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 SANTA ANA, a federally-recognized Indian tribe, and PUEBLO OF SANTA CLARA, a federally-recognized Indian tribe, PUEBLO OF SAN FELIPE, a federally-recognized Indian tribe,

Plaintiffs-in-Intervention,

v.

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, 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 MOTION FOR PROTECTIVE ORDER TO QUASH DEFENDANTS' RULE 30(B)(6) DEPOSITION NOTICES AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS

Pursuant to Federal Rule of Civil Procedure 26(c), Plaintiffs and Plaintiffs-in-Intervention ("Pueblos") hereby move for a protective order quashing the Rule 30(b)(6) deposition notices ("Notices") served by the Defendants on May 29, 2018. The Pueblos also respond in opposition to Defendants' Motion to Compel Discovery and for Sanctions ("Motion

to Compel"), filed on June 8, 2018. ECF No. 81. Because the topics of information sought by Defendants in their written discovery requests of March 28, 2018 (the subject of their Motion to Compel) and in their 30(b)(6) Notices are identical (but for one exception discussed below), the Pueblos' arguments are generally applicable to both of the pending motions.[1]

I. LEGAL STANDARDS FOR DISCOVERY

Under "Rule 26(b), as amended, parties 'may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.'" *Willis v. Geico Gen. Ins. Co.*, No. CV 13-280 KG/KK, 2016 WL 1749665, at *2 (D.N.M. Mar. 29, 2016) (quoting Fed. R. Civ. P. 26(b)(1)). Factors the Court must consider in determining whether discovery is "proportional to the needs of the case" are:

> the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Id. "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* "The court's responsibility, using all the information provided by the parties, is to consider these . . . factors in reaching a case-specific determination of the appropriate scope of discovery." *Id.* (quoting Fed. R. Civ. P. 26(b)(1), 2015 Amend., Advisory Comm. Notes).

"Rule 26(c), in turn, governs the Court's authority to issue protective orders." *Id.* (citing Fed. R. Civ. P. 26(c)(1)). "The Court may issue a protective order 'for good cause . . . to protect

[1] This Court's Local Rules permit a combined motion and supporting memorandum to be 27 pages in length, and permit a response to a motion to be 24 pages. *See* D.N.M.LR-Civ. 7.5. This consolidated motion and response is no more than 30 pages of text. The Pueblos assume that since it is far less than the combined allowable lengths of a motion and a response, no motion to exceed page limits is required, but if they are in error, they will file such a motion if directed by the Clerk. Defendants' counsel, in any event, have informed the undersigned that they have no objection to the length of this motion/response, provided they are accorded the same treatment for their consolidated response/reply.

a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Id.* "A protective order may forbid or limit particular discovery, or otherwise control the terms on which it may be had." *Id.* "Moreover, '[i]f a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.'" *Id.* (quoting Fed. R. Civ. P. 26(c)(2)). "The party seeking a protective order bears the burden of showing good cause for the order to issue." *Id.* "The decision whether to grant a motion for protective order is within the trial court's discretion." *Id.*

II. PUEBLOS' MOTION FOR PROTECTIVE ORDER

Defendants served their Rule 30(b)(6) Notices on each of the Pueblos via email on May 29, 2018. (Copies of these Notices are attached hereto as Exhibits A through F.) These Notices informed the Pueblos that Defendants would take the deposition of "a representative" of each Pueblo on June 21, 2018,[2] on the following topics ("Topics"):

> 1. The distribution of free play coupons to patrons between January 1, 2001 and December 31, 2010.
>
> 2. The calculation of net win with respect to players' redemption of free play coupons between January 1, 2001 and December 31, 2010.
>
> 3. The negotiation of revenue sharing provisions in the 2007 Compact.[3]
>
> 4. How you treated the use of free play coupons for purposes of calculating net win under the 2007 Compact.
>
> 5. The transition from free play coupons to electronic free play credits.
>
> 6. The decision to exclude electronic free play credits from net win calculations under the 2007 Compact.

[2] The parties have conferred in good faith on the issues discussed herein, and were unable to come to any agreement regarding these Notices. Counsel for Defendants have agreed that the filing of this motion will stay the depositions, at least until the Court has ruled on the motion.

[3] This is the only Topic that was not expressly included in the Defendants' requests for admission, interrogatories, and requests for production of March 28, 2018.

> 7. How free play was considered in the calculation of total amount wagered for purposes of complying with the minimum payout percentage under the 2007 Compact.
>
> 8. How free play has been calculated in terms of "net win," "gross gaming revenue," and "daily net win" for purposes other than revenue sharing under the 2007 Compact.

As discussed below, none of the Topics is relevant to any of the claims or appropriate defenses at issue in this lawsuit. Even were the Court to conclude there is some relevance, these requests are not proportional to the needs of the case. Further, Defendants' examination of the Topics at a 30(b)(6) deposition would cause undue burden and expense to the Pueblos, especially in light of Defendants' right of access to the information under the compacts and the State's long delay in asserting the claims that prompted the Pueblos to file this case. The Court should therefore order that the Notices be quashed.

A. The Defendants' Notices Seek Information That is Not Relevant

Generally, the Defendants' Notices seek information that is not relevant to this suit, that would be of no value in resolving the issues before this Court, and for which the burden of production outweighs any possible benefit. *See* Fed. R. Civ. P. 26(b)(1). The Pueblos' complaints are governed by and limited to principles of federal law that preclude the State's demand that the Pueblos include free play in calculating revenue sharing payments to the State under the 2007 Compact. Federal law requires the Pueblos to maintain their gaming records and account for their gaming revenues in compliance with generally accepted accounting principles ("GAAP"), 25 C.F.R. §§ 542.19(b), 571.12(b). As the Secretary of the Interior explained in the no-action approval letters on the 2015 Compact, ECF Nos. 68-6 at 5; 68-7, at 4; 68-8, at 3; 68-21, at 3 n.6, the State violates federal law by asserting under the 2007 Compact that it has a right to revenue sharing payments that include free play in the calculation of Net Win. Such an assertion, made years after the 2007 Compact was negotiated and agreed to, and which was not

expressly and clearly agreed to by the Pueblos in the Compact, constitutes an illegal attempt to tax the Pueblos in violation of the *per se* rule against the State taxation of Indian tribes. *See* ECF No. 68 at 17-19. Federal law principles control both the Pueblos' claims and the Defendants' asserted defense that the 2007 Compact's terms should be interpreted to support their position. *See* Mot. to Compel at 6-7. However, the parties' actions, and even their intent, cannot change the applicability of federal law to the issues presented by the Defendants' claims.

