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10 HARRAH'S ARIZONA CORPORATION

11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 Jie Xia, a married woman; Necy Sundquist,
15 a married woman; Mary Grace Abon, a
16 married woman; Susan Samons, a married
17 woman; Mariah Henry, a married woman,

18 Plaintiffs,

19 v.

20 Harrah's Arizona Corporation, a Nevada,

21 Defendant.

Case No. 2:23-cv-02086-GMS

MOTION TO DISMISS

22 **I. INTRODUCTION**

23 Defendant Harrah's Arizona Corporation ("Harrah's") formerly employed Plaintiffs
24 as table games dealers at the Harrah's Ak-Chin Casino Resort in Maricopa, Arizona (the
25 "Casino"). Harrah's sole purpose is to manage the Casino for and on behalf of the Ak-Chin
26 Indian Community, a federally recognized Indian tribe (the "Community"). The doctrine of
27 tribal sovereign immunity not only exempts Indian tribes such as the Community from suit
28 but extends to entities who, like Harrah's, are considered arms of the tribe acting for the
tribe. The Court must dismiss Plaintiffs' Complaint against Harrah's under Rule 12(b)(1)
because it lacks subject matter jurisdiction over this action under the doctrine of tribal
sovereign immunity.

1 **II. FACTUAL BACKGROUND**

2 **A. The Factual Allegations in Plaintiffs' Complaint**

3 Plaintiffs brought this lawsuit against Harrah's asserting race, gender, ethnicity, and
4 national origin discrimination and retaliation claims under Title VII of the Civil Rights Act
5 of 1964, 42 U.S.C. §§ 2000(e) *et seq.* ("Title VII"), race discrimination and retaliation
6 claims under 42 U.S.C. § 1981 ("Section 1981"), and wrongful termination claims under
7 the Arizona Employment Protection Act, A.R.S. § 23-1501 (the "EPA"). Plaintiffs are all
8 non-white women who worked for Harrah's as "table games dealers" at the Casino. (Doc.
9 1 ¶ 12.)

10 The Complaint alleges that Harrah's determined that several gamblers were cheating
11 at a casino game it called "Roll to Win." (Doc. 1 at ¶¶ 36-45.) At least 13, and as many as
12 19, dealers were identified as having dealt Roll to Win when the cheating occurred. (Doc.
13 1 at ¶ 46.) The Ak-Chin Tribal Gaming Agency (the "TGA") "initiated proceedings to
14 revoke Plaintiffs' gaming licenses" and Harrah's suspended them. (Doc. 1 at ¶ 49.) Harrah's
15 ultimately terminated all five Plaintiffs. (Doc. 1 at ¶ 66.) Plaintiffs contend that similarly
16 situated employees who are male, white, native English-speaking, and born in the United
17 States and who engaged in "substantially similar alleged" policy violations were treated
18 more favorably than them in that they were not terminated for a first offense. (Doc. 1 at ¶¶
19 77-80.)

20 **B. Harrah's Manages the Casino for the Community Under its Supervision**

21 The Community is a federally recognized Indian tribe organized under the Indian
22 Reorganization Act of 1934. (Mike Kintner's Declaration, attached as Exhibit A, ¶ 4.) It
23 possesses sovereign governmental powers over the land where the Casino is located and
24 operates the Casino for the benefit of the Community, to improve the economic conditions
25 of its members, to enable it to serve the social, economic, educational, and health needs of
26 the Community, to increase Community revenues, and to enhance the Community's
27 economic self-sufficiency and self-determination. (Kintner Decl. Ex. A ¶ 5.)
28

1 Harrah's and the Community are parties to a Management Agreement whereby
2 Harrah's lends its technical expertise to the Community and manages the Casino for and on
3 behalf of the Community. (Kintner Decl. Ex. A ¶ 6.) Harrah's sole purpose is to manage the
4 Casino. (Kintner Decl. Ex. A ¶ 7.) It does not engage in managing any other casino or
5 engage in any other business. (Kintner Decl. Ex. A ¶ 7.)

6 Although Harrah's employs and pays employees, it is acting for the Community in
7 doing so and the only business Harrah's conducts is managing the Casino for the
8 Community. (Kintner Decl. Ex. A ¶ 8.) The Community Council, which is a body the
9 Community created in accordance with its articles of association to, among other things,
10 oversee Harrah's, approves Harrah's Employee Handbook. (Kintner Decl. Ex. A ¶ 9.) The
11 Community requires Harrah's to have certain policies and procedures, including grievance
12 procedures, that apply to Harrah's employees and whenever Harrah's wants to change an
13 employment policy it must give the Community Council written notice of any proposed
14 changes or additions to its employment policies. (Kintner Decl. Ex. A ¶¶ 10-11.) The
15 Community Council has ten days to object to any change in employment policies. (Kintner
16 Decl. Ex. A ¶ 12.)

