No. 23-2316

# In the United States Court of Appeals for the Fourth Circuit

WILLIAM PETERSON, III,

*Plaintiff - Appellant,*

v.

HARRAH'S NC CASINO COMPANY, LLC, CAESARS ENTERTAINMENT, INC.,

*Defendants - Appellees.*

On Appeal from the United States District Court
for the Western District of North Carolina
No. 1:23-cv-00036, Hon. Max O. Cogburn Jr.

## APPELLANT'S BRIEF

Daniel Gray Leland (MN #389027)
LELAND CONNERS PLC
60 South Sixth Street, Suite 2800
Minneapolis, MN 55402
(612) 255-2255
dan@lelandconners.com

Jake Snider (NC #46416)
WIMER SNIDER, P.C.
349 Haywood Road
Asheville, NC 28806
(828) 350-9799
jsnider@ashevillelegal.com

*Attorneys for Plaintiff - Appellant*
WILLIAM PETERSON, III

## Corporate Disclosure Statement

Pursuant to Federal Rules Appellate Procedure 26.1, **Plaintiff - Appellant, WILLIAM PETERSON, III** is an individual and there are no interests to report.

Dated: April 22, 2024 By: /s/ Daniel Leland

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## STATEMENT OF JURISDICTION

William Peterson III ("Peterson") filed a lawsuit against his former employer, Defendant-Appellee Harrah's NC Casino Company ("Harrah's"). This appeal arises from the District Court's dismissal of Appellant's Complaint. In a November 20, 2023, Order, the District Court dismissed Plaintiff's Complaint for failure to join a necessary and indispensable party. Appellant timely appealed the order of dismissal, providing this Court with jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Tribal Casino Gaming Enterprise ("TCGE") is a necessary and indispensable party to Appellant's Complaint.

2. Whether the record established that TCGE is a necessary and indispensable party to Appellant's Complaint.

## STATEMENT OF THE CASE

Harrah's NC Casino Company, LLC ("Harrah's") is one of the world's largest casino and hotel gaming enterprises. Harrah's controlled all aspects of Appellant Peterson's employment when he worked as a table games dealer. Peterson alleges his employment with Harrah's was terminated in violation of the Family and Medical Leave Act ("FMLA") and the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

Harrah's North Carolina Casino operates under a Management Agreement with the Tribal Casino Gaming Enterprise ("TCGE"), an arm of the Eastern Band of Cherokee Indians ("ECBI"). Under the Management Agreement, Harrah's controlled all aspects of Peterson's employment, including the decision to unlawfully terminate his employment. Appellant brought suit against Harrah's based on his unlawful termination. Harrah's brought a motion requiring compulsory joinder of TCGE. On Harrah's motion, the United States District Court for the Western District of North Carolina dismissed Appellant's Complaint in its entirety. The District Court held Appellant was required to sue TCGE under Federal Rule of Civil Procedure 19. Because Appellant did not sue TCGE the District Court held that Appellant's Complaint was fatally defective. The District Court held TCGE was an indispensable and necessary party but could not be sued based on tribal sovereign immunity. Because Peterson could not sue TCGE the District Court held that his Complaint required dismissal.

The District Court's decision was in error and requires reversal. Case law under the FMLA has long held that a plaintiff alleging violations of the Act is not required to bring suit against all entities that might be jointly or severally liable for violations of its terms. The essence of joint liability is that any individual entity can be held individually liable for violations of the law. An analysis of Federal Rule of Civil Procedure 19, which governs compulsory joinder, makes clear that Harrah's motion fails both as to the first and the second steps of the Rule 19 inquiry.

The District Court, like two other district courts in the Western District of North Carolina, misinterpreted and misapplied this Court's decision in the seminal case

of *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541 (4th Cir. 2006). This case requires the Court to review the *Yashenko* decision to correct the lower courts misapplication of this critical precedent and to reverse the District Court's decision granting Harrah's motion for the compulsory joinder.

## STATEMENT OF FACTS AND PROCEDURAL POSTURE

### I. Appellant's Employment and Termination

Appellant William Peterson III is a former employee of Defendant. (*See* JA 8–9.) Harrah's NC Casino Company ("Harrah's) is a North Carolina corporation that operates Harrah's Cherokee Casino Resort. (JA 8.) Harrah's is owned by Ceasars Entertainment Inc. (Ceasars), a hotel and casino entertainment company that owns, operates, or manages more than 50 properties and is the largest casino entertainment company in the United States. (JA 8–9.)[1] Peterson was employed by Harrah's as a Table Games Dealer. (JA 9.)

Peterson is a disabled veteran afforded the employment rights and protections of the Uniformed Services Employment Rehabilitation and Reemployment Services Act ("USERRA"). (JA 10, JA 18–19.) Harrah's is subject to the federal Family and Medical Leave Act ("FMLA") that provides employees with leave to care for their own medical condition or the medical condition of family member under certain circumstances. (JA 9, JA 12–13.)

[1] For the purpose of this briefing, Peterson refers to Harrah's and Ceasars collectively as "Harrah's."

During his employment Peterson requested and took intermittent FMLA leave connected to his service-related disability. (JA 12–13, JA16–18.) Harrah's refused to timely provide Peterson with leave when he had a serious medical event at work. (JA 12–13.) Peterson reported Harrah's failure to timely allow him to take FMLA leave to management and human resources. (JA 12–14.) Peterson reported that his supervisor had instructed him to not discuss FMLA, that his supervisor was rude and aggressive when he had requested leave, and that management was not properly trained in FMLA and that he was concerned for his health as a result. (JA 12–14.)

