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; Plaintiffs, vs. STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I –V, Defendants.	Case No. 1:15-cv-00625 JOB/GBW

MOTION FOR ORDER TO SHOW CAUSE RE CIVIL CONTEMPT

Plaintiffs, PUEBLO OF POJOAQUE, a federally-recognized Indian tribe (the "Pueblo") and JOSEPH M. TALACHY, Governor of the Pueblo, pursuant to Fed. R. Civ. P. 70, move this Court to issue an Order to Show Cause for Defendants JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, and CARL E. LONDENE (collectively, the "Certain Defendants")[1] to appear and present evidence as to why Certain Defendants should not be held in civil contempt of court for violating the Preliminary Injunction issued by this Court (Docs. 31 and 32), and upon finding that Certain Defendants are in civil

[1] At this juncture, the Pueblo does not have clear and convincing evidence that Defendants Susana Martinez and Jeremiah Ritchie participated in the actions that constitute civil contempt. If credible information becomes available that they participated in the actions, however, the Pueblo reserves the right to pursue civil contempt proceedings against them.

contempt, the Pueblo moves this Court to impose sanctions in an amount necessary to compel Certain Defendants to comply with the Preliminary Injunction issued by Judge Brack on October 7, 2015, and to award attorneys' fees and costs incurred by the Pueblo.

I. OVERVIEW

The Defendants in this action are subject to a Preliminary Injunction presently in effect that enjoins all Defendants from:

> taking any action that threatens, revokes, conditions, modifies, fines, 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.

(Docs. 31 and 32, p. 23).

On October 21, 2015, at the first meeting of the New Mexico Gaming Control Board ("NMGCB") following Judge Brack's issuance of the Preliminary Injunction, Certain Defendants noticed thirty-six (36) applications[2] for action, thirteen (13) of which were applications for companies or individual officers or principals of companies doing business with the gaming operations of the Pueblo. With one minor exception, the NMGCB approved all of the license applications except the thirteen (13) applications that were related to the Pueblo's gaming operations, which the NMGCB deferred. Based on the subsequent public testimony of Certain Defendants at an October 27, 2015 meeting of the State Legislature's Indian Affairs Committee, it is now clear that Certain Defendants intend to continue deferring license decisions on all applications for persons or companies doing business with the Pueblo. NMGCB's action of deferring decision on the thirteen (13) applications clearly threatens the applicants in violation of

[2] The Board has established various categories of licenses and other means of formal approvals required to engage in gaming activities. *See* NMSA 60-2E-14. For ease of reference, this motion refers to all of these formal Board actions as applications or licensing matters in general.

the Preliminary Injunction. Despite the clear admonishment by this Court in its Memorandum Opinion (Doc. 32), the Certain Defendants continue to embrace a poorly-disguised policy of asserting jurisdiction over the Pueblo's gaming activities by threatening the licenses of those persons or companies doing business with the Pueblo's gaming operations. Accordingly, Certain Defendants should be held in civil contempt of court and remedial actions should be taken in order to compel Certain Defendants to comply with the Preliminary Injunction.

II. STANDARDS FOR CIVIL CONTEMPT

The Court has broad discretion to use its contempt powers to ensure adherence to its orders. *Rodriguez v. IBP, Inc*., 243 F.3d 1221, 1231 (10th Cir. 2001); *Premium Nutritional Products v. Ducote*, 571 F. Supp. 2d 1216, 1217 (D. Kan. 2008). A district court retains jurisdiction to enforce its orders and judgments through contempt proceedings following the filing of an appeal.[3] *Avendano v. Smith*, 2011 WL 5223041 at *4 (D.N.M. 2011) (citing *Chagnati & Associates P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006)). It is well-established in the Tenth Circuit that compensatory contempt actions are appropriately held before a judge, applying a clear and convincing standard for liability and a preponderance of the evidence standard for sanctions. *FTC v. Kuykendall*, 371 F.3d 745, 754 (10th Cir. 2013). In civil contempt proceedings, all that is required to satisfy the Due Process Clause is that defendants be given reasonable notice and an opportunity to be heard. *Id.* at 754. To justify an order of civil contempt, the moving party has the burden of proving, by clear and convincing evidence, (1) that a valid court order existed, (2) that the defendant had knowledge of the order, and (3) that the defendant disobeyed the order. *United States v. Ford*, 514 F.3d 1047, 1051 (10th Cir. 2008);

[3] Defendants have filed a Notice of Appeal (Doc. 40) of this Court's October 7, 2015 Order granting the Pueblo's Motion for Preliminary Injunction (Docs. 31 and 32).