17 Community Inspectors, who are Community employees reporting directly to the
18 Community Council, have the right to immediate access to the Casino, to inspect all aspects
19 of the Casino's operation, without notice to Harrah's, to investigate problems relating to
20 any aspect of the Casino's operations, and to perform any other tasks as assigned by the
21 Community Council. (Kintner Decl. Ex. A ¶ 13.) The Community also imposes limits on
22 whom Harrah may employ, *i.e.*, it may not employ any individual whose prior criminal
23 record, reputation, habits, or associations are known to pose a threat to the public interest
24 or to create or enhance the dangers of unfair or illegal gaming practices. (Kintner Decl. Ex.
25 A ¶ 14.)

26 To maximize the Casino's benefits to the Community, the Community requires
27 Harrah's to give preference to qualified members of the Community, their spouses, and
28 their children in recruiting, training, and hiring. (Kintner Decl. Ex. A ¶ 15.) Harrah's must

1 submit quarterly reports to the Community Council regarding each such individual
2 undertaking training in all job categories of the Casino, including management categories.
3 (Kintner Decl. Ex. A ¶ 16.) Harrah’s is also required to submit an annual budget and plan
4 to the Community for approval. (Kintner Decl. Ex. A ¶ 17.)

5 The Tribal Gaming Agency (“TGA”) is the onsite regulator at the Casino. (Kintner
6 Decl. Ex. A ¶ 18.) The TGA ensures compliance with federal and state law to protect the
7 Community’s assets. (Kintner Decl. Ex. A ¶ 18.) Among its oversight functions, the TGA
8 regulates and controls the gaming licenses of Harrah’s employees. (Kintner Decl. Ex. A ¶
9 19.) If the TGA suspends or revokes an employee’s gaming license, that employee can no
10 longer work at the Casino. (Kintner Decl. Ex. A ¶ 19.) Harrah’s suspended each of the
11 Plaintiffs here because the TGA first suspended their gaming licenses. (Kintner Decl. Ex.
12 A ¶ 20.) At that point, Harrah’s had no choice but to suspend Plaintiffs along with the other
13 employees who had their gaming license suspended by the TGA. (Kintner Decl. Ex. A ¶
14 21.)

15 The Community pays all expenses, which include any attorneys’ fees, costs,
16 expenses, settlements, and/or judgments, from lawsuits against Harrah’s. (Kintner Decl. Ex.
17 A ¶ 22.) Harrah’s must inform the Community of any lawsuits or claims being asserted
18 against Harrah’s or the Community and the Community has the right to defend or settle any
19 legal claim against Harrah’s regarding the operation of the Casino. (Kintner Decl. Ex. A ¶
20 23.)

21 **III. LAW AND ARGUMENT**

22 **A. Applicable Legal Standards for Harrah’s Motion to Dismiss**

23 Harrah’s moves to dismiss Plaintiffs’ Complaint under Rule 12(b)(1) for lack of
24 subject matter jurisdiction under the doctrine of tribal sovereign immunity, which is a quasi-
25 jurisdictional defense in that it “may be forfeited where the [sovereign] fails to assert it and
26 therefore may be viewed as an affirmative defense.” *Arizona v. Bliemeister (In re*
27 *Bliemeister)*, 296 F.3d 858, 861 (9th Cir. 2002). “Although sovereign immunity is only
28 quasi-jurisdictional in nature, Rule 12(b)(1) is still a proper vehicle for invoking sovereign

1 immunity from suit.” *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (footnote
2 omitted). Thus, when a defendant timely and successfully invokes tribal sovereign
3 immunity, courts lack subject matter jurisdiction. *See, e.g., Arizona v. Tohono O’odham*
4 *Nation*, 818 F.3d 549, 562–63 (9th Cir. 2016) (holding that when tribal sovereign immunity
5 applied, “the district court correctly concluded that it lacked subject matter jurisdiction”);
6 *Pistor*, 791 F.3d at 1111 (“[A]s the tribal defendants invoked sovereign immunity in an
7 appropriate manner and at an appropriate stage, *i.e.* in a Rule 12(b)(1) motion to dismiss, if
8 they were entitled to tribal immunity from suit, the district court would lack jurisdiction
9 over the claims against them and would be required to dismiss them from the litigation.”).

