

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

**JOSEPH CLARK, On Behalf of
Himself and All Others Similarly
Situated,**

Plaintiff,

vs.

**HARRAH'S NC CASINO
COMPANY, LLC, d/b/a
HARRAH'S CHEROKEE CASINO
RESORT and d/b/a HARRAH'S
CHEROKEE VALLEY RIVER
CASINO AND HOTEL, and
BROOKS ROBINSON,**

Defendants.

**DEFENDANT BROOKS
ROBINSON'S REPLY IN
SUPPORT OF HIS MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COLLECTIVE/CLASS
ACTION COMPLAINT**

Defendant Brooks Robinson ("Defendant Robinson"), through counsel and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(7) and Local Rules 7.1(D) and 7.1(E), hereby submits this Reply in Support of His Motion to Dismiss Plaintiff's First Amended Collective and Class Action Complaint (the "Amended Complaint").

In his response to Defendant Robinson's Motion to Dismiss, Plaintiff misconstrues both the nature of his claims and the case law surrounding tribal sovereign immunity. Notably, Plaintiff does not contest the fact that tribal sovereign immunity may extend to an individual defendant that is the subject of an official-

capacity claim. Instead, Plaintiff argues that his claims against Defendant are personal-capacity claims, such that tribal sovereign immunity is inapplicable. Plaintiff's arguments are misplaced and mischaracterize the nature of his own claims against Defendant Robinson. It is clear that, in his Amended Complaint, Plaintiff is only alleging official-capacity claims against Defendant Robinson, such that Defendant Robinson is not the real party of interest in this suit.

As explained in Defendant Robinson's opening Brief in Support of His Motion to Dismiss, in deciding whether an individual is being sued in an official capacity or a personal capacity, courts look to the real party of interest in the suit. *See Lewis v. Clarke*, 137 S.Ct. 1285, 1291 (2017). Where the relief sought against an individual defendant is only nominal, the real party of interest is the sovereign and the claim against the individual defendant is considered an official-capacity claim. *Id.*

In support of his flawed argument that he is bringing personal-capacity claims against Defendant Robinson, Plaintiff cites to an Eastern District of Pennsylvania case where a plaintiff brought suit against an individual employee of an Indian Tribe to impose personal liability on that employee and recover money damages against that employee for his personal actions. *See Pennachietti v. Mansfield*, 2017 WL 6311646, at *3 (E.D. Pa. Dec. 11, 2017). In that circumstance, the court found that

tribal sovereign immunity did not extend to the defendant because the plaintiff sought to impose “personal liability only upon [the individual employee].” *Id.* at *4.

The *Pennachietti* court determined that the plaintiff brought a personal-capacity claim because the real party of interest was the individual employee, since the plaintiff brought claims only against the individual employee, sought to impose personal liability on that employee, and sought to recover money damages against that employee. *Id.* Indeed, in *Pennachietti*, the plaintiff *only* alleged claims against the individual employee, not against any other person or entity; he contended that the individual employee violated certain provisions of the Racketeer Influences and Corrupt Organizations Act through certain actions that the employee took in his personal capacity. *Id.* at *3. The court held that sovereign immunity did not extend to the employee because “[t]his is a personal capacity suit to recover money damages *solely* from [the individual employee] for his personal actions” *Id.* (emphasis added).

By contrast, where a plaintiff focuses on alleged wrongs committed by an individual defendant acting in his official capacity, rather than identifying actions committed by the employee in his personal capacity, courts construe that as an official-capacity claim. *See, e.g., Forsythe v. Reno-Sparks Indian Colony*, 2017 WL 3814660, at *3 (D. Nev. Aug. 30, 2017) (“Here, Plaintiffs fail to identify what actions [the individual defendants] committed in their individual capacity to render

them liable, as Plaintiffs' Amended Complaint focuses mainly on the alleged wrongs the [individual defendants] committed solely while acting in their official capacity.”). In those circumstances, courts recognize that the relief sought against the individual defendant is nominal, such that the individual defendant is not the real party of interest. *Id.* (“Although Plaintiffs basely allege that ‘Plaintiffs sue all [individual defendants] in their individual and official capacities,’ Plaintiffs only allege causes of action against [the individual defendants] for conduct that occurred while [the individual defendant] were acting in their official capacity and within the scope of their authority . . . Pursuant to Plaintiffs' pleadings, RSIC is the real party in interest and the relief sought from [the individual defendants] is nominal.”) Thus, to adequately allege a personal-capacity claim against an individual defendant, a plaintiff must identify specific actions committed by the individual in their personal capacity that would render them personally liable. *Id.*

The claims brought by the plaintiff in *Pennachietti* are not remotely similar to the claims brought by Plaintiff here. Unlike the plaintiff in *Pennachietti*, Plaintiff here did not bring claims solely against Defendant Robinson for actions committed by Defendant Robinson in his personal capacity and does not seek money damages solely from Defendant Robinson. *Pennachietti*, 2017 WL 6311646, at *3. Instead, Plaintiff focuses solely on the alleged wrongs committed by Defendant Robinson while he was acting in his official capacity and within the scope of his authority. For

example, Plaintiff's Amended Complaint alleges that Defendant Robinson "has responsibility to act on behalf of, and in the interest of, Harrah's in devising, directing, implementing, and supporting the wage and hour practices and policies relating to Plaintiff" and that he "exercised this authority with respect to Plaintiff." [ECF No. 29, ¶ 20]. The Amended Complaint further alleges that, in his official position, Defendant Robinson "is responsible, and in fact exercises this responsibility, for the day-to-day operations of Harrah's Cherokee Casino Resort and Harrah's Cherokee Valley River Casino as explicitly set forth in the Management Agreement." [ECF No. 29, ¶ 26]. Those are the only allegations related to Defendant Robinson in Plaintiff's Amended Complaint. The Amended Complaint plainly fails to identify *any* action committed by Defendant Robinson in his individual capacity that would render him liable.

