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 BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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Defendant Hannahville Indian Community d/b/a the Island Resort and Casino ("HIC"), through counsel and pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(1), 28 U.S.C 1267(b), and Local Rule 7.2 hereby submits this Brief in Support of Its Motion to Dismiss the First Amended Complaint of Plaintiff Alexandria Parrotta ("Plaintiff"). Plaintiff brings her amended claims against Defendant (her former employer) under the Fair Labor Standards Act (FLSA) for alleged overtime and PUMP Act (an amendment to the FLSA) violations (collectively, "Plaintiff's FSLA claims" or "FLSA claims"). Plaintiff also requests relief under unidentified state law. Plaintiff's FLSA claims must be dismissed for lack of subject matter jurisdiction because the FLSA does not expressly and unequivocally abrogate tribal sovereign immunity allowing for private suit. Plaintiff's references to unspecified and undefined state law violations likewise should be dismissed on the basis of lack of subject matter jurisdiction, lack of supplemental jurisdiction, and for failing to plead under Rule 8(a). Finally, all the claims should be dismissed on the basis of the tribal exhaustion doctrine as a matter of comity.

INTRODUCTION

Defendant is a federally recognized Indian tribe with sovereign authority akin to that of a state. Included within its sovereign authority, the Defendant has sovereign immunity from private suit.

This Court is familiar with the standard of tribal sovereign immunity from private suit. *See Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 717-18 (W.D. Michigan 2017) (Hon. Robert J. Jonker, presiding); *Mich. v. Bay Mills Indian Cmty.*, 695 F.3d 406, 413-14 (6th Cir. 2012). 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 tribes. *Id.* Similarly, a tribe may waive its

immunity only if its intentions are clear. *Id.* Plaintiff does not (and cannot) point to any language in the FLSA abrogating sovereign immunity because it simply does not exist, nor can Plaintiff cite to any tribal law or resolution waiving immunity in this context.

Like the original Complaint, Plaintiff's First Amended Complaint has no basis in law. Plaintiff has not added any substantive legal theory and the few added allegations in Count I for unpaid overtime wages provide no basis for the relief she seeks. Plaintiff continues to cite to irrelevant authority that does not address sovereign immunity. Plaintiff is attempting to pull the wool over this court's eyes by cherry-picking language from irrelevant authority in the hopes that this Court ignores Supreme Court and Sixth Circuit precedent and imply a waiver of sovereign immunity, which it cannot do. Plaintiff's First Amended Complaint should be dismissed with prejudice for lack of subject matter jurisdiction and for the other reasons discussed, *infra*.

FACTUAL BACKGROUND AND SUMMARY OF ARGUMENT

HIC is a federally recognized Indian tribe located in Wilson, Michigan. 25 U.S.C. § 5131; 81 Fed. Reg. 5019, 521 (Jan. 29, 2016). All Island Resort and Casino employees, including Plaintiff, are employees of HIC. At all times relevant to the First Amended Complaint, Plaintiff was employed by HIC as an executive chef at the Island Resort and Casino.

Plaintiff's First Amended Complaint contains the same two claims under the FLSA contained in her original Complaint: (1) that Defendant violated the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* (the "FLSA") by classifying her as an exempt employee and failing to properly compensate her for all overtime hours worked; and (2) that Defendant violated the PUMP ACT, 29 U.S.C. § 218d(a)(1) (an amendment to the FLSA) by failing to provide a reasonable break time to Plaintiff in the form of a flexible work schedule.

As fully set forth below, Plaintiff's First Amended Complaint should be dismissed in its

entirety because, despite Plaintiff's misplaced reliance on the authorities she cites, this Court lacks subject matter jurisdiction over Plaintiff's FLSA claims. HIC has sovereign immunity from suit. Congress has not chosen to abrogate sovereign immunity in private suits brought under FLSA, nor has the HIC waived sovereign immunity for any FLSA claims. The Plaintiff also asserts undefined state law claims which should likewise be dismissed for lack of subject matter, lack of supplemental jurisdiction, and failure to adequately plead. All the claims should similarly be dismissed on the exhaustion doctrine out of concerns for comity.

