UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE and
BUFFALO THUNDER, INC.,

Plaintiffs,

vs. No.: 1:20-CV-00166-KRS-GBW

HONORABLE BRYAN BIEDSCHEID, individually and in his official capacity as District Judge, New Mexico First Judicial District Division VI; and RUDY PENA,

Defendants.

DEFENDANT RUDY PENA'S MEMORANDUM IN SUPPORT OF RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DEFENDANT Rudy Pena, by and through his attorneys of record, RIOS LAW FIRM, P.C. (Linda J. Rios and Michael G. Solon), hereby submits the following Memorandum in Support of his Response to Plaintiffs' Motion for Summary Judgment:

I. INTRODUCTION

This case arises from an incident involving Defendant Rudy Pena that occurred on February 1, 2015 at Buffalo Thunder Casino. Immediately prior to the subject incident, Defendant Rudy Pena was seated at a slot machine and engaged in a "Class III" gaming activity. When a casino employee approached Defendant Rudy Pena and demanded that Defendant Rudy Pena move immediately in order to allow the casino employee to change out the slot machine's cash box, Defendant Rudy Pena informed the casino employee that Defendant Rudy Pena was unable to move as Defendant Rudy Pena has multiple sclerosis and requires the use of a walker and/or cane to ambulate. Despite having actual notice of Defendant Rudy Pena's above-mentioned disability and physical limitations, the casino employee again demanded that

Defendant Rudy Pena move immediately. In response to the casino employee's aggressive and unreasonable demands, Defendant Rudy Pena attempted to move out of the way as quickly as possible, at which time Defendant Rudy Pena lost his balance, fell to the floor, and suffered severe injuries as a result.

Defendant Rudy Pena filed his Complaint for Personal Injuries and Damages (hereinafter "Complaint") on January 25, 2017 in the First Judicial District of the State of New Mexico. Plaintiff Buffalo Thunder, Inc. (hereinafter "Buffalo Thunder") filed its Answer to Defendant Rudy Pena's Complaint on March 12, 2018. On October 11, 2019, over a year and a half after the filing of its Answer, Plaintiff Buffalo Thunder filed its Motion to Dismiss. On December 16, 2019, the First Judicial District Court held a hearing on Plaintiff Buffalo Thunder's Motion to Dismiss, at which time Plaintiff Buffalo Thunder's Motion to Dismiss was denied.

Plaintiff Buffalo Thunder subsequently filed an application for interlocutory appeal. However, the New Mexico Court of Appeals denied Plaintiff Buffalo Thunder's application. Plaintiff Buffalo Thunder then filed its Complaint for Declaratory Judgment in the United States District Court for the District of New Mexico on February 26, 2020.

II.
STATEMENT OF MATERIAL FACTS

1. Defendant Rudy Pena does not dispute Plaintiff's Buffalo Thunder's Material Fact No. 1.

2. Defendant Rudy Pena does not dispute Plaintiff Buffalo Thunder's Material Fact No. 2.

3. Defendant Rudy Pena does not dispute Plaintiff Buffalo Thunder's Material Fact No. 3.

4. Defendant Rudy Pena does not dispute Plaintiff Buffalo Thunder's Material Fact No. 4. However, not only was Defendant Rudy Pena seated at a slot machine when he was asked by a casino employee to move, Defendant Rudy Pena was also engaged in a "Class III" gaming activity. *See* Affidavit of Rudy Pena, attached hereto as **Exhibit 1**.

5. Defendant Rudy Pena does not dispute Plaintiff Buffalo Thunder's Material Fact No. 5.

6. Plaintiff Buffalo Thunder's Material Fact No. 6 is not an undisputed fact. Rather, it is merely a legal conclusion which is disputed.

7. Plaintiff Buffalo Thunder's Material Fact No. 7 is not an undisputed fact. Rather, it is merely a legal conclusion which is disputed.

8. Plaintiff Buffalo Thunder's Material Fact No. 8 is not an undisputed fact. Rather, it is merely a legal conclusion which is disputed.

9. Plaintiff Buffalo Thunder's Material Fact No. 9 is not an undisputed fact. Rather, it is merely a legal conclusion which is disputed.

10. Defendant Rudy Pena suffers from multiple sclerosis. *See* **Exhibit 1**.

III.
ARGUMENT AND AUTHORITY

A. IGRA AUTHORIZED TRIBES AND STATES TO NEGOTIATE CLASS III GAMING COMPACTS THAT COULD INCLUDE PROVISIONS FOR THE APPLICATION OF STATE OR TRIBAL LAW AS DEEMED APPROPRIATE BY EACH TRIBE AND EACH STATE.

1. The Statute

Congress enacted the Indian Gaming Regulatory Act (hereinafter "IGRA") to provide a framework for regulating gaming activity on Indian lands. *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2028, 188 L.Ed.2d 1071, 82 USLW 4398 (2014) (citing 25 U.S.C. §

2702(3)). IGRA was Congress's compromise solution to the contentious issues regarding Indian gaming. *Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 715, 2003 WL 22998116 (9th Cir. 2003). The issue of regulation of tribal gaming had been the subject of negotiations and discussions between gaming tribes, states, the gaming industry, and the Congress at least since 1979. *See* Senate Report No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 307 (hereinafter "Senate Report"), which accompanied the bill that ultimately became IGRA. See also *Doe v. Santa Clara Pueblo,* 2007-NMSC-008, ¶¶ 31-40, 141 N.M. 269, 154 P.3d 644 (explaining the background leading Congress to devise the Class III compacting process to enable tribes and states to work out between themselves jurisdictional issues that had eluded Congress).

Indian tribes may not conduct Class III gaming unless they negotiate a compact with the surrounding state. 25 U.S.C. § 2710(d)(l)(C); *Bay Mills Indian Cmty.*, 134 S.Ct. at 2035; Senate Report at p. 13. The statutory structure necessarily contemplates give and take between the tribe and the state regarding the regulation of gaming. The statute provides that any tribal-state compact negotiated under IGRA:

> ...may include provisions relating to—
>
> (i) the application of the criminal and civil laws and regulation of the Indian tribe or the state that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the state and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(iv) any other subjects that are directly related to the operation of gaming facilities.

25 U.S.C. § 2710(d)(3)(C). The sections quoted above authorize the application of civil laws of the state or tribe directly related to the regulation of gaming; the allocation of civil jurisdiction between the state and the tribe for the enforcement of regulations; standards for the operation and maintenance of the gaming facility; and any other subjects directly related to the operation of gaming facilities. As is explained below, rather than specify mandatory compact provisions, Congress left it to each individual tribe and state to negotiate terms for the regulation of gaming.

Plaintiffs contend that two federal cases establish their entitlement to summary judgment in this matter. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment at p. 4. First, Plaintiffs cite *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1266 (D.N.M. 2013) as authority for their sweeping claim that IGRA does not authorize ceding subject matter jurisdiction over negligence-based personal injury claims that arise on tribal lands. However, nothing in *Nash* actually supports this claim. *Nash* concerned the serving of alcohol at a wedding reception on tribal property adjacent to a casino, not any activity involving Class III gaming. The court ruled a "personal injury claim arising from the negligent serving of alcohol has no bearing whatever on the licensing or regulation of Class III gaming activities." *Id.* at 1264. The Court in *Nash* specifically limited its ruling to a claim arising from allegedly negligent serving of alcohol on Indian lands and explained its ruling did not address other personal injury claims. *Id.* at 1266. Any assertion to the contrary by Plaintiffs constitutes a blatant misrepresentation of case law.

Second, Plaintiffs cite *Navajo Nation v. Dalley*, 896 F.3d 1196, 1210 (10th Cir. 2018) as authority for the proposition that IGRA does not authorize tribes to agree in gaming compacts to shift jurisdiction to state courts over tort claims. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment at p. 5. However, nothing in *Dalley* actually supports this proposition. *Dalley* involved a patron who slipped and fell on casino premises owned and operated by Navajo Nation, but Plaintiffs gloss over the fact that the incident occurred in the casino's bathroom, the significance of which did not go unnoticed by the Tenth Circuit in the process of reaching its decision. *Dalley*, 896 F.3d at 1210. In *Dalley*, the Tenth Circuit held that IGRA "does not authorize tribes to agree in gaming compacts to shift jurisdiction to state courts over tort claims ***like these***." *Id.* (emphasis added). Plaintiffs are well aware of the limiting language emphasized above because Plaintiffs unsuccessfully attempted to advance the same exact argument in the Motion to Dismiss they filed in the First Judicial District Court. *See* Response to Motion to Dismiss, attached hereto as **Exhibit 2**. Accordingly, this constitutes a knowing misrepresentation of law by Plaintiffs for which sanctions are warranted.

Unlike *Nash* and *Dalley*, the case at bar concerns a gaming patron who was engaged in Class III gaming activity and was injured by the alleged negligence of a casino employee performing what is presumably a job duty required for Class III gaming activity. This case presents a question not decided in *Nash* or *Dalley*. Specifically, does IGRA authorize a tribal-state compact to allow gaming patrons to choose state district court as a forum for resolution of immunity-waived torts to which state substantive law applies when the gaming patron is injured: (a) while engaged in a Class III gaming activity; and (2) by the alleged negligence of a casino employee who was performing a job duty required for Class III gaming activity?

Congress did not define the terms "directly related to, and necessary for, the licensing and regulation of" Class III gaming. Similarly, the statute does not specify how jurisdiction between the State and tribes should be allocated. There is nothing in the statute to indicate the kind and type of standards that should be specified for the operation and maintenance of the gaming facility. Additionally, the statute says compacts may include "any other subject" directly related to the operation of gaming facilities.

The statute's use of the term "may" suggests a permissive rather than a restrictive intent. In any event, the plain meaning of the statute does not answer the question of whether the jurisdiction shifting provisions of Section 8 of the Compact between the State of New Mexico and the Pueblo of Pojoaque (hereinafter "Compact") are authorized by IGRA. Accordingly, it is necessary to look to the legislative history to help determine congressional intent.

2. Legislative History

Statutory interpretation must begin with an examination of the plain language at issue. *Tucker v. Grover,* 660 F.3d 1249, 1252 (10th Cir. 2011). However, the meaning of statutory language, plain or not, depends on context. *In re Woods,* 743 F.3d 689, 694 (10th Cir. 2014). This contextual analysis "requires us to consider the statute's intended purpose ..." *Dalzell v. RP Steamboat Springs, LLC,* 781 F.3d 1201, 1207 (10th Cir. 2015). "Where the language is not dispositive, we look to congressional intent revealed in the history and purposes of the statutory scheme." *Norton,* 353 F.3d at 720. IGRA provided a nationwide platform for each of the several states and hundreds of Indian tribes to fashion agreements for the conduct of Class III gaming. *Bay Mills Indian Cmty.,* 134 S.Ct. at 2028. One significant congressional objective was to thwart organized crime by allowing the introduction of state regulation, state laws, and

state venue on tribal lands. *Doe* at ¶ 35 (citing *Pueblo of Santa Ana v. Kelly,* 932 F. Supp. 1284, 1292 (D. N.M. 1996)); 25 U.S.C. § 2702(2). While fear of the infiltration of criminal elements was one concern, it was not the only one. Senator McCain noted, "[i]n 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity." Senate Report at p. 5.

More central to the policy debate about IGRA was the matter of providing a basis for sovereign tribes to assess their own interests and to negotiate and reach agreement with the states as to the proper balance between tribal and state interests when Class III gaming occurred. Rejecting total federal or state regulatory control of Class III gaming, Congress concluded "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as . . .casino gaming." Senate Report at p. 13.

To accomplish this, Congress made clear that the compact process was intended to assure the proper balancing of important tribal and state interests between equal and independent sovereigns. The Senate Report identified many of the tribal and state interests that were legitimate matters for consideration and signaled that there might be situations where give and take would be required to resolve disputes and the interests of the respective sovereigns might appear to clash:

> In the Committee's view, both state and tribal governments have significant governmental interests in the conduct of class III gaming. . .
>
> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, *promoting public safety* as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders.

> A state's governmental interests with respect to Class III gaming on Indian lands include *the interplay of such gaming with the state's public policy, safety, law and other interests,* as well as impacts on the state's regulatory system, including its economic interest in raising revenue for its citizens.

Senate Report at p. 13 (emphasis added). The report explains "[t]he Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. *Id.* The Chair of the Committee, in an important colloquy with Sen. Domenici during the floor debate, noted that jurisdictional matters were within the power of the tribes to negotiate and to reach agreement with the state:

> [T]he committee believes that tribes and states can sit down at the negotiating table *as equal sovereigns, each with contributions to offer and to receive. There is and will be no transfer of jurisdiction without the full consent and request of the affected tribe and that will be governed by the terms of the agreement that such tribe is able to negotiate.*

134 Cong. Rec. at S12650 (emphasis added). Rather than a regulatory regime focused on the narrow problem of criminal infiltration into Indian gaming, Congress's focus in adopting IGRA was in response to a range of tribal and state concerns. The negotiating process entailed delegation of power to the tribes and states to work as equal sovereigns so that the compacts would accommodate the particular needs of each.

After a thorough review of the statutory language and legislative history, the New Mexico Supreme Court concluded that Congress intended the compacting provision of IGRA to allow states and tribe broad latitude to negotiate for jurisdiction shifting, if they wished, as part of a global settlement of complex issues that was necessary to make tribal gaming work. *Doe* at ¶ 45. The global scope of the compacting process established by Congress in IGRA authorized the parties, if they wished, to negotiate choice of laws for personal injury suit against casinos as well as choice of venue for the enforcement of those laws. *Doe* at ¶¶ 41, 47.

The tribal-state compacts negotiated pursuant to IGRA provide a congressionally authorized exception to the general rule that authorization for jurisdiction shifting must be express. Senate Report at p. 6 ("S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands"). In that regard, IGRA is similar to P.L. 280, 18 U.S.C.A. § 116, which broadly authorized jurisdiction shifting to the states for limited purposes. *Doe* at ¶ 45.

In *Bay Mills Indian Cmty.*, the United States Supreme Court addressed IGRA in a suit seeking to enjoin *off*-reservation gaming. In the course of its opinion, the Court discussed the compacting scheme established by IGRA and explained that because a tribe cannot conduct Class III gaming without a compact, a state can refuse to agree to a gaming compact absent a tribe's waiver of sovereign immunity from suit. *Bay Mills Indian Cmty.* 134 S.Ct. at 2035. The United States Supreme Court's broad view of the negotiating process contemplated in IGRA is similar to that of the New Mexico Supreme Court in *Doe.* While the compact before the Court in *Bay Mills Indian Cmty.* did not authorize state judicial remedies, the Court recognized the strong bargaining power of the states and cited an amicus brief that contained a list of tribal-state compacts with waivers of tribal sovereign immunity including those allowing tort suits in state court for gaming patrons. *Id.*

Plaintiffs ignore the comprehensive scope of IGRA that, in the language of *Williams v. Lee,* 358 U.S. 217, 220 (1958), plainly is a "governing act of Congress." The *Williams v. Lee* Preemption/Infringement test is discussed at length in Cohen's Handbook of Federal Indian Law, 2012 Edition, § 6.03[2][b]. There are two prongs to the *Williams* test because there are two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal

law. Second, the application of state law may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. *Williams,* 358 U.S. at 220. IGRA is a governing act of Congress passed for the benefit of Indian tribes that controls Indian gaming, and the Pueblo of Pojoaque has made its own laws and acted in accordance with those laws in entering into the Compact.

B. PROVIDING A FORUM AND CHOICE OF LAW FOR THE ADJUDICATION OF PERSONAL INJURY CLAIMS OF CASINO PATRONS IS SUFFICIENTLY CLOSELY RELATED TO THE REGULATION OF CLASS III GAMING AS TO BE WITHIN THE CONTEMPLATION OF CONGRESS.

Unquestionably, IGRA intended that in the compact negotiation process, states could assert their interests. The legislative history specifically notes the state interest in public policy, safety, and laws. Senate Report at p. 13. The Senate Report identifies state interests to include issues of safety, law, and public policy. Explaining that these subjects play a significant role in tort suits, the *Doe* court correctly concluded that the broad compact negotiating process may include the issue of jurisdiction over personal injury claims. *Doe* at ¶ 39. See also *Muhammad v. Comanche Nation Casino,* W.D. OK, No. Civ-09-968-D, 20 I O WL 4365568 (allocation of jurisdiction for civil tort claims directly related to and necessary for regulation of gaming activities); *Bay Mills Indian Cmty.*, 134 S.Ct. at 2035. Redressing injuries sustained by casino visitors is sufficiently related to the regulation of tribal gaming. *Doe* at ¶ 39.

The *Doe* court continued "[p]ersonal injury law is meant, in part, to expose weaknesses in safety procedures and protect the public from safety hazards." *See generally* Dan B. Dobbs, *The Law of Torts* § 5, at 8 (2000) (indicating tort law "can be seen as [a] means of imposing a degree of social control by preventing injury or compensating it"); ("Tort law is . . . one of a number of ways in contemporary American society aimed at creating incentives

for safety or at providing compensation for loss or both"). See also *Doe* at ¶ 39 (quoting Dobbs, *supra* at 10). Tort suits are thus related to gaming activity in helping to ensure that patrons, especially those with disabilities like Defendant Rudy Pena's, who are engaged in Class III gaming activity are not exposed to unwarranted dangers posed by casino employees performing job duties required for Class III gaming, something that inures to the benefit of the tribes. *Doe* at ¶ 39; *Jones v. Reagan,* 696 F.2d 551, 554 (7th Cir. 1983).

Noting that no provision of IGRA refers to the transfer of jurisdiction over personal injury claims, Plaintiffs argue that the statute only allows a state directly to apply its laws concerning the licensing and regulation of gaming activities and nothing else. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment at p. 4. This view is taken by the Justice Minzner's dissent in *Doe.* See *Doe at* ¶ 53 ("IGRA takes a narrow view of jurisdiction shifting"). The legislative history does not support this position.

The Senate Report explains with respect to the delegated authority in Section 2710(d)(3)(C) that "subparts of each of the broad areas may be more inclusive," stressing that "[a] compact may allocate most or all of the jurisdictional responsibility to the tribe, to the state, or to any variation in between." Senate Report at p. 14. Such discretionary power was necessary in Congress's view because "[t]he terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and the state, etc." *Id.* As Chairman Inouye stressed on the floor of the Senate, SB 555 (which became IGRA) was "intended to provide a means by which tribal and state governments can realize their unique and individual governmental objectives." 134 Cong. Rec. at S12650. That is why Congress made it absolutely clear that "to the extent tribal governments elect to relinquish rights in a tribal-state compact . . . the relinquishment of such rights shall be specific to the

tribe so making the election, and shall not be construed to extend to other tribes . . . ." Senate Report at p. 6.

Nothing in the Compact extends state court jurisdiction beyond claims of visitors to gaming facilities. Nowhere does the Compact exceed the limits contemplated by Congress. See *Doe* at ¶ 42. Section 8 of the Compact, moreover, reflects the determination of the Pueblo of Pojoaque and the State of New Mexico that agreeing to allow gaming patrons injured by the alleged negligence of the Pueblo of Pojoaque in a gaming facility to choose state district court as a forum for resolution of immunity-waived torts to which New Mexico substantive law applies is "directly related to, and necessary for" the regulation of Class III gaming. IGRA grants states and tribes the power to negotiate arrangements of this type. *Doe* at ¶ 44; *Bay Mills* 134 S.Ct. at 2035.

lf this Court were to accept Plaintiffs' narrow reading of IGRA, several other Compact provisions would be invalid. Any construction of IGRA's "directly related to, and necessary for" language must recognize that casinos are entertainment venues where patrons may come to eat and drink. It is unrealistic to limit regulation of Class III gaming to slot odds, maximum bets, and the thickness of felt at the blackjack tables.

Alternatively, 25 U.S.C. Section 2710(d)(3)(C)(vii) authorizes agreements on "any other subjects that are directly related to the operation of gaming activities." There is no other limitation in this provision. See *In re Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2003) (labor relations provisions are "directly related to the operation of gaming activities" and thus permissible under § 2710(d)(3)(C)(vii)). Consideration of the legislative history shows that Congress deliberately chose not to specify mandatory provisions for inclusion in tribal-state compacts. Instead IGRA sets out broad parameters of what may and may not be included.

It bears repeated emphasis that Defendant Rudy Pena is physically disabled and was engaged in Class III gaming activity when the subject incident occurred. Additionally, Defendant Rudy Pena was injured as a result of the alleged negligence of a casino employee who was performing job duties required for Class III gaming. The Compact's allowance of jurisdiction shifting in tort suits for visitors injured in such a manner is sufficiently related to gaming to be included in tribal-state compacts. *Doe* at ¶ 44; *Bay Mills Indian Cmty.*, 134 S.Ct. at 2035.

C. THE COMPACT EXPRESSLY WAIVES THE NATION'S IMMUNITY FROM SUIT AND UNAMBIGUOUSLY PERMITS PERSONAL INJURY CLAIMS TO BE BROUGHT IN STATE COURT UNDER STATE LAW.

Section 8 of the Compact between the State of New Mexico and the Pueblo of Pojoaque is crystal clear. The safety and protection of visitors to a gaming facility is a priority of the Pueblo of Pojoaque. The stated purpose of Section 8 of the Compact is to assure that visitors who suffer bodily injury proximately caused by the conduct of the gaming enterprise have an "effective remedy for obtaining fair and just compensation." To that end, the Pueblo of Pojoaque agrees to carry insurance, waive its immunity from suit, and allow the visitors to elect to proceed in state district court unless a state or federal court finally determines that "IGRA does not permit the shifting of jurisdiction over visitors personal injury suits to state court."

Section 8D, which is titled "Specific Waiver of Immunity and Choice of Law" states that the Pueblo of Pojoaque "waives its defense of sovereign immunity" for covered claims of visitors up to the amount of $10,000,000 per occurrence. The Pueblo of Pojoaque further agrees that New Mexico law shall govern the substantive rights of the claimant. As demonstrated herein, IGRA authorizes jurisdiction shifting to state court. The language of

Section 8 reflects that the Pueblo of Pojoaque unambiguously and expressly agreed to jurisdiction shifting as well as the waiver of tribal sovereign immunity.

The waiver of immunity and jurisdiction provisions embodied in the Compact is a contract between the State of New Mexico and the Pueblo of Pojoaque codified by the Legislature. *Doe* at ¶ 15. Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts. *Id.; Santa Ana v. Kelly* 104 F. 3d at 1556; *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California,* 618 F.3d 1066, 1073 (9th Cir. 2010). The Pueblo of Pojoaque agreed to jurisdiction shifting "unless IGRA does not permit" it. Nothing in IGRA prohibits the agreement embodied in Section 8.

D. THE PUEBLO OF POJOAQUE EXERCISED ITS INDPENDENT AUTHORITY TO WAIVE IMMUNITY FROM SUIT.

There is no need for this Court to find that IGRA authorizes Section 8 of the Compact, because Indian tribes have independent authority to waive sovereign immunity by contract so long as it is "clearly" done. *C&L Enterprises v. Citizen Band of Potawatomi Indian Tribe,* 532 U.S. 41 1, 419 (2001); *Kiowa Tribe of Oklahoma v. Mfg. Techs.,* 523 U.S. 751, 754. Based on the express language of the Compact, the Pueblo of Pojoaque's waiver of immunity was sufficiently clear.

The Pueblo of Pojoaque's willing agreement to the provisions of Section 8 of the Compact constituted a valid waiver of sovereign immunity, because the Compact was authorized by IGRA. A different issue is presented here when the Pueblo of Pojoaque exercises its own sovereign power. When the Pueblo of Pojoaque operates independently from congressionally imposed constraints, it may contract freely for any terms it finds acceptable. C *& L Enterprises* provides a separate basis to sustain the Pueblo of Pojoaque's waiver of sovereign immunity.

If the Court should find that IGRA does not authorize jurisdiction shifting to state court for the immunity-waived tort claims of casino patrons, the Court should nevertheless rule that Section 8 of the Compact is a valid contract because it is based on the sovereign authority of the Pueblo of Pojoaque. Essentially, it becomes a side-agreement providing remedies for tort claims of casino visitors engaged in Class III pursuant to the Compact.

Without citing any controlling authority, the *Nash* Court ruled that the negotiated terms of a compact cannot exceed what is authorized by IGRA. *Nash* at 1266. This ruling appears to be an unwarranted limitation on the sovereign powers of Indian tribes. The Pueblo of Pojoaque agreed to Section 8A of the Compact not conditioned upon IGRA allowing such jurisdiction shifting, but upon IGRA not permitting it. Nothing in the language of IGRA prohibits jurisdiction shifting. *Doe* at ¶ 13. There is no law that restricts the sovereign power of the Pueblo of Pojoaque to make this contract.

IV.
CONCLUSION

WHEREFORE Defendant Rudy Pena respectfully requests that the Court enter an Order denying Plaintiffs' Motion for Summary Judgment, awarding associated costs and fees to Plaintiff, dismissing Plaintiffs' Complaint for Declaratory Judgment, and for any other relief the Court deems just and proper under the circumstances.

Respectfully submitted,

RIOS LAW FIRM, P.C.

/s/ Linda J. Rios
Linda J. Rios
Michael G. Solon

Attorneys for Defendant Rudy Pena
P.O. Box 3398
Albuquerque, NM 87190
(505) 232-2298

I hereby certify that a true and correct copy of the foregoing Response to Plaintiffs' Motion for Summary Judgment and the corresponding Memorandum in Support were filed electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means:

Ripley B. Harwood
RIPLEY B. HARWOOD, P.C.
Attorney for Plaintiffs
ripharwoodrbhpc@gmail.com

Nicholas M. Sydow
OFFICE OF THE NEW MEXICO ATTORNEY GENERAL
Attorney for Defendant Hon. Bryan Biedscheid
nsydow@nmag.gov

This 23rd day of July, 2021.
/s/ Linda J. Rios
Linda J. Rios

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE and
BUFFALO THUNDER, INC.,

Plaintiffs,

vs. No.: 1:20-CV-00166-KRS-GBW

HONORABLE BRYAN BIEDSCHEID, individually
and in his official capacity as District Judge,
New Mexico First Judicial District Division
VI; and RUDY PENA,

Defendants.

AFFIDAVIT OF RUDY PENA

1. My name is Rudy Pena.

2. I am over 18 years of age.

3. I am a resident of Bernalillo County, New Mexico.

4. On or around February 1, 2015, I was a patron at Buffalo Thunder Casino when I was involved in an incident in which I fell to the floor.

5. Immediately prior to the incident, I had been seated at a slot machine and was actively engaged in gaming activity when a casino employee approached me and demanded that I move out from my seat so that he could change out the slot machine's cash box.

6. I informed the casino employee that I could not move from my seat because I had multiple sclerosis and required the use of a walker.

7. The casino employee ignored my objection and told me I had to move anyways.

8. I attempted to move out of the way as quickly as possible, at which time I lost my balance and fell to the floor.

Rudy Pena

STATE OF NEW MEXICO)
)ss.
COUNTY OF BERNALILLO)

Subscribed and sworn to me on this 21 day of July, 2021 by Rudy Pena.

Official Seal
LOGAN RHOTEN
Notary Public
State of New Mexico
My Comm. Expires 6-15-23

Notary Public

My commission expires: June 15, 2023

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
10/11/2019 4:41 PM
KATHLEEN VIGIL CLERK OF THE COURT
Victoria Neal

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

RUDY PENA,

Plaintiff,

v.

No. D-101-CV-2017-00218

BUFFALO THUNDER, INC.,

Defendant.

DEFENDANT'S MOTION TO DISMISS

Defendant, Buffalo Thunder, Inc., through counsel, Ripley B. Harwood (Ripley B. Harwood, P.C.), pursuant to Rule1-012.B(1) NMRA, moves to dismiss Plaintiff's Complaint. Pursuant to Rule 1-007.1.C(1) NMRA, Defendant presumes this Motion to be opposed. As grounds, Defendant states:

A motion to dismiss tests the legal sufficiency of a complaint: "its purpose is to test the law of the claim, not the facts that support it." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 24, 142 N.M. 437, 442, 166 P.3d 1091, 1096. Plaintiff's Complaint confirms that the slip and fall giving rise to his claims occurred at the Buffalo Thunder Casino. Plaintiff's Complaint, ¶ 24. It is undisputed (and beyond reasonable dispute), that the Buffalo Thunder Casino is a Pojoaque Pueblo Tribal entity and is located on Tribal land. *Id.*, ¶'s 2-4. Accordingly, for the reasons set forth below, the Court lacks subject matter jurisdiction and must dismiss Plaintiff's Complaint.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION

Congress possesses plenary power over Indian affairs. *See e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998). Thus, if state court jurisdiction over Indians or activities on Indian lands would interfere with tribal

DeFeo v. Ski Apache Resort, 120 N.M. 640, 642, 904 P.2d 1065, 1067 (Ct.App.1995) (holding injured skier suing tribal-owned ski resort limited to tribal court because injury occurred on portion of the ski resort located within tribal boundaries).

Two cases establish Buffalo Thunder's entitlement to dismissal and are on all fours with the facts pleaded in this Plaintiff's Complaint: in *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013), two patrons were allegedly overserved alcohol at a Pueblo-operated casino, and thereafter drove/occupied a motor vehicle which crashed, killing them both. *Nash, supra*, 972 F.Supp.2d at 1257. The state district court dismissed the lawsuit for lack of subject matter jurisdiction. *Id.*, 972 F.Supp.2d at 1258. The Court of Appeals reversed based on a provision of the Tribal-State gaming compact which purported to cede jurisdiction to New Mexico state district courts for tortious acts occurring on casino premises. The New Mexico Supreme Court affirmed. *Id.* The Pueblo then filed in federal court seeking injunctive and declaratory relief, and an order barring the state district court from proceeding on the merits of Plaintiffs' claims. *Id.*, 972 F.Supp.2d at 1255 & 1259.

The federal district court held that the Indian Gaming Regulatory Act (IGRA), does not authorize ceding subject matter jurisdiction over negligence-based personal injury claims that arise on tribal lands. *Id.*, 972 F.Supp.2d at 1266. The nationwide majority view on the subject is that IGRA only waives tribal sovereign immunity in a narrow category of cases where compliance with its provisions is the issue, and then only where declaratory or injunctive relief is sought. *Id.*

The most recent case to deal with the same issue is *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018). In *Dalley* a patron slipped and fell on casino premises owned and operated by the Navajo Nation. *Dalley*, 896 F.3d at 1200. Plaintiff brought suit in