing Tribal Court action involving the same or similar facts. This case is thus different from the vast majority of the authority addressing tribal exhaustion, which presupposes that a party has come to the federal court without completing tribal remedies. The Supreme Court has made clear that because "the federal policy of promoting tribal self-government encompasses the development of the entire tribal court system ... exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9, 16-17 (1987). *See also Tidwell v. Harrah's Kansas Casino Corp*., 322 F. Supp.2d 1200, 1204 (D. Kan. 2004) (distinguishing tribal exhaustion authority urged by the Harrah's LLC in that case because "[i]n both cases there was a pending tribal suit").

2. Tribal Exhaustion is Rarely Warranted Where the Tribe Has Not Intervened to Assert the Jurisdiction of its Courts.

Further distancing this case from the vast majority of tribal exhaustion cases is the fact that, invariably, the tribal court is a party to virtually all tribal exhaustion decisions and there is an already instituted tribal proceeding that is the issue of the exhaustion discussion in the federal court. Here, the tribe is not a party nor has it sought to intervene to invoke the jurisdiction of its courts, nor is there a pending

uncompleted tribal court proceeding. *Compare Ninigret Dev. Corp. v. Naragansett Indian Wetuomuck Housing Auth*., 207 F.3d 21, 31-31 (1st Cir. 2000) ("To be sure, the tribal exhaustion doctrine does not apply mechanistically to every claim brought by or against an Indian tribe….as a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum"). The doctrine does not apply.[3]

3. Non-Members Are Not Subject to the Tribal Exhaustion Doctrine.

As the Supreme Court in *Montana* noted, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" although

[3] Harrah's cites *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, 730 F. Supp.2d 485 (W.D.N.C. 2010), but it is clearly distinguishable. First, Harrah's ignores that the Plaintiff in *Madewell* had sued to tribal casino itself, which is a radically different circumstance than exists here. Second, the nature of the lawsuit in *Madewell* was a personal injury claim, which is significantly different than the FLSA claims at issue here. Third, the Plaintiff in *Madewell* "did not file a response to the Defendants' motion" which means that the Court was denied any countervailing arguments. Finally, the *Madewell* Court did not apply the *Montana* factors at all – a failing that is probably almost directly attributable to the plaintiff having failed to file a response brief. As concerns the *Madewell* court's statement that "the exhaustion rule is applicable regardless of whether an action is currently pending in tribal court", the conclusion is based a flimsy assertion made by the Tenth Circuit in *U.S. v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) where the Court cited to a 1933 decision involving state/federal abstention. There is no other authority cited for this proposition which preceded the recognition of the tribal exhaustion doctrine by several decades. There is no rationale that supports such a proposition, and the absence of the tribe as a party asserting such resort to tribal courts in the first instance is a telling difference.

a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe [] through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565.

The Plaintiffs in this case are not EBCI members, and the Defendants are not tribal entities. These facts doom Harrah's tribal exhaustion argument. *See Tidwell*, 322 F.Supp.2d at 1204 ("The Court finds it difficult to discern what sovereignty concerns are threatened by plaintiff's suit. Her suit is between two non-Indian entities and plainly involves issues of federal law. The only connection with the tribe is the casino's location on the reservation. Nevertheless, Harrah's suggests that adjudication of plaintiff's suit jeopardizes tribal sovereignty."); *Myrick v. Devils Lake Sioux Manufacturing Corp.,* 718 F. Supp 753, 755 (D.N.D. 1989) (court declined to apply the tribal exhaustion doctrine to a Title VII age discrimination case brought by a tribal member because there was no challenge to the jurisdiction of the tribal court, the tribe was not a party, and the case presented issues of federal law); *Vance v. Boyd Mississippi, Inc.,* (nontribal employee suing its non-tribal company employer for Title VII violations not required to exhaust because the case involved a dispute between two non-Indians concerning issues of federal law, the employee was not challenging a tribal ordinance or its applicability to her situation, and there was no pending tribal court proceeding or attack on the jurisdiction of the tribal court).