At bottom, these motions hinge on Defendants' mistaken belief that a far-ranging "interpretation" of the 2007 Compact is allowed or necessary to resolve this dispute. The Pueblos' complaints are far more narrowly tailored than that and constrain the available defenses. To the extent the 2007 Compact must be "interpreted" by the Court at all, that review is essentially limited to the plain meaning of two sentences in Section 4(C):

> Not less than annually, the Tribal Gaming Agency shall require an audit and a certified financial statement covering all financial activities of the Gaming Enterprise, including written verification of the accuracy of the quarterly Net Win calculation, by an independent certified public accountant licensed by the State. The financial statement shall be prepared in accordance with generally accepted accounting principles and shall specify the total amount wagered in Class III Gaming on all Gaming Machines at the Tribe's Gaming Facility for purposes of calculating "Net Win" under Section 11 of this Compact using the format specified therein.

The Pueblos' contention is simple and unassailable: one cannot prepare a financial statement in accordance with GAAP (and therefore in compliance with federal law) if one includes free play in "the total amount wagered in Class III Gaming on all Gaming Machines at the Tribe's Gaming Facility for purposes of calculating 'Net Win' under Section 11 of this Compact." In order for the State to collect additional revenue sharing from the Pueblos, one would have to prepare a financial statement that does not comply with GAAP. That would violate federal regulations (and the Compact itself).

It is hornbook law that a contract must be interpreted to be in compliance with applicable law. *See* RESTATEMENT (SECOND) OF CONTRACTS, §203, cmt. C. (1981) ("In the absence of contrary indication, it is assumed that . . . the agreement is intended to be lawful rather than unconscionable, fraudulent or otherwise illegal.") If the Court concludes that the Pueblos' contention regarding GAAP and free play is correct, then it would violate federal law to do otherwise. Course of performance, parol evidence, and the parties' "intent" are meaningless, because even were the Court to find sufficient ambiguity in the limited material provisions of the Compact to allow for such evidence in the normal course,[4] it would still be irrelevant here because the ambiguity would have to be resolved by choosing the lawful construction dictated by GAAP. Thus, as expanded upon below, any conceivable "defense" by the Defendants cannot rely on such evidence, and the discovery sought by Defendants is irrelevant and also cannot conceivably lead to the discovery of admissible evidence.

The Pueblos have already moved for summary judgment on this point, contending that the State's attempt to collect revenue sharing payments on free play is a violation of federal law because federal regulations expressly require that all accounting for the entirety of the Pueblos' gaming operations must comply with GAAP, including the calculation of "Net Win" for revenue sharing purposes, and under GAAP free play cannot be treated as part of Net Win. *See* ECF Nos. 67, 68. The Pueblos also contend that even if a provision of the Compact purported to require

[4] The Defendants in their Motion to Compel cite to *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 11, 114 N.M. 778 and two other New Mexico state court cases for the proposition that they may introduce extrinsic evidence even if the Compact is unambiguous. Their reliance is misplaced for two reasons. First, federal common law, not New Mexico law, governs the construction of the Compact. *See Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-39 (10th Cir.2018). Second, none of the cases cited by Defendants addresses a situation in which one proposed reading of the Compact would contravene federal law. In this context, ambiguity aside, extrinsic evidence is irrelevant, even were Defendants correct that it could otherwise be allowed.

accounting in violation of GAAP, such a provision would be invalid and unenforceable. *See, e.g.*, ECF No. 67-1 at 25. It is extremely likely that this case will be resolved on summary judgment on the basis described above due to the clear and unambiguous requirements of the federal regulations and the fact that the Defendants have not offered any accounting expert to contest Andrew M. Mintzer's confirmation of the controlling effect of GAAP in this case, as explained in the Expert Report of Andrew M. Mintzer, CPA/CFF, CFE ("Mintzer Report"), ECF No. 67-10.

Thus, the Defendants' proposed depositions are irrelevant and not proportional to the needs of the case, and the Notices should be quashed. Alternatively, at a minimum, the Court should postpone any discovery relating to Defendants' proposed far-ranging interpretation of the 2007 Compact until after it has ruled on the legal issues in the Pueblos' motions for summary judgment. The Pueblos should not be forced to respond to burdensome discovery unless and until the Court denies their motions for summary judgment, which denial would presumably identify genuine issues of material fact precluding summary judgment, that in turn would properly guide any discovery going forward.

The Defendants assert in their Motion to Compel that it is "internally inconsistent" for the Pueblos to rely on the Mintzer Report while arguing that the Defendants' requests for discovery into the Pueblos' accounting practices are irrelevant to disposition of the claims, Mot. to Compel at 6, and that the Pueblos should be estopped from arguing against the Defendants' discovery because they rely on the Mintzer Deposition, the AICPA Gaming Guide, and "letters," *id.* at 7-8. This contention compares apples and oranges. The Gaming Guide is a judicially noticeable document, *see* ECF No. 68, that has been judicially recognized as the source of GAAP, *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 813 (6th Cir. 2007), and the

"letters" to which Defendants refer appear to be the Secretary's statutorily required letters regarding Tribal-State Compacts, which express an agency's interpretation of federal law, *see* Complaint ¶40. Those documents, and the Mintzer Deposition, are relevant because they explain or illustrate the meaning and effect of the federal law that controls this case. The Defendants' discovery is irrelevant because the discovery they seek does not, and could not, change the meaning or effect of federal law. It is not inconsistent to rely on relevant materials while opposing irrelevant discovery. Nor does estoppel apply, because it cannot be inequitable for the Pueblos to rely on the Rules of Civil Procedure to oppose irrelevant discovery requests.

More specific reasons why the deposition Notices should be quashed are discussed below.

