UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ALEXANDRIA PARROTTA,

Plaintiff,

v.

ISLAND RESORT AND CASINO,

Defendant.

Case No. 2:24-cv-00056

Hon. Robert J. Jonker

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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, by and through her attorneys, Hurwitz Law PLLC, respectfully requests that this Court deny Defendant's Motion to Dismiss in its entirety pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(1), 28 U.S.C. 1267(b), and Local Rule 7.2.

1. Plaintiff admits that she has brought claims against Defendant, who is her former employer, under the FLSA for unpaid overtime wages as well as PUMP act violations. Plaintiff denies that her claims must be dismissed for lack of subject matter jurisdiction because the FLSA is a statute of general applicability and applies to Defendant regardless of its tribal immunity status.

Plaintiff denies that she brought a state law claim against Defendant. Additionally, Plaintiff denies that the claims levied against Defendant should be dismissed based on tribal exhaustion doctrine.

Respectfully submitted,

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Dated: July 15, 2024

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CONCISE STATEMENT OF ISSUES PRESENTED v

INTRODUCTION 1

STATEMENT OF FACTS 1

STANDARD OF REVIEW 3

LAW AND ANALYSIS 3

I. THE FLSA IS A STATUTE OF GENERAL APPLICABILITY AND APPLIES TO DEFENDANT REGARDLESS OF SOVEREIGN IMMUNITY. 4

A. Application of the FLSA in this Matter does not "touch exclusive rights of self-governance in purely intramural matters" 6

B. The "Treaty Rights" Exception. 8

C. The "Other Indications" Exception. 9

II. DEFENDANT DECLINED TO EXERCISE ITS TRIBAL AUTHORITY WITH REGARD TO ANY FEDERAL LAW THAT APPLIES TO THE TRIBE. 10

III. THE TRIBAL EXHAUSTION DOCTRINE DOES NOT BAR THIS SUIT. 11

IV. ALTERNATIVELY, DISMISSAL IS PREMATURE BECAUSE DEFENDANT CANNOT ESTABLISH AT THE PLEADING STAGE THAT THE NAMED DEFENDANT IS ENTITLED TO TRIBAL IMMUNITY. 14

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Cartwright v. Garner, 751 F.3d 752 (6th Cir. 2014) 3
Chao v. Spokane Tribe of Indians, No. CV-07-0354-CI, 2008 WL 4443821 (E.D. Wash. Sept. 24, 2008) 7, 10
DLX, Inc. v. Commonwealth of Kentucky, 381 F.3d 511 (6th Cir.2004) 3
Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) ..... passim
EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir.1993) 6
F.T.C. v. AMG Services, Inc., No. 2:12-CV-00536-GMN, 2013 WL 7870795 (D. Nev. July 16, 2013) 9
Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir.1999) 6
Hilton v. Guyot, 159 U.S. 113 (1895) 13
Hines v. Grand Casinos of La., LLC–Tunica-Biloxi, No. 01-30692, 2002 WL 180364 (5th Cir. Jan. 4, 2002) 12
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 11
Johnson v. Harrah's Kan. Casino Corp., No. 04-4142-JAR, 2006 WL 463138 (D.Kan. Feb. 23, 2006) 12
Lobo v. Miccosukee Tribe of Indians of Fla., 279 Fed. App'x. 926 (11th Cit. 2008) 9
Menominee Tribal Enters. v. Solis, 601 F.3d 669 (7th Cir.2010) 5
Montana v. United States, 450 U.S. 544 (1981) 8
Montez v. Dep't of the Navy, 392 F.3d 147 (5th Cir. 2004) 3
Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 13
Natl. Lab. Rel. Bd. v. Little River Band of Ottawa Indians Tribal Govt., 788 F.3d 537 (6th Cir. 2015) ..... passim
Navajo Tribe v. NLRB, 288 F.2d 162 (D.C.Cir.1961) 6
Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) 7
Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996) 6, 9
Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir.1989) 6
Snyder v. Navajo Nation, 382 F.3d 892 (9th Cir. 2004) 4, 6
United States v. Ritchie, 15 F.3d 592 (6th Cir.1994) 3

Statutes

29 U.S.C. § 201 8
29 U.S.C. § 216(b) 11, 12

Rules

Fed.R.Civ.P. 12(b)(1) 3

INDEX OF EXHIBITS

Exhibit 1 - Hannahville Indian Community Constitution

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Count I (FLSA- Unpaid Overtime Wages) and Count II (Violation of the FLSA and PUMP Act) should be dismissed because Defendant's status as a federally recognized Indian Tribe grants Defendant Tribal Sovereign Immunity that bars this Court from exercising subject matter jurisdiction where the FLSA applies to Defendant and Defendant has waived its sovereign immunity defense through its Constitution.

