IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

GLORIA MENDOZA *et al.*,

Plaintiffs, **Case No. 1:19-cv-00991-SCY-KK**

v.

FIRST SANTA FE INSURANCE SERVICES, INC. *et al.*,

Defendants.

HUDSON INSURANCE AND TRIBAL FIRST'S
REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

I. The Pueblo of Isleta's Reservation is a Federal Enclave.

As noted in the memorandum in support of the Motion to Dismiss, and left unaddressed by Plaintiffs in their Response, a federal enclave is federal land within the borders of a state that the Constitution empowers Congress to regulate exclusively. *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1236 (10th Cir. 2012). "The central principal of federal enclave doctrine is that Congress has exclusive legislative authority over these enclaves." *Id.* at 1237. The "power of Congress over federal enclaves bars state regulation without specific congressional action." *Id*. at 1236. "This exclusive jurisdiction is 'legislative,' meaning the laws and statutes applied to these locations must be supplied by the federal government, not the states." *Id*. citing *Pac. Coast Dairy v. Dep't of Ag. of Cal*., 318 U.S. 285, 294 (1943).

Contrary to Plaintiffs' argument, the question is not simply one of land title, but instead is whether Congress has exclusive legislative authority over the land that constitutes the federal enclave. *Allison*, 689 F.3d at 1237. As the Fifth Circuit Court of Appeals noted in *United States v. Hollingsworth*:

> Instead of asking whether this case involves "federal judicial power," the Supreme Court's caselaw makes clear that we should ask a simpler question: whether the case arose in a "geographical area[ ], in which no State operate[s] as sovereign." *Marathon,* 458 U.S. at 64 (plurality opinion). The Constitution and the Supreme Court's caselaw define these areas. They include United States territories, the District of Columbia ("D.C."), **Indian territories**, and foreign areas over which the United States has jurisdiction to try American citizens by treaty.

783 F.3d 556, 561–62 (5th Cir. 2015) (emphasis added). Nowhere in their Response do Plaintiffs allege that Congress does not have exclusive jurisdiction over the Pueblo of Isleta. Indeed, they concede as much in their argument that the alleged torts at issue are somehow unrelated to their employment with the Isleta Pueblo Resort & Casino, as any admission that the harm arose out of their employment would concede federal jurisdiction, and would require naming their employer as an indispensable party, which cannot be done because of the employer's sovereign immunity.[1]

The Court may take judicial notice of adjudicative facts and its own files and records, "as well as facts which are a matter of public record." *DeBaca v. United States*, 399 F. Supp. 3d 1052, 1159 (D.N.M. 2019); *see* Fed. R. Evid. 201(a)-(d). "The most frequent use of judicial notice of ascertainable facts is in noting the content of court records." *General Elec. Capital Corp. v. Lease Resolution Corp*., 128 F.3d 1074, 1081 (7th Cir. 1997) ("A court may take judicial notice of an adjudicative fact that is both 'not subject to reasonable dispute' and 1) 'generally known within the territorial jurisdiction of the trial court' or 2) 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'").[2] Courts must take judicial notice when "a party requests it and supplies all

[1] *E.g.,* Resp. 2-3, ECF No. 8: "[t]he harms complained of did not arise out of . . . employment on a federal enclave."

[2] Courts routinely take judicial notice of geographical boundaries of Indian land within a state where jurisdiction is at issue. *State v. Cutnose*, 1974-NMCA-130, ¶¶ 29-31, 87 N.M. 307.

necessary information." *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010) (trial court erred in refusing to take judicial notice of official action taken by BIA). Defendant Hudson Insurance and Tribal First (Defendants) request that the Court take judicial notice of the fact that Congress has exclusive legislative authority over the Pueblo of Isleta's Reservation, and the generally known facts not subject to reasonable dispute set out in the Defendants' memorandum in support of the motion, and set out below, which confirm the exclusive authority of Congress (and not the State of New Mexico) over the Pueblo of Isleta's reservation.[3]

There is no dispute that these Plaintiffs are or were employed on reservation lands of the Pueblo of Isleta through its tribally owned and operated casino. That casino operates based on federal law, including a contractual agreement entered into by the Pueblo with the state of New Mexico pursuant to federal law.[4] Exclusive Congressional authority over the Pueblos in New Mexico in general, and the Pueblo of Isleta in particular, is well-established in case law:

