IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS,	§	
Plaintiff/Counter-Defendant,	§	
	§	
v.	§	
	§	
YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR,	§	**EP-17-CV-179-PRM**
Defendants/Counter-Plaintiffs.	§	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS

On this day, the Court considered several motions filed by Plaintiff/Counter-Defendant State of Texas [hereinafter "Plaintiff"] and Defendants/Counter-Plaintiffs Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Carlos Hisa [hereinafter "Defendants"] in the above-captioned cause. Specifically, the Court considered:

- Defendants' "Second Motion to Dismiss Plaintiff's First Amended Complaint" (ECF No. 83) [hereinafter "Defendants' Motion"], filed on April 18, 2018;

- Plaintiff's "Response to Defendants' Second Motion to Dismiss First Amended Complaint" (ECF No. 86) [hereinafter "Plaintiff's Response"], filed on May 2, 2018;

- Defendants' "Reply in Support of Pueblo Defendants' Second Motion to Dismiss First Amended Complaint" (ECF No. 90) [hereinafter "Defendants' Reply"], filed on May 9, 2018;

- Plaintiff's "Motion to Dismiss Defendants' Counterclaims" (ECF No. 97) [hereinafter "Plaintiff's Motion"], filed on May 29, 2018;

- Defendants' "Response to Plaintiff's Motion to Dismiss Defendants' Counterclaim" (ECF No. 98) [hereinafter "Defendants' Response"], filed on June 6, 2018; and

- Plaintiff's "Reply in Support of Motion to Dismiss Defendants' Counterclaims" (ECF No. 99) [hereinafter "Plaintiff's Reply"], filed on June 19, 2018.

After due consideration, the Court is of the opinion that Defendants' Motion should be denied and Plaintiff's Motion should be granted in part and denied in part for the reasons that follow.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute between Plaintiff and Defendants regarding bingo activities on the Ysleta del Sur Pueblo [hereinafter "Pueblo" or "the Tribe"] reservation in El Paso, Texas. The Restoration Act, enacted in 1987, restored a federal trust between the United States and the Tribe. *See generally* Ysleta del Sur Pueblo and Alabama and

Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat 666 (1987). The Act governs different aspects of the federal trust, including the delicate balance of tribal, federal, and state authority. *See generally id.* This case principally focuses on § 107 of the Act, which concerns gaming activities on the reservation. *Id.*

This is the latest iteration of a long-running dispute between Plaintiff and Defendants. Prior litigation occurred under cause number EP-99-CV-320, initially filed on September 27, 1999.[1] The current iteration of the case, under cause number EP-17-CV-179, involves bingo machines.

In this case, the initial "Complaint" (ECF No. 1) was filed on June 7, 2017. An "Amended Complaint" (ECF No. 8) was then filed on August 15, 2017. In its Amended Complaint, Plaintiff seeks a declaration that the bingo activities in question violate the Restoration Act. Am. Compl. 8–9. Plaintiff also seeks an injunction prohibiting the

[1] While it is unnecessary to delve into the prior litigation in detail, a particular past order is relevant here. Specifically, in 1999, Defendants argued that § 107 does not waive tribal sovereign immunity, and Judge Hudspeth—who presided over the case at that time—rejected Defendants' contention. *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 711 (W.D. Tex. 1999), *aff'd sub nom. State v. Ysleta del Sur*, 237 F.3d 631 (5th Cir. 2000).

activities in question. *Id.* at 9. In their "Amended Answer to Plaintiff's First Amended Complaint and [ ] Counterclaim" (ECF No. 87) [hereinafter "Amended Answer"], filed on May 7, 2018, Defendants responded to Plaintiff's Amended Complaint and also raised counterclaims seeking six declarations.[2]

Plaintiff contends that Defendants are operating a form of electronic bingo that violates Texas gambling law. Am. Compl. 5–6. According to Defendants, the bingo activities in question are not prohibited by Texas law. Am. Answer 8. Further, Defendants assert

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[2] Defendants seek a declaratory judgment holding:

> A. That bingo is a gaming activity;
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> B. That the laws of the State of Texas do not prohibit bingo;
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> C. That the machines used at Speaking Rock as an aid to bingo are not a gaming activity;
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> D. That the manner in which bingo is conducted at Speaking Rock is not a gaming activity;
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> E. That the State of Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act; and
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> F. That the State of Texas is violating the Pueblo Defendants' right to equal protection under the laws and Constitution of the United States, including U.S. Const. amend. XIV, § 1.

Id. at 12–13.

that the "tribal bingo games at issue provide over ninety percent of the revenues for the operation of the Pueblo's government." *Id.* at 5. Accordingly, "[t]he well-being of the Pueblo Defendants . . . is threatened by the State's actions" because the Tribe will be unable to provide services or employment for its members if it cannot continue its bingo operations. *Id.* at 12.

