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,

Case No. 1:15-cv-00625 RB/GBW

Plaintiffs,

vs.

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.

NEW MEXICO GAMING CONTROL BOARD DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE RE CIVIL CONTEMPT

Defendants Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene, the members of the New Mexico Gaming Control Board ("Gaming Control Board Defendants"), respond as follows in opposition to Plaintiffs' November 19, 2015, "Motion for Order to Show Cause Re Civil Contempt" (Doc. 53).

By its October 7, 2015 Preliminary Injunction (Doc. 32), the Court barred the Defendants "from taking any action that threatens, revokes, conditions, modifies, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board ("Board") based wholly or in part on grounds that such licensee is conducting business with the [Pojoaque] Pueblo." However, the Court's interlocutory ruling has not resolved the State of New Mexico's dispute with the Pueblo. On the contrary, the State's police power to

enforce state law regarding non-Indian gaming manufacturers' licenses to deal with non-Indian racetrack casinos and nonprofit fraternal and veterans' organizations operating outside of tribal lands, based on the manufacturers' continued involvement with the Pueblo's now-illegal gaming operations, remains in vigorous litigation. In light of this continuing dispute, the Board justifiably and properly has deferred taking action on licenses and certifications of such manufacturers and their personnel, respectively.

Plaintiffs have now moved for a determination that the deferral decisions violate the October 7 preliminary injunction and that the Board members therefore should be held in civil contempt. The motion should be denied for several reasons. First, the Preliminary Injunction order does not prohibit the Board from deferring licensing and certification applications, nor does it mandate immediate renewal of any licenses or certifications, which is what Plaintiffs' motion seeks to achieve. Second, more generally, the deferrals clearly do not amount to enforcement action, which is the general category of conduct that is the focus of the order. Thus, the Gaming Control Board Defendants are complying with the spirit and intent as well as the letter of the Court's October 7, 2015 Preliminary Injunction. Third, the Board's deferrals clearly are justified given that the Board's authority to enforce New Mexico's gaming statutes and regulations against non-Indian manufacturers in connection with their dealings with non-Indian racetrack casinos and non-profit fraternal and veteran's organizations off tribal lands remains in sharp dispute. Fourth, because even if the applicants were relicensed, certified or recertified, they would be just as much "threatened" as a result of their continued dealings with the Pueblo as they are today, the Plaintiffs are asking the Court to engage in a meaningless exercise.

A. Facts

A lengthy response to Plaintiffs' statement of facts is not necessary. Defendants obviously do not deny that the Court issued its October 7, 2015 preliminary injunction decision and order, or what it says, or that they have received copies of it. Defendants also do not deny that the Gaming Control Board has deferred taking action on applications for the renewal of licenses, and the issuance[1] and renewal of certifications of findings of suitability, of companies and their personnel, respectively, that are doing business with the Pueblo. Further, Defendants do not deny – and have never denied or otherwise represented to the contrary – that these deferral decisions were based on the fact that these companies have continued to do business with the Pueblo since June 30 of this year. The only dispute is whether these deferral decisions constitute a violation of the October 7 Order, a proposition on which the Plaintiffs do not focus and instead simply assume, but which is obviously the fundamental predicate to their motion.

The Defendants ask the Court to note one fact that is omitted from the Pueblo's motion: the Pueblo does not claim, or even present evidence, that anyone doing business with the Pueblo feels threatened by the Board's deferral decisions or otherwise has made any decision in response to those decisions to curtail doing business with the Pueblo. In short, the Pueblo has not been injured by the deferral decisions. This is made clear by an email exchange between counsel for the Defendants and counsel for the Pueblo. Counsel for the Defendants specifically asked counsel for the Pueblo on November 17, 2015, whether the Pueblo had been injured in some manner by the deferral decisions. Counsel for the Pueblo avoided answering the question,

[1] In their Motion at 6, the Plaintiffs state that at its October 21, 2015 meeting, the Board deferred taking action on three applications for certifications of finding of suitability submitted by personnel of gaming manufacturers who have continued doing business with the Pueblo. This is not correct. While the Board deferred action on applications to renew licenses and certifications, the applicants for new certifications were issued provisional licenses which permit them to work until the Board votes on the applications. See Declaration of J. Landers, ¶ 7, attached hereto as Exhibit B.

asserting only that "[t]he elements of civil contempt do not require a showing of such injury," see Exhibit A attached hereto, but the implication is clear that the deferral decisions have had no negative repercussions from the perspective of either the Pueblo or its vendors.

