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)
LANDERS, SALVATORE MANIACI,
PAULETTE BECKER, ROBERT M. DOUGHTY
III, CARL E. LONDENE and JOHN DOES I-V,

Defendants.

INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COUNT IV ON THE BASIS OF QUALIFIED IMMUNITY

Defendants Susana Martinez ("Governor Martinez"), Jeremiah Ritchie ("Ritchie"), Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene (together "Individual Defendants") submit this reply in support of their motion to dismiss Count IV of Plaintiffs Pueblo of Pojoaque ("Pueblo") and Joseph M. Talachy's (together, "Plaintiffs") Complaint on the basis of qualified immunity ("Motion").

In their response, Plaintiffs do not cite to any authority setting forth a clearly established federal right that the Individual Defendants violated. There is none. As the cases the Individual Defendants cite in their Motion establish, the actions taken by the Individual Defendants upon which Plaintiffs base their Complaint were proper exercises of the State's police power and neither preempted nor even covered by the Indian Gaming Regulatory Act ("IGRA"). At the very least, the authority supporting the Individual Defendants' actions demonstrates that there is

uncertainty in the law surrounding the Individual Defendants' ability to regulate the conduct of non-Indian gaming manufacturers or operators outside tribal lands, in furtherance of the State's interest in ensuring that its licensees comply with State standards of lawful behavior. Accordingly, the Individual Defendants violated no *clearly established* federal right and are entitled to qualified immunity and dismissal of Count IV of Plaintiffs' Complaint.

A. Plaintiffs' Procedural Arguments Are Red Herrings.

Plaintiffs seem to complain that the Individual Defendants are raising qualified immunity in a motion to dismiss (as opposed to a motion for summary judgment) and intimate that a motion to dismiss is an improper vehicle to raise this defense. As this Court has noted, however, "[t]he Supreme Court has suggested that, to avoid unnecessary exposure to burdensome discovery, the preferred practice is for the government officials to move to dismiss the action based on qualified immunity before discovery is ordered." *Saenz v. Lovington Muni. Sch. Dist.*, No. 14-1005, 2015 U.S. Dist. LEXIS 55175, *11 (D.N.M. April 6, 2015)(Browning, J)("[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law.")(citing *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)); *see also Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)("Thus, the Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Furthermore, this Court, the Tenth Circuit, and the Supreme Court have all previously held on numerous occasions that qualified immunity properly can be granted in the context of a motion to dismiss. *See, e.g., Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)(reversing the denial of a motion to dismiss on qualified immunity grounds, finding that the defendant was entitled to

qualified immunity because the factual allegations in the complaint did not state a claim for either a Fourth Amendment violation or a violation of any clearly established right); *Guttman v. Khalsa*, 669 F.3d 1101, 1125-26 (10th Cir. 2012)(affirming the district court's grant of the defendants' motion to dismiss on the basis of qualified immunity); *Saenz v. Lovington Muni. Sch. Dist.*, No. 14-CV-1005, 2015 U.S. Dist. LEXIS 64338 (D.N.M. April 30, 2015)(Browning, J.)(granting motion to dismiss on the basis of qualified immunity).

Plaintiffs also stress the unremarkable proposition that a motion to dismiss is more difficult for a defendant to prevail on than a motion for summary judgment, because in evaluating a motion to dismiss, a court must accept all of the well-pleaded factual allegations as true and the defendants cannot provide any additional facts to persuade the court that dismissal is warranted. But the Individual Defendants' argument is not based on the lack of specificity in Plaintiffs' factual allegations. Rather, despite the lengthy rendition of their factual allegations against the Individual Defendants, Plaintiffs cannot make out a claim against the Individual Defendants because their allegations – all of which relate to actions and comments directed at non-Indian entities and their ability to do business with other non-Indian entities – are not prohibited by any federal right. It is therefore the legal underpinning of Plaintiffs' Complaint that is faulty and warrants the dismissal of Count IV on the basis of qualified immunity.[1]

[1] Plaintiffs also attempt to argue that the Individual Defendants' qualified immunity defense is somehow weakened by the fact that Plaintiffs have also asserted other claims against the Individual Defendants, and claim that the Individual Defendants have not moved to dismiss the same, despite the fact that the Individual Defendants indicated they would do so both at the November 24, 2015 hearing and in their Motion. (See Defs.' Mot. at 1 n.1, Dkt. No. 60.) Now that the Individual Defendants have filed dispositive motions on all of Plaintiffs' claims against them, this argument is moot and the Individual Defendants need not take the time to rebut the same.