In Defendants' instant Motion, they seek dismissal of the case on two grounds. First, Defendants claim that they are immune from suit because § 107 of the Restoration Act does not unequivocally waive sovereign immunity as to the State. Defs. Mot. 3. Second, Defendants assert that the case should be dismissed because the Ysleta del Sur Pueblo Fraternal Organization [hereinafter "Fraternal Organization"] is a required party and is unable to be joined. *Id.* at 6.

Additionally, Plaintiff, as Counter-Defendant, seeks dismissal of Defendants' counterclaims. Plaintiff asserts that declarations A through E are redundant to Plaintiff's claims and should therefore be dismissed. Pl. Mot. 2. Further, Plaintiff contends that declaration F must be dismissed because it is barred by the Eleventh Amendment. *Id.* at 5.

II. LEGAL STANDARD

A. Rule 12(b)(1): Lack of Subject-Matter Jurisdiction

If a court lacks subject-matter jurisdiction over a claim for relief, then it must dismiss the claim. FED. R. CIV. P. 12(b)(1). Federal courts are courts of limited jurisdiction, and therefore have power to adjudicate claims only when jurisdiction is conferred by statute or the Constitution. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). A case is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Once a defendant files a motion under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court possesses subject-matter jurisdiction over the dispute. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

If a tribe is properly immune from suit based on tribal sovereign immunity or a State is properly immune from suit pursuant to the

Eleventh Amendment, then federal courts lack subject matter jurisdiction over the case. *See Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) (stating that, "[e]xcept when waived . . . immunity deprives federal courts of subject matter jurisdiction"). Therefore, if a court determines that a defendant[3] is shielded by sovereign immunity, it must dismiss the case.

B. Rule 12(b)(7): Failure to Join a Required Party[4]

Rule 12(b)(7) allows a defendant to move for dismissal for "failure to join a party under rule 19." FED. R. CIV. P. 19. Rule 19 "provides for the dismissal of litigation that should not proceed in the absence of parties that cannot be joined." *HS Res., Inc. v. Wingate*, 327 F.3d 432,

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[3] In this case, given that counterclaims have been filed, both parties are defendants to each other's claims.

[4] Defendants characterize their Motion as a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Defs. Mot. 2. Plaintiff correctly challenges Defendants' characterization, claiming that Rule 19 is not jurisdictional. Pl. Resp. 5. A motion to dismiss for failure to join a person required by Rule 19(b) should be filed pursuant to Rule 12(b)(7), not 12(b)(1). FED R. CIV. P. 12(b). When a Rule 12(b) motion is mislabeled, a court may construe the motion as one filed under the appropriate rule. *See Knight v. Idea Buyer, LLC*, 723 F. App'x 300, 301 (6th Cir. 2018) (construing a motion mislabeled as a Rule 12(b)(1) motion as a Rule 12(b)(6) motion). Thus, the Court will construe Plaintiff's motion to dismiss for failure to join a required party as a motion pursuant to Rule 12(b)(7).

438 (5th Cir. 2003). The burden is on the moving party to show: "the nature of the unprotected interests of the absent individuals or organizations and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence." 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1359 (3d ed. 2018).

Courts conduct a two-step analysis to determine whether a case should be dismissed pursuant to Rule 12(b)(7). First, the court decides whether the missing party is required to be joined under Rule 19(a). *Id.* at 439. If the party is required to be joined, the court must order the party to be joined if feasible. FED. R. CIV. P. 19(a)(2). If the party cannot be joined, then the court moves on to step two and "determine[s] under Rule 19(b) whether to press forward without the person or to dismiss the litigation." *Wingate*, 327 F.3d at 439.

In considering a motion pursuant to Rule 12(b)(7), courts may consider information outside the pleadings. *See Estes v. Shell Oil Co.*, 234 F.2d 847, 852 n.5 (5th Cir. 1956) (stating that "affidavits and other proofs" are traditionally considered in Rule 12(b)(7) motions).

C. Rule 12(b)(6): Failure to State a Claim upon which Relief can be Granted

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action for "failure to state a claim upon which relief can be

granted." In determining whether a plaintiff states a valid claim, a court "accept[s] all well-pleaded facts as true and view[s] those facts in the light most favorable to the plaintiffs." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)). In considering a motion pursuant to Rule 12(b)(6), a district court's review "is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)).

III. ANALYSIS

A. Defendants' Motion to Dismiss

In their Motion, Defendants claim that the Restoration Act provides a limited waiver of sovereign immunity only for suits brought by the federal government and, therefore, that the Tribe is immune from the State's suit. Defs. Mot. 3. Defendants also aver that Plaintiff has failed to join a required party that cannot feasibly be joined. *Id.* at 6. Below, the Court considers each of these arguments in turn and

concludes that Defendants' Motion should be denied.

1. Waiver of Tribal Sovereign Immunity

a. The Restoration Act's Text

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Waivers of sovereign immunity must be unequivocal. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). Further, "[c]ourts must strictly construe all waivers of . . . sovereign immunity, [resolving] all ambiguities in favor of the sovereign." *Linkous v. United States,* 142 F.3d 271, 275 (5th Cir. 1998).

