

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

STATE OF NEW MEXICO ex rel KENNETH GOMEZ,

Plaintiff,

vs.

No. CIV 10-00594 JP/LFG

ELEVENTH JUDICIAL DISTRICT COURT,

Defendant.

**DEFENDANT’S RESPONSE TO MOTION FOR JUDICIAL NOTICE UNDER
RULE 201 OF DEFENDANT’S PART IN RACKETEERING ACTIVITY [Docket No. 44]**

Defendant, Eleventh Judicial District Court, through its attorneys Robles, Rael & Anaya, P.C. (Luis Robles, Esq.) states the following for its Response to Motion for Judicial Notice under Rule 201 of Defendant’s Part in Racketeering Activity [*Docket No. 44*]:

INTRODUCTION

In his motion, Plaintiff, Kenneth Gomez (“Gomez”) requests a finding from this Court that Defendant and other non-parties to this lawsuit violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, (“RICO”) by engaging in a pattern of racketeering activity. *See [Docket No. 44, pp. 1-2 & Docket No. 45, pp. 5-7]*. Specifically, Gomez charges the following:

Two or more organized groups of persons engaged in common purposes so that each are agents and principals of each other promoting the objective of perpetuating the same current illegalities form joint enterprises and each enterprise operate separate patterns of racketeering activity. The Defendant District Court or components thereof who were not covered with penal bonds mandated by both constitutions and applicable state laws participated in the separate patterns of racketeering, by and through the same law firm and attorney, involving the crimes of money laundering, mail and wire fraud, and defrauding the United States. The two

enterprises involved and exercised separate, independent federal district courts with equal power and authority for a common purpose of perpetuating the identical illegalities of denying the power of both constitutions and the New Mexico statutory authorities giving those powers effect. Therefore, the Defendant District Court, by and through ROBLES, RAEL, & ANAYA, P.C., and Luis Robles, their attorney and law firm in both cases, was a component of racketeer influenced corrupt organizations for the common purpose of perpetuating current illegalities denying the power of both constitutions and the state statutory authorities giving effect to those powers.

THEREFORE, there are persons within the State and District of New Mexico holding state or federal public office positions under false pretenses allied with others, in and out of public office, and organized in a joint enterprise to perpetuate the current constitutional and statutory illegalities. State and federal persons/ agencies, and some not state public employees, form joint enterprises as both agents and principals of each other who are engaged in separate patterns of racketeering activity independent of the organized community interest perpetuating the current illegalities of denying the power of both constitutions and the ancillary state statutes giving those powers effect.

See [Docket No. 45, pp. 7-8].

As a matter of law, however, Gomez' RICO claims against the Eleventh Judicial District Court and its judges are barred. In the alternative, Gomez cannot state an actionable claim under federal criminal statute because Gomez is a private citizen, not a federal prosecutor. For these reasons, this Court should deny the relief requested by Gomez' Motion for Judicial Notice under Rule 201 of Defendant's Part in Racketeering Activity *[Docket No. 44]*.

STATEMENT OF THE FACTS

As stated in the Complaint, the relevant facts are these: Since 1963, judges of the Eleventh Judicial District have entered a series of judgments against Gomez. *See [Docket No. 8-1, pp. 7 & 9 (Exhibit 1)]*. According to Gomez, the judges who entered the judgments against Gomez have done so without the corporate surety bond required by State law. *See [Docket No. 8-1, p. 3]*. For

the deprivation of his constitutional rights, Gomez claims that he is entitled to damages in the amount of \$100,000.00. See [Docket No. 8-1, p. 7]. Despite spanning nine pages, these are all the facts which Gomez alleged in his Complaint. See [Docket No. 8-1, pp. 1-9].