Kuykendall, 371 F.3d at 756; *Reliance Ins. Co. v. Master Const. Co*., 159 F.3d 311, 315 (10th Cir. 1988); *Ducote*, 571 F. Supp. 2d at 1217; *IRS v. Plagge*, 2013 WL 7873534 at *4 (D.N.M. 2013). Once those elements have been established, the burden is on the defendant to show that he or she has made all reasonable efforts to meet the term of the court order. *United States v. Rylander*, 460 U.S. 752, 755-57, 103 S. Ct. 1548, 1551-51 (1983); *SEC v. Merrill Scott & Assoc*., 2011 WL 5834271 at *8 (D. Utah 2011); *Plagge* at *4. Parties are expected to comply with both "the letter and the spirit" of a court's orders. *McComb v. Jacksonville Paper Co*., 336 U.S. 187, 192, 69 S. Ct. 497, 500 (1949). Willingness or good faith is not an element of civil contempt. *McComb*, 336 U.S. at 191, 69 S. Ct. at 499: *Ducote*, 571 F. Supp. 2d at 1217; *Merrill Scott & Assoc*. at *8. Advice of counsel is not a defense to civil contempt. *Universal Motor Oils v. Amoco Co*., 743 F. Supp. 1484 (D. Kan. 1990).

Civil contempt is remedial and is intended to coerce or compel compliance with an order of the court. *McComb*, 336 U.S. at 191, 69 S. Ct. at 499; *Merrill Scott & Assoc.* at *7. Upon a finding of civil contempt, the court has numerous remedial options available to it, including the imposition of coercive or punitive fines, increasing per day, to compel compliance. *Ager v. Jane C Stormonte Hospital*, 622 F.2d 496, 500 (10th Cir. 1980); *Ducote*, 571 F. Supp. 2d at 1221. The court may also award costs and attorneys' fees incurred by the moving party with respect to the contempt issue. *Allied Materials Corp. v. Superior Prods. Co.*, 620 F.2d 224, 227 (10th Cir. 1980); *Ducote*, 571 F. Supp. 2d at 1220; *Derma Pen LLC v. 4Everyoung Ltd*., 2015 WL 1726088 at *3 (D. Utah 2015). Applying these standards to this case, Certain Defendants should be found to be in civil contempt, and this Court should impose sanctions sufficient to compel the Certain Defendants to comply with this Court's Preliminary Injunction.

III. RELEVENT FACTS

1. The Certain Defendants are current members of the NMGCB and at all relevant times have been the members taking all actions (including deferral) on all gaming license applications or renewals up for consideration by the NMGCB. These gaming licenses include those companies and individuals who are officers or principals of companies doing business with the Pueblo's gaming operations on the Pueblo's Indian lands. See Answer (Doc. 16) at ¶¶ 19-23.

2. On October 7, 2015, this Court issued a Preliminary Injunction (Doc. 32), which *inter alia* enjoins all Defendants from:

> taking any action that threatens, revokes, conditions, modifies, fines, 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.

(See also Doc. 31, p. 23).

3. At all times relevant, Certain Defendants have been represented by legal counsel who has an obligation to inform his clients of this Court's issuance of the Preliminary Injunction. See Notice of Appearance of Jerry Walz on behalf of all Defendants (Doc. 15) and Notice of Appearance of Henry Bohnhoff on behalf of all Defendants (Doc. 39). Additionally, the deferrals could have been taken up at the November 18, 2015 meeting of NMGCB, well after Defendant Jeffery S. Landers' October 27, 2015 testimony to the State Legislature, wherein he acknowledged Certain Defendants' awareness of the Preliminary Injunction (see Section III, paragraph 10, below). Accordingly, there is no credible basis to suggest that Certain Defendants did not have knowledge of the Preliminary Injunction when the NMGCB met in formal session on October 21, 2015 and November 18, 2015.