When a court considers whether a tribe has waived immunity pursuant to an Act of Congress, the text of the statute that purportedly waives immunity is principally important, as "it is fundamentally Congress's job, not [the court's], to determine whether or how to limit tribal immunity." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2017 (2014). Therefore, the central question here is whether the Restoration Act unequivocally abrogates tribal immunity when lawsuits seeking an injunction are filed by the State. In this case, the controlling

portion of the Restoration Act is § 107(c). Section 107(c) states:

> Notwithstanding section 105(f),[5] the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a)[6] that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Restoration Act § 107(c). Further, subsection (b) provides that, "nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." *Id.* at § 107(b).

The Restoration Act explicitly provides the State with a specific mechanism to enforce its gaming laws against the Tribe: obtaining an injunction in federal court. *Id.* at § 107(c). A long line of precedent holds that § 107(c) unequivocally waives sovereign immunity when the State of Texas seeks to enjoin a violation of its gaming laws. For

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[5] Section 105(f) provides that "[t]he State shall exercise civil and criminal jurisdiction within the boundaries of the reservation . . . ." Restoration Act § 105(f).

[6] Subsection (a) states that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas." Restoration Act § 107(a).

example, nearly twenty years ago, in an earlier iteration of this litigation, Judge Hudspeth issued a decision holding that § 107(c) "represent[s] an unequivocal waiver of tribal immunity." *Ysleta*, 79 F. Supp. 2d at 711. *See also Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994) ("Under § 107(c), the state of Texas is authorized to file suit in a federal court to enjoin any violation by the Tribe of the provisions of § 107(a)."); *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 692 (W.D. Tex. 2001) ("Most importantly, the Restoration Act allows the State of Texas to bring suit in federal court to enjoin any such violations."), *modified* (May 17, 2002), *aff'd*, 31 F. App'x 835 (5th Cir. 2002), and *aff'd sub nom. State of Tex. v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), and *order clarified sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CV-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009).

Defendants attempt to circumvent precedent by casting § 107(c) as a "savings clause" and "not a jurisdictional grant." Defs. Mot. 5. According to Defendants, this subsection "[a]t most . . . demands the Plaintiff identify an extrinsic law that unequivocally abrogates

sovereign immunity in order for its claim to survive."[7] *Id.* However, Defendants' argument fails to convince the Court to depart from precedent. In a recent Order, the Court rejected the Magistrate Judge's suggestion that § 107(c) is not an affirmative grant of power and provided a detailed accounting of case law and legislative history in support of this position. Order Regarding Magistrate's Report and Recommendation 17–23, March 29, 2018, ECF No. 77. Accordingly, as articulated in the March 29 Order, the Court maintains that § 107(c) provides an affirmative grant of authority.

b. The Supreme Court's Ruling in *Bay Mills*

Further, contrary to Defendants' assertion, Judge Hudspeth's conclusion regarding sovereign immunity has not been rendered incorrect by Supreme Court precedent. Def.'s Mot. 5. According to Defendants, *Bay Mills* stands for the proposition that a limited waiver of sovereign immunity does not apply to activities outside of the scope of the waiver. Defs. Reply 2. Because they believe that the Restoration Act's waiver of sovereign immunity does not extend to the State,

[7] While Defendants fail to provide support for this contention in their Motion, they previously discussed their theory in a "Memorandum of Law" (ECF No. 54), which was filed on November 27, 2017, as a supplemental briefing to a hearing before the Magistrate Judge.

Defendants assert that the State's lawsuit should be barred. *Id.* The Court disagrees that the Restoration Act's waiver of sovereign immunity does not extend to the State, as discussed above, and determines that *Bay Mills* does not preclude this lawsuit.

In *Bay Mills*, the Supreme Court held that, pursuant to the Indian Gaming Regulatory Act ("IGRA"), Michigan could not sue to enjoin the Bay Mills Indian Tribe from operating a casino outside of its reservation. *Id.* The pertinent IGRA provision gives United States district courts jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity *located on Indian lands* and conducted in violation of any Tribal-State compact . . . ." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). However, Michigan endeavored to enjoin the tribe from gaming activities that occurred on lands the tribe had purchased located off of the tribal reservation. *Bay Mills*, 134 S. Ct. at 2029. The Supreme Court's decision that the tribe was immune from suit hinged on the distinction between gaming that occurs on Indian lands versus off of Indian lands. *See id.* at 2032 ("A key phrase in that abrogation [of sovereign immunity] is 'on Indian lands'—three words reflecting IGRA's overall scope . . . . A State's suit

to enjoin gaming *on* Indian lands [falls within IGRA's jurisdictional provision]; a similar suit to stop gaming *off* Indian lands does not.").

Here, the Restoration Act—like IGRA—provides jurisdiction over alleged gaming violations that occur on the reservation. Restoration Act § 107(c) (giving United States district courts exclusive jurisdiction over violations of the Act that are "committed by the tribe, or by any member of the tribe, on the reservation or on the lands of the tribe"). Notably, Plaintiff seeks an injunction barring activities that occur on the reservation. Accordingly, the Court is of the opinion that *Bay Mills* does not cast any doubt on whether the Restoration Act abrogates sovereign immunity when the State seeks to enjoin gaming violations that occur on the reservation.

