UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ALEXANDRIA PARROTTA,

Plaintiff,

v.

ISLAND RESORT AND CASINO,

Defendant.

Case No. 24-cv-00056
Hon. Robert J. Jonker

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Plaintiff avoids the core procedural issue addressed in Defendant's motion to dismiss: whether the Fair Labor Standards Act (the FLSA) clearly and unequivocally abrogates tribal sovereign immunity allowing a private party to sue a federally recognized Indian tribal government in federal court. Plaintiff asks this Court to disregard precedential decisions of the United States Supreme Court, the U.S. Sixth Circuit Court of Appeals, and its own previous rulings similar matters, and instead apply an incorrect standard to imply a waiver of tribal sovereign immunity on the bare allegation that the FLSA applies to tribes. Controlling case law establishes that the possibility that a law *may* generally apply to a tribe cannot be extended to provide a private party a claim to enforce that against a tribal government where such a claim is barred by the tribe's sovereign immunity.

Courts have long recognized that there is a conceptual distinction between the procedural question of whether tribal sovereign immunity bars a private plaintiff from filing a claim against the sovereign tribe (the issue addressed in Defendant's Motion to Dismiss) and the substantive question of whether the federal law underlying the claim applies to the sovereign tribe (the issue incorrectly addressed in Plaintiff's Response). In *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998), the court stated "to say substantive … laws apply … is not to say that a tribe no longer enjoys immunity from suit. … There is a difference between the right to demand compliance with … laws and the means available to enforce them." *Id*. at 755.

The Sixth Circuit and this Court's own previous rulings follow the *Kiowa Tribe* requirement: in order for a private party to sue a federally recognized Indian tribe, Congress must ***clearly*** and ***unequivocally*** abrogate tribal sovereign immunity in the text of the federal law. *See Michigan v. Bay Mills Indian Comm.*, 695 F.3d 406, 413-14 (6th Cir. 2012); *Michigan v. Bay*

Mills Indian Community, 572 U.S. 782, 790-91, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014); *Lesperance v. Sault Ste. Marie Tribe*, 259 F. Supp. 3d 713, 717-20 (W.D. Mich. April 27, 2017) (Hon. Robert J. Jonkers, presiding) ("Thus, even in seemingly unfair situations, it is still ''settled law' [according to *Bay Mills]* that a tribe is entitled to tribal sovereign immunity unless Congress [clearly and unequivocally] abrogated [tribal sovereign] immunity."). Courts cannot make any inference of Congress's intent where a statute is silent on the issue of abrogation of tribal sovereign immunity. *Id.*

Finally, despite Plaintiff's contention, the Exhaustion Doctrine must be followed, especially where there is no language in the FLSA expressly and unequivocally abrogating tribal sovereign immunity and Plaintiff does not submit any argument that the four established exceptions to the Exhaustion Doctrine apply in this case beyond suggesting that the tribal court forum is inherently biased, which is a non-factor under all applicable law.

I. Plaintiff's Response Does Not Address the Core Procedural Issue of Whether Tribal Sovereign Immunity Bars a Private Party from Filing Suit against a Sovereign Tribal Government under the FLSA.

Plaintiff's response brief does not address the *core procedural issue* of whether tribal sovereign immunity bars a ***private party*** from filing suit against a federally recognized Indian tribe under the FLSA. Instead, Plaintiff focuses exclusively on the substantive issue of whether the FLSA applies to the tribes in the first place. Case law is clear that these are two separate and distinct issues that are mutually exclusive. Because there is no clear and unequivocal waiver of sovereign immunity in the FLSA allowing for private suit against a tribe under *Bay Mills* and *Lesperance*, this case must be dismissed.

The Supreme Court has long recognized that there is a conceptual distinction between the procedural question of whether tribal sovereign immunity bars a lawsuit and the substantive

question of whether the federal law underlying the claim applies to a tribe. *Kiowa Tribe*, 523 U.S. at 755, *supra*; *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130 (11th Cir. 1999):

> The district court ended its consideration of the Tribe's motion to dismiss this lawsuit with its finding that Title III governs Indian tribes and that no exception prevents its application to the Miccosukee Tribe's commercial enterprise. The analysis does not stop here, however, for whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions. [as the Supreme Court bluntly stated in *Kiowa Tribe*] ... 'there is a difference between the right to demand compliance with state laws and the means available to enforce them.' This principle, which simply spells out the distinction between a right and a remedy, applies with equal force to federal laws.

