UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe; JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque,

Plaintiffs,

v. Case No. 1:15-CV-00625 JB/GBW

STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY(sic) S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I-V,

Defendants.

MOTION TO DISMISS COUNTS III AND IV OF PLAINTIFFS' COMPLAINT

Defendants Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene (together the "Individual Defendants") move to dismiss Counts III and IV of the Complaint. Concurrence in this motion was sought but denied. As grounds for this motion, the Individual Defendants state as follows.

I. INTRODUCTION

In Counts III and IV, Plaintiff Joseph M. Talachy ("Talachy") seeks prospective injunctive relief and damages[1] against the Individual Defendants for their alleged violations of 42 U.S.C. §§ 1983 and 1985. (Compl. ¶¶ 135-51, Dkt. No. 1.) Talachy bases his claim on actions taken (or announced) by the Individual Defendants against non-Indian State-licensed gaming operators ("Vendors") who need said licenses to conduct business with on non-tribal land with non-Indian State-licensed gaming operators. The Individual Defendants took these actions against the Vendors based on their reasonable belief that the Vendors are violating State law in

[1] The Individual Defendants are also entitled to qualified immunity against Talachy's claim for damages as explained in their Motion to Dismiss Count IV on the Basis of Qualified Immunity.

supplying equipment to or receiving proceeds from a gaming enterprise conducted illegally by the Pueblo of Pojoaque (the "Pueblo") on its tribal lands in the absence of a compact with the State. Although the Vendors do business with the Pueblo, the Vendors do not need a state license to do so and, therefore, any licensure action taken by the State against the Vendors does not prevent the Vendors from continuing to do business with the Pueblo.

The Individual Defendants have neither sought to enforce any law against the Pueblo, nor seized any Pueblo property, nor entered Pueblo lands, nor prevented the Vendors from dealing with the Pueblo on such terms as they see fit as licensees of the Pueblo's gaming enterprise. Talachy nonetheless complains that the Individual Defendants' actions are an effort to regulate the Pueblo directly with respect to its gaming operations on tribal land in violation of 42 U.S.C. §§ 1983 and 1985. Talachy's position is contrary to an extensive body of law that supports the administrative actions taken by New Mexico's Gaming Control Board ("NMGCB"). The Individual Defendants' regulation of the conduct of non-Indian manufacturers of gaming equipment with respect to their licensure to do business with non-Indian gaming operators outside Indian lands, in furtherance of the State's interest in ensuring that its licensees comply with State standards of lawful behavior, is not preempted by federal law, even if the State's exercise of that authority indirectly impacts the Pueblo's ability to conduct illegal gaming.

Given the lack of federal preemption, and Talachy's failure to identify any federal right violated by the Individual Defendants, Talachy's Section 1983 claim fails as a matter of law. Similarly, Section 1985 is neither a source of substantive rights nor provides an avenue of redress under the allegations of the Complaint. Talachy, moreover, is not a proper plaintiff under either Section 1983 or 1985. Finally, despite Talachy's inclusion of both Governor Susana Martinez ("Governor Martinez") and Jeremiah Ritchie ("Ritchie") in Counts III and IV, the

actions of which Talachy complains are actions taken by the NMGCB, not Governor Martinez or Ritchie and, therefore, these two Defendants are entitled to dismissal for this additional reason.

II. LAW ON MOTIONS TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal where the allegations in a complaint fail to state a claim for relief. "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). The sufficiency of the allegations of a complaint is a question of law for the Court to decide, after "accept[ing] all the well-pleaded allegations . . . as true and [construing] them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (citation & internal quotation marks omitted). Nevertheless, the complaint must plead sufficient facts that, when taken as true, provide "plausible grounds" that the case will yield evidence to support Talachy's allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Talachy must "allege[ ] facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