Peterson's employment with Harrah's was terminated on April 29, 2021. (JA 14.) Peterson's Complaint alleges he was unlawfully terminated in violation of the FMLA and USERRA. (JA 1–20.) Harrah's brought a motion to dismiss Peterson's Complaint under Federal Rule of Civil Procedure 12(b)(7) for failure to join a necessary party. (JA 24.) Harrah's argued that TCGE was a necessary and indispensable party to the litigation. (JA 24, JA 27.) Harrah's argued that compulsory joinder of TCGE would defeat jurisdiction because TCGE has tribal sovereign immunity from suit. (JA 27, JA 31–33.)

## II. The Management Agreement Between Harrah's and TCGE

Harrah's operates the North Carolina casino by virtue of a Management Agreement with TCGE. The Management Agreement states:

> All business and affairs in connection with the day-to-day operation, management, and maintenance of the enterprise and the Facility,

> including the establishment of operating days and hours, shall be the responsibility of [Harrah's] . . . . [Harrah's] shall have . . . the ***exclusive responsibility and authority to direct the selection, hiring, training, control and discharge of all employees*** performing regular services of the Enterprise in connection with the maintenance, operation, and management of the Enterprise and the Facility and any activity upon the property . . . . [Harrah's has] the sole responsibility . . . for determining whether a prospective employee is qualified and the appropriate level of compensation to be paid.

(JA 51, JA 69–71, JA 120–185) (emphasis added.) Employees at Harrah's casino are paid by TCGE but are "leased employees" to Harrah's. (JA 144, JA 145.)

## SUMMARY OF THE ARGUMENT

The District Court misapplied the correct standard under Federal Rule of Civil Procedure 19 in holding Peterson was required to join TCGE as a necessary and indispensable party. The District Court similarly made critical errors in its analysis and application of the Fourth Circuit Court of Appeals decision in *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541; errors and misapplications that other district courts in the Western District of North Carolina have made as well.

Peterson's argument will first examine this Circuit's decision in *Yashenko* focusing on how its analysis was unique to the factual and legal circumstances in that case, and how several district courts have committed reversible error by unnecessarily extending *Yashenko*'s reasoning to non-applicable circumstances. Most obviously, *Yashenko* addressed a tribal preference hiring policy that was an explicit and critical term of Harrah's contract with TCGE. Second, and unlike here,

in *Yashenko* the Fourth Circuit clearly and affirmatively did not apply a Rule 19 analysis to a claim under the federal Family and Medical Leave Act; one of the very types of claims at issue here.[2]

Peterson will next examine the two-step inquiry required under a Federal Rule of Civil Procedure 19 analysis. Contrary to the District Court's analysis, a review of Rule 19(a)(1) reflects that Harrah's motion fails under the "first step" of the inquiry: TCGE is not a "necessary" party to this litigation. The District Court ignored the great weight of case law that runs contrary to its analysis; which is a routine analysis under joint employer claims under the federal Fair Labor Standards Act. Peterson will also show that the District Court grafted the inapplicable *Yashenko* analysis—an analysis the *Yashenko* specifically did not apply to FLA claims—in concluding that Harrah's proved its burden under Rule 19(a) that compulsory joinder was required.

Finally, Peterson will examine the District Court's "second step" of its Rule 19 analysis. As an initial matter, an examination of the "second step" is only required if Harrah's established it satisfied the elements of the "first step;" something that Harrah's did not establish in this litigation. Assuming for the purpose of argument that Harrah's did establish the "first step," a "second step" analysis also makes clear that TCGE is not required to be joined to this litigation. In brief, Harrah's cannot show any prejudice to TCGE or any other party if TCGE is not joined to

[2] Peterson's Complaint alleges three different violations of the FMLA to which he seeks to hold Harrah's liable.

this litigation. The only possible "prejudice" is the "prejudice" that applies to any claim alleging joint employers; which is not sufficient to warrant compulsory joinder.

In this case the District Court, and like other district courts in the Western District of North Carolina, have attempted to graft special rules to a basic Rule 19 analysis when an entity can claim an affiliation with a sovereign tribal entity. In addition to the district court here, two others district courts claim to find authority for special rules and exceptions to a standard Rule 19 analysis based on misapplication of *Yashenko*. There is no special exception to Rule 19 because Harrah's can point at a tribal sovereign and simply allege it is a necessary party. The District Court committed reversible error requiring correction by this Court.

## ARGUMENT

### I. Standard of Review

"The district court's order to dismiss a case on the grounds of lack of subject matter jurisdiction is a legal determination subject to *de novo* review." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 439 (4th Cir. 1999) (*quoting Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1034 (4th Cir. 1994)) "Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will

certainly result." *Id.* (citations omitted). "Such a decision must be made pragmatically, in the context of the substance of each case, rather than by procedural formula." *Id.* (internal quotation omitted.)

## II. The Standard Rule 19 Analysis

Federal Rule of Civil Procedure 19 governs compulsory joinder of parties. Rule 19 sets out a two-step inquiry for a district court to determine whether a party should be joined in an action. *Owens-Illinois, Inc.*, 186 F.3d at 440. First, the district court must determine whether the party is "necessary" to the action because of its relationship to the matter under consideration. *Id.* Rule 19 sets forth specific criteria to be considered in this "first step:"

> Rule 19(a)(1)(A): In the non-party's absence, can the court accord complete relief among the existing parties; or
>
> Rule 19(a)(1)(B): If a non-party claims an interest in the subject of the action and disposing of the action in the person's absence may:
>
> > i. as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > ii. leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If the moving party cannot establish this first step of the Rule 19 inquiry joinder is not required and a court not need to proceed to the second step of the Rule 19 analysis. In his argument, Peterson will establish that Harrah's argument, and the District Court's analysis, do not satisfy the "first step" of the Rule 19 inquiry.