See also, Lobo v. Miccosukee Tribe of Indians, 279 Fed. Appx. 926, 926-27 (11th Cir. 2008) ("[W]hether or not a tribe may be subject to a statute and whether or not a tribe may be sued for violating a statute are 'two entirely different questions … A tribe is not subject to suit unless the tribe waives its immunity or Congress expressly abrogates it …. We observed that in order for Congress to have expressly abrogated immunity, it must have made its intention 'unmistakably clear in the language of the statute.'... 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"); *Casino Pauma v. NLRB*, 888 F.3d 1066, 1079, Footnote 5 (9th Cir. 2018) ("Further, although Casino Pauma does not acknowledge it, [under *Kiowa*] there is a conceptual distinction between the procedural question whether tribal sovereign immunity bars a lawsuit and the substantive question whether a federal law applies to a tribe. To say substantive … laws apply … is not to say that a tribe no longer enjoys immunity from suit …. There is a difference between the right to demand compliance with … laws and the means available to enforce them.").

This distinction was further defined by the Sixth Circuit (and later by the Supreme Court) in *Bay Mills* when it addressed federal claims brought by a non-federal party, i.e., the State of Michigan, to enforce federal Indian gaming laws that clearly **applied to the tribes, yet the Sixth Circuit held that sovereign immunity barred enforcement by Michigan** because these are two separate and distinct issues and there was no clear and unequivocal language in those federal laws abrogating tribal sovereign immunity. *Bay Mills Indian Comm.*, 695 F.3d at 414-15; *Bay Mills Indian Community*, 572 U.S. at 788-98.

Thus, on the substantive issue of whether the federal laws at issue there (IGRA and Major Crimes Act) applied to the tribes, there was no dispute because those federal laws were created to address specific tribal gaming concerns. *Bay Mills Indian Comm.*, 695 F.3d at 414-15. However, when addressing the procedural issue of whether sovereign immunity barred the private suit, the Sixth Circuit refused to imply any language into those laws to create a private cause of action where none existed in the text of the laws, despite the laws applying generally to the tribes. *Id.* The Court reasoned "it takes more than inferential logic to abrogate tribal immunity. What it takes is an "unequivocal expression" of Congress…. [The cited federal law does not] … say anything about suing Indian tribes in particular. … [Without such unequivocal expression,] a tribe's immunity would turn on the happenstance of a … statute[], rather than on any provision of federal law." *Id.* at 414-16.

Thus, to address the procedural issue of whether a private party may sue a tribe, it takes more than inferential logic to abrogate tribal immunity in the statute. Congress must be clear and unequivocal **within** the FLSA and that act contains no language discussing "tribes," "Indian", "tribal communities," "tribal sovereign immunity" or the "waiver of tribal sovereign immunity." The FLSA is silent on these issues, just like the federal criminal and gaming laws addressed in *Bay*

Mills, **which applied to the tribe generally, but did not abrogate tribal sovereign immunity allowing for private suit (which are two separate issues)**.

It must be assumed that Plaintiff is attempting to confuse these issues by simply ignoring *Kiowa, Bay Mills* and *Lesperance*. However, to do so would cause this Court to disregard its own holding in *Lesperance*, which applied the correct "settled law" in *Bay Mills:* Congress must provide a clear and unequivocal waiver to abrogate tribal sovereign immunity for a private party to sue a tribe. *See Lesperance*, 259 F. Supp. 3d 713, 718-19 (W.D. Mich. 2003) (Hon. Robert J. Jonkers, presiding) ("Thus, even in seemingly unfair situations, it is still **'settled law'** that a tribe is entitled to tribal sovereign immunity unless Congress [clearly and unequivocally] abrogated [tribal sovereign] immunity.") (emphasis added).

In the Brief in Support of Its Motion to Dismiss, Defendant challenged Plaintiff to find a single case that says that the FLSA clearly and unequivocally abrogates tribal sovereign immunity allowing for private suit. Plaintiff still has not (and cannot) cite to a single such case because this doctrine is based on the previously discussed authorities. In fact, every federal district court and circuit court that has addressed this procedural issue in the context of an FLSA claim **has found no waiver of tribal sovereign immunity allowing for private suit against a tribe in the FLSA**. *See, e.g., Larimer v. Konocti Vista Casino Resort Marina & RV Park*, 814 F.Supp.2d 952, 956-57 (N.D. Cal. 2011) ("Here, the FLSA makes no mention of private enforcement against tribal governments and does not specifically reference tribes anywhere in the statutory scheme. *See* 29 U.S.C. §§ 201-19. … That Congress specifically considered the abrogation issue and did not include tribes among those sovereigns whose immunity was being abrogated is telling evidence of Congress' decision not to abrogate."); *Brown v. Cheyenne Arapaho Tribes, Oklahoma*, 2010 WL 9473334, *4-6 (W.D. Ok. Nov. 3, 2010) ("Congress did not expressly make the FLSA applicable