ARGUMENT

I. MOTION TO DISMISS STANDARDS.

Federal Rule of Civil Procedure 12(b)(1) provides that dismissal of a complaint is appropriate in circumstances where a court lacks subject matter jurisdiction over the dispute. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919-20 (6th Cir. 2009) ("[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction."). Plaintiff bears the burden of establishing that subject matter jurisdiction exists. *Cartwright v. Garner*, 751 F.3d 752, 759-60 (6th Cir. 2014).

II. PLAINTIFF'S FIRST AMENDED COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(1) BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION OVER ALL CLAIMS ON THE BASIS OF TRIBAL SOVEREIGN IMMUNITY

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*

Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). Congress may abrogate tribal immunity only if its intentions are "unequivocally expressed" and "cannot be implied." *Santa Clara Pueblo*, 436 U.S. at 58 ("But without congressional authorization, the Indian Nations are exempt from suit. It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."); *Memphis Biofuels, LLC*, 585 F.3d at 920-21 ("This directive to favor tribes [in the construction of a statute] counsels against interpreting [ambiguous federal law that is silent on the question of tribal sovereign immunity] as impliedly waiving tribal-sovereign immunity."); *Bay Mills,* 695 F.3d at 413-14. Similarly, a tribe may waive its immunity only if such a waiver is "clear." *Lesperance*, 259 F. Supp. 3d at 717-18; *Bay Mills,* 695 F.3d at 413-14.

Here, this Court lacks subject matter jurisdiction over Plaintiff's claims under the long-established doctrine of sovereign immunity because her employer, the Island Resort and Casino, is a wholly-owned enterprise and arm of HIC. *Mich. v. Bay Mills Indian Cmty*., 572 U.S. 782, 797-04 (2014). Therefore, absent express authorization from Congress or a clear waiver from HIC, Plaintiff's claims cannot stand. *See id.; Lesperance*, 259 F. Supp. 3d at 717-18. The fact that the FLSA is silent on sovereign immunity for private causes of actions and HIC has not consented to suit must be interpreted in favor of HIC's continuing sovereign immunity. *Memphis Biofuels, LLC*, 585 F.3d at 920-921, *Lesperance*, 259 F. Supp. 3d at 717-18; *Bay Mills,* 695 F.3d at 413-14. There can be no implied waiver according to these precedents, regardless of any argument by Plaintiff that the FLSA applies to the tribe.

1. Congress Has Not Abrogated Sovereign Immunity Under The FLSA.

As an initial matter, HIC cannot be sued under the FLSA unless Congress expressly abrogated HIC's tribal sovereign immunity. For Congress to abrogate tribal sovereign immunity, it must "unequivocally express that purpose" and immunity cannot be impliedly waived where a

statute is silent on this issue. *See Santa Clara Pueblo*, 436 U.S. at 58; *Bay Mills*, 572 at 789-90; *Memphis Biofuels, LLC*, 585 F.3d at 920-21; *Bay Mills,* 695 F.3d at 413-14. There is no question that Congress did not expressly abrogate tribal sovereign immunity. In fact, the statutes are silent with respect to any Congressional authorization of private lawsuits against Indian tribes or tribal agents. Nowhere in their text is there any mention of tribal immunity from suit, much less an express and unequivocal abrogation of tribal immunity for private lawsuits. *See* 29 U.S.C. §§ 201 *et seq.*; 29 U.S.C. § 218d. As there is no statutory language to the contrary, these statutes do not abrogate long-standing tribal sovereign immunity barring Plaintiff's FLSA claims. *See Santa Clara Pueblo*, 436 U.S. at 58; *Bay Mills*, 572 at 789-90; *Memphis Biofuels, LLC*, 585 F.3d at 920-21; *Bay Mills,* 695 F.3d at 413-14.

