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 COUNT II 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 Count II of Plaintiffs Pueblo of Pojoaque[1] and Joseph M. Talachy's (together "Plaintiffs") Complaint. Concurrence in this motion was sought but denied. As grounds for this motion, the Individual Defendants state as follows.

I. INTRODUCTION

In Count II of their Complaint, Plaintiffs seek declaratory and injunctive relief against the Individual Defendants' alleged violation of the Supremacy Clause. (Compl. ¶¶ 132-34, Dkt. No. 1.) Plaintiffs base their claim on actions taken (or announced) by the Individual Defendants against non-Indian State-licensed gaming operators ("Vendors") who need said licenses to

[1] It is unclear whether the Pueblo of Pojoaque (the "Pueblo"), as opposed to only Joseph M. Talachy ("Talachy") is seeking relief under Count II. In the Complaint, Talachy is identified as the only party seeking relief under Count II. But in its Motion for Temporary Restraining Order and/or Preliminary Injunction ("Motion for TRO"), at 18-19, the Pueblo took the position that it sought relief under Count II. This motion assumes that both plaintiffs seek relief under Count II.

conduct business on non-tribal land with non-Indian State-licensed gaming operators. The Individual Defendants took these actions against the Vendors based on the Individual Defendants' reasonable belief that the Vendors are violating State law in supplying equipment to or receiving proceeds from a gaming enterprise conducted illegally by 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. Plaintiffs nonetheless contend 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 their rights under the Supremacy Clause and claim that the State is acting unlawfully because the Indian Gaming Regulatory Act ("IGRA") has not permitted the State to so act. Plaintiffs' 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. Furthermore, the Supremacy Clause is not a source of any federal rights (and cannot, therefore, form the basis for any claim), and Talachy would not in

any event be the proper plaintiff to bring such a claim. Accordingly, Count II fails to state a claim upon which relief can be granted and should therefore be dismissed with prejudice.

Furthermore, despite Plaintiffs' inclusion of both Governor Susana Martinez ("Governor Martinez") and Jeremiah Ritchie ("Ritchie") in Count II, the actions of which Plaintiffs complain are actions taken by the NMGCB, not Governor Martinez or Ritchie and, therefore, they 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 Plaintiffs' allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs 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. PLAINTIFFS' ALLEGATIONS IN COUNT II

In Count II of Plaintiffs' July 18, 2015 Complaint, Talachy alleges as follows:

> Individual Defendants[2] have made a unilateral determination regarding the legality of gaming on the Pueblo's Indian lands despite th[e] fact that no tribal-

[2] It is not clear whether Plaintiffs intended to bring Count II against the State of New Mexico, as they make no allegation that the State has violated their rights under the Supremacy Clause. (*See* Compl. ¶¶ 132-34.) If Plaintiffs

> state compact is in effect. Accordingly, the actions[3] of Individual Defendants unlawfully interfere with the rights of Plaintiff Talachy in his personal capacity and on behalf of the enrolled members of the Pueblo, to engage in activity on the Pueblo's Indian lands in a manner that is free from state interference except to the limited extent that Congress, in the exercise of the United States' plenary authority over Indian affairs allows.

(Compl. ¶ 134.) Talachy seeks a declaration that these actions are unlawful and an injunction to prevent "Individual Defendants from taking any action on licenses issued by the [NMGCB] based on the licensed entity conducting business with the Pueblo" and "from taking any official action, or refraining to take any official action that is based upon the legal status of gaming activity occurring on the Pueblo's Indian lands." (*Id.* ¶¶ D-K.)

In Plaintiffs' September 25, 2015 Motion for TRO, 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 'audited' by the NMGCB; and (iv) demand the production of all communications and business records between the Vendor and the Pueblo." (Pls.' 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

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intended to include the State of New Mexico as a defendant in Count II, all of the arguments contained in this Motion apply equally to the State of New Mexico, and the State should be dismissed for the same reasons as well as on the grounds of Eleventh Amendment immunity.

[3] According to the Complaint, these actions include (1) requesting information from the Pueblo regarding the 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 the Vendors, (3) announcing that they had determined the Pueblo is acting illegally in its continued operation of its Class III gaming activities and placing in abeyance approval of any license application or renewal for the Vendors, and (4) announcing that they intend to deny the Vendors' license applications and renewals if the Vendors continue to do business with the Pueblo. (Compl. ¶¶ 65-81.)

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 claim that these actions amount to improper interference with Plaintiffs' gaming activities. (*See* Mot. TRO.) Although Plaintiffs have not sought leave to amend the Complaint to add these additional allegations to support Count II, even if they were to do so, these additional allegations would not survive dismissal for the same reason: Plaintiffs cannot establish that the Individual Defendants' actions violated Plaintiffs rights under the Supremacy Clause.

It is also important to emphasize what Plaintiffs do *not* claim. Plaintiffs do 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 Plaintiffs acknowledge, 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, Plaintiffs' theory is that the Individual Defendants are interfering with their 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). Plaintiffs' 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 Plaintiffs' position.