to Indian tribes. As such, the Court cannot conclude that Congress expressly abolished the Tribes' sovereign immunity with regard to claims under the FLSA."); *Noriega v. Torres Martinez Desert Cahuilla Indian Tribe*, 2010 WL 11601191, *4-5 (C.D. California, September 14, 2010) ("Congress not having [expressly or unequivocally] abrogated sovereign immunity of Indian tribes with respect to enforcement of the FLSA and Defendant not having waived its immunity, the Court finds that the [tribe] is immune from [private] suit."); *Lobo v. Miccosukee Tribe of Indians of Fla*., 279 Fed. Appx. 926, 927 (11th Cir. 2008) (affirming the dismissal of an FLSA complaint against a Tribe because the FLSA is silent with regard to Indian Tribes and contains no express or unequivocal indication that Congress intended abrogate tribal sovereignty). Thus, Plaintiff is asking this Court to create new law contrary to *Kiowa*, *Bay Mills*, and *Lesperance*.

According to the holding in *NLRB v. Little River Band*, 788 F.3d 537 (6th Cir. 2015), cited in Plaintiff's Amended Complaint and the only *theoretical* mechanism for enforcement of the FLSA against a sovereign tribal government (and that's assuming the FLSA applies to a tribe in the first place which Defendant does not concede) is the commencement of a federal enforcement action brought by the Department of Labor, the agency tasked with enforcement of the FLSA. In *Little River Band*, the National Labor Relations Board (a federal agency) issued a cease and desist order to compel the tribe's compliance to the National Labor Relations Act. *Id.* at 541-542, 555. Despite holding that the National Labor Relations Act applied generally to the tribes, the Court still recognized that if a private party filed the case (not the federal government) the case would have been dismissed on sovereign immunity grounds because sovereign immunity only applies to private parties, and not in instances where the federal government is a party. *Id.* The Court highlighted this distinction as follows:

> We recognize that Indian tribes are immune from suit in both state and federal court unless 'Congress has authorized the suit or the tribe

> has waived its immunity.' *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Indian tribes, however, have no sovereign immunity against the United States. *Fla. Paraplegic Ass'n*, 166 F.3d at 1135 (citing *Mashantucket Sand & Gravel*, 95 F.3d at 182)); *see also United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987). Furthermore, Congress may choose to impose an obligation on Indian tribes without subjecting them to the enforcement of that obligation through a private right of action. *See Santa Clara Pueblo*, 436 U.S. at 65 (finding that although the Indian Civil Rights Act of 1968 did not waive tribal immunity, the act nevertheless imposes obligations on tribes which may be enforced through vehicles other than private right of action); *Fla. Paraplegic Ass'n*, 166 F.3d at 1134. That choice, however, simply does not evince Congress's intent that a statute not impose obligations on Indian tribes or that those obligations not be enforced by other means, for example, by agency action. *See Santa Clara Pueblo*, 436 U.S. at 65; *Fla. Paraplegic Ass'n*, 166 F.3d at 1134. The fact that Congress did not waive tribal sovereign immunity from private suits to enforce collective-bargaining agreements under Section 301 in no way suggests that the Band is immune from suits by the Board to enforce other requirements imposed by NLRA.

Id. at 555. Thus, because the federal government was a party to the proceeding, the only substantive issue addressed was applicability of the federal law and the issue of sovereign immunity was not implicated. *Id.* Had a private party filed that case, it would have been dismissed on sovereign immunity grounds because Congress did not clearly and unequivocally abrogate tribal sovereign immunity allowing for private suit.

Here, Plaintiff chose to bypass the Department of Labor to her peril, wasting this Court's time and resources with misplaced reliance on inapplicable authority. The Plaintiff's presentation of a non-responsive brief is further evidence of the frivolousness of her claims. To the extent that Plaintiff submitted non-factual allegations, the Defendant denies them as untrue and unwarranted at this stage.

II. The Hannahville Constitution Does Not Provide a Clear and Unequivocal Waiver of Sovereign Immunity Allowing for Private Parties to File Claims Against It Under the FLSA.