But if a moving party establishes that a non-party is "necessary" under Rule 19(a)(1) it will be ordered into the action. *Owens-Illinois, Inc.*, 186 F.3d at 440. "When a [necessary] party cannot be joined . . . the court must determine whether the proceeding can continue in its absence, or whether it is indispensable pursuant to Rule 19(b) and the action must be dismissed." *Id.* If an unnamed party is "indispensable" then a Court is to examine the factors set forth in Rule 19(b):

> 1. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> 2. the extent to which any prejudice could be lessened or avoided by:
>
> A. protective provisions in the judgment;
>
> B. shaping the relief; or
>
> C. other measures;
>
> 3. whether a judgment rendered in the person's absence would be adequate; and
>
> 4. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

## III. The District Court's Analysis

### A. The District Court Held TCGE Was a "Necessary" Party to the litigation by Holding TCGE Was Peterson's "True" Employer

While Harrah's maintained the exclusive "responsibility and authority" over Peterson's employment the District Court created a novel distinction: that TCGE was Peterson's "true employer." (JA 222.) The "true employer" distinction appears to be a novel construct created by Harrah's out of whole cloth to defeat liability for its unlawful actions. (JA 27, JA 29, JA 30, JA 31, JA 33) (Harrah's using the term "true employer"). The District Court did not analyze the definition of "employer" under either the FMLA or USERRA, or how Harrah's might be jointly and severally liable for unlawful employment actions.

### B. The District Court Determined TCGE Was an "Indispensable" Party to the Litigation

After holding TCGE was a necessary party as Peterson's "true employer" the district court examined the four Rule 19(b) factors. (JA 222–224.) The District Court concluded:

> 1. "Any judgment on [Peterson's] claims would prejudice TCGE's interest as an employer and prejudice TCGE's economic interests in the Management Agreement with [Harrah's]."
>
> 2. "[Harrah's] would be prejudiced by TCGE's absence as well because a judgment rendered in the absence of TCGE would interfere with [Harrah's] ability to resolve its contractual obligation with TCGE."

> 3. "[A]ny judgment rendered without TCGE would only bind [Peterson] and [Harrah's], and TCGE would be able to continue enforcing its policies to which [Peterson] takes issue."

(JA 223.) The District Court's analysis of the Rule 19(b) factors was limited to the analysis quoted above. (JA 223.) The District Court then concluded TCGE was an "indispensable" party under Rule 19 and the inability to name TCGE required dismissal under Rule 12(b)(7).

In addition, the District Court relied heavily on the Fourth Circuit's decision in *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541. Peterson addresses the *Yashenko* analysis *supra* Argument § V.

## IV. Fundamental Assumptions

Peterson submits the following "fundamental assumptions" guiding his analysis of the matters at issue. Peterson submits that none of these "fundamental assumptions" are contested or reflect anything other than black-letter law.

### A. TCGE Has Tribal Sovereign Immunity

Peterson has not contested TCGE's tribal sovereign immunity and assumes that TCGE is an arm of the Eastern Band of Cherokee Indians. Similarly, Peterson does not contest he would be unable to pursue his claims solely against TCGE.

### B. Harrah's Does Not Have Sovereign Immunity

Harrah's is not an arm of the tribe and does not have sovereign immunity from claims. This was the assumption of the District Court, seemingly assumed by Harrah's in the argument below, and has been the assumption in some other district court decisions that have addressed the issue. *See Clark v. Harrah's NC Casino Co.*, Case No. 1:17CV240, 2018 WL 6118624, at *3 (W.D. N.C. April 27, 2018); *Humble v. Harrah's NC Casino Co.*, Case No. 1:17CV262, 2018 WL 4576784, at *5–6 (W.D. N.C. June 1, 2018).

### C. Dismissal is Proper if Compulsory Joinder of the Tribe is Necessary

Appellant does not contest that his claims fail if a court determines that TCGE is a necessary and indispensable party that it must be joined.

### D. Harrah's Is an "Employer" Under the FMLA and USERRA

Harrah's is an "employer" under the definitions of the FMLA and USERRA. The District Court, Harrah's, and the Fourth Circuit Court of Appeals all seemingly assumed Harrah's met the definition of employer under the FMLA. *See Yashenko*, 446 F.3d at 544. Under the FMLA "the term 'employer' . . . includes any person who acts, directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 2611(4)(A)(iii)(I). USERRA defines "employer" similarly: "[T]he term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over

employment opportunities, including—a person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities . . . .” 38 U.S.C. § 4303(4).

The FMLA and USERRA define “employer” very similarly. Their definition of “employer” is nearly identical to the definition of “employer” under the Fair Labor Standards Act. *Buser v. Southern Food Svc., Inc.*, 73 F.Supp.2d 556, 561 (M.D. N.C. 1999) (*citing and quoting with approval Meara v. Bennett*, 27 F.Supp.2d 288, 291 (D. Mass. 1998)). In FMLA claims “courts have routinely relied on FLSA case law . . . when interpreting the definition of employer.” *Buser*, at 561 (*citations omitted*); *see Kilvitis v. Cnty. of Luzerne*, 52 F.Supp.2d 403, 411 (M.D. Pa. 1999). As a result, “the majority view [is that] individual liability may, indeed, be imposed under the FMLA” just as it is under the FLSA. *Buser*, at 562.

