IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS, *Plaintiff/Counter-Defendant*,	§	
v.	§	
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR, *Defendants/Counter-Plaintiffs.*	§	EP-17-CV-179-PRM

PLAINTIFF/COUNTER-DEFENDANT STATE OF TEXAS'S REPLY IN SUPPORT OF MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

Defendants' response to Texas's motion to dismiss (Doc. 98) does not show how their counterclaims add to the existing litigation. Nor does overcome Texas's sovereign immunity. These deficiencies warrant dismissal of Defendants' counterclaims.

A. Defendants' First Four Counterclaims Are Redundant.

All parties to this litigation agree that some form of gaming is being conducted on the Ysleta del Sur Pueblo's reservation. *See* First Amended Complaint, Doc. 8 ¶15; Amended Answer to First Amended Complaint and Counterclaim, Doc. 87 ¶29 ("Bingo is offered at Speaking Rock Entertainment Center on the reservation and on lands of the Pueblo."). The factual questions, then, are: (1) what are those games? and (2) how do the machines that patrons use to play those games operate? *See, e.g.*, Order Regarding Magistrate's Report and Recommendation and Plaintiff's Application for Preliminary Injunction, Doc. 77 at 36 ("[T]he legality of the machines in question will

require a difficult, fact-intensive inquiry and assessment not easily resolved at this juncture."). The legal question, in turn, is whether Defendants' "gaming activities" are "prohibited by the laws of the State of Texas." *See* 25 U.S.C. §1300g-6(a).

Defendants' first four counterclaims present a duplicative inquiry, merely divided into subparts: (1) is bingo a gaming activity? (2) does Texas law prohibit bingo? (3) do the machines at Speaking Rock constitute "gaming activity"; (4) is the bingo at Speaking Rock "gaming activity"? Doc. 87 at 12–13. These questions are entirely captured by Texas's First Amended Complaint. *See* Doc. 8 ¶17-28 (asserting that the Tribe's gaming constitutes an illegal lottery and common nuisance under Texas law and identifying at least some of the reasons these activities are not charitable bingo). Defendants fault Texas for relying on Rule 12(b)(6) as the basis for its motion, *see* Doc. 98 at 3, but ignore cases holding that courts have wide discretion to dismiss counterclaims at the Rule 12(b)(6) stage when those counterclaims "seek resolution of matters that will already be resolved as part of the claims in the lawsuit." *Regus Mgmt. Group, LLC, v. Int'l Bus. Mach. Corp.*, 2008 WL 2434245, at *2 (N.D. Tex. June 17, 2008).

For these reasons and those in Texas' motion to dismiss, such dismissal is appropriate here.

B. Defendants' Fifth Counterclaim is not Legally Cognizable.

Rule 12(b)(6) also "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citations omitted). "This procedure, operating on the assumption that the factual allegations

in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding." *Id.* at 326–27. Defendants' fifth counterclaim, which seeks a declaration that "the State of Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act," Doc. 87 at 13, should be dismissed on this basis.

The Restoration Act provides Texas a cause of action for civil injunctive relief in federal court to enjoin violations of State gaming law. 25 U.S.C. §1300g-6(c). Defendants cite no authority for the proposition that Texas is violating the Restoration Act in pursuing the exact cause of action Congress provided for. In fact, in this and prior litigation, this Court has reached the opposite conclusion. *E.g., State of Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-cv-00320-KC (W.D. Tex. Mar. 10, 2017), Doc. 625 at 3 (noting that Texas "may seek to file a new case in this Court seeking injunctive relief, if it has reason to believe Defendants are otherwise in violation of the Restoration Act."); Order Denying Motion to Dismiss, Doc. 76 at 9 ("Plaintiff has pleaded a plausible claim that Defendants are engaged in an activity in violation of Texas law.").

Indeed, even if Defendants were to prevail in this matter—that is, if the Court were to find that Defendants' gaming activities do not violate Texas law—Texas still would not have violated the Restoration Act by pursuing its claim. It merely would have pursued a claim unsuccessfully, and there is no authority for the proposition that unsuccessful pursuit of a claim under the Restoration Act *violates* the Restoration Act (or any law, for that matter). Similarly, to the extent Defendants'

fifth counterclaim can be construed as a request for declaratory relief that their activities are lawful bingo (because it certainly could not violate the Restoration Act to attempt to enjoin *unlawful* bingo), that request should be dismissed as duplicative of the claims already at issue. *See* Section (A), *supra*.

Defendants' fifth counterclaim should be dismissed.

C. Sovereign Immunity Bars Defendants' Equal Protection Claim.

In their response, Defendants clarify that they are not seeking an award of damages. Doc. 98 at 1,[1] 10[2]. Nor can they seek attorney's fees, as they fail to refute the case law holding that the Declaratory Judgment Act does not provide a basis for such an award.[3] *See Self-Ins. Inst. of Am., Inc. v. Korioth*, 53 F.3d 694, 697 (5th Cir. 1995) (noting that the Declaratory Judgment Act "does not provide statutory authority for an award of attorneys' fees."). Defendants' response makes clear that they seek only "a declaratory judgment that this Counter-Defendant [the State of Texas] is violating these Counter-Plaintiffs' Constitutional right to Equal Protection under the Fourteenth Amendment to the United States Constitution." Doc. 98 at 10.

