UNITED STATES DISTRICT COURT
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 SANTA 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. Susana Martinez, in her official capacity as the 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, Raechelle 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.	)	No. 1:17-CV-00654-KG-KK

PLAINTIFFS' AND PLAINTIFFS-IN-INTERVENTION'S CONSOLIDATED REPLY TO DEFENDANTS' RESPONSES TO MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs and Plaintiffs-in-Intervention ("Pueblos") file this consolidated reply to the Defendants' Responses to the Pueblos' Motions for Summary Judgment, ECF Nos. 71, 72 ("Defs.' Resp."), and the supporting Declarations of Krystle A. Thomas, attached to those Responses, *see*

ECF Nos. 71-1, 72-1 ("Thomas Decl."), filed April 24. The Defendants advance two arguments: First, that the Court should rule on the Defendants' Motion for Summary Judgment on the Issue of Arbitrability, *see* ECF No. 55 ("Arb. Mot."), before ruling on the Pueblos' Motions for Summary Judgment, *see* ECF Nos. 67, 68 (collectively, "Pueblos' Motions"); second, that under Fed. R. Civ. P. 56(d), the Court should defer ruling on the Pueblos' Motions for the reasons stated in the Thomas Declaration, namely that a deposition already taken, and others that have not even been noticed, will assist them in disputing a single undisputed material fact supporting each of the Pueblos' Motions, *see* ECF Nos. 67-1, 68.

Neither argument has merit. The first fails for the reasons set forth in the Pueblos' Motions. The second fails because the Defendants' vague description of the unavailable facts, and their failure to show how additional time would enable the Defendants to establish a genuine issue of material fact, does not satisfy the requirements of Rule 56(d). Accordingly, the Court should reject the Defendants' argument that their Arbitrability Motion should be decided before the Pueblos' Motions and should deny the Defendants' Rule 56(d) request. The Court should then find that the Defendants failed to respond to the Pueblos' statements of uncontested facts and legal arguments, and exercise its discretion to grant the Pueblos' Motions.

I. This Court Should Decide The Pueblos' Motions First Because If Federal Law Bars Defendants' Claim, There Is No Dispute To Arbitrate.

The Defendants respond to the Pueblos' Motions by arguing that the Court should rule on their Arbitrability Motion before ruling on the Pueblos' Motions, and should issue an order providing that "unless and until the Court decides the Arbitrability Motion in the Pueblos' favor," the Defendants need not respond to the Pueblos' Motion. Defs.' Resp. at 2. This argument has no merit, and the Defendants' request should be denied.

As the Pueblos of Isleta and Sandia show in Section IV(A) of their Motion for Summary Judgment, the Pueblos' Motions should be decided before the Arbitrability Motion for four reasons. *See* ECF No. 68, at 12-14.[1] First, the Pueblos' Motions must be decided first to resolve the threshold question of the legality of the arbitration provisions of the 2015 Compact relied on by the Defendants to advance their claim. The Pueblos assert that those provisions are invalid and unenforceable because they are inconsistent with IGRA and therefore cannot be relied on by the Defendants to initiate arbitration. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1236-38 (10th Cir. 2018) (IGRA "determines a gaming compact's effectiveness and permissible scope," and the arbitration provisions of a compact that are contrary to federal law are invalid and unenforceable); ECF No. 68, at 12, 15-16. Furthermore, that threshold question cannot be decided in arbitration because Section 7(A)(3) of the 2015 Compact excludes from the arbitrators' authority "any question as to the validity or effectiveness of this Compact or of any provision hereof." *See* ECF No. 68, at 12 n.12. Second, a ruling that IGRA bars the Defendants' claim would make it unnecessary to even consider the Defendants' interpretation of the 2007 and 2015 Compacts because IGRA controls the scope and effectiveness of compact terms. *Id.* at 12-13. Third, because the Defendants earlier conceded that "whether arbitration is the exclusive or one of many permissible avenues available for the parties to resolve their dispute is immaterial," Defs.' Reply in Supp. of Mot. for Summ. J. on the Issue of Arbitrability, ECF No. 62, at 2, they cannot now urge that their arbitrability claim bars the Pueblos' pursuit of a different permissible remedy, namely a federal court action that was filed before arbitration was initiated. *See* ECF No. 68, at 12-13. And fourth, the Secretary of the Interior's determination that it would be illegal for the

[1] In their motion for summary judgment, the other Plaintiff and Plaintiffs-in-Intervention requested that, if the Court grants relief on these grounds, it grant the relief to all the Pueblos. ECF No. 67, at 2 n.1.