4. On October 21, 2015, during NMGCB's formal monthly meeting, the NMGCB had on its agenda ten (10) gaming licenses renewals, four (4) of which were for vendors doing business with the gaming operations of the Pueblo. See Agenda of NMGCB Meeting of October 21, 2015 at item III(B)(1), Attachment Three to November 16, 2015 Declaration of Governor Joseph M. Talachy, attached hereto as Exhibit A (herein "Talachy Decl."). Five (5) of the six (6) renewals for companies not doing business with the Pueblo were approved. One (1) of the six (6) renewals for companies not doing business with the Pueblo was deferred to NMGCB's November meeting. The four (4) renewals for companies doing business with the Pueblo were deferred without a date for future consideration. See Draft Minutes of NMGCB Meeting of October 21, 2015 at pp. 3-6, Talachy Decl. and Attachment Four thereto.[4]

5. On October 21, 2015, during NMGCB's formal monthly meeting, the NMGCB had on its agenda ten (10) new applications for a certification of finding of suitability, three (3) of which were for individuals who are officers or principals of companies doing business with the gaming operations of the Pueblo. See Agenda of NMGCB Meeting of October 21, 2015 at item III(B)(4), Talachy Decl. and Attachment Three thereto. The seven (7) applications for individual principals or officers of companies not doing business with the Pueblo were approved. The three (3) applications for principals or officers of companies doing business with the Pueblo were deferred without a date for future consideration. See

[4] The Pueblo has obtained the draft minutes of the NMGCB meeting of October 21, 2015 through an IPRA request. The draft minutes were considered and approved without comment or amendment at the November 18, 2015 NMGCB meeting. See Attachment Two to November 19, 2015 Declaration of Ellen Frick at ¶ 5, attached hereto as Exhibit B (herein "Frick Decl."). It is anticipated that the final minutes will be posted on NMGCB's formal web page, nmgcb.org..

Draft Minutes of NMGCB Meeting of October 21, 2015 at pp. 7-8, Talachy Decl. and Attachment Four thereto.

6. On October 21, 2015, during NMGCB's formal monthly meeting, the NMGCB had on its agenda nine (9) renewal applications for certifications of findings of suitability, two (2) of which were for individuals who are officers or principals of companies doing business with the gaming operations of the Pueblo. See Agenda of NMGCB Meeting of October 21, 2015 at item III(B)(5), Talachy Decl. and Attachment Three thereto. Six (6) of the seven (7) applications for individual principals or officers of companies not doing business with the Pueblo were approved. Without explanation, no vote was taken on one (1) of the seven (7) applications for individual principals or officers of companies not doing business with the Pueblo. The two (2) applications for principals or officers of companies doing business with the Pueblo were deferred without a date for future consideration. See Draft Minutes of NMGCB Meeting of October 21, 2015 at pp. 8-10, Talachy Decl. and Attachment Four thereto.

7. To summarize, the NMGCB approved all of the thirty-six (36) applications for consideration at the October 21, 2015 meeting with the exception of one (1) application for a company not doing business with the gaming operations of the Pueblo being deferred for a limited one-month period and one (1) application for a company not doing business with the gaming operations of the Pueblo being subject to an unexplained no-vote; and thirteen (13) applications for businesses and principals or officers of companies doing business with the gaming operations of the Pueblo being deferred without a date for future consideration.

