UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe; et al.,

Plaintiffs,

vs. Case No. 1:15-cv-00625 JB/GBW

STATE OF NEW MEXICO, et al.,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COUNT II OF PLAINTIFFS' COMPLAINT

Defendants Susana Martinez ("Governor Martinez"), Jeremiah Ritchie ("Ritchie"), Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene (together the "Individual Defendants") submit this reply in support of their Motion to Dismiss Count II of Plaintiffs Pueblo of Pojoaque and Joseph M. Talachy's (together "Plaintiffs")[1] Complaint (Dkt. No. 72) ("Motion"). Count II should be dismissed because it is now undisputed that the Supremacy Clause, upon which Count II is based, does not create a right of action. The sovereignty rights that Plaintiffs claim, moreover, are not rights held by Talachy or the individual members of the Pueblo, and Talachy therefore has no standing to bring Count II. Furthermore, Plaintiffs have identified no federal right that the Individual Defendants have violated by regulating third party licensees pursuant to the State's police power, and in any event neither IGRA nor any other federal law preempts New Mexico's enforcement of its gaming laws and regulations applicable to non-Indian manufacturers' dealings with non-Indian operators off tribal lands. Finally, Governor Martinez and Ritchie should be dismissed for the additional

[1] Plaintiffs did not clarify whether Count II is being brought by Plaintiffs or only Joseph M. Talachy ("Talachy").

reason that Plaintiffs' sole allegation against them fails to state a claim upon which relief can be granted.

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

In response to the Individual Defendants' argument that the Supremacy Clause is not a source of any right and does not create a cause of action, Plaintiffs argue that the District of Arizona stated that it "is not convinced that Congress intended to foreclose an equitable cause of action asserting preemption." *Tohono O'odham Nation v. Ducey*, No. 15-CV-01135, 2015 U.S. Dist. Lexis 124979, at *32 (D. Ariz. September 17, 2015). The point is inapposite. Count II is not a cause of action brought pursuant to the Court's equitable power. It is a cause of action explicitly "based on the Supremacy Clause." (Compl. ¶¶ 133, Dkt. No. 1.) And *Tohono* confirms the United States Supreme Court's conclusion that "the Supremacy Clause is not, however, 'the source of any federal rights, and certainly does not create a cause of action.'" *Tohono*, 2015 U.S. Dist. Lexis 124979, at *16-18 (quoting *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015)). Accordingly, Count II, as pled, undisputedly fails to state a claim upon which relief can be granted and must be dismissed.

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

As explained in greater detail in the Motion, the Individual Defendants' December 4, 2015 Motion to Dismiss Count IV on the Basis of Qualified Immunity (Dkt. No. 60), and Defendants' Reply in support of their Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015 Preliminary Injunction, and for Relief Pursuant to Fed. R. Civ. P. 62.1 (filed concurrently with this reply), which the Individual Defendants incorporate by reference, federal law neither applies to nor preempts the State's enforcement of its licensing laws applicable to non-Indian Gaming manufacturers that sell equipment to non-Indian gaming

operators off tribal lands.[2] Plaintiffs' expansive interpretation of IGRA's preemptive scope would confer a derivative immunity from state regulation on non-Indians doing business outside the Pueblo. There is no support for such a view. On the contrary, "Tribes do not have supersovereign authority to interfere with another jurisdiction's right to enforce laws within its borders." *Muscogee Creek Nation v. Pruitt*, 669 F.3d 1159, 1182 n. 11 (10th Cir. 2012) (internal quotation marks and citation omitted). Accordingly, Plaintiffs have failed to allege facts that would support a claim that the Individual Defendants violated their federal rights, and therefore Count II of Plaintiffs' Complaint should be dismissed.

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

As explained in greater detail in the Motion and Defendants' Reply in support of their Motion to Dismiss Counts III and IV of Plaintiffs' Complaint (filed concurrently with this reply), which the Individual Defendants incorporate by reference, Talachy has no standing to bring Count II, either on his own behalf or on behalf of any other members of the Pueblo, because

[2]At the January 12, 2015 hearing in this matter, the Court queried counsel whether the preemption analysis that applies in other contexts, *see, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), applies in an Indian law context.