   Plaintiffs Answer "No"
   This Court Should Answer "No"

2. Whether Count I (FLSA- Unpaid Overtime Wages) and Count II (Violation of the FLSA and PUMP Act) should be dismissed under the "Tribal Exhaustion Doctrine" where Defendant itself has expressed a desire to be bound by applicable federal law and would be the improper arbiter of whether the law was broken.

   Plaintiffs Answer "No"
   This Court Should Answer "No"

INTRODUCTION

Without addressing any relevant legal authority, Defendant fails to demonstrate at this pleading stage how tribal immunity bars Plaintiff's FLSA claims and instead argues in conclusory fashion that "Plaintiff continues to cite to irrelevant authority that does not address sovereign immunity." ECF No. 9, PageID.68. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) established a three-part test for determining whether a statute of "general applicability" applies to Indian Tribes. *Coeur d'Alene* has been expressly followed by the Sixth Circuit Court of Appeals and is binding law. *See Natl. Lab. Rel. Bd. v. Little River Band of Ottawa Indians Tribal Govt.*, 788 F.3d 537, 551 (6th Cir. 2015). Pursuant to *Coeur d'Alene* and its progeny, Defendant consented to waive its Tribal Counsel authority in situations where applicable federal law controls—so Plaintiffs' claims can be litigated in this forum. There are other facts that prevent dismissal of this action, but Defendant consenting to federal law is dispositive.

STATEMENT OF FACTS

The sole named Defendant in this matter is Island Resort and Casino. ECF No. 7, PageID.47. Defendant is a hotel and casino headquartered in Harris, Menominee County, Michigan. *Id.* at ¶3. Defendant's motion is focused solely on this Court's alleged lack of subject matter jurisdiction. ECF No. 9. Defendant claims that Plaintiff's first amended complaint [ECF No. 7] should be dismissed "because this court lacks subject matter jurisdiction over all claims on the basis of Tribal Sovereign Immunity." ECF No. 9, PageID.63. Defendant also claims that "Plaintiff's first amended complaint should be dismissed under the Triable Exhaustion Doctrine." *Id.* Defendant's Constitution Article V – Powers of the Council §(12) of the Constitution and Bylaws of the Hannahville Indian Community [of] Michigan [Approved July 23, 1936] [Amended April 15, 2020; Approved May 6, 2020] states that Defendant reserves the right "[t]o make rules for its own procedure and the conduct of its business of governing the Community, and to delegate

to committees of the Council any of the foregoing powers, reserving the right to review any action taken under such delegated powers." **Ex. 1, Hannahville Indian Community Constitution**, page 4. However, Article V - (12) §2. states explicitly "[t]he Council shall ***not exercise any of the foregoing powers so as to conflict with any laws of the United States which apply to the Hannahville Indian Community***." *Id*. (emphasis added)

Although Defendant does not challenge the adequacy of Plaintiff's allegations, a short recitation of the facts is appropriate. Alexandira Parrotta ("Plaintiff") worked as an Executive Chef for Island Resort and Casino ("Defendant") between August 2014 and October 26, 2023 before she was forced to resign. ECF No. 7, PageID.48, ¶1, ¶13. Prior to her termination Plaintiff was earning $52,000.00 per year and consistently working at least forty-five hours per week. *Id.* at ¶14-15. Defendant never paid Plaintiff overtime compensation for hours worked in excess of forty hours per week. *Id.* at ¶15. Despite Plaintiff's job title of "Executive Chef," her job responsibilities were effectively those of a Line Cook, a position classified as non-exempt. *Id.* at ¶16. Plaintiff's job responsibilities consisted mainly of non-managerial tasks including counting inventory, placing orders with vendors, washing dishes, and preparing food. *Id.* at ¶17. Plaintiff did not have authority to make any hiring or firing decisions. *Id.* Plaintiff's job duties did not require advanced knowledge of a predominantly intellectual character, nor did those duties require consistent exercise of discretion and judgement. *Id.* at ¶18. In 2023, Plaintiff informed her manager that she was pregnant and that she intended to take maternal leave to care for her child. *Id.* at ¶22. Plaintiff applied for and was granted the requested leave. *Id.* In July 2023, Plaintiff's maternal leave began and she gave birth to her child. *Id.* at ¶23. In October 2023, Plaintiff returned to work following her maternal leave. *Id.* at ¶24. Upon her return, Plaintiff was informed by Director of Food and Beverage, Steven Gakstatter, that she would be required to work noon until 8:00 P.M. with no