8. When asked in writing why the October 21, 2015 action of Certain Defendants is not a violation of this Court's Preliminary Injunction, legal counsel for all Defendants explained in an October 26, 2015 email:

> For several reasons, the Defendants do not view the Board's deferral action as being inconsistent with Judge Brack's preliminary injunction, as you imply. First, initially, you should be aware that at its September meeting the Board in fact approved key licenses for individuals associated with manufacturers that have been identified as doing business with the Pojoaque Pueblo's gaming operators. Second, the Board did not discuss, and instead simply voted to approve, Mr. Landers' motion to defer action on the remaining applications of the manufacturers and other associated individuals. Third, the deferral action does not affect the vendors' ability to continue doing business. Instead, upon submission of the renewal application a license stays in place until such time as the Board takes formal action to vote on the renewal application. The Board in fact will take no action against the manufacturers and the associated individuals based on their dealings with the Pueblo while the current version of the preliminary injunction remains in place. Third, Judge Brack did not order the Board to approve the license renewal applications, only to not take any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee. The Board has done none of those things. Fourth, 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. 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. Respectfully, any claim of violation of the October 7 injunction is unfounded.

See Attachment One to November 19, 2105 Declaration of Scott Crowell, attached hereto as Exhibit C (herein "Crowell Decl.").

9. Counsel for the Pueblo informed counsel for all Defendants that it was not able to confirm that "at its September meeting the Board in fact approved key licenses for individuals associated with manufacturers that have been identified as doing business

with the Pojoaque Pueblo's gaming operators" and was not able to confirm "the deferral action does not affect the vendors' ability to continue doing business. Instead, upon submission of the renewal application a license stays in place until such time as the Board takes formal action to vote on the renewal application." Counsel for all Defendants responded in an email dated November 4, 2015:

> Scott, I am writing to address the follow-up questions you posed during our Friday conference call regarding my October 26 email, which is copied below. First, you wanted to know which key licenses were approved and not deferred. I had misunderstood the date of the meeting. However, at the August 19, 2015 meeting, the Board approved a new application for a key license for John Connelly, Chief Executive Officer, Interblock D.D., and renewed a key license for Scott Schweinfurth, Executive Vice President/Chief Financial Officer, Scientific Games Corp. Second, you had asked what is the authority for the licensee to continue doing business while the renewal application has been deferred. Under NMSA 1978, section 60-2E-16(H), "After issuance, a license ... 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…." This provision permits a licensed manufacturer to continue to operate under its existing license until such time as the board votes on the merits of the renewal application.

See Crowell Decl. and Attachment One thereto.

10. On October 27, 2015, Defendant Jeffery S. Landers testified before the Indian Affairs Committee of the New Mexico State Legislature. See Minutes for the Sixth Meeting of the Indian Affairs Committee, Talachy Decl. and Attachment Two thereto. During the hearing, in response to a specific question by Senator Nancy Rodriguez, Mr. Landers answered to the effect that those licenses for companies and individuals doing business with the gaming operations for the Pueblo had been deferred and would remain deferred so long as the Preliminary Injunction was in effect. See Talachy Decl. at ¶ 6.

11. The thirteen (13) deferred applications were not noticed on the agenda for the November 18, 2015 NMGCB meeting. See Frick Decl. and Attachment One thereto. The deferred applications were not called by the Defendant Landers or otherwise taken up or discussed in the open session at the November 18, 2015 NMGCB Meeting. See Frick Decl. at ¶ 4.[5]

12. On the agenda for the November 18, 2015 meeting was an item "Policy & Rulemaking" "Consideration of licensing matters pursuant to 15.4.3.16 NMAC." See Frick Decl. and Attachment One thereto. During the November 18, 2015 meeting, the Certain Defendants discussed an ongoing concern in light of NMGCB regulations at section 15.4.3.16, which requires that bingo and raffle licensees must cease gaming upon expiration of a license. Certain Defendants discussed that several bingo licenses are set to expire at the same time such that the Board is receiving numerous applications for renewals and is concerned they cannot process and r to approve renewals before the December 31, 2015 expiration date. Chairman Landers made a motion, which passed unanimously, that the Board grant a variance to all entities that filed timely renewals and currently hold bingo licenses. The stated purpose was to relieve the licensee/applicants of the requirement to cease bingo operations, in the event that the Board has not renewed a license before expiration. The Certain Defendants noted that formal action was needed to ensure that a licensee can continue to operate in the event that its license expires and renewal has not yet been approved. See Frick Decl. at ¶¶ 7 and 8.