Texas's argument for dismissal is simple: a claim asserting a Fourteenth Amendment violation must be brought under 42 U.S.C. §1983 against a state official acting in his official capacity. Doc. 97 at 7–8. Defendants' Equal Protection claim fails

[1] Characterizing Defendants' counter-suit as "a declaratory judgment action seeking no relief other than a declaration that the Counter-Defendant is violating the Equal Protection guaranties in the Fourteenth Amendment to the United States Constitution."
[2] "The counterclaims do not seek any award of damages."
[3] With these concessions, Texas's reliance on absolute prosecutorial immunity as a bar to suit no longer appears relevant, as such immunity applies strictly to monetary damages. *See Supreme Ct. of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 726 (1980).

because they have not done so. *Id.*

Without citing any on-point case law, Defendants counter that they do not need to bring an *Ex Parte Young* claim because they invoke the Declaratory Judgment Act.[4] Doc. 98 at 10–12. This ignores the fact that the Declaratory Judgment Act "does not provide 'an independent basis for federal subject matter jurisdiction.'" *Michigan Corrections Org. v. Michigan Dep't of Corrections*, 774 F.3d 895, 902 (6th Cir. 2014) (citation omitted). Even though the Court has jurisdiction over Texas's Restoration Act claims, Defendants still must identify an appropriate vehicle to bring their constitutional counterclaim. The only basis on which a plaintiff can pursue an Equal Protection claim is through 42 U.S.C. §1983. *Udeigwe v. Texas Tech Univ.*, --- F. App'x ---, 2018 WL 2186485, at *3 (5th Cir. May 11, 2018). And the State of Texas cannot be sued under §1983. *E.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[A] state is not a 'person' within the meaning of §1983."). Defendants' Equal Protection counterclaim therefore fails at the outset, by Defendants' own admission. Doc. 98 at 10 ("This is not a 42 U.S.C. § 1983 action, nor is it an action against a state officer under the doctrine of *Ex Parte Young*[.]")

To avoid dismissal of their Equal Protection claim, Defendants assert that Texas waived its immunity by bringing this lawsuit. Doc. 98 at 12–14. But Defendants' response cites no analogous authority for this proposition, instead

[4] The case cited in the response that involved a declaratory judgment claim, *Lynch v. Public School Retirement System of Missouri, Board of Trustees*, 27 F.3d 336, 338-39 (8th Cir. 1994), merely confirms that properly pleaded Equal Protection claims can proceed under §1983, and attendant claims for declaratory relief can be proper where a state official is named as a defendant. This is unhelpful to Defendants, because "[t]his is not a 42 U.S.C. § 1983 action, nor is it an action against a state officer under the doctrine of *Ex Parte Young*[.]". Doc. 98 at 10.

relying upon two distinct cases. The first, *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), involved removal. It is inapposite because governmental defendants have a choice of venue in removal situations (that is, whether to litigate a case in state or federal court). In *Lapides*, Georgia law waived immunity for a state-court cause of action asserted against a governmental defendant. 535 U.S. at 616. The Supreme Court concluded that by voluntarily removing the case to federal court, that governmental defendant waived immunity to those same state-court claims in federal court. *Id.* at 624. By contrast, the Restoration Act vests exclusive jurisdiction with enforcement of Texas state gaming law in the "courts of the United States.". 25 U.S.C. §1300g-6(c).[5] Texas is not "voluntarily invoking the jurisdiction of the federal courts" in the sense *Lapides* contemplates—that is, to potentially "achieve unfair tactical advantages." 535 U.S. at 621. Rather, it is pursuing the means Congress specifically authorized for enforcement of its State gaming laws against a Tribe with some sovereign rights of its own.

Defendants' second authority, which does not bind this Court, is *Board of Regents of University of Wisconsin System v. Phoenix International Software*, 653 F.3d 448 (7th Cir. 2011). There, the court emphasized that the state asserting immunity after filing suit in federal court had several litigation options other than filing a federal action, including bringing a state court suit, filing a challenge directly in the

[5] Defendants' argument that Texas ought to "do nothing" ignores Fifth Circuit precedent authorizing these suits and holding, time and again, that Texas law functions as surrogate federal law on the Tribe's reservation. *E.g., Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334, 1336 (5th Cir. 1994). Similarly, Defendants' suggestion that Texas should simply allow the National Indian Gaming Commission (NIGC) to assume oversight over the gaming on the Tribe's reservation, Doc. 98 at 14, ignores that "Class II bingo" under the Indian Gaming Regulatory Act violates Texas gaming law.

court of appeals, or refusing to participate in the administrative proceedings that preceded the federal suit. *Id.* at 464. None of those options was available to Texas in this dispute.

Moreover, even if filing suit under the Restoration Act amounted to a waiver-by-conduct of Texas's immunity, in this context "'federal courts have consistently held that a state plaintiff does not waive its sovereign immunity with respect to all plausible counterclaims.'" *Massachusetts v. Wampanog Tribe of Gay Head,* 98 F. Supp. 3d 55, 73 (D. Mass. 2015) (quoting *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985)). Rather, a counterclaim may be asserted against a state that waives immunity by conduct only where that counterclaim "1) arise[s] from the same event underlying the state's action and 2) [is] asserted defensively, by way of recoupment, for the purpose of defeating or diminishing the State's recovery, but not for the purpose of obtaining an affirmative judgment against the State." *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. at 502 (N.D. Ill., 1985) (quotation marks and citations omitted). Defendant's Equal Protection claim seeks an affirmative judgment, rather than a recoupment of Texas's potential recovery. *E.g.,* Doc. 98 at 1, 10. It therefore does not fall within this limited exception to immunity.

Texas has not waived its immunity by suing to vindicate its laws in the manner contemplated by the Restoration Act and Fifth Circuit precedent on point. Defendant's Equal Protection counterclaim fails.

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Defendants' counterclaims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of June, 2018, a true and correct copy of the foregoing was filed using the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/Anne Marie Mackin
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