opportunity to adjust her schedule. *Id.* at ¶25. The next day, Plaintiff met with Mr. Gakstatter in order to request the same flexible schedule that she was given prior to her leave in order to nurse her newborn baby. *Id.* at ¶26. Mr. Gakstatter refused and demanded that Plaintiff resign. *Id.*at ¶27. As a result of Mr. Gakstatter's coercion, Plaintiff resigned on October 26, 2023. *Id.* at ¶28.

STANDARD OF REVIEW

Fed.R.Civ.P. 12(b)(1) provides for the dismissal of an action for lack of subject matter jurisdiction. *Cartwright v. Garner*, 751 F.3d 752, 759–60 (6th Cir. 2014). A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir.1994). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. *Id.* Plaintiff bears the burden of establishing that subject matter jurisdiction exists. *DLX, Inc. v. Commonwealth of Kentucky,* 381 F.3d 511, 516 (6th Cir.2004). "[T]he trial court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case." *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

LAW AND ANALYSIS

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to Defendant if: (1) the law "touches exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation." Defendant has not argued in its motion that any of these apply. Regardless, the FLSA applies to Defendant based on

the language of Defendant's Constitution waiving immunity. Lastly, there is no admissible evidence in Defendant's motion to establish that the named Defendant is even a tribal entity.

I. THE FLSA IS A STATUTE OF GENERAL APPLICABILITY AND APPLIES TO DEFENDANT REGARDLESS OF SOVEREIGN IMMUNITY.

Defendant argues that Plaintiff's Count I and Count II should be dismissed because "Congress has not chosen to abrogate sovereign immunity in private suits brought under the FLSA, nor has the HIC waived sovereign immunity for any FLSA Claim." ECF No. 9, PageID.69. However, Defendant is wrong when it alleges that "for a private party to bring a claim against a sovereign tribal nation, Congress must clearly and unequivocally state in the federal law that tribal sovereign immunity is abrogated, and private parties may file suit against the tribe." *Id.* at 67. The basis of Defendant's argument is not supported by authority in this circuit. The Sixth Circuit supports Plaintiff's position that the FLSA applies to Defendant and as such, Plaintiff is permitted to bring suit against them under the statute. "The FLSA is a statute of general applicability[,]" and "[s]uch generally applicable statutes typically apply to Indian tribes." *Snyder v. Navajo Nation*, 382 F.3d 892, 894– 95 (9th Cir. 2004). A federal statute of general applicability that is silent on the issue of applicability to Indian tribes ***will not apply to Defendant*** if: (1) the law "touches exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). "In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them." *Id.*

The Sixth Circuit in *Natl. Lab. Rel. Bd. v. Little River Band of Ottawa Indians Tribal Govt.*, 788 F.3d 537, 551 (6th Cir. 2015) accepted the *Coeur d'Alene* analysis by holding:

> We find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty. *See Mashantucket Sand & Gravel,* 95 F.3d at 179; *Pueblo of San Juan,* 276 F.3d at 1206 (Murphy, J., dissenting) ("A limited notion of tribal self-governance preserves federal supremacy over Indian tribes while providing heightened protection for tribal regulation of purely intramural matters. Any concerns about abrogating tribal powers ... are fully addressed by the *Coeur d'Alene* exceptions."). The *Coeur d'Alene* framework reflects the teachings of *Montana, Iowa Mutual*, and *Santa Clara Pueblo:* there is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The *Coeur d'Alene* framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress's power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. *See* 751 F.2d at 1115; *cf. Montana,* 450 U.S. at 557, 101 S.Ct. 1245. The exceptions enumerated by *Coeur d'Alene* then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of *Iowa Mutual* and *Santa Clara Pueblo* that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the *Coeur d'Alene* framework preserves "the unique trust relationship between the United States and the Indians." *Grand Traverse Band,* 369 F.3d at 971 (quoting *Blackfeet Tribe,* 471 U.S. at 766, 105 S.Ct. 2399). ***We therefore adopt the Coeur d'Alene framework to resolve this case.***

Id. (emphasis added). The *Natl. Lab. Rel. Bd. v. Little River Band of Ottawa Indians Tribal Govt.* panel also recognized that courts throughout the country have applied generally applicable federal statutes to Indian Tribes using the same analysis.