III. TALACHY'S ALLEGATIONS IN COUNT III AND IV

In Counts III and IV of the Complaint, Talachy claims entitlement to injunctive relief and money damages from the Individual Defendants for actions that he alleges they took in their official or personal capacities under color of state law in violation of 42 U.S.C. §§ 1983 and 1985. (Compl. ¶¶ 135-151.) Talachy alleges that the "Individual Defendants knew or should have known that actions purporting to assert jurisdiction of the State over conduct occurring on Pueblo Indian lands wrongfully deprives Plaintiff Talachy and the individual members of the Pueblo their federal right to engage in conduct free from the jurisdiction of the State." (*Id.* ¶

145.) These allegedly wrongful actions consist of the following: (1) requesting information from the Pueblo regarding their Class III Gaming Machine Manufacturer vendors; (2) stating that "the U.S. Attorney's decision [to temporarily refrain from taking enforcement action against the Pueblo for continuing to conduct Class III gaming without a compact] provides no protection to banks, credit card vendors, gaming machine vendors[,] advertisers, bondholders, and others that are now doing business with an illegal gambling enterprise;"[2] (3) holding a closed meeting of the New Mexico Gaming Control Board and thereafter "announc[ing] that they had determined the Pueblo is acting illegally in its continued operation of its Class III gaming activities and placed in abeyance approval of any license application or renewal for the Pueblo's vendors" when "[n]o other vendor applications were placed in abeyance;" and (4) "announc[ing] that they intend to deny license applications, including renewals of those gaming entities doing business in the State of New Mexico if such entity continues to do business with the Pueblo." (*Id.* ¶¶ 65-81, 148.) The Complaint alleges that these actions "establish a pattern of repeated incidents that establish a policy, custom and/or practice of wrongfully asserting State jurisdiction over gaming activities on the Pueblo's Indian lands." (*Id.* ¶ 148.)

In Plaintiffs' September 25, 2015 motion for temporary restraining order and/or preliminary injunction, they complain of additional allegedly wrongful actions that post-dated the filing of their Complaint. Specifically, Plaintiffs objected to the fact that the NMGCB sent letters to the Vendors, which "(i) assert that the Pueblo is conducting illegal gaming operations; (ii) list various New Mexico state laws, including criminal laws, that are allegedly violated by doing business with an illegal gaming operation; (iii) inform each Vendor that it is being

[2] In his June 30, 2015 letter, the U.S. Attorney unequivocally stated that the Pueblo's continued operation of its gaming operation after its compact expired would be illegal. (6/30/15 Ltr., Dkt. No. 23-10.) But in doing so the U.S. Attorney was only stating the obvious. *See* 25 U.S.C. §§ 2710(d)(1), (d)(7)(B)(vii); *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035 (2014) ("[A] tribe cannot conduct class III gaming on its lands without a compact[.]")

'audited' by the NMGCB; and (iv) demand the production of all communications and business records between the Vendor and the Pueblo." (Mot. TRO at 1, Dkt. No. 23.) Similarly, in his second supplemental declaration, Terrence "Mitch" Bailey stated that the Vendors were issued citations by the NMGCB and attached copies of some of these citations to his declaration. (2d Supp. Bailey Decl. ¶¶ 5-6, Exs. 1-3, Dkt. No. 30.) Each citation identified statutes or rules violated by the Vendor, the Vendor's actions that constituted said violations, and noted that "the Gaming Control Board will contact [the Vendor] concerning this matter." (*Id.* Exs. 1-3.) As they did in their Complaint, Plaintiffs claimed that these actions amount to improper interference with their gaming activities. (*See* Mot. TRO.) Although Talachy has not sought leave to amend the Complaint to add these additional allegations to support Counts III and IV, even if he were to do so, these additional allegations would not survive dismissal for the same reasons.

