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 RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO, AND REQUEST FOR REVIEW OF, THE MAGISTRATE JUDGE'S JANUARY 16, 2025 REPORT AND RECOMMENDATION ECF NO. 12

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Defendant, by and through its attorneys, respectfully submits the following response in opposition to Plaintiff's objections to ECF No. 12 pursuant to 28 U.S.C §636(b)(1)(C); Fed. R. Civ. P. 72(b)(2); and W.D. Mich. LCivR 72.3(b).

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DEFENDANT'S STATEMENTS OF OPPOSITION TO PLAINTIFF'S OBJECTION

1. This Court must dismiss all claims because there is no clear and unequivocal written waiver of tribal sovereign immunity in the Defendant's (the Tribe's) Constitution as required by binding Sixth Circuit (and this Court's own) precedent.

2. This Court must dismiss all claims under the tribal exhaustion doctrine as a matter of comity and deference to the Hannahville Tribal Court's case law holding that the Tribe's Constitution does not waive sovereign immunity for employment actions.

3. This Court must dismiss the Plaintiff's unspecified state law claims under Rule 8, Rule 12(b)(1) and 28 U.S.C § 1267(b) because Plaintiff provides no argument or objection to the dismissal on those grounds.

4. This Court must refrain from incorporating the Magistrate's discussion on the applicability of the FLSA to the tribes in any final order because that issue was not brought by the Defendant in its motion to dismiss, is a separate and distinct issue from the issue of sovereign immunity, is not dispositive of the Magistrate's Recommendation to dismiss on sovereign immunity grounds, and is an issue of first impression in the Sixth Circuit that would be more addressed when tribal sovereign immunity is not implicated.

INTRODUCTION

Defendant Hannahville Indian Community (the Tribe) filed its motion to dismiss Plaintiff's Fair Labor Standards Act (FLSA) claims on the grounds of tribal sovereign immunity and the tribal exhaustion doctrine. The Tribe also moved to dismiss Plaintiff's related unspecified state law claims under Rule 8, Rule 12(b)(1), and 28 U.S.C § 1267(b).

With regard to the issue of tribal sovereign immunity, abrogation of tribal sovereign immunity requires a clear and unequivocal waiver by either act of Congress or written resolution of the Hannahville Tribal Council; a waiver cannot be implied. *See Michigan v. Bay Mills*, 695 F.3d 406, 413-16 (6th Cir. 2012); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 716-25 (W.D. Mich. April 27, 2017) (Hon. Jonker, presiding.); *see* **Exhibit 1**, Tribal Sovereign Immunity, Commerce-Tribal Immunities, Title 7, Ch. 4., pp.1-2.

In lieu of addressing the core issue of tribal sovereign immunity, Plaintiff's response to the motion to dismiss focused on the non-issue of applicability of the FLSA to Indian tribes, in general. The Tribe's reply brief pointed out that Plaintiff was being non-responsive to the core issue of tribal sovereign immunity and was citing inapplicable case law. The issue of tribal sovereign immunity is distinct from (and not mutually inclusive of) the issue of the general applicability of federal law. Just because a federal law may apply to a tribal government does not mean that tribal sovereign immunity is automatically abrogated for private suit. Sixth Circuit case law and the Tribe's Sovereign Immunity Code require a clear and unequivocal waiver by formal written resolution of the Tribal Council.

In the Report and Recommendation, the Magistrate correctly distinguished these distinct issues. Applying the standard in *Bay Mills* and *Lesperance*, the Magistrate properly recommended dismissal on the grounds of tribal sovereign immunity because there was no clear and unequivocal

waiver of tribal sovereign immunity either by an Act of Congress or by a written resolution of the Tribal Council.

Recognizing her failure to address the core issue of tribal sovereign immunity, Plaintiff now focuses solely on a *fringe* argument offered in her response, stating that Article V-Section II of the Tribe's Constitution somehow provides a waiver, despite there being no language of "sovereign immunity" or "waiver" in the Tribe's Constitution, and citing to no applicable case law. The Court cannot, as a matter of law, infer or imply a waiver in Plaintiff's favor.