> Our sister circuits have employed the framework set forth in *Coeur d'Alene* to conclude that aspects of inherent tribal sovereignty can be implicitly divested by comprehensive federal regulatory schemes that are silent as to Indian tribes. *See, e.g., Menominee Tribal Enters. v. Solis,* 601 F.3d 669, 674 (7th Cir.2010) (holding that OSHA applied to tribe's operation of a sawmill and related commercial activities); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians,*

> 166 F.3d 1126, 1128–30 (11th Cir.1999) (holding Title III of the Americans with Disabilities Act applied to tribe's restaurant and gaming facility); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 177–82 (2d Cir.1996) (holding that OSHA applied to Indian tribe's construction business which operated only within confines of reservation); *Smart v. State Farm Ins. Co.,* 868 F.2d 929, 932–36 (7th Cir.1989) (applying Employee Retirement Income Security Act to tribal employee benefits plan because statute did not affect tribe's ability to govern itself in intramural matters); *see also Navajo Tribe v. NLRB,* 288 F.2d 162, 165 (D.C.Cir.1961) (holding that NLRA applies to employers located on reservation lands); *cf. EEOC v. Fond du Lac Heavy Equip. & Constr. Co.,* 986 F.2d 246, 249 (8th Cir.1993) (holding that Age Discrimination in Employment Act, although generally applicable to Indian tribes, does not apply to employment discrimination action involving member of Indian tribe, tribe as employer, and reservation employment because "dispute involves a strictly internal matter" and application would affect "tribe's specific right of self-government")

Natl. Lab. Rel. Bd. v. Little River Band of Ottawa Indians Tribal Govt., 788 F.3d 537, 551 (6th Cir. 2015). Thus, any argument by Defendant that the FLSA does not apply to them must be accompanied by a *Coeur d'Alene* analysis. However, Defendant has failed to do so and should not be permitted to raise the issue for the first time in a reply brief.

A. Application of the FLSA in this Matter does not "touch exclusive rights of self-governance in purely intramural matters"

The first exception applies "only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated." *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004). "The tribal self-governance exception is designed to except internal matters such as the conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes also apply to Indian tribes." *Natl. Lab. Rel. Bd. v. Little River Band of Ottawa Indians Tribal Govt.,* 788 F.3d 537, 552 (6th Cir. 2015). The first exception does not apply in this case because Defendant's casino enterprise is not a "purely intramural matter" nor does it involve issues of tribal membership, inheritance rules, or domestic relations.

Coeur d'Alene, at 1116. Defendant is engaged in routine activities of a commercial character. "The right to conduct commercial enterprises free of federal regulation is not an aspect of tribal self-governance." *Little River Band of Ottawa Indians Tribal Govt.* 788 F.3d at 553 (*See, e.g., Fla. Paraplegic Ass'n,* 166 F.3d at 1129 (finding tribal gaming facility "does not relate to the governmental functions of the Tribe"); *Chao v. Spokane Tribe of Indians*, No. CV-07-0354-CI, 2008 WL 4443821, at *5 (E.D. Wash. Sept. 24, 2008) (the Court finds the FLSA does not touch upon primarily intramural matters because the Casino employs, and is open to, both tribal members and non-members). "Indian tribes are not shielded from general federal statutes because the application of those statutes may incidentally affect the revenue streams of tribal commercial operations that fund tribal government." *Little River Band of Ottawa Indians Tribal Govt.* 788 F.3d at 553. In 2022, Defendant, Island Resort & Casino reported net earnings of approximately $59,637,900.[1] Plaintiff is not a member of the tribe and works for a restaurant that primarily services non-members. ECF No. 7 at ¶40. Application of the FLSA to the tribe would not "abrogate rights guaranteed by Indian Treaties. *Little River Band of Ottawa Indians Tribal Govt.* 788 F.3d at 553.