B. The Law of Civil Contempt

"Civil contempt is an appropriate remedy for the enforcement of a judicial decree, but it is a severe one which should be used only when necessary to sustain the authority of the court." N.L.R.B. v. Shurtenda Steaks, Inc., 424 F.2d 192, 194 (10th Cir. 1970). Accord, MAC Corp. of Am. v. Williams Patent Crusher & Pulverizer Co., 767 F.2d 882, 885 (Fed. Cir. 1985); T.Y. v. Board of County Comm'rs, 912 F. Supp. 1424, 1427 (D. Kan. 1996).

As the Pueblo acknowledges, Mot. at 3, the predicate violation of an underlying order must be shown by clear and convincing evidence. See, e.g., F.T.C. v. Kuykendall, 371 F.3d 745, 754 (10th Cir. 2004). Moreover, the courts stress that the order at issue must itself be "clear and unambiguous," Reliance Ins. Co. v. Mast Constr. Co., 84 F.3d 372, 377 (10th Cir. 1996) (internal quotation marks and citation omitted), "definite and specific," Grace v. Center for Auto Safety, 72 F.3d 1236, 1241 (6th Cir. 1996) (internal quotation marks and citation omitted), and "in specific detail an unequivocal command," Ferrell v. Pierce, 785 F.2d 1372, 1378 (7th Cir. 1986) (internal quotation marks and citation omitted). Accord, D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 460 (7th Cir. 1993) ("a party can only be held in contempt for behavior clearly prohibited by a court order within its four corners" (internal quotation marks and citation omitted)); see generally 12 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 3022, at 202 (3d ed. 2014) ("a party may not be punished for disobeying an order that does not definitely state what it is to do or refrain from doing"). "Any ambiguities or omissions in the order will be construed in favor of [the party charged with contempt]." Reliance Ins. Co., 84

F.3d at 377. "Civil contempt … should not be resorted to where there is a fair ground of doubt as to the wrongfulness of defendant's conduct." MAC Corp. of Am., 767 F.2d at 885. While there is no good faith exception to the requirement of obedience to a court order, "a person should not be held in contempt if his action appears to be based on a good faith and reasonable interpretation of the court's order." In re Dual-Deck Video Cassette Antitrust Recorder Litig., 10 F.3d 693, 695 (9th Cir. 1993).

The Pueblo is simply wrong in contending that injury is not part of the civil contempt analysis: "[W]here the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by the continued contumacy…." United States v. United Mine Workers of Am., 330 U.S. 258, 304 (1947). "Assuming [the moving party] can prove these elements [defendant had actual notice of an order, the order was in effect at the time of the alleged violation, and the order was clear and unambiguous], it must also demonstrate actual damages." Reliance Ins. Co., 83 F.3d at 377 (citing Gemco Latinoamerica, Inc. v. Seiko Time Corp., 61 F.3d 94, 100 (1st Cir. 1995) (a party "is liable in a civil contempt proceeding only for actual damages")).

C. New Mexico Gaming Law and Regulations

The Pueblo's motion reflects a basic misunderstanding of New Mexico's Gaming Control Act, NMSA 1978, §§ 60-2E-1 et seq., and its implementing regulations, NMAC 15.1, in particular, their interrelationship. See generally Declaration of J. Landers, ¶¶ 1-6, attached hereto as Exhibit B.