In some areas of Indian affairs, the courts have resolved preemption questions on the basis of a balancing of federal, tribal and state interests. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (resolution of states' authority over the conduct of non-Indians engaging in on-reservation activity "has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *Bracker*; state jurisdiction over non-Indians acting on tribal reservations "is preempted … if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of state authority"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-22 (1986) (*New Mexico v. Mescalero* balancing test governed preemption of state regulation of gaming activities on Indian land). The *Bracker* balancing exercise is not, however, applicable to state authority over non-Indians *outside* of tribal lands. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 101 (2005) (no preemption where state asserts jurisdiction over non-Indians engaging in activity off Indian lands; "[U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequence.").

IGRA, however, "is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." S. Rep. No. 100-446, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071. Thus, the first prong of the *Cipollone* test – Congress has enacted a statute that expressly preempts state law, 505 U.S. at 516 – is applicable. The question for the Court therefore reduces to establishing the bounds of IGRA's preemptive scope and determining whether they extend to the actions of the State that are the subject of Plaintiffs' Complaint. For all the reasons set forth in their Motion to Reconsider and Reply filed in connection therewith, Defendants submit that those actions are not preempted.

neither Talachy nor any of the other members of the Pueblo are sovereigns or have sovereignty rights.

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

While the foregoing analysis applies equally to Governor Martinez and Ritchie, they have yet another basis for dismissal of Count II: 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 *Tohono* case is "similar" to this case and therefore persuasive authority. (Pls.' Resp. to Mot. at 5.) 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 [Pueblo] 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.*

Furthermore, although Plaintiffs make the bald assertion that "[t]he actions of Governor Martinez and Mr. Ritchie constituted, and continue to constitute threats to licenses doing

business with the Pueblo, and are part of the State's unlawful attempt to assert jurisdiction over the Pueblo's gaming activities," (Pl.'s Resp. to Defs.' Mot. at 6, Dkt. No. 86), Plaintiffs provide no authority to support the position that these statements, by themselves, can constitute the basis for a cause of action against Governor Martinez and Ritchie. Plaintiffs instead claim that Judge Brack so found, but that is simply not the case. Judge Brack only mentions these statements once – in the background section of his memorandum opinion and order. (10/7/15 Brack Memo. Op. & Order at 4, Dkt. No. 31.) Nowhere does Judge Brack state, as Plaintiffs claim, that these statements were even "part of the actions that caused him to conclude that 'Plaintiffs have established that the Individual Defendants are attempting to enforce state gaming regulations on the Pueblo's Indian lands in the absence of a tribal-state compact,'" (Pl.'s Resp. to Defs.' Mot. at 6 (quoting 10/7/15 Brack Memo. Op. & Order at 15)), besides sufficient, in and of themselves, to state such a claim.[3]

Apparently recognizing that these statements alone are insufficient to state a claim against Governor Martinez and Ritchie, Plaintiffs argue that they should be permitted to conduct discovery to potentially find additional information to bolster their claims against Governor Martinez and Ritchie.[4] This Court considered and rejected this argument in *Saenz v. Lovington*

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[3] Moreover, preliminary injunction rulings are not binding in the context of ruling on a subsequently filed motion to dismiss:

> 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 … 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.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2nd Cir. 1953). *Accord, City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992) (preliminary injunction fact findings reversed on summary judgment); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1211 (D.N.M. 2010) (court declined to follow conclusion of law contained in order denying preliminary injunction motion).

[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*,

Muni. Sch. Dist., No. 14-1005, 2015 U.S. Dist. LEXIS 55175, *11 (D.N.M. April 6, 2015)(Browning, J). There, 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 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). The same is true here. In the context of a motion to dismiss, Plaintiffs should not be permitted to use discovery as a fishing expedition to bolster their claims. Because Count II, as pled, is legally deficient, dismissal is warranted.

For the reasons stated above and in the Motion, the Individual Defendants respectfully request that the Court dismiss Count II of Plaintiffs' Complaint.

Respectfully submitted,

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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.

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 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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