State to insist that the Pueblos include free play in net win[2] merges the merits of the case with the arbitrability issue, and in such a case "the court's duty to determine whether the party intended the dispute to be arbitrable trumps its duty to avoid reaching the merits." *Id.* at 13-14 (quoting *Commc'n Workers of Am. v. Avaya, Inc.*, 693 F.3d 1295, 1300 (10th Cir. 2012)).[3]

The Defendants simply ignore these arguments, asserting only that the Arbitrability Motion "presents the first fundamental question the Court needs to determine in this case" without any supporting law or arguments. Defs.' Resp. at 2. This conclusory assertion is not sufficient to overcome the Pueblos' legal arguments. The Defendants try to bolster their statement by stating that following their proposed path will promote judicial economy and expediency. But, in this case, where the merits are bound up with the question of arbitrability, and a ruling on the merits adverse to Defendants would preclude arbitration, it is more economical and efficient for both the court and the parties if the Court decides the Pueblos' Motions first, consistent with the Tenth Circuit's decision in *Avaya*.

II. The Defendants Have Not Established That The Court Should Defer Ruling On Summary Judgment Until The Transcript Of Mr. Mintzer's Testimony Is Available And Until They Have Taken Fed. R. Civ. P. 30(b)(6) Depositions.

The Defendants also argue that, pursuant to Fed. R. Civ. P. 56(d), the Court should defer ruling on the Pueblos' Motions until the transcript of Mr. Mintzer's deposition is available and until they have taken Fed. R. Civ. P. 30(b)(6) depositions of representatives of each Pueblo. Defs.'

[2] The Defendants do not contest Plaintiffs' Uncontested Fact 16, *see* ECF No. 68, at 10-11, or Plaintiff's and Plaintiffs-in-Intervention's Uncontested Facts 11-13, *see* ECF No. 67-1, at 8-9, which describe the Secretary's determination, as stated in the no-action approval letters on the 2015 Compact for New Mexico gaming tribes, including the Plaintiffs and Plaintiffs-in-Intervention.

[3] Moreover, as the Pueblos explained in their Response in Opposition to the Arbitrability Motion, ECF No. 58, the Arbitrability Motion should be denied, so its pendency should not delay the Court's consideration of the Pueblos' Motions.

Resp. at 2-4. As we show next, Defendants' deferral request should be denied because they have failed to carry their burden of showing that Rule 56(d) is satisfied. *Martinez v. Brown*, No. 1:16-CV-00263-MCA-SCY, 2017 WL 34236020, at *1 (D.N.M. Mar. 21, 2017) (describing the "nonmovant's burden under Rule 56(d)"); *see also Coleman v. Cnty. of Lincoln*, No. 17-663 GBW/SMV, 2018 WL 401185, at *7 (D.N.M. Jan. 12, 2018) (deferral under 56(d) granted only if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to summary judgment) (quoting Fed. R. Civ. P. 56(d)).

Rule 56(d) allows the Court to defer consideration of a summary judgment motion or allow time for discovery, if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(d); *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1249 (10th Cir. 2015). At the same time, however, the protections provided by Rule 56(d) "can be applied only if a [nonmoving] party satisfies certain requirements." *Wickward v. Manville*, 676 F. App'x 753, 770 (10th Cir. 2017) (quoting *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000)). And

> [t]he fact that a Rule 56(d) motion is pending does not, by itself, defer the due date for the response, or relieve the party of complying with Rule 56(c) in any response that it might file. If a party files a Rule 56(d) motion in advance but does not later file a timely response to the summary judgment motion itself, and the court then denies the Rule 56(d) motion, the party may find itself subject to the 'considered undisputed' provisions of Rule 56(e).

Wilson v. Vill. of Los Lunas, 572 F. App'x 635, 639 (10th Cir. 2014) (emphasis added) (quoting 11 *Moore's Federal Practice* § 56.101[4]) (ruling that the pendency of a 56(d) request did not freeze summary judgment schedule or preclude district court from ruling on 56(d) request and summary judgment at the same time where nonmovant failed to file a timely response).