CAUSES OF ACTION SUBJECT TO DISMISSAL

In his Complaint, Gomez alleged the violation of his federal constitutional rights. See [Docket No. 1-3, ¶¶ 43-63]. More specifically, Gomez claims that Defendant violated his Fourteenth Amendment rights in the following manner:

[Defendant has] severely injured him by denying him constitutional rights under Sections 1, and 3, Fourteenth Amendment and all civil rights laws giving the said constitutional powers effect. In addition, said decisions and judgments have damaged his personal character without recourse, since there are no persons who have acquired title to positions as judges in any State of New Mexico courts of law, and since there are no courts of law to which he could appeal the non-competent judgments rendered.

See [Docket No. 8-1, p. 1]. Unfortunately, Gomez' Complaint does not elsewhere plead his claim with greater clarity. See [Docket No. 8-1, pp. 1-9].

LEGAL ARGUMENT

I. AS A MATTER OF LAW, GOMEZ' RICO CLAIMS AGAINST THE ELEVENTH JUDICIAL DISTRICT COURT AND ITS JUDGES ARE BARRED.

In his motion, Plaintiff, Kenneth Gomez ("Gomez") requests a finding from this Court that Defendant and other non-parties to this lawsuit violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, ("RICO") by engaging in a pattern of racketeering activity. See [Docket No. 44, pp. 1-2 & Docket No. 45, pp. 5-7]. Although his motion focuses on the actions of judges of the Eleventh Judicial District Court, Gomez did not name the judges as defendants in

this case. *See [Docket No. 1-3]*. Because Gomez' motions focuses on the actions of the judges while acting in an official capacity, State Defendants will assume for purposes of this Motion that Gomez' RICO claims are asserted against the judges in their official capacity.

A. GOMEZ CANNOT BRING RICO CLAIMS AGAINST THE ELEVENTH JUDICIAL DISTRICT COURT AND ITS JUDGES IN THEIR OFFICIAL CAPACITIES BECAUSE CLAIMS AGAINST INDIVIDUALS IN THEIR OFFICIAL CAPACITIES ARE TANTAMOUNT TO BRINGING SUIT AGAINST THE STATE OF NEW MEXICO AND THE STATE CANNOT FORM THE REQUISITE *MENS REA* TO PERFORM ACTS OF RACKETEERING.

As a matter of law, Gomez cannot assert a RICO claim against the State. To recover under 18 U.S.C. § 1964, a plaintiff must first prove that the defendant previously committed one of the “predicate offenses” set out in 18 U.S.C. § 1962 of the RICO statute. Massey v. City of Oklahoma City, 643 F.Supp. 81, 84-85 (W.D. Okla 1986). In Massey, the district court stated:

[I]t is clear that the City . . . could not be found to have violated one of the predicate offenses in § 1962, because, since it is a corporation or an ‘artificial person’ that can act only through its officers, the City itself is incapable of forming the mens rea or criminal intent necessary to perform an act of racketeering as defined by § 1961(1) of the RICO statute. The officials of the City, the mayor, the City councilmen, etc., have the capacity to perpetrate this type of activity, but the City, the body politic, could not. Further, since the City is a municipal corporation, its powers to act are controlled by the Legislature . . . This Court is aware of no act of the . . . Legislature that granted municipal corporations within this State the power to engage in any kind of activity that could be deemed racketeering. Without power conferred by the legislature, it does not have the capacity to engage in this type of activity and cannot be found to have violated the predicate offenses of § 1962.

Id. at 85.¹

¹ See also Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (rejecting, as a matter of law, plaintiff's RICO claim against defendant city), cert. denied, 520 U.S. 1268 (1997); Lancaster (continued...)

When a governmental official is sued in his official and individual capacity for acts performed in each capacity, those acts are “treated as the transactions of two different legal personages.” Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543 n. 6 (1986) (internal quotation marks omitted). Thus, a person sued in his official capacity has no stake, as an individual, in the outcome of the litigation. Id. at 543-44. Personal or individual capacity suits “seek to impose personal liability upon a government official for actions he takes under color of state law,” while an official capacity suit is “only another way of pleading an action against an entity of which an officer is an agent.” Kentucky v. Graham, 473 U.S. 159, 165 (1985) (internal quotation marks omitted); Monell v. Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978) (same). “As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity,” and not as a suit against the official personally, “for the real party in interest is the entity.” Kentucky, 473 U.S. at 166.