[5] The Pueblo anticipates that the formal Meeting minutes for the November 18, 2015 NMGCB meeting will become available on the Board's official web site, nmgcb.org, but was not posted at the time of preparing this motion.

IV. THE ACTIONS OF CERTAIN DEFENDANTS SATISFY THE ELEMENTS FOR CIVIL CONTEMPT

The Pueblo has established the elements of civil contempt against the Certain Defendants. The evidence establishes: (1) that a valid court order existed, (2) that the Certain Defendants had knowledge of the order, and (3) that the Certain Defendants disobeyed the order. It is clear that certain licensed applicants have been singled out by the NMGCB solely for the reason that they are doing business with the Pueblo's gaming operations. This Court has already found that Certain Defendants, at the July 15, 2015 NMGCB meeting, held the applications in abeyance based on the applicants doing business with the Pueblo (Doc. 31, p.4). But for the applicants doing business with the Pueblo, the applications would have been approved. Perhaps there is some type of amazing coincidence that the NMGCB possesses negative information, wholly unrelated to the applicants' conduct of business with the Pueblo, that would warrant a deferral, but such negative information would more likely warrant denial or suspension. Certain Defendants will have the opportunity to provide such evidence, if any, at the Show Cause Hearing. Lacking such evidence, the only conclusion that can be drawn is that the NMGCB continues to attempt to assert state jurisdiction over the Pueblo's gaming activities by intimidating vendors with the non-renewal of their applications. There is no other plausible explanation for the actions of the NMGCB. The evidence is clear and convincing, and far exceeds the threshold of a prima facie case. This Court should now require the Certain Defendants to appear and show cause as to why they are not in civil contempt.

The explanations proffered by legal counsel for the Certain Defendants, albeit courteously shared, are unavailing. The first proffered explanation, that the application for a suitability determination for an individual associated with a vendor doing business with the Pueblo was

approved at the September NMGCB meeting,[6] is not an explanation at all. The fact that the NMGCB considered and approved such an application prior to the October 7, 2015 issuance of the Preliminary Injunction, and has discontinued that practice after the issuance of the Preliminary Injunction, only further proves the Pueblo's point: but for an applicant's doing business with the Pueblo, the application would have been approved at the October 21, 2015 NMGCB meeting, and/or the November 18, 2015 NMGCB meeting. The Certain Defendants' argument is also made irrelevant by Defendant Landers' October 27, 2015 public testimony that the NMGCB will continue to defer such application as long as the Preliminary Injunction is in effect.

The second proffered explanation, that "the Board did not discuss, and instead simply voted to approve, Mr. Landers' motion to defer action on the remaining applications of the manufacturers and other associated individuals," is equally unavailing. Even if this Court accepted that the Certain Defendants did not discuss the motion in open meeting, the actions of the Certain Defendants skirted their responsibility in a manner that violates the Preliminary Injunction. Apparently, it is merely a question of timing, because Mr. Landers' testimony on October 27, 2105 that the NMGCB will continue to defer such applications suggests that, at some point in time, the discussion amongst and decision by the Certain Defendants did take place. Potential violations of New Mexico's Open Meetings Act, NMSA 1978, Sections 10-15-1 to 10-15-4, aside, the collective silence of the Certain Defendants when the motion to defer was made in an open meeting does not justify or explain their violation of the Preliminary Injunction.

[6] The Pueblo has only been able to verify that one of the two applicants Defendants' legal counsel later identified as being approved at the earlier August meeting of the NMGCB does indeed do business with the Pueblo.

The third proffered explanation, that "the deferral action does not affect the vendors' ability to continue doing business. Instead, upon submission of the renewal application a license stays in place until such time as the Board takes formal action to vote on the renewal application," even as expanded upon in the November 4, 2015 email, is not supported by the NMGCB regulations:

> **15.1.13.11 MANDATORY CESSATION OF GAMING ACTIVITY:**
>
> 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.
>
> **15.1.13.12 RENEWAL LICENSE PERIOD:**
>
> All licenses shall expire annually on the anniversary date of the original issuance and will be subject to renewal on an anniversary date basis.