Under the law of the Tenth Circuit, "a non-movant requesting additional discovery under Rule 56(d) 'must specify (1) the probable facts not available, (2) why those facts cannot be

presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable [the party] to obtain those facts and rebut the motion for summary judgment.'" *Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016) (quoting *Birch*, 812 F.3d at 1249) (alteration in original). The Tenth Circuit "expect[s] Rule 56(d) motions to be robust," *Birch*, 812 F.3d at 1249, and "Rule 56(d) may not be invoked based solely upon the assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable," *Lopez v. Delta Int'l Machinery Corp.*, No. CIV 15-0193 JB/GBW, 2018 WL 1363834, at *28 (D.N.M. Mar. 15, 2018) (citing *Jensen v. Redev. Agency*, 998 F.2d 1550, 1554 (10th Cir. 1993)), *appeal docketed*, No. 18-2055 (10th Cir.). Furthermore, "if . . . the information sought is either irrelevant to the summary judgment motion or merely cumulative, no extension will be granted." *N.M. Consol. Constr., LLC v. City Council*, 97 F. Supp. 3d 1287, 1304 (D.N.M. 2015) (quoting *Jensen*, 998 F.2d at 1554).

The Thomas Declaration fails to satisfy these requirements because it does not describe "the probable facts not available," nor does it show that "additional time will enable [the Defendants] to obtain those facts and rebut the motion for summary judgment." *Gutierrez*, 841 F.3d at 908. The Thomas Declaration first avers that the Defendants have not had the opportunity to "fully analyze [their] position in response to [the Pueblos' Motions] in light" of the deposition of Andrew Mintzer, Thomas Decl. ¶8, and that although the court reporter has not yet delivered to the Defendants a copy of the deposition, "at this juncture" they believe that Mr. Mintzer's testimony would "assist Defendants in demonstrating a genuine issue of material fact with respect

to" undisputed material Fact 7 in the Plaintiffs' Motion, ECF No. 68, and undisputed material Fact 17 in the Plaintiff's and Plaintiffs-in-Intervention's Supporting Memorandum, ECF No. 67-1.[4] *Id.*

This justification is plainly insufficient under Rule 56(d). First, the Defendants make no attempt to show "the probable facts not available." *Gutierrez*, 841 F.3d at 908. Even though the Defendants filed the Thomas Declaration the day after taking Mr. Mintzer's deposition, the Thomas Declaration says nothing about the testimony Defendants need from the transcript. Simply saying that Mr. Mintzer's deposition would "assist Defendants in demonstrating a genuine issue of material fact" with respect to one fact in each of the Pueblos' two motions, Thomas Decl. ¶8, is not enough because it does not "identify the 'probable facts not available.'" *Burke v. Utah Transit Auth.*, 462 F.3d 1253, 1264 (10th Cir. 2006) (quoting *Price*, 232 F.3d at 783). Second, the Thomas Declaration does not "state with specificity how the desired time would allow it to meet its burden in opposing summary judgment." *N.M. Consol. Constr.*, 97 F. Supp. 3d at 1304. Indeed, the Defendants do not even explain how Mr. Mintzer's deposition would rebut Facts 7 and 17, much less show how it would allow Defendants to meet their burden in opposing summary judgment. That is simply not enough. *Estate of Stevens ex rel. Collins v. Bd. of Cty. Comm'rs*, No. CV 13-00882 WJ/KK, 2014 WL 12785147, at *5 (D.N.M. Nov. 5, 2014) (nonmovant did not "explain how [a witness's] deposition would allow Plaintiff to better respond to the instant motion"). Furthermore, the Defendants' statement that the transcript is not yet in their possession is not itself sufficient under Rule 56(d). *Price*, 232 F.3d at 784; *Lopez*, 2018 WL 1363834, at *28

[4] Fact 7 in the Plaintiffs' Motion shows that generally accepted accounting principles ("GAAP") are derived from the American Institute of Certified Public Accountants Gaming Guide, and that the Gaming Guide is relied on for that purpose under federal case law. ECF No. 68, at 6. Fact 17 in the Plaintiff's and Plaintiffs-in-Intervention's Supporting Memorandum shows that the State's position would require the Pueblos to violate GAAP as defined in the Gaming Guide. ECF No. 67-1, at 9-10.