### E. An Employee Can Have Multiple Employers Under Peterson’s Claims

It appears uncontested by Harrah’s and assumed by the District Court that multiple entities can meet the statutory definition of employer with respect to a single employee. This is consistent with the FLSA under which “it is well-established that an FLSA employee may be employed by more than one employer at the same time . . . .” *Iraheta v. Lam Yuen, LLC*, Case No. DKC 12–1426, 2012 WL 5995689, at *5 (D. Maryland Nov. 12, 2012) (*citing Schultz v. Capital Int’l*

*Sec. Inc.*, 466 F.3d 298, 305 (4th Cir. 2006)); *see Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132–35 (4th Cir. 2017); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66–69 (2nd Cir. 2003).

### F. "Joint and Several Liability" Attaches to FMLA and USERRA Claims

Under the FLSA—with a nearly identical definition of "employer" as the FMLA (and USERRA)—"[a]ll entities that are employers within the meaning of the FLSA are jointly and severally liable for all damages that stem from failure to comply with the provisions of the FLSA." *Moreno v. EDCare Mgmt., Inc.*, 243 F.R.D. 258, 259 (W.D. Texas 2007) (citations omitted); *Roy v. FedEx Ground Package Sys., Inc.*, Case No. 3:17–30–30116-KAR, 2020 WL 3799203, at *1–3 (D. Mass. 2020); *Iraheta v. Lam Yuen, LLC*, 2012 WL 5995689, at *5; *see Salinas*, 848 F.3d at 134; *Zheng v. Liberty Apparel Co.*, 355 F.3d at 66–69.

## V. The District Court Misinterpreted and Misapplied *Yashenko*

### A. *Yashenko* and its Progeny

Harrah's and the District Court relied heavily on *Yashenko*, 446 F.3d 541, a decision of the United States Court of Appeals for the Fourth Circuit. Two other unpublished decisions in the Western District of North Carolina similarly relied on the *Yashenko* decision in what Peterson argues were decisions in error: *Humble*, 2018 WL 4576784; and *Clark*, 2018 WL 6118624.

At issue in *Yashenko* was a claim for FMLA retaliation under the FMLA and a claim that Harrah's tribal preference hiring policy—a policy mandated by Harrah's contract with TCGE—was racially discriminatory under 42 U.S.C. § 1981 to the plaintiff, a non-tribal member. *Yashenko*, 446 F.3d at 544. This Court stated the issues thusly:

> 1. [D]oes the Family and Medical Leave Act ("FMLA") provide a covered employee with an absolute right to be restored to his previous job after taking approved eave?
>
> 2. [I]s a private employer that contracts with an Indian tribe subject to suit for race discrimination when it enforces a contractual tribal preference policy?

*Id.* The Fourth Circuit answered both questions in the negative and affirmed the dismissal of the complaint by the district court. *Id.*.

*Yashenko* did not decide or even discuss the applicability of tribal sovereign immunity to the plaintiff's FMLA claims. *Id*. at 546–50. *Yashenko* did not dismiss the FMLA claims based on Rule 12(b)(7) or the applicability of tribal sovereign immunity. To the contrary, *Yashenko* assumed the FMLA claim was proper and addressed the FMLA claims on their merits and at-length. *Id.* The *Yashenko* analysis was thoughtful and considered; no less underscored as it was deciding two issues of first impression. *Id.* at 542.

*Yashenko* specifically did not address whether Rule 19 was applicable to the plaintiff's FMLA claims. *Yashenko* only addressed Rule 19 when examining compulsory joinder and tribal sovereign immunity with respect to plaintiff's claims

contesting the tribal preference hiring policy. *Id.* at 550–53. Peterson submits that the Fourth Circuit's omission of a Rule 19 analysis to the FMLA claims, but applying it to the tribal preference hiring policy was specific, purposeful, and meaningful to a proper Rule 19 analysis. Peterson submits that *Yashenko*'s thorough and lengthy analysis of the plaintiff's FMLA claims was not dicta and surplusage, but reflects the Fourth Circuit's acknowledgment that Harrah's was subject to the FMLA and that TCGE was not a required (compulsory) party to the plaintiff's FMLA claims.

This inference is supported by the authority relied upon in *Yashenko*: *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, a 2002 decision issued by the Ninth Circuit Court of Appeals. *Id.* at 552. The *Yashenko* court noted that the facts in *Dawavendewa* were "materially indistinguishable" from the facts presented in *Yashenko*. *Id.*

### B. *Dawavendewa v. Salt River*, like *Yashenko*, is About the Application of Rule 19 with Respect to a Contractual Tribal Hiring Preference

Peterson's position that the *Yashenko* Rule 19 analysis was specific to the contractual tribal preference hiring policy between Harrah's and TCGE—and was irrelevant to the FMLA claims—is supported by *Yashenko*'s extensive reliance on *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, a decision from the Ninth Circuit Court of Appeals. *Yashenko*, 446 F.3d at 552.