B. The Defendants' Requests are Disproportionate Because They Seek Documents to Which the Defendants Already Had Access Under the 2007 Compact

The Defendants' deposition notices indicate that they seek evidence to support the collection by the State of purported underpayments of revenue sharing. Seeking discovery of those documents now, in this manner, should be foreclosed by Defendants' failure to timely avail themselves of the right they have enjoyed for the past eleven years to obtain this information. For that reason, the Defendants' requests are disproportionate to the needs of the case.

To illustrate the extent to which the Defendants have had access to such information, their April 13, 2017 Notices of Noncompliance to each Pueblo calculated the alleged revenue sharing shortfall based on free play to the dollar. *See, e.g.*, ECF No. 67-6 at 1–2. While the Pueblos do not concede the accuracy of those calculations, the Defendants clearly believed they had sufficient information to make them and make a formal demand for payment based on them. That fact alone renders hollow their requests for discovery in this case, years after the fact.

The Defendants are now seeking discovery on the Pueblos' accounting methods to justify the State's demands for revenues from the Tribe, circumventing the process that the State and Pueblos negotiated and embodied in the 2007 Compact. Because they would require the Pueblos to provide information that the State already has, or had the opportunity to obtain pursuant to the 2007 Compact, the requests are disproportionate.

C. Free Play "Coupons

Topics 1, 2, 4, and 5 of Defendants' Notices concern "free play coupons." This term is at best ambiguous in Defendants' Notices, but in their Motion to Compel the Defendants distinguish between "coupons/cash" and "electronic credits/points," and indicate that "coupons" are promotional incentives that are distributed to customers that the customer can redeem for cash. *See* Mot. to Compel at 4–5 (using the term "coupons/cash/cash equivalents"). Although Defendants refer to all of these as "free play," that usage is incorrect, as the Pueblos have explained in their objections to Defendants' written discovery, and such "coupons" are not relevant to the federal law issues in this lawsuit. At best, discovery relating to them would also be highly disproportional to the needs of the case.

1. Relevance

The only type of promotional incentive at issue in the Pueblos' complaints are electronic free play credits that "*are not redeemable for cash or merchandise*, but that can be played on gaming machines like currency." *See* Complaint-in-Intervention for Injunctive and Declaratory Relief ("SA/SC Complaint"), ECF No. 11, ¶17 (emphasis added); Cmpl.-in-Intervention for Injunctive & Decl'y Relief, ECF No. 36, ¶15 ("SF Complaint"); Compl. for Injunctive & Decl'y Relief, ECF No. 1, ¶¶24-25 ("Complaint") (free play credits are distinct from cash and are a house-authorized "form of electronic currency"). The Pueblos' complaints seek a declaration that the Defendants' demand for revenue-sharing payments based on such electronic free play credits

violates GAAP, and therefore violates federal law and the express terms of the 2007 Compact, both of which expressly require that the accounting for the entirety of the Pueblos' gaming activities, including especially its calculation of "Net Win" for revenue sharing purposes, comply with GAAP. *See* SA/SC Complaint ¶¶35–37; Complaint ¶¶76. The Pueblos' claims, thus, solely concern promotional incentives that are *not* redeemable for cash; the topic of free play "coupons" that *are* redeemable for cash is entirely outside the scope of the issues presented in this case. The Pueblos are not seeking any declaration regarding such "coupons," and there is no dispute between the Pueblos and the Defendants regarding revenue sharing on any such "coupons" (or other promotional devices that are redeemable for cash).

The AICPA Gaming Guide, which is the authoritative source of GAAP for tribal gaming,[5] expressly distinguishes "free play" from other incentive programs through which patrons receive "cash" or "cash equivalents." *Compare* Gaming Guide § 6.13, 6.17–6.19 *with* § 6.14–6.15, 6.20–21; *see also* §§ 6.05, 6.09, 6.27 (disjunctive use of "cash" and "free play"), attached as Exhibit A to Mintzer Declaration, submitted herewith. Consistent with the AICPA Gaming Guide, the Mintzer Report explains that under GAAP, different accounting standards apply to different types of incentive programs, and those accounting standards directly affect how revenue is calculated. The Mintzer Report is focused on the treatment of electronic free play credits under GAAP. But Section D of the report briefly addresses other loyalty programs,

[5] *See* Mintzer Report at ¶¶ 19-22. The National Indian Gaming Commission, created by IGRA to provide federal oversight of Indian gaming, also expressly includes the Gaming Guide in its definition of GAAP in 25 C.F.R. §543.2:

> *Generally Accepted Accounting Principles (GAAP).* A widely accepted set of rules, conventions, standards, and procedures for reporting financial information, as established by the Financial Accounting Standards Board (FASB), including, but not limited to, the standards for casino accounting published by the American Institute of Certified Public Accountants (AICPA).

including cash and point programs that are redeemable for cash. Mintzer Report at 11–12. Unlike electronic free play credits where free play is not included in the calculation of revenue, the Mintzer Report explains that under GAAP the cost of cash benefits – the Defendants' "coupons" – "should be netted against revenue," and similarly the costs of points programs that are redeemed for cash are "recorded as a reduction of net gaming revenue." *Id.* at 11.[6] "Free play coupons," both in fact and as that term is used by the Defendants, are thus subject to entirely different accounting standards from the electronic free play credits at issue in the Pueblos' complaints (and the State's underlying demand for additional revenue sharing). This distinction further confirms that such coupons are entirely irrelevant to the issues before the Court and would not inform the Court's analysis regarding the accounting standards applicable to electronic free play credits. Indeed, Defendants' use of the term "free play coupons" is actually a misuse of the term "free play," as that term is used in the AICPA Gaming Guide, because cash and cash equivalents are a distinct concept from "free play." Defendants cannot make cash and cash-equivalent incentive programs relevant to this lawsuit simply by incorrectly referring to them as "free play." Having failed to identify an accounting expert in this lawsuit, Defendants could not offer any expert opinion to the Court about the accounting standards applicable to such programs and how those accounting standards relate to the standards for electronic free play credits that are not redeemable for cash. Discovery on this topic thus has virtually no likelihood of having any value to the Defendants or the Court in this case.