2. Required Joinder

Second, Defendants assert that the case should be dismissed for failure to join a required party pursuant to Rule 19. According to Defendants, the Fraternal Organization is a required party. Defs. Mot. 9. The Fraternal Organization operates the bingo activities at the center of this dispute. *Id.* The Fraternal Organization is established through a charter issued by the Secretary of the Interior and

incorporated as a distinct legal entity from the Tribe. *Id.* at 9, Ex. 1. Although the Fraternal Organization is a "distinct and separate" entity from the tribe, it is "wholly controlled" by the tribe. *Id.* at Ex. 1. Thus, the Court concludes that the Fraternal Organization is not required to be joined.[8]

> A party is required to be joined if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
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> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED R. CIV. P. 19(a)(1).

a. Rule 19(a)(1)(A): Whether the Court can Accord Complete Relief Among Existing Parties

First, the Court determines that the Fraternal Organization's

[8] Because the Court determines that the Fraternal Organization is not a required party, the Court finds no reason to consider step two of the Rule 19 analysis and decide whether the case should be dismissed pursuant to Rule 19(b).

absence would not keep the Court from according complete relief among the existing parties. In determining whether complete relief can be accorded, the key inquiry is whether "the court would be obliged to grant partial or 'hollow' rather than complete relief *to the parties before the court.*"[9] *Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, 1:07-CV-00111, 2008 WL 5191934, at *3 (S.D. Tex. Dec. 8, 2008) (quoting FED. R. CIV. P. 19 Advisory Committee Note) (emphasis added). "With regard to an injunction, complete relief is possible if an injunction can be crafted that would constitute meaningful relief." *Broad. Music, Inc. v. Armstrong*, No. EP-13-CV-0032-KC, 2013 WL 3874082, at *5 (W.D. Tex. July 24, 2013) (citing *United States v. Rutherford Oil Corp.*, CIV.A. G–08–0231, 2009 WL 1351794, at *2 (S.D. Tex. May 13, 2009)).

Here, Plaintiff can obtain complete and meaningful relief because an injunction against the Tribe would effectively prohibit the challenged activities and bind the Fraternal Organization. *See* FED. R. CIV. P. 65

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[9] Defendants argue that, because the Fraternal Organization "conducts and runs the bingo operations," complete relief cannot be accorded here. Defs. Mot. 10. Further, they argue that "Plaintiff's effort to bind an absent party through an injunction entered in that party's absence is the very harm against which Rule 19 protects." Defs. Reply 4. However, this particular subpart of the rule pertains to existing—not absent—parties.

(stating that an injunction binds "other persons who are in active concert or participation" with the party). Indeed, Defendants do not argue that an injunction would be meaningless or hollow as to the existing parties. Thus, the Court concludes the Fraternal Organization is not a required party pursuant to Rule 19(a)(1)(A).

b. Rule 19(a)(1)(B): Whether Disposing of the Action will Impede the Absent Party's Ability to Protect its Interest or Leave an Existing Party Subject to Multiple or Inconsistent Obligations

To determine whether Rule 19(a)(1)(B) mandates joinder, the Court must analyze whether deciding this case in the Fraternal Organization's absence would either: (i) impede the Fraternal Organization's ability to protect its interest relating to the operation of the bingo activities at issue, or (ii) leave an existing party subject to multiple or inconsistent obligations. FED. R. CIV. P. 19(a)(1)(b).

i. Whether the Fraternal Organization's Ability to Protect its Interest is Impaired

As a threshold matter, the Fraternal Organization has an interest in the outcome of this litigation. Specifically, because the Fraternal Organization runs the bingo operations, an injunction barring the bingo

operations would effectively stop the Fraternal Organization from running an operation that "provide[s] over ninety percent of the revenues for the operation of the Pueblo's government." Am. Answer 5. Therefore, the Court must determine whether the Fraternal Organization's ability to protect its interests would be impaired if the litigation continues in its absence.

A party is unable to protect its interest when, as a practical matter, the party faces prejudice through a disposition in its absence. FED. R. CIV. P. 19 Advisory Committee Note. Determining whether a party faces prejudice is "not mechanical and 'the court must consider the practical potential for prejudice in the context of the particular factual setting presented by the case at bar.'" *Carder v. Cont'l Airlines, Inc.*, No. CIV. A. H-09-3173, 2009 WL 4342477, at *4 (S.D. Tex. Nov. 30, 2009), *aff'd*, 636 F.3d 172 (5th Cir. 2011) (quoting *Schlumberger Indus. Inc. v. Nat'l Sur. Corp.*, 36 F.3d 1274, 1286 (4th Cir. 1994)).