Section 60-2E-16(H) provides that, "After issuance, a license, certification or permit shall continue in effect upon proper payment of the initial and renewal fees, subject to the power of the board to revoke, suspend, condition or limit licenses, certifications and permits." The

Gaming Control Board historically has construed and applied this statute to permit licenses, certifications and permits to remain in effect past their nominal expiration date, pending Board action on a pending renewal application. Under New Mexico law, the Board's construction of its authorizing statute and the regulations it has promulgated and enforces is entitled to deference. Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 32, 147 N.M. 583 (when agency construes its governing statute, court will accord deference to agency's construction of it); Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n, 2006-NMCA-115, ¶ 25, 140 N.M. 464 ("we afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation, and we give deference to an agency's interpretation of its own regulations"); Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n, 2001-NMCA-047, ¶ 17, 130 N.M. 497 (when statute is unclear, court affords an agency's interpretation substantial weight; when agency interprets a rule or regulation in a manner that complies with the statute, court will affirm the regulation).

The Board does not dispute that the language of NMAC 15.1.13.11 and 15.1.13.12, which the Pueblo quotes in its motion, at 13, can be construed in a manner that is in conflict with section 60-2E-16(H). NMAC 15.1.13.11 provides that:

> No licensee shall engage in any gaming activity unless the licensee has received a renewed license from the board. Any licensee that fails to renew its license as required by the act and this rule shall cease the gaming activity authorized by the license on the date the license expires. Engaging in any gaming activity without a renewed license shall subject the licensee to fines and penalties as determined by the board.

NMAC 15.1.13.12 provides that, "All licenses shall expire annually on the anniversary date of the original issuance and will be subject to renewal on an anniversary date basis." However, the Board has construed and applied them in a reasonable and pragmatic manner to be consistent with Section 60-2E-16(H): so long as the licensee has applied for renewal in a timely manner, it

will not be penalized by the fact that the Board has not taken action, or deferred action, on or before the license expiration date. In any event, "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail." Jones v. Employment Servs. Div., 1980-NMSC-120, ¶ 3, 95 N.M. 97. Accord, State v. Bowden, 2010-NMCA-070, ¶ 10, 148 N.M. 850.

The Pueblo points to NMAC 15.4.3.16, which addresses renewal of licenses to engage in bingo, raffle and pull-tab games. Mot. at 13-14. The language of that regulation is similar to NMAC 15.1.13.11, and in view of it the Board at its November 18, 2015 meeting granted a variance to bingo, raffle and pull-tab licensees who had filed timely license renewal applications but who faced the possibility that their license anniversary dates might pass before the Board acted on their renewal applications. The Pueblo fails to acknowledge a key difference between NMAC 15.4.3.16 as opposed to NMAC 15.1.13.11 and .12: there is no statute applicable to bingo, raffle and pull-tab licenses similar to Section 60-2E-16(H). That is, no statute is in place that prevails over NMAC 15.4.3.16 to the extent the latter operates to bar those licensees from continuing to engage in the licensed activity after the anniversary date. In contrast, Section 60-2E-16(H) unquestionably prevails over NMAC 15.1.13.11 and .12. It is for that reason that it was not necessary for the Board to issue variances to the 36 vendors and their personnel whose renewal applications are discussed in the Pueblo's motion.

D. Argument

The Court's October 7 Preliminary Injunction bars the Defendants "from taking any action that threatens, revokes, conditions, modifies, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo." The Gaming

Control Board Defendants have not violated this order by deferring action on the license and certification applications of those entities and their personnel, respectively, that are doing business with the Pueblo, given that the entities and persons may continue to act under their pending applications for the full extent of any period of deferral.

First, and most obviously, the order does not "clearly and unambiguously" or "in specific detail" and by "an unequivocal command," or even implicitly, bar the Board from deferring these decisions.