With regard to the tribal exhaustion doctrine, this judicial doctrine was created as a matter of comity and recognition of tribal sovereign status. It recognizes that tribal courts are best suited to interpret tribal constitutions and requires the federal court to remand and defer judgment to allow the tribal courts to address tribal constitutional issues first. Plaintiff provides an absurd argument under the Tribe's Constitution inferring a waiver. The Hannahville Tribal Court has already addressed a similar argument in a similar employment action, finding that the Tribe's Constitution contains no inferred waiver of tribal sovereign immunity. At a minimum, the exhaustion doctrine requires this Court to provide deference to the Hannahville Tribal Court's existing case law reaffirming that there is no express or implied waiver in the Tribe's Constitution and that the Tribal Council is the only government body authorized to define the scope and extent of tribal sovereign immunity and the procedures for waiver as reflected in its Sovereign Immunity Code and employee manuals. *See* **Exhibit 2**, *Pittman v. Pearson, et. al.*, Case No. 21-CV-01 (Dec. 17, 2021) (Hon. Russell Hall, presiding).

With regard to Plaintiff's unspecified state law claims, Plaintiff provides no objection to the recommended dismissal. The legal grounds for such claims are tenuous and unclear. Plaintiff provides no factual or legal support, just a mere references to "state law" without citation, factual

argument or reference to which state or state law Plaintiff is referring to. The Tribe reaffirms its requests that those unspecified state law claims be dismissed under Rule 8, Rule 12(b)(1), and 28 U.S.C § 1267(b).

Finally, the non-issue of the applicability of the FLSA to tribes, in general, should not be incorporated into the final order. General applicability of the FLSA was not an issue presented (or briefed) in the Tribe's motion to dismiss. This issue is not dispositive to the Magistrate's Recommendation to dismiss on sovereign immunity grounds only, and would be advisory. As an issue of first impression in the Sixth Circuit, the issue of applicability of the FLSA to the tribes should be reserved for a future civil action when tribal sovereign immunity is not implicated.

ARGUMENT

(1) The Court Must Dismiss All Claims Because There Is No Clear and Unequivocal Written Waiver of Sovereign Immunity in the Tribe's Constitution As Required By Binding Sixth Circuit (and This Court's Own) Precedent.

Despite there being no clear language of "sovereign immunity" or "waiver" in the Tribe's Constitution, Plaintiff infers that the Tribe waived its sovereign immunity in its entirety and without limitation in favor of Plaintiff to bring her FLSA claims. Abrogation of tribal immunity cannot be implied; a waiver must be clearly and unequivocally expressed. *Bay Mills*, 695 F.3d at 413-414; *Lesperance*, 259 F. Supp. 3d at 717-18. Any ambiguity is construed in the light most favorable to the tribe. *Id.* Per the binding Sixth Circuit precedent, this Court is not permitted to imply a waiver.

There is no clear and unequivocal statement in the Tribe's Constitution. To the contrary, the language in the Tribe's Constitution approved July 23, 1936, predates the FLSA and was included for purposes of federal recognition. *See Lesperance*, 259 F. Supp. 3d at 724-25 ("[T]he Tribe's Constitution does not even apply to Lesperance because she is not a member of the Tribe.");

see also **Exhibit 3**, Constitution and Bylaws of the Hannahville Indian Community, Title Page Approved July 23, 1936. Similar language appears in other tribal constitutions, including the constitution examined by this Court in *Lesperance*, a similar tort action that this Court dismissed on sovereign immunity grounds. *See id*; *see also* **Exhibit 4**, Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, Art. 3, Sec. 1, p. 6.

The only possibility for this Court to find a waiver would be to unlawfully infer a waiver. This inference would be in the light most favorable to Plaintiff (not the Tribe). This Court would have to infer that the Tribe's Constitution somehow applies to Plaintiff, a non-member, despite the fact that the Tribe's Constitution references application only to its members. *See* **Exhibit 3**, Constitution and Bylaws of the Hannahville Indian Community, Preamble, p. 3. This Court would also have to infer that any reference to applicable federal law, no matter how minimal, automatically includes abrogation of sovereign immunity. In effect, this inference would necessarily have to include a waiver in its entirety for all federal laws without limitation, which means that Plaintiff may be able to reach casino revenues and community health funds.

Plaintiff has neither argued that the FLSA provides a clear and unequivocal waiver of tribal sovereign immunity nor objected to the Magistrate's Recommendation on that basis. Thus, there is no *applicable* federal private enforcement authorization or any express or implied abrogation of tribal sovereign immunity in the FLSA to be considered *applicable* against the Tribe. Plaintiff's reasoning is circular and assumes applicable federal law automatically includes the right for a private causes of action in all cases without limitation. Plaintiff again confuses the substantive issue of whether a federal law applies with the procedural issue of whether the Tribe may assert sovereign immunity. These issues are separate and distinct (not mutually inclusive). Plaintiff's arguments are frivolous.