> When, in 1541-1543, the first Spanish Conquistadors invaded what is now known as New Mexico, they found numerous established Indian agricultural communities. Among those were the Pueblos with which we are concerned [Isleta & Sandia]. The Kingdom of Spain ruled the area until 1821 when Mexico won independence. The Republic of Mexico held dominion until 1848 when, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, it ceded the area to the United States. Articles VIII and IX of that treaty protect rights recognized by other sovereigns. In 1851, Congress extended provisions of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to the Indians of the territory newly acquired from New Mexico. See 9 Stat. 574, 587. The Act of 1934 prohibited settlement on lands belonging to Indian Tribes and provided that Indians could sell their lands only to the United States. The Pueblos'

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[3] The parties moving to dismiss do not include the unserved Defendant First Santa Fe Insurance Services, Inc. Hudson and Tribal First are nevertheless identified in this reply as the "Defendants" for ease of reference. Plaintiffs apparently feel no urgency in serving First Santa Fe, which is an indication that First Santa Fe was named as a defendant for strategic reasons, including to destroy federal diversity of citizenship jurisdiction. As of November 26, 2019, there is no proof of service filed for First Santa Fe. See Dockets attached as Exhibit A.

[4] Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 et seq. *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1262 (D.N.M. 2013)("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian country [and] IGRA is a federal statute, the interpretation of which presents a federal question, suitable for determination in a federal court.")

> land titles had long been recognized by the Spanish and Mexican governments. In 1858, these titles were confirmed by Congress. 11 Stat. 374 […] The 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, specified that the term 'Indian Country' includes '**all lands owned or occupied by the Pueblo Indians'** and that such lands **are 'under the absolute jurisdiction and control of the Congress of the United States**.'

State of New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976) (emphasis added). Plaintiffs' allegation that the Pueblo of Isleta holds restricted fee title to some of its lands has no impact on the determination of whether those lands are a federal enclave because that issue is resolved by the fact that these lands, regardless of title, "are 'under the absolute jurisdiction and control of the Congress of the United States.'" *Id.* Regardless of land title status, the Tenth Circuit has held that Pueblo Indian reservations are treated the same as all other Indian lands when it comes to exclusive congressional legislative authority:

> The Pueblos received fee simple title to their lands by the 1858 Act. 11 Stat. 374. The Sandoval decision and the Candelaria decision each hold that the Pueblos are to be treated like other Indian communities. The fact that the Pueblos hold fee simple title makes no difference. Sandoval, 231 U.S. at 48, 34 S.Ct. 1.

Id. at 1111 (internal citations omitted).[5]

Finally, Plaintiffs do not cite to, let alone attempt to distinguish, the Tenth Circuit Court of Appeals' opinion addressing this very issue in the context of an Indian Pueblo. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191, (10th Cir. 2002) (*en banc*) ("state right-to-work laws are of no effect in federal enclaves such as Indian reservations.") (cited in Defendants' memorandum in support at p. 4).[6]

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[5] *United States v. Abeyta* also confirms that Pueblo lands were ceded to the United States upon the signing of the treaty of Guadalupe Hidalgo. 632 F. Supp. 1301, 1303 (D.N.M. 1986), and *United States for & on Behalf of Santa Ana Pueblo v. Univ. of New Mexico* reiterates that jurisdiction and control of Pueblo lands is exclusively with the Congress of the United States. 731 F.2d 703, 706 (10th Cir. 1984).

[6] Congress passed ancillary legislation in 1871, the Federal Enclave Act, for purposes of federal criminal jurisdiction over Indians in Indian country. *United States v. Begay*, 42 F.3d 486, 498

As the Plaintiffs recognize in their response, "a plaintiff armed with nothing more than conclusions" cannot survive a motion to dismiss. Resp. at 3(citing and quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009)). Because the Plaintiffs offer nothing more than their own opinions regarding the federal enclave status of the Pueblo of Isleta's reservation and the federally sanctioned tribal casino operating on that reservation, they have not met their burden in the Amended Complaint to overcome application of the federal enclave doctrine to dismiss their Amended Complaint.

II. Because the State Law Claims in Plaintiffs' Complaint Arose by Virtue of Plaintiffs Employment on the Pueblo of Isleta, They are Barred by the Federal Enclave Doctrine.