The Fifth Circuit has not yet issued an opinion discussing whether tribes, tribal leadership, and tribal fraternal organizations adequately represent each other's interests. However, another circuit considered this issue and decided that a tribe's interests are aligned with its

leadership's for the purposes of Rule 19. *See, e.g., Vann v. United States Dep't of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012) (holding that the "Chief can adequately represent the [tribe]" and the tribe was "not a required party for purposes of Rule 19"). Likewise, the Court is of the opinion that a tribe's chartered organization's interests are aligned with the tribe's.[10]

In their Motion, Defendants claim that the Fraternal Organization cannot protect its interests if it is not joined in the action.[11] According to Defendants, "[w]hile the interests of the Pueblo

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[10] Further, in an earlier iteration of this litigation, a district court held that the Alabama-Coushatta Tribe, which is also governed by the Restoration Act, was not a required party to a case about the Pueblo's gaming operations because there was "no indication that the Pueblo Defendants [would] inadequately represent the Alabama-Coushatta's interests, which are aligned with the Pueblo Defendants' interests." *State of Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *18 (W.D. Tex. May 27, 2016). Similarly here, the Tribe adequately represents the Fraternal Organization's interests.

[11] Defendants' primary legal support for this contention is inapposite. Defendants cite *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). There, racetrack operators sought to prevent the Arizona Governor from, among other things, allowing the State's existing compacts with Indian tribes to be automatically renewed. *Id.* at 1020. No parties' interests were aligned with the tribes'. *See id.* The district court allowed the suit to proceed without joining the tribes and entered an injunction with the effect of terminating the compacts. *Id.* at 1023. On appeal, the Ninth Circuit determined that the tribes were

and the Fraternal Organization can be aligned in certain instances, their interests are not always consistent and there are many potential conflicts that could arise." Defs. Reply 5. Specifically, Defendants aver that the Fraternal Organization manages contracts with the bingo operations' vendors, and therefore its duties to the vendors and the Tribe may be inconsistent. *Id.* However, Defendants do not explain how the Fraternal Organization's contracts could possibly give rise to different interests pertaining to the outcome of this litigation.

Instead, Defendants and the Fraternal Organization have an identical interest: both entities want to continue the bingo operations. Both entities also share an identical defense: that the bingo operations are legal. Thus, the Court concludes that the Fraternal Organization and Tribe share an aligned interest regarding the outcome of this litigation.

Further, the Fifth Circuit has held that absent parties who are aware of litigation and able to intervene in a suit "have means to protect their interest." *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 201 (5th Cir. 2017) (citing *Smith v. State Farm Fire & Cas.*

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required parties that could not protect their interests without being joined in the litigation. *Id.* at 1024.

Co., 633 F.2d 401, 405 (5th Cir. 1980)). Here, the Fraternal Organization is aware of the litigation and able to intervene if it believes that the Tribe does not sufficiently protect its interests. This fact weighs, at least slightly, against a finding of prejudice.

Accordingly, the Court is of the opinion that the Tribe adequately protects the Fraternal Organization's interests in its absence.

ii. Whether Existing Parties would Face Multiple or Inconsistent Obligations

Next, the Court considers whether the existing parties may be left subject to multiple or inconsistent obligations. FED. R. CIV. P. 19(a)(1)(B)(ii). Defendants aver that "there is a significant risk that Plaintiff may choose to prosecute the Fraternal Organization as a separate entity apart from the case at bar with an end result that could be entirely different than any the Court reaches here." Defs. Mot. 12. Moreover, according to Defendants, they could be left "with a variety of inconsistent rulings regarding the same subject matter, or depending on how a case is brought, double liability on the same subject matter." *Id.*

Regarding multiple obligations, Defendants do not explain how a case could be brought that leads to "double liability." Since the Restoration Act limits the State to seeking injunctive relief, the Court is

unaware of how "double" obligations are possible here. In short, Defendants' operations could either be enjoined, or they could not. However, they cannot be doubly enjoined.

Additionally, the Court is of the opinion that Defendants do not face a risk of inconsistent obligations. Defendants assert that a separate case could be brought against the Fraternal Organization and be decided differently.[12] However, as previously mentioned, if an injunction were issued in this case, the injunction would stop both the Tribe and the Fraternal Organization from continuing the bingo activities because the entities act in concert with each other. FED. R. CIV. P. 65. Therefore, if Plaintiff prevails here, it would have no occasion to bring a separate suit against the Fraternal Organization attempting to enjoin the bingo operations.

Further, if Plaintiff does not prevail, and no injunction is issued, a second suit against the Fraternal Organization would be barred based

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[12] Defendants also suggest that the Fraternal Organization may be subject to subsequent litigation based on its existing contracts with vendors. Defs. Reply 7. Any subsequent litigation based on contract law would raise legal issues that are different than the issues litigated here. Additionally, the Fraternal Organization is not an existing party. Accordingly, these potential contract disputes are not the type of inconsistent obligations contemplated by Rule 19.

on the doctrine of collateral estoppel. Pursuant to Texas Law, "[a] party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 377 (5th Cir. 1997) (quoting *Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994)). The third prong of this rule is "generally stated as binding a party and those in privity with [the party]." *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). "[P]rivity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." *Id.*

Here, collateral estoppel would bar any case where Plaintiff attempted to relitigate this legal issue by substituting the Fraternal Organization as a defendant. First, any facts related to the bingo operations in question will be fully litigated in this action. Second, facts regarding the legality of the bingo operations are central to a judgment either granting or denying an injunction. Third, the Tribe and

Fraternal Organization are in privity with one another because the Fraternal Organization is wholly controlled by the Tribe and the entities share the same identity and interest with regard to the bingo operations. Accordingly, the Court believes that Plaintiff would be barred from bringing a second case against the Fraternal Organization. Thus, Defendants do not face a risk of inconsistent obligations.