In *Bay Mills*, the state of Michigan brought certain federal and state law claims against the Bay Mills Indian Community for its operation of a casino in Vanderbilt, which the State alleged was in contravention of federal and state law. The federal claims arose out of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii), and 18 U.S.C. § 1166. *Bay Mills Indian Cmty*., 695 F.3d at 415-19 (affirmed on appeal in *Mich. v. Bay Mills Indian Cmty*., 572 U.S. 782 (2014). In dismissing the claims for lack of subject matter jurisdiction, the Sixth Circuit held that the federal laws "did not mention anything about abrogation of tribal immunity much less expressly authorizing a State to sue a tribe…It takes more than inferential logic to abrogate tribal immunity….What it takes is an 'unequivocal expression' of Congress…And, neither § 1166(a) nor the cited sections of Michigan law say anything about suing Indian tribes in particular." *Bay Mills*, 695 F.3d at 415. Thus, the court refused to read language into the federal law that simply was not there.

This Court has already applied the Supreme Court's (and the Sixth Circuit's) reasoning in

Bay Mills, and held that it will not (and cannot) read language into state and federal law to imply a waiver of tribal sovereign immunity for purposes of tort claims because "it is fundamentally Congress's job not [the courts], to determine whether or how to limit tribal immunity." *See Lesperance,* 259 F. Supp. 3d at 717-18. This reasoning applies in all matters regardless of arguments of the harshness of the consequences and fairness for the litigant because it is up to Congress to make "this important judgment." *Id.* at 718-19.

The Plaintiff's reliance on the Sixth Circuit case of *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015) is misplaced and irrelevant to this matter because it does not address the issue of tribal sovereign immunity from **private** suit. There, the National Labor Relations Board, a federal entity acting under a federal law (the National Labor Relations Act, 29 U.S.C. § 152 *et seq.*), issued a cease and desist order against the Little River Band tribe to comply with the Act. In the context of a federal agency bringing a claim under a federal law, the Sixth Circuit recognized that the issue of sovereign immunity is not applicable because tribes cannot assert immunity against the federal government. *Bay Mills,* 695 F.3d at 413-14 ("tribes are not immune from suits **brought by the federal government**") (citing *Cohen's Handbook of Fed. Indian L.* § 7.05[1][a] (2005 ed. Supp. 2009)). (Emphasis added). Thus, the issue in that case was simply whether the National Labor Relations Act applied because sovereign immunity was not implicated.

Indeed, the text of that opinion explains this concept and supports the dismissal of Plaintiff's **private** claim on sovereign immunity grounds in this matter, 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. Inc.* [*v. Miccosukee Tribe of Indians of Fla.*],

> 166 F.3d [1126, 1135 (11th Cir. 1999)] (citing [*Reich v.*] *Mashantucket Sand & Gravel*, 95 F.3d [174, 182 (2nd Cir. 1996)]; *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.

Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d at 555.

Assuming, *arguendo*, that this Court could disregard the Sixth Circuit and Supreme Court in *Bay Mills* (which it cannot) and rely solely on cases from other circuit courts, the Eleventh Circuit is the only circuit court to address the issue of tribal sovereign immunity in the context of the FLSA brought by a **private** party. *See Lobo v. Miccosukee Tribe of Indians of Fla.*, 279 Fed. App'x. 926 (11th Cir. 2008). There, the plaintiff brought similar FLSA unpaid wage claims against a tribal-owned casino and its chairperson arguing that the private action must proceed because the statute is a law of general applicability that applies to the tribe. *Id.* at 926-27. However, the Eleventh Circuit distinguished that the issue of whether or not a tribe may be subject to a federal law and whether or not a tribe may be privately sued for violating a statute as "two entirely different questions". *Id.* In affirming dismissal of plaintiff's complaint on sovereign immunity grounds, the Eleventh Circuit stated as follows:

> The district court dismissed the complaint because the Appellees, the Miccosukee Tribe and its chairman Billy Cypress, enjoy