Thus, it is clear from Plaintiff's Amended Complaint that, unlike the individual defendant in *Pennachietti*, Defendant Robinson is being sued in his official capacity, not his individual capacity. Unlike the plaintiff in *Pennachietti*, Plaintiff does not seek to impose personal liability solely on Defendant Robinson and is not seeking to recover money damages solely from Defendant Robinson. Rather, the relief sought against Defendant Robinson is only nominal because, like the plaintiff in *Forsythe*, Plaintiff focuses only on the alleged wrongs committed by Defendant Robinson while he was acting in his official capacity. *See Forsythe* 2017

WL 3814660, at *3-4 (holding that a plaintiff brings an official-capacity claim where a plaintiff focuses on “the alleged wrongs [the individual defendants] committed solely while acting in their official capacity”); *see also Stanko v. Tribe*, 2017 WL 4217113, at *4 (D.S.D. Sept. 20, 2017) (holding that claims against an individual defendant were official-capacity claims where the plaintiff’s complaint only asserted actions by the individual defendants while they were acting in their official capacity).

Because Defendant Robinson is being sued in his official capacity, tribal sovereign immunity extends to Defendant Robinson just as it extends to Defendant Harrah’s. Indeed, as explained in Defendant Robinson’s Brief in Support of His Motion to Dismiss and in Defendant Harrah’s Motion to Dismiss, the real party of interest is the Tribal Casino Gaming Enterprise (“TCGE”), which is the tribal entity owned by the Eastern Band of Cherokee Indians (“the Tribe”) that employs Plaintiff and operates Harrah’s Cherokee Casino Resort and Harrah’s Cherokee Valley River Casino and Hotel (the “Cherokee Casinos”). Indeed, it is undisputed that Plaintiff’s claims arise out of his employment at the Cherokee Casinos and that the Cherokee Casinos are tribal gaming enterprises that are operated by the TCGE. Plaintiff’s suit concerns employment policies and practices that are in place at the Cherokee Casinos, which, as explained in both Defendant Robinson’s Brief in Support of His Motion to Dismiss and Defendant Harrah’s Motion to Dismiss, directly implicate

both the economic viability of the Cherokee Casinos and the Tribe's rights under the Management Agreement. *See id.* ("In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself.").

Because the TCGE is the real party of interest in this matter, Plaintiff's claims against Defendant Robinson are official-capacity claims. For the reasons stated in Defendant Robinson's opening Brief in Support of His Motion to Dismiss and Defendant Harrah's Motion to Dismiss, the Tribe's sovereign immunity extends to Defendant Robinson just as it extends to Defendant Harrah's, such that Plaintiff's claims are barred.¹ Just as Plaintiff cannot avoid tribal sovereign immunity by suing Defendant Harrah's instead of TCGE, he likewise cannot avoid such immunity by suing Defendant Robinson individually. *See Forsythe*, 2017 WL 3814660, at *4 (granting defendant's motion to dismiss on sovereign immunity grounds even though plaintiffs' amended their complaint to add individual employees as defendants because "RSIC is the real party of interest and the relief sought from RSIC Officers is nominal"); *Stanko*, 2017 WL 4217113, at *4 (finding that the tribe's tribal immunity extended to its employees acting in their official capacity

¹ As explained in Defendant Robinson's Opening Brief in Support of His Motion to Dismiss, in addition to tribal sovereign immunity, Plaintiff's claims are also barred because the tribal exhaustion doctrine is applicable and because TCGE is a necessary and indispensable party that Plaintiff failed to join. Plaintiff does not contest these argument in his response to Defendant Robinson's Motion to Dismiss.

because “Plaintiff’s claims against the Individual Tribal Defendants in their official capacities function as a suit against the Tribe”); *Martin v. Wood*, 772 F.3d 192, 196 (4th Cir. 2014) (dismissing FLSA claim on sovereign immunity grounds where plaintiff sued two individual employees, rather than the sovereign entity that employed them, because the facts confirmed that the defendants were “being sued in their official capacities”).

CONCLUSION

For the reasons set forth herein, as well as in Defendant Robinson’s Brief in Support of His Motion to Dismiss Plaintiff’s First Amended Collective/Class Action Complaint and in Defendant Harrah’s Brief in Support of Its Motion to Dismiss Plaintiff’s First Amended Collective/Class Action Complaint, Defendant Brooks Robinson respectfully requests that this Court dismiss Plaintiff’s Amended Complaint in its entirety, and award Defendant Robinson such other and further relief as to it seems just and proper.

This the 27th day of February, 2018.

COZEN O'CONNOR

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he electronically filed the foregoing *Defendant Brooks Robinson's Reply in Support of His Motion to Dismiss Plaintiff's Amended Collective/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 27th day of February, 2018.

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