Finally, the Court concludes that Plaintiff would not be left with inconsistent obligations. Defendants believe that Plaintiff may be subject to inconsistent obligations because "there is ample risk [that the Fraternal Organization] will bring its own action against the State of Texas seeking to confirm its rights as a federally chartered corporation." Defs. Mot 13. To the extent that the Fraternal Organization may seek to relitigate this case and assert any rights regarding the operation of the bingo activities in question, the Court is of the opinion that the case would be barred by collateral estoppel, for the reasons discussed above. Further, if the Fraternal Organization were to seek to assert its rights regarding any issue unrelated to the case at hand, Plaintiff would not face inconsistent obligations.

In conclusion, the Court is of the opinion that the Fraternal

Organization is not a required party. Accordingly, Defendant's Motion should be denied.

B. Plaintiff/Counter-Defendant's Motion to Dismiss

In their Amended Answer, Defendants include counterclaims seeking six declaratory judgments. Am. Answer 12–13. Plaintiff contends that declarations A through E should be dismissed pursuant to Rule 12(b)(6), and based on the Court's discretion provided by the Declaratory Judgment Act, because they are redundant to Plaintiff's claims. Pl. Mot. 2–3. Further, Plaintiff argues that declaration F should be dismissed pursuant to Rule 12(b)(1) because the claim is barred by the Eleventh Amendment. *Id.* at 5. After due consideration the Court is of the opinion that declarations A and B should not be dismissed and that declarations C, D, and E should be dismissed. The Court also concludes that declaration F is barred by the Eleventh Amendment as currently pleaded; however, Defendants should be granted to leave to amend their pleading and cure this defect.

1. The Declaratory Judgment Act

The Declaratory Judgment Act "has long been understood 'to confer on federal courts unique and substantial discretion in deciding

whether to declare the rights of litigants.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995)). Therefore, "a district court may dismiss a declaratory judgment claim before reaching the merits of the action if it determines that such a claim 'will serve no useful purpose. . . .'" *Synthetic Oils & Lubricants of Texas, Inc. v. Essex Ins. Co.*, No. CV H-07-3276, 2008 WL 11399493, at *2 (S.D. Tex. Aug. 15, 2008) (quoting *Wilton*, 515 U.S. at 288). For example, a counterclaim may be dismissed when the counterclaim "adds little that exceeds the scope of [the defendant's] affirmative defense to [the plaintiff's] claim." *Redwood Resort Properties, LLC v. Holmes Co.*, No. CIV.A.3:06-CV-1022-D, 2007 WL 1266060, at *4 (N.D. Tex. Apr. 30, 2007).

a. Declarations A and B

Declarations A and B should not be dismissed because they raise questions that are not duplicative to proving or defending Plaintiff's claims. In declaration A, Defendants seek a declaration "[t]hat bingo is a gaming activity." Am. Compl. 12. In declaration B, Defendants ask for a declaration that "[t]he laws of the State of Texas do not prohibit bingo." *Id.* These two declarations are not necessarily redundant to

Plaintiff's claims. For example, a finder of fact could determine that the activities in question are not actually bingo. In that case, there would be no occasion to determine whether bingo is a gaming activity or to consider whether Texas law prohibits bingo. Because the Court does not believe that these declarations are redundant, it declines to dismiss declarations A and B.

b. Declarations C and D

Conversely, declarations C and D are redundant to Plaintiff's claims. That is, these declarations raise questions that must be answered in the course of prosecuting or defending Plaintiff's claims. In declaration C, Defendants request a declaration "[t]hat the machines used at Speaking Rock as an aid to bingo are not a gaming activity." *Id.* at 13. Moreover, in declaration D, Defendants seek a declaration "[t]hat the manner in which bingo is conducted at Speaking Rock is not a gaming activity." *Id.* Whether or not Defendants' current operations are gaming activities is an issue that must be decided in order to determine whether the activities are covered by § 107 of the Restoration Act. Accordingly, declarations C and D should be dismissed as redundant.

c. Declaration E

Further, the Court is of the opinion that declaration E fails as a matter of law and is redundant. In declaration E, Defendants seek a declaration "[t]hat the State of Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act." *Id.* First, this declaration fails as a matter of law because it hinges on a view of the Restoration Act that the Court has rejected. Although Defendants believe that the Tribe should be immune from a suit brought by the State of Texas in this case, the Restoration Act waives sovereign immunity when the State seeks an injunction in federal court to prohibit violations of the State of Texas's gaming laws.[13] Second, this declaration is redundant. Defendants raised this issue in their Motion to Dismiss. In this Order, the Court considered the issue and determined that the Restoration Act allows the State to initiate this lawsuit. Therefore, declaration E should be dismissed.