Notably, there is no evidence here that the Tribe caused Harrah's, to whom it delegated the right to establish employment policies and to hire and fire, to require employees to sign a policy agreeing to use tribal courts to resolve any employment dispute as a condition of employment. The Tribe eschewed such a contractual term, for whatever reason, and now Harrah's, and not the Tribe, is trying to force Plaintiffs into Tribal Court. This is inconsistent with the language of *Montana* as the Supreme Court later made clear in *Nevada v. Hicks,* 533 U.S. 353 (2001), clarifying that "[t]he *Montana* Court ... was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Id.* at 358. There are no such "arrangements" here. *Compare Solis v. Matheson*, 563 F.3d 425, 436 (9th Cir. 2009) ("As was the case in *Montana,* here also, '[n]o such circumstances ... are involved in this case.' First, there is no evidence that the Puyallup Tribe asserted regulatory authority over employment and wages for non-Indians….Second, there is no evidence that the non-Indians employed at Baby Zack's entered into any agreements or dealings with the Puyallup Tribe that would subject the non-Indians to tribal civil jurisdiction. Finally, the Mathesons have not alleged that requiring payment of time and a half for overtime imperils the welfare of the Tribe. We, therefore, conclude that the *Montana* holding is inapplicable to the instant case.")

Tellingly, the EBCI and Harrah's, in the compact cited throughout Plaintiffs'

amended complaint, specifically contracted that the parties may "commence an action in the Federal District Court for the Western District of North Carolina for the purposes of seeking a declaration of the rights of the parties under this Agreement." Section 20.2. Harrah's would nonetheless have the Plaintiffs here pursue a declaration of their rights in the tribal courts which even Harrah's itself would not have to do. Further, Harrah's has failed to cite a single case where a non-tribal entity can successfully force a non-tribal plaintiff into a tribal court in a case in which the tribe was not in any way a party. To the contrary, "[t]he burden rests on ***the tribe*** to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. These exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink' it." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 and 659 (2001) (emphasis added). The burden has been squarely placed by the Supreme Court on "the Tribe" to prove need for exhaustion, yet the Tribe is not a party seeking the jurisdiction of its courts here – the party seeking to invoke the jurisdiction of the tribal court is a private non-Indian corporation which itself is able to resort to the federal courts in any dispute with the Tribe.

4. There is No Evidence That There is A Tribal Forum For Plaintiffs' Claims.

Finally, Harrah's does not even discuss the availability of a tribal forum for this dispute. Harrah's does not argue that the Tribal Court recognizes Plaintiffs' causes of action, that the Tribal Court would exercise jurisdiction over Plaintiffs, etc. Harrah's incorrectly asserts that Plaintiff is required to exhaust his remedies in the EBCI tribal court before asking this Court for relief. Harrah's is incorrect. The "tribal exhaustion doctrine" is applied by federal courts as a matter of comity and respect for tribal self-government. *Strate v. A-1 Contractors*, 520 U.S. 438, 451-53 (1997). The tribal exhaustion doctrine is not jurisdictional.

C. The EBCI and the TCGE Are Not Necessary and Indispensable Parties To This Lawsuit

Harrah's has 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 has failed to explain why either asserted "impairment" would arise, let alone apply the test for a necessary party to the alleged "impairments." Harrah's has thus "failed to meet [its] burden" of showing that the Tribe is a necessary party. *United Property & Cas. Ins. v.*

Hunter, 2017 WL 1135238 at *2 (D.S.C. March 27, 2017).[4] 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.*

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

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").

1. Harrah's Has Failed to Cite Let Alone Apply the Required Test for Determining Whether Rule 19 Dismissal is Appropriate.

The mere inability to join another party such as EBCI does not make that party "indispensable" for purposes of Rule 19(b).[5] "Only necessary persons can be indispensable, but 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 by the case at bar." *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* directed that courts should follow a four-part test to determine whether 19(b) applies, and Harrah's has neither mentioned, let

[5] 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 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").

alone applied this test. Harrah's failing cannot be remedied on reply – Harrah's as the movant has the burden here and it has prima facie failed that burden in its motion by failing to mention let alone apply the required factors. That Plaintiffs have to, in their response brief, even inform this Court that these factors exist and then attempt to guess at how Harrah's might have applied the factors is proof enough of Harrah's failing. Indeed, "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 "situation" this court must examine is limited to the two interests of the Tribe which Harrah's (and not the Tribe) has asserted. As a threshold matter, Harrah's has neither explained the Tribe's interest in anything other than the most conclusory manner, nor has it applied those purported interests to the required indispensability factors set forth in *Provident Tradesmen* wherein the Supreme Court stated that

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

Id. at 109-112.