Plaintiffs spend over three pages pointing out that the Motion does not address Plaintiffs' claims for prospective relief. (Pls.' Resp. to Mot. at 11-14.) That point is accurate, but inapposite. The Motion raises the Individual Defendants' qualified immunity defense and, therefore, properly deals only with Plaintiffs' claim for damages under Count IV. The Individual Defendants have separately moved to dismiss all of Plaintiffs' claims in motions to dismiss filed on December 22, 2015. (*See* Mots. Dismiss, Dkt. Nos. 69, 71-73.)

B. Plaintiffs Fail to Meet their Heavy Burden to Show that the Individual Defendants Violated Plaintiff's Clearly Established Federal Rights.

1. Plaintiffs fail to address the merits of their claims or rebut the Individual Defendants' authority demonstrating they are entitled to qualified immunity.

Surprisingly, Plaintiffs have elected not to address the substance of the Individual Defendants' argument: that they are entitled to qualified immunity because the State can enforce its gaming laws and regulations against non-Indian gaming manufacturers in connection with their dealings with non-Indian gaming operators off tribal lands without violating the Pueblo's clearly established federal rights. In their response, Plaintiffs claim that they "merely need[] to demonstrate that [they] ha[ve] presented a plausible claim that a clearly-established federal right has been violated by [the Individual Defendants], and that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" (Pls.' Resp. to Mot. at 6.) This is not the standard. Plaintiffs are confusing facts and law. On a motion to dismiss, a 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). But qualified immunity requires that the legal theory itself must satisfy the "heavy two-part burden": a showing that the Individual Defendants' actions violated Plaintiffs' rights under federal law, and that those rights were clearly established at the time of the conduct at issue. *Albright*, 51 F.3d at 1534. The Tenth Circuit has held that a plaintiff

> must do more than identify a clearly established legal test and then allege that the defendant has violated it. The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Hannula v. Lakewood, 907 F.2d 129, 131 (10th Cir. 1990)(citations & quotations omitted).[2]

[2] Plaintiffs attempt to attack this standard, presumably because they know they cannot meet it. (*See* Pls.' Resp to

This case is analogous to *Guttman*: no matter what facts Plaintiffs may allege against the Individual Defendants, dismissal is required because there is a fundamental flaw in their theory. In *Guttman*, the Tenth Circuit affirmed the district court's grant of the defendant's motion to dismiss on the basis of qualified immunity because the plaintiff could not make out his stigma-plus claim – not because the allegations of defamation were insufficient, but because the defendant did not employ the plaintiff and therefore could not have made defamatory statements in the context of terminating his employment as the stigma-plus claim required. 669 F.3d at 1125-26. Similarly, Plaintiffs cannot prevail on their claims for damages against the Individual Defendants because, whatever the Individual Defendants may have said or done against non-Indian entities with regard to their licenses to do business with other non-Indian entities off tribal lands, the Individual Defendants have taken no action directly against the Pueblo.