2. The Eleventh Amendment

The Eleventh Amendment provides that "[t]he Judicial power of

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[13] This legal conclusion is more thoroughly discussed in Part III(A)(1) of this Order.

the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. However, "[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002).

Plaintiff avers that Defendants' sixth claim (declaration F) should be dismissed under Rule 12(b)(1) because it is barred by the Eleventh Amendment. Pl.'s Mot. 5. However, according to Defendants:

(1) Plaintiff waived immunity when it initiated this litigation, and

(2) an action for a declaratory judgment is not barred by sovereign immunity. Defs. Resp. 9, 12. The Court will address each of these contentions in turn.

a. Whether Plaintiff Waived Immunity by Initiating Litigation

Generally, when a State voluntarily becomes a party to a case, the State cannot then invoke the Eleventh Amendment. *Lapides*, 535 U.S.

at 619–20 (collecting cases).[14] However, the scope of this general principle is limited in the context of counterclaims. In the Fifth Circuit, "[w]hether States' sovereign immunity extends to [a defendant's] 'counterclaim' is controlled by [the] compulsory-permissive distinction." *Texas v. Caremark, Inc.*, 584 F.3d 655, 659 (5th Cir. 2009). The crux of the compulsory-permissive distinction is this: "[t]he state waives its sovereign immunity only as to compulsory counterclaims . . . that is, those 'arising out of the same transaction or occurrence which is the subject matter of the government's suit.'" *Id.* (quoting *Frederick v. United States,* 386 F.2d 481, 488 (5th Cir. 1967)).

For claims to arise out of the same transaction or occurrence, there must be "a logical relationship between a potential counterclaim and the principal claim." *Ormet Primary Aluminum Corp. v. Ballast Techs., Inc.*, 436 F. App'x 297, 299 (5th Cir. 2011). In other words, "'the same operative facts serve[] as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant.'" *Id.* (quoting *Plant v. Blazer Fin.*

[14] Specifically, the Supreme Court has held that a State waives sovereign immunity when it removes a case to federal court, voluntarily appears as an intervener, or files a bankruptcy claim. *Id.*

Servs., Inc. of Ga., 598 F.2d 1357, 1361 (5th Cir. 1979)). For two claims to share the same set of operative facts, there must be "shared, overlapping facts that give rise to each cause of action . . . ." *DietGoal Innovations LLC v. Arby's Rest. Grp., Inc.*, No. 2:11CV418, 2012 WL 12895339, at *2 (E.D. Tex. Aug. 30, 2012) (discussing the transaction or occurrence test in the context of permissive joinder). Thus, determining whether the transaction or occurrence test is satisfied "requires factual examination of the transactions that form the basis of the underlying complaint and the transactions that are at the heart of [a defendant's counterclaims]." *Caremark*, 584 F.3d at 559.

In this case, the Court is of the opinion that Defendants' counterclaims do not arise from the same transaction or occurrence as Plaintiff's claims. The factual questions that underlie Plaintiff's claims turn on what types of activities comprise the Tribe's bingo operations and whether those activities violate Texas law. Contrastingly, the questions that form the basis of an Equal Protection claim do not focus on Defendants' current bingo operations.[15] Rather, Defendants' Equal

[15] Defendants are concerned that the State allows some types of organizations to conduct charitable bingo but has denied the Tribe such authorization because the Tribe does not fall into one of the statutorily

Protection claim likely centers on the Act authorizing charitable bingo's legislative or administrative history. *See generally Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977) (describing how to prove an Equal Protection claim).

Because the key factual inquiries for Plaintiff's claims and Defendants' counterclaims are meaningfully different, the Court is of the opinion that they do not arise out of the same transaction or occurrence. Accordingly, the Court concludes that Plaintiff did not waive immunity by initiating litigation in this case.

b. Whether the Declaratory Judgment Act Waives Sovereign Immunity

Next, the Court considers whether the Declaratory Judgment Act waives sovereign immunity as to Defendants' Equal Protection claim and concludes that is does not. Defendants assert that, because the Declaratory Judgment Act allows courts to declare the rights of litigants whether or not further relief could be sought, the Act waives

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authorized categories of entities allowed to conduct bingo. Defs. Resp. 11; *see also* Order Regarding Interim Petition to Conduct Bingo, Aug. 3, 2010, EP-99-CV-320-KC, ECF No. 323. Defendants aver that allowing some types of organizations to conduct bingo but not extending the authorization to Indian Tribes is an Equal Protection violation. Defs. Resp. 11.