The Court cannot grant Harrah's motion when it has 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 …. For their part, Plaintiffs do not squarely address any of the [] factors.").

2. The Provident Tradesmen Factors Establish That EBCI Is Not a Necessary Party, and Harrah's Cannot Try to Apply the Factors on Reply.

a. The Potential Immunity of EBCI Augurs Strongly Against Rule 19(b) Dismissal.

Harrah's spends several pages of its brief arguing EBCI is immune from suit. Plaintiffs need not address that issue on the merits as it involves a non-party. However, Plaintiffs do note that if EBCI, the purported "necessary party[,] is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (citation omitted). *See also Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.

1989) (when "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves."). Because, for purposes of this motion, Plaintiffs do not contest the immunity of the Tribe to the requirements of the FLSA, immunity "itself should be regarded as the compelling factor." Nonetheless, and unlike Harrah's, Plaintiffs here will discuss and demonstrate the lack of applicability of the Rule 19(b) factors.

b. Harrah's Has Not Put Forth Evidence That Plaintiffs Would Have a Forum Against Harrah's in a Tribal Court.

The very first indispensability factor is that the plaintiffs here have an interest in having a forum. 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.

c. Harrah's Has Not Shown a Risk of Inconsistent Relief or Multiple Litigation.

The second 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." But Harrah's motion does not assert 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. That an existing party may pursue or be subject to further litigation against other absent parties has no effect on the analysis.[6]

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[6] *See, e.g., 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.").

Indeed, the only concern Harrah's cites are not even its own – Harrah's only asserts the Tribe's concerns in the contracts the Tribe agrees to with non-tribal entities. This factor cannot therefore weigh in Harrah's favor, especially when Plaintiff does not need the Tribe in this case as the joint and several liability imposed by the FLSA neuters any argument that that Plaintiffs cannot obtain complete relief from just Harrah's as the 1966 advisory committee's note to the 1966 amendment 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."[7]

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[7]*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 (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

d. Harrah's Has Not Shown That The Interests of EBCI Require Rule 19(b) Dismissal.

The third factor identified by the *Provident Tradesmen* Court "is the interest of the outsider whom it would have been desirable to join." But the Court noted that "since the outsider is not before the court, he cannot be bound by the judgment rendered" and that Rule 19(b) "obviously does not mean … that a court may never issue a judgment that, in practice, affects a nonparty". *Id.* at 110. While Harrah's asserts summarily that the Tribe has "interests" in this lawsuit, it has failed to produce any evidence that the Tribe actually supports Harrah's position, which is fatal to its motion. *See, e.g., Stehney v. Ferguson*, 2017 WL 2982114 at *4 (D.S.C. July 13, 2017) (denying Rule 19 motion because "Defendants have provided no evidence that any of the alleged necessary parties have actually claimed an interest relating to the action"); *Wellin v. Wellin*, 2015 WL 628071, at *8 (D.S.C. Feb. 12,

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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.").

2015) (holding that an absent person's failure to claim an interest in the case constitutes adequate grounds to deny a Rule 19 motion).

Further, there is nothing remotely set forth in Harrah's motion which explains what exactly these purported contractual interests might be. For example, in *GAA Family Limited Partnership v. Southeast Restoration, Inc*., 2017 WL 2261739 at *2 (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 between GAA, Schewel, and AfterDisaster is null and void" because "it does not explain what those interests may be." *Compare Pettus v. Servicing 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.").

e. 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. Harrahs has not identified 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. Plaintiffs will not even

attempt to guess what Harrah's might argue under this factor, as Harrah's chose not to argue this factor at all. Plaintiffs do, however, note that "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).[8]

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

f. 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

[8] *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 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).

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, which itself is a basis for denial of the motion to dismiss under Rule 19.

IV. CONCLUSION

For the reasons stated above, the Court should deny Harrah's Motion to Dismiss.

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CERTIFICATE OF SERVICE

This is to certify that on December 7, 2017 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:

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