It is also important to emphasize what Talachy does *not* claim. Talachy does not allege that the Individual Defendants have taken, or threaten to take, any action on the lands of the Pueblo or directly against the Pueblo to seize property or to shut down or otherwise interfere with the Pueblo's gaming operations. On the contrary, and as Talachy acknowledges, New Mexico gaming licenses are only "required for the Vendors to do business with non-Indian 'racinos', fraternal and charitable entities, and the State lottery, but are not required for the Vendors to do business with any tribal gaming facility located on Indian lands within the State's borders." (*Id.* at 1-2.) *See also* NMSA 1978, §§ 60-2E-3(GG) (2009), -62(I) (2002). Thus, Talachy's theory is that the Individual Defendants are interfering with the Pueblo's gaming operations and thereby their sovereignty "[b]y … asserting jurisdiction over the tribe's gaming activities in the form of threatening vendors regarding their licenses to do business *with other entities* in the state over which they . . . have jurisdiction." 10/2/15 Hr'g Tr. at 37:17-19

(emphasis added). Talachy's theory of liability thus distills to the proposition that the State of New Mexico cannot enforce its gaming laws and regulations against non-Indian manufacturer licensees in connection with their dealings with non-Indian gaming operators at locations off the Pueblo's lands, because such enforcement will have an impact on the Pueblo's gaming operations. As the discussion below makes clear, federal law does not support Talachy's position.

IV. ARGUMENT

Counts III and IV should be dismissed for a number of reasons. First, Talachy is not a proper plaintiff under either Section 1983 or 1985. Second, neither Section 1983 nor 1985 provides Talachy with a right of action against the Individual Defendants. Third, because federal law does not preempt the state law that the Individual Defendants are enforcing, the Individual Defendants' actions are not in violation of any federal law. Fourth, even assuming for the sake of argument the validity of Talachy's preemption claim, such federal law would not amount to a federal "right," the violation of which is a prerequisite to establishing a cause of action under Section 1983. Fifth, Talachy does not allege any denial of equal protection of any laws, which is a predicate to a claim under Section 1985(3).[3] Finally, Governor Martinez and Ritchie should be dismissed for the additional reason that, in Counts III and IV, Talachy complains of actions taken by the NMGCB, not Governor Martinez or Ritchie.

A. Talachy Is Not a Proper Plaintiff Under Either § 1983 or § 1985.

Counts III and IV are brought by "Plaintiff Joseph M. Talachy, in his personal capacity and on behalf of the individual enrolled members of the Pueblo." (Compl. ¶¶ 135, 143.) Counts III and IV are not brought by the Pueblo itself, presumably in recognition that an Indian tribe is

[3] Talachy does not identify the subsection(s) of Section 1985 on which he bases his claim. However, Subsections 1985(1) (preventing an officer of the United States from performing his duties) and 1985(2) (intimidating a party, witness or juror, or otherwise obstructing justice), are plainly inapplicable, leaving only Subsection 1985(3).

not a "person" who could bring a claim under 42 U.S.C. §§ 1983 or 1985[4] when it is attempting to vindicate alleged violations of its sovereignty rights. *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701,711-12 (2003). Talachy's claim, however, fails for the same reason.

Here, Talachy is not claiming that the Individual Defendants violated his individual constitutional or other federal rights. (*See* Compl. ¶¶ 135-51.) Instead, he is claiming that the Individual Defendants "wrongfully assert[ed] State jurisdiction over gaming activities on the Pueblo's Indian lands," which "deprives Plaintiff Talachy and the individual members of the Pueblo of their federal right to engage in conduct free from the jurisdiction of the State." (*Id*. ¶¶ 138-39, 145, 148-49.) It is therefore clear that the "right" that Talachy is asserting is a "sovereign right" that he "may not sue under § 1983 to vindicate." *Inyo County*, 538 U.S. at 712. In fact, Talachy's claimed right to be free from state interference over tribal gaming is the very same right that the United States Supreme Court found was improper for the plaintiffs in *Inyo County* to bring under § 1983. *See id.*

"Nor can the ruling in *Inyo County* be circumvented by the expediency of simply naming" Talachy as a plaintiff on behalf of himself and other tribal members, because they have "no independent ownership interest in the [Pueblo's gaming operations]; they are tribal officers and members attempting to obtain immunity from state laws based upon the sovereign status of the tribe." *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1298 (D. Kan. 2004). Although Talachy may attempt to "characterize [his] claims as an attempt to vindicate private rights, each