Thus, “a suit against a [government] official in his or his official capacity is not a suit against the official but rather is a suit against the official’s office.” Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, (1989); Thompson v. City of Lawrence, Kan., 58 F.3d 1511, 1517 (10th Cir. 1995) (holding that “a suit against a city official in his official capacity is no different from a suit against

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 (...continued)
Community Hosp. v. Antelope Valley Hosp., 940 F.2d 397, 404 (9th Cir. 1991) (holding that defendants, as government entities, were incapable of forming malicious intent as required by RICO statutes); McGee v. City of Warrensville Heights, et al., 16 F.Supp.2d 837, 848 (N.D. Ohio 1998) (finding that “[b]ecause a municipality is incapable of forming the specific intent associated with the underlying predicate acts of fraud, Defendant Warrensville Heights cannot be held liable under RICO. . .”); Frooks v. Town of Cortlandt, 997 F. Supp. 438, 456-57 (S.D.N.Y. 1998), aff’d, 182 F.3d 899 (2nd Cir. 1999) (same).

the City itself”); Moore v. City of Wynnewood, 57 F.3d 924, 929 n.4 (10th Cir. 1995) (same); Parras v. Harrison, No. CIV 98-153 LFG/DJS, slip op. (D.N.M. filed May 14, 1998) [Docket No. 16] (stating “[c]ase law is clear that a claim against a government official in his or her official capacity is in fact a claim against the municipality.”). Based on the foregoing, it is clear that Gomez’ RICO claims against Eleventh Judicial District Court judges in their official capacities is in fact RICO claims against the State. As such, the Eleventh Judicial District Court, and therefore Eleventh Judicial District Court judges sued in their official capacities, cannot be liable for RICO violations.

B. THE RICO STATUTES’ MANDATORY AWARD OF TREBLE DAMAGES ARE PUNITIVE IN NATURE, AND AS SUCH, PUNITIVE DAMAGES CANNOT BE AWARDED AGAINST THE ELEVENTH JUDICIAL DISTRICT COURT.

A governmental entity is also immune from suit for alleged RICO violations because “a municipal corporation is immune from actions for treble damages under 18 U.S.C. § 1964(c) as a matter of public policy.” Massey, 643 F. Supp. at 85; Genty v. Resolution Trust Corp., 937 F.2d. 899, 908-14 (3rd Cir. 1991). Confronted with this issue, the District Court in Massey began its analysis with an overview of the prohibition of an award of punitive damages against a municipality under 42 U.S.C. § 1983. 643 F. Supp. at 84-85. The court noted that punitive damages are intended to punish a tortfeasor and deter him and others from again knowingly and maliciously engaging in wrongful conduct but a municipality “can have no malice independent of the malice of its officials.” 643 F. Supp. at 86; (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)). The court therefore stated that it is unclear whether municipal officials would be deterred from wrongdoing simply by the knowledge that a large punitive award could be assessed against the municipality. Id.;

City of Newport, 453 U.S. 247. The court expressed concern that “[p]unitive damages awarded against a municipality only ‘punish’ the taxpayers who took no part in the commission of the tort.” Id.; City of Newport, 453 U.S. 247.

The court in Massey then concluded that the “same public policy considerations that disallow assessing punitive damages against municipalities under 42 U.S.C. § 1983 apply in cases arising under 19 U.S.C. § 1964 of the RICO statutes because

[n]othing in the RICO statutes themselves . . . or in its legislative history . . . Reveals any intention by Congress to abolish the common law doctrine of municipal immunity to punitive damages. Although the RICO statutes do not speak of “punitive damages,” 18 U.S.C. §1964(c) allows for a plaintiff to receive treble damages and treble damages have long been held to be a type of punitive damage award.