The Supreme Court has long been suspicious of tribal authority to regulate the activities of non-members and is apt to view such power as implicitly divested, even in the absence of congressional action. *Little River Band of Ottawa Indians Tribal Gov't.* 788 F.3d at 544 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 327 (2008)). Defendant's "power to regulate the activities of non-members is constrained, extending only so far as 'necessary to protect tribal self-government or to control internal relations.'" *Little River*

[1] https://www.michigan.gov/mgcb/-/media/Project/Websites/mgcb/Tribal-Gaming/AnnualReports/2022-Tribal-Gaming-Annual-Report-Final-4623.pdf?rev=6d7f0711fc594c52afb08cfec8b01db0&hash=FA45D7B59ECC6A3EE8526C392313B137

Band of Ottawa Indians Tribal Gov't. 788 F.3d at 544 (citing *Montana v. United States,* 450 U.S. 544, 564 (1981)). Plaintiff is not a member of the Hannahville Indian Community and she performed job duties entertaining primarily non-tribal customers in a capacity that does not protect tribal self-government or control tribal internal relations. In addition, Plaintiff is a former "employee" within the meaning of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq*. Defendant was and continues to be an "enterprise engaged in interstate commerce or in the production of goods" within the meaning of 29 U.S.C. § 203. As such, the FLSA, in this scenario, does not impinge upon Defendant's right to "self-government" and Defendant is not entitled to dismissal under the first *Coeur d'Alene* exception.

B. The "Treaty Rights" Exception.

The second *Coeur d'Alene* test states statutes of general applicability do not apply to Indian Tribes absent a clear expression of Congressional intent where the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties." However, since Defendant did not bother to analyze the relevant test, there is no evidence of any treaty signed by the Hannahville Indian Community and the United States in the record. Nor can Plaintiff locate with reasonable effort any such treaty. The Court in *Coeur d'Alene* held that where no treaty exists between the United States and the specific tribe in question the "exception is … unavailable." 751 F.2d at *1118. (the Farm cannot avail itself of the "treaty rights" exception and must rely exclusively on the "aspects of tribal self-government" exception.) "[T]here is no treaty between the Coeur d'Alene Tribe and the United States government. Nor can the Farm point to any document to which the United States is a signatory that specifically guarantees the Tribe's right to exclude non-Indians." *Coeur d'Alene* at *1117. Because Defendant has not produced evidence of any treaty "guaranteeing the Tribe's right to exclude non-Indians," they are unable to avail themselves of the second *Coeur d'Alene* exception. *See F.T.C. v. AMG Services, Inc.*, No. 2:12-CV-00536-GMN,

2013 WL 7870795, at *19 (D. Nev. July 16, 2013), *report and recommendation adopted*, No. 2:12-CV-00536-GMN, 2014 WL 910302 (D. Nev. Mar. 7, 2014) (As the FTC Act is one of general applicability, is silent on the issue of applicability to Indian tribes, and none of the defendants argue that a *Donovan* exception applies, that is the end of the inquiry).

C. The "Other Indications" Exception.

The third *Coeur d'Alene* exception requires some proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation." Without any such proof, there can be no argument that the FLSA does not apply to Indian Tribes. Defendant similarly cannot avail themselves of its protection. In fact, Defendant outright admitted that "the text of the FLSA contains no indication that Congress intended to abrogate the tribe's immunity to suit." ECF No. 9, PageID.75 (citing *Lobo v. Miccosukee Tribe of Indians of Fla.,* 279 Fed. App'x. 926 (11th Cit. 2008). Moreover, this proposition is well established. *See Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA is silent as to Indians, thereby eliminating the third [*Coeur d'Alene* exception].) *See Little River Band of Ottawa Indians Tribal Govt.* 788 F.3d at 553 (Nor is there proof "that Congress intended not to apply [the FLSA] to Indians on their reservation.) Since the FLSA is silent as to Indians, Defendant cannot avoid this Court's jurisdiction within the third *Coeur d'Alene* exception.