Like *Yashenko*, *Dawavendewa* addressed a tribal hiring preference policy in the context of national origin discrimination. *Dawavendewa v. Salt River Project*, 276

F.3d 1150, 1154 (9th Cir. 2002). In *Dawavendewa* a sovereign tribe leased land to a non-tribal public entity, the "SRP." *Id.* at 1153. The lease was for a massive public works project, one that specifically implicated Tribal land: "cost[ing] [Tribal] water, [ ] prime land, and the inevitable pollution of the [Tribal] homeland . . . a price the [Tribe] paid in return for jobs for the [Tribal] people." *Id.* at 1154 (*quoting* an amicus brief filed by the tribe).

First, *Dawavendewa* examined whether in the absence of the Tribe complete relief could be afforded to the plaintiff. *Id.* at 1155. The Ninth Circuit determined that the plaintiff could not be afforded complete relief because the Court could not prohibit the tribe from enforcing a tribal preference hiring policy. *Id.* at 1155–56. *Dawavendewa* specifically noted that if the federal court granted the requested injunctive relief, the defendant, the non-tribal SRP, "would be between the proverbial rock and a hard place – comply with the injunction prohibiting the hiring preference policy or comply with the lease [with the tribe] requiring it." *Id.* This created multiple and inconsistent obligations for the non-tribal SRP, a factor considered under the "first step" of a Rule 19 analysis. *Id.* at 1157–59.

In considering whether the SRP was required to be joined as an "indispensable" party the Ninth Circuit principally found that the tribe was required to be joined to the case because any decision would fundamentally affect the contractual relationship between the tribe and SRP, because the contract between the entities specifically required the tribal preference hiring policy. *Id.* at 1162. In *Dawavendewa* and *Yashenko* a decision in favor of the plaintiff rejecting the tribal

sovereign's bargained-for, and critical requirement for a tribal preference hiring policy would have destroyed the tribe's rights in its contract with the non-tribal party.

### C. *Yashenko* and *Dawavendewa* Got it Right: A Federal Court Cannot Invalidate a Tribal Contract Without Requiring Compulsory Joinder and the Application of Tribal Sovereign Immunity

*Yashenko* and *Dawavendewa* were correct in their analysis. A tribal preference hiring policy was the matter at issue in those cases, that policy was an explicit term of the contract, and that policy was a critical term of the contract between the tribal and non-tribal entity. A court decision holding that policy to be unlawful would effectively invalidate the tribal entity's contract with the non-tribal entity and would put the non-tribal party in the position of either violating its contract or the law. Peterson agrees that a federal court lacks the authority to invalidate a tribal entity's contract.

That, of course, is not the situation here. Peterson's case does not require the effective invalidation of a tribal entity's contract. Unlike the tribal preference hiring policies, compliance, or non-compliance with the FMLA or USERRA are not terms of the Management Agreement. A decision holding Harrah's responsible for violating Peterson's rights does not implicate TCGE's rights and does not implicate, much less invalidate, the Management Agreement between Harrah's and TCGE.

### D. Several District Courts Got it Wrong: They Misapplied *Yashenko* Which Requires Correction by this Court

In addition to the District Court in this case, two other district courts in the Western District of North Carolina have relied upon *Yashenko* to dismiss the employee/plaintiff's claims against the Harrah's. Those cases are: (1) *Humble v. Harrah's NC Casino Co.*, 1:17CV262, 2018 WL 4576784 at *5–6 (W.D. N.C. June 1, 2018) and (2) *Clark v. Harrah's NC Casino Co.*, 1:17CV240, 2018 WL 6118624 (April 27, 2018). Peterson takes the straight-forward position: in *Peterson/Humble/Clark* the District Courts got it wrong and misapplied *Yashenko*. For example:

- *Yashenko* specifically did not apply a Rule 19 analysis to the plaintiff's FMLA claims.
- Contrarily, *Peterson/Humble/Clark* applied a Rule 19 analysis to the plaintiffs' FMLA and FLSA claims;
- *Yashenko* applied Rule 19 only to its analysis of a tribal preference hiring policy.
- Contrarily, *Peterson/Humble/Clark* applied *Yashenko*'s analysis of a tribal preference hiring policy to FMLA and FLSA claims.
- *Yashenko* determined that the explicit tribal preference hiring policy was a critical term of the contract between the tribal and non-tribal entities.
- Contrarily, in *Peterson/Humble/Clark* there is no suggestion there were any contractual obligations between the tribal and non-tribal entities about the FMLA or USERRA.
- *Yashenko* was specifically about the ramifications of invalidating a tribal entities' contract.
- Contrarily, in *Peterson/Humble/Clark* there is no indication that a judgment would invalidate any contract term required by a tribal entity, much less effectively invalidate the contract.

*Peterson/Humble*/*Clark* take the unique situation of a federal court invalidating a tribal contract—at issue in *Yashenko* and *Dawavendewa*—and extending its application to garden-variety, run-of-the-mill cases examining Rule 19 compulsory joinder. *Yashenko* and *Dawavendewa* are not cases about run-of-the-mill Rule 19 cases; they are about the invalidation of key contract terms negotiated and bargained-for by tribal sovereigns. *Peterson/Humble/Clark* are much less complicated. They ask a simple question that they got wrong: Is a tribal entity required to be party to a lawsuit that does not affect its rights or its contracts? The answer is, "no."

## VI. The District Court Erred by Holding that TCGE Was a "Necessary" Party to the Litigation

A court's Rule 19 analysis is a two-step process. *See supra*, Argument § II. First, the party moving for joinder must show that an unnamed party is "necessary" to the action. The District Court committed reversible error in finding that TCGE was a "necessary" party to the action.