> sovereign immunity. On appeal, the Appellants argue that the district court erred because the FLSA is a statute of general application that applies to Indian tribes. In *Florida Paraplegic, Association, Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126 (11th Cir. 1999), we addressed precisely that issue. We noted that although the district court was correct that the Act -- in that case the Americans with Disabilities Act -- applied to Indian tribes, there was no indication that Congress intended to waive Indian sovereign immunity to suit on that act. We also noted that whether 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." *Id.* at 1130. A tribe is not subject to suit unless the tribe waives its immunity or Congress expressly abrogates it. *Id.* at 1131. 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.'" *Id.* (quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985)).
>
> 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. Therefore, the district court did not err when it dismissed the complaint with regard to the Appellant tribe.

Id. Thus, just because a law may or may not apply to a tribe does not give rise to a **private** cause of action. Because Congress did not abrogate sovereign immunity clearly and unequivocally in the FLSA, Plaintiff's claims here are barred by sovereign immunity. *Bay Mills,* 695 F.3d at 413-14.

Federal districts courts that have addressed FLSA claims brought by **private** parties against tribes have come to the same conclusion as the Eleventh Circuit in *Lobo* that sovereign immunity bars the private action. *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."); *Costello v. Seminole Tribe*

of Fla., 763 F.Supp.2d 1295, 1298 (M.D. Fla. 2010) ("*Lobo* finds that the text of the FLSA contains no indication that Congress intended to abrogate the tribe's immunity to suit.") (Internal citations omitted); *Brown v. Cheyenne Arapaho Tribes, Okla.*, No. Civ-10-970-R, 2010 WL 9473334, at *2 (W.D. Okla. Nov. 3, 2010) ("As noted by the Court in *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993), 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*, No. CV 10-3776 FFM, 2010 WL 11601191, at *5 (C.D. Cal. Sept. 14, 2010) ("Congress not having 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 suit.").

Plaintiff does not and cannot cite to a single case supporting waiver of tribal sovereignty for a private party to file suit against a tribe. Plaintiff's citation to *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004), is inapplicable because the issue addressed there was whether the FLSA applies to the tribe. In lieu of addressing sovereign immunity, the Ninth Circuit chose to dismiss that case on the grounds that the FLSA *did not* apply to tribal law enforcement activities. *Id.* at 892-97. As similarly discussed in *Lobo*, the question of whether or not a federal law applies to a tribe in *Snyder* is completely different from whether or not sovereign immunity bars private suit against tribes. *See Lobo*, 279 Fed. Appx.at 926-27 ("We also noted that whether 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.'"); *see also Larimer*, 814 F.Supp.2d 952, 956-57 ("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.").

Frankly, there is no Ninth Circuit appeals court case directly addressing sovereign immunity in the context of FLSA claims brought by **private** parties. Instead, the standard that the Ninth Circuit would apply if this issue were ever to be addressed is the same standard applied in *Lobo* and *Bay Mills*: the court will not infer abrogation of sovereign immunity when Congress is silent in the FLSA. *Bay Mills,* 695 F.3d at 413-14. When Congress does not abrogate immunity, the only question is whether the casino is an arm of the tribe to assert immunity. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) ("In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit [absent a waiver from Congress that is unequivocally expressed in a law"); *Carsen v. Inter-Tribal Council of Nev.*, 599 Fed. App'x. 659, 660 (9th Cir. 2015) ("The district court correctly held that the FMLA does not abrogate tribal sovereign immunity [for private parties to sue tribes] …. Accordingly … the [FMLA] claim is barred if [the entity] is an arm of a tribe acting on behalf of the tribe and therefore has tribal sovereign immunity."); *Cook v. AVI Casino Entrs*., 548 F.3d 718 (9th Cir. 2008) ("Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. This immunity applies to the tribe's commercial as well as governmental activities.")