Here, the Tribe's Constitution bestowed certain rights upon its *tribal members* (not Plaintiff), and bestowed certain powers and authority upon its Tribal Council. It defines the powers and authority of the Tribal Council to manage its internal business affairs and make certain rules for its own procedures and conduct of its community, members and its businesses, as follows:

> The Council shall have the following powers: . . .
>
> (2) To manage the business affairs and enterprises of the Community in accordance with the terms of a charter granted to the Community by the Secretary of Interior, and to issue a charter to any group of members of the Community for business purposes. . . .
> (12) To make rules for its own procedure and 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 power.

Exhibit 3, Constitution and Bylaws of the Hannahville Indian Community, Article V(2)(12).

There is no language in the Tribe's constitution that specifically states "sovereign immunity" or "waivers" of sovereign immunity. Instead, in furtherance of its sovereign authority to make rules for its own procedure and manage its own business affairs, the Tribal Council created the Sovereign Immunity Code that reaffirmed the Tribe's sovereign immunity and states that the Tribe's "[s]overeign immunity shall only be waived by formal, written resolution of the Tribal Council expressly waiving its sovereign immunity." **Exhibit 1**, Tribal Sovereign Immunity, Commerce-Tribal Immunities, Title 7, Ch. 4., p. 1-2. The Tribal Council again reaffirmed its sovereign immunity in its employee manuals, which is applicable to Plaintiff's employment. *See* **Exhibit 5**, Island Resort and Casino Employee Manual, Section 21 Disclaimer. The Plaintiff acknowledged, signed and accepted the manual.

A former community employee recently brought a similar employment action in Hannahville Tribal Court. *See* **Exhibit 2**, *Pittman v. Pearson, e. al.*, Case No. 21-CV-01 (Dec. 17, 2021) (Hon. Russell Hall, presiding). Finding no express or implied waiver of tribal sovereign

immunity in the Tribe's Constitution, the Tribal Court dismissed Plaintiff's employment law claims, as follows:

> There is a significant number of cases from the United States Supreme Court which provides guidance on the issue of sovereign immunity and it is clear that unless United States Congress adopts laws which permit litigation or the Hannahville Indian Community expressly waive its sovereign immunity, Hannahville Indian Community has sovereign immunity as to by Ms. Pittman. See ... *Michigan v. Bay Mills Indian Community* et al 572 US 782 (2014). The Hannahville Indian Community Employee Handbook specifically states at Section 1.6 "The Hannahville Indian Community does not waive sovereign immunity for any action arising out of your employment." Therefore it is clear that the Hannahville Indian Community did not waive its sovereign immunity. No case law has been cited by counsel nor has counsel cited.
>
> The Hannahville Indian Community is governed by its Constitution which was approved by the Secretary of the Interior for the United States and ratified by the adult Indians residing [in] Wilson and Harris, Michigan on June 27, 1936. Article V of the Constitution provides for the powers of the Council . . . . The Council has all other rights and powers as noted in Article 5 Section 3 "Further Powers" and Section 5 (Reserved Powers). In essences all powers as to Tribal matters are reserved by the Council . . . .

Id.

Federal courts addressing provisions similar to Article V-II of the Tribe's Constitution have uniformly concluded that they are nothing more than a mere acknowledgement to comply with applicable federal law as opposed to an express waiver of tribal sovereign immunity. For example, in *Colmar v. Jackson Band of Miwuk Indians*, 2011 U.S. Dist. LEXIS 62832 (E.D. Cal. June 13, 2011), a tribal employee filed an age discrimination claim against the Jackson Band of Miwuk Indians under the federal Age Discrimination and Employment Act. The Plaintiff argued that Jackson Band waived its sovereign immunity in Article X of the Jackson Band Constitution, as follows:

> Neither the Tribal Council nor the General Council shall exercise any powers in such a manner as to deprive any person of rights secured by this Constitution or applicable laws of the United States, including the provisions of the Indian Civil Rights Act.