### A. Joint and Several Liability is Not a Basis for Compulsory Joinder Under Rule 19

The United States Supreme Court and Rule 19 establish that a joint tortfeasor is not an indispensable party requiring joinder under Rule 19. In *Temple v. Synthes Corp.*, the Supreme Court held "it [was] error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss [a] lawsuit with prejudice"

as a result. *Temple*, 498 U.S. 5, 7 (1990). The Supreme Court specifically noted: "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Id.* Similarly, the advisory committee notes to the 1966 Amendment to Rule 19 state that Rule 19 does not alter the "settled authorities holding that a tortfeasor with the usual 'joint and several' liability is merely a permissive party to an action against another with like liability."

This principle—that a plaintiff need not sue all potentially liable entities when there is joint and several liability—has been applied by many courts in claims under the FLSA which shares a nearly identical definition of employer as the FMLA and USERRA. *See Iraheta v. Lam Yuen, LLC*, Case No. DKC 12–1426, 2012 WL 5995689, at *5 (D. Md. Nov. 29, 2012) (internal quotation omitted) (*citing DeWitt v. Daley*, 336 B.R. 552, 556 (S.D. Fla. 2006)); *Moreno v. EDCare Mgmt., Inc.*, 243 F.R.D. at 258–60; *Yates v. Applied Performance Techs., Inc.*, 209 F.R.D. 143, 149 (S.D. Ohio 2002); *see also Sullivan v. Starwood Hotels & Resorts Worldwide, Inc.*, 949 F.Supp.2d 324, 330 (D. Mass 2013); *Arwine-Lucas v. Ceasars Enters. Servs., LLC*, Case No. 4:17-cv-00451-HFS, 2019 WL 4296496, at *3 (W.D. Mo. Feb. 25, 2019).

As noted by one district court:

> It is well-established that an employee may be employed by more than one employer at the same time, in which all employers are jointly and severally liable for FLSA violations. Rule 19 does not require the joinder of joint tortfeasors. Rather, a joint tortfeasor is merely a permissive party to an action against another with like liability.

> Consistent with these principles, courts generally hold where a plaintiff states an FLSA claim against a defendant who is alleged to be his employer, an unnamed co-employer is not a necessary party who should be joined under Rule 19.

*Iraheta*, 2012 WL 5995689 *5 (internal quotation and citations omitted).

This analysis has been applied to countless cases presenting with similar facts: employment law claims alleging claims with joint and several liability, and include various entities working with and for each other under various contracts. *DeWitt v. Daley*, 336 B.R. at 556; *Moreno v. EDCare Mgmt., Inc.*, 243 F.R.D. at 258–60; *Yates v. Applied Performance Techs., Inc.*, 209 F.R.D. at 149; *see also Sullivan v. Starwood Hotels & Resorts Worldwide, Inc.*, 949 F.Supp.2d at 330; *Arwine-Lucas v. Ceasars Enters. Servs., LLC*, 2019 WL 4296496, at *3.

### B. Rule 19(a)(1)(A) Analysis: Complete Relief is Available Among Existing Parties

The basic premise of joint and several liability is that one party can be held liable for a judgment even if that liability potentially could include other entities. As a result, the District Court could "accord complete relief" among Peterson and Harrah's. This is set forth at-length above: in cases of joint employment liability complete relief is available from am an action against a single employer. *See supra*, Argument § VI.A. In cases alleging joint and several liability in employment cases the assumption is that a single named employer can "accord complete relief." *See supra*, Argument § VI.A.

The District Court, however, applied a novel standard that TCGE was in the unique status of a "true employer." (JA 222.) This conclusion mirrors the *Humble* and *Clark* Courts conclusory statements that TCGE was a proper party because TCGE was the "real employer." *Humble*, 2018 WL 4576784, at *9; *Clark*, 2018 WL 6118624, at *5. This distinction has no basis in the law of compulsory joinder either by Rule or case law authority. Instead, it appears to be terminology created by Harrah's for the purposes of avoiding liability; it is not any sort of meaningful legal distinction when joint and several liability is the long-held rule. Certainly, there does not seem to be any authority that a "real" or "true" employer somehow abrogates the long-held tenets of joint and several liability not requiring joinder.

Finally, Harrah's and the District Court seemed to find support for the argument that TCGE is required to provide complete relief because of their faulty interpretation of *Yashenko*. In *Yashenko* complete relief could not be provided without the joinder of TCGE because complete relief required the invalidation of a tribal preference hiring policy agreed upon between Harrah's and TCGE. As set forth in Argument § V.C that is not the situation here.

### C. The District Court's Analysis Fails at a Threshold Question Under Rule 19(a)(1)(B)

Rule 19(a)(1)(B) states that a party is required to be part of litigation when a third-party *claims* that "disposing of the action" in the entities absence "would leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the third-parties interest in the

litigation." Here, TCGE has not claimed an interest in the subject matter of the action. TCGE has not made any appearance or filed any matter in connection with this litigation.

The District Court erred in its analysis of an initial threshold question in a Rule 19(a)(1)(B) analysis: TCGE has not claimed an interest regarding the action. Peterson submits that this is dispositive. Rule 19 cannot require joinder when a non-party has not claimed an interest in the litigation. It is an explicit requirement of Rule 19. This error requires reversal.[3]

### D. The District Court's Rule 19(a)(1)(B)(ii) Analysis is Based on Fundamental, Clear Error

In addition to the lack of a Rule 19(a)(1)(b) analysis—whether TCGE ever "claim[ed]" in interest in the subject of the action, the District Court committed another fundamental error. The inquiry under Rule 19(a)(1)(B)(ii) is whether "an *existing* party [Harrah's] would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . . " because of TCGE's interest in the subject of the action. Fed. R. Civ. P. 19(a)(1)(B)(ii). The analysis applies to Harrah's obligations and not TCGE's obligations.