Plaintiff argues that the Hannahville Constitution expresses conformance to *applicable* federal law. This again confuses the substantive issue of applicability of a federal law with the procedural issue of the ability of a private party to enforce a federal law against an Indian tribe. As previously stated, the core issue before the court is the procedural issue of whether the FLSA clearly and unequivocally waives sovereign immunity for private suit, not the substantive issue of whether the statute applies to tribes.

To the extent that the Defendant argues that Article V-12, 2 of the Hannahville Constitution somehow abrogates sovereign immunity, the cited provision discuss applicable "laws of the United States which apply to the Hannahville Indian Community". Like the FLSA, there is no *clear and unequivocal* language waiving sovereign immunity in that provision. To reach Plaintiff's conclusion, the court would have to infer a waiver, which it cannot do according to *Bay Mills* and *Lesperance.*

Here, the language cited in the Constitution was created to comply with the Indian Reorganization Act of 1934, enacted decades before the FLSA was even conceived. Similar language was required for all tribes formed on or before the date the Indian Reorganization Act was implemented in order to receive federal financial support. Other federally recognized tribes under the Indian Reorganization Act have similar language in their respective constitutions. The language in Hannahville's Constitution, like the language in the FLSA, says nothing about private enforcement of FLSA claims, the FLSA, labor laws, or anything relating to abrogation of a tribe's sovereign immunity allowing for private causes of action. Instead, the Tribal Council (the governing body of the Hannahville Indian Community) clearly and unequivocally reaffirmed its

sovereign immunity in its Sovereign Immunity Code attached at **Exhibit 1.** Thus, to reach Plaintiff's conclusion this Court must impermissibly infer a waiver in the Hannahville Constitution, which it cannot do under *Bay Mills* and *Lesperance*.

Also to the extent that the provision discusses applicable federal law, Congress did not provide clear and unequivocal authorization for private parties to sue tribes. The law is not applicable in that respect for private enforcement. There is no means for private enforcement against tribes in the statute to make that interpretation applicable to Defendant.

III. The Tribal Exhaustion Doctrine Requires Dismissal of All Claims.

Plaintiff also argues the Tribal Exhaustion Doctrine should not apply because the Hannahville Tribal Court may exhibit bias providing a favorable forum because of the economic interests at stake. Plaintiff further argues that the FLSA states that claims can only be brought in state and federal courts.

Plaintiff questions the integrity of the Hannahville Tribal Court but inherent bias is not one of the four recognized exceptions to the Exhaustion Doctrine (i.e., harassment, violates express jurisdictional prohibitions, futility, etc.) and should not be considered. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300-01 (8th Cir. 1994) ("The Supreme Court has declined to permit parties to excuse themselves from the exhaustion requirement by *merely alleging* that tribal courts will be incompetent or biased."); *Gustafson v. Poitra*, 2014 U.S. Dist. LEXIS 134640, *9-10, 2014 WL 4772663 (D. N.D. September 24, 2014) ("Since there is no question the Turtle Mountain Band of Chippewa Indians has a long-established tribal court system, any claim of futility would be unlikely to succeed. Suggestions of bias would also likely fail. In addition, a mere suggestion of bias would also likely fail as bias will not be

presumed."). Defendant is not familiar with the Hannahville Tribal Court to call its integrity into question.

The lack of certainty regarding applicability of the FLSA to tribes requires remand to the Hannahville Tribal Court to define the extent and breadth of tribal sovereign immunity. *See Geroux v Assurant, Inc.*, 2010 US Dist. Lexis 24847, *34-48 (W.D. Mich. March 17, 2010) (Hon. Allan Edgar, Presiding) (dismissing the Employee Retirement Income Security Act of 1974 (ERISA) claim because (like with the FLSA) there was uncertainty about the applicability of ERISA to the tribe). Plaintiff asks this court to interpret Hannahville's Constitution to infer a waiver of tribal sovereign immunity. Under the Exhaustion Doctrine, the appropriate forum is tribal court.

With regard to the language in the FLSA that limits enforcement to state and federal courts and does not contain any language addressing tribes or tribal courts, this argument also does not address one of the four exceptions to the Exhaustion Doctrine (a judicially created doctrine). A similar argument was also rejected in *Geroux* in the context of a federal ERISA claim that only provided for state and federal court forums in the ERISA statute; the ERISA claim was remanded back to tribal court regardless. *Id.* at 34-49.