[6] The different treatment of free play and cash incentive programs makes intuitive sense. Once a patron has redeemed coupons or points for cash, neither the casino nor the gaming machine can differentiate that cash from the cash the customer brought into the facility. The casino has given the cash away, and it is now the customer's. If she chooses to put that cash into a gaming machine, it is revenue to the casino, the same as any other cash that is played, and must be included in net win. In contrast, free play credits are not cash, they have no cash value, and thus under GAAP they have no place in the net win calculation.

Defendants' primary argument for why "coupons" are relevant to this lawsuit is their claim that the Pueblos' accounting treatment of these "coupons" will somehow inform the Court's interpretation of the 2007 Compact. Mot. to Compel at 8 (arguing that these "past incentive programs" are "relevant in construing the terms of the 2007 Compact," and to "interpreting the parties' intentions in drafting the revenue sharing provisions in the 2007 Compact"). As argued above, however, no extrinsic evidence is permissible or necessary in this case. Even were such evidence to be allowed, Defendants do not specifically explain *how* these coupons would inform the Court's analysis of any provision of the 2007 Compact. They do not explain how the Pueblos' past use of promotional programs that are subject to entirely different accounting standards would inform how free play credits should be treated. Defendants' conclusory assertions that these past practices are relevant must therefore be rejected.

2. Proportionality

In addition to being irrelevant, Defendants' requests for information regarding "coupons" are not proportional to the needs of this case. The information that Defendants seek regarding the use of coupons prior to the negotiation of the 2007 Compact is now at least ten years old. Many, and perhaps most or even all, of the employees of the Pueblos who would have had knowledge of the use of "coupons" are no longer employed by the Pueblos. Many of the records regarding this time period also likely no longer exist because the 2007 and 2015 Compacts require the Pueblos to retain documents for only five years, as discussed in more detail below. It would, therefore, be extremely burdensome for the Pueblos to attempt to locate and prepare witnesses to testify about the Pueblos' past use of "coupons," particularly as that might bear (if it did at all, which is entirely unclear) on the negotiations of the 2007 Compact. *See S.E.C. v. Goldstone*, No. CIV 12-0257 JB/LFG, 2014 WL 4349507, at *33 (D.N.M. Aug. 23, 2014) (discussing obligation of Rule 30(b)(6) deponent to become informed on topics for deposition). The nonexistent or, at

best, very low potential value of the information sought does not justify this significant burden on the Pueblos and their representatives.

Additionally, but similarly, the Defendants in their Motion to Compel argue that "coupons" are relevant to this lawsuit because "the way in which the Pueblos accounted for their coupon/cash/cash equivalent incentives is relevant to demonstrate that GAAP does not prevent the Pueblos from accounting for free play in the manner in which the State claims they should be accounted." Mot. to Compel at 8. As discussed above, under the AICPA Gaming Guide, which is the authoritative source of GAAP, the accounting standards that are applicable to coupons or cash incentives are distinct from those applicable to electronic free play credits, and thus information regarding the Pueblos' treatment of coupons would not inform the questions at issue in this proceeding regarding the proper accounting treatment of electronic free play credits. The manner in which the Pueblos accounted for cash or cash equivalent incentives does not and cannot affect how GAAP requires the Pueblos to account for free play (as Mr. Mintzer explains in his report). This argument must therefore also be rejected.

D. The Time Frames for Defendants' Requests

Topics 1 and 2 of Defendants' Notices seek information from the period between January 1, 2001 and December 31, 2010, and Topic 3 focuses on 2007 and the years preceding. The time frames for the other Topics are not defined, but some could and likely would encompass information going back prior to 2007, when the 2007 Compact was being negotiated. These time frames are not relevant to this lawsuit and are extremely overbroad.

Mirroring the time period of the State's demand for additional revenue sharing from the Pueblos, the Pueblos' claims solely concern the State's demand for revenue sharing on electronic free play credits for the period from April 1, 2011 until the Pueblos' new 2015 compacts took effect. *See* SA/SC Complaint, ¶¶35–37; Complaint ¶43; SF Complaint ¶17. The ten-year time

period in Topics 1 and 2 of Defendants' Notices, thus, completely pre-dates the relevant time period of the claims in this lawsuit. Defendants' only justification for seeking discovery from this earlier time period appears to be based on their contention that such discovery would be relevant to interpretation of the terms of the 2007 Compact. As described elsewhere in this brief, however, this justification should be rejected because extrinsic evidence regarding compact negotiations is not required for resolution of this lawsuit. Additionally, it would be highly burdensome for the Pueblos to have to prepare representatives for deposition regarding matters that go back up to 17 years, particularly given that the Pueblos properly may no longer possess records from this time period and because employees with knowledge from those periods likely no longer work for the Pueblos.

E. Negotiation of the 2007 Gaming Compact

Topic 3 in Defendants' Notices is "The negotiation of revenue sharing provisions in the 2007 Compact." On its face, this Topic is extremely overbroad and would potentially cover every aspect of the 2007 Compact negotiations, including provisions of the Compact (that is, nearly all of them) that have no relationship to this case. It would be extremely burdensome for the Pueblos to prepare a deponent to testify on every aspect of the revenue-sharing provisions in the 2007 Compact, particularly since these negotiations occurred more than 11 years ago.

Moreover, as explained above, the negotiation of the 2007 Compact is not relevant to the claims in this lawsuit, because federal law requires all of the Pueblos' gaming accounting to comply with GAAP, and precludes the State's claim. At the very least, the Court should first determine whether the Pueblos' claims can be decided as a matter of law based on the Pueblos' motions for summary judgment. If the Court determines that the Pueblos' claims cannot be decided as a matter of law and that interpretation of the 2007 Compact is required beyond the

plain meaning itself, only then should it allow discovery regarding the 2007 Compact negotiations to proceed.

An additional issue regarding the 2007 Compact negotiations warrants mention. The Compact was negotiated primarily by attorneys on both sides, and of course involves government-to-government negotiations between the tribes and the State. Thus, internal communications that might be responsive, if any, are likely to be subject to assertions of attorney-client privilege, the deliberative process privilege, or both. Moreover, many of the Pueblos' attorneys in this action represented tribes during the negotiations. The Court should avoid a situation in which those attorneys might be deposed unless it were absolutely necessary. Regardless, and on information and belief, the fact is that the accounting treatment of free play credits was never discussed during the negotiation of the 2007 Compact.