Because Defendant wholly failed to engage in an analysis the *Coeur d'Alene,* they should be precluded from arguing it in their reply and this Court should hold that the FLSA as a statute of general applicability applies to Defendant.[2] *See F.T.C. v. AMG Services, Inc.*, No. 2:12-CV-00536-GMN, 2013 WL 7870795, at *19 (D. Nev. July 16, 2013), *report and recommendation*

[2] *See Harris v. Colvin*, No. 3:14-cv-143-RJC, 2015 WL 4921180, at *6 (W.D.N.C.) (holding that "[a]lthough Plaintiff raises this issue in his reply brief, the Plaintiff must first raise the issue in his original brief. Therefore, we decline to consider this argument."

adopted, No. 2:12-CV-00536-GMN, 2014 WL 910302 (D. Nev. Mar. 7, 2014) (As the FTC Act is one of general applicability, is silent on the issue of applicability to Indian tribes, and none of the defendants argue that a *Donovan* exception applies, that is the end of the inquiry). (*See Chao v. Spokane Tribe of Indians*, No. CV-07-0354-CI, 2008 WL 4443821, at *5 (E.D. Wash. Sept. 24, 2008) (the Court concludes the FLSA applies to the Casino)). Regardless of Defendant's failure to analyze the issue at hand, the case law is clear that the FLSA applies to Defendant's because none of the *Coeur d'Alene* exceptions apply to it and the FLSA is a statute of general applicability.

II. DEFENDANT DECLINED TO EXERCISE ITS TRIBAL AUTHORITY WITH REGARD TO ANY FEDERAL LAW THAT APPLIES TO THE TRIBE.

The FLSA also applies to Defendant based on the language of Defendant's Constitution. Defendant claims that there "is no evidence whatsoever that HIC has waived its sovereign immunity with regard to the FLSA." ECF No. 9, PageID.79. And Defendant cites to its own "sovereign immunity code" as evidence that they have not. *Id.* Yet, what could be clearer than Defendant's own Constitution which expressed an "unequivocal . . . and clear" desire to comply with applicable federal law.

Article V – Powers of the Council §(12) of the Constitution and Bylaws of the Hannahville Indian Community [of] Michigan [Approved July 23, 1936] [Amended April 15, 2020; Approved May 6, 2020] states that Defendant reserves the right "[t]o make rules for its own procedure and the conduct of its business of governing the Community, and to delegate to committees of the Council any of the foregoing powers, reserving the right to review any action taken under such delegated powers." **Ex. 1, Hannahville Indian Community Constitution, p. 4**. Article V -12 §2. states explicitly "[t]he Council ***shall not exercise any of the foregoing powers so as to conflict with any laws of the United States which apply to the Hannahville Indian Community***." *Id*. This means, that where a federal law is applicable to Defendant, such as the case with the FLSA,

Defendant will not exercise any power through its counsel conflicting with that law. What defendant desires to do here and what it is bound to do by its own constitution clearly conflict. Defendant argues that it has not waived its immunity, yet, at the same time has agreed to be bound by applicable federal law.

29 U.S.C. § 216(b) states in relevant part that "[a]n action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in ***any Federal or State court*** of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Unambiguously, the FLSA limits suits to federal or state courts under 29 U.S.C. § 216(b). Because the FLSA clearly applies to Defendant and Defendant itself agreed not to exercise "any of the foregoing powers so as to conflict with ***any*** laws of the United States which apply to the Hannahville Indian Community" the FLSA's jurisdictional rules require this matter to be heard in the present forum. Defendant's tribal court jurisdiction is limited by a federal statute as well as their own constitution. Maintaining this action in a jurisdiction or locale other than federal or state court would violate the FLSA's jurisdictional prohibitions as well as Defendant's own constitution.

III. THE TRIBAL EXHAUSTION DOCTRINE DOES NOT BAR THIS SUIT.

Defendant argues that "principles of comity also compel this Court to dismiss the instant action under the tribal exhaustion doctrine." ECF No. 9, PageID.81. Contrary to Defendant's belief, Plaintiffs do not "bear the burden of proof" for Defendant's reliance on the exhaustion rule under Rule 12(b)(1). As the Supreme Court stated, the exhaustion rule does "not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule . . . renders it appropriate for the federal courts to decline jurisdiction in certain circumstances." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8 (1987). Here, Defendant provides no reason that the Court should decline to exercise its

subject matter jurisdiction. Defendant contends that "[t]he operation of the casino clearly has an impact on the economic interests and welfare of the HIC and the HIC has the power to regulate the activities of Plaintiff operating on HIC lands." ECF No. 9, PageID.84. But Defendant submitted no admissible evidence in support of its contention and Defendant's conclusory arguments are not a factual basis to apply the exhaustion rule.