10 In the context of a Rule 12(b)(1) motion to dismiss based on tribal sovereign
11 immunity, “the party asserting subject matter jurisdiction has the burden of proving its
12 existence,” *i.e.*, that immunity does not bar the suit. *Robinson v. United States*, 586 F.3d
13 683, 685 (9th Cir.2009). When a district court is presented with a challenge to its subject
14 matter jurisdiction, “[n]o presumptive truthfulness attaches to [a] plaintiff’s allegations.”
15 *Id.* at 685 (*quoting Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)). In
16 resolving such a motion, “[a] district court may ‘hear evidence regarding jurisdiction’ and
17 ‘resolv[e] factual disputes where necessary.” *Id.* at 685 (*quoting Augustine*, 704 F.2d at
18 1077.).

19 **B. The Doctrine of Tribal Sovereign Immunity**

20 Congress has expressly exempted Indian tribes from the definition of “employers”
21 under Title VII. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir.
22 1998) (*quoting* 42 U.S.C. § 2000e(b)). The purpose of this “tribal exemption, like the
23 purpose of sovereign immunity itself, [is] to promote the ability of Indian tribes to control
24 their own enterprises.” *Id.* (*citing Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 375-
25 76 (10th Cir. 1986)).

26 “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign
27 authority over their members and territories.” *Oklahoma Tax Comm’n v. Citizen Band*
28 *Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Thus, aside from the

1 specific Title VII exemption that tribes enjoy, it is well-established that Indian tribes are
2 immune from suit absent congressional authorization or clear waiver. *See, e.g., Michigan v.*
3 *Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014); *Santa Clara Pueblo v. Martinez*, 436
4 U.S. 49, 58 (1978). Federal courts have applied sovereign immunity to bar civil rights and
5 tort claims against Indian tribes in a variety of contexts. *See e.g., NLRB v. Chapa De Indian*
6 *Health Program, Inc.*, 316 F.3d 995, 1001 (9th Cir. 2003); *Dawavendewa v. Salt River*
7 *Project Agric. Improvement Dist.*, 276 F.3d 1150, 1159 & n. 9 (9th Cir. 2002); *Evans v.*
8 *McKay*, 869 F.2d 1341 (9th Cir. 1989) (affirming district court's dismissal of § 1983 action
9 due to sovereign immunity against Blackfeet Tribe and the individual police officers "for
10 want of jurisdiction."); *Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004) (federally-
11 recognized Indian tribes are immune from suit under the Family Medical Leave Act brought
12 by employee of casino operated by Indian tribe).

13 Tribal sovereign immunity applies to the tribe's commercial as well as its
14 governmental activities. *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (citation
15 omitted). In addition, and significantly for the purposes of this Motion, the settled law in
16 the Ninth Circuit is that “[t]ribal sovereign immunity not only protects tribes themselves,
17 but also extends to arms of the tribe acting on behalf of the tribe.” *White v. Univ. of*
18 *California*, 765 F.3d 1010, 1025 (9th Cir. 2014) (citations omitted).

19 **C. Harrah’s is Entitled to Tribal Immunity as an Arm of the Community**

20 In determining whether an entity is entitled to sovereign immunity, the Ninth Circuit
21 has explained that “[t]he question is not whether the activity [at issue] may be characterized
22 as a business . . . but whether the entity [claiming immunity] acts as an arm of the tribe so
23 that its activities are properly deemed to be those of the tribe.” *Allen v. Gold Country*
24 *Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The plaintiff in *Allen* brought wrongful
25 termination and retaliation claims against his former employer, Gold Country Casino, and
26 the federally recognized Indian tribe that owned and operated the casino. The district court
27 dismissed the claims against the defendants on the ground of sovereign immunity. On
28 appeal, the plaintiff conceded the tribe's immunity, “but argued that the district court erred

1 in extending that immunity to the Casino without scrutinizing the relationship between the
2 Tribe and the Casino.” *Id.* at 1045.

3 The Ninth Circuit affirmed the dismissal against the casino finding that “the record
4 and the law establish sufficiently that it functions as an arm of the Tribe.” *Id.* In reaching
5 that conclusion, the court noted that the tribe owned and operated the casino, which was
6 “no ordinary business.” *Id.* at 1046. Specifically, the casino was “not a mere revenue-
7 producing tribal business” but was created under a compact with the State of California to
8 “enable the Tribe to develop self-sufficiency, promote tribal economic development, and
9 generate jobs and revenues to support the Tribe's government and governmental services
10 and programs.” *Id.* at 1046-47. Given that the Tribe owned and operated the casino, the
11 *Allen* Court observed that the “economic and other advantages [of the casino] inure[d] to
12 the benefit of the Tribe” and the casino’s immunity directly protected “the sovereign Tribe's
13 treasury, which is one of the historic purposes of sovereign immunity in general.” *Id.* at
14 1047 (citation omitted). Consequently, given “the purposes for which the Tribe founded
15 this Casino and the Tribe's ownership and control of its operations,” the court held that
16 “there can be little doubt that the Casino functions as an arm of the Tribe” and, therefore,
17 “enjoys the Tribe's immunity from suit.” *Id.*