F. Decisionmaking by the Pueblos

Topic 6 in the Notices is "The decision to exclude electronic free play credits from net win calculations under the 2007 Compact." However, in response to Defendants' Interrogatory No. 7, the Pueblos have already stated that they have never included electronic free play credits in the calculation of net win under the 2007 Compact, and thus no decision to exclude free play credits was ever made. *See, e.g.*, Santa Ana Response to Interrogatory No. 7, ECF No. 81-4 at 4; Sandia Resp. to Interrogatory No. 7, ECF No. 81-1, at 5; San Felipe Resp. to Interrogatory No. 7, ECF No. 82-1, at 4. The Pueblos have thus already provided the Defendants with the information they seek. More specifically, the Pueblos have confirmed that no such information exists.

Even if the Pueblos had not already provided this information, this Topic is also irrelevant to the claims in this lawsuit, as the Pueblos explained in their objections to the Interrogatory. *See id.* The sole issue before the Court in this lawsuit is the question of whether the State's demand for revenue-sharing payments based on free play is permissible under federal

law, which will be determined based upon federal regulations, IGRA, and GAAP. Any "decisions" made by the Pueblos about the treatment of free play would not affect these questions regarding the proper interpretation of federal law and GAAP.

G. Minimum Payout Percentage

Topic 7 of Defendants' Notices is "How free play was considered in the calculation of total amount wagered for purposes of complying with the minimum payout percentage under the 2007 Compact." This Topic is not relevant to this lawsuit because none of the Pueblos' claims concern the concept of a "minimum payout percentage," and that concept is not relevant to determining whether revenue sharing on electronic free play credits is permitted under federal law or GAAP.

Although the term "minimum payout percentage" (or "hold percentage," which is the more common term, and is simply the obverse of "payout percentage") does not appear in the 2007 Compact, the Pueblos understand the Defendants to be referring to the requirement under Section 4(A)(12) that "each electronic or electromechanical gaming device in use at the Gaming Facility must pay out a mathematically demonstrable percentage of all amounts wagered, which must not be less than eighty percent (80%) . . ." *See* 2007 Compact § 4(A)(12). The meaning of this requirement, and the Pueblos' compliance with it, is a highly technical subject that requires knowledge of the gaming machine software and the complex processes involved with testing that software. It is not a figure that is calculated by a tribal gaming enterprise, and it has no bearing at all on the issues in this case. *See* Declaration of John Cirrincione, submitted herewith.

H. Calculations for Non-Revenue-Sharing Purposes

Topic 8 of Defendants' Notices is "How free play has been calculated in terms of 'net win,' 'gross gaming revenue,' and 'daily net win' for purposes other than revenue sharing under the 2007 Compact." The Pueblos' treatment of free play for purposes other than revenue sharing

is completely irrelevant to the issues before the Court. The Pueblos' complaints solely seek a determination from the Court regarding the State's demand for additional revenue sharing payments based on free play credits played in each Pueblo's gaming facility. *See, e.g.*, SA/SC Complaint ¶¶35–37; Complaint ¶¶76. Specifically, the Pueblos seek a determination that including free play in the calculation of Net Win for purposes of determining the amount of revenue sharing that is due would violate GAAP, and therefore would violate federal law. *Id.* The Pueblos' treatment of free play for any purpose other than revenue sharing therefore has no bearing on any issue before the Court. The question of whether federal law and GAAP preclude treating free play as revenue for revenue sharing purposes, as the State contends, does not in any way depend upon how the Pueblos treat free play for non-revenue-sharing purposes, and the Topic is also facially overbroad and unduly burdensome.

III. PUEBLOS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL

On June 8, 2018, Defendants filed their Motion to Compel, ECF No. 81, which requests that the Pueblos supplement their responses to the Defendants' written discovery requests ("Discovery Demands"), which were served on each of the Pueblos on March 28, 2018. *See* Certificate of Service, ECF No. 66. As noted above, with the exception of Topic 3, the Defendants' Discovery Demands seek information essentially identical to the Topics on which the Defendants propose to depose Pueblo representatives. With that exception, the same arguments made in support of the Pueblos' motion for protective order apply fully in response to Defendants' Motion to Compel. For those reasons, and others set forth below, that motion is meritless and should be denied.

A. Defendants Have Not Identified Any Inadequacy with the Pueblos' Substantive Responses to Defendants' Discovery Demands

In response to Defendants' Discovery Demands, the Pueblos raised certain general objections, but the Pueblos also provided substantive responses to most (or in some cases all) of the requests for admissions and interrogatories and explained that documents responsive to most of the requests for production had already been produced, or did not exist. Defendants' Motion to Compel disputes many of the objections raised by the Pueblos, but the Defendants do not argue that any of the substantive responses that the Pueblos did provide are inadequate. Thus, for most of their Discovery Demands, the Defendants have failed to show that the Pueblos have not already provided the information that they seek. Defendants' Motion to Compel should therefore be denied as to all of the Discovery Demands for which the Pueblos have already substantively responded or have already produced the requested records, which is the majority of the Defendants' requests.

A related inadequacy of Defendants' Motion to Compel is that, with few exceptions, they fail to identify the specific Discovery Demands for which they believe they are entitled to additional responses. Defendants dispute the general objections raised by the Pueblos, but they fail to specifically identify which responses are inadequate and what additional information they believe they are entitled to. Given that the Pueblos have already provided substantive responses and documents in response to numerous of their requests, this lack of specificity makes it largely impossible for the Pueblos or the Court to determine what specific additional information or discovery is being requested in the motion.