After incorrectly asserting that they need not address the merits of the Motion, Plaintiffs perfunctorily incorporate their motion for preliminary injunction by reference and claim that Judge Brack's findings in the preliminary injunction are conclusive on this issue and justify rejecting the qualified immunity defense. But Plaintiffs' motion for preliminary injunction did not address the issue of whether the Individual Defendants' actions violated Plaintiffs' federal *rights* (as opposed to more generally violating federal law), or whether those rights were *clearly established*. Accordingly, Plaintiffs have presented the Court with neither argument nor authority

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Mot. at 4.) However, neither case that Plaintiffs identify as "heavily critiz[ing]" *Hannula* does any such thing, and there appears to be no good faith basis for Plaintiffs' claim to the contrary. *See Estate of Booker v. Gomez*, 745 F.3d 405, 426 (10th Cir. 2014); *Dixon v. Richer*, 922 F.2d 1456, 1461 (10th Cir. 1991). Furthermore, according to Lexis, *Hannula* has been cited in published opinions a total of 91 times for this proposition, and not once was *Hannula* criticized for "imposing too strict a standard" as Plaintiffs claim. (*See* Pls.' Resp to Mot. at 4.) And *Hunt v. Central Consolidated School District*, 951 F. Supp. 2d 1136, 1233-34 (D.N.M. 2013) is not to the contrary. There, the defendants' qualified immunity defense was denied not on the basis of any subtle analysis of the factual allegations, but rather simply because the alleged constitutional violation – a school district's discrimination against its employees on the basis of their religion – was uncomplicated and it was therefore unnecessary to find authority precisely on point. *See id*. ("[T]he case involves not some novel application of the Fourteenth Amendment to a particular set of facts, but a basic American proposition – the government may not discriminate against its employees and demote its employees based on their religion without a compelling interest.")

to challenge the Individual Defendants' position that their actions were a proper exercise of the State's police power and neither preempted nor addressed by IGRA.

Even more problematic is Plaintiffs' erroneous position that Judge Brack's conclusions set forth in his order granting Plaintiff's motion for preliminary injunction are binding on this Court in considering this motion. This Court, the Tenth Circuit, and the United States Supreme Court have flatly rejected this notion: "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Navajo Health Found. v. Burwell*, 100 F. Supp. 3d 1122 (D.N.M. 2015)(quoting *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009)(quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981))). Nor is a preliminary injunction ruling applicable to the Court's decision on a motion to dismiss or for summary judgment. *See Chanute v. Williams Natural Gas Co.*, 995 F.2d 641, 649 (10th Cir. 1992)("In a summary judgment proceeding, the district court is not bound by its prior factual findings determined in a preliminary injunction hearing."), *overruled on other grounds by Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137 (10th Cir. 1997); *Berrigan v. Sigler*, 162 U.S. App. D.C. 378, 499 F.2d 514, 518 (D.C.Cir. 1974)("The decision ... to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings and does not limit or preclude the parties from litigating the merits."); *Am. Ass'n of Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1211 (D.N.M. 2010)(Browning, J.)(rejecting the argument that preliminary injunction findings compel the same result on a motion to dismiss, explaining that the "[t]wo standards ... are substantively different" and "[t]he Court's prior findings thus do not permit it to dispose of the Complaint.").

This is so because of the "limited purpose" of a preliminary injunction "and given the haste that is often necessary" to effectuate the purpose of a preliminary injunction, which is

"customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395. *See also Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (10th Cir. 1953)("The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction – as indicated by the numerous more or less synonymous adjectives used to label it – is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.")

Indeed, in this case, while Plaintiffs had ample time to prepare their 37-page motion for preliminary injunction, the Individual Defendants had less than a week to prepare and file their response before the motion was heard. Judge Brack had less than a day to review the response brief before the hearing, and entered his decision and order the Wednesday following the Friday hearing. In the time available, the Individual Defendants focused their response on the issues of jurisdiction, standing, their general immunity from suit, and the lack of irreparable harm. (*See* Defs.' Resp. to Prelim. Inj. Mot., Dkt. No. 28.) The Individual Defendants did not have adequate opportunity to brief, and Judge Brack therefore did not have the benefit of their analysis of, the complicated and core questions of whether the Individual Defendants' exercise of the State's police power was preempted by IGRA, or whether IGRA even reaches actions taken off-reservation. Without more developed briefing and argument, Judge Brack did not focus on the fact that the Individual Defendants' actions were directed at non-Indian entities with regard to their licenses to do business with other non-Indian entities off tribal lands, and *not* the entities' ability to continue doing business with the Pueblo. Judge Brack instead accepted as correct Plaintiffs' contention that IGRA applied to and preempted the Individual Defendants' ability to

act against non-Indians off tribal lands. Finally, the issue of whether there was a violation of a clearly established federal right (as opposed to a more general violation of federal law) was not addressed at all in connection with the preliminary injunction.[3]