* * *

If the officers and policymakers of a municipality are engaging in the type of activity that would render them liable to treble damages under the RICO statutes, they may be sued individually and treble damages may be recovered against them. But such a suit does not lie against municipal corporation because justice and public policy dictate that taxpayers, who are not privy to the private dealings of a corrupt city official, should not be penalized for wrongdoing of which they know nothing and could not prevent.

Massey, 643 F. Supp. at 86-87.

As a matter of law, Gomez cannot pursue his RICO claims against the Eleventh Judicial District Court because it cannot form the requisite *mens rea* to perform acts of racketeering. Massey, 643 F. Supp. at 85. Moreover, Gomez cannot pursue his RICO claims against the Eleventh Judicial District Court because the RICO statutes’ mandatory award of treble damages is punitive in nature and punitive damages cannot be assessed against the Eleventh Judicial District Court. Genty, 937

F.2d at 914; Massey, 643 F. Supp. at 86-87.

Asserting RICO claims against the Eleventh Judicial District Court judges in their official capacities is no different than asserting RICO claims against the State itself. Thompson, 58 F.2d at 1517; Moore, 57 F.3d at 929 n.4. For the foregoing reasons, this Court should dismiss Gomez' RICO claims against Eleventh Judicial District Court and its judges in their official capacities.

II. IN THE ALTERNATIVE, GOMEZ CANNOT STATE AN ACTIONABLE CLAIM UNDER FEDERAL CRIMINAL STATUTE BECAUSE GOMEZ IS A PRIVATE CITIZEN, NOT A FEDERAL PROSECUTOR.

Generally, a private citizen has no authority to initiate a federal criminal prosecution. Keenan v. McGrath, 328 F.2d 610, 611 (1st Cir. 1964). Only the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241-242 (the criminal analogue of 42 U.S.C. § 1983), Dugar v. Coughlin, 613 F.Supp. 849, 852 (S.D.N.Y. 1985); Fiorino v. Turner, 476 F.Supp. 962, 963 (D.Ma. 1979). Suffice to say, Gomez is not a federal prosecutor, but only a private citizen.

As a matter of law, the statutes found under Title 18 of the United States Code are criminal statutes that do not give rise to a private civil cause of action. Kelly v. Rockefeller, 69 Fed. Appx. 414, 415 (10th Cir. 2003) (citing Newcomb v. Ingle, 827 F.2d 675, 677 n. 1 (10th Cir. 1987)); see also Clements v. Chapman, 189 Fed.App. 688, 692 (10th Cir. 2006) (unpublished) (federal criminal statutes do not provide private causes of action and § 1983 does not allow a plaintiff to pursue violations of federal criminal law); Henry v. Albuquerque Police Dep't, 49 Fed.App. 272, 273 (10th Cir. 2002) (unpublished) (18 U.S.C. §§ 241 and 242 do not provide for a private civil cause of action). In addition to the Tenth Circuit, other circuits have reached the same conclusion. See, e.g., Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989); United States v. Oguaju, 76 Fed.Appx. 579, 581 (6th

Cir. 2003); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 511 (2nd Cir. 1994). Thus, Gomez does not and cannot state a claim under federal criminal statutes and denial of Gomez' motion is proper.

WHEREFORE, Defendant respectfully requests that this Court enter an Order, which grants the following relief:

- A. Denies Gomez' Motion for Judicial Notice under Rule 201 of Defendant's Part in Racketeering Activity [*Docket No. 44*];
- B. Awards Defendant its attorney's fees and costs; and
- C. Orders all other relief this Court deems just and proper.

Respectfully submitted,

ROBLES, RAEL & ANAYA, P.C.

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I hereby certify that on this
10th day of August 2010, the
foregoing was electronically
served through the CM/ECF
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/s/ Luis Robles
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