Id. at *10-12. Finding no waiver of sovereign immunity, the court held as follows:

> This language merely acknowledges that the Tribal Council . . . will not deprive anyone of rights secured by applicable federal laws. In this regard the passage is nothing more than an acknowledgment of the Tribe's agreement to comply with federal law. However, a tribe's agreement to comply with federal law, without more, does not constitute an unequivocal waiver of tribal sovereign immunity. Article X of defendant's Tribal Constitution does not mention the Tribe's sovereign immunity, the waiver of that immunity or the scope of any such waiver. Under plaintiff's interpretation Article X waives the Tribe's sovereign immunity in its entity and without limitation [and ignores the procedures for waiver as outlined in the tribe's own sovereign immunity code]. *Id.*

Id.; *see also Bay Mills Indian Community*, 695 F.3d 406 (holding that plaintiff offered a "tendentious junk drawer argument" by claiming that Bay Mills Indian Community waived its sovereign immunity based on a reference in the tribe's gaming ordinance granting the gaming commission the authority to "to sue or be sued in a court of competent jurisdiction . . . ."); *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1153 (10th Cir. 2011) ("We thus hold that the Tribe's agreement to comply with Title VII, like similar agreements to comply with other federal statutes, may convey a promise not to discriminate, but it in no way constitutes an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court."); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (finding that the Tribe, which owned and operated the casino, did not clearly waive its immunity by stating in an employee handbook that employees could be terminated "for any reason consistent with applicable state or federal law," or when it stated in an Employee Orientation Booklet that it would "practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin . . . and other categories protected by applicable federal laws."); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 n.2 (8th Cir. 2000) ("Nor did the College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964.").

Like the plaintiffs in *Jackson Band*, *Bay Mills* and *Lesperance*, Plaintiff is asking this Court to ignore the clear and unequivocal language in the Sovereign Immunity Code and

unlawfully infer a waiver in to the Tribe's Constitution. Article V-II of the Tribe's Constitution does not mention the Tribe's sovereign immunity, the waiver of that immunity, or the scope of any such waiver. Under Plaintiff's unlawful interpretation Article V-II waives the Tribe's sovereign immunity in its entity and without limitation and ignores the procedures for waiver as outlined in the Tribe's own Sovereign Immunity Code. *Bay Mills* and *Lesperance* require that this Court reject such inferential waiver and dismiss Plaintiff's claims.

(2) The Court Must Dismiss All Claims under the Tribal Exhaustion Doctrine as a Matter of Comity and Deference to the Hannahville Tribal Court's Case Law Holding that the Tribe's Constitution Does Not Waive Sovereign Immunity for Employment Actions.

The Magistrate's Recommendation did not address the tribal exhaustion doctrine because he concluded that the issue of sovereign immunity was dispositive. However, the tribal exhaustion doctrine should still be considered as alternative grounds for dismissal because this matter presents an issue of interpretation of the Tribe's Constitution. The Tribal Court has already found no inferred or express waiver in the Tribe's Constitution.

Plaintiff, who is not a Hannahville tribal member, claims rights from the Tribe's Constitution. She advances federal and still unspecified state employment law claims. The Supreme Court defined the purpose of the tribal exhaustion doctrine as a matter of comity to allow the tribal courts the first opportunity to determine the extent of its sovereignty and jurisdiction, as follows:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination . . . . The risks of the kind of 'procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction . . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2447, 85 L. Ed. 2d 818 (1985); *Geroux v. Assurant*, Inc., 2010 U.S. Dist. LEXIS 24847, *24(WD Mich. March 17, 2010) (Hon. R. Allen Edgar, Pres.). Plaintiff lacks standing to assert any rights or claims under the Tribe's Constitution because she is not a member of the Hannahville Indian Community. *See Lesperance*, 259 F. Supp. 3d at 724-25 ("[T]he Tribe's Constitution does not even apply to Lesperance because she is not a member of the Tribe.").

In a similar employment action, the Tribal Court held that the Tribal Council did not waive sovereign immunity in the Tribe's Constitution or employee manuals. *See* **Exhibit 2**, *Pittman v. Pearson, e. al.*, Case No. 21-CV-01 (Dec. 17, 2021) (Hon. Russell Hall, presiding). The Tribal Council reaffirmed sovereign immunity in its Sovereign Immunity Code. **Exhibit 1**, Tribal Sovereign Immunity, Commerce-Tribal Immunities, Title 7, Ch. 4., p. 1-2. This Court must at a minimum give deference to that opinion and the Tribal Council's Sovereign Immunity Code and employee manuals disclaimer any waiver of tribal sovereign immunity.

(3) The Court Must Dismiss the Plaintiff's Unspecified State Law Claims under Rule 8, Rule 12(b)(1) and 28 U.S.C § 1267(b) Because Plaintiff Provides No Argument or Objection to the Dismissal on Those Grounds.