Plaintiffs' argument that the claims in the Amended Complaint did not arise on the Pueblo of Isleta is simply wrong. Their claims all are based on a contract that provides workers' compensation insurance to employees of the Pueblo of Isleta's Casino while the employees are working on the Pueblo of Isleta. That contract, attached as Exhibit 2 to the Amended Complaint, requires application of tribal law to claims made under the provision of the workers' compensation system adopted by the Pueblo of Isleta. Despite the unsupported and conclusory allegations in the Response, Hudson pays, and Tribal First administers, hundreds of claims made under this and similar contracts these Defendants have with Pueblos in New Mexico. *See*, *e.g.*, Exhibit B (response to notice of supplemental authority in *Mendoza* Supreme Court action). In paying and administering these claims, neither of these two private business Defendants alleges it can avoid its contractual obligations based on its own sovereign immunity. The issue of

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(9th Cir. 1994) ("to balance the sovereignty interest of Indian tribes and the United States' interest in punishing offenses committed in Indian country, Congress enacted 18 U.S.C. §§ 1152 and 1153. Section 1152 known as the Federal Enclave Act…"); *United States v. Antelope*, 430 U.S. 641, 648 n.9 (1977) ("Congress has provided for federal jurisdiction over the crime of murder on a reservation, much as on other federal enclaves.").

sovereign immunity only arises when individuals who have subjected themselves to tribal jurisdiction by contracting to work for the Pueblo of Isleta on its reservation thereafter ignore that jurisdiction and instead ask the New Mexico Courts to impose state jurisdiction on this sovereign Indian tribe, something the State's executive branch never sought nor agreed to.

Instead of addressing these issues, Plaintiffs urge the Court to make a distinction between claims arising *on* a federal enclave rather than *in* a federal enclave, arguing that a claim arising in a federal enclave cannot be barred by the federal enclave doctrine. Resp. at 5. In doing so, Plaintiffs concede that their claims arise in the Pueblo of Isleta. Yet whether in or on, that is a distinction without a difference. Resp. at 6 ("In *Abeyta*, defendant killed a golden eagle . . . **upon and within** the exterior boundaries of Isleta Pueblo" (emphasis by Plaintiffs modified)). Plaintiffs' concession that their claims arise "in" the Pueblo of Isleta is alone sufficient to confirm that under controlling law, the Amended Complaint must be dismissed.

Plaintiffs attempt to rely on *Ashland Chem. Co*. to support their misguided *on* versus *in* argument. Resp. at 5. But *Ashland Chem. Co.* supports Defendants' removal of this case and dismissal of the claims based on the federal enclave doctrine. *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) (removal of tort claims arising on federal enclave was proper). As established in Defendants' Motion, state law claims, whether arising on or in a federal enclave, are barred by the federal enclave doctrine. *Allison*, 689 F.3d 1234 (plaintiff's state law claims arising on federal enclave are barred); *Benavidez v. Sandia Nat'l Labs*., 212 F. Supp. 3d 1039 (D.N.M. 2016) (state law discrimination and emotional distress claims barred by federal enclave doctrine).

Plaintiffs also ignore the lineage of cases from the District of New Mexico cited in Defendants' Motion establishing that regardless of where decisions are made about an employee

– whether in, on or off the enclave – those decisions arose by virtue of employment on the federal enclave and thus the federal enclave doctrine applies. *Smelser v. Sandia Corp*., Civ. No. 17-388 SCY/KK, 2018 WL 1627214 (D.N.M. March 30, 2018). In *Smelser,* the court held that even though alleged discriminatory and retaliatory decisions were made off the federal enclave, those decisions concerned employment on the federal enclave and were barred, because the place of employment "is the significant factor in determining where the plaintiff's employment claims arose under the federal enclave doctrine." *Id*. at *8 quoting *Lockhart v. MVM, Inc*., 175 Cal. App. 4th 1452, 1459 (Cal. Ct. App. 2009). Months after the *Smelser* decision, the court in *Kennicott v. Sandia Corp*. conducted a comprehensive analysis of this issue, relying in part on *Smelser,* and dismissed the state law claims because the alleged harm occurred at the place of employment, regardless of where decisions at issue were made. *Kennicott v. Sandia Corp*., 314 F. Supp. 3d 1142, 1168 (D.N.M. 2018) (the critical inquiry is whether the "claims that Plaintiff asserts with regard to her employment 'arose by virtue of her employment on the federal enclave.'"). The *Kennicott* court also cited case law from other jurisdictions to support its holding that regardless of where decisions are made, those decisions stem from employment on the federal enclave. *Id*. quoting *Powell v. Tessada & Assocs., Inc*., No. C 0405254, 2005 WL 578103 (N.D. Cal. Mar. 10, 2005) (federal enclave doctrine barred state discrimination claims where decisions made in Virginia and employees worked on enclave in Northern California, because "regardless of where the decision not to retain Plaintiffs was made, the decision reflects Defendant's employment practice on the enclave. As a result, Plaintiffs cannot maintain their state law claims."); *Shurow v. Gino Morena Enterprises, LLC*, No. 3:16-CV-02844 L-KSC, 2017 WL 1550162, at *2 (S.D. Cal. May 1, 2017)(federal enclave doctrine applies to state law claims even where decisions made off the enclave because "plaintiff's place of employment was