[4] Numerous courts have "applie[d] the same definition of 'person' under both statutes" and, therefore, this analysis applies equally to Talachy's Section 1985 claim. *See Scrutchins v. Div. of Youth & Family Servs.*, No. 05-CV-925, 2008 U.S. Dist. Lexis 11544, at *28 (D.N.J. Feb. 15, 2008) (citing cases "in which the court either assumed or actually determined that the definition of 'person' under § 1985(3) is the same as that under § 1983").

of the claims advanced by [Talachy] ultimately invokes the Tribes' unique sovereign status" and therefore are incompatible with a Section 1983 or 1985 claim. *Id.*

Neither Talachy nor any of the other members of the Pueblo are sovereigns, and therefore they have no alleged rights of sovereigns "to engage in [gaming] conduct free from the jurisdiction of the State." (Compl. ¶ 145.) Just as the Pueblo cannot vindicate under Sections 1983 or 1985 any sovereignty rights, Talachy has no independent rights, derived from the Pueblo's claimed sovereignty rights, that he may vindicate under these statutes. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514-15 (9th Cir. 2005) (finding that the tribal members, like the tribe itself, were not entitled to sue to enforce the treaty-based fishing rights under Section 1983 because the fishing rights were communal rights of the tribe even though the individual members benefitted from those rights). Accordingly, Talachy (whether on behalf of himself or other tribal members[5]) cannot bring a claim under Sections 1983 and 1985 for the Individual Defendants' alleged wrongful assertion of State jurisdiction over the Pueblo's illegal gaming activities.

B. Neither § 1983 nor § 1985 Is a Source of Any Right.

In Counts III and IV of the Complaint, Talachy claims that the Individual Defendants' actions "establish a pattern of repeated incidents that establish a policy, custom and/or practice of wrongfully asserting State jurisdiction over gaming activities on the Pueblo's Indian lands . . . in violation of 42 U.S.C. §§ 1983 and 1985." (Compl. ¶¶ 138, 140.) Sections 1983 and 1985 do not, however, confer any rights; instead, they are merely a vehicle for a plaintiff to bring an action "against state actors to enforce rights created by federal statutes as well as by the Constitution." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002) (*citing Maine v. Thiboutot*, 448 U.S. 1 (1980));

[5] Talachy's attempt to bring a claim on behalf of other individual members of the Pueblo also runs afoul of the "well-settled principle that a section 1983 claim must be based upon the violation of [the] plaintiff's rights, and not the rights of someone else." *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990).

see also Corson v. Mattox, No. 09-65, 2010 U.S. Dist. Lexis 102626, at *17 (N.D.W. Va. Sept. 29, 2010) ("Sections 1983 and 1985 only provide causes of action for the deprivation of rights conferred by the Constitution or a separate statute, and do not confer any substantive rights." (citing *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618-20 (1979))). *See also Brown v. Phillip Morris, Inc*., 250 F.3d 789, 805 (3d Cir. 2001) ("It is well established that § 1985(3) does not itself create any substantive rights; rather, it serves only as a vehicle for vindicating federal rights and privileges which have been defined elsewhere.") Because Talachy does not identify any federal or constitutional rights[6] that he claims the Individual Defendants violated that can form the basis for his Section 1983 or 1985 claim, Counts III and IV fail to state a claim upon which relief can be granted and should be dismissed.

C. Talachy Has Not Alleged Facts To Support his Claim that the Individual Defendants Violated Any Federal Right that is a Predicate for his Section 1983 Claim.

1. Talachy has not established a violation of federal law because there is no preemption.

Talachy has not alleged facts that would support a claim under Section 1983 that the Individual Defendants violated his federal rights because no federal law prevents the State of New Mexico from exercising its authority to enforce its gaming laws in the manner alleged in the Complaint. As explained in greater detail in the Individual Defendants' December 4, 2015 Motion to Dismiss Count IV on the Basis of Qualified Immunity ("Qualified Immunity Motion") at 9-18 (Dkt. No. 60), which the Individual Defendants incorporate herein by reference, the Individual Defendants' actions were properly taken in connection with the State's legitimate regulation of non-Indian licensees with respect to their ability to deal with other non-Indian

[6] To the extent that Talachy is claiming that the Supremacy Clause is the source of these rights, that argument fails because the Supremacy Clause is not a source of federal rights for the reasons explained in greater detail in the Individual Defendants' Motion to Dismiss Count II.

licensees in conducting gaming activities on non-tribal lands, and the State's police power has not been preempted by federal law.