IV. ARGUMENT

Count II of the Complaint should be dismissed for a number of reasons. First, the Supremacy Clause does not create a right of action upon which Count II can be based. Second, the Individual Defendants have not violated any right held by Plaintiffs by regulating third party licensees pursuant to the State's police power. Third, Talachy is not a proper plaintiff and has no sovereignty rights. Finally, Governor Martinez and Ritchie should be dismissed for the additional reason that, in Count II, Plaintiffs complain of actions taken by the NMGCB, not Governor Martinez or Ritchie.

A. The Supremacy Clause Is Not a Source of Any Right.

Plaintiffs claim that their "right . . . to engage in activity on the Pueblo's lands in a manner that is free from state interference except to the limited extent that Congress, in the exercise of the United States' plenary authority over Indian affairs allows" is found in "the Supremacy Clause." (Compl. ¶ 133.) The Supremacy Clause, however, is "'not a source of any federal rights'; it 'secures federal rights by according them priority whenever they come in conflict with state law.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). The Supremacy Clause "certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, ___ U.S. ___, 135 S. Ct. 1378, 1383 (2015). Because the Supremacy Clause does not support a private right of action, Count II fails to state a claim as a matter of law and should be dismissed.

B. Plaintiffs Have Not Alleged Facts To Support Their Claim That the Individual Defendants Violated Their Federal Rights.

Nor have Plaintiffs alleged facts that would support a claim that the Individual Defendants violated their rights under any other potentially available cause of action, because no federal law prevents the State of New Mexico from exercising its authority to enforce its gaming laws in the manner alleged in Plaintiffs' 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 9-11 (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-tribal New Mexico gaming activities in the exercise of its police power. *See Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). New Mexico's Gaming Control Act (the "Act") permits gaming in the State only if it is in compliance with the Act or federal law "that expressly permits the activity or exempts it from the application of the state criminal law." NMSA 1978, § 60-2E-4(B) (1997). The Act prohibits the NMGCB from issuing a license to the Vendors if the Vendors conduct business with an illegal gaming enterprise and authorizes the NMGCB to issue citations for violations of the Act or NMGCB's regulations. *Id.* §§ 60-2E-10(D)(3) (2002), -16(B)(2) (2009); 15.1.10.9(F), (N), 15.1.16.12(B), 15.1.16.8(B) NMAC. There is no doubt that the NMGCB, in citing licensees for regulatory violations or otherwise carrying out its responsibilities to ensure that gaming activities in New Mexico are conducted in accordance with the law, is exercising the State's police power. *See Srader v. Verant*, 1998-NMSC-025, ¶¶ 11, 16, 125 N.M. 541, 964 P.2d 82; *see also Kearns v. Aragon*, 1959-NMSC-102, ¶ 16, 65 N.M. 119, 333 P.2d 607 (observing that the State exercises its police power "to insure so far as possible the decent and orderly conduct of a business affecting the public health, morals, safety

and welfare"). The New Mexico Supreme Court has "firmly assert[ed]" the State's authority to exercise its police power with respect to gaming activities within its jurisdiction. *Srader,* 1998-NMSC-025, ¶ 16. Therefore, the actions of which Plaintiffs complain were properly taken by the Individual Defendants in connection with the State's legitimate exercise of its police power to regulate non-Indian licensees with respect to their ability to deal with other non-Indian licensees in conducting gaming activities on non-tribal lands.

Furthermore, there is no federal law that preempts the State's exercise of its police power. As explained in greater detail in the Qualified Immunity Motion at 11-18, which the Individual Defendants incorporate herein by reference, to the extent that Count II can be read to claim that 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 federal preemption of state law, IGRA does not preempt the State's authority over its licensees on State lands. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."). That presumption is particularly strong when the state law in question, like New Mexico's Gaming Control Act, is aimed at promoting the public welfare, safety, and morals. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986). This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The Court should reject out of hand Plaintiffs' attempt to reverse the preemption analysis and assert that the Individual Defendants are acting unlawfully because IGRA has not *permitted* the State to so act. Instead, the proper preemption question is whether IGRA has *prohibited* the

enforcement of State law in the manner alleged in the Complaint. Further, it is well established that for a federal statute to preempt a state's historic police powers, Congressional intent must be "clear and manifest." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). An intent to preempt state law is clear and manifest: (1) when Congress enacts a statute that explicitly preempts state law; (2) where state law conflicts with federal law; and (3) if federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). No federal law explicitly preempts the State's authority to regulate gaming within its jurisdiction and outside tribal lands. 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 IGRA cannot be read to occupy the field because IGRA does not apply outside of Indian country. *See Michigan v. Bay Mills Indian Comty.,* 134 S. Ct. 2024, 2034 (2014) (explaining that IGRA "regulate[s] gaming *on Indian lands, and nowhere else*" (emphasis added)). Accordingly, neither IGRA nor any other federal law preempts the State police powers in this manner.