("Rule 56(d) may not be invoked based solely on the assertion that . . . specific facts necessary to oppose summary judgment are unavailable."). Accordingly, the Defendants' reliance on the Mintzer deposition to delay responding to the motion for summary judgment does not satisfy Rule 56(d).

To be sure, the certified deposition transcript, *see* Fed. R. Civ. P. 30(f)(1), is a better source for describing Mr. Mintzer's testimony than an affidavit from the Defendants. But even assuming *arguendo* that the Thomas Declaration was a sufficient basis for the Defendants' request, the Defendants would be entitled to only a reasonable period of time from their receipt of the certified transcript to file a response addressing how Mr. Mintzer's deposition "assist[s] Defendants in demonstrating a genuine issue of material fact with respect to" Fact 7 in the Plaintiffs' Motion, ECF No. 68, at 6, and Fact 17 in the Plaintiff's and Plaintiffs-in-Intervention's Supporting Memorandum, ECF No. 67-1, at 9-10. In that event, the Pueblos would also request the right to reply to the Defendants' response.

The Thomas Declaration also avers that the Defendants "intend to take [Fed. R. Civ. P.] Rule 30(b)(6) depositions of representatives from each of the Pueblos" and that they "anticipate that these depositions will provide information that Defendants can use to further dispute" Plaintiffs' Fact 7 and Plaintiffs' and Plaintiffs-in-Intervention's Fact 17. Thomas Decl. ¶¶9-10. This statement fails to meet the Defendants' Rule 56(d) burden for the same reasons that their statement on the Mintzer deposition fails to do so, namely it says nothing about the probable facts to be gained from those depositions, nor does it say anything about why the Defendants contend these depositions would preclude summary judgment. *See supra* at 6-8. Instead, the Defendants simply "anticipate" they "will provide information" that the Defendants could "use" to dispute certain facts. Thomas Decl. ¶10; *see Brown*, 2017 WL 34236020, at *1; *Lopez*, 2018 WL 1363834,

at *28. That is not enough because it fails to set out "with any degree of specificity" the testimony that Defendants will seek from the proposed deponents. *Crow v. Vill. of Ruidoso*, No. 16-cv-1315 JB/SMV, 2017 WL 3393964, at *4 n.10 (D.N.M. Aug. 7, 2017). So it cannot show how that testimony would preclude summary judgment.

The Defendants have also failed to show that the deposition of tribal representatives would even be relevant to Facts 7 and 17. *See Jensen*, 998 F.2d at 1554 (no extension if "the information sought is irrelevant to the summary judgment motion"); *N.M. Consol. Constr.*, 97 F. Supp. 3d at 1304 (quoting *Jensen*, 998 F.2d at 1554) (same). Nor could they make such a showing. Those undisputed facts describe how the Gaming Guide is the source of GAAP, the relevant provision of GAAP, and how the State's position on the calculation of Net Win violates GAAP. The Gaming Guide is issued by a non-tribal entity, and tribal employees have no control over its contents or the meaning of federal law. So, the testimony of Pueblo representatives could not call into question the applicability of GAAP under federal law, the definition of GAAP in the Gaming Guide, or whether the State's position violates GAAP as defined therein. As the Pueblos will show, if and when the Defendants issue Rule 30(b)(6) notices, or, if appropriate, even before, the fact that these depositions are not relevant to the application of GAAP means that the Defendants are also not entitled to take the proposed deponents' testimony. For these reasons, "[n]one of the information which [Defendants] seek[] to discover relates to the question" of whether Facts 7 and 17 are correct, and there is no reason for the Court to grant relief under Rule 56(d). *See Martinez v. Lucero*, No. CIV 11-1003 JB/LFG, 2012 WL 2175772, at *30 (D.N.M. May 31, 2012); *see also Lopez*, 2018 WL 1363834, at *11.