located on the federal enclave."). Plaintiffs concede that they were employed at the Isleta Resort & Casino, on the Pueblo of Isleta. Given that concession, and because Congress has the exclusive jurisdiction to control activities on the Pueblo of Isleta, the federal enclave doctrine applies and bars Plaintiffs' state law claims.

Moreover, Plaintiffs' Amended Complaint itself belies their argument that the harm did not occur at Isleta Resort & Casino on the Pueblo of Isleta's reservation. Specifically, paragraphs 22, 23, and 24, of the Complaint allege that the state causes of action arose from injuries "while in the course and scope of [their] employment." Plaintiffs' Am. Compl. ¶¶ 22, 23, 24. Plaintiffs then incorporate those paragraphs into each of the five counts in the Complaint. Plaintiffs' Am. Compl. ¶¶ 30, 42, 48, 58, 64. Plaintiffs cannot now divorce themselves from their own allegations in the Complaint and change the locus of harm based upon Defendants' defenses. Even if Plaintiffs could change the Amended Complaint to alter where they allege their purported harm occurred, controlling law confirms that the federal enclave doctrine bars their state law claims because those claims arise out of Plaintiffs' employment on and in a federal enclave.

Plaintiffs further argue that "some" of the harm occurred "when each Plaintiff received letters denying their claims for workers' compensation benefits" and that this harm "occurred outside the Pueblo of Isleta." Resp. at 7-8. But this Court rejected an identical argument in *Smelser*: "Although plaintiff was home at the time she received her termination letter-and although that letter may have originated at Defendant's corporate headquarters in Virginia-plaintiff was the employee of a federal contractor operating on a federal enclave. Thus, her employment claims are governed by the enclave's law." *Smelser*, 2018 WL 1627214 at *8. The

Smelser court also dismissed plaintiffs state breach of contract and negligence claims as barred by the federal enclave doctrine. *Id*. at *9.

Plaintiffs' also attempt to rely on *Guidance Endodontics, LLC v. Dentsply Intern*., Inc., 663 F. Supp. 2d 1138 (D.N.M. 2009) for the proposition that harm occurs "both at the place where the acts occurred and where the legal consequences occur." Resp. at 7. But that reliance is misplaced. *Dentsply* involved a defamation claim that did not arise on a federal enclave. That court was specifically referring to harm from the defamation claim as occurring both where the person was defamed and where the economic (legal) consequences occur from that defamation, which is not material here. *Id.* at 1152.

Finally, if the Court were to agree with Plaintiffs that the place where the decisions were made is where the cause of action accrued, then Plaintiffs' Amended Complaint should have been filed in either Delaware or California where Plaintiffs allege Hudson Insurance and Tribal First are located, respectively. Plaintiffs' Am. Compl. ¶¶ 1-2, 7 & 9. Instead, Plaintiffs argue that "the harms occurred in New Mexico where each Plaintiff resides." Resp. at 3. Plaintiffs have not cited, and Defendants are unaware of, any rule or law that makes the location of receipt of a letter, even if that is a Plaintiff's residence, the location at which an employment-based tort or contract claim arises.

III. Plaintiffs' Have Not Alleged Valid Contract or Tort Claims.

In their response, Plaintiffs offer detailed argument claiming that their allegations of contract breach, negligent misrepresentation, and breach of covenant of good faith and fair dealing must survive this motion to dismiss as they all are grounded in contract law. But Plaintiffs are not a party to the contract at issue. Instead, the parties to the contract are the governmental entity, the Pueblo of Isleta, and Hudson Insurance. The Pueblo of Isleta being a

party to the contract makes the contract upon which Plaintiffs base their claim a government contract. As such, the contract must "manifest the intent to grant the third party an independent cause of action to enforce the promise. Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Shay v. RWC Consulting Group*, No. CIV 13-0140 JB/ACT, 2014 WL 3421068 at *30 (D.N.M. June 30, 2014) *citing Callahan v. New Mexico Federation of Teachers-TVI*, 2006-NMSC-010, ¶ 208, 139 N.M. 201 (internal citations omitted). When a contract is with a government entity, a more stringent test applies: "parties that benefit … are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) (a third party beneficiary cannot bring a contract claim against a government contract that does not grant the third party enforceable rights).