The District Court, however, made the conclusory determination that excluding TCGE "would put TCGE in jeopardy of incurring multiple, and possibly inconsistent obligations." (JA 223.) This analysis is facially wrong. The inquiry under Rule 19(a)(1)(B)(ii) is whether "an *existing* party [Harrah's] would be

[3] The district courts in *Clark* and *Humble* made the same fundamental error.

subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . . .” because of TCGE’s interest in the subject of the action. Fed. R. Civ. P. 19(a)(1)(B)(ii). The District Court’s analysis is therefore fundamentally flawed and require reversal. Regardless, Peterson addresses a proper Rule 19(a)(1)(B)(ii) analysis below.

### E. The *Yashenko* Court Properly Applied a Rule 19(a)(1)(B)(ii) Analysis, Showing Why it Does Not Apply Here

The *Yashenko* decision reflects the situations in which a non-tribal entity—e.g. Harrah’s—would be subject to multiple and/or possibly inconsistent obligations. This expressly shows the concerns to be considered in a Rule 19(a)(1)(B)(ii) analysis and why it does not apply here.

At issue in *Yashenko* was a tribal preference hiring policy that was an explicit term of Harrah’s contract with TCGE. If Harrah’s did not comply with the tribal preference hiring policy it would be in breach of an explicit and affirmative term of its agreement with TCGE. Harrah’s would have multiple or otherwise inconsistent obligations. In *Yashenko* Harrah’s could have been enjoined to comply with a finding that the tribal preference hiring policy was unlawful, but also have the dual and inconsistent obligation of having to comply with a tribal preference hiring policy that was explicitly part of its contract with TCGE and a critical element of that contract.

That is not the situation. Harrah’s is not at “at risk” of double, multiple, or inconsistent obligations. Harrah’s can comply with the FMLA and USERRA and

its contract with TCGE. There is nothing in the Management Agreement stating Harrah's is required to violate the FMLA and USERRA or be in breach of its agreement with TCGE. Indeed, the Management Agreement does not address the FMLA or the FLSA at all. Regarding the employment of employees, the only requirements of the Management Agreement between Harrah's and TCGE are that Harrah's is responsible for nearly all aspects of casino employees' employment and the tribal preference hiring policy.

Here, Harrah's has the same obligations of any joint employer. It is obligated to follow the law and is required to abide by the terms of its contract with TCGE. There is no "risk." It is a situation just like that presented in most joint employment cases under the FMLA and FLSA: one employer can be held liable without requiring the joinder of all potentially liable employers.

### F. Rule 19(a)(1)(B)(i) Analysis: This Litigation Does Not Impair or Impede Any TCGE Contractual Interest

Rule 19(a)(1)(B)(i) states that if a non-party claims an interest in the subject of the action joinder is required if "disposing of the action in the [entity's] absence may . . . as a practical matter impair or impede the [entity's] ability to protect the interest." The threshold requirement has not been met: there has been no demonstration that TCGE "claims" an interest in the subject of this action.

If this Court should determine that there has been a showing that TCGE has "claim[ed] an interest relating to the subject of the action" the District Court's Rule 19(a)(1)(B)(ii) analysis is in in error. The District Court made the conclusory

determination that TCGE had an interest in the litigation because "any judgment on [Peterson's] claims would impair TCGE's contractual interests with [Harrah's] and it's fundamental economic relationship with the private party." (JA 223.) The District Court's conclusion is without basis.

A decision finding liability against Harrah's does not "impair or impede" TCGE's ability to protect its interest with Harrah's. As forth above, *supra*, Argument §VI.E, there is no evidence that the Management Agreement makes any terms or conditions about compliance with the FMLA or USERRA. TCGE's ability to protect its interest in the Management Agreement cannot be "impair[ed]" or "impede[d]" when the Management Agreement has no conditions about compliance with the FMLA or USERRA. In this instance, there is no TCGE interest impaired or impeded.

*Peterson*/*Humble*/*Clarke* suggest that a decision in this litigation could, in the abstract, hypothetically, *affect* the terms of a *future* contract. Conceivably Harrah's or a future non-tribal casino operator might attempt to argue for more favorable terms in a Management Agreement based on the possibility of liability under the FMLA or USERRA claims. But hypothetical possibilities of *effects* on future contracts is not what is anticipated under Rule 19a(1)(B)(ii); the proper inquiry is a present interest being impaired or impeded. In nearly all, or nearly any, joint employment case under the FLSA an unnamed defendant's interest is *affected*, and Courts regularly deny motions for compulsory joinder in those cases. *See supra*, Argument §§ VI.A, VI.B.

For example, in *Roy v. FedEx Ground Package Sys., Inc.*, the plaintiffs, delivery drivers, alleged FedEx failed to properly compensate them for overtime under the FLSA. *Roy v. FedEx Ground Package Sys., Inc.*, 2020 WL 3799203. FedEx sought joinder of "Service Providers" with which it contracted. *Id.* In *Roy* the Service Providers determined the drivers' pay, maintained the relevant employment records, and had indemnity agreements with FedEx. *Id.* at *2. Under those circumstances a determination of liability against FedEx would certainly have a hypothetical and far greater abstract *effect* on the Service Providers to contract with FedEx in the future. In *Roy*, as in so many other joint employer FLSA cases, the District Court determined that the party demanding joinder did not establish that compulsory joinder was required under Rule 19(a)(1)(B)(i) when a possible effect on a future right to contract could hypothetically be implicated. *See* Argument §§ VI.B, VI.F.