The Defendants have also failed to meet their burden under Rule 56(e) to properly address the Pueblos' statements of uncontested facts. *See Wilson*, 572 F. App'x at 639. Rather than

seeking an extension of the briefing schedule to allow for a response after discovery is completed, or responding to the Pueblos' Motions and addressing their statements of undisputed facts, the Defendants instead selectively responded by arguing that their Arbitrability Motion should be decided first, while simultaneously filing an insufficient 56(d) request that cited the need for discovery related to two uncontested facts. The pendency of a 56(d) request does not freeze the summary judgment briefing schedule, *see id.*, and the Pueblos' Motions and uncontested facts presented in those motions show that the Pueblos are entitled to summary judgment. Therefore, given that the Defendants' Rule 56(d) request was insufficient, the Court should exercise its discretion under Rule 56(e)(3) to grant summary judgment to the Pueblos. *Wickware*, 676 F. App'x 753, 769 (10th Cir. 2017) (quoting *Campfield v. State Farm Mut. Auto Ins. Co.*, 532 F.3d 1111, 1125 (10th Cir. 2008)) (where a nonmovant fails to satisfy Rule 56(d), "there is no abuse of discretion in granting summary judgment if it is otherwise appropriate"); *Gutierrez*, 841 F.3d at 898-99; *Wilson*, 572 F. App'x at 639-40; *accord Lopez*, 2018 WL 1363834, at *1; *Coleman*, 2018 WL 401185, at *7-8; *Butler v. City of Las Cruces*, No. CIV 14-1019 RB/WPL, 2015 WL 13658685, at *4 (D.N.M. Aug. 19, 2015) (all three denying Rule 56(d) relief to nonmovant and simultaneously granting summary judgment to movant).

For all these reasons, this Court should not defer consideration of the Pueblos' Motions on either of the grounds stated by the Defendants and should grant summary judgment to the Pueblos. In the alternative, the Defendants could be allowed a reasonable period of time, such as ten days, from their receipt of the certified transcript of Mr. Mintzer's deposition to file their response and to address how the Mintzer deposition rebuts undisputed material Fact 7 in the Plaintiffs' Motion, ECF No. 68, at 6, and undisputed material Fact 17 in the Plaintiff's and Plaintiffs-in-Intervention's Supporting Memorandum, ECF No. 67-1, at 9-10. The Plaintiff Pueblos should then have the right

to reply to that response. The Defendants should not, however, be given more time to take Rule 30(b)(6) depositions. Nor should the Defendants otherwise be permitted to argue further that the Defendants' Arbitrability Motion should be decided before the Pueblos' Motions, or dispute the statements of uncontested facts in the Pueblos' Motions.

Dated: May 18, 2018

By: *s/ David C. Mielke*

David C. Mielke, Esq.
Sonosky, Chambers, Sachse,
Mielke & Brownell, LLP
500 Marquette Avenue NW, Suite 660
Albuquerque, NM 87102
(505) 247-0147
dmielke@abqsonosky.com

Douglas B. L. Endreson, Esq.
Frank S. Holleman, Esq.
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
1425 K St NW, Suite 600
Washington, DC 20005
(202) 682-0240
dendreson@sonosky.com
fholleman@sonosky.com
Attorneys for Plaintiffs Pueblo of Isleta and Pueblo of Sandia

s/ Thomas J. Peckham
Thomas J. Peckham, Esq.
Nordhaus Law Firm, LLP
6705 Academy Rd. NE, Ste. A
Albuquerque, NM 87109-3361
(505) 243-4275
tpeckham@nordhauslaw.com

Attorney for Plaintiff
Pueblo of Tesuque

s/ Richard W. Hughes
Richard W. Hughes, Esq.
Reed C. Bienvenu, Esq.
Rothstein Donatelli LLP
P.O. Box 8180; 1215 Paseo de Peralta
Santa Fe, Mexico 87504

(505) 988-8004
rwhughes@rothsteinlaw.com
rbienvenu@rothsteinlaw.com

Attorneys for Plaintiffs-in-Intervention Pueblo of Santa Ana and Pueblo of Santa Clara

s/ Gwenellen P. Janov
Gwenellen P. Janov, Esq.
Janov Law Offices, P.C.
901 Rio Grande Blvd. NW., Suite F-144
Albuquerque, New Mexico 87104
(505) 842-8302
gjanov@janovlaw.com

Joe M. Tenorio, Esq.
Tenorio Law Offices, P.A.
13383 Briarwood Dr.
Broomfield, CO 80020
(505) 228-4823
joe@tenoriolawoffices.com

Attorneys for Plaintiff-in-Intervention Pueblo of San Felipe

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I filed the foregoing electronically through the CM/ECF system, which caused all parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

By: *s/ Frank S. Holleman*
Frank S. Holleman