Lacking evidentiary support, Defendant relies on inapposite legal support from *Madewell*, 730 F. Supp. 2d at 487-489. In *Madewell*, this Court held that the tribal court had a colorable basis to exert civil jurisdiction over a personal injury claim. But this case is much different from a run-of-the mill slip and fall case. This action involves a federal question (FLSA wages) arising out of Defendant's actions, as an employer, against a non-Indian Plaintiff, who serviced mostly non-Indian casino guests. Numerous courts have rejected the exhaustion rule, opting to exercise their jurisdiction in cases analogous to the instant matter. *See, e.g., Hines v. Grand Casinos of La., LLC–Tunica-Biloxi*, No. 01-30692, 2002 WL 180364, at *1-3 (5th Cir. Jan. 4, 2002) (holding that exhaustion rule does not require dismissal of discrimination case because the terms of the management agreement with the tribe gave casino operator "exclusive responsibility" to select, control, and discharge employees at the casino and the tribe's interests were not implicated, although they paid the employee's salary, given the operator was the employer as a matter of law); *Johnson v. Harrah's Kan. Casino Corp.*, No. 04-4142-JAR, 2006 WL 463138, at *10 (D.Kan. Feb. 23, 2006) (declining to dismiss discrimination suit based on considerations of comity because the case did not implicate tribal law or policy warranting application of the exhaustion doctrine).

The exhaustion rule also does not apply here because the FLSA limits suits to federal or state courts under 29 U.S.C. § 216(b). Thus, tribal court's jurisdiction is limited by a federal statute and Defendant agreed, within the text of its own Constitution, that it shall not exercise any of the

foregoing powers so as to conflict with any laws of the United States which apply to the Hannahville Indian Community. Ex. 1. Again, maintaining this action in a jurisdiction or locale other than federal or state court would violate the FLSA's jurisdictional prohibitions as well as Defendant's own Constitution, which is a basis to decline application of the exhaustion rule. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 n.21. (1985).

Moreover, given the Tribe's inherent bias (Defendant's claim that the Tribe has an economic interest implicated by this case), the assertion of tribal jurisdiction is motivated by bad faith. Defendant's assertion of the rule is a transparent attempt to bring this matter before a more favorable venue where the Tribe can decide whether it owes current and former employees overtime wages. As the Supreme Court has long held:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard . . . to the rights of its own citizens or of other persons who are under the protection of its laws."

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). In this particular case, the principles of comity underlying the exhaustion rule warrant this Court exercising jurisdiction over this matter. The Tribe, through its Constitution intended Defendant to be bound statutorily to applicable federal law. Thus, it is the rights and laws of this jurisdiction and its citizens, not the Tribe, which requires this matter be heard in this federal court. Dismissing Plaintiff's case and improperly relegating them to tribal court, when Plaintiff can prove a set of facts entitling her to relief from Defendant for its violations of the FLSA, would undermine the spirit of the liberal rules of pleading, legal authority, and Defendant's own wishes as expressed through its Constitution.

IV. ALTERNATIVELY, DISMISSAL IS PREMATURE BECAUSE DEFENDANT CANNOT ESTABLISH AT THE PLEADING STAGE THAT THE NAMED DEFENDANT IS ENTITLED TO TRIBAL IMMUNITY.

Even if Defendant's other arguments for the application of tribal immunity are well-taken by this Court, it would be premature to grant dismissal because Island Casino is the only employer-defendant in this case who can provide Plaintiff with complete relief and Defendant does not establish that it is entitled to tribal immunity. Indeed, Defendant's brief merely states "[a]ll Island Resort and Casino employees, including Plaintiff, are employees of HIC," without referencing any evidence of the same. ECF No. 9, PageID.68. Accordingly, Defendant does not sufficiently contend that it enjoys immunity from suit. *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, No. 2:10-cv-8, 2010 WL 2574079 (W.D.N.C.), *adopted unpublished report and recommendation*, 730 F.Supp.2d 485, 487 (W.D.N.C. 2010) (stating "Defendants have failed to explain how they believe [Harrah's,] a nontribal, North Carolina limited liability corporation enjoys tribal sovereign immunity"). Until it is established that Defendant and the Hannahville Indian Community are one in the same, HIC's alleged immunity is irrelevant at this time.

CONCLUSION

For the aforementioned reasons, Plaintiff respectfully request that this Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

HURWITZ LAW PLLC

/s/ *Colin H. Wilkin*
Colin H. Wilkin (P86243)
Attorney for Plaintiffs

Dated: July 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2024 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorney(s) of record.

/s/ Colin H. Wilkin