Federal district courts in the Ninth Circuit addressing this issue of first impression after *Snyder* have distinguished *Snyder* as inapplicable to the issue of tribal sovereign immunity in the context of an FLSA claim. Instead, after applying the standard in *Allen v. Gold Country Casino* and its progeny, the courts found the FLSA does not abrogate sovereign immunity because Congress did not unequivocally waive sovereign immunity in the FLSA.

For example, in addressing the tribe's assertion of sovereign immunity from a **private** suit under the FLSA, the Central District of California in *Noriega* held as follows:

> 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. *See, e.g.*, *Kiowa Tribe*, 523 U.S. at 754-55 (discussing sovereign immunity as opposed to applicability of statute to Indian tribes); *Oklahoma Tax* [*Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.]*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L.Ed. 2d 1112 (1991); 498 U.S. at 509 (same); *Allen*, 464 F.3d at 1046 (same).
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> The more recent Ninth Circuit decision in *Allen v. Gold* [*Country*] *Casino*, 464 F.3d 1044 (9th Cir. 2006)[] directly addresses the sovereign immunity question and holds that, absent waiver by the tribe or abrogation by Congress, immunity applies. Immunity has been found regardless of whether the activity in question took place on or off the reservation, *Kiowa*, 523 U.S. 754 (citing *Puyallup Tribe, Inc. v. Dep't. of Game*, 433 U.S. 165, 167, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977)), or whether the activity was governmental or commercial in nature, *id.* at 754-55 (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)). The only question is whether the activity was engaged in by the tribe or an arm of the tribe.
>
> Here, there is no question that the activity was engaged in by the tribe for the welfare and benefit of the tribe. Therefore, the Court finds that sovereign immunity applies, absent waiver or express Congressional abrogation.

Noriega, 2010 WL 11601191, at *5.

Another example is the Northern District of California in *Larimer* which addressed the tribe's assertion of sovereign immunity to a FLSA claim brought by a private party 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.

Larimer, 814 F.Supp.2d at 956-57.

The requirement that federal law must contain language clearly abrogating tribal sovereign immunity to bring a private claim is the same conclusion that the Eleventh Circuit reached in *Lobo*, that the Ninth Circuit reached in *Allen v. Gold Country Casino*, and that the Sixth Circuit reached in *Bay Mills*, which was affirmed by the Supreme Court. *Lobo*, *Allen* and *Bay Mills* are consistent with this Court's own reasoning in *Lesperance*, which restricts this Court from implying a waiver where Congress is silent on the issue of abrogation of sovereign immunity in the FLSA. Clearly, the First Amended Complaint must be dismissed based on the foregoing authority, including Plaintiff's cited cases, because there is no language abrogating sovereign immunity in the FLSA and the HIC did not itself clearly waive immunity. There is no dispute that the Island Resort and

Casino is an economic arm of HIC (HIC merely doing business under an assumed name) which is bestowed such immunity.

2. HIC Has Not Waived Its Sovereign Immunity.

HIC did not and has not waived its sovereign immunity with respect to Plaintiff's FLSA claims. Here, any waiver cannot be implied from a tribe's actions, but must be unequivocal, expressed and clear. *Lesperance*, 259 F. Supp. 3d at 717-20. Plaintiff's Complaint contains no allegation that HIC waived its sovereign immunity from her claims and rightfully so – as there is no evidence whatsoever that HIC has waived its sovereign immunity with regard to the FLSA. Instead, HIC adopted a sovereign immunity code attached at **ECF No. 6-2** reaffirming HIC's sovereign immunity defense and applying it to its enterprises and agents unless expressly waived by formal Resolution of the Hannahville Tribal Council, HIC's governing body. There was no express waiver by formal resolution of HIC Tribal Council as required by the Ordinance for the FLSA to apply, nor is there anything in the HIC civil code authorizing consent to this action. *Id.*

Without either express Congressional abrogation or clear tribal waiver, Plaintiff's claims are barred for lack of subject-matter jurisdiction. *Id.* Because the FLSA does not abrogate the doctrine of tribal sovereign immunity, and HIC has not waived its right to tribal sovereign immunity for itself or for its enterprises and agents, this Court must dismiss Plaintiff's Complaint as a matter of law for lack of subject matter jurisdiction consistent with its previous holding in *Lesperance*. *Id.*; *Bay Mills,* 695 F.3d at 413-414.