Instead, the fact that tribes and tribal courts are not referenced in the FLSA is strong evidence under *Bay Mills* that this Court must hold that the FLSA does not abrogate tribal sovereign immunity allowing for private suit. Congress had the opportunity to address tribal sovereign immunity when it drafted that legislation but chose to leave that language out of the FLSA, as noted by the Northern District of California in *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952 (N.D. Cal. 2011) as follows:

> The Ninth Circuit has not directly addressed whether the FLSA abrogates tribal sovereign immunity. Thus, the Court treats this as a matter of first impression.
>
> In interpreting whether Congress intended a particular statute to waive tribal sovereign immunity, other circuits have drawn on a similar doctrine interpreting congressional intent to legislatively abrogate state sovereign immunity. *See Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)). In *Atascadero*, the Supreme Court held that Congress may abrogate sovereign immunity "only by making its intention unmistakably clear in the language of the statute." 473 U.S. at 242. This interpretive standard, looking solely to statutory text, is consistent with the approach taken by the Supreme Court in holding that the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-03, did not abrogate tribal sovereign immunity in that "[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." *Santa Clara Pueblo*, 436 U.S. at 59.
>
> Here, the FLSA makes no mention of private enforcement against tribal governments and does not specifically reference tribes anywhere in the statutory scheme. See 29 U.S.C. §§ 201-19. To the contrary, while the statute does expressly abrogate sovereign immunity with regards to public agencies, it expressly limits the definition of "public agencies" to agencies of the United States or state governments. *Id.* §§ 203, 216. That Congress specifically considered the abrogation issue and did not include tribes among those sovereigns whose immunity was being abrogated is telling evidence of Congress' decision not to abrogate. Thus, the Court finds that Congress did not abrogate tribal sovereign immunity in the FLSA.

Id. at 956-57. Simply, tribes and tribal courts are not mentioned anywhere in the FLSA because Congress never intended to abrogate sovereign immunity by clear and unequivocal expression. Had it done so, it would have included that language and likely provided for a tribal court forum to address FLSA claims arising in Hannahville (similar to the forums provided to the states).

IV. Hannahville Is The Owner of the Island Resort and Casino.

To the extent that Plaintiff argues that the Hannahville Indian Community does not own the Island Resort and Casino, this argument is without factual merit. The Indian Gaming Regulatory Act (IGRA) U.S.C. § 2709(4)(a) provides that federally recognized Indian tribes can be the only owners of tribal casinos. Section 2709(4)(a) states as follows:

> No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

Id. The tribal gaming compact, which is a perquisite agreement for the establishment of a tribal casino under Indian Gaming Regulatory Act, § 2710 (d)(1)(C) names the Hannahville Indian Community as the owner of the Island Resort and Casino. **Exhibit 2.** Further, both the Sixth Circuit and this Court have recognized the Hannahville Indian Community as the owner of the Island Resort and Casino. *See Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 808 (6th. Cir.) ("Plaintiff Hannahville owns and operates the Island Resort and Casino … in Harris, Michigan."); *State of Michigan v. Hannahville Indian Community*, Case No. 2:17-cv-0045-GJQ-TPG (WD Mich. Dec. 02, 2021) (**Exhibit 3 and 4**, publically available at https://www.michigan.gov/mgcb/tribal-casinos/tribal-state-compacts-in-michigan).

The Hannahville Indian Community is and was always doing business as the Island Resort and Casino. The Island Resort and Casino has no assets other than those owned by the Hannahville Indian Community. The Hannahville Indian Community has no corporation or LLC codes to form a separate entity. There are no record of any entity other than the Hannahville Indian Community having any interest in the Island Resort and Casino because such an arrangement would be illegal under the federal IGRA. These facts are all easily ascertainable public information.

Indeed, Plaintiff's failure to stipulate to the Hannahville Indian Community's ownership of the Island Resort and Casino is actually counterproductive to her claim. If the Hannahville Indian Community is not a party, then Plaintiff has failed to join a necessary party to her complaint under Fed.R.Civ.P. 19, despite having clear notice. The Hannahville Indian Community exclusively owns all assets attributable to the Island Resort and Casino. This is further grounds for dismissal.

CONCLUSION

For each of the foregoing reasons, Defendant respectfully requests this Honorable Court will enter its Order dismissing Plaintiff's Amended Complaint in its entirety with prejudice, and awarding Defendant such other and further relief as to it seems just and proper.

Dated: July 29, 2024

By: /s/ *Mark E. Hills*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit as set forth in LCivR 7.2. I certify that this document contains 4,116 words as generated by Microsoft Word 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he electronically filed the foregoing *Defendant's Reply Brief in Support of Its Motion to Dismiss Plaintiff's 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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