18 In assessing whether an entity is an “arm of the tribe” for the purposes of tribal
19 sovereign immunity, the Ninth Circuit considers the “(1) the method of creation of the
20 economic entities; (2) their purpose; (3) their structure, ownership, and management,
21 including the amount of control the tribe has over the entities; (4) the tribe's intent with
22 respect to the sharing of its sovereign immunity; and (5) the financial relationship between
23 the tribe and the entities.” *White*, 765 F.3d at 1025. Based on these factors, and applying
24 the Ninth Circuit’s decision in *Allen*, the Court must find that Harrah’s functions as an arm
25 of the Community in managing the Casino for the Community’s benefit.

26 The Community owns the land where the Casino is located and operates the Casino
27 for the benefit of the Community, to improve the economic conditions of its members, to
28 enable it to serve the social, economic, educational, and health needs of the Community, to

1 increase Community revenues, and to enhance the Community's economic self-sufficiency
2 and self-determination. The Community pays all expenses associated with lawsuits against
3 Harrah's, including attorneys' fees, costs, expenses, settlements, and judgments. Indeed, the
4 Community retains the legal right to defend or settle any lawsuit against Harrah's regarding
5 the operation of the Casino. Thus, just as in *Allen*, the economic benefits of the Casino inure
6 to the Community and Harrah's immunity would directly protect the Community's treasury,
7 which is one of the historic purposes of sovereign immunity. *Allen*, 464 F.3d at 1047.

8 The factors outlined in *White* also support applying the Community's tribal
9 sovereign immunity to Harrah's. Although Harrah's was not created by the Community, its
10 sole purpose is to manage the Casino for and on the Community's behalf. As described in
11 Mike Kintner's Declaration, the Community, the Community Council, and the TGA
12 exercise a high level of control over Harrah's budget, employment policies, and the
13 employees it hires. Community Inspectors have the right to immediate access to the Casino
14 at any time, to inspect all aspects of the Casino's operation, without notice to Harrah's, to
15 investigate problems relating to any aspect of the Casino's operations, and to perform any
16 other tasks as assigned by the Community Council. The TGA regulates and controls the
17 gaming licenses of all Harrah's employees and has the authority to revoke those licenses,
18 which would prohibit Harrah's from continue to employ those employees. Finally, the
19 Community is financially responsible for defending this lawsuit and paying any settlement
20 or judgment.

21 Given Harrah's purpose, the degree of control the Community has over Harrah's,
22 and the financial relationship between the Community and Harrah's, this Court must find
23 that, in managing the Casino, Harrah's is acting as an arm of the Community and is entitled
24 to share in its immunity from suit. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold*
25 *Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010) (applying the Ninth Circuit factors
26 and concluding that the Casino defendant had "a sufficiently close relationship to the Tribe
27 to share in its immunity.")
28

1 **IV. CONCLUSION**

2 Harrah’s sole purpose and only business is to manage the Casino on the
3 Community’s behalf. The Community has the right to exercise control over Harrah’s
4 budget, employment policies, management, and the employees it can hire and promote. The
5 TGA oversees and controls the gaming licenses of Harrah’s employees. The Community
6 financially benefits from the Casino and is financially responsible for any lawsuits against
7 Harrah’s, including this one. Consequently, the Court must grant Harrah’s Motion and
8 dismiss Plaintiffs’ claims against it because in managing the Casino for the Community it
9 acts as an arm of the Community and is entitled to share in its tribal sovereign immunity.

10 DATED this 20th day of December, 2023.

11 /s/ Peter C. Prynkiewicz
12 Peter C. Prynkiewicz
13 LITTLER MENDELSON, P.C.
14 Attorney for Defendant
Harrah’s Arizona Corporation

15 I hereby certify that I electronically
16 transmitted the attached document to
17 the Clerk’s Office using the CM/ECF
18 System for filing and transmittal of a
19 Notice of Electronic Filing to the
following CM/ECF registrants, and
mailed a copy of same to the following
if non-registrants, this 20th day of
December, 2023, to:

20 John Dean Curtis, II
21 Aaron M. Duell
22 **BURCH & CRACCHIOLO, P.A.**
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24 /s/ Tisha A. Davis
25 4856-2761-2054.1 / 083558-1272