To the extent that Counts III and IV can be read to claim that the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721 ("IGRA"), preempts the Individual Defendants' actions, that argument fails because IGRA neither preempts the State's proper exercise of its police powers nor applies to the actions taken by the Individual Defendants. Given the strong presumption against preemption, the complete absence of any explicit preemption language in IGRA or any other federal law, the fact that federal law does not conflict with the State's regulatory authority over non-Indian licensees conducting gaming within the State and outside tribal lands, and the fact that IGRA does not occupy the field because it does not apply outside of Indian country, neither IGRA nor any other federal law preempts the State police powers in this manner.

2. Even assuming preemption and a violation of federal law, Talachy has still established no violation of a federal right.

Even assuming for the sake of argument that Talachy were able to show that the State's enforcement of its gaming laws as alleged in the Complaint is preempted by federal law, Talachy has still failed to state a claim under Section 1983 because a mere violation of federal *law* is not sufficient to establish a violation of a federal *right*, as is required for a Section 1983 claim. *See Gonzaga*, 536 U.S. at 283 ("Section 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States. Accordingly, it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section."). The Court in *Gonzaga* emphatically "reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.*

Talachy has not and cannot identify in IGRA or any other federal statute an "unambiguously conferred right" that permits this Section 1983 claim against the Individual Defendants. Accordingly, Talachy has failed to state a claim upon which relief can be granted under Section 1983.

D. Talachy Identifies no Denial of Equal Protection to Support his Section 1985 Claim.

Section 1985(3) prohibits a conspiracy "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws." Accordingly, Section 1985(3) "applies only to conspiracies motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *O'Connor v. St. John's College*, 290 Fed. Appx. 137, 141 n.4 (10th Cir. 2008) (citation & internal quotation marks omitted). The Tenth Circuit "has signaled that § 1985(3) requires at least a 'commingling of racial and political motives.'" *Id.* Here, Talachy makes no allegation of any racial motivations on the part of the Individual Defendants. Section 1985 is therefore simply inapplicable to Talachy's claims against the Individual Defendants, and any such claim should be dismissed.

E. Talachy Complains of Actions Taken by the NMGCB, Not Governor Martinez or Jeremiah Ritchie.

Both Governor Martinez and Ritchie are entitled to dismissal of Counts III and IV for yet another reason: the actions of which Talachy complains are not actions taken by either Governor Martinez or Ritchie. As stated in greater detail in the Qualified Immunity Motion at 21-23, which the Individual Defendants incorporate by reference, for liability to attach to Governor Martinez or Ritchie, Talachy must allege facts that show "actual enforcement action" against the Pueblo. *See Tohono O'odham Nation v. Ducey*, No. 15-1135, 2015 U.S. Dist. Lexis 124979, at *16-18 (D. Ariz. Sept. 17, 2015). Talachy fails to do so here. Instead, as Talachy himself alleged in the Complaint, the regulatory actions of which he complains have been taken by the

NMGCB, not Governor Martinez or Ritchie. The only factual allegations directed at Governor Martinez or Ritchie are that they made statements that "the U.S. Attorney's decision [to temporarily refrain from taking enforcement action against the Pueblo for continuing to conduct Class III gaming without a compact] provides no protection to banks, credit card vendors, gaming machine vendors[,] advertisers, bondholders, and others that are now doing business with an illegal gambling enterprise." (Compl. ¶ 68.) This indirect involvement is insufficient to establish liability against Governor Martinez and Ritchie (*see id.*), and they are therefore entitled to dismissal for this additional reason.

V. CONCLUSION

For the reasons discussed above, the Court should dismiss Counts III and IV of the Complaint.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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