Additionally, Plaintiffs' argument that their claims are based on tort allegations that must be governed by New Mexico law is flawed. First, Plaintiffs' allegations that Defendants acted unlawfully preclude Plaintiffs' tort claims. *Border Area Mental Health Inc v. United Behavioral Health Inc.,* 331 F. Supp. 3d, 1308, 1318 (D.N.M. 2018). "In order to state a claim for prima facie tort, Plaintiffs must allege: 1) an intentional and *lawful* act; 2) an intent to injure the plaintiff; 3) injury to the plaintiff as a result of the intentional act; and 4) the absence of justification for the injurious act." *Id*. at 1318 (emphasis added) ("Accepting as true Plaintiffs' allegations that PCG acted unlawfully, then they cannot allege the same conduct was lawful in their prima facie tort claim."). Plaintiffs failed to plead viable tort claims because they have not alleged a tort based on lawful conduct by Defendants, but instead alleged Defendants acted unlawfully by also alleging civil conspiracy. *Id*. Additionally, Plaintiffs have not alleged facts

showing that Hudson Insurance and Tribal First acted "intentionally with a specific intent to injure them" nor have they alleged facts showing that "defendant not only intended the act, but that he also intend the harm." *Id*. at 1318-19 ("Plaintiffs bear a heavy burden of proving actual intent to injure, an intent that is quite distinct from an intent to commit an act that naturally and foreseeably results in injury.") Just as in *United Behavioral Health Inc.*, Plaintiffs' Amended Complaint here is "devoid of any allegations that [Defendants] acted with a specific intent to injure Plaintiffs." *Id*. at 1319. Where a plaintiff has not properly alleged a tort, that claim must be dismissed, along with the accompanying common-law civil conspiracy claim. *Id*.

> Further, Plaintiffs have not sufficiently alleged a civil conspiracy.
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> > To establish a defendant's liability for a civil conspiracy, plaintiffs must allege and prove: (1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result of such acts. However, unlike a conspiracy in the criminal context, a civil conspiracy by itself is not actionable, nor does it provide an independent basis for liability unless a civil action in damages would lie against one of the conspirators. A civil conspiracy must actually involve an independent unlawful act that causes harm—*something that would give rise to a civil action of its own*. (emphasis added).

Id. at 1319. Plaintiffs' averments of civil conspiracy are insufficient because they did not plead it together with a valid underlying tort, and "mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must show specifically presented facts tending to show agreement and concerted action." *Archuleta v. City of Roswell*, 898 F. Supp. 2d 1240, 1251 (D.N.M. 2012). Plaintiffs' Amended Complaint simply states, "Count V – Civil Conspiracy Between Defendants Hudson Insurance and Tribal First" without stating what Defendants allegedly conspired to do. Plaintiffs' Am. Compl. at 11. And in paragraph 66 of their Amended Complaint, Plaintiffs allege that Defendants conspired to "avoid payment of Plaintiffs' claims … for economic gain … while conducting sales transactions and administering claims" and that "in furtherance of this civil conspiracy, Defendants Hudson Insurance and

Tribal First knowingly/willfully committed numerous unlawful acts in violation of the UPA, sections 57-12-10(B) and/or 57-12-2(E)." Plaintiffs' averments are unclear as to whether they allege that Defendants conspired to violate section 57-12-10(B) or section 57-12-2(E) of the UPA. The averments in the Amended Complaint fail to specify the "numerous unlawful acts" that allegedly occurred. And in any event, violation of the Unfair Practices Act is not a tort.

Plaintiffs' arguments in their Response as to the merits of their contract claims, tort claims, and civil conspiracy claim, and those claims in the Amended Complaint, fail as a matter of law.

CONCLUSION

Plaintiffs' First Amended Complaint should be dismissed with prejudice.

Dated: November 26, 2019

Respectfully Submitted,

/s/ Randolph H. Barnhouse

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CERTIFICATE OF SERVICE

I CERTIFY that on the day of November 26, 2019, 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:

LeeAnn Ortiz, keeptaosfree@yahoo.com
Counsel for Plaintiffs

/s/ Dianna DH Kicking Woman
Dianna DH Kicking Woman