Furthermore, Judge Brack made findings and conclusions regarding Plaintiffs' *likelihood of success* on the merits, not a decision on the merits. Instead, it was by its very nature a preliminary and temporary measure pending the ultimate merits determination that this Court will now make, and is therefore neither binding nor persuasive authority. In deciding this Motion, this Court will make the first definitive legal determination of the merits of the Individual Defendants' qualified immunity defense and independently determine whether the Individual Defendants violated Plaintiffs' clearly established federal rights.

Plaintiffs' reliance on Judge Brack's opinion is problematic for yet another reason: the preliminary injunction was issued *after* the Individual Defendants' actions. The United States Supreme Court has been abundantly clear that it is the state of the law "at the time an action occurred" that is crucial to a qualified immunity analysis. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "If the law *at that time* was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful," and should be granted qualified immunity. *Id.* (emphasis added).

2. Plaintiffs have not established a violation of federal law because there is no preemption.

Plaintiffs have not alleged facts that would support their claim for damages against the Individual Defendants, because no federal law prevents the State of New Mexico from exercising

[3] Plaintiffs attempt to argue otherwise, but the section of the preliminary injunction that they cite to support their assertion states only that the Individual Defendants knew they could not directly regulate the Pueblo. Judge Brack made no finding that the Individual Defendants knew that their conduct with regard to the vendors infringed on any federal right held by Plaintiffs. (*See* Pls. Resp. to Mot. at 6 (quoting Prelim. Inj. at 20).)

its authority to enforce its gaming laws in the manner alleged in the Complaint. As explained in greater detail in the Motion, 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 licensees in conducting gaming activities on non-tribal lands. Given the complete absence of any explicit preemption language in IGRA, 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 tribal lands, neither IGRA nor any other federal law preempts the State police powers in this manner.

3. Even assuming preemption and a violation of federal law, Plaintiffs have still established no violation of a clearly established federal right.

Even assuming for the sake of argument that Plaintiffs could show that the State's enforcement of its gaming laws as alleged in the Complaint is preempted by federal law, Plaintiffs have still failed to state a claim against the Individual Defendants, because a violation of federal *law* is not sufficient to establish a violation of a federal *right*, much less a *clearly established* federal right. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasizing that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of [Section 1983]."). Plaintiffs have not and cannot identify in IGRA or any other federal statute an "unambiguously conferred right" that supports their Section 1983/1985 claim. Accordingly, Count IV fails to state a claim upon which relief can be granted.

At the very least, Plaintiffs failed to show that there is a *clearly established* federal right that the Individual Defendants violated, which entitles the Individual Defendants to qualified immunity and dismissal of Count IV. "Whether the law in question was clearly established when the conduct complained of occurred is a legal issue to be resolved by the court." *Miller v. City of*

Mission, 705 F.2d 368, 375 n.6 (10th Cir. 1983)(citing *Harlow*, 457 U.S. at 819). Therefore, this issue is eminently appropriate for the Court's resolution at the motion to dismiss stage.

Plaintiffs have failed to identify a single "Supreme Court or Tenth Circuit decision on point, or [show that] the clearly established weight of authority from other courts [] have found the law to be as the plaintiff maintains." *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) (citation & internal quotation marks omitted). Instead, Plaintiffs rest on the allegations in their Complaint that the Individual Defendants are "wrongfully asserting State jurisdiction over gaming activities on the Pueblo's Indian lands." (Compl. ¶ 148.) Plaintiffs have therefore provided no authority that, even if the state laws being enforced by the Individual Defendants were preempted – which they are not – application of state law to third-party vendors (not to Plaintiffs) would violate any clearly established federal right held by Plaintiffs. The issues of whether IGRA confers a federal *right* and whether any such right was *clearly established* are issues that Plaintiffs have completely waived because they failed to address them in their response and never briefed them in the context of the preliminary injunction. Accordingly, the Individual Defendants' position is undisputed and Plaintiffs have failed to meet their "burden to establish that the law [was] clearly established" at the time in question, "not as a broad proposition," but "in light of th[is] case's specific context." *Smith v. Kenny*, 678 F. Supp. 2d 1124, 1145 (D.N.M. 2009)(Browning, J.)(quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