The Tribe also moved to dismiss the Plaintiff's unspecified state law claims under Rule 8, Rule 12(b)(1), and 28 U.S.C § 1267(b). Plaintiff provided no objection to the dismissal on those grounds. The legal grounds for those claims are tenuous and unclear. Plaintiff provides no factual support, just a mere references to "state law" without citation, factual argument or regard to which state or state law the Plaintiff is referring. Therefore, the Tribe reaffirms its requests that those claims be dismissed under Rule 8, Rule 12(b)(1), and 28 U.S.C § 1267(b).

(4) The Court Must Not Incorporate the Magistrate's Discussion on the Applicability of the FLSA to the Tribes Because That Issue Was Not Brought by the Tribe in its Motion to Dismiss, Is a Separate and Distinct Issue from the Issue of Sovereign Immunity, Is Not Dispositive of the Magistrate's Recommendation to Dismiss Only on Sovereign Immunity Grounds, and Is An Issue of First Impression in the Sixth Circuit that Would Be Appropriately Addressed When Tribal Sovereign Immunity Is Not Implicated.

The Tribe requests that the Court refrain from incorporating the Magistrate's discussion about the general applicability of the FLSA to the tribes. The issue of the applicability of the FLSA to the tribes was not an issue brought before the Court in the Tribe's motion to dismiss. The Tribe did not fully brief that issue. In fact, the Tribe spent most of its argument in its reply brief addressing Plaintiff's misguided effort to confuse applicability of the federal law with the defense of tribal sovereign immunity from private suit, which is the core issue before this Court.

Federal courts should refrain from providing advisory opinions on non-issues which are not dispositive or relevant to the final decision. *See United States v. Ciesielski*, 2023 U.S. Dist. LEXIS 128156, *2-3 (E.D. Mich. July 25, 2023) ("But the waiver of Defendant's attorney-client privilege is not an issue presently before this Court. Thus, Trial Counsel's Motion merely seeks an advisory opinion. . . . . Because this Court lacks the authority to issue an advisory opinion, Trial Counsel's request for an order detailing the relevant law surrounding attorney-client privilege must be denied."). The issue of applicability of the FLSA is not central or even relevant to the Magistrate's Recommendation to dismiss on tribal sovereign immunity grounds. There is no Sixth Circuit precedent on the applicability of the FLSA to the tribes. Thus, it is an issue of first impression in the Sixth Circuit. As such, this issue should be reserved for a time when the issue of sovereign immunity is not in dispute and adequately briefed by both parties.

Including this issue in the final order would further confuse two separate and distinct issues that are not imperative of one another or mutual inclusive. Other federal courts have recognized

that intermingling sovereign immunity with the applicability of the federal law confuses these issues and is unnecessary for the outcome when the matter is resolved solely on tribal sovereign immunity grounds. *See Noriega v. Torres Martinez Desert Cahuilla Indian Tribe*, 2010 WL 11601191, *4-5 (C.D. California, September 14, 2010) ("The analysis in *Snyder* appears to bypass recent Supreme Court authority regarding the sovereign immunity of Indian tribes by proceeding directly with an examination of whether . . . the statute applies to Indian tribes . . . . The more recent Ninth Circuit decision in *Allen v. Gold Casino*, 464 F.3d 1044 (9th Cir. 2006) directly addresses the sovereign immunity question [for purposes of an FMLA claim] and holds that, absent [clear and unequivocal] waiver by the tribe or abrogation by Congress, immunity applies.")." Thus, it is respectfully requested that the Court not incorporate the non-issue of applicability of the FLSA to the tribes in its final order dismissing this matter on tribal sovereign immunity grounds.

CONCLUSION

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

Dated: February 13, 2025

By: /s/ *Mark E. Hills*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.2(b) AND 7.3(b)

Defendant the Hannahville Indian Community hereby certifies that *Defendant's Response in Opposition to Plaintiff's Objections to, and Request for Review of, the Magistrate Judge's January 16, 2025 Report and Recommendation ECF No. 12* complies with Local Rule 7.2(b) and 7.3(b) contains 3,860 words, excluding the Table of Contents, Index of Authorities, Index of Exhibits, Signature Blocks, and Proof of Service. The word processing software used to generate word count was Microsoft Word 16 for Office, Version 2308 (Build 16731.20234).

Dated: February 13, 2025

By: /s/ *Mark E. Hills*

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