And if the State properly may take action against the licenses of non-Indian manufacturers in connection with their dealings with off-reservation non-Indian gaming operators, it follows that it may make determinations about the illegality of the Pueblo's and thus the Vendors' conduct in accordance with Section 60-2E-4 NMSA and 15.1.10.9(f) NMAC. IGRA does not remove the State's ability to decide whether the Pueblo's gaming operations are lawful – something the State must do in order to enforce its own law – and *Srader* underscores the State's obligation to do so.

Any indirect effect on the Pueblo that has or may result from the Individual Defendants' regulation of the Vendors does not change this analysis. As explained in greater detail in the

Qualified Immunity Motion at 14-15, which the Individual Defendants incorporate herein by reference, many cases recognize that a state may enforce its laws and policies on its own lands even if doing so has a consequential (or even profound) impact on reservation-based activity by an Indian tribe. *See, e.g., Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1183 (10th Cir. 2012) ("The alleged ancillary effect of these laws based on the State's off-Indian country enforcement of them, is that [the tribe's] members cannot buy contraband cigarettes. But such an indirect effect does not establish a preemption or an infringement of tribal sovereignty claim."); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." (citations omitted)); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980) (approving of off-Indian country seizure of cigarettes to "police[ ] against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests"); *Bay Mills*, 134 S. Ct. at 2034-35, n.7 (noting that Michigan properly could prosecute or sue tribal officials and employees, or anyone else who "maintains – or even frequents" a tribe's off-reservation illegal gaming operation, notwithstanding that such "alternative remedies may be more intrusive on, or less respectful of, tribal sovereignty"). Therefore, Plaintiffs' Complaint does not allege a violation of the Supremacy Clause or any federal law.

Finally, even assuming *arguendo* that the State's issuance of citations to the manufacturers were solely an indirect attempt to regulate the Pueblo's illegal gaming rather than the NMGCB's compliance with State law (an intent that the Individual Defendants deny), the United States Supreme Court recognized in *Bay Mills* that a state is within its rights to assert

"leverage" to enforce its laws against an Indian tribe that is conducting illegal gaming. 134 S. Ct. at 2035. Although a state might not be able to act directly against a tribe that is gaming illegally but is shielded from state action by federal exclusivity or tribal sovereign immunity, the state's ability to assert its authority indirectly by enforcing its law on its own lands remains "capacious." *Id*. at 2034. The United States Supreme Court explained that although "a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation[,] . . . on its own lands, [it] has many other powers over tribal gaming"; or for instance, a state can deny a license to a tribe for an off-reservation casino and can bring suit against tribal officials or employees seeking an injunction for gambling illegally. *Id.* at 2034-35; *cf. Potawatomi*, 498 U.S. at 514 (noting that, although sovereign immunity protected tribe from suit by state to enforce collection of cigarette sales tax, state could "of course collect the sales tax from cigarette wholesalers").

C. Talachy Is Not a Proper Plaintiff and Has No Sovereignty Rights.

In Count II, Talachy claims that "the actions of Individual Defendants unlawfully interfere with the rights of Plaintiff Talachy in his personal capacity and on behalf of the enrolled members of the Pueblo, to engage in activity on the Pueblo's Indian lands in a manner that is free from state interference except to the limited extent that Congress, in the exercise of the United States' plenary authority over Indian affairs allows." (Compl. ¶ 134.) However, neither Talachy nor any of the other members of the Pueblo[4] are sovereigns, and therefore they have no rights of sovereigns to engage in gaming "free from state interference." (*Id.*)

In the context of a claim under 42 U.S.C. § 1983, courts have explained that individual tribal officials and members have "no independent ownership interest in the [Pueblo's gaming

[4] Talachy's attempt to bring a claim on behalf of other individual members of the Pueblo is also problematic because standing principles require a person to raise claims that are based on violations of a plaintiff's own rights, not the rights of others. *See Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990).

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). Talachy has no independent rights, derived from the Pueblo's claimed sovereignty rights, that he may vindicate on behalf of himself, other tribal members, or the Pueblo itself. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514-15 (9th Cir. 2005) (explaining that tribal members 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). Similarly, Talachy cannot assert any Supremacy Clause claim for the Individual Defendants' alleged wrongful assertion of State jurisdiction over the Pueblo's illegal gaming activities.

D. Plaintiffs Complain of Actions Taken by the NMGCB, not Governor Martinez or Jeremiah Ritchie.

Both Governor Martinez and Ritchie are entitled to dismissal of Count II for yet another reason: the actions of which Plaintiffs complain 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 either Governor Martinez or Ritchie, Plaintiffs must allege facts that show "actual enforcement action" against the Pueblo. *See Tohono O'odham Nation v. Ducey*, No. 15-CV-01135, 2015 U.S. Dist. Lexis 124979, at *16-18 (D. Ariz. September 17, 2015). Plaintiffs fail to do so here. Instead, as Plaintiffs themselves alleged in their Complaint, the regulatory actions of which they complain 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 Count II of Plaintiffs' 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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