III. PLAINTIFF'S STATE LAW CLAIMS SHOULD LIKEWISE BE DISMISSED UNDER RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION.

Plaintiff's First Amended Complaint also contains a claim for purported violation of unspecified state law. This Court can easily dispense with this cause of action because the

factual basis for Plaintiff's state law claim is presumably similar to the factual basis for Plaintiff's FLSA claim even though Plaintiff presents no argument or authority to support them.

Tribal sovereign immunity encompasses both Plaintiff's federal law FLSA claims and Plaintiff's state law claims. *See Bay Mills*, 695 F.3d 413-14 (holding that a tribe may not be sued on the basis of federal or state law absent waiver or abrogation of tribal immunity enforce those regulations). Sovereign immunity is a matter of federal law and is not subject to the diminution by state law. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S.751, 755-56 (1998). ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."). Thus, a tribe is immune from suit on the basis of state law unless Congress has authorized the suit or the tribe has waived its immunity. An abrogation of tribal immunity cannot be implied but must be unequivocally expressed. *Id.* Therefore, Plaintiff's state law claims are also barred for lack of subject matter jurisdiction.

IV. PLANTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED FOR FAILURE TO PLEAD WITH PARTICULARITY UNDER RULE 8(a).

Plaintiff's state law claims should be dismissed under Fed. R. Civ. P. 8(a) for failing to state a claim upon which relief can be granted. Under Rule 8(a), a complaint must contain a (1) "short and plain statement of the grounds for the court's jurisdiction", (2) "short and plain statement of the claim showing that the pleader is entitled to relief," (3) "and a demand for relief." Plaintiff does not meet any of these requirements. Instead, she merely states the word "state law" three times in the demand for relief section. There is no factual allegations for those unspecified state law claims. The Plaintiff does not identify what state common or statutory law she is relying on to provide the Defendant with adequate nature of her claim under 8(a). Accordingly, those claims should be dismissed under Rule 8(a) for failing to state a claim upon

which relief can be granted.

V. PLANTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED FOR LACK OF SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1267(b) BECAUSE THE FEDERAL CLAIMS THAT PLAINTIFF RELIES ON TO ESTABLISH FEDERAL QUESTION JURISDICTION SHOULD BE DISMISSED.

Plaintiff's state law claims should be dismissed for lack of supplemental jurisdiction under 28 U.S.C. § 1267(b) because the federal claims that Plaintiff relies on to establish federal question jurisdiction should be dismissed. Plaintiff asserted only federal question jurisdiction under 28 U.S.C. § 1331 in her Complaint. Because none of Plaintiff's other federal question claims should survive, the court lacks supplemental jurisdiction over any state law claims. *See Rajapakse v. Credit Acceptance Corp*., No. 19-1192, 2021 WL 3059755 (6th Cir. 2021) ("A complaint must contain a 'short and plain statement of the grounds for the court's jurisdiction.' Fed. R. Civ. P.8(a)(1). Here, Rajapakse asserted only federal question jurisdiction under 28 U.S.C. § 1331. But there is no federal law providing relief for common law fraud; the claim would necessarily arise under state law. Because none of Rajapakse's other, federal question claims survived, the district court lacked supplemental jurisdiction over any state law claim. 28 U.S.C. § 1367(a).").

VI. PLAINTIFF'S FIRST AMENDED COMPLAINT SHOULD BE DISMISSED UNDER THE TRIBAL EXHAUSTION DOCTRINE.

Principles of comity also compel this Court to dismiss the instant action under the tribal exhaustion doctrine. Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on their reservations and non-Indian fee lands. *Mont. v. United States*, 450 U.S. 544, 565 (1981). A tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members and may retain inherent power to exercise civil authority over the conduct of non-Indians that threatens the economic security or the health or

welfare of the tribe. *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997).

