

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

THE PUEBLO OF ISLETA, a federally-recognized Indian tribe, THE PUEBLO OF SANDIA, a federally-recognized Indian tribe, and THE PUEBLO OF TESUQUE, a federally-recognized Indian tribe,

Plaintiffs,

PUEBLO OF SANA ANA, a federally-recognized Indian tribe and PUEBLO OF SANTA CLARA, a federally-recognized Indian tribe; and

PUEBLO OF SAN FELIPE, a federally-recognized Indian tribe,

Plaintiffs-in-Intervention,

v.

No. 1:17-CV-00654-KG-KK

SUSANA MARTINEZ, in her official capacity as Governor of the State of New Mexico, JEFFREY S. LANDERS, in his official capacity as Chair of the Gaming Control Board of the State of New Mexico, RAEHELLE CAMACHO, in her official capacity as Acting State Gaming Representative, and SALVATORE MANIACI, in his official capacity as a member of the Gaming Control Board of the State of New Mexico,

Defendants.

**DEFENDANTS' RULE 56(D) RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

In response to the motion for summary judgment ("Motion") filed by Plaintiffs Pueblo of Isleta and Pueblo of Sandia ("the Pueblos"), Defendants seek an order from the Court stating that the Court will not consider the Motion until (1) the Court rules on Defendants' motion for summary judgment on the issue of arbitrability and (2) Defendants have the opportunity to

complete the discovery they need to respond to the Motion. In support of their response, Defendants state as follows.

1. The Court should not consider the Motion until the Court rules on arbitrability

Defendants filed a motion for summary judgment on the issue of arbitrability on January 4, 2018 (“Arbitrability Motion”), and that motion has been fully briefed. The Arbitrability Motion presents the first fundamental question the Court needs to determine in this case – whether the parties’ dispute should be considered by this Court or in arbitration. If the Court decides the Arbitrability Motion in Defendants’ favor, then the parties must proceed to arbitration instead of raising the merits of their dispute in this Court. Only if the Court determines that the parties’ dispute is not arbitrable should the Court consider any motions that go the merits. Accordingly, in the interests of judicial economy and in the interests of allowing the parties to receive a speedy and inexpensive resolution to their dispute, the Court should order that Defendants need not respond to the Motion – which addresses the merits of the Pueblos’ claim for declaratory and injunctive relief – unless and until the Court decides the Arbitrability Motion in the Pueblos’ favor.

2. The Court should not consider the Motion until additional discovery has taken place

Federal Rule of Civil Procedure 56(D) states that, “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Pursuant to Rule 56(D), Defendants are requesting that the Court should not consider the Motion until Defendants complete the discovery they need to fully respond to the Motion.

As shown by the Declaration of Krystle A. Thomas, attached hereto as Exhibit A, Defendants require additional time to obtain the discovery that they need to defend against the Motion. Specifically, in their Motion, the Pueblos have alleged that Defendants' claim for revenue-sharing payments based on free play credits is in violation of federal law. (*See id.*) The Pueblos seek summary judgment on their claim for declaratory and injunctive relief, and specifically request that the Court enjoin Defendants from seeking these revenue sharing payments from the Pueblos and attempting to arbitrate this dispute. (*Id.*) Plaintiffs have identified an accounting expert, Andrew Mintzer, and have relied heavily on Mr. Mintzer's opinions in their Motion to support both "undisputed material fact" 7 ("Fact 7") and their argument that Defendants' request for payment violates federal law. (*Id.*)

Mr. Mintzer was deposed yesterday. (*Id.*) Neither Defendants nor their counsel have had the opportunity to fully analyze our position in response to the Motion in light of this deposition. (*Id.*) Nonetheless, at this juncture, it is Defendants' position that testimony Mr. Mintzer gave during his deposition would assist Defendants in demonstrating a genuine issue of material fact with respect to Fact 7, and in supporting Defendants' position with respect to the arguments the Pueblos make in the Motion. (*Id.*) As of today, the date Defendants' response to the Pueblo's Motion is due, Defendants do not have a copy of Mr. Mintzer's deposition transcript that we could use in opposing the same. (*Id.*)

Furthermore, Defendants intend to take 30(b)(6) depositions of representatives from each of the Pueblos. The parties' respective counsel have been discussing setting these depositions and Defendants anticipate a discovery dispute arising from the same. (*Id.*) Defendants anticipate that these depositions will provide information that Defendants can use to further dispute Fact 7 and support Defendants' position that its request for payment is consistent with federal law. (*Id.*)

It is essential that Defendants have the opportunity to depose the Pueblos' representatives to enable Defendants to properly evaluate and respond to the Motion. (*Id.*)

Defendants anticipate that the requested discovery can be completed before the relevant pretrial deadlines. The discovery deadline is July 30, 2018, and the deadline for motions for summary judgment is August 30, 2018. (*Id.*) There will be no inconvenience to the parties or to the Court in allowing Defendants to undertake the requested discovery before responding to the Motion. Defendants do not propose a continuance that would affect any existing deadline or jeopardize the Court's ability to decide the motion before trial (which has not yet been set). (*Id.*) If Defendants are not permitted to undertake discovery before responding to the Motion, Defendants will be prejudiced in its ability to present their case. (*Id.*)

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Krystle A. Thomas

Edward Ricco

Nelson Franse

Krystle A. Thomas

P. O. Box 1888

Albuquerque, NM 87103

Telephone: (505) 765-5900

FAX: (505) 768-7395

ericco@rodey.com

nfranse@rodey.com

kthomas@rodey.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2018, I filed the foregoing pleading electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Krystle A. Thomas

Krystle A. Thomas