sovereign immunity. Defs. Resp. 10–11. However, Defendants misconstrue the rights that the Act provides to litigants. Importantly, the Declaratory Judgment Act does not provide a litigant the opportunity to bypass the Eleventh Amendment. *See Okpalobi v. Foster*, 244 F.3d 405, 432 (5th Cir. 2001) (Higginbotham, J., concurring) ("Congress did not and could not have created a generic exception to the Eleventh Amendment for declaratory relief.").[16]

Defendants believe that seeking only declaratory relief should permit this suit to proceed against the State. Specifically, Defendants aver that this suit is allowable—and does not need to be raised as an *Ex Parte Young* pleading against a named officer[17]—because the Tribe does not seek an award of damages or an injunction. Defs. Resp. 10. However, Defendants fail to cite controlling case law supporting that a

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[16] The parties disagree about whether the Declaratory Judgment Act or § 1983 is the correct vehicle for Defendants' counterclaims. *See* Pl. Mot. 7; Defs. Resp. 9–10. However, this distinction is immaterial for Eleventh Amendment purposes. Neither the Declaratory Judgment Act nor § 1983 waives sovereign immunity in this case. Because the Court lacks subject matter jurisdiction over Defendants' Equal Protection counterclaim, the Court declines to further discuss this disagreement.

[17] *Ex Parte Young*, 209 U.S. 123 (1908), allows a plaintiff to sue a named officer of a State to enjoin the enforcement of an unconstitutional law, even though the State is immune from suit.

claim brought against a State seeking declaratory relief may proceed without any waiver of sovereign immunity and without an *Ex Parte Young* pleading. Indeed, declaratory relief is precisely the type of prospective relief contemplated by *Ex Parte Young*. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause."). Accordingly, the Court is of the opinion that Defendants' Equal Protection claim is barred by the Eleventh Amendment.

c. Whether Defendants Should be Granted Leave to Amend

Finally, Defendants aver that "although [Defendants as] Counter-Plaintiffs do not believe it is necessary, should the Court hold that the counterclaims must be raised by way of an *Ex Parte Young* pleading, [Defendants as] Counter-Plaintiffs should be given leave so to amend the counterclaims . . . ." Defs. Resp. 10 n.8.

"Whether leave to amend should be granted is entrusted to the sound discretion of the district court . . . ." *Young v. U.S. Postal Serv. ex rel. Donahoe*, 620 F. App'x 241, 245 (5th Cir. 2015). "The court should

freely give leave when justice so requires." *Id.* (quoting FED. R. CIV. P. 15(a)(2)). In determining whether to grant leave to amend, the relevant considerations are: "1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004).

Here, the Court concludes that the factors identified in *EMC Corporation* favor the Court's granting of leave to amend. First, allowing leave to amend will not lead to undue delay because Defendants can amend the named Counter-Defendants without affecting the current scheduling order or otherwise delaying litigation. Second, the Court has no reason to believe that Defendants are acting in bad faith. Rather, it appears that Defendants believe they correctly named the State of Texas as the sole Counter-Defendant. Third, there is no repeated failure to cure deficiencies as Defendants have not yet amended their counterclaims. Fourth, allowing Defendants to amend their pleading is unlikely to cause Plaintiff to face undue prejudice. If anything, Plaintiff likely anticipates that Defendants may amend their counterclaim since Defendants raised this possibility in their Response.

Fifth, and finally, the amendment would not be futile. Granting leave to amend provides Defendants, as Counter-Plaintiffs, the opportunity to bring their constitutional claim in federal court. Accordingly, the Court finds that each factor weighs in favor of granting Defendants leave to amend their counterclaim.[18]

IV. CONCLUSION

Accordingly, **IT IS ORDERED** that Defendants/Counter-Plaintiffs Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Carlos Hisa's "Second Motion to Dismiss Plaintiff's First Amended Complaint" (ECF No. 83), filed on April 18, 2018, is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff/Counter-Defendant State of Texas's "Motion to Dismiss Defendants' Counterclaims" (ECF No. 97), filed on May 29, 2018 is **GRANTED** as to Defendants' Counterclaims regarding declarations C, D, E, and F and **DENIED** as to Defendants' Counterclaims regarding declarations A and B.

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[18] The Court notes that, notwithstanding its willingness to grant leave in this instance, Defendants did not properly move for leave to amend by raising the issue in their Response. *See* W.D. TEX. R. 7(b) (stating that when a motion for leave to file a pleading is required, an executed copy of the proposed pleading shall be filed as an exhibit to the motion for leave).

IT IS FURTHER ORDERED that Defendants' declarations C, D, and E are **DISMISSED**.

FINALLY, IT IS ORDERED that Defendants/Counter-Plaintiffs Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Carlos Hisa are **GRANTED LEAVE TO AMEND** their Counterclaim only regarding declaration F. Should they choose to amend their Counterclaim, they must **FILE** their Amended Counterclaim by no later than **September 7, 2018, at 12:00 p.m. Mountain Time**. Failure to file by this deadline will result in dismissal of Defendants' Counterclaim seeking declaration F.

SIGNED this 27 **day** of **August, 2018**.

PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE