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

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	**No. 03:17-CV-00179 PRM**
v.	§	
	§	
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR,	§	
	§	
Defendants.	§	
	§	

PUEBLO DEFENDANTS' SECOND
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

SECOND MOTION TO DISMSS

Defendants Ysleta del Sur Pueblo, the Tribal Council and Governor Carlos Hisa or his Successor ("Pueblo Defendants") respectfully submit their Second Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(h). This Court does not have jurisdiction over the matters raised in the First Amended Complaint given: (1) the Pueblo Defendants' inherent sovereign immunity, and (2) the Plaintiff's failure to join – and the infeasibility of joining – the corporate entity that conducts the challenged activities as a party to its suit, namely the Ysleta del Sur Pueblo Fraternal Organization.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION

As a threshold matter, each reason to dismiss the Plaintiff's First Amended Complaint is based in this Court's lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *see also Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 935 (5th Cir. 2012) ("A lack of subject matter jurisdiction may be raised at any time …"). The Fifth Circuit has also explicitly held that Rule 12(h)(2) allows for a second motion to dismiss. *Doe v. Columbia-Brazoria Indep. Sch. Dist. by and through Bd. of Trs.*, 855 F.3d 681, 686 (5th Cir. 2017).

The burden of proof for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("plaintiff constantly bears the burden of proof that jurisdiction does in fact exist"). *See also Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). The Fifth Circuit recognizes that lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts

evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id.* (citing *Barrera–Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996)). Here the Plaintiff's First Amended Complaint and undisputed facts all require the Court to dismiss this case.

II. THE RESTORATION ACT'S LIMITED WAIVER OF SOVEREIGN IMMUNITY OPERATES ONLY AS TO THE FEDERAL GOVERNMENT—NOT PLAINTIFF.

A. The Restoration Act Denies Regulatory Jurisdiction to the State.

The Ysleta del Sur Pueblo is a federally recognized Indian Tribe and is immune from suit absent an identified waiver of its sovereign immunity:

> Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." . . . [T]ribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals.

Michigan v. Bay Mills Indian Cmty., ___ U.S. ___, 134 S. Ct. 2024, 2030-31 (2014).

Tribal sovereignty predates all federal law, the United States Constitution, and the existence of the State of Texas. *Bay Mills*, 134 S. Ct. at 2024 (Indian tribes "remain 'separate sovereigns pre-existing the Constitution'") (citing *Santa Clara v. Martinez*, 436 U.S. 49, 56 (1978)). This immunity can be waived only by the Indian tribe itself or when expressly abrogated by Congress. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Even then, because key aspects of tribal self-determination are at issue whenever Congress passes legislation affecting tribal governance, courts will not infer that Congress intended "[t]o abrogate tribal immunity" unless it "'unequivocally' express[es] that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citation omitted).

As particularly relevant here, the Pueblo's immunity is considered "a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla.*, 523 U.S. at 756

(citations omitted) (emphasis added). As a rule of construction, "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 134 S. Ct. at 2032. "The upshot is this: Unless Congress has authorized [the state]'s suit, our precedents demand that it be dismissed." *Id.*

It is against this fundamental sovereign immunity backdrop that the Plaintiff argues when it claims that Section 107(c) of the Restoration Act waives the Pueblo's immunity to allow for Plaintiff's action. ECF No. 8, p. 2. Yet, as set forth below, the language of the Restoration Act does not expressly waive the Pueblo's immunity as to the State. Instead, the Restoration Act's limited waiver only operates in the Pueblo's relationship to the Federal Government. *Bridges v. Soc. Sec. Admin.*, Civil Action No. SA-05-0CA-0652 XR, 2006 WL 1881454, at *7 (W.D. Tex. July 6, 2006) *subsequently aff'd,* 251 F. App'x 927 (5th Cir. 2007) ("Without a waiver, the doctrine of sovereign immunity bars plaintiff's action, and the Court lacks subject matter jurisdiction to hear his claim"). *See also* ECF No. 77, p. 37 ("This is an unusual statute that prohibits Defendants—who represent a sovereign entity. . . .").

Tribes have an inherent sovereign right to offer some forms of gaming. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-22 (1987) (affirming sovereign right of Indians to engaged in gaming on tribal lands). Therefore, the language of Section 107(a) that "prohibit[s] on the reservation or lands of a tribe" the operation of "[a]ll gaming activities which are prohibited by the laws of the State of Texas" represents a limited interference with that sovereign right. 25 U.S.C. § 1300g-6(a).[1] But a congressional decision to limit the Pueblo's sovereign right in this regard is not a waiver of the Pueblo's sovereign immunity with regard to the Plaintiff.

[1] The Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (Aug. 6, 1987), was formally codified at 25 U.S.C. § 1300g-1, *et seq*. However, it is now omitted from the U.S. Code.

Congress explicitly states in the next section of the Restoration Act, Section 107(b), that "[n]othing in [Section 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b). This language is hardly an "unequivocal" waiver of the Pueblo's sovereign immunity. Instead, this language merely represents an affirmation that the State of Texas has no inherent civil or regulatory jurisdiction over gaming on the Pueblo, and nothing in this section of the Restoration Act changes that. Congress confirmed its choice to not abrogate the Pueblo's sovereign immunity as to Plaintiff in Section 107 by placing the "exclusive jurisdiction" in "the courts of the United States" in Section 107(c) for "any offense in violation of" the subsection of the Restoration Act allowing gaming, 107(a). This is not an unambiguous expression of congressional intent to authorize the Plaintiff's action. At most, Section 107(c) represents not a jurisdictional grant, but a "savings clause" that demands the Plaintiff identify an extrinsic law that unequivocally abrogates sovereign immunity in order for its claim to survive. *See* ECF No. 54. Thus in Section 107, Congress provides limited abrogation of the Pueblo's sovereign immunity as to the federal government. There is no waiver language as to the state.

B. Judge Hudspeth's Prior Sovereign Immunity Ruling Is Abrogated by Supreme Court Precedent.

The 1999 order entered by Judge Hudspeth on this issue cannot be relied upon to vitiate the Pueblo's sovereign immunity. *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708 (W.D. Tex. 1999). That decision contains two conclusions central to any waiver of sovereign immunity argument: (1) that Section 107(c) "allows the State of Texas to bring suit" for injunctive relief "in federal court," and (2) that "tribal immunity is not a defense to a claim for injunctive relief when brought against tribal officials *and the Tribe itself*." *Id.* at 692 (emphasis added). Supreme

Court precedent, however, holds that these rulings are incorrect and therefore nonbinding on this Court.

Although "general res judicata principles" usually prevent "collateral attacks on subject matter jurisdiction," those principles permit collateral attacks on previous subject matter jurisdiction rulings when it "would serve an important policy extrinsic to the judicial system," such as preserving a sovereign's immunity to suit. *See generally* Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction*, 66 CORNELL L. REV. 534, 542–43, 560–61 (1981). The Supreme Court has expressly held as much. Because "[c]onsent alone gives jurisdiction to adjudge against a sovereign," the "suability of the United States *and the Indian Nations* . . . depends upon affirmative statutory authority," the absence of which renders "the attempted exercise of judicial power . . . void." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) (emphasis added). The Fifth Circuit follows this authority and views the "doctrine of immunity" as "sufficiently important to prevail over the application of the doctrine of *res judicata*." *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1054 n.9 (5th Cir. 1987). As a result, Judge Hudspeth's prior opinion does not preclude the Pueblo from asserting—and this Court from holding—both that Section 107(c) is an insufficiently express abrogation of tribal sovereign immunity for purposes of a lawsuit by this Plaintiff, and that Plaintiff otherwise cannot obtain declaratory and injunctive relief directly against the Pueblo.

III. PLAINTIFF HAS FAILED TO NAME A REQUIRED PARTY THAT CANNOT BE JOINED.

A. The Applicable Rules.

Federal Rule of Civil Procedure 12(b)(7) provides that a complaint may be dismissed for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). Because Rule 19 protects the rights of an absentee party, it may be raised at any time. *Pickle v. Int'l Oilfield Divers, Inc.*, 791

F.2d 1237, 1242 (5th Cir.1986) ("[A] Rule 19 objection can even be noticed on appeal by the reviewing court *sua sponte.*").

"Determining whether to dismiss a case for failure to join [a required party that cannot be joined] requires a two-step inquiry." *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 628 (5th Cir. 2009) (finding no abuse of discretion in the district court's determination that Tennessee was a required party that could not be joined and that in equity and good conscience the suit should be dismissed).[2]

In the first step, "the district court must determine whether the party should be added under the requirements of Rule 19(a)." *Id.* An absent party who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:

> (A) in the person's absence complete relief cannot be accorded among those already parties, or (B) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a)(1).

If a necessary party cannot be joined, the court proceeds to the second step to determine "whether litigation can be properly pursued without the absent party." *Hood*, 570 F.3d at 628-29. Rule 19(b) enumerates four factors which must be weighed by the district court when

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[2] "[A]fter the 2007 amendments to the Rules, Rule 19 no longer asks whether a party is 'necessary,' nor does it include the term 'indispensable.' However, the Advisory Committee's Notes make clear that the Amendment, including the change from 'necessary' to 'required,' and the omission of the term 'indispensable,' were 'intended to be stylistic only.' Rule 19, advisory committee's notes to 2007 amendment." *Manning v. Manning*, 304 F.R.D. 227, 229–30 (S.D. Miss. 2015) (citation omitted).

determining "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The factors are:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1312 n.6 (5th Cir. 1986) (affirming district court's dismissal of case); Fed. R. Civ. P. 19(b)(1) – (4). This list of factors is not, however, exclusive. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. and Proc. § 1608 (3d ed. 2001) (stating "[t]he list in [Rule 19(b)] does not exhaust the possible considerations the court may take into account; it simply identifies those that will be most significant in most cases"). *See also Republic of Philippines v. Pimentel*, 553 U.S. 851, 869 (2008) (finding the appellate court "did not accord proper weight to the compelling claim of sovereign immunity"). In "assess[ing] the factors set out in Rule 19(b), [the court] seek[s] to avoid manifest injustice while taking full cognizance of the practicalities involved." *Pulitzer*, 784 F.2d at 1312.

Court determinations under Rule 19 are reviewed for abuse of discretion:

> Determining whether an entity is a [required party that cannot be joined] is a highly-practical, fact-based endeavor, and Federal Rule of Civil Procedure 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be. However, a court abuses its discretion when its ruling is based on an erroneous view of the law.

Hood, 570 F.3d at 628. However, underlying legal conclusions supporting Rule 19 determinations are reviewed de novo. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003) (affirming dismissal of district court on grounds that tribe was a required party that could not be joined).

B. The Case Must be Dismissed for Failure to Name the Ysleta del Sur Pueblo Fraternal Organization as a Required Party.

1. This Court's Prior Rulings Regarding the Conduct of Bingo Under the Restoration Act.

This Court has found that, "the Tribe is not prohibited from participating in all gaming activities, only those gaming activities that are prohibited by Texas law to private citizens and other organizations." *State of Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-CV-320, ECF No. 165, p. 2 ("*Ysleta I*"). "As such, the Tribe may participate in legal gaming activities." *Id.* at 16. Under the Texas Constitution and Texas Bingo Enabling Act, one of those "legal gaming activities" is charitable bingo. Vernon's Ann. Tex. Const., art. 3, § 47(b); Tex. Occ. Code § 2001.001, *et seq*. That same authority provides that a variety of organizations may operate charitable bingo under Texas law, including "fraternal organization[s]." This Court has confirmed the authority of fraternal organizations to conduct charitable bingo under the Texas statutory scheme. *E.g., Ysleta I*, ECF No. 323, pp. 2-3.

The Ysleta del Sur Pueblo Fraternal Organization ("Fraternal Organization") operates the charitable bingo activities that are challenged in the First Amended Complaint. ECF No. 17-2, p. 2. The Fraternal Organization is a "Section 17" corporation established by a charter issued by the Secretary of the Interior pursuant to 25 U.S.C. § 5124 (originally 25 U.S.C. § 477) of the Indian Reorganization Act of 1934. Fraternal Organization Federal Charter (Exhibit 1). The Fraternal Organization is a corporate entity separate and distinct from that of the Pueblo and has a separate governing body. *See Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 237 F. Supp. 3d 867, 872 (W.D. Wis. 2017) ("the Tribe and its Section 17 corporation are distinct"); Request for Interpretive Opinion on the Separability of Tribal Organizations under Sections 16 and 17 of the Indian Reorganization Act, 65 Interior Dec. 483, 485 (1958) (Exhibit 2).

As the corporation conducting charitable bingo activities, the Fraternal Organization must be joined, and because it cannot be joined, the Court has no option other than to dismiss this case.

2. The Fraternal Organization is a Required Party Under Rule 19(a)(1).

a. Complete relief cannot be accorded to existing parties in the absence of the Fraternal Organization.

Without the Fraternal Organization added as a party, the Court will not be able to provide complete relief to the existing parties in this case. *See* Fed. R. Civ. P. 19(a)(1)(a). The Fraternal Organization is a separate and distinct corporation operating charitable bingo on the Ysleta del Sur Pueblo, yet the Plaintiff has brought suit only against the Pueblo's sovereign government. Indeed, it is the Fraternal Organization that is "involved in the activities that gave rise to this cause of action." *Seven Seas Marine Servs. WLL v. Remote Int'l, LLC*, 2018 WL 704993, at *3 (S.D. Tex., 2018).

As an example, the Plaintiff operates a state-wide lottery through the Texas Lottery Commission. If an individual or entity has a cause of action against the Texas Lottery Commission it would and does sue the Texas Lottery Commission — as the Commission is the entity conducting and running the state-wide lottery. *E.g., Wenner v. Texas Lottery Comm'n*, 123 F.3d 321 (5th Cir. 1997) (reversing district court entry of summary judgment in favor of Lottery Commission). An entity or individual would not sue the Governor of the State of Texas, nor the State of Texas generally, as both are not proper parties to such a suit. However, in the current case, that's exactly what Plaintiff has done. It has sued the Pueblo, Tribal Council, and the Governor, but not the Fraternal Organization which is the entity that conducts and operates the bingo operations on Tribal land. Of all parties to sue, it is imperative and necessary to include the Fraternal Organization that conducts and runs the bingo operations Plaintiff challenges. This

makes the Fraternal Organization a required party in this case, and complete relief cannot be granted in its absence.

b. The Fraternal Organization's interest relating to the subject matter in this action.

As the organization that conducts the "ongoing bingo operations … in the Ysleta del Sur Pueblo," the Fraternal Organization has a substantial interest and claim in this action. ECF No. 17-2, p. 2. *See* Fed. R. Civ. P. 19(a)(1)(B). Plaintiff is well-aware of the centrally-situated role of the Fraternal Organization, as indicated in the filings in this case, and Plaintiff's discovery requests. ECF No. 26, p. 2. *See JPMorgan Chase Bank, N.A. v. Sharon Peters Real Estate, Inc.*, 2013 WL 3754621, *2 (W.D. Tex. 2013) (finding party had an interest in the case when the party's rights to land title were affected by the suit). Disposing of the action in the absence of the Fraternal Organization will both impair and impede the Fraternal Organization's ability to protect its interest and leave the existing parties subject to the substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of that interest.

(i) Disposition of the action in the absence of the Fraternal Organization will impair and impede the Fraternal Organization's ability to protect its interest.

A required party that cannot be joined "is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights." *Hilton v. Atlantic Refining Co.*, 327 F.2d 217, 218 (5th Cir. 1964) (case reversed and remanded to district court based on appellate holding that unnamed parties were required parties to the litigation) (emphasis added). *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Judicial decisions on the gaming rights of the sovereign Ysleta del Sur Pueblo will by definition impair and impede the ability of the corporate Fraternal Organization to protect its interests and rights to maintain its bingo operations. Any ruling by this Court in the absence of the Fraternal Organization will be

looked to as controlling precedent to determine the gaming rights of the Fraternal Organization. Disposition of this action without having the Fraternal Organization joined to argue on its own behalf as a separate corporation, will "impair or impede [its] ability to protect [its] interest" to offer bingo on the Ysleta del Sur Pueblo. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) ("the tribes claim an interest and are so situated that this litigation *as a practical matter* impairs or impedes their ability to protect it. It was an abuse of discretion for the district court to find otherwise") (emphasis in original). The rights of the Fraternal Organization are integral to this case. Without being a party to this action, the Fraternal Organization is powerless to assert and protect the rights it has that may be impaired or impeded as a result of the case's outcome.

(ii) Disposition of the action in the absence of the Fraternal Organization will leave the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of its interest.

This "subsection [of Rule 19(a)] is intended to prevent 'a double or otherwise inconsistent liability.'" *Pulitzer*, 784 F.2d at 1312 (quoting Fed. R. Civ. P. 19 advisory committee note). *See* Fed. R. Civ. P. 19(a)(1)(B)(ii). If this federal litigation is allowed to proceed, and this Court rules adverse to the Pueblo, there is a substantial risk that inconsistent obligations among existing parties would occur because of the parties' interests. It is the Fraternal Organization that conducts the bingo activities at Ysleta del Sur Pueblo. Thus without joining the Fraternal Organization, 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. There is a considerable risk that separate litigation will leave the Pueblo 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.

In addition, if the Fraternal Organization is not joined in this action, there is ample risk it will bring its own action against the State of Texas seeking to confirm its rights as a federally chartered corporation. That parallel action would place Texas at risk of incurring inconsistent obligations as well. *Davis*, 343 F.3d at 1292 ("[T]he Tribe would not be bound by the judgment in this case and could initiate litigation against Defendants . . . Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe").

3. Because the Fraternal Organization Cannot be Named as a Party in this Action, the Case must be Dismissed Under Fed. R. Civ. P. 19(b).

a. Joinder of the Fraternal Organization is not feasible.

The Fraternal Organization is immune from suit absent a waiver of its sovereign immunity. *See* Fed. R. Civ. Proc. 19(b). A Section 17 corporation's powers are conveyed by the Secretary of the Interior. *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966) (quoting 25 U.S.C.A. § 477) ("the Secretary of the Interior 'may' convey powers to the corporation by the charter; and it is clear that the powers granted to the corporation were only those which the Secretary of the Interior, by the terms of the charter, conveyed to them"). Thus, the terms of the federal charter are instructive as to what claims may or may not be brought against the Fraternal Organization. Upon examination, the Fraternal Organization's "federal charter does not state that [the corporation] … consents to submit to a particular forum, or consents to be bound by its judgment." *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 687 (8th Cir. 2011) (discussing sovereign immunity of Section 17 corporations and finding sovereign immunity not waived). To the contrary, the relevant article of the Fraternal Organization's charter established by the Secretary of the Interior grants to the Fraternal Organization "all of the privileges and immunities of the Tribe" and provides authorization to the

Fraternal Organization to waive its sovereign immunity, if it so decides. The Fraternal Organization has not waived the immunities – including sovereign immunity – which it was granted, *see Bay Mills Indian Cmty.* at 2030-31 (2014), and the Plaintiff has "provided no evidence of an express waiver." *Elliott v. Capital Intern. Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E.D. Tex. 1994). With such immunity, the Fraternal Organization is precluded from being joined in this case. [3] As a final matter, "[a]micus status is not sufficient to satisfy this test, however, nor is [the absent party's] ability to intervene if it requires waiver of immunity," which further makes joinder of the Fraternal Organization not possible. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

b. This action should not proceed without the Fraternal Organization.

(i) A judgment rendered in the absence of the Fraternal Organization would prejudice it and the existing parties.

As noted above, a judgment rendered in the absence of the Fraternal Organization would prejudice its rights as a corporation and those of the existing parties. *See* Fed. R. Civ. P. 19(b)(1). "This prejudice test [for this subsection] is essentially the same as the inquiry under Rule 19(a)(2)(i) into whether continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject of the lawsuit." *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890, 894 n. 4 (10th Cir. 1989) (affirming case dismissal for lack of tribe as indispensable party). *See also Am. Greyhound,* 305 F.3d at 1024-25 ("the first factor of prejudice, insofar as it focuses on the absent party, largely

[3] Some Section 17 corporations have identical governing bodies with a tribe, which can cause complications for purposes of sovereign immunity. *See* Cohen's Handbook of Federal Indian Law § 4.04[3][a][ii], at p. 258 (Nell Jessup Newton ed., 2012). Plaintiff would be required to make such a showing, which it cannot do because that is not the case here.

duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence"). Because the Fraternal Organization is a distinct corporation that operates bingo on the Ysleta del Sur Pueblo, a Court judgment in this case may severely prejudice the Fraternal Organization by impairing and impeding its ability to continue its charitable bingo operations. *See Seven Seas Marine Servs.*, 2018 WL 704993, at *5 (finding corporation "would be prejudiced because it would be deprived of the ability to defend its conduct or protect its interests"). The existing parties would also be prejudiced in the ways noted above; specifically, if multiple actions were to occur, the existing parties "could be subject to inconsistent obligations." *JPMorgan Chase Bank, N.A. v. Sharon Peters Real Estate, Inc.*, 2013 WL 3754621, at *5.

(ii) Prejudice to the Fraternal Organization by entry of a judgment in its absence cannot be lessened or avoided.

Because the parties' interests in this action are of an "all-or-nothing nature," prejudice to the Fraternal Organization cannot be lessened or avoided by including protective relief, reshaping the relief or through any other measures. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1282 (10th Cir. 2012) (finding "equity and good conscience" required the case to be dismissed under Rule 19(b)). *See* Fed. R. Civ. P. 19(b)(2). "Any attempt to fashion a judgment which would lessen this harm would result in a meaningless decree." *Schutten v. Shell Oil Co.*, 421 F.2d 869, 875 (5th Cir.1970) (affirming dismissal of the case for nonjoinder of a required party). Furthermore, because the Pueblo and the Fraternal Organization are independent organizations with separate governing bodies and fiduciary obligations, there is nothing the Court can do to limit the impact of its decision to only Pueblo Defendants without causing prejudice to the Fraternal Organization. *Accord Am. Greyhound Racing* 305 F.3d at 1025.

(iii) A judgment entered in the absence of the Fraternal Organization would not be adequate.

"[A]dequacy [in Rule 19(b)(3)] refers to the public stake in settling disputes by wholes, whenever possible." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870 (2008) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 111 (1968)) (internal quotations omitted). *See* Fed. R. Civ. P. 19(b)(3). As previously discussed, a judgment in the Fraternal Organization's absence "could well lead to further litigation and possible inconsistent judgments." *Davis*, 343 F.3d at 1293 (10th Cir. 2003). In other words, this claim cannot be adequately litigated as a "whole" without the Fraternal Organization.

(iv) The Plaintiff has an adequate remedy if the action is dismissed.

As Judge Schydlower notes in his recommendation, adequate remedies available to Plaintiff exist. ECF No. 64. *See* Fed. R. Civ. P. 19(b)(4). Specifically, Judge Schydlower states that "if Texas can otherwise obtain its requested federal injunctive relief based on a source *outside of Section 107*, then nothing *in Section 107* would prevent such relief." ECF No. 64, p. 8 (emphasis in original). However, due to the Fraternal Organization's sovereign immunity in this instance, this factor need not be weighed by the Court. *See Am. Greyhound Racing, Inc.,* 305 F.3d at 1025 (even where it was unclear whether plaintiff could obtain an adequate remedy in an alternative forum, the court nevertheless recognized that "this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims"). Some Courts have even determined that sovereign immunity precludes the need for weighing any of the factors at all. *See Davis*, 343 F.3d at 1293 (10th Cir. 2003) ("When ... a necessary party ... is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed

as one of those interests compelling by themselves." (quotation marks and citation omitted)); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 (D.C. Cir 1986) ("The dismissal of this suit is mandated by the policy of tribal immunity. This is not a case where some procedural defect such as venue precludes litigation of the case."). Therefore, no matter if this – or any other factor – is considered, equity and good conscience weigh in favor of dismissal of this case.

CONCLUSION

For these reasons, the Court should dismiss this action in its entirety.

Dated: April 16, 2018 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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