Actions taken at the most recent November 18, 2015 meeting of the NMGCB contradict the proffered explanation. As set forth in Section III paragraph 12 above, Certain Defendants were concerned that bingo and raffle licensees would be required to cease doing business in the State because NMGCB staff would not be able to process renewal applications before the current licenses expired. Accordingly, Certain Defendants caused the approval of a variance to regulation 15.4.3.16 NMAC, the text of which is virtually identical to 15.1.13.11, which applies to the deferred applications at issue here:

> **15.4.3.16 MANDATORY CESSATION OF BINGO, RAFFLE AND PULL-TAB ACTIVITY:**
>
> No licensee shall engage in any games of chance 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 games of chance authorized by the license on the date the license expires. Any person engaging in any games of chance without a renewed license may be subject to criminal sanctions.

Given the parallel language between the two NMGCB regulations, the proffered explanation does not match up with either the text or the practice of the NMGCB. No similar variance has been provided to the license applications that have been deferred.

The gravamen of the NMGCB's regulations cannot be understated. Over the course of less than a year, the NMGCB licenses of all vendors doing business with the Pueblo's gaming operations will expire, and the vendors will be required under New Mexico state law to cease doing business with all gaming entities in the State – Indian and non-Indian. The statute cited in the November 4, 2015 email, NMSA 1978, section 60-2E-16(H), expressly defers the conditions for renewal to be set by the Board, which conditions are set by the regulations, and those regulations do not allow for a licensee to continue to do business after the expiration of the annual term of its license.

The Pueblo is open to the possibility that the NMGCB could grant similar variances to the licensees subjected to the deferrals, or amend the regulations to conform to the proffered explanation, and the Pueblo would encourage it to do so. But no such variance has been adopted, and the regulations have not been amended, making the consequences of a deferred renewal application dire. Even if the regulations read as legal counsel for the Certain Defendants suggest, Certain Defendants would still be in civil contempt.

The third proffered explanation goes on to assert that "[T]he Board in fact will take no action against the manufacturers and the associated individuals based on their dealings with the Pueblo while the current version of the preliminary injunction remains in place." That certainly is not correct. The NMGCB has in fact taken action to defer licenses based on the applicants' dealings

with the Pueblo. The consequences of the deferral, discussed above, only underscore the devastating impact of the action taken.

The fourth proffered explanation,[7] that "Judge Brack did not order the Board to approve the license renewal applications, only to not take any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee," is a statement with which the Pueblo agrees. But the Pueblo disagrees that the Preliminary Injunction allows the NMGCB to withhold approval where the only reason for doing so is the applicant's business relationship with the Pueblo's gaming operations. The Certain Defendants cannot argue that approval of an application provides an applicant an unjustified "free pass" regarding future circumstances as the relationship with the Pueblo is clarified by the pending litigation. If the NMGCB does approve a license, it retains jurisdiction over the licensee to take action on the license based upon new information that comes to the NMGCB's attention. See NMGCB regulation 15.1.14.9(A) (authority to summon a licensee) and 15.1.14.10 (authority to initiate action against a licensee for cause).

The Certain Defendants apparently take an extremely narrow reading of "threaten" beyond its plain meaning. The Merriam Webster Dictionary defines "threaten" to mean "to say that you will harm someone or do something unpleasant or unwanted especially in order to make someone do what you want" or "to give signs of warning" or " to hang over dangerously." See merriam-webster.com. By not approving an application for the sole reason that the applicant has a business relationship with the Pueblo is clearly a threat to the applicant.

[7] This statement was mislabeled as another "third" explanation by Defendants' counsel in the October 26, 2015 email.

The fifth proffered explanation (mislabeled as the "fourth" explanation in the October 26, 2015 email) asserts that the NMGCB has refrained from contact with licensees for fear of threatening the licensee. That too, is unavailing. It is not relevant, it is not a requirement of the Preliminary Injunction, and it does not excuse the Certain Defendants' violation of the Preliminary Injunction.

