

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (Northern (Jackson))**

HOWARD BROWN and	)	
BRANDON SIBLEY,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Civil Action No. 3:22-cv-00256-DPJ-FKB
	)	
CHOCTAW RESORT	)	
DEVELOPMENT ENTERPRISE,	)	
ET AL.,	)	
	)	
Defendants.	)	
	)	

**REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE
CLAIMS UPON WHICH RELIEF CAN BE GRANTED UNDER 42 U.S.C. § 1983**

COME NOW the Defendants by and through their counsel of record, C. Bryant Rogers, VanAmberg, Rogers, Yepa, Abeita, Gomez & Wilkinson, LLP, and for their Reply to “Plaintiffs’ Motion to Strike Defendants’ Motion to Dismiss” (Docs. 9 and 10), state as follows:

1. Defendants understand Plaintiffs’ “Motion to Strike” to constitute a response to both of Defendants’ pending Motions to Dismiss and the Memoranda filed in support of those Motions. (Docs. 4-7).

2. This Reply is filed in support of Defendants’ “Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, for Failure to State Claims Upon Which Relief Can Be Granted Under 42 U.S.C. § 1983.” (Docs. 4 and 5).

3. For the reasons set out below, Plaintiffs’ new submission does not contravene Defendants’ prior showing that Plaintiffs’ Complaint fails to allege any factual basis for their 42 U.S.C. § 1983 claim and it remains the case that instead of pleading facts which support a claim that Defendants acted under color of state law (as required to state a valid § 1983 claim),

Plaintiffs’ new submissions of 7/11/2022 (Docs. 9 and 10) further confirm that Plaintiffs’ core claim is that Defendants violated their rights through actions Defendants took under color of tribal law, not under color of state law. This is confirmed by the following excerpts from Plaintiffs’ submission at Doc. 9:

¶ 13:

Plaintiffs have alleged the causation for an Article III standing court is Chief Cyrus Ben’s Ordinance 2020-06-B (hereinafter ‘ordinance’) which imposed administrative restrictions on living, breathing, and sentient men and women which exceeded the scope of the Chief’s authority. (Health Defense Fund).

¶ 19:

Plaintiffs have alleged and still contend today, that Chief Cyrus Ben’s Ordinance was then, and still remains the causation of the injury to the Plaintiffs.

¶ 37:

Plaintiffs have carefully plead, with specificity, every essential element required for such allegations. Plaintiffs continue to allege that Chief Cyrus Ben’s ordinance was the nexus that created a systematic loss of institutional control and a discriminatory environment, absent of any legal or lawful authority.

Likewise, in Plaintiffs’ Memorandum filed at Doc. 10, Plaintiffs’ admit at page 1:

Plaintiffs have maintained that the initial causation of injury to the Plaintiffs was a proximate result of an unconstitutional ordinance.

4. At the Doc. 10 Memorandum, unnumbered page 2, Plaintiffs—disregarding the critical and controlling distinction for § 1983 purposes between allegations of actions taken under state law and actions taken under tribal law—state:

Plaintiffs, have plead sufficiently, that constitutional rights¹ were violated without any legal or lawful authority. Semantics over the wording of “tribal” law

¹ Defendants did not originally identify the following issue as a separate grounds for dismissal of Plaintiffs’ 42 U.S.C. § 1983 claim. However, Plaintiffs’ repeated reference to the “Constitutional” claims they have pled (Doc. 9, ¶s 4, 6, 8, 12, 21, 24, 26, *and see*, their Complaint, ¶s 84-98, 107-116) prompts Defendants to call to the attention of the Court that to the extent Plaintiffs’ § 1983 claim depends upon allegations of such “Constitutional” violations, that

or “state” law, does in no way abrogate responsibility away from Chief Cyrus Ben, William Sonny Johnson, nor any of the unnamed Defendants, who worked directly or indirectly, by and through the ordinance of Chief Cyrus Ben, chilling and deterring Plaintiffs from exercising their freedoms and liberties as enumerated in the Bill of Rights.

5. Yet, Plaintiffs admit at unnumbered page 5 of their Doc. 10 Memorandum that one of the essential elements of their § 1983 claim are factual allegations “that the conduct complained of was committed by a person acting under color of state law” and that to adequately plead a § 1983 claim Plaintiffs must allege facts showing that “the party charged with an alleged constitutional deprivation ‘may fairly be said to be a state action.’”

6. In an effort to avoid the legal consequences of the “under color of state law” requirement, Plaintiffs suggest in their Doc. 9 submission at ¶ 9 that:

It is a FACT, that the Mississippi Band of Choctaw Indians, by and through their Chief Cyrus Ben, issued an ordinance that coincided with the actions of many state governor’s mandates, state health department’s advice, suggestions by the CDC, and recommendations by federal agencies that did little more than to suggest, advise, and recommend, not force, as plead in Plaintiffs’ Complaint. (Preliminary Statement and 4th Federal Question in the Complaint)

Plaintiffs also argue at unnumbered page 5 of their Doc. 10 submission that:

Plaintiffs have plead, with specificity, that the arbitrary actions of Chief Cyrus Ben were not that of a Sovereign acting independently on their own, but rather following the path of states and federal agencies. To maintain an action under section 1983 against the individual defendants, the Plaintiffs must instead show:

triggers another grounds for dismissal of Plaintiffs’ § 1983 claim. This is because none of the Constitutional protections of the Bill of Rights imposed on the federal government by the Fifth Amendment or on the States by the Fourteenth Amendment, apply to Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Talton v. Mayes*, 163 U.S. 986 (1896). As noted by Plaintiffs (Doc. 9, ¶s 13, 14), the Congress has imposed similar federal law restrictions on Indian tribes via the Indian Civil Rights Act (“ICRA”), 25 U.S.C. §§ 1301, 1302 and the MBCI has incorporated the same standards into its own Tribal Constitution. However, there exists no private right of action to enforce these ICRA standards in federal court, *Santa Clara Pueblo*, *supra* at 69-80; and, allegations of violations of the Tribe’s own Constitutional provisions are not actionable under § 1983 and do not otherwise state federal questions under 28 U.S.C. § 1331. *See*, authorities cited at Doc. 5, pp. 5-6.

(1) that the conduct complained of was committed by a person acting under the color of state law; ... (Emphasis added).

Initially, nowhere do such allegations appear in the Complaint; but, even if Plaintiffs had included these allegations in their Complaint they would not be sufficient to show that the Tribal Council's enactment of Ordinance 50-A or Chief Ben's issuance of and tribal staff's enforcement of the Chief's Executive Order implementing that ordinance via promulgation of the Covid-19 mask mandate challenged by Plaintiffs were the product of some kind of "conspiracy" with state actors nor would they be sufficient to satisfy the State "public function" test, the "nexus" test or the State "compulsion" test nor would they otherwise satisfactorily allege any kind of "joint action" with state actors necessary to establish (even at the pleading level) that the Defendants' actions were taken under color of state law sufficient to validate their § 1983 claim. *See, Marvin Jones v. Tyson Foods, Inc.*, 971 F.Supp.2d 632 (N.D. Miss. 2013) (to state a valid § 1983 claim against a non-State party plaintiff must allege facts showing that the non-State party entered into a conspiracy with or willfully engaged in joint action with a state actor or engaged in conduct which if proven would satisfy the "nexus" or State "compulsion" test); *accord, Broughton v. Livingston Independent School District*, 2009 WL 10707489 (E.D. Texas 6/11/2009), and cases there cited.

CONCLUSION

As previously shown at Docs. 4 and 5, it remains the case that Plaintiffs' Complaint does not contain any factual allegations that if true would establish that any of the conduct complained of (requiring Plaintiffs to comply with a tribal Covid-19 mask mandate at a tribal facility on the Choctaw Reservation established by a Choctaw Tribal Ordinance) was committed by Defendants acting under color of state law. Hence, the Complaint fails to state a 42 U.S.C. § 1983 claim upon which relief can be granted; and, in the alternative, fails to invoke this Court's subject

matter jurisdiction to adjudicate that claim. Thus, Plaintiffs' § 1983 claim should now be dismissed.

Respectfully submitted,

VanAMBERG, ROGERS, YEPA, ABEITA
& GOMEZ, LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the Plaintiffs by United States Mail, postage prepaid, on July 18, 2022.

/s/ C. BRYANT ROGERS
C. BRYANT ROGERS