The District Court's determination that Peterson's case carried some sort of existential threat to TCGE's ability to contract is wholly insufficient to warrant compulsory joinder under well-established law and requires reversal.

## VII. Rule 19(b) Factors Establish that TCGE is Not an Indispensable Party to the Litigation

As argued above, *see supra*, Argument § VI, Harrah's motion for compulsory joinder fails at the first step: it has failed to prove that TCGE is a "necessary" party to the litigation. Should, however, this Court determine that TCGE is a "necessary" party Harrah's motion fails at the second step: showing that TCGE is an

"indispensable" party to the litigation. If an unnamed defendant is determined to be "necessary" to the litigation the Court is to examine four factors. To a considerable extent these factors overlap Peterson's arguments regarding the appropriate Rule 19(a) analysis. For clarity, Peterson addresses the Rule 19(b) factors below.

### A. Rule 19(b)(1): Any Judgment Would Not Prejudice TCGE or the Existing Parties

Rule 19(b)(1) requires a court to consider "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties. As set forth above, Peterson submits that neither TCGE nor the parties are prejudiced by TCGE's non-joinder. *See* Argument §§ VI.B, VI.E, VI.F. Harrah's has made the argument, of course, that it is "prejudiced" insofar as it is required to defend against Peterson's lawsuit. That, of course, is not the "prejudice" contemplated by the Rule; "prejudice" contemplates an unfair advantage not based on the merits of the case. By virtue of his Complaint not naming TCGE Peterson has made clear that he does not believe he is prejudiced by his decision (and inability) to name TCGE as his employer. Finally, TCGE is not prejudiced: it has no horse in this race. Unlike the facts of *Yashenko*, this case does not affect a critical and bargained-for agreement of its Management Agreement with Harrah's. The Management Agreement's silence about FMLA and USERRA claims reflects the lack of prejudice to TCGE.

### B. Rule 19(b)(2): The Lack of Prejudice Does Not Require Any Prejudice Mitigation Measures

Rule 19(b)(2) states a court should consider how prejudice can be lessened or avoided. Given the lack of prejudice Rule 19(b)(2) does not apply to a court's analysis.

### C. Rule 19(b)(3): A Judgment Rendered in TCGE's Absence Could be Adequate

Rule 19(b)(3) states a court should consider whether a "judgment rendered in the unnamed person's absence would be adequate." As set forth above, *supra*, Argument §§ VI.A, VI.B., joint and several liability provides that any judgment in favor of Peterson against Harrah's would be for the entirety of the judgment.

Further, as set forth above, Peterson is not requesting a judgment to enjoin Harrah's from enforcing a tribal preference hiring policy or enjoining Harrah's from any term or agreement with TCGE, as was the case in *Yashenko*. This factor favors denying Harrah's motion for joinder.

## CONCLUSION

The District Court committed reversible error in granting Harrah's motion for compulsory joinder. Harrah's motion fails at the first step of a Rule 19 analysis: TCGE is not a "necessary" party to the litigation. This is established by the weight of case law analyzing cases that provide for joint and several liability in employment law claims and by the plain language of Rule 19. Even if Harrah's

motion could establish that TCGE was a "necessary" party under the first step, compulsory joinder is not required under the second step of the analysis. Any judgment or remedy without TCGE is adequate and there is no evidence that TCGE would somehow be prejudiced, that its interests would be impaired or impeded and, most basically, has any practical interest in this litigation.

Instead, district courts have erroneously applied the Fourth Circuit's decision in *Yashenko* to manipulate and misapply a Rule 19 analysis simply because Harrah's can make conclusory statements that TCGE somehow and for some reason must be joined to the lawsuit under Rule 19. There are no special rules or special exceptions to a Rule 19 analysis because a party can make a claim, however tenuous, that a lawsuit somehow implicates a tribal sovereign.

Peterson has no quarrel with TCGE. TCGE did not determine the terms or conditions of his employment or make the decision to terminate his employment in violation of the law. By all objective indications, and the express terms of the Management Agreement between Harrah's and TCGE, TCGE has no quarrel with Peterson either. Peterson should have the legal right to pursue his legal claims against Harrah's; his employer that made all the decisions at issue in this litigation.

Peterson respectfully requests that this Court reverse the decision of the District Court and remand it for further proceedings.

Respectfully submitted,

Dated: April 22, 2024

By: /s/ Daniel Leland

Daniel Gray Leland (MN Bar No. 389027)
LELAND CONNERS PLC
*Admitted pro hac vice*
60 South Sixth Street, Suite 2800
Minneapolis, MN 55402
Telephone: (612) 255-2255
Email: dan@lelandconners.com

Jake Snider (NC Bar No. 46416)
WIMER SNIDER, P.C.
349 Haywood Road
Asheville, NC 28806
Telephone: (828) 350-9799
Email: jsnider@ashevillelegal.com

*Attorneys for Plaintiff - Appellant*
WILLIAM PETERSON, III

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **7,192 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, **14-pt Times New Roman**, using TypeLaw.com's legal text editor.

Dated: April 22, 2024 By: /s/ Daniel Leland

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S BRIEF** with the Clerk of the Court by using the Appellate CM/ECF system on April 22, 2024. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 22, 2024 By: /s/ Daniel Leland