B. Defendants Do Not Contest the Pueblos' Objections to Time Frame and Overbreadth.

The Pueblos objected to certain Discovery Demands on the grounds that the time periods of the demands, some of which went back to 2001, were overbroad, because the Pueblos seek

declaratory and injunctive relief going back only to April 1, 2011. *See, e.g.*, Santa Ana Resps. to Request for Admission 1–7; Resps. to Request for Production No. 3. Defendants' Motion to Compel does not contest these objections to the time frames, and these objections are therefore accepted. *See* D.N.M.LR-Civ. 26.6 ("Failure to proceed within [this rule's required] time period constitutes acceptance of the objection."); *Navajo Nation v. Urban Outfitters, Inc.*, No. 12CV0195 KG/LAM, 2015 WL 11089521, at *4 (D.N.M. June 10, 2015) (objections accepted where not addressed in motion to compel but instead raised in "supplemental brief" that was untimely under Local Rule 26.6); *White v. City of Albuquerque*, No. CV 12-0988 MV/KBM, 2014 WL 12639929, at *1 (D.N.M. May 13, 2014) (finding party had accepted objections not raised within applicable time period under Local Rule 26.6).

The Pueblos also objected to some of Defendants Discovery Demands on the grounds that they were overbroad because they sought "all documents," or encompassed large quantities of documents that are irrelevant to the litigation. For example, Defendants' Request for Production No. 3 sought "*all documents* related to your issuance of free play to patrons in the form of coupons, cash, coins, tokens, credits, electronic or otherwise from the inception of your free play program until the effective date of the 2015 Compact." (Emphasis added). The Pueblos responded that this request was overbroad and "would potentially encompass an enormous volume of accounting records, electronic gaming records, promotional materials and advertisements, communications and other records that merely mention 'free play,'" none of which would be relevant to the case. *See, e.g.*, ECF No. 81-4 at 5. The Pueblos similarly objected to Defendants' request for "all documents" in Request for Production No. 4. *Id.* Defendants' Motion to Compel does not contest these objections to the overbreadth of these Discovery

Demands, nor do Defendants attempt to narrow the scope of these requests, and thus they are also accepted. (*See* cases and authorities cited above.)

C. The Pueblos' General Objections Are Proper

Defendants contend that the "General Objections" section of the Pueblos' Discovery Responses "is improper and should be stricken since, by definition, this section is general and does not involve any meaningful effort to apply the objections to a particular discovery request as required by the rules." Mot. to Compel at 3. This argument is without merit, both because these General Objections are proper and because the Pueblos have specifically identified the Discovery Demands to which the objections apply.

Many of Defendants' Discovery Demands, for example, concern "free play coupons." *See, e.g.*, Requests for Admission No. 1–7; Interrogatories 1–3, 8; Requests for Production 2, 3. In their General Objections, the Pueblos sought to provide a detailed explanation for why none of these requests is relevant to the claims at issue in this lawsuit. Similarly, the Pueblos' General Objections explained why the time periods for many of Defendants' demands were overbroad and outside the time period at issue in the case, and that the Defendants already had access to much of the information that they were demanding. The Pueblos' use of General Objections to provide a more complete and detailed explanation of these objections, each of which were applicable to multiple discovery demands, was entirely proper, particularly since the Pueblos also provided detailed responses and objections to every one of Defendants' individual requests which specifically and expressly referenced the General Objections that were applicable.

In support of their argument, the Defendants cite an order in which the court found that "a general objection asserted 'to the extent it may apply to a particular request for discovery' and unaccompanied by any meaningful effort to apply the objection to a particular discovery request is tantamount to asserting no objection at all." *Certain Syndicate Subscribers to the Down Side v.*

Lasko Prods., Inc., No. CIV 08-0220 MCA/DJS at 2 (D.N.M. Jul. 29, 2009). That is not the situation here. The General Objections provide a detailed explanation of the basis of the Pueblos' objections, and are then expressly and specifically incorporated by reference into the responses to the individual demands to which they apply. *See, e.g.*, ECF No. 81-1, at 2-3, ECF No. 81-3, at 2-3 (incorporating General Objections into specific responses to Requests for Admission). *Davis v. St. Anselm Exploration Co.*, No. CV 10-00883 JEC/WPL, 2011 WL 13143891, at *3 (D.N.M. Sept. 2, 2011) ("In order to invoke general objections, the responding party must specifically reference them in an individual response."). The Pueblos' presentation of their objections is thus consistent with the "general practice in this district" to provide "a list of general objections, with specific references to those objections where relevant." *Id.*

D. "Free Play Coupons"

The Pueblos' primary objection to many of Defendants' Discovery Demands is that Defendants' requests for information concerning "free play coupons" are irrelevant to this lawsuit because this lawsuit concerns only electronic free play credits that are not redeemable for cash. *See* SA/SC Complaint ¶17; SF Complaint ¶15; Complaint ¶¶24-25. As discussed in detail above, *supra* at § II.B, the Pueblos specifically contend that what the Defendants call "free play coupons," which are redeemable for cash, are not within the scope of the Pueblos' claims and are subject to different accounting standards. The Pueblos also objected to these requests on the grounds that Defendants' demands were vague, overbroad, and improper because they had not defined what they mean by "free play." Their persistent and undefined misuse of the term "free play coupons" is improper in this context and comprised a threshold objection to a number of their requests.

In their Motion to Compel, the Defendants now contend that they "used the term 'free play' *in its broadest sense* – incentives provided by the Pueblos to the customers (whether the

obligation was discretionary or non-discretionary and whether the incentive was cashable or not) that the customers could use to game." Mot. to Compel at 4 (emphasis added). This definition of "free play" appears nowhere in Defendants' Discovery Demands and is even broader than the Pueblos originally suspected. Defendants' evolving and imprecise definition of the meaning of "free play," which also contravenes the AICPA Gaming Guide, alone warrants denial of their Motion to Compel. Defendants cannot respond to Discovery Demands where the terminology used is vague and ambiguous, and certainly not when it conflates distinct concepts (free play vis-à-vis cash incentives). Defendants should not be required to guess the meaning of the terms used by the Defendants nor defend against Defendants attempts to conflate different concepts.[7]

Defendants' explanation that they are using the term free play "in its broadest sense," further confirms the overbroad and irrelevant nature of their Discovery Demands. As explained above and in the Mintzer Report, different accounting standards apply to different types of incentive programs, depending upon whether the incentives are cash (or are redeemable for cash), or not. Defendants' demand for discovery regarding a wide set of incentive programs that are wholly irrelevant to Defendants' claims and which are subject to entirely different accounting standards from electronic free play credits at issue in this case are irrelevant to this lawsuit and should be denied.