C. Plaintiffs' Claims Against Governor Martinez and Ritchie Fail for Added Reasons.

While the foregoing analysis applies equally to Governor Martinez and Ritchie, they have yet another basis for dismissal of Count IV: they are alleged to have done nothing but make statements about the potential legal consequences faced by non-Indian vendors continuing to do business with the Pueblo's illegal gaming operation after the expiration of the compact.

In their response, Plaintiffs do not dispute that they have alleged no other facts against Governor Martinez and Ritchie. They also do not deny that the recent District of Arizona case of *Tohono O'odham Nation v. Ducey*, No. 15-CV-01135, 2015 U.S. Dist. Lexis 124979, at *18 (D. Ariz. September 17, 2015) is "similar" to this case and therefore persuasive authority. (Pls.' Resp. to Mot. at 7.) However, they attempt to distinguish *Tohono* on the basis that the officials in *Tohono* made statements to the gaming board whereas here Governor Martinez and Ritchie made public statements. This claimed distinction is immaterial. The critical issue, as the *Tohono* court recognized, is the fact that the officials in *Tohono* (and Governor Martinez and Ritchie here), "have not written directly to the Nation or otherwise directly threatened enforcement of the law against the Nation." 2015 U.S. Dist. Lexis 124979, at *18. Furthermore, as in *Tohono*, "the Nation cites no state law that gives [Governor Martinez and Ritchie] authority to deny [or revoke] certificates" or licenses. *Id.* Accordingly, as in *Tohono*, there is an "absence of a 'fairly direct' connection" between Governor Martinez and Ritchie and the actions taken by the New Mexico Gaming Control Board ("NMGCB") with regard to its vendors' licenses to conduct business with non-Indian entities, and this Court should "grant the motion to dismiss." *Id.*

Plaintiffs' argument that they should be permitted to conduct discovery to potentially find additional information to bolster their claims against Governor Martinez and Ritchie[4] is one that this Court rejected in *Saenz*. There, the plaintiff objected to briefing the qualified immunity issue prior to being able to conduct discovery to support her claims. 2015 U.S. Dist. Lexis 55175 at *3-4. In rejecting the plaintiff's objection, this Court explained that, in the context of a motion to dismiss, "the Court will consider all factual allegations as true. Additional discovery would not

[4] Moreover, even if Plaintiffs were able to obtain the documents that they baldly speculate would support their suspicion that Governor Martinez and Ritchie influenced the actions of NMGCB, Governor Martinez and Ritchie's influence over the NMGCB's decisions would only place this case even more closely in line with *Tohono*, where the court dismissed the claims against the officials even though they influenced the gaming board's decision to deny the Tribe's gaming certification. *See Tohono*, 2015 U.S. Dist. Lexis 124979, at *16-18.

assist Saenz in responding to the MTD, because the Court would not consider additional discovery." *Id.* at *25-26. As in this case, "the only use that discovery could provide in responding to the MTD would be to allow [Plaintiffs] to more fully understand [their] claims and then amend the complaint." *Id.* at *26. This Court found that "[t]his use is not an appropriate use of discovery in response to a qualified immunity defense. Once the qualified immunity defense has been raised, the Court must not let a plaintiff use discovery as a fishing expedition to flesh out the merits of his claim." *Id.* (internal citations and quotations omitted).

For the reasons discussed above and in the Motion, the Court should dismiss Count IV of Plaintiffs' Complaint on the basis of qualified immunity.

Respectfully submitted,

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

By: *[/s/ Krystle A. Thomas]*

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, 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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