The Supreme Court in *National Farmers Union Ins. Companies v Crow Tribe of Indians*, 471 US 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), held that so long as the issues are not patently violative of express jurisdictional prohibitions, the first examination of tribal court jurisdiction should take place in the tribal court rather than in federal courts under the exhaustion doctrine because the Supreme Court's cases "have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.*, at 856-57.

Thus, when there is a 'colorable question' as to whether a tribal court has subject matter jurisdiction over a civil action, a federal court should stay or dismiss the action so as to permit a tribal court to determine in the first instance whether it has the power to exercise subject matter jurisdiction. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21, 31-34 (1st Cir. 2000); *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, 730 F. Supp. 2d 485, 487-89 (W.D.N.C. 2010) ("In the present case, it is alleged that the Tribe owns and operates the Casino and has contracted with Harrah's NC Casino to manage the facility. The operation and management of the Casino clearly implicates the economic interests and welfare of the Tribe. As such, the Plaintiffs' claims against Harrah's NC Casino raise at least a "colorable question" of tribal jurisdiction."); *Brown v. Western Sky Fin*., *LLC*, 84 F. Supp. 3d 467, 480-92 (Middle Dis. Carolina January 30, 2015) ("Because this court finds that Defendants have asserted at least a colorable claim of [tribal] jurisdiction, this court is persuaded by the *Heldt* [*v. Payday Fin., LLC*], court approach and with requiring tribal court exhaustion."). Moreover, the doctrine applies even though the contested claims are to be

defined substantively by state or federal law and "is applicable regardless of whether an action is currently pending in tribal court." *Ninigret Dev. Corp*., 207 F.3d at 31; *Geroux v. Assurant*, *Inc*., No. 2:08-cv-00184, 2010 WL 1032648, at *34 (W.D. Mich. Mar. 17, 2010) (Hon. Edgar, Presiding) (dismissing a federal ERISA claim on tribal exhaustion doctrine grounds); *Madewell*, 730 F. Supp. 2d at 489.

Tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction, requiring that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court. *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc*., 715 F.3d 1196, 1200-1201 (9th Cir. 2012) "Therefore, under *National Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction . . . until tribal remedies are exhausted." *Id.* (internal citations omitted). The courts have created four recognized exceptions to the requirement for exhaustion of tribal court remedies where:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule.

Grand Canyon Skywalk Dev., LLC, 715 F.3d at 1200.

The tribal exhaustion doctrine has been recognized in the Western District of Michigan in the context of an employee brining a federal ERISA employment benefits claim against its tribe employer (the Keweenaw Bay Indian Community). In *Geroux v Assurant, Inc.*, No. 2:08-cv-00184, 2010 WL 1032648, *34-48 (W.D. Mich. Mar. 17, 2010) (Hon. Allan Edgar, Presiding), the court dismissed the ERISA claim because (like with the FLSA)

there was uncertainty about the applicability and the extent tribal sovereignty in relation to the claim. The court determined that the uncertainty weighed in favor of dismissal of the claim for the tribe to determine its sovereignty under the exhaustion doctrine. *Id*. at *34 ("Where the law is still unclear on this issue [of applicability to the tribe], the court concludes that the lack of clarity in the law weighs in favor of granting the remand as the Defendants bear the burden of proof on removal questions.").

It is beyond dispute that the tribal court has subject matter jurisdiction over the instant action. Plaintiff's claims stem from alleged payroll and employment policies at an HIC casino located on HIC Indian Reservation Lands. The 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. That the instant action should be dismissed pursuant to the tribal exhaustion doctrine is readily supported. There is no language in the FLSA even mentioning tribes. Like *Geroux*, there is least a colorable question of tribal jurisdiction that requires dismissal because of the uncertainty and none of the exceptions in *Grand Canyon Development Company* apply. Accordingly, the instant action should be dismissed.

CONCLUSION

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

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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