None of the explanations proffered by Certain Defendants meet their burden of demonstrating to this Court that Certain Defendants have "in good faith made all reasonable efforts to meet the term of the court order." The Pueblo has established (1) that a valid court order existed, (2) that the Certain Defendants had knowledge of the order, and (3) that the Certain Defendants disobeyed the order. Accordingly, this Court should issue the requested Order to Show Cause requiring Certain Defendants to appear and present evidence and argument, if any, as to why they should not be held in civil contempt.

V. THE APPROPRIATE REMEDY IN THE CIRCUMSTANCES

This Court is vested with a very large array of possible remedies, from fines to jail and everything in between, to remedy civil contempt. As stated in Section II above, the purpose of the remedy is to compel compliance with this Court's order. The Pueblo suggests that the available remedy most likely to be successful is to require the Certain Defendants to pay into a designated account, $25,000.00 per day beginning November 18, 2015, and continuing until Certain Defendants take action to approve or disapprove, with valid reasoning, the pending applications for those companies and individuals doing business with the Pueblo's gaming operations. The funds should not be disbursed from the account to any person for any purpose except as decided by this Court prior to entry of Final Judgment. If a decision cannot be made on

an applicant, the Certain Defendants can present evidence to this Court explaining the exception. The critical compliance issue is that the decision by the Certain Defendants on an application or renewal cannot be based, in whole or in part, on the applicant doing business with the Pueblo's gaming operations.

This Court should not wait until the Pueblo suffers actual harm caused by Certain Defendants' civil contempt in order to make use of fines to ensure compliance. The Pueblo is seeking civil contempt now in order to avoid such harm. Accordingly, the Pueblo is not seeking compensatory sanctions at this juncture. However, that does not justify the Certain Defendants avoidance of contempt fines. The Pueblo does not advocate for jail time or criminal contempt at this juncture because it believes that its proposed remedy can result in successfully bringing Certain Defendants into compliance with the Preliminary Injunction. The Certain Defendants can avoid coercive fines altogether by complying with the Preliminary Injunction and taking action on the deferred license applications. The NMGCB has regularly scheduled monthly meetings, the next meeting is scheduled for December 16, 2015. See, nmgcb.org. The Certain Defendants can call a special meeting and have scheduled a special Meeting for December 1, 2015 on other matters. Id. Until Certain Defendants actually come into compliance with the Preliminary Injunction, however, the coercive fines should be imposed daily.

Additionally, this Court should award the Pueblo its reasonable attorneys' fees and costs incurred in this matter upon submission by the Pueblo itemizing and documenting those fees and costs.

VI. CONCLUSION

The Pueblo has established, by clear and convincing evidence, the three elements of civil contempt: (1) that a valid court order existed, (2) that the defendant had knowledge of the order, and (3) that the defendant disobeyed the order. The Certain Defendants' explanations for the deferral of all license applications for persons and companies doing business with the Pueblo's gaming operations until the expiration of the Preliminary Injunction are unavailing. Accordingly, this Court should issue an Order to Show Cause requiring Certain Defendants to appear and present evidence and argument as to why they should not be held in civil contempt. Expecting that Certain Defendants will not meet their burden of proving that they have "in good faith made all reasonable efforts to meet the term of the court order," this Court should thereafter find Certain Defendants in civil contempt, award the Pueblo its attorneys' fees and costs incurred in connection with the contempt issue, and impose a fine of $25,000.00 per day, and continue until such time as Certain Defendants have come into compliance with the Preliminary Injunction.

RESPECTFULLY SUBMITTED this 19th day of November, 2015.

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on November 19, 2015, I caused the PUEBLO OF POJOAQUE'S MOTION FOR ORDER TO SHOW CAUSE REGARDING CIVIL CONTEMPT, DECLARATION JOSEPH M. TALACHY, ELLEN FRICK AND SCOTT CROWELL IN SUPPORT AND ATTACHMENTS to be served upon counsel of record through the Court's electronic service system.

/s/ Scott Crowell
Scott Crowell, AZ Bar No. 009654**