Second, and moreover, the Board is complying with both the letter and the spirit of the preliminary injunction. The Court has prohibited the Board from either taking or threatening to take license enforcement action by either (1) changing the licensee's status (revoking, conditioning or modifying the license) or (2) otherwise punishing the licensee (the only non-licensing sanction available to the Board is a fine). If the Board wished to take any of these actions, it would have to initiate an administrative proceeding pursuant to NMSA 1978, §§ 60-2E-32, -59. The Board has taken no such action. On the contrary, the Board has simply postponed taking any action. A postponement of taking action cannot be equated with taking action.

Third, the Board's deferral decision is justified. There is no question that there is a substantial issue which remains in litigation before both this Court and the United States Court of Appeals for the Tenth Circuit regarding the status of the Pueblo's gaming operations and the ability of the State to enforce its gaming laws and regulations. In particular, the Defendants contend that the Court clearly erred in enjoining them from taking action regarding the licensure of non-Indian manufacturers to engage in dealings with non-Indian racetrack casinos and nonprofit fraternal and veterans' organizations operating outside of tribal lands, based on the

manufacturers' continued involvement with the Pueblo's illegal gaming operations. See, e.g. Defendants' December 4, 2015 Motion to Dismiss Count IV on the Basis of Qualified Immunity (Doc. 60). The Defendants will pursue multiple avenues of relief against the Preliminary Injunction and to otherwise oppose the Complaint. The Defendants will fully comply with the Preliminary Injunction while it remains in place, but pending resolution of this dispute, the Board properly may defer taking action on the licenses and certifications in question.

Fourth, if the Board's deferral action truly amounted to a "threat," then one logically would expect to find someone who feels "threatened." But the Pueblo itself does not claim that it feels that its gaming operations are threatened by the license and certification deferrals. More fundamentally, the Pueblo also does not claim that any licensee or certification holder whose application or renewal application has been deferred feels threatened. Similarly, no one feels threatened or even concerned about the continued validity or effectiveness of his, her or its license or certification due to the language of NMAC 15.1.13.11 and .12. In other words, the Pueblo cannot establish that it has suffered any injury, even assuming solely for the sake of argument that the Board's deferral decisions amounted to a technical violation of the October 7 order.[2]

Fifth, the Pueblo is elevating form over substance, and thereby burdening the Court with an immaterial point. Because the Defendants have – properly and within their rights – voiced

[2] This was the point of several of the observations that the Defendants' counsel made in his October 26 and November 4, 2015 emails to Plaintiffs' counsel, Mot. Ex. C (attachment one): "the deferral action does not affect the vendors' ability to continue doing business" (explaining that, pursuant to Section 60-2E-16(H), the licenses will remain in effect until such time as the Board takes formal action); "to the Board's knowledge based on correspondence received by the Board's staff from the manufacturer's representatives, the manufacturers are continuing to do business with the Pueblo. The Board's staff has received no correspondence or other communication from any manufacturer advising that it has stopped doing business with the Pueblo based on the Board's deferral decisions. In fact, the Board's staff has received notification from one of the manufacturers advising that it shipped gaming devices to the Pueblo's gaming operators following the October 21 Board meeting." See also Landers Decl., ¶ 8. The Court can note that, had the Plaintiffs believed their interests were truly threatened by the deferral decisions, they surely would have filed their motion immediately following the Board's October 21 meeting instead of waiting until approximately a month later.

their disagreement with the Court's October 7 order, the licensee and certificate holders whose applications were deferred would be just as "threatened" even if the Board had issued or renewed their licenses and certifications. These entities and individuals are continuing to do business with the Pueblo. In compliance with the Preliminary Injunction and while it remains in effect, the Board will not take any enforcement action against these entities and individuals. However, if it turns out that the State should not have been enjoined, then the Board properly could revoke any new or renewed licenses and certifications, or variances as the Plaintiffs urge, just as easily as it could refuse to approve the currently-deferred applications. Either way, the potential risk arising from continuing to do business with the Pueblo remains the same. The Pueblo's motion is meaningless.

E. Conclusion

Plaintiffs' motion to have the Gaming Control Board Defendants held in contempt is baseless and should be summarily dismissed.

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CERTIFICATE OF SERVICE:

I hereby certify that on December 7, 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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