As discussed above, Defendants' belated definition of "free play" to include cash and benefits that can be exchanged for cash is also contrary to the use of "free play" in the AICPA Gaming Guide. Defendants' Motion to Compel cites the definition of "free play" in the AICPA

[7] It seems that Defendants may be attempting to conflate cash incentives and free play so that they can then argue that they received revenue sharing on cash incentives so they should continue to receive revenue sharing on free play. As explained throughout, that argument is irrelevant to the federal law issues in this case. Also as explained in the text, it is wrong as a matter of GAAP. It is the equivalent of saying that a tax on apples applies equally to oranges.

Gaming Guide and asserts that "[t]his definition does not exclude cashable free play credits that are wagered." Mot. to Compel at 4. Contrary to Defendants' claim about the meaning of "free play," the AICPA Gaming Guide repeatedly contrasts "free play" with "cash" incentives when discussing the applicable accounting standards, confirming that "free play" does not include cashable incentives, as discussed above. *See* Gaming Guide § 6.13, 6.17–6.19 *with* § 6.14–6.15, 6.20–21; *see also* §§ 6.05, 6.09, 6.27, Mintzer Decl. Ex. A.[8] Perhaps not surprisingly, Defendants have not offered any accounting expert or other admissible evidence to explain or support their apparent interpretation of the AICPA Gaming Guide.

E. Accounting Records Regarding "Free Play"

Defendants' Motion to Compel seeks records relating to "the Pueblos' accounting and treatment of free play, both in the revenue-sharing and in other contexts." Mot. to Compel at 9. Defendants contend that although they "are in possession of some accounting records, there remain numerous accounting records that the State Defendants do not possess." *Id.* A motion to compel is not justified here because the Defendants had an avenue to obtain these documents and were provided the documents to which they were entitled. The gaming compacts give broad authority to the State Gaming Representative to inspect "all records relating to Class III Gaming of the Tribe," subject to certain conditions. *See* 2007 Compact, § 4(E)(3). The Pueblos were also required to provide an annual financial statement and audit report to the State Gaming Representative. *Id* at § 4(C). The Pueblos thus already have provided and made available extensive information about their gaming operations and accounting to the Defendants. The Defendants' contention that they require a motion to compel to obtain additional accounting

[8] The Pueblos explained in their motion for protective order, *supra* at 7-8 , that despite the Defendants' attack on the Pueblos' use of the Mintzer Report, *see* Mot. to Compel at 6, 7-8, the Pueblos may properly rely on it here.

records, without any explanation of why they could not and did not obtain them long ago under the Compacts, should thus be denied. *See* Rule 37(a)(1).

Defendants' Motion to Compel claims that "when asked to produce free play related documents as part of an audit in 2010, the Pueblos refused, and the State Defendants were unable to obtain the same." Mot. to Compel at 9. Defendants have provided absolutely no evidentiary support for this assertion (regarding events that allegedly occurred eight years ago, and a year before the commencement of the period with which this cased is concerned), and did not raise it in the Rule 37(a)(1) conference. It should therefore be disregarded.

Defendants also contend that they are entitled to records regarding the Pueblos' treatment of free play "in other contexts." Mot. to Compel at 9. The language in Defendants' Discovery Demands seeking this information is vague and overbroad. Defendants' Request for Production No 4 seeks "*[a]ll documents* relied on by you to calculate 'Net Win', 'Gross Gaming Revenue', 'Gross Handle', 'Daily Net Win' and Percentage of Coin-In' for purposes of paying gaming machine manufacturers under the terms of the agreements related to participation agreements, machine leases, wide area progressive machines or systems." (Emphasis added). This request potentially encompasses an enormous volume of documents of, at most, only speculative relevance to the issues in the lawsuit.

In their Motion, the Defendants only justify this broad request by providing the assertion that "[u]pon information and belief, at least some of the Pueblos include free play in net win calculations with respect to their contracts with gaming machine manufacturers and/or minimum payout percentages under the 2007 Compact." Mot. to Compel at 9. As discussed above, the Pueblos' treatment of free play outside the context of revenue-sharing payments is irrelevant to the claims in this lawsuit. Defendants' speculation about how some Pueblos may treat free play

in connection with contracts with other parties—that are not governed by federal law requirements--has no bearing whatever on the issues presented here. *See Certain Underwriters of Lloyd's v. Old Republic Ins. Co.*, 2015 WL 12748248, at *5 (D.N.M. Aug. 18, 2015). As the Pueblos have explained, *supra*, the State's demand is barred by IGRA and the per se rule against State taxation of Indian tribes. The Pueblos' agreements with third parties, or practices in other contexts, have no effect on how these principles of federal law apply. So, information about the Pueblos' accounting is not relevant, and the Motion to Compel should be denied.[9]

F. Defendants Do Not Actually Seek Sanctions

Contrary to the title of their Motion to Compel, Defendants are not seeking sanctions. *See* Mot. to Compel at 10 ("It is therefore premature for the State Defendants to file a motion for sanctions."). The Pueblos agree that Defendants have no basis for filing any such motion. The Defendants do, however, "seek an order from the Court compelling each of the Pueblos to state what responsive documents were/were not destroyed and when." *Id.* This request should be denied because Defendants have not established any facts showing that any responsive documents have been improperly destroyed.

Defendants' Discovery Demands cover a tremendously overbroad and ill-defined time period. Defendants' Request for Production No. 3, for example, requested "All documents

[9] Similarly, the discovery of these accounting materials is not relevant for "potential[] . . . defenses of waiver, estoppel, and/or unclean hands." Mot. to Compel at 9-10. As the Pueblos have shown, the State's demand is barred by federal law. The equitable defenses to which the Defendants refer could not permit the State to assert unlawful demands or engage in conduct forbidden by law. *Fourth Corner Credit Union v. Fed. Reserve Bank*, 861 F.3d 1052, 1054-55 (10th Cir. 2017) (quoting *Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)) ("a court won't use its equitable power to facilitate illegal conduct"); *see also Am. Sur. Co. of N.Y. v. Gold*, 375 F.2d 523, 528 (10th Cir. 1966) (equitable defenses like estoppel "do not in general apply in transactions that are forbidden by statute or that are contrary to public policy") (quotation marks omitted). It would not be proportionate to the needs of the case to engage in discovery related to defenses that are legally unavailable to the Defendants.

related to your issuance of free play to patrons in the form of coupons, cash, coins, tokens, credits, electronic, or otherwise *from the inception of your free play program* until the effective date of the 2015 Compact." *See, e.g.*, ECF No. 81-4 at 5 (emphasis added). Similarly, Defendants' Request for Admission No. 1 sought an admission that "between January 1, 2001 and December 31, 2010" the Pueblos distributed free play coupons. *See, e.g., id.* at 2. Defendants' Discovery Demands, thus, concerned periods of time going back at least 17 years. In contrast, the Pueblos' complaints solely concern revenue sharing on electronic free play credits for the period from April 1, 2011 until the Pueblos' new 2015 compact took effect, which is a period of time going back only about 7 years. *See, e.g.*, SA/SC Complaint, ¶¶35–37.

In response to these overbroad Discovery Demands, the Pueblos correctly explained that some of these old documents sought by the Defendants would not be available because they had likely been destroyed pursuant to the document retention policies of the Pueblos. The Pueblos further noted that the compacts have an express provision governing the maintenance of records, which requires that a variety of categories of documents, including accounting records, be maintained for "not less than five (5) years." 2007 Compact § 4.C.1, ECF No. 1-2; 2015 Compact § 4.C.2, ECF No. 1-3. That requirement mandates the converse: the Compact does not require the Pueblos to retain documents for *more* than five years.

Defendants' attempt to portray the Pueblos as bad actors that improperly destroyed records relevant to this dispute is thus baseless. The Pueblos have provided all of the relevant information in their possession to the Defendants and they have also complied with all of their document retention obligations, including those required under their 2007 and 2015 Compact. The fact that the Pueblos correctly stated that potentially responsive records dating back nearly 17 years may have been destroyed pursuant to a routine policy does not entitle the Defendants to

an order compelling them to state "what responsive documents were/were not destroyed and when." Mot. to Compel at 10.[10] Such an order would be particularly inappropriate given that Defendants have not identified a single specific document or record that they believe was improperly destroyed. It would also be inappropriate because the Defendants and the Pueblos have an express agreement governing the period for which documents must be retained, and to the best of their knowledge the Pueblos are fully in compliance with that agreement.

The Defendants argue that the Pueblos have been obligated to disregard their document retention policies and preserve documents for future litigation since "at least 2010" because the State and the Pueblos were engaged in various "informal meetings" and correspondence over revenue sharing and because the Gaming Control Board requested accounting documents from the Pueblos. *See id.* at 10-11. The apparent inference is that, if the Pueblos did apply their document retention policies to responsive documents, they did so improperly. The Defendants are wrong. The duty to preserve evidence arises only when litigation is "imminent." *Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288, 1294 (D.N.M. 2016) (citing *Turner v. Pub. Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009)). It is only at that point – which occurs well after settlement negotiations begin – that a party is under any obligation to suspend document retention policies. *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, No. CIV 05-279 WJ/ACT, 2012 WL 12294413, at *3 & n.2, *4-5 (D.N.M. Aug. 31, 2012) (quoted in *Browder*, 187 F. Supp. 3d at 1294) (duty to preserve evidence arose after party to False Claims Act suit unequivocally rejected further settlement negotiations). The fact that the parties sought to resolve

[10] The Pueblos of Isleta and Sandia specifically note that it would not be possible for them to comply with such an order, for the reasons stated in their response to the Defendants' request for more information about their document retention policies. *See* ECF No. 81-8, at 2.

their differences on this issue through various formal and informal negotiations since 2010 did not give rise to any legal obligation to suspend the Pueblos' routine document retention policies.

The Defendants also do not support their request that the Court issue an order compelling the Pueblos to obtain potentially responsive documents from third parties, or seek to determine the recollection of individuals who are no longer in their employ. Mot. to Compel at 12. The Defendants are, in effect, asking the Court to expand the scope of their discovery requests to require the Pueblos to seek materials from third parties. That is not a proper basis for a motion to compel. *See* Rule 37(a)(3)(B).

IV. ATTORNEYS' FEES

The Defendants seek attorneys' fees under Federal Rule of Civil Procedure 37(a)(5). Rule 37(a)(5) requires a court, after it disposes of a motion to compel, to award attorneys' fees in limited situations. If the motion succeeds, fees are only awarded against a nonmovant whose nondisclosure or objections were not "substantially justified." *Id.* 37(a)(5)(A)(ii). If the motion fails, fees are awarded against the movant, if his or her motion was not "substantially justified," *id.* 37(a)(5)(B). And in either case, fees are not awarded if they would be unjust. *Id.* 37(a)(5)(A)(iii), (a)(5)(B). This is a high bar. This Court has declined to award fees when a losing party has "taken some positions that are substantially justified, and some that are without merit," because to award fees in such a situation would be unjust and inappropriate. *EEOC v. N.M., Corrections Dep't*, No. Civ. 15-879 KG/KK, 2016 WL 9777238, at *11 (D.N.M. Sept. 30, 2016); *Certain Underwriters*, 2015 WL 12748248, at *14. The Court should, therefore, deny the Defendants' request for attorneys' fees because the Pueblos' arguments are substantially justified by federal law and the Federal Rules of Civil Procedure and awarding fees to the Defendants would be unjust.

By contrast, the Defendants here have sought irrelevant and unduly burdensome discovery in support of a claim for revenue sharing that violates federal law and that would require the Pueblos to violate federal and tribal law, if they complied with it. The motion to compel that discovery is not substantially justified, and it would not be unjust or inappropriate to require the Defendants to pay the Pueblos' attorneys' fees incurred in defending against it.

V. CONCLUSION

For all the reasons discussed above, the Court should grant the Pueblos' motion for a protective order quashing Defendants' Notices. Furthermore, the Court should deny the Defendants' Motion to Compel.

Date: June 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I caused the foregoing document and all attachments to be filed using CM/ECF, which caused